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File: 568-34-4

Citation: 2005 PSLRB 180

Public Service
Labour Relations Act

Before the Vice-Chairperson

BETWEEN

LINDA RICHARD

Applicant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Richard v. Canada Revenue Agency

In the matter of an application for an extension of time referred to in subsection 61*(b)* of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Sylvie Matteau, Vice-Chairperson

For the Applicant: Doug Hill, Public Service Alliance of Canada

For the Respondent: Richard Fader, counsel

Heard at Charlottetown, Prince Edward Island,
November 15, 2005.

Application before the Vice-Chairperson

[1] This is an application for an extension of time under subsection 61 (*b*) of the *Public Service Labour Relations Board Regulations* (the Regulations). The bargaining agent filed this application on behalf of Ms. Linda Richard, the grievor, on June 9, 2005. The grievances against the grievor's indefinite suspension on May 13, 2004, and her termination on July 21, 2004, were filed on January 26, 2005.

[2] The employer objected to the timeliness of these grievances on the basis of clause 18.10 of the collective agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada (PSAC), which expired on October 31, 2003.

[3] The bargaining agent argued that there are mitigating factors that should be taken into consideration and that clause 18.21 of the collective agreement should apply to the grievor's circumstances at the time of her suspension and termination.

[4] Pursuant to section 45 of the *Public Service Labour Relations Act*, the Chairperson authorized myself as Vice-Chairperson to exercise any of his powers or perform any of his functions as specified in subsection 61 (b) of the *Public Service Labour Relations Board Regulations* for the hearing and determination of this application for extension of time. Further, it should be noted that as of December 12, 2005, the Canada Customs and Revenue Agency changed its name to the Canada Revenue Agency.

Summary of the evidence

[5] The grievor has been an employee of the Canada Revenue Agency (CRA), at Summerside Centre, Prince Edward Island (PEI), since September 15, 2001. At the time of the circumstances giving rise to the grievances, she was acting as a Claim Officer, group and level PM-01, in the Visitors Tax Rebate Claim Office.

[6] At the time of her dismissal, she had been an employee of the federal public service for 22 years. Her previous employment was with the Department of National Defence in Moncton, New Brunswick. That employment was terminated in 2001, with the closure of the base where she worked. She was given options at the time to be transferred to Summerside or somewhere in Western Canada. In order to stay closer

to her family in Moncton, New Brunswick, she opted for PEI and employment with the CRA.

[7] She explained that, in addition to losing her house by fire in 1999 and her employment in 2001, she has had to deal with a number of personal traumas in the last 10 years. She was married in 1981, to a husband who became very abusive and controlling. She had two sons with him, the first during the marriage and the second after she had left him in 1991. Some five years after the separation, her ex-husband committed suicide in her house.

[8] Both her sons continue to require special attention. They are now 16 and 18 years old. They have had medical conditions which are ongoing and with which she has had to expend considerable effort in order to deal with them.

[9] She has been regularly followed by a family physician since she arrived in PEI in 2001. In 2004, she was diagnosed with Post Traumatic Stress Disorder (PTSD) and, in a note dated December 14, 2004 (Exhibit G-3), her physician lists some of the same events as underlying this condition.

[10] On May 13, 2004, the grievor was called to a meeting by Ms. Gayelene Cook-Angus, Assistant Director, Rebate Services. At the suggestion of management, Ms. Ann Ferrish, a union representative and local union president, was invited to the meeting. Ms. Nancy Darling, from the Human Resources section, was also present. The grievor was told that serious anomalies had surfaced regarding her handling of rebate claims. She was informed that an investigation would be conducted and that, in the meantime, she would be suspended indefinitely. She was asked to hand over her building pass and keys. She was escorted to her desk to sort out her personal belongings and was told that they would be sent to her later.

[11] Ms. Darling and Ms. Cook-Angus called the grievor on July 19, 2004, to tell her that the investigation report from Internal Affairs had been received and that they wanted to meet with her and her union representative on July 20, 2004. The grievor had been notified of this call by her union representative beforehand. Ms. Cook-Angus told her that it was a meeting from which disciplinary action could ensue and that this was an opportunity for the grievor to explain her actions. It would be followed by a reflection time, in order for Ms. Cook-Angus to make a decision on disciplinary consequences.

[12] In the course of the July 20, 2004, meeting, Ms. Cook-Angus explained the findings of the Internal Affairs investigation. It concluded that over $40,000 had been paid to the grievor, directly or indirectly, over a period of three years through fictitious rebate claims. According to Ms. Cook-Angus, the grievor apparently seemed surprised at the total amount but did not deny the facts. The grievor indicated that, on legal advice, she would not make any further comments.

