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Citation: 2007 PSLRB 118

Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

JACQUES DEMERS

Applicant

and

TREASURY BOARD
(Department of Public Works and Government Services)

Respondent

Indexed as
Demers v. Treasury Board (Department of Public Works and Government Services)

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

REASONS FOR DECISION

Before: Michele A. Pineau, Vice-Chairperson

For the Applicant: Himself

For the Respondent: Karl G. Chemsi, counsel

Heard at Montréal, Quebec,
July 10 and 11, 2007.
(P.S.L.R.B. Translation)

Application before the Chairperson

[1] Jacques Demers ("the applicant") is a translator at the Translation Bureau of the Department of Public Works and Government Services. His specialization is translation in the fields of science and mathematics.

[2] Under section 45 of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the Chairperson of the Public Service Labour Relations Board ("the Chairperson") has delegated to me, in my capacity as Vice-Chairperson, all of the powers conferred on him by paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") to hear and decide any matter regarding an extension of time in this application.

[3] On June 14, 2004, the applicant presents a grievance to the first level of the grievance process alleging harassment by the employer for the following three reasons: (a) he has not received incentive pay under the Incentive Pay Plan (IPP) since 2000; (b) he appears to have been reassigned for no valid reason to a team where the nature of the texts to be translated had no relation to his translation training and experience; and (c) since January 2000 he has no longer been allowed to take leave without prior notice, one morning at a time, because of his insomnia.

[4] The applicant's grievance reads as follows:

> [Translation]
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> . . .
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> *I recently discovered that in January 2000 I was the victim of two unsuspected acts of harassment by Mr. Jacques Pellerin, then my section chief.*
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> *The first of those acts consisted of grouping me without my knowledge with the slow translators to prevent me from earning incentive pay under the IPP or at least to make it much more difficult to do so. (By slow translators, I mean persons for whom the number of* pro forma *hours is always equal to the number of billable hours on the monthly statements, regardless of why the actual number of hours exceeds the estimated number of hours.) I recently discovered that at that time, I was not one of the slow translators.*
>
> *The second of those acts consisted of reassigning me for no valid reason to a team where the nature of the*

texts to be translated is not related to my translation training and experience. As a result of that reassignment, which was done maliciously and not for operational reasons, to my knowledge I am the only one among approximately 15 colleagues with scientific or technical training who works in a field with no relation to his or her training or experience, which puts me at a disadvantage in achieving objectives. It was only at the end of 2000 that I discovered that I had been grouped among the translators that are considered slow. At that time, I was under the impression that the grouping was recent, and it seemed plausible to me since I had been working for approximately 10 months in a field that was new to me. It was only by chance that I recently discovered that I was grouped among the slow translators starting in January 2000, at a time when my section chief had no apparent reason to consider me a slow translator.

Another act of harassment occurred in January 2000. At that time, I had for some time been taking my annual leave on an occasional basis, meaning without prior notice, a half day at a time, in the morning. My section chief, knowing that I have insomnia, forbade me from continuing to take my leave in that manner. His malice in that act was obvious, but at the time I considered it an isolated act unrelated to my new assignment. I realized only recently that I was the victim of two other malicious acts at the same time and that those three acts formed part of the same harassment.

I then considered filing a harassment complaint, but on last May 7 Mr. Charles Vézina (Conflict of Interest and Harassment, PWGSC) told me that a grievance would be more advisable. I am therefore filing this grievance within 25 working days of receiving Mr. Vézina's recommendation.

. . .

I would like my incentive pay records starting in January 2000 to be reviewed, taking into account the fact that I was not one of the slow translators until that time and the fact that my section chief had no valid reason to group me among the slow translators at that time. I would like to be reinstated to the team where I worked before the reassignment referred to in section . . . above. Lastly, I would like to be authorized again to take my annual leave on an occasional basis as I did previously.

. . .

[5] On May 8, 2006, the employer dismisses the grievance at the first level of the grievance process because the grievance is being filed after the time limit and because the manager does not appear to have acted in bad faith regarding the grievance's other aspects. The employer is prepared to accommodate the applicant taking annual leave without prior notice provided that he furnishes a medical certificate of his limitations and a certificate indicating the required accommodation measures.

