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File: 166-18-35169

Citation: 2005 PSLRB 65

Public Service Staff Relations Act

Before an adjudicator and the Public Service Labour Relations Board

BETWEEN

WAYNE TRENHOLM

Grievor

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Employer

Indexed as
Trenholm v. Staff of the Non-Public Funds, Canadian Forces

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Paul Love, adjudicator and Board member

For the Grievor: Jack Gerow, United Food and Commercial Workers Union, Local 1518

For the Employer: Margaret T.A. Shannon

Heard at Campbell River, British Columbia,
April 26, 27, 2005.

Grievance referred to adjudication

[1] On December 17, 2004, the grievor filed a reference to adjudication with respect to his termination from employment. On January 4, 2005, the employer, the Staff of the Non-Public Funds, Canadian Forces, 19 Wing Comox, applied to the Board to dismiss the reference to adjudication on the basis of lack of jurisdiction in the Board, arising from the failure of Brent Trenholm, the grievor, to file a reference of a grievance to adjudication in a timely manner. The parties agreed that this hearing should proceed on the basis of hearing the employer's preliminary objection as to jurisdiction.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act,* S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, I continue to be seized with this reference to adjudication, which must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the *PSSRA*).

Summary of the evidence

[3] At this hearing, the employer called the following persons to give evidence: Yvonne Dixon, a human resources manager, and Brenda Dagenais, Director of Human Resources. The grievor did not attend and did not give any evidence in this matter. The bargaining agent did not call evidence in this proceeding, but cross-examined the witnesses and presented argument.

[4] Mr. Trenholm was employed by the employer as a full-time seasonal grounds keeper at the Glacier Greens Golf Course at Canadian Forces Base Comox, British Columbia. At all material times, he was a member of the United Food and Commercial Workers Union of British Columbia, Local 1518 (UFCWU or bargaining agent).

[5] Yvonne Dixon became aware of a situation involving an off-duty assault by Mr. Trenholm on Larry Pasaluko, at an employment-related social function on October 2, 2003. As a result, Mr. Trenholm was suspended pending an investigation. Ms. Dixon was contacted by Wayne Vicic, a bargaining agent representative, and was asked to hold off on the employer's investigation until after the Royal Canadian Mounted Police had conducted its investigation. The employer accommodated the bargaining agent's request.

[6] The employer eventually held a disciplinary hearing on February 19 and 20, 2004. Mr. R. Curren, a regional manager, conducted the hearing. Mr. Curren heard from Mr. Pasaluko and Mr. Trenholm as well as three co-workers, none of whom was a witness to the assault. Mr. Curren made the following findings in a letter dated March 31, 2004 (Exhibit E-3):

. . .

> *By virtue of your own admission, you assaulted Mr. Pasaluko on the evening of 2 October, 2003 in the workplace, as alleged. While your evidence differs from Mr. Pasaluko's as to which of you initiated the altercation and assaulted the other first, it is clear from uncontradicted evidence given by both of you that you punched Mr. Pasaluko and that you continued to deliver two further kidney punches to his back after he had withdrawn and was in fact curled up on the floor in the fetal position.*
>
> *Whether one accepts your evidence or the evidence of Mr. Pasaluko's regarding how the fight started, I find that in any event you clearly assaulted Mr. Pasaluko and that you used excessive force in the circumstances. Even were I to find that you were provoked as you allege, or that you were acting in self-defence as you further allege, one is legally justified only in using as much physical force as is reasonably necessary to stop another person from assaulting them when defending themselves. It is clear that, in the circumstances and by your own admission, you continued to physically assault Mr. Pasaluko in circumstances where there was clearly no real threat that he would assault or harm you. I find that the force you used in assaulting Mr. Pasaluko was excessive and not reasonably justifiable. …*
>
> *Given the potential severity of this matter, and the multiplicity of factors to be considered in assessing the appropriate disciplinary penalty to be imposed in this case, I shall refer the matter back to the Glacier Greens Golf Course and Country Club Manager for a decision concerning the appropriate penalty in this situation.*

. . .

[7] The investigative report hints at a past history of relations between the parties. The investigative report hints at bullying of Mr. Trenholm by Mr. Pasaluko prior to the assault, although the investigator and the employer were of the view that the degree of force applied was unreasonable. It is apparent from the investigator's report that there was consumption of alcoholic beverages by both Mr. Trenholm and Mr. Pasaluko. There appears to be no independent witnesses to the alleged assault called before the

investigator. Credibility, including the influence of alcohol consumption on credibility may have played some role in the fact finding process at the investigative stage.

[8] Mr. Trenholm was terminated by Y. Bossé, Lieutenant-Colonel Wing Administration officer for Wing Commander, by letter on April 30, 2004 (Exhibit E-2).

[9] The employer received a grievance from Mr. Trenholm dated May 31, 2004. It is common ground that the grievance was filed within the time limit for the filing of a grievance under the collective agreement.

[10] Since it was a termination grievance, Ms. Dixon treated the grievance as a third level grievance and sent it to headquarters. Mr. John F. Geci, President and CEO of CFPSA, replied to the grievance as follows on June 15, 2004:

. . .

> *I have reviewed your grievance and the circumstances surrounding your dismissal. You admitted to the Hearing Officer at your discipline hearing that you assaulted a co-worker at a work related function. I find nothing in the facts that would mitigate or excuse your behaviour. Discipline was warranted.*
>
> *Violence in the workplace is unacceptable behaviour and will not be tolerated by CFPSA. Consequently, your grievance is denied.*

[11] The employer has not established the precise date on which the grievor received the June 15, 2004 letter. There was no proof of the date of delivery of the letter. I must surmise that the grievor received the letter at least by July 22, 2004, as Mr. Vicic wrote to Ms. Dagenais on that date as follows:

. . .