[13] The grievor was notified that the case had been referred to the police. It was pointed out that the subject matter of the meeting would be restricted to the human resources aspect of the case. When asked why the grievor had done this, she replied that she did not know. She said that she was experiencing heavy stress at home, that she was seeing her doctor and that she was having a breakdown. When told that this had been going on since 2001, she replied that she was losing her home, she was behind in her mortgage payments and, as with a disease, she could not stop. It was a way to relieve the financial and other pressures in her life. She then went on to explain how she had proceeded to receive these fraudulent payments.

[14] By the end of the meeting, Ms. Ferrish suggested that there were mitigating factors and that the grievor could obtain a note from her physician. Ms. Darling testified that she had advised the grievor that any disciplinary decision would take into account the 22 years of service of the employee as well as any mitigating factors. The grievor was asked to provide this note as soon as possible. The Employee Assistance Program (EAP) was brought up and discussed. Finally, the grievor was told that a decision would be made quickly and that she would be notified.

[15] A second meeting was set for July 22, 2004. On that date, Ms. Cook-Angus, with Ms. Darling and Ms Ferrish, tried unsuccessfully to reach the grievor by phone, as she had not appeared at the meeting set for that day. Ms. Ferrish was consulted on the best means to further communicate the disciplinary decision to terminate the grievor's employment to her. It was decided that a sheriff would be used to deliver the letter to her home.

[16] On July 27, 2004, the sheriff delivered the letter and reported on his service on the same day (Exhibit E-4). At first, the grievor did not recall this delivery. She thought the letter had come by regular mail. She also explained that when she received the letter of termination, she had her family visiting. She had kept everything

secret. Her family was unaware of her situation. She read the letter summarily, having expected it, and put it away.

[17] When asked why she did not file a grievance at the time, the grievor replied that she felt she had no case. She said that she was just numb. She had thought that if she co-operated and explained her circumstances there would be sympathy, but there was none. At that point, she gave up. She was just trying to make a living at the time. Her union did not encourage her either. She was left to believe that it was a lost cause.

[18] Ms. Ferrish brought the grievor's personal belongings to her home. She offered her assistance, if need be, and handed over the notes she had taken during the meetings. She told the grievor: "Should you want to file a grievance, here are my notes from the meetings." Ms. Ferrish acknowledged that she did not clearly come out and say that the grievor should file a grievance.

[19] The grievor decided to file the grievances when she learned that her Employment Insurance (EI) claim had been denied by the Employment Insurance Appeal Board (EIAB) on December 20, 2004 (Exhibit E-9), due to her wilful misconduct (section 31 of the *Employment Insurance Act*).

[20] At the suggestion of her physician, she had appeared before the EIAB on December 16, 2004. She had presented her physician's letter dated December 14, 2004, stating his diagnosis in support of her case. Although sympathetic to her situation, the EIAB members told her that their hands were tied; they suggested that she file a grievance.

[21] She immediately contacted her union to file the grievances. They are dated January 26, 2005. The final reply to the grievances is dated April 14, 2005. It raised the issue of timeliness and stated that given the deadlines for the filing of grievances contained in clause 18.10 of her collective agreement, the grievances were six and eight months late. The reply (Exhibit G-5) also provided a response to the merits of the grievances, stating that, considering the serious nature of the misconduct, the numerous attempts at concealing the fraudulent activities and her refusal to explain the behaviour, the bond of trust was broken and the grievances were denied.

[22] Ms. Darling testified that she had become aware of the grievor's claim for EI benefits through a call from that department on June 21, 2004. Ms. Edith Doherty,

from the EI office, was looking for clarification on the grievor's status. Ms. Darling confirmed that she had been suspended indefinitely. Thereafter, she received both the package of documentation for the EIAB hearing (Exhibit E-8) and the EIAB decision. It appears from that documentation that the grievor applied on-line for EI benefits on May 26, 2004. It also appears from that application form, that the claimant consulted her union representative with respect to her claim for EI benefits.

Summary of the arguments

Arguments for the grievor

[23] On behalf of the grievor, the bargaining agent stated that, should the extension of time be granted, it is not her intention to contest the fact that disciplinary measures were warranted in this case. Rather, she intends to submit that, due to important mitigating factors, the disciplinary measures should be reviewed in light of her medical condition and other circumstances. More importantly, they should be reassessed in view of the fact that her actions should not, in her opinion, be determined to have been wilful misconduct.