[6] On May 18, 2006, the grievance is presented at the second level of the grievance process. On June 30, 2006, the grievance is rejected at that level because it is being presented after the time limit.

[7] On July 18, 2006, the grievance is presented at the third level of the grievance process.

[8] On August 4, 2006, the applicant files this application for an extension of time to present his grievance at the first level of the grievance process. The application for extension of time reads as follows:

> [Translation]
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> . . .
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> *In June 2004, I filed a grievance alleging harassment by my former section chief. That harassment consisted of a series of quite different acts. In February 2004 I discovered the main act, for which I am requesting corrective action by the employer. At that time, the union Labour Relations Officer with whom I discussed the matter was of the opinion that the possibility of filing an abuse-of-power complaint should be considered. She nevertheless suggested that I consult Mr. Charles Vézina, Conflict of Interest and Harassment, PWGSC, who advised me to file a grievance, which I did within the 25-day time limit following his response.*
>
> *A mediator was appointed, but delayed matters; as a result, the grievance was heard at the first level only in April of this year. The grievance was heard at the second level in June. On both occasions, I was told that my grievance was filed after the time limit because it was not filed within 25 days following the discovery in February 2004. In my personal opinion, the law implicitly assumes that the complainant knows or ought to know that there is a basis for a grievance when the facts giving rise to a grievance are discovered. That was not so in my case. Having concluded that I had*

> *been a victim of harassment, I quite naturally considered filing a harassment complaint. The union Labour Relations Officer herself did not know that a grievance was the right tool to use. I find it unreasonable that February 2004 is considered the beginning of the period in this case, and that is why I am applying for an extension of time.*
>
> *I also have a second reason for applying for an extension of time, which I consider the more important of the two. The Translation Bureau has a productivity bonus program called the Incentive Pay Plan (IPP). The above-mentioned harassment consisted of grouping me among the slow translators, out of malice, to prevent me from earning incentive pay; as corrective action I request a review of those incentives. In August 2005, as well as verifying that my former section chief had grouped me among the slow translators at a time when he had no valid reason to do so, I discovered the existence of what could be called a "blacklist": a group of translators that, for all practical purposes, the Section Chief had decided in advance were unable to earn any incentive pay, regardless of the difficulty of the texts to be translated. Furthermore, according to my analysis, the IPP as it was administered in our department actually rewarded the slow translators and, contrary to the statement by my former section chief, I was not one of the slow translators. That new fact alone would justify a grievance, and I therefore believe that my grievance was not filed after the time limit. I pointed out that fact at my grievance hearings at the first two levels, and the two responses that I received make no mention of it.*
>
> *I am therefore applying for an extension of time for the reasons set out above.*
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> . . .

[9] From August 8 to 23, 2006, the employer communicates with the applicant by email to set a date for the third-level grievance hearing.

[10] On August 29, 2006, the employer objects to the application for extension of time and to the jurisdiction of an adjudicator to hear the applicant's grievance.

[11] On August 31, 2006, the applicant files the following written submission:

> [Translation]
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> . . .
>
> *My application for extension of time points out a new fact: the discovery in August 2005 of the existence at that time of*

> *a "blacklist," for which I request a review of my productivity bonuses (the* pro forma *hours as described in the IPP). Neither Ms. Duhaime at the first level nor Mr. Barabé at the second level explicitly denied the existence of the list; as well, in their respective responses they avoid mentioning it as a new fact. Given the risk for the Bureau of other translators requesting a review, the Bureau is strongly motivated to bring a nonsuit against me. In this grievance, the Bureau is in a conflict of interest because it is both judge and party. Thus it is understandable that first the mediator — who was to verify if such a list existed at that time and to inform me of the result of that verification — took refuge in silence and that second my dialogue partners at the first two levels avoided mentioning it.*
>
> *Regarding my grievance, the discovery confirms in a new way that in April 2000 I was the victim of a malicious act, in addition to two other similar acts occurring two months earlier.*
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> . . .

[12] On October 10, 2006, the employer dismisses the grievance at the third level of the grievance process for the following reasons: the grievance is filed after the time limit since over four years have elapsed between the facts giving rise to the grievance and its presentation, and the new fact put forward occurs after the grievance is filed. That said, the employer is prepared to accommodate the applicant if he provides a medical certificate indicating his limitations and the required accommodation measures.