> *We are in receipt of a letter dated June 15, 2004 from John F. Geci, President & CEO of C.F.P.S.A., in which Mr. Geci has denied Wayne Trenholm's grievance. Therefore, we are proceeding to adjudication and have retained the following legal counsel:*
>
> *Jack Gerow*
>
> . . .
>
> *We have instructed Mr. Gerow to call you and set up the hearing.*

[12] Ms. Dagenais is a lawyer and a former head of labour relations for this employer prior to her appointment as the Director of Human Resources. Ms. Dagenais indicated that Mr. Vicic was an experienced bargaining agent representative. From the July 22, 2004 letter, it is apparent that Mr. Vicic was unaware of the proper process to initiate a reference to the Public Service Staff Relations Board for adjudication. The letter appears to mirror the customary process of setting up a private sector labour arbitration in British Columbia. Under the federal public sector grievance adjudication process, it is unnecessary for the bargaining agent, except perhaps as a courtesy, to notify the employer by letter that it intends to proceed to adjudication.

[13] Ms. Dagenais indicated that she took this letter in the same vein as a courtesy notification or letter from a lawyer indicating that the lawyer was going to sue the party. She indicated that until an action was commenced, no response would be required by her. The usual process to refer a matter to adjudication is for the bargaining agent to file a Form 14 with the Board and to serve a copy of the form on the employer. I accept Ms. Dagenais' evidence that she expected that if a party was going to proceed to adjudication, the party would file a Form 14 and deliver a copy of it to the employer.

[14] The relevant collective agreement between the parties was filed as an exhibit in these proceedings (Exhibit 1). The collective agreement contains the following time limits:

. . .

> *17.17 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 in the opinion of the Employer or his delegate, it was not possible for the employee to comply with the prescribed time limits.*
>
> *17.18 Where an employee has presented a grievance up to and including the final level with respect to disciplinary action resulting in discharge, suspension or a financial penalty, and the grievance has not been dealt with to the employee's satisfaction, he/she may refer the grievance to adjudication in accordance with the provisions of the Public Service Staff Relations Act and Regulations.*

. . .

[15] Section 76 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993*, SOR/93-348 as am. SOR/96-457 (*Regulations*) made pursuant to the *PSSRA*, sets out the time limits to file a reference to adjudication:

. . .

> *76. (1) An employee may refer a grievance to adjudication under section 92 of the Act by filing with the Secretary in duplicate a notice in Form 14 of the schedule, together with a copy of the grievance that the employee submitted to the employee's immediate supervisor or the local officer-in-charge pursuant to paragraph 71(1)(a) or (b) or paragraph 71(2)(a) or (b), no later than on the thirtieth day after the earlier of*
>
> > *(a) the day on which the employee received a reply at the final level of the grievance process, and*
> >
> > *(b) the last day on which the authorized representative of the employer was required, pursuant to the provisions of a collective agreement or arbitral award or pursuant to section 74, to reply to the grievance at the final level of the grievance process.*

. . .

[16] In re-examination, Ms. Dagenais indicated that she referred to notes of the phone messages with Mr. Gerow prior to giving her evidence. On an application by the bargaining agent during re-examination, I ordered that she produce for the bargaining agent her file notes of the bargaining agent's telephone calls. While the employer objected that these documents were privileged, there was no basis for this position, as the notes were clearly a business record and were not made at the instruction of counsel, or in contemplation of litigation. The notes were produced in an edited form and there was further cross-examination and re-examination of Ms. Dagenais limited to the notes.

[17] The file notes and oral evidence indicate that Mr. Gerow contacted Ms. Dagenais on September 10, 2004. Ms. Dagenais' note of the September 10, 2004 call was that Mr. Gerow had phoned about getting hearing dates. Ms. Dagenais said that Mr. Gerow's phone message was that he wanted to talk about mediating or settling the matter, and that she phoned him the same day or next morning and left a message that the procedure for resolving the matter was pursuant to the *Public Service Staff Relations Act*, and she referred him to article 17 of the collective agreement.

[18] This first telephone call by Mr. Gerow was well after the letter from Mr. Vicic and there is no explanation in the evidence for this delay.

[19] Ms. Dagenais' file notes indicate that Larry Ransom of the bargaining agent phoned on October 21, 2004, about the "next step re hearing". Ms. Dagenais indicated that she called Mr. Ransom and told him that the procedure to follow was under the *PSSRA* and that the employer had no notice of adjudication.

[20] Ms. Dagenais' file notes indicate that Mr. Gerow phoned on November 30, 2004. She testified that Mr. Gerow was put through to her assistant Ms. Stonehouse. I note that Ms. Dagenais related what Ms. Stonehouse told Mr. Gerow; however, this was clearly hearsay, and I put no weight on this testimony, as it is somewhat germane to the matter in issue, and the weight of the evidence cannot be tested through cross-examination.

[21] Ms. Dagenais alerted the employer's legal counsel of all the calls and returned the calls; however, Ms. Dagenais did not speak to any representative of the bargaining agent about the Trenholm grievance. The parties exchanged telephone messages. Given the bargaining agent's attempts to continue to contact Ms. Dagenais after the expiration of the time limits, it cannot be said that the bargaining agent intended to abandon the grievance.

[22] Under the collective agreement and pursuant to the *PSSRA*, the proper method to initiate a reference to adjudication is to file a Form 14 with the Board. I take notice that if a representative was unfamiliar with the Board's process, the Board has a Website which contains the documents necessary to initiate a reference to adjudication and contact numbers for the Board.

[23] The bargaining agent did not file a Form 14 with the Board within thirty days after Mr. Trenholm received notification of the employer's answer to the grievance at the final level. The Form 14 was first filed with the Board on December 17, 2004, by Larry Ransom. This Form 14 did not set out the subsection of the *Public Service Staff Relations Act* that Mr. Trenholm was relying upon in the filing of the reference to adjudication. This form was apparently signed by Mr. Trenholm and by Mr. Ransom on behalf of the bargaining agent on September 21, 2004.

[24] Mr. Ransom filed a second Form 14 with the Board on December 28, 2004, indicating that the reference was made pursuant to subparagraph 92(1)(b)(ii) of the *Public Service Staff Relations Act*. As pointed out by the employer, the bargaining agent identified the wrong section of the legislation.

[25] Ms. Dagenais received a copy of the April 2005 schedule which set down this matter for an adjudication hearing. This appears to have been some time in early January 2005.