[24] The grievor acknowledged that article 18 of the collective agreement outlines the grievance procedure and that the time limit in which a grievance should be filed is set out in clause 18.10; it reads as follows:

> ***18.10*** *An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause 18.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing, or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

[25] However, clause 18.21 provides an exception which reads as follows:

> ***18.21*** *An employee who fails to present a grievance to the next higher level within the prescribed time limits shall be deemed to have abandoned the grievance, unless the employee was unable to comply with the prescribed time limits due to circumstances beyond his or her control.*

[26] This last clause should be considered when assessing the mitigating factors supporting the application for extension of time.

[27] As early as July 20, 2004, the grievor indicated to the employer that she was having difficulties with her health and her situation at home. She described her

behaviour as being out of her control. She also mentioned that she was sick and had been seeing her family doctor as a result of stress and pressure in her personal life. In the bargaining agent's view, one can only imagine that, with the stress described by her family doctor prior to the suspension and termination actions, these last disciplinary measures would only have a compounding effect on the grievor's level of stress and her ability to make decisions and think clearly. All these factors should be considered when evaluating the grievor's ability to make a decision to file a grievance at the time in question.

[28] It was only after the EIAB decision that the grievor decided to take action. From that point on, the grievor was diligent in filing her grievance.

[29] During the July 2004 meeting, the employer confirmed to the grievor that it always considers medical mitigating factors in making disciplinary decisions. That practice should also be followed here. The grievor's medical condition was not contested at this hearing. The union's position is that the actions of the grievor, contrary to the employer's view, were not wilful acts.

[30] The bargaining agent submitted that the time limits provided for in the collective agreement should be interpreted as guidelines rather than mandatory. They should not restrict the grievor in her access to the grievance procedure or adjudication.

[31] The bargaining agent submitted the case of *Halfaoui v. Treasury Board (National Defence)*, Board File Nos. 149-2-113 and 166-2-22201 (1992) (QL), in support of its argument. Although the circumstances were different in that case, it is submitted that, where a grievor is awaiting a decision from the EIAB (in that case, Quebec's Commission de la santé et de la sécurité du travail (CSST)), the time limit to file a grievance should be extended for the duration of that appeal process.

[32] Therefore, it is requested that the June 9, 2005, application for extension of time be granted. The mitigating circumstances or stress factors that operated in this case affected the abilities of the grievor to make a decision, such that clause 18.21 of the collective agreement applied to her situation.

Arguments for the employer

[33] The employer submits that the time limit set out in clause 18.10 of the collective agreement is a limitation on the right to file a grievance and has been recognized as such. It is suggested that the language used was meticulously chosen.

[34] It is clear beyond dispute that the grievor was out of time to file a grievance. The suspension was effective May 13, 2004, and the termination, which was effective July 21, 2004, was delivered to the grievor on July 27, 2004. The grievances were filed on January 26, 2005. It is also beyond dispute that the burden of proof in an application for extension of time, is on the applicant.

[35] According to the employer and based on *Batson v. Treasury Board (Transport Canada)*, Board File no. 149-2-57 (1984) (QL), a delay in an appeal to the EIAB cannot justify a delay in filing a grievance. In that case, Vice-Chairman Jean-Maurice Cantin found as follows: "…the delay caused by the proceedings in the Federal Court cannot be relied on as a valid reason for failing to present a grievance in a timely fashion."

[36] More importantly for the employer, the case law has established that the grievor, in order to be granted an extension of time, has to establish that his or her intention to grieve existed before the time limit ended.

[37] In *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113, at paragraph 29, the Board considered that "the Federal Court of Appeal has found that the Board is not required to weigh the prejudices that might follow upon the granting or refusal of an extension of time limits when it has found that the grievor had not formed the intention to grieve until after the time to do so had expired".

[38] Also, in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, arbitrator Mackenzie provided an analysis of the case law cited by the parties in that case. He identified the following basic criteria for determining whether to exercise the Board's discretion under subsection 63(*b*) of the former *PSSRB Regulations*:

- *clear, cogent and compelling reasons for the delay;*
- *the length of the delay;*
- *the due diligence of the grievor;*

- *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*

- *the chance of success of the grievance.*

[39] It is submitted that the case law as summarized in *Schenkman* (*supra*) also established that there is no need to proceed to the balancing of prejudice to the employer with injustice to the grievor once it has been determined that there were no clear, cogent and compelling reasons for the delay.