[13] On March 5, 2007, the applicant files his response to the employer's objection. On March 7, 2007, the employer replies to that response.

[14] The hearing for this application took place on July 10 and 11, 2007, because the parties were not available before then.

Summary of the evidence

[15] The applicant was the only witness. The employer presented its case based on the applicant's testimony and cross-examination. The applicant's testimony relates facts that occurred between 1999 and 2007, some of which are unrelated to the matter before me. The summary of the evidence takes into account the facts that are relevant to my decision regarding the application for extension of time.

[16] The applicant explains that the IPP is based on translations. Under the IPP, before texts are allocated to individual translators, the number of hours required to translate them is estimated; usually clients are billed for that estimate. After a text is translated, the translator indicates the actual number of hours spent translating it. Translators who take fewer than the estimated number of hours are credited with "*pro forma*" hours. At the end of the fiscal year, "*pro forma*" hours accumulated by a translator can generate incentive pay. If a translator takes more than the estimated number of hours to translate a text, he or she is required to provide an explanation for the overage. The section chief then reads the translation and decides if the overage is justified and whether — for example, because of the difficulty of the text or the amount of research required — the client can be billed for the overage. If the overage is considered justified, the translator may still be credited with "*pro forma*" hours at the section chief's discretion. If the overage is not considered justified, the actual number of hours taken to translate the text is considered equal to the estimated number of hours, and no "*pro forma*" hours are credited to the translator. Translators who take the estimated number of hours to translate a text or who take more than the estimated number of hours without justification do not receive incentive pay.

[17] In 1998, the applicant changed translation teams at the request of his section chief at the time, Jacques Pellerin. He was reassigned from the translation team serving the Canadian Space Agency, where he translated patents, to the Scientific and Technological translation team, where he began translating texts on the environment and meteorology. As an experienced translator, under the IPP he had received considerable incentive pay each year. He stated that he was disadvantaged compared to translators working in their fields of specialization when he was given responsibility for translating texts on the environment, which is not his field of specialization. The hours he took to translate texts became equal to the estimated hours. He alleges that once the number of hours he took to translate texts exceeded estimates, the Section Chief no longer reviewed his hours to credit him with "*pro forma*" hours as was being done for other translators. The applicant admits that at that time he did not usually provide any explanation of overages, although he was required to do so. However, he stated that after being reminded, he complied with that requirement.

[18] According to the applicant, the fact that he was translating more slowly meant that in April 2000 he was grouped, without his knowledge, with the persons he referred to as "[translation] the slow translators" or the "blacklist." The applicant

maintains that the existence of a "blacklist" makes the IPP easier to manage, since it means that the section chief does not have to consider slow translators' work in minute detail when they take more than the estimated number of hours for a translation. The section chief automatically records both the actual number of hours and the "*pro forma*" hours as the estimated number of hours. The applicant estimates that 30% of translators — 12 persons — are on the "blacklist" and that because they are grouped, unlike their colleagues who are not grouped with them, the slow translators are automatically deprived of the entitlement to receive credit for "*pro forma*" hours and thus to earn incentive pay each year. In the applicant's opinion, the purpose of the "blacklist" is to save money on the IPP at the end of the fiscal year.

[19] The applicant states that he finds it hard to believe that he is the only person to complain, since in his opinion there are translators who lost much more than he did. He maintains that perhaps the other translators did not complain because they did not have access to information that he requested or did not realize a fact that came to his attention. Consequently, he maintains that it is not reasonable to say that his grievance was filed after the time limit since 12 persons may file the same grievance. The reason he became aware of the employer's trickery before the others was the harassment of which he complained.

[20] The consequence of placing the applicant on the "blacklist" was that he permanently lost entitlement to incentive pay. He maintains that his reassignment to another translation team and his subsequent grouping among the slow translators were malicious actions by his section chief at the time and constitute a form of harassment against him. He adds that Robert Aubut, his current section chief, continues to use the same recording method. The applicant discovered that he had been grouped among the slow translators only well after the fact, when he wondered why he had not received incentive pay for three years. He then requested a review of his production records from October 1999 to March 2000. However, he admitted having received the annual records, although sometimes late.