[26] The employer's counsel wrote to the Board on January 4, 2005, and indicated that the employer was unaware that the bargaining agent had referred the matter to adjudication and that the employer did not have a notice or copy of the reference to the adjudication and that the employer was not consulted as to the length of the hearing. The letter further indicated as follows:

. . .

> *The employer wishes to advise the Board that as of the date of the PSSRB Hearing Schedule for April 2005, it was unaware that the Union (UFCW Local 1516) had purportedly referred this matter to adjudication. No notice or copy of any Reference to Adjudication has been served on us, nor have we been consulted as to the anticipated length of hearing. In addition, the Employer wishes to object to the Board setting the matter in violation of the Collective Agreement which requires that any reference be made to adjudication within the time frames as set out in the Public Service Staff Relations Act. As you are aware the act stipulates that a reference to adjudication must be filed no later than the thirtieth (30th) day after the earlier of the day on which the employee received the reply at the final level of the grievance process or the last day on which the authorized representative of the Employer was to reply.*
>
> *In this case, the Employer replied to the Grievor by letter dated 15 June 2004. We therefore respectfully submit that the adjudication of this matter is not only in violation of the Collective Agreement, it is statute barred and the Board is respectfully without jurisdiction to hear the matter. Consequently, we request that the matter be removed from the docket. Failing this, we request that this letter be considered a preliminary objection as to jurisdiction and that this objection be dealt with – affording the parties full opportunity to submit evidence and make legal argument – prior to the scheduling of any hearing to review the alleged merits of this matter. I await your response.*

[27] On January 5, 2005, the Board sent a letter to Ms. Dagenais attaching the notice of reference to adjudication of December 17, 2004, along with a request for a reply to the grievance. This letter also indicated that the Board had tentatively scheduled the matter for adjudication since it was a case involving termination of employment.

[28] Ms. Dagenais gave some evidence concerning the grievance process. She indicated that the time limits under the collective agreement are intended to be mandatory. She indicated that the time limits are clearly expressed in the *PSSRA*. She indicated that the employer has no role in setting down the bargaining agent's reference to adjudication, other than to respond to the documents that are filed. She also indicated that the Staff of the Non-Public Funds was set up under the authority of the *National Defence Act*, and that the *Public Service Staff Relations Act* applied to the employer, but not the *Public Service Employment Act*. Ms. Dagenais indicated that subparagraph 92(1)(b)(ii) of the *PSSRA* did not apply to this grievance, as this subparagraph relates to terminations under the *Financial Administration Act*, which did not apply.

[29] Ms. Dagenais indicated that the UFCWU usually responded within the time limits on other grievance matters, and that the failure to file a reference to adjudication for more than five months was unusual. Ms. Dagenais had dealt with Mr. Vicic for a number of years. While Mr. Vicic appears to have been knowledgeable about the grievance process, from the evidence before me it appears that he was engaged in bargaining in the fall of 2004 and was not representing Mr. Trenholm.

[30] Ms. Dagenais believed that the delay was unreasonable. In a case such as this, which was difficult and emotional for witnesses, the bargaining agent usually handled grievances in an expeditious manner.

[31] Ms. Dagenais indicated that the employer would suffer prejudice if the time limits were relaxed and this matter proceeded to adjudication on the merits. Two witnesses have relocated, and one senior military person who dealt with the matter has left the base. The whereabouts of these witnesses have not yet been ascertained. Ms. Dagenais indicated that Mr. Pasaluko is suffering from post-traumatic stress syndrome. Post-traumatic stress syndrome is a medical diagnosis, and Ms. Dagenais, as a trained lawyer, is not qualified to express an opinion on Mr. Pasaluko's medical state. She indicated that Mr. Pasaluko is anxious about having to testify and is anxious about the potential to have Mr. Trenholm back in the workplace if he is successful in

adjudication. There is also a suggestion that Mr. Pasaluko is having difficulties in the workplace.

[32] Mr. Pasaluko will be required to give evidence in criminal court when the matter proceeds to trial, and that forum is likely to be a more contentious and stressful forum in which to give evidence than a more informal Board hearing. I am also satisfied that the employer could make further efforts to find the witnesses required to take this matter to adjudication. The evidence does not clearly indicate when these witnesses left the workplace. I am not prepared to assume that these witnesses left the workplace after the thirty-day period for filing the grievance. It would be pure conjecture, and I note that it took six months for the employer to make a decision concerning the termination of Mr. Trenholm, although part of that delay was at the request of Mr. Trenholm, presumably so that the employer's investigation would not prejudice his criminal defence.

[33] In cross-examination, Ms. Dagenais admitted that there were only two collective agreements on Vancouver Island with Local 1518. She indicated that since her involvement in 1998, it is not often that the bargaining agent filed Form 14 references to adjudication. She believes it has happened on two previous occasions. Ms. Dagenais testified that when she received nothing after the July 22 letter, she assumed that the bargaining agent had decided to abandon the grievance. Ms. Dagenais indicated that the grievance was approximately out of time as of July 22, or shortly thereafter.

[34] A suggestion was made to Ms. Dagenais in cross-examination that a reference to adjudication was sent to the Board, earlier than the application that was filed with the Board on December 17, 2004. Ms. Dagenais' evidence was that she was not aware of this. There was no positive evidence called by the bargaining agent or any documents filed by the bargaining agent to show that there was an attempt to file the reference at an earlier time. There is therefore no proof to establish that the bargaining agent attempted to file the reference to adjudication with the Board before December 17, 2004.

[35] Mr. Pasaluko gave evidence on the issue of prejudice. He indicated that the stress from the assault and the lengthy ongoing investigation was driving him crazy. He indicated that he had never felt so much pressure in his life. He indicated that when he heard yesterday that it will keep going on and on, he felt physically sick. He

indicated that he will "do what is necessary not to work with him. If I have to terminate my job I will".

[36] The bargaining agent's representative sent to the Board a written submission on January 21, 2005, which asks for relief against a flaw in the proceedings (Exhibit E-8).

[37] The bargaining agent is prepared to represent Mr. Trenholm in an adjudication proceeding, should I relax the timeliness barrier to proceeding to adjudication. There is also an indication in the materials that Mr. Trenholm has withdrawn a guilty plea and is proceeding, to trial on assault charges involving Mr. Pasaluko. The bargaining agent has indicated in e-mail correspondence to the Board (April 13, 2005) that if Mr. Trenholm is convicted at trial, the bargaining agent will not represent him in the adjudication hearing. The bargaining agent sought a delay in the scheduling of the employer's application pending the result in the criminal proceeding. This application was denied by the Board.

