File: 125-2-77

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN QUIGLEY

Applicant

and

TREASURY BOARD
(Citizenship and Immigration Canada)

Respondent

RE: Request for Review under Section 27 of the Public Service Staff Relations Act

Before: P. Chodos, Vice-Chairperson

For the Applicant: Himself

For the Respondent: Kathryn Hucal, Counsel

Heard at Toronto, Ontario,
April 27 and 28, 1998.

This case has a long and rather convoluted history which, except for this most recent chapter, is outlined in the decision which is the subject matter of this Application for Review (i.e. Board file 166-2-27258). In brief, Mr. Quigley had filed a grievance in 1993 seeking compensation for damages allegedly incurred as a result of his dismissal in 1992, which had been quashed by the Federal Court of Appeal. Following the filing of this grievance, Mr. Quigley chose to pursue this matter in the Federal Court by way of an action in damages. In a judgment dated October 19, 1994 (Court File: T-1007-85) the Federal Court, Trial Division dismissed the claim for want of jurisdiction. In 1996 Mr. Quigley attempted to have his original grievance referred to adjudication. That matter was set down for a hearing for September 9, 1996. Prior to this hearing, the employer had advised that it objects to the Board assuming jurisdiction in this matter, among other reasons, because of the considerable lapse of time since the grievance was first filed. At the hearing, Mr. Quigley requested that he be granted an extension of time under the Board's Regulations to file this reference to adjudication. I determined that I would address the jurisdictional issues, including whether this is an appropriate case for the granting of an extension of time under the Board's Regulations. At the commencement of that hearing, the proceedings were recessed to afford Mr. Quigley the opportunity to review the employer's objections and the Board's jurisprudence concerning a request for extension of time. Mr. Quigley was advised that he was entitled to present evidence concerning the matters at issue; he chose to rely entirely on documentary evidence which was then put before the Board.

In my decision, I dismissed Mr. Quigley's grievance, concluding among other things that "... i*n my view there are no grounds for the Board exercising its authority under section 63 of the Regulations.*" (page 8) Mr. Quigley then proceeded to file an application with the Federal Court, Trial Division requesting that this decision be set aside. In a judgment issued on September 25, 1997 Mr. Justice Teitelbaum denied the Application for Judicial Review (Court file: T-2567-96).

At the outset of this hearing, the employer reiterated that the Board had no authority to entertain Mr. Quigley's Application for Review under section 27 of the Act. To assist Mr. Quigley in presenting his case, the undersigned provided him with a number of the Board's decisions respecting section 27 applications; as well, counsel for the employer provided Mr. Quigley with her materials respecting the employer's

jurisdictional objections. The following day Mr. Quigley was permitted to testify, and provide documentary evidence in support of his application under section 27.

In essence, it was Mr. Quigley's assertion that at the previous hearing he was not provided an opportunity to explain in full the reasons for the delay in pursuing his grievance to adjudication, as that hearing was confined to the issue of the adjudicator's jurisdiction.

Mr. Quigley proceeded to give the following testimony concerning the events subsequent to the filing of his grievances in 1983. Mr. Quigley noted that when he sought to obtain compensation from the employer for the financial losses which he incurred as a result of pursuing the Federal Court action to quash his dismissal, he was advised by the employer, through his Manager, Mr. W.F. Holman, that he was not entitled to "compensation for damages" because there had not been any wrongful dismissal (see Exhibit A-1, memorandum from W. Holman dated April 27, 1983). Throughout his attempts to seek compensation, the employer insisted that this was not a labour relations issue; nevertheless he decided to pursue this matter through the grievance procedure. However, he was advised by his lawyer to take action in the Federal Court, and so he filed a Statement of Claim in 1985.

Mr. Quigley maintained that the employer had continued to harass him following his reinstatement. For example, they insisted that his probation period be extended (Exhibit A-2). This caused him considerable concern; he felt at the time that this may have been an attempt to terminate him while on probation. However, his probation period was completed without incident and he achieved permanent status sometime in late 1983. He was also concerned about a performance appraisal which he received at the time; he submitted a grievance, as a result of which it was rewritten, putting him in a more favourable light. The resolution of these matters was due in part to the intervention of the Public Service Commission, following his submission of a complaint.