[21] At the request of the union representative that he consulted, the applicant carried out an initial analysis of his translation hours. At first he made an error by including January, February and March 2000, when he should have recorded his translation hours starting in April 2000, the start of the fiscal year during which he realized that he was grouped among the slow translators. In carrying out his analysis,

he realized that he had been grouped among the slow translators starting when he was reassigned to the Scientific and Technological translation team. That coincidence was what made him conclude in February 2004 that he was being harassed.

[22] The applicant maintains that in 2005 he worked on the same text as another translator, who apparently exceeded the estimated number of hours by 16% but was nevertheless apparently credited with "*pro forma*" hours, while the applicant had an overage that he considered similar but for which he received nothing. The applicant stated that that new fact, which he discovered after filing his grievance, confirmed his suspicion at the time he filed his grievance that there was a "blacklist" and that he was on it.

[23] The applicant testifies that for over 16 years, with his section chief's approval, he took his vacation leave on an irregular basis because he has insomnia. After a bad night, he might take a half day of leave and come into work at the end of the morning. Everyone was satisfied with that arrangement since he was at work every day and the department was not disrupted by his absence for an extended period of annual leave. During a meeting about another matter, Mr. Pellerin abruptly and maliciously withdrew that privilege. The applicant only realized in February 2004 that being on the "blacklist," receiving a poor performance evaluation in 2003 and getting a reprimand letter in 2002 constituted a series of acts of harassment.

[24] The applicant testifies that he intended to file a grievance against his performance evaluation and the reprimand letter but that he missed the time limit for doing so because his union representative was promoted to a management position.

[25] However, the applicant filed his grievance with little concern for time limits, because he was convinced that the time limit for filing a harassment grievance was longer and because his union representative had not pointed anything out to him in that regard. He then consulted Charles Vézina, Acting Manager, Conflict of Interest and Harassment Program, who suggested that a review of his "*pro forma*" hours might demonstrate pecuniary loss that could be grieved. The applicant therefore filed his grievance within the 25 days following Mr. Vézina's advice.

[26] At a mediation meeting held on an unidentified date, the employer agreed to investigate whether the issue raised by the 16% overage was widespread and to hold a second meeting. That meeting was never held. The employer then undertook a detailed

review of the hours of all the translators on the team. According to the applicant, that review is suspect, because it serves to conceal that a "blacklist" existed. The applicant maintains that sampling a half-dozen translators would have sufficed to demonstrate the situation to which he referred, but the employer took advantage of the situation to falsify the analysis.

[27] Under cross-examination, the applicant lists the three malicious acts for which he criticized the employer. First, in 2000, at a meeting about a complaint filed against him, his privilege of taking half days of leave without prior notice was withdrawn. Second, he was reassigned to a translation team with a different field of specialization to make his life difficult. Third, he no longer received incentive pay. He states that he wondered about the situation in February 2002 but that he had no evidence at that time.

[28] The applicant admits that in 2002 he filed a complaint with the Public Service Commission about his reassignment to another translation team, but he argued that the subject matter of that complaint was not the same as the subject matter of his grievance. The applicant admits that the Translation Bureau lost the contract to translate patents for the Canadian Space Agency. He did not complain about not receiving incentive pay in 2002. He thought he was slow simply because he was translating texts in a less familiar field of specialization. The situation changed in 2004 when he discovered that he was on a "blacklist." He states that he was entitled to incentive pay during the time that he was on the "blacklist."

[29] The applicant admits that he likely received incentive pay in 2000 and that he cashed the cheque without knowing what it was for; the situation was not really of concern to him until he received the comparative records in 2004, although he received annual records before 2004.

[30] The applicant admits that he received a copy of the document describing the IPP but that he did not study it; thus he did not learn that he could file a grievance if he was dissatisfied with the incentive pay he received or should have received. He admits that a new recording method was used from 2000 to 2002 and that he received a letter about that method but did not look at the details. He admits that he did not take note of the time limits for filing grievances against his performance evaluation or the reprimand letter until it was too late. At that time, he was concentrating on his

harassment grievance. He filed a grievance in October 2003 after discussing all of his problems regarding Mr. Pellerin with Marc Grenon, a union representative,

[31] The new fact to which the applicant refers occurred in August 2005, when he received the comparative records from the employer that led him to conclude that there was a "blacklist." It was then that he realized the full importance of the fact that the translator with a 16% overage had been credited with "*pro forma*" hours. The applicant admits that he first pointed out that fact when his grievance was heard at the first level of the grievance process.