Summary of the arguments

For the employer

[38] The employer says that the Board lacks jurisdiction to hear and decide this grievance, including the jurisdiction to hear this application. Further, the employer says that the bargaining agent has not made an application for an extension of time, and a response to the employer's motion to strike this reference for want of jurisdiction is not an extension of time application.

[39] The employer placed the grievor on suspension while it investigated the allegations of assault by Mr. Trenholm on October 2, 2003. The employer rendered its decision, finding that Mr. Trenholm was culpable of assault on March 31, 2004. The employer terminated Mr. Trenholm on April 30, 2004. Mr. Trenholm did not comply with clause 17.18 of the collective agreement, which adopts the grievance procedure set out in the *Public Service Staff Relations Act*. Section 76 of the *Regulations* provides that there is a mandatory 30-day period for the filing of a reference to adjudication. There was no Form 14 filed by the grievor within the limitation period. The employer argues it was not made aware of the reference to adjudication until December 28, 2004, when it received the April 2005 docket from the Board, which shows that the matter was set for hearing. The employer says that the form indicates that the reference to adjudication was filed on December 17, 2005. The employer raised its

objection to jurisdiction at the earliest possible time. The allegation that the bargaining unit representative was not aware of the process to refer the matter to adjudication and the bargaining agent's tardiness in referring this matter to adjudication are not excuses which would justify a time extension to permit the hearing of the grievance by the Board. The bargaining agent has not asked for an extension of time. The employer argues that it is prejudiced by the expiration of the time, as essential witnesses have left the jurisdiction, and the victim of the assault should not be left in a state of limbo. Errors made by lawyers or representatives for the parties do not justify an extension of the time, as the employee has other remedies, including breach of duty of representation and civil action in negligence. If the Board extends time for the filing of the reference to adjudication, as a condition of the extension of the time, the employer should not be liable for compensation for any back pay.

[40] The employer relies on the following authorities:

Brown D.J. and Beatty D.M., *Canadian Labour Arbitration*, (Aurora, Ont.: Canada Law Book) (looseleaf updated to 2002) at paragraph 2:1300; *Cominco Ltd. and U.S.W.A. Local 480 (Raymond) (*2000), 87 L.A.C. (4th) 380; *Air Liquide Canada Inc. and Teamsters, Local 213 (Hall)* (2001), 98 L.A.C. (4th) 230; *Chambers v. Treasury Board (Public Works Canada)*, PSSRB File No. 149-2-63 (1995) (QL); *Rattew v. Treasury Board (National Defence)*, PSSRB File No. 149-2-107 (1992) (QL); *Thunder Bay (City) and C.U.P.E.*, Local 87 (1991), 20 L.A.C. (4th) 361; *Casselholme Home for the Aged and C.U.P.E., Local 146* (1982), 3 L.A.C. (3d) 377; *Stubbe v. Treasury Board (Transport Canada – Canadian Coast Guard)*, PSSRB File No. 149-2-114 (1992) (QL); *Miller v. Treasury Board (Indian and Northern Affairs Canada)*, PSSRB File No. 149-2-149 (1995) (QL); *Boulay v. Treasury Board (Correctional Services of Canada)*, PSSRB File No. 149-2-160 (1997) (QL); *Anthony v. Treasury Board (Fisheries and Oceans Canada)*, PSSRB File No. 149-2-167 (1998) (QL); *Goligher v. Treasury Board (Department of Supply and Services)*, PSSRB File No. 149-2-43 (1982) (QL); *Vincent v. Treasury Board (Solicitor General – Correctional Services)*, PSSRB File No. 166-2-21022 (QL); *Coram v. Treasury Board (Transport Canada)*, PSSRB File Nos. 149-2-156 and 166-2-26146 (1996) (QL); *Rouleau v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 51; *Mbaegbu v. Treasury Board (Solicitor General Canada – Correctional Services)*, 2003 PSSRB 9; *Wyborn v. The Parks Canada Agency*, 2001 PSSRB 113.

Bargaining Agent's Argument

[41] The bargaining agent submits that a distinction must be drawn between a situation where the grievor did not grieve within the applicable time limits and the situation where a grievor complied with the time limits for the filing of the grievance, but has not complied with the time limits for the reference to adjudication due to the default of its bargaining agent. The bargaining agent submits that while there was a defect in process, it was clear to the employer that the bargaining agent intended to proceed to adjudication of the grievance.

[42] This is a termination case, with very serious consequences for the grievor. The bargaining agent made its intentions clear, within the time period for the filing of the reference to adjudication, that the bargaining agent did not accept the employer's decision and that the grievor wished this matter to proceed to adjudication. The bargaining agent admits that it lacked knowledge of the applicable process to set a matter for hearing, and proceeded on an informal basis to contact the employer to "get the matter on for a hearing".

[43] The employer gave no notice to the bargaining agent that the reference to adjudication was out of time. There is a duty on the employer's part, particularly Ms. Dagenais, to provide notice that the grievance was out of time. This falls within the good faith nature of the bargaining relationship. The employer was well aware that the bargaining agent apparently did not understand the formal process required to set a matter down for adjudication. Timeliness only became an issue in January of 2005. Mr. Gerow submits that it would be reasonable for the employer to provide information about the Board's processing of grievances, and that the Board should not sustain the employer's position, which is "labour relations by ambush".

[44] If this matter is not permitted to proceed because of the employer's technical arguments, there will be an injustice; the dismissal of Mr. Trenholm may not be a just cause dismissal, and he might be denied the proper remedy of reinstatement. The amount of delay in this matter is not extraordinary, it is not substantial and there is a reasonable explanation for the delay. The Board has a power to relieve against technical defects and should exercise that power in the circumstances of this case. The bargaining agent relies on *Enns v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 171.