At about the same time, the employer also insisted that he be evaluated by a Health and Welfare Psychiatrist. He discovered that the psychiatric report was provided to the employer in January 1984; however, he only learned of this in a memorandum from his supervisor, Mr. Holman, dated February 16, 1984. According

to this memorandum, it was noted that the psychiatrist had found him "psychologically sound". He made efforts to obtain the psychiatric report, but this was denied to him (Exhibit A-6). He subsequently discovered that the report had noted that *"The psychological stresses which have developed at work, and for which he has claimed W.C.B. benefits, appear to be the result of personality conflicts at work, and these may be a result of inappropriate handling of this employee by management."* (Exhibit A-7, a memorandum from Dr. Parliament, the Medical Assessment Officer dated January 24, 1984). This was in fact confirmed in a psychiatric report from Dr. Andrew Malleson, the Consulting Psychiatrist (Exhibit A-8). Mr. Quigley also noted that as a result of these incidents he was suffering from considerable stress which caused him to seek psychiatric help. He had also applied for Workmen's Compensation in 1983, without success (Exhibit A-4). During this period he was entirely preoccupied with responding to the various forms of harassment which the employer had been subjecting him to. This, rather than his grievances, became his predominant concern. Furthermore, it was his experience that other forms of redress (for example complaints to the Public Service Commission, as well as his success before the Federal Court in quashing his original termination) were more effective than the grievance procedure in providing him with redress. Accordingly, he focussed on pursuing his claim for damages in the Federal Court, rather than the grievances.

Mr. Quigley maintained that there were difficulties in having his claim heard by the Court because the employer's counsel was dragging its feet. Mr. Quigley referred to a letter from his lawyer, Mr. Robert Fenn dated December 6, 1990 in which, among other things, Mr. Fenn noted that ". . . *The Department of Justice is, in our view, stalling the progress of your case....*" A letter from Mr. Fenn dated September 5, 1991 noted that ". . . *If we have not received a response from the Department of Justice by next week, it is our intention to bring the appropriate motion to compel production of the documents as well as set the matter down for trial....*" Finally a trial date was established in 1994; Mr. Quigley acknowledged that at this point the Department of Justice was not responsible for the delay in getting a trial date, which was in the hands of the Court.

The Applicant also referred to a complaint that he had submitted to the Anti-Discrimination Branch of the Public Service Commission in 1986 concerning management's decision to prohibit him from working with a co-worker,

Mr. Dale Lewis. Through the intervention of an officer of the Anti-Discrimination Branch, this matter was resolved on November 4, 1986 by way of a Memorandum of Agreement (Exhibit A-11). According to Mr. Quigley, this reinforced his view that other avenues of redress, rather than the grievance procedure, were more effective in resolving his complaints. However, Mr. Quigley insisted that there was never any question in his mind about processing this grievance, nor did he have any desire to delay the resolution of the grievances which he had filed in 1983.

In cross-examination, Mr. Quigley acknowledged that he had submitted a grievance respecting his dismissal in 1987, and had referred that grievance to adjudication. He also grieved a subsequent dismissal in 1988 and had also referred that grievance to adjudication. He acknowledged as well that the documents which he had submitted in this hearing were available to him at the time of the previous hearing; however, he maintained that he was precluded from making submissions about these matters in the earlier proceedings.

In argument, Mr. Quigley referred to the recent Supreme Court decision in *Wallace* v. *United Grain Growers Ltd.,* [1997] 3 S.C.R. 701 in which the Court observed that employees are most vulnerable and most in need of protection when the rupture in their employment first occurs. Mr. Quigley insisted that he was in this category when he returned to work in 1983. He was ill equipped to deal at that time with a myriad of problems which he encountered when he returned to work. If he had made an error of judgment in respect of the avenue of redress it was not done to sideline the adjudication function or to avoid that process. It seemed to him at the time that the only effective resolution was outside the grievance process, since the majority of obstacles which he faced were resolved outside that process. Furthermore, management had indicated to him that the grievance process was not going to work for him. He maintained that most of the delay prior to launching his claim for damages and subsequent to the Court decision was a result of dealing with obstacles put in his way by the employer. Mr. Quigley further submitted that although the evidence he put forward today in this hearing was available to him sometime ago, he believed that he could not submit this evidence at the initial adjudication hearing. He argued that this meets the standard for review under section 27 as noted in the *Public Service Alliance of Canada and Treasury Board* case (Board file 125-2-83). That is, he had demonstrated reasonable diligence given that he had this material in hand ready