[32] The applicant acknowledges that the "blacklist" does not in fact exist and that it is a figure of speech used to refer to persons for whom the actual number of hours is always equal to the number of billable hours and who therefore receive no incentive pay. The "blacklist" is the conclusion of the applicant's own analysis of a situation camouflaged by the employer.

Summary of the arguments

[33] To support his application for extension of time, the applicant submits that the grievance was not filed after the time limit simply because the new fact to which he referred occurred after the grievance was filed. Although the grievance was considered to be filed after the time limit, the applicant argues that he showed due diligence and was not responsible for the delay because there were valid reasons for it. The Chairperson should exercise the discretionary power and order the employer to consider the grievance on its merits.

[34] According to the applicant, if a new fact occurs before the employer responds to a grievance, the employer must consider it. In the applicant's opinion, it would be illogical to file a second grievance requesting the same corrective action. Since the new fact is in addition to the facts that gave rise to the original grievance, the grievance can then no longer be considered as having been filed after the time limit. The applicant argues that the new fact was pointed out at each level of the grievance process and that the employer did not consider it.

[35] The applicant maintains that it is also illogical to apply the 25-day time limit to a harassment grievance. In his opinion, the time limit for filing his grievance should start when he received Mr. Vézina's advice encouraging him to present a grievance.

[36] The applicant argues that his grievance is based on a series of facts: the existence of a "blacklist"; the records from 2000 to 2002; the reassignment to another translation team; and the fact that another translator who translated the same text as him received preferential treatment.

[37] According to the applicant, his placement on a "blacklist" constituted a disguised disciplinary action, and if he had filed a grievance against that action the grievance could have been referred to adjudication. The employer never explained to him why the recording method of his "*pro forma*" hours was changed. At each of the three levels of the grievance process, the employer's representatives acted in bad faith by refusing to consider the new fact, which in the applicant's opinion was similar to a new grievance. The applicant asks the Chairperson to order the employer to consider the grievance on its merits.

[38] The applicant submits that in the circumstances there was no need to debate the length of the delay since the existence of a new fact meant that, in a way, there was no delay.

[39] The applicant maintains that he showed due diligence in pointing out the existence of a new fact to the employer at the first opportunity. The new fact occurred to him when the grievance was being heard at the first level of the grievance process, and he communicated it to the employer immediately.

[40] In the applicant's opinion, because the employer is accountable for its actions, he must be considered to have suffered prejudice in being denied access to adjudication. His incentive pay claim is comparable to Maher Arar's claims, to those of persons infected by hepatitis C or to those of persons who have contracted HIV. There should be no double standard between those claims and his. The financial compensation he requests amounts to less than 25¢ per taxpayer, which in his opinion is ridiculous in comparison with the employer's financial means. Being maliciously placed on a "blacklist" places the applicant on the same footing as other persons who have received compensation.

[41] If the applicant's grievance is allowed, his reputation will be re-established, and the employer would have to respond to the harassment allegations in the grievance and would have to provide different responses than those provided so far. The only

way to remedy the wrong done to the applicant is to review his production records from April 2000 to April 2003 or beyond using the method proposed by the applicant.

[42] The employer maintains that the grievance filed in June 2004 had to do with facts that occurred in 2000, or four years previously. The employer objected to that grievance, even if the employer were incidentally to consider the grievance on its merits, because the grievance was clearly filed after the time limit at each level of the grievance process.

[43] The burden of proof was on the applicant to provide clear, cogent and compelling reasons for filing a grievance four years after the fact, beyond the 25-day time limit set out in the collective agreement. The point at which a time limit begins is determined not by the description of the grievance (abuse of position, harassment or pecuniary loss) but by the facts giving rise to the grievance.

[44] As well, the applicant's reassignment to another translation team, his reduced incentive pay in 2000 and his problems with Mr. Pellerin were matters already dealt with by the Public Service Commission in a June 3, 2002 decision. The subject matter of the applicant's grievance is the same as that of the complaint before the Public Service Commission. That point is irrefutable proof that the applicant was aware of the events giving rise to his grievance two years before he presented it.