Employer's Reply

[45] The employer says that there is a difference in the limits for filing a grievance (25 days), and the filing of a reference to adjudication (30 days), but that is the only difference. The Board should not impose a duty on the employer to ensure that the bargaining agent properly represents its members. Each party is sophisticated and experienced in labour relations, and imposing that duty is novel and unwarranted. The delay in this case is substantial; in the real world, there is substantial impact on labour relations and on other employees if the time limits negotiated by the parties are not adhered to by the parties.

Reasons

[46] This is a case where the employee made his decision to grieve within the applicable time limits for the filing of the grievance, and not a case where the employee waited for many months after the termination decision to decide to file and proceed with a grievance. The bargaining agent who had carriage of the grievance delayed in the filing of the reference to adjudication. This is the last step in the redress process. There were telephone calls by the bargaining agent to the employer, to set the matter for hearing, but the bargaining agent did not file a Form 14 referral to adjudication with the Board in compliance with the *Regulations*.

[47] The employer has done nothing improper in the way in which it answered the inquiries made by the bargaining agent. The employer has done nothing to mislead the bargaining agent, to indicate that it waived any lateness, and in fact Ms. Dagenais provided some information indicating that the process was under the *Public Service Staff Relations Act*. The employer is entitled to assume that it is dealing with a bargaining agent experienced in the handling of grievances. Ms. Dagenais was a credible witness and I accept her evidence that the employer was not aware that the bargaining agent had filed a reference to adjudication until she received the April hearing schedule from the Board. I accept that she assumed that the bargaining agent was not proceeding to adjudication because she did not receive a reference to adjudication in a timely manner. The employer raised its jurisdictional objection once the matter appeared on the April hearing schedule.

[48] It is inappropriate to impose a duty on the employer arising from the general language in clause 1.01 of the collective agreement to ensure that the bargaining agent understands the process to refer grievances to adjudication. Generally, both parties to

a collective agreement are sophisticated and knowledgeable. There is no factual basis for suggesting that the employer has engaged in any tactic amounting to labour relations by ambush. While Mr. Vicic appears to have been knowledgeable about the grievance process, from the evidence before me it appears that he was engaged in bargaining in the fall of 2004 and was not representing Mr. Trenholm.

[49] I have been appointed as a division of the Board, and therefore have the power given to the Board, pursuant to section 63 of the *Regulations*, to extend the time for the filing of the reference to adjudication as set out below:

. . .

> *63. Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times*
>
> *(a) by the agreement between the parties; or*
>
> *(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*

[50] The employer submits that no application was made for relief against time limits, and therefore the Board is without jurisdiction to relieve against time limits. However, the bargaining agent's representative sent to the Board a written submission on January 21, 2005, which asks for relief against a flaw in the proceedings (Exhibit E-8). In my view, it does not matter how the issue of timeliness gets to the Board for adjudication, whether it is by the employer making application to strike the matter for lack or timeliness, or the union asking for relief against timeliness. The Board is empowered by the *PSSRA* to relieve against the consequences of lack of timeliness, in an appropriate case.

[51] Grievance adjudication in the federal public sector is governed by the collective agreement and, for grievances presented prior to April 1, 2005, by the *Public Service Staff Relations Act* and *Regulations*. The *Regulations* specify the form of reference and the time limit for referring a matter to adjudication. The time limit is "no later than on the thirtieth day after the earlier of …" the employer's final answer or the deadline for

the employer's final answer to the grievance. The parties adopted this process by reference in the collective agreement in clause 17.18. I note that clause 17.17 provides that the failure to present within the prescribed limits shall be deemed to be an abandonment of the grievance. There appears to be strong and clear language that a reference to adjudication must be made using the process specified by the Board, and made within the time limits specified in the *Regulations*. This language is mandatory and not directory.

[52] It is open to the Board to relieve against a breach of time limits. Generally, a grievance must be filed using a Form 14. In reviewing s. 10 of the *Regulations* it is apparent that the Board can relieve against the obligation to file using a Form 14 provided the necessary information is there:

. . .

> *10. No proceeding under these Regulations is invalid by reason only of a defect in form or a technical irregularity*

. . .

[53] I note, however, that if I rule in favour of the bargaining agent, the bargaining agent has filed a Form 14, which requires an amendment to cite 92(1)(c) as the authority for the grievance.

[54] The case authorities indicate that an extension of time should not be automatic. There are good labour relations reasons why time limits are in place. The grievance process and adjudication process are intended to be a final and binding method of resolving disputes arising during the course of the collective agreement. It is an important labour relations policy that both the bargaining agent and the employer must have some certainty or closure with regard to grievances. In *Anthony* (*supra*), the Board noted:

. . .

> *The 25-day limit on the filing of grievances is in the regulations and in article M-38 of the Master Agreement between PSAC and Treasury Board. It is not there because it is unreasonable. This limit contributes to stability in labour relations. For, without a time limit the employer would be under perpetual exposure to defend itself against grievances for incidents that are long since forgotten. The purpose for a*

> *time limit of 25 days was that it was considered a sufficient period in which to seek advice, to ponder one's options, or to decide whether or not to file a grievance.*
>
> . . .
>
> *When deciding whether to grant an extension, the Board must consider all the factors that contribute to the delay. As well, I must weigh the balance of prejudice that would result, if the extension were granted or not. There are no definite rules which outline how a particular request should be decided. Nevertheless, there is a principle that is discernible though every decision cited by both parties in this case. That principle ordains that we must look for some evidence to suggest that the party requesting the extension has been diligent in exercising his rights.*
>
> . . .

