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Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

SEBRENA THOMPSON

Applicant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Thompson v. Treasury Board (Canada Border Services Agency)

In the matter of an objection to timeliness and 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: Casper Bloom, Q.C., Ad. E., Chairperson

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

For the Respondent: Jennifer Lewis, counsel

Heard via teleconference,
March 12 and 26, 2007.

I. Matter before the Chairperson

[1] Sebrena Thompson ("the applicant") was dismissed effective August 27, 2004, from her position as Customs Inspector at the International Mail Processing Centre of the Canada Border Services Agency. She filed a grievance against this action, which was subsequently referred to adjudication, requesting reinstatement and other remedies. The employer ("the respondent") denied the grievance on the grounds of timeliness, among others. Her bargaining agent, acting on behalf of the applicant, maintained that the grievance was timely. In the event, however, that the grievance was found to be untimely, the applicant's bargaining agent filed an application for an extension of time. I heard the arguments of the parties on the timeliness issue by teleconference on March 12, 2007, and an oral decision was rendered that found the grievance to be untimely, with reasons to follow.

[2] Consequently, a second teleconference was held on March 26, 2007, to hear the application for an extension of time. The matter was taken under reserve and the parties were informed on April 4, 2007, that the application was granted, with reasons to follow. What follows are the reasons substantiating both of the above decisions.

II. Summary of the evidence, of the arguments and reasons

A. Timeliness of the grievance

[3] On the face of it, the grievance was clearly filed after the deadlines. The collective agreement signed by the Canada Customs and Revenue Agency and the Public Service Alliance of Canada on March 22, 2002, for the Program Delivery and Administrative Services bargaining unit binds the parties to this case and provides, at clause 18.10, for the presentation of the grievance to the employer no later than 25 days after the date on which the grievor first became aware of the circumstances giving rise to the grievance. While the grievance form bears the signatures of the applicant and her local bargaining agent's representative, Ron Warren, on September 28 and September 30, 2004, respectively, the respondent's receipt stamp as well as the management representative's personal inscription clearly indicate that the date received was January 21, 2005. This was some five months after the incident and four months after the applicant's signature was placed on the grievance form.

[4] The explanation offered for this discrepancy by the applicant's representative, Douglas Hill, was the negligence of the respondent's agent who allegedly allowed the grievance to sit on his desk for four months without processing it. This was denied categorically by counsel for the respondent, Jennifer Lewis. I advised Mr. Hill that some cogent documentary or *viva voce* (oral) evidence would be required to substantiate that allegation.

[5] In this regard, Mr. Warren was produced as a witness. His testimony did not at all contain any factual proof that could persuade me of the claim that the grievance had in fact been presented at the first level of the grievance process in a timely fashion and that the respondent had simply refused or failed to deal with it. His testimony was implausible and, in the absence of any further evidence, I had no alternative but to find the grievance untimely. This led to the grievor's application for an extension of time for the filing of the grievance.

B. Application for an extension of time

[6] Section 61 of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") authorizes the Chairperson to extend the time limits for presenting a grievance at any level ". . . in the interest of fairness . . . ." The exercise of this authority is discretionary and, as is the case with exercising any discretionary power, is subject to the precept of natural justice requiring that it satisfy the test of reasonableness. Decisions rendered under the *Public Service Labour Relations Act* have established a set of criteria to provide objective measures circumscribing and defining the test for the exercise of this authority (*Vidlak v. Treasury Board (Canadian International Development Agency),* 2006 PSLRB 96; *Rabah v. Treasury Board (Department of National Defence),* 2006 PSLRB 101; and *Virdi v. Treasury Board (Department of Human Resources and Skills Development),* 2006 PSLRB 124). These criteria are:

a) clear, cogent and compelling reasons for the delay;

b) the length of the delay;

c) the due diligence of the applicant;

d) balancing the injustice to the applicant against the prejudice to the respondent in granting an extension; and

e) the chances of success of the grievance.

[7] It is self-evident that the particular set of circumstances defining each case must dictate the weight to be given to any one of the above criteria relative to the others. It would be patently unfair to attribute the same weight to each of these criteria irrespective of the factual context. Consequently, it behooves the Chairperson seized of an application for an extension of time to apply or at least attempt to apply each of the criteria to the facts of the particular case at hand. Once this exercise is completed, the Chairperson should then attribute the appropriate weight to each of the criteria based on the specific factual circumstances that may, in some instances, justify attributing all or most of the weight to only one or two of the criteria.

[8] In this case, both parties were given the opportunity to present their written and *viva voce* evidence as well as their arguments and authorities supporting their respective positions.