[45] The part of the grievance regarding the applicant no longer being allowed to take annual leave without prior notice was clearly filed after the time limit, and the applicant may not invoke that aspect retroactively to support another grievance when he could have complained of it at the time. The applicant has provided no reasons that would have prevented him from filing a grievance regarding that aspect at the time. He may not combine facts occurring over a period of several years to circumvent time limits that contribute to labour relations stability.

[46] Regarding incentive pay, the applicant received his annual IPP production records. Although those records were not always timely, that fact did not prevent the applicant from filing a grievance for each year in which he was wronged. Each time he failed to act, he missed an opportunity. Even if his grievance had to do only with the year preceding the year it was presented, it would still be late. The change of union representative or the incompetence of that person's replacement does not constitute a valid explanation for the delay in taking action. The applicant is well aware of the time

limits set out in the collective agreement, since in testifying he admitted that he had missed the time limits for filing other grievances. The fact that Mr. Vézina advised the applicant to present a grievance did not mean that the 25-day time limit began on the date of that advice. Mr. Vézina's advice is not a valid reason for an extension of time. Even if the dates on which the applicant stated that he became aware of the facts giving rise to the grievance are accepted, his grievance was still filed after the time limit.

[47] The applicant's suggestion that because of the new fact his grievance was not filed after the time limit is illogical and unfounded. The new fact alleged by the applicant is not really a new fact. Merely pointing out old facts for the first time during the grievance process does not constitute a new fact.

[48] The "blacklist" is an invention by the applicant to justify his hypothesis of being a victim of harassment. There are no clear, cogent and compelling reasons that support his application for extension of time.

[49] The relative prejudice is suffered by the employer; its review of the production records over a four-year period produced results that do not support the applicant's hypothesis. The applicant himself admits that the amount allegedly owing to him was ridiculously low. He eventually admits that his grievance alleges harassment, and it cannot be referred to adjudication. The applicant argues that he could have filed a grievance regarding a pecuniary loss or disciplinary action based on the same facts as those invoked in his grievance. The employer argues that having raised no such issue during the grievance process, the applicant may not change the nature of his grievance. Even if an extension of time for presenting the grievance were granted, an adjudicator would not have jurisdiction to hear the grievance.

[50] The applicant had comparative data in 2000 but did nothing until 2004. According to the case law, such a delay is inexcusable.

[51] The employer argued that the IPP has its own grievance procedure, which the applicant did not use. That procedure includes a 25-day time limit for filing a grievance.

[52] In rebuttal, the applicant replies that he does not understand why the employer continued to process the grievance at the third level of the grievance process even

though he had made an application for extension of time to the Chairperson. He criticizes the employer for raising the delay issue at each level of the grievance process without considering the new fact or his harassment complaint.

[53] According to the applicant, there was no valid reason for placing him on the list of slow translators since he is no slower than a specialist translator. He assumed he was working slowly because he was translating in a new field, but the new fact contradicted that assumption.

[54] The applicant believes that if the bargaining agent had been aware of the existence of a "blacklist" when it represented him, it would not have supported him in his efforts since it would then have been in a conflict of interest regarding the IPP, which it had helped set up. The employer made its investigation unnecessarily complicated to conceal the existence of a "blacklist."

[55] The applicant maintains that his reassignment to another translation team affected the incentive pay to which he would have been entitled and that the IPP favours slow translators. If there had been no "blacklist," he could have benefited from being a slow translator.

[56] The applicant could have filed a grievance on the withdrawal of his privilege regarding annual leave but that privilege apparently ran counter to the provisions of the collective agreement. He only realized later that the withdrawal of that privilege was one in a series of acts of harassment by Mr. Pellerin.

[57] The comparative records that the applicant received in 2004 differed from the annual records that he received, because they allowed him to see the situation as a whole. The applicant states that he did not use the change of union representation to justify the delay. Rather, he used the fact that Mr. Vézina advised him to present a grievance instead of a harassment complaint and that the time limit should begin when he received that advice, since Mr Vézina acted as the employer's harassment counsellor.