[55] In *Re Pacific Forest Products Ltd. (Sooke Logging Division) and I.W.A., Local 1-118* (1984), 17 L.A.C. (3d) 435, Arbitrator Donald Munroe [1] said in considering the applicable British Columbia legislation empowering an arbitrator to relieve against the consequences of a breach of the time limits set out in a collective agreement:

> *Section 98(e) of the Labour Code provides that an arbitration board may ' . . . relieve, on just and reasonable terms, against breaches of time-limits . . . set out in the collective agreement'. As with other discretionary powers, this one must be exercised judiciously: a decision to relieve against apparently mandatory time-limits must be a reasoned decision, one which proceeds from the premise that relief against any provision of a collective agreement is an extraordinary event. Moreover, and implicit in what I have said, the party who seeks such relief should bear the burden of showing why it is proper in the circumstances.*

[56] In *Rouleau*, the Board wrote at paragraph 38:

> . . .
>
> *The employer is entitled to have some closure on its business operation within a reasonable period of time following its action. What the reasonable period of time is will depend on the circumstances of each individual case. In this case the employer has chosen to define that period as being the time following the 25th day after the event. In other words, for the first 25 days after the event, an employee can file a grievance, and the employer does not have closure on the*

[1] Cited in *Air Liquide Canada Inc.* (*supra*)

> *issue until the grievance is resolved. After the 25th day, if there is no justification to extend this period of time, the employer is entitled to closure. In the circumstances presented to me in this case, I do not find a compelling reason to grant the extension, and accordingly this application is denied.*

[57] The purpose of section 63 of the *Regulations* is to allow the exercise of redress provided in legislation or the collective agreement, where the time limits have expired, and where there would be an injustice if the matter was not heard by the Board. In *Rattew* (*supra*), the Board held:

. . .

> *In general, the purpose and intent of section 83* [as it was then] *and similar provisions is not to render nugatory the time-limits provided by the parties in a collective agreement or in the Regulations. Rather, it is to allow the exercise of a redress provided in legislation or in a collective agreement, notwithstanding the expiry of time-limits where to do otherwise would cause an injustice. In making that determination, the extent of the delay and the reasons for it must weigh heavily in the balance, as well as the relative prejudice to the parties.*

. . .

[58] The Board's discretion to relieve against a failure to comply with time limits must be exercised with regard to the relevant considerations and facts presented at the hearing. It is an extraordinary form and not a routine form of relief. Generally, one would expect to hear testimony from the grievor or the bargaining agent. There is no evidence emanating from the grievor or the bargaining agent as to the reasons for the delay in this matter. Mr. Gerow made submissions on behalf of Mr. Trenholm; however, submissions are not evidence.

[59] The employer relied on a number of cases where the Board or arbitration panels did not relieve against the consequences of negligence or failures of the bargaining agent or union representative. The Board has held that the grievor should be accountable for the mistakes of the bargaining agent. For example, in *Gourlie* (Board File No. 149 – 2-17 (1977)) the Board said:

. . .

> *Let me say for present purposes that I am generally of the view that a party who feels prejudiced by the actions of the*

> *employer must at all times act with expedition and due diligence in forwarding any claim that he may have as a result of the impuned* [sic] *actions taken against him. He ought not to be allowed to tarry and sleep on his rights and at a later date when the circumstances giving rise to the wrong doing have passed, raise issues that could have been brought to the Board's attention at an earlier date. In this regard, such a party in seeking recourse must accept some responsibility for the type and quality of advice he receives be it at the instance of a bargaining agent or indeed legal counsel. In short, generally a party retains counsel and secures advice at his own peril and must look to other forums for the bad or negligent advice he may have received.*
>
> . . .

[60] In *Cassellholme Home for the Aged* (*supra*), a posting grievance case, the arbitration panel refused to relieve from the consequences of lack of timeliness in taking the next step in the grievance process where the delay was caused by an inexperienced steward who did nothing with the grievance until the return of the local president, a delay of slightly more than 60 days. In *Boulay* (*supra*), the Board held, in considering an application for an extension of time:

> . . .
>
> *There is no evidence that the omissions and actions of the lawyers were committed in bad faith. However, I do believe these omissions and actions, which according to the evidence, seem to be at the source of the delay, can by themselves constitute reasons for extending the deadline in which to file a grievance with the employer. It seems to me that errors committed by lawyers and other employee representatives cannot be the sole ground for extending time limits without running the risk of opening the door to a series of applications citing a variety of oversights as justification for seeking the extension of time limits. In conclusion I feel that in the present case, the facts as a whole as submitted, cannot support the conclusion that there are sufficient reasons for extending the deadline in which to file a grievance, and consequently, the application is dismissed.*
>
> . . .

[61] In *Boulay* (*supra*), these comments were made in the context of a case where the employee was declared surplus in 1989, and the grievor came to the conclusion in 1996 that her termination was disguised discipline. The delay attributable to lawyers

was a delay in 1996. The grievance was not filed until April 26, 1996, and then it was filed with the wrong entity.

[62] The authorities indicate that the Board should balance the injustice caused to the applicant should the application be denied, against the prejudice to the employer should the application be granted. The facts vary from case to case. In *Chambers* (*supra*), the Board permitted an extension of time to file a grievance after the expiration of three years from the date of the event giving rise to termination. In *Air Liquide Inc.* (*supra*), the arbitrator held that a delay of 8 months in the filing of a reference to arbitration in a termination case was an extraordinary delay. In *Thunder Bay (City)* (*supra*), a delay of 11 months was found to be inordinate, and since the termination case did not involve any matter fundamental to labour relations between the parties, an extension of time was not granted. It was also clear that the grievor's rights were not lost completely, as the grievor had filed an action under the Ontario *Human Rights Code*. In *Stubbe* (*supra*), the Board found that the grievor did not form the intention to grieve his dismissal for more than three months after the date of dismissal. The Board did not find the grievor to be a credible witness as to the reasons for the delay in filing the grievance. In *Miller* (*supra*), the Board held that it is not merely a question of weighing prejudice; the Board must determine before the weighing of relative prejudice if the grievor has shown a reason why the grievance could not have been filed on a timely basis. I note that *Miller* was a pay and benefits case, where the employee first raised a claim concerning lost earnings almost 15 years after the facts gave rise to the grievance.

[63] On occasion, the Board has balanced the prejudice by permitting the extension of time to file the grievance, but denying the employee monetary compensation for the period of time which can be attributable to the grievor's delay in the filing of a grievance: *Goligher* (*supra*).

[64] In considering the issue of relief from the clear mandatory time limits set out in the *Regulations*, which are incorporated by reference into the collective agreement, I have considered the following factors which include:

- Are there clear, cogent and compelling reasons for the delay?
- What is the length of the delay?
- Has the grievor been diligent?

- What is the balance of injustice to the employee against the prejudice to the employer in granting an extension?