to submit to the Board at the time, but was told that he could not bring it forward. Accordingly, he was not given the opportunity to present evidence which would explain the delay. Furthermore, he had every reason to believe that, as the employer was telling him, the Federal Court, and not the Public Service Staff Relations Board, had the authority to address his grievances of 1983. Mr. Quigley maintained that this constitutes "special circumstances" as recognized in the Board's decisions under section 27.

Counsel for the Respondent replied that the Applicant is attempting to revive a grievance that should have been submitted to adjudication, or alternatively should have been the subject of a direction from the Court, back in 1983. In accordance with the Board's decision in *Murray and Shaver* (Board file 125-2-66) the adjudicator has authority to consider an extension of time in accordance with section 96.1 of the Act; however, the Board does not have the authority under section 27 to review an adjudication decision, as noted by the Federal Court in *Doyon* v. *Public Service Staff Relations Board,* [1979] 2 F.C. 190.

In the alternative, Ms. Hucal submitted that the Applicant has not satisfied any of the criteria which would permit a review under section 27; that is, he has not demonstrated a change of circumstances since the decision under review, nor has he brought forward any new evidence or grounds which could not reasonably have been presented at the original hearing. She noted that the Board does not permit the party to repair the deficiencies in their case or reargue the merits by resorting to section 27, yet this is what Mr. Quigley is attempting to do here. The Board has consistently insisted on the need for finality, particularly where a long period of time has elapsed. Ms. Hucal also maintained that Mr. Quigley has not demonstrated that there were special circumstances warranting a reconsideration of the original decision.

Counsel for the employer also argued that the grievor was fully aware of the grievance and adjudication process; he took every opportunity to seek redress throughout his employment and was well informed about the process and readily took advantage of it at every opportunity. He did not do so in a timely fashion in this case because he felt that some other avenue was more advantageous to him. There was clearly an abandonment of his grievance; accordingly, there is no grievance in respect of which he could ask for an extension of time to refer to adjudication.

In rebuttal, Mr. Quigley insisted that his case is unique, that the actions of the employer contributed to the delay and therefore it would be unfair not to have the employer be accountable for its actions.

Reasons for Decision

On many occasions and in a number of different contexts labour relations boards and arbitrators have emphasized the importance of having some finality in respect of proceedings before these tribunals. Accordingly, this Board as well as others, have interpreted and applied provisions such as section 27 with a great deal of caution. As this Board stated in the *Public Service Alliance of Canada* and *Treasury Board* (Board file 125-2-41):

> *In the Board's view, section 25 was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of section 25 was rather to enable the Board to reconsider a decision either in the light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists. It would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of.*
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> *6. The Board notes that this approach to section 25 of the Act is very much in line with that taken by the Ontario Labour Relations Board in relation to its statutory power "if it considers it advisable to do so, [to] reconsider any decision". In Lorain Products (Canada) Ltd. [1978] OLRB Rep. March 262, at page 263, the Ontario Board explained its understanding of the purpose of this power in these terms:*
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> > *The Board having regard to the labour relations chaos which would result if there were not some finality to its decisions has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party seeking reconsideration can show that it has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board. The parties to Board proceedings are entitled to*

> *rely upon the decisions of the Board in the knowledge that they are final and conclusive unless evidence of the type referred to above is uncovered (See re Detroit River Construction Ltd. case, 63 CLLC 16,260 at p. 1117, York University case, [1976] OLRB Rep., April 187, Ottawa Journal case, [1977] OLRB Rep. Sept. 549). The Board does not permit reconsideration for the purpose of allowing a party to repair the deficiencies in its case or to reargue the merits of its case.*