[58] The applicant maintains that other translators who do not receive incentive pay do not complain because they lack the necessary information. They simply accepted that they worked more slowly and were not entitled to incentive pay. The applicant

requests a review to determine that his lost incentive pay constituted harassment, which would have allowed him to file a grievance for pecuniary loss.

[59] The applicant puts forward that the actions he complained about are parts of a context of harassment: having his annual leave privilege withdrawn, being reprimanded by a letter placed in his file, being reassigned to another translation team, being placed on the slow translators list and losing his incentive pay, and how the employer carried out its review. His grievance is based on the permanent effects of grouping him with the slow translators. He requests that his grievance be seriously considered on its merits.

Reasons

[60] The applicant maintains that he discovered the facts giving rise to the grievance only recently but does not indicate an exact date. He maintains that those facts are part of a context of harassment against him. The first fact he complains of is that without his knowledge, he was grouped among the slow translators (placed on the "blacklist") so that he could no longer earn incentive pay under the IPP. That fact allegedly began in April 2000 and continued until February 2004. The second fact is that he was allegedly reassigned for no valid reason to a translation team where the nature of the work was not related to his translation training and experience. That fact goes back to 1998. The third fact is that his section chief withdrew his privilege of taking annual leave a half day at a time even though he had done so for a long time. That fact goes back to 2000.

[61] The applicant presented his grievance on June 14, 2004.

[62] Clause 30.04 of the collective agreement signed on February 23, 2004 by the Treasury Board and the Canadian Association of Professional Employees for the Translation Group bargaining unit sets out a 25-day time limit for filing a grievance:

> *30.04 Time Limits*
>
> *In determining the time within which any action is to be taken as prescribed in this procedure, Saturdays, Sundays and designated holidays shall be excluded.*
>
> *(a) An employee may present a grievance to the first step of the procedure in the manner prescribed in*

> *paragraph 30.01(b), not later than the twenty-fifth (25th) day after the date:*
>
> *(i) on which he is notified orally or in writing,*
>
> *or*
>
> *(ii) on which he first becomes aware of the action or circumstances giving rise to grievance.*
>
> . . .

Previous collective agreements set out the same time limit for presenting a grievance.

[63] In *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113, para 24, the employer and the applicant's bargaining agent agreed that the 25-day time limit set out in clause 30.04 of the collective agreement is ". . . a sufficient time period for an employee to reflect, seek advice and decide whether or not to grieve." That time limit is found in most collective agreements in the federal public service.

[64] Despite clause 30.04 of the collective agreement, under paragraph 61(*b*) of the *Regulations*, in the interest of fairness the Chairperson may assist a party that has failed to meet a time limit for presenting a grievance at any level of the grievance process. Regarding the appropriateness of granting an extension of time, the following criteria, set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, para 75, have repeatedly been considered helpful in assessing "fairness":

- 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.

[65] In preparation for the hearing, the Public Service Labour Relations Board's registrar sent a copy of *Schenkman* to the parties, who took it into account when adducing their evidence and making their arguments. That said, I consider that an analysis of the first criterion set out in *Schenkman* suffices to decide on this application for extension of time to present a grievance.

[66] In *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34, I ruled that the action or circumstances giving rise to a grievance are time limited and that an applicant must file a grievance as soon as he or she becomes aware of the facts giving rise to it:

. . .

> *[22] Generally, the action or circumstances that gave rise to a grievance are time specific and cannot be extended by invoking further circumstances beyond what constitutes the employer's original decision. In this case, the 25-day limit to file a grievance started to lapse from the time of the employer's refusal on December 22, 2004, and not from the time when the applicant had amassed what he considered sufficient evidence to file a grievance. Except when the parties agree to an extension as provided by the collective agreement, the time limit to file a grievance is not unilaterally extended by an employee's attempts to convince the employer to reverse or modify its decision. To the extent that an act is a violation of the collective agreement, there is no threshold standard to be met as to the strength of the applicant's knowledge before a grievance can be filed.*

. . .

[67] In this application, the applicant indicates two reasons supporting his application for extension of time to present his grievance: (a) the existence of a new fact, which he discovered after presenting his grievance and that he first pointed out during the hearing at the first level of the grievance process; and (b) the fact that the grievance was presented within 25 days following the advice received from the employer's representative responsible for dealing with harassment complaints. I must therefore determine whether these two reasons provide clear, cogent and compelling reasons justifying the applicant's delay.