- What is the chance of success in the grievance, or is the grievance devoid of merit?

I have set out below my analysis of each of the factors.

Clear, cogent and compelling reasons for the delay

[65] Unlike many of the cases referred to in the authorities, here there was no evidence called by the bargaining agent. It would have been helpful to hear evidence from the bargaining agent and from the grievor in determining this application. While there is no positive obligation to call evidence, the burden rests with the bargaining agent to satisfy me that this is an appropriate case to extend the time for the filing of the reference to adjudication. The authorities indicate that the facts are very important in the determination of an application to extend time.

[66] Further, submissions made by counsel at the hearing are not evidence. Mr. Gerow's chronology set out in his fax of January 21, 2005, while helpful in understanding the bargaining agent's position in this matter, is not evidence.

[67] Further, a suggestion to a witness made in cross-examination does not become evidence unless it is adopted by a witness. For example, there is no explanation of why the bargaining agent did not file the reference of adjudication signed by Mr. Trenholm on September 21, 2004, until December 17, 2004. A suggestion was made to Ms. Dagenais in cross-examination that an earlier application was sent to the Board. Ms. Dagenais' evidence was that she was not aware of this. There was no positive evidence called by the bargaining agent or any documents filed by the bargaining agent to show that there was an attempt to file the reference at an earlier time. There is therefore no proof to establish that the bargaining agent attempted to file the reference to adjudication with the Board before December 17, 2004.

[68] When I review the evidence in this case, it appears that the bargaining agent was unfamiliar with the process for launching a reference to adjudication. There is no requirement under the collective agreement to contact the opposing party to determine dates before making an application for adjudication. The employer filed an authority that a letter indicating that a matter was to be referred to arbitration was not a referral to arbitration: *Air Liquide Inc.* (*supra*), but rather was in the nature of sabre rattling or a threat to go to litigation. *Air Liquide Inc.* is a case distinguishable on its

facts, as the letter purporting to refer the matter to arbitration was sent before the employer made its decision at the final grievance level. Unlike *Air Liquide Inc.*, the bargaining agent sent a letter after all the steps in the grievance process were exhausted and after the employer gave its "final answer". Mr. Gerow and Mr. Ransom made a total of three telephone calls about scheduling the adjudication for hearing.

[69] From the evidence of Ms. Dagenais, it appears that this bargaining agent represents only two employee groups on Vancouver Island. The number of references to adjudication appears to be limited. The testimony of Ms. Dagenais indicates that there were only three telephone calls from the bargaining agent following the employer's termination decision between July 22 and November 30, 2004. The process to file a reference to adjudication appears to be relatively straightforward under the collective agreement and the *Regulations*. It is, however, a different process from the process to refer a matter to arbitration under a collective agreement in the labour relations sphere. I also bear in mind Ms. Dagenais' evidence that it was unusual for the UFCWU to act in an untimely way in the processing of grievances.

[70] It seems by at least September 21, 2004, the bargaining agent was aware that it required an application signed by the grievor in order to refer this matter to adjudication. If the bargaining agent was not aware of the process, certainly it must have been aware of the process as a result of the September 10, 2004 phone message from Ms. Dagenais, as illustrated by completion of the Form 14 on September 21, 2004. There is no explanation in the evidence why this application was not sent to the Board until December 17, 2004.

[71] The grievor did not attend this application. I was advised by Mr. Gerow that the grievor had a funeral to attend.

[72] In the circumstances of this case, I cannot find that there are any clear cogent and compelling reasons for the delay from September 21 to December 17, 2004. The delay seems to rest at the feet at the bargaining agent, but again there was no oral evidence from the bargaining agent, or from the grievor explaining the nature of the problem, and why. It may be inferred from the circumstances, however, that there was an error made by the bargaining agent with regard to the procedure required to refer a matter to adjudication.

[73] While typically in private-sector labour relations, the union has carriage and control of grievances, under the federal public service labour relations scheme, there is some onus on the grievor in the adjudication process. There is no requirement in section 76 of the *Regulations* for the grievor to have consent of the bargaining unit to refer a grievance to adjudication by filing it with the Board. For example, in *Vincent* (*supra*), an extension of time was granted where the grievor was also not negligent in trusting the bargaining agent to look after his grievance without his intervention. The Board has relieved against inadvertent breaches of the time limits to refer matters to adjudication, where there was no prejudice to the employer and where there was an intention to refer the matter to adjudication: *Coram* (*supra*).

[74] The evidence appears to show that Mr. Trenholm signed the reference to adjudication on September 21, 2004. This is more than two months after the date of the termination letter. This is some evidence that Mr. Trenholm intended to proceed to adjudication. There is no evidence that the bargaining agent did anything other than make telephone calls, until it filed the grievance on December 17, 2004.

Length of the Delay

[75] The length of the delay from the date when the reference should have been filed to the filing of the grievance on December 17, 2004, was five and a half months. The length of delay in this case was not inordinate, although it was clearly in excess of the limit provided in the *Regulations*. If one considers the unknown actual date of receipt of the termination letter by the grievor, and the period of time during which the bargaining agent appears to have been unaware of the process to refer a matter to adjudication, the amount of delay runs for a period of about 3 months (September 21, 2004, to December 17, 2004). I contrast this with the delay of approximately six and a half months from the date of the incident until the date of the employer's termination decision.

[76] While termination decisions are not decisions that should be reached lightly, it cannot be suggested seriously that the pre-grievance handling of this matter by the employer was timely. The employer delayed the commencement of the investigation at the request of the bargaining agent; however, the length of the delay in the making of the decision to terminate is a factor that I consider, particularly in the consideration of the relative prejudice to each party.

Due Diligence of the Grievor

[77] There is no evidence concerning the due diligence of the grievor in this matter. The best that can be said is that the bargaining agent complied with all the steps in the grievance process up until the date of the expiration for the reference of this matter to adjudication. The grievor signed the reference to adjudication. It appears, however, that the error in process can be attributable to the bargaining agent, in light of the evidence of the union's letter rather than Form 14, and the phone calls attempting to set the matter down for adjudication. I consider this all in the context of Ms. Dagenais' evidence that the UFCWU usually acts in a timely manner. This referral to adjudication obviously fell off the rails.