For a number of reasons, it is readily apparent that Mr. Quigley cannot succeed in this Application for Review under section 27. Firstly, contrary to his submission, Mr. Quigley was afforded an opportunity to present any relevant evidence which would explain the thirteen year delay in pursuing his original grievance. He did in fact adduce evidence respecting his claim for damages before the Federal Court, and the Court's disposal of that action. The question of delay was therefore clearly at issue in the earlier proceedings and was dealt with at length in that decision; for example, at page 7 of the decision, the following observations were made:

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> *Undoubtedly one of the impediments that Mr. Quigley must overcome, in the circumstances of this case, is the question of timeliness. It is the height of understatement to observe that he has exceeded the time limits provided in the relevant collective agreement, and in the Board's Regulations. In the course of this hearing Mr. Quigley requested that the Board exercise its discretion under section 63 to provide relief from the effects of the time limits. Apart from any questions as to whether a Board Member sitting as adjudicator can address a request under section 63, and whether such an application can be heard without proper notice to the employer, in my view there are no grounds for the Board exercising its authority under section 63 of the Regulations. It is expected that an employee pursuing a grievance will adhere to the time frames applicable to the grievance and adjudication process; section 63 allows the Board to relieve against the strict application of these time limits; however, were the Board to exercise this authority indiscriminately it would quickly render the time limits meaningless, to the ultimate detriment of the entire grievance and adjudication process. Accordingly, the Board, when faced with a request under section 63, must determine if there are special circumstances which warrant the Board's intervention. One important consideration is whether there was a reasonable*

> *degree of due diligence notwithstanding the failure to meet the time limits; obviously, the length of the delay weighs heavily in making that determination. In this instance the delay was of quite extraordinary duration. The only rationale given for the delay was Mr. Quigley's assumption that he could obtain redress elsewhere. Even accepting that this is a satisfactory basis for exercising the Board's discretion under section 63, there is no evidence of any sort that would explain, firstly, why the Statement of Claim was not filed until 1985, and secondly, why the action was not heard until 1994. In my view, Mr. Quigley as the applicant under section 63 has the onus of providing some explanation concerning these lengthy delays; none was forthcoming from him.*
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> . . .

It is also apparent from the September 25, 1997 judgment of the Federal Court, Trial Division (supra) that the question of delay was clearly at issue; thus, the Court notes at page 5 that ". . . *The respondent submits that the Adjudicator made no reviewable errors and had the right to conclude* ***that the applicant did not provide sufficient grounds to explain his delay....***" (emphasis added) It was clearly open to Mr. Quigley to argue before the Court that he was denied the opportunity to make his case in respect of the question of delay; he apparently did not do so. Accordingly, Mr. Quigley had an opportunity to present the evidence which he now wishes to bring forward today, and chose not to do so.

Furthermore, I am not satisfied that there are any "special circumstances" which warrant a reconsideration of his case. In essence, the evidence which Mr. Quigley presented in the first instance, and in this proceeding, demonstrates only that Mr. Quigley decided that it was in his best interests to pursue his remedy in the Federal Court, rather than through the grievance process. Mr. Quigley claims that he was preoccupied with the employer's efforts to harass and intimidate him. This however did not prevent him from seeking redress in the Federal Court in 1985 and to pursue that matter until 1995. Mr. Quigley acknowledged that he was well aware of the existence of the adjudication procedure, and in fact invoked it on two other occasions. I see nothing in the evidence which Mr. Quigley presented at this hearing that would warrant the Board reconsidering its original decision.

Notwithstanding my conclusion that he has not established proper grounds for review under section 27, I have considered whether, in light of the evidence he

presented in these proceedings, an extension of time would be warranted under the Board's Regulations. I have no doubt that it would be entirely inappropriate to grant an extension of time, notwithstanding this evidence. Mr. Quigley has not presented any evidence which is substantively different from the evidence he submitted in the previous proceedings. There is nothing in his testimony which would justify a thirteen year delay in pursuing his grievances. It would be entirely unfair to allow him to resuscitate his grievances in light of the circumstances, so many years later.

Accordingly, for the reasons noted above, this application is dismissed.

P. Chodos,
Vice-Chairperson.

OTTAWA, June 4, 1998.