[68] In this application, the new fact, by the applicant's own admission, is a conclusion that he reached in August 2005 after receiving the comparative records of translation hours. The applicant testified that he first pointed out the fact to the employer during his first-level grievance hearing. He also testified that he discovered that another translator was credited with "*pro forma*" hours at some time in 2005. However, he adduced no independent evidence to support that claim, which I am therefore unable to verify. Whatever the case, that event does not justify the delay in filing the grievance, because it occurred more than one year after the grievance was presented on June 14, 2004.

[69] There is no rule of law and no logical explanation that would allow me to accept a fact occurring after the grievance was presented as justification for the delay in presenting it, particularly when that fact is completely unrelated to the grievance's subject matter. When the applicant discovered that he had not received the same incentive pay as another translator, he was entitled to file a new grievance, which he failed to do. He may not attempt to use that event as a retroactive justification for not presenting his initial grievance within the time limit set out in the collective agreement. Nor do I accept his argument that he did not need to present a new grievance regarding the new fact because the corrective action requested would have been the same as that requested in the initial grievance. Despite what the applicant pointed out, the late filing of the initial grievance is unrelated to the "*pro forma*" hours credited to another translator.

[70] I also reject the applicant's argument that the grievance was presented within the time limit set out in the collective agreement because it was presented within 25 days following the advice received from the employer's representative responsible for dealing with harassment complaints. The collective agreement clearly provides that the applicant had 25 days to present a grievance after the date on which he was notified orally or in writing or the date on which he first became aware of the action or circumstances giving rise to the grievance. By his own admission, the facts on which the grievance was based occurred a number of years previously, and he was fully aware of them when they occurred. He also admitted that he did not pay attention to the annual IPP records provided by the employer and was not concerned about them for a number of years. He admitted that more than once he missed the time limits for presenting other grievances. A grievance could have been based on each of the alleged facts when they occurred: his privilege of taking half days of leave without prior notice being withdrawn, his reassignment to another translation team and his lost incentive pay. The fact that the applicant acted based on advice received from a representative of the employer does nothing to change old facts into new facts that might give rise to new remedies.

[71] Furthermore, in cross-examining the applicant the employer adduced a decision by the Public Service Commission regarding the applicant's reassignment to another translation team, a decision the applicant did not invoke to support his grievance. The Public Service Commission dismissed the applicant's complaint on June 3, 2002. The 25-day time limit began when the applicant first became aware of the circumstances giving rise to the grievance. By his own admission, the applicant became aware of his

reassignment to another translation team in 1998, of the withdrawal of his privilege of taking half days of leave without prior notice in 2000 and of his lost incentive pay starting in April 2000. I accept the employer's argument that the time limit for presenting a grievance begins when there is awareness of the facts giving rise to the grievance. The applicant's decision to describe the acts as harassment does not mean that the time limits began afresh.

[72] As noted in *Mark*, there are good labour-relations reasons for imposing time limits:

. . .

> *[24] Moreover, there are good labour relations reasons for imposing time limits. First, the grievance and adjudication processes are intended to provide a final and binding method of resolving disputes that arise during the course of the collective agreement. Second, time limits contribute to labour relations stability by providing closure on the employer's business decisions with the consequence of avoiding, for either the bargaining agent or the employer, constant or long-term exposure to workplace incidents.*

. . .

[73] The facts that the applicant complains about in this application occurred when he first became aware of them, in 1998, in 2000 and in each year thereafter. In the absence of clear, cogent and compelling reasons from the applicant, there is no basis for finding that he showed due diligence in filing his grievance or that the delay was reasonable in the circumstances. On the contrary, given the length of time elapsed and the remedies already exercised by the applicant, I consider that if the time limit was extended the prejudice to the employer would be greater than the injustice to the applicant, who did not exercise his rights in a timely manner. Based on the evidence, I cannot assess the chance of success of the grievance; in any case, I find that criterion inconsequential in light of this application.

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

(The Order appears on the next page)

Order

[75] The application for extension of time is dismissed.

December 14, 2007.

P.S.L.R.B. Translation

Michele A. Pineau,
Vice-Chairperson