Balancing the Injustice to the Employee and Employer

[78] This is a serious matter for Mr. Trenholm, as his employment was terminated. The context is out-of-work behaviour, at an employment-related social function. If the application is not granted, Mr. Trenholm will not have an opportunity to question his termination and have the employer prove that it had just cause for the termination to an independent third party. A termination for fighting clearly has detrimental consequences to a grievor. In my view, there is a clear injustice to the employee if I do not grant relief from the time limits in this case.

[79] The employer provided some authorities to the effect that the mere passage of time is a sufficient prejudice. The Board in *Chambers* (*supra*) referred to a decision in *Re: Children's Aid Society of Metropolitan Toronto and CUPE, Local 2316* (unreported) May 21, 1982:

. . .

> *The passage of time itself can be considered to be prejudicial. When one party is lulled into a sense of security because it has no hint of any complaint about a particular situation, it would be most unfair and inequitable to allow that complaint to be raised almost one year after it arose.*

. . .

[80] In terms of an injustice to the employer, witnesses have moved from Comox. There is no evidence, however, when the witnesses moved from Comox. I have already noted the lengthy delay from the date of the incident to the date of the employer's

decision to terminate. I cannot speculate whether the witnesses moved before or after the employer's decision to terminate. Further, I cannot speculate whether the witnesses would have been available in Comox if this matter had proceeded to adjudication in the usual course, with a reference to adjudication filed within the time limits.

[81] Mr. Pasaluko is upset that this matter is now proceeding, when he thought that this matter was concluded. The criminal proceedings where he will be a witness have not yet concluded. Undoubtedly, if the Crown continues the criminal proceedings Mr. Pasaluko will be called as a Crown witness. There is evidence before me from Ms. Dagenais that the criminal process is a far more adversarial process than grievance adjudication before the Board. The Board hearing is therefore an incremental prejudice to Mr. Pasaluko additional to inconvenience from having to testify in a criminal proceeding.

[82] If the dismissal of Mr. Trenholm is not upheld, it is a possibility that Mr. Pasaluko may have some degree of contact with Mr. Trenholm if Mr. Trenholm is reinstated. Mr. Pasaluko has indicated that he will take steps not to work with Mr. Trenholm, including quitting his employment. This is a possible prejudice, if it materializes, that will not arise as a result of the delay in the adjudication proceeding; it is prejudice that would arise as a result of having to deal with a colleague whom one had problems in dealing with in the past, and who the Board has found was dismissed without just cause. This prejudice has not been made any worse by the delay in this matter. Further, I note that while Ms. Dagenais and the grievor submitted that Mr. Pasaluko was under stress, there is no medical evidence supporting this assertion.

[83] It is my view that there is more prejudice to the grievor if this matter does not proceed than prejudice to the employer if this matter does proceed.

Chance of Success

[84] The parties have not addressed the chance of success of the grievance, and there was no evidence on this issue. The authorities indicate that in the context of an application to extend time, the chance of success is really an issue of whether there is an arguable case. In a case of workplace violence, there may well be a history of relations between the parties. The investigative report hints at bullying of Mr. Trenholm by Mr. Pasaluko prior to the assault, although the investigator and the

employer were of the view and that the degree of force applied was unreasonable. It is apparent from the investigator's report that there was consumption of alcoholic beverages by both Mr. Trenholm and Mr. Pasaluko. At this time, I cannot form any impressions of the merits of this grievance other than that there may be questions that could be asked of Mr. Pasaluko, that there appear to be no independent witnesses to the alleged assault that were called before the investigator, and that credibility, including any influence on credibility by alcohol consumption, may play some role in the fact-finding process. Therefore, I am not prepared to state that this grievance is without merit.

[85] I am satisfied that this is an appropriate case, considering all the applicable factors and case law to relieve against the filing time limits in the collective agreement. In my view, the grievor should not be deprived of the opportunity to have a third party review the termination because of errors made by the bargaining agent. In my view, the bargaining agent approached this grievance in a tardy manner.

[86] I place more weight on prejudice to the grievor than on the other factors, given that this is a termination case, and given that the breach of timeliness occurred in the reference to adjudication and not in the initial decision to file a grievance. The balance of prejudice weighs in favour of hearing this grievance. While the employer and some of the authorities suggest that there are alternative remedies against the bargaining agent, in my view there is no alternative adequate and timely remedy to address the loss of employment status other than through the grievance process. If, in fact, the employer has failed to establish just cause for the dismissal, which I will decide at the main hearing, the usual remedy is reinstatement. Grievance adjudication is the only timely method where the bargaining agent has the possibility of persuading an adjudicator to reinstate the employee to his position. An action in negligence can at best result only in a monetary award. Given the important interest of any employee in preservation of employment status, damages are not an adequate, alternative remedy. An application to the Board for breach of representational rights under section 23 of the *PSSRA* may result in an order to proceed to adjudication; however, in my view this is not a timely method in which to deal with the problem in the workplace. There appears to be a relatively clear error made by the bargaining agent which can be remedied with less prejudice to all parties by proceeding with the adjudication of the grievance.

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

(The Order appears on the next page)

Order

[88] I therefore direct that the grievor and the bargaining agent shall have relief from the expiration of the time limits to present the reference to adjudication. The time limits for filing the reference to adjudication are extended to December 28, 2004, the date that the amended reference to adjudication was filed. I also direct that the bargaining agent file an amended reference to adjudication setting out in question 15 the proper statutory authority for the reference. The hearing of this case should proceed on an expedited basis, and should not await the outcome of Mr. Trenholm's criminal case. Because of the differences in the standard of proof, the decision in a criminal case may have little impact on the determination of the merits of the grievance.

[89] At this point, I am not prepared to place any terms limiting compensation that may be sought by Mr. Trenholm as the adjudicator did in *Golighe*r (*supra*). This is a matter which is better dealt with in the consideration of the merits of the case, particularly given the lengthy delay in the investigation and imposition of discipline in this case. I would like to hear more about this point in the course of submissions following evidence on the main issue.

[90] I dismiss the employer's objection to jurisdiction based on timeliness.

June 28, 2005.

Paul Love,
adjudicator and Board member