[40] Most important in the employer's view in this case is the grievor's testimony. She declared that she thought that she had no case. She also declared that the union did not encourage her in filing a grievance, but rather led her to believe that she had no case.

[41] This application should not be granted. The evidence produced by the grievor herself shows that she had not formed the intention to file a grievance within the time limit set out in clause 18.10 of the collective agreement. Clearly, the grievor chose not to grieve.

[42] The medical information presented does not deal with the issue at hand. It is used as a rationale in trying to explain that the grievor was so stressed at the time that she could not file a grievance. However, her clear answer when asked why she did not file a grievance at the time was that she believed that she did not have a case.

[43] There are also important inconsistencies in her actions. Within days of being suspended, she filed a claim for EI benefits. When she was refused, she made the decision to appeal on November 9, 2004. This is inconsistent with the claim that she was incapable of making decisions. Her actions in claiming and fighting for her EI benefits show that she had the ability to think clearly and to act. She appeared before the EIAB and argued her case. Why did she not do the same with the grievance process?

[44] In conclusion, pursuant to *Wyborn* (*supra*), it is clear that the intention of the grievor to file a grievance was not formed by the time the time limit expired. On the contrary, at the time in question, the grievor had made a conscious decision not to file a grievance. She changed her mind later when she realized that her file, as it stood, denied her EI benefits.

[45] Reviewing the factors outlined in *Schenkman* (*supra*), it is argued that a delay of six to eight months in filing grievances is a significant period in terms of due diligence. The evidence is overwhelming that the grievor had simply abandoned the case.

[46] Under these circumstances, the balancing of prejudice should not be considered. The employer acknowledged that it is no less able to argue its case but as a matter of principle submitted that it is important that the provision of the collective agreement be respected.

[47] In view of all these factors, the employer submits that the application should be denied.

Reasons

[48] Prior to April 1, 2005, the tribunal with labour relations jurisdiction over this matter was the Public Service Staff Relations Board (the PSSRB), and the applicable statute and regulations were the *Public Service Staff Relations Act* (the former *Act*) and the *Public Service Staff Relations Board Regulations and Rules of Procedure*, 1993 (the former *Regulations*). As of April 1, 2005, a new Board, the Public Service Labour Relations Board, was established under the *Public Service Labour Relations Act* (the *Act*) and new regulations were adopted, being the *Public Service Labour Relations Board Regulations* (the *Regulations*)

[49] The parties were asked to make submissions regarding the application of the *Regulations* to the present case. Both were of the opinion that this application should proceed in accordance with the former *Regulations*, the regulations that existed at the time that the grievances were filed, considering that the grievances would be heard under the former *Act*.

[50] However, the application was made on June 9, 2005, to the new Board and can only be decided in accordance with its regulations. In this case, as in all cases before this Board, the transitional rules will be interpreted in order to ensure fairness and to avoid compromising any vested interests which may have arisen under the former *Act*. As such, subsection 61(b) of the *Public Service Labour Relations Board Regulations*, as it applies to the present case, does not affect the grievor's or the employer's rights.

[51] Subsection 61(*b*) of the PSLRB *Regulations* provides:

> *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*
>
> …
>
> *(b) in the interest of fairness, on the application of a party, by the Chairperson.*
>
> …

[52] Under either the former or the new regulations, the Board has a broad discretion to grant such an application. The principles which evolved from the case law of the former Board and the principle set out in the *Regulations* of the new Board are not incompatible; on the contrary, they are of the same nature. Both require an analysis of each situation. Under subsection 63(b) of the former *Regulations* a time limit could be extended:

> *(b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.*

[53] Following a review of the case law, the former Board, in *Schenkman* (*supra*), distilled five criteria for the granting of such an extension of time under the former *Regulations*. The first relates to the presence of a clear, cogent and compelling reason for the delay. The second refers to the length of the delay, in order to ensure a full evidentiary process and fairness to both parties. The third has to do with the due diligence of the grievor. Finally, the Board has looked at balancing grievor and employer prejudice along with the chances of success of the grievance itself.

[54] Under subsection 61(b) of the *Regulations,* these principles have in essence been summarised and the Chairperson, or a Vice-Chairperson to whom the Chairperson has delegated that authority, may extend the time limit "in the interest of fairness".

[55] In *Wyborn* (*supra*), Deputy Chairperson Giguère stated that the former Board did not need to look at all of these criteria in order to come to its conclusions: "The Board is not required to weight the prejudices that might follow upon the granting or refusal of an extension of time limit when it has found that the grievor had not formed the intention to grieve until after the time to do so had expired."

[56] The employer relies on this principle to conclude that this application should be denied. The principle is found in a one paragraph decision of the Federal Court of Appeal in *Stubbe v. Canada (Treasury Board),* [1994] F.C.J. 508 (referred in *Wyborn (supra)).* However, it should be noted that the circumstances of the *Stubbe (supra*) case demonstrated that the grievor was attempting to divert attention from his own negligence. The grievor, who had been a union officer for two unions, was given every opportunity to file grievances, but blamed the dilatoriness on his lawyer whom he could not even name. The Federal Court of Appeal specifically referred to these very particular circumstances in its short decision. It is not the case here.

[57] In the case at hand, the grievor has presented clear, cogent and compelling reasons that explain the delay. There is evidence, not contested by the employer at this time, that the grievor was suffering from post-traumatic stress disorder which could, in the words of her physician, "be responsible for the 'situation' that she found herself in with the dismissal from work for misconduct"(Exhibit G-3). This she will need to establish in any further proceedings before this Board. However, for the purposes of this proceeding, I find that her medical condition is a factor which should be considered in this application.

[58] The evidence revealed that it was only with the intervention of third parties, such as her physician and members of the EIAB, that the grievor was able to assess more objectively the grounds available to her for contesting her termination. Furthermore, it was only over time and when faced with the consequences of her decision not to grieve that she realized the implications of that decision. Only then did she realize that she might have an argument to contest the disciplinary measures. Up to that point, she was relying on the fact that she did not believe in her chance of success in such a grievance as well as her perception of the opinion of her union in this regard. She felt that she did not have the support of her union. I do not, by this, mean to say that the Board should automatically grant extensions to grievors who learn that, contrary to their assumptions, they do have grounds to file a grievance. However, in this particular case, the grievor was already emotionally fragile for a variety of reasons, and her termination, coupled with the fact that the union did not encourage her to grieve, is a factor which I must consider in rendering my decision on this application.

[59] The fact that the grievor applied for her EI benefits on May 26, 2004, does not create an inconsistency with my decision, in my view. She did what any person in her position at that time would have done. She needed to replace her income and believed that she was entitled to EI benefits. She simply had to file an application. After her application for EI benefits was denied, she testified that it was at her physician's suggestion that she appealed the decision. He provided her with a letter stating his diagnosis in order to assist her case.

[60] From the moment that the grievor made up her mind and form the intention to grieve the disciplinary measures imposed on her, she acted diligently, from December 16, 2004, to her filing of the grievances on January 29, 2005.

[61] Although time limits set out in collective agreements are specific and should not be lightly set aside, as stated by the former Board in *Mbaegbu v. Treasury Board (Solicitor General Canada - Correctional Services),* 2003 PSSRB 9, each case should be reviewed carefully and decided according to its own special circumstances with a view to due process and fairness for each party. The state of mind of the grievor is only one of many factors that need to be considered in an application such as this one.

[62] The employer acknowledged that the delay would not affect its ability to present its case in contesting the grievance. On the other hand, because of the nature of the disciplinary measure, denying the application would have important negative consequences for the grievor (*Kirsch v. Treasury Board (Public Works and Government Services Canada)*, PSSRB File No. 149-2-60 (1985) (QL)).

[63] As such, in balancing the serious consequences for the grievor with the prejudice to the employer in its ability to present its case to this Board, I find that this a proper case for granting this application *(Brennan v. Treasury Board (National Defence)*, PSSRB File No. 149-2-70 (1986) (QL)). The loss of employment is a serious matter for the grievor. The fact that the grievor had been employed in the public service for 22 years should also be taken into consideration (*Anderson v. Treasury Board (Revenue Canada)*, PSSRB File No. 149-2-49 (1983) (QL)).

[64] The diligence of the grievor from the time she made the decision to file her grievances, as well as the short time elapsed since the time limit ran out (6 and 8 months) are also important considerations (*Trenholm v. Staff of the Non-Public Funds, Canadian Forces,* 2005 PSLRB 65). Finally, the fact that the grievor presented clear,

cogent and compelling reasons explaining the delay in the filing her grievances, namely her apparent mental and emotional state at the time (*Anderson* (*supra*)) should be considered. The application filed by the bargaining agent on behalf of the grievor should therefore be granted in the interest of fairness.

[65] For all of the above reasons, I make the following order:

Order

[66] The application for an extension of time to file the grievances is granted.

[67] The grievances filed on January 26, 2005, will proceed to adjudication at a time and on a date to be set by this Board.

December 28, 2005.

Sylvie Matteau,
Vice-Chairperson