1. Clear, cogent and compelling reasons for the delay

[9] Mr. Hill argued that the applicant sincerely believed that her grievance had in fact been presented to the first level of the grievance process. Mr. Hill then argued that Mr. Warren had never had a problem with timeliness, and that Mr. Warren had testified that he believed the grievance was properly filed. Finally, Mr. Hill submitted that it was perhaps the employer who was in default for having filed its final level reply too late.

[10] Numerous emails produced in evidence unequivocally support Mr. Hill's first argument concerning the applicant's sincere belief that her grievance had indeed been presented at the first level of the grievance process in a timely manner. On the other hand, with respect to Mr. Warren's claim and belief, as indicated above, I give little credence to his testimony. Moreover, despite my request, Mr. Hill never produced the copies of the grievance transmittal forms that he claimed were in Mr. Warren's possession. As to Mr. Hill's attempt to shift the default to the employer, I find this tactic to be disingenuous given its tardiness, the employer's explanatory letter of February 15, 2005 (referring to the usual practice of extending, by mutual agreement the time limit to respond to the grievance until the applicant's bargaining agent had made formal representations on the grievance), and the permissive (not mandatory) language of clause 18.13 of the collective agreement. Clause 18.13 provides that: "The Employer shall normally reply to an employee's grievance at the final level of the

grievance procedure within thirty (30) days after the grievance is presented at that level." This latter argument by Mr. Hill is consequently rejected.

[11] Ms. Lewis argued that there were no clear, compelling and cogent reasons for the delay. She referred me to *Anthony v. Treasury Board (Fisheries and Oceans Canada)*, PSSRB File No. 149-02-167 (19981214), which explains the justification for the time limits contained in the collective agreement:

. . .

> *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.*

. . .

With this statement of principle, I am in full accord. However, *Anthony* went on to add:

. . .

> *Still, this Board has a discretion in granting extensions, when it deems that it is necessary to do so in the interest of justice. . . .*

. . .

It is in the exercise of that discretion that the Chairperson's role and judgement are paramount, subject to the limitations set forth earlier.

[12] Ms. Lewis argued that the respondent should not be prejudiced by Mr. Warren's negligence and that the applicant had the obligation to follow up, despite Mr. Warren's inaction. In this regard, she referred me to *Boulay v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 149-02-160 (19961125).

[13] While I fully endorse the principle whereby a principal is bound by acts of his or her agent acting within the mandate's legitimate and valid limits, nevertheless, there is room for the exercise of discretion if negligence on the part of the agent is present or apparent. The very pertinent question raised by Ms. Lewis still remains, however: even

if there was negligence, why should the respondent be held liable for the resulting consequences? This issue will be treated below under the standard of balancing the injustice to the applicant against the prejudice to the respondent.

2. The length of the delay

[14] Mr. Hill argued that the four-month delay (or five months, depending on when one starts counting) was not significant and referred me to *Richard v. Canada Revenue Agency*, 2005 PSLRB 180, where six- and eight-month delays were considered short. It is a fact that time is relative and a delay may be deemed short or long only in relation to its context. Only delays fixed by statute or law are not subject to qualification. I am not prepared to qualify the delay in this case as short or long, other than to refer to the collective agreement's time limit of 25 days. The applicant has the onus of providing a convincing explanation for the time gap between the contractual time limit and the date when the contractual obligation was met. In my opinion, that onus was satisfied by the applicant's diligence after signing the grievance form.

3. The due diligence of the applicant

[15] The applicant's diligence cannot be doubted. In the words of Mr. Hill, she relied on Mr. Warren. The contents of the numerous email exchanges serve as convincing proof of that fact. Ms. Lewis argues, on the other hand, that the applicant should not have relied solely on Mr. Warren's diligence and good faith, especially since she appeared to have some knowledge of her obligations under the collective agreement, as revealed in at least one of the emails. Her familiarity or lack of it with the collective agreement, which in some instances could be very relevant, is in this case of no assistance in determining her degree of diligence. She had no reason to pursue the matter personally since Mr. Warren not only had the matter in hand, but also gave her every reason to believe that he was following up diligently. Without deciding the matter, even if the applicant's local bargaining agent's representative was negligent, the applicant can certainly not be faulted for not exercising due diligence in her efforts to advance her grievance.

4. Balancing the injustice to the applicant against the prejudice to the respondent

[16] Ms. Lewis did not invoke any particular hardship that the respondent would suffer resulting from the delay in presenting the grievance. On the other hand, the

applicant has lost her employment, and this is her only recourse to such redress. Accordingly, the injustice to the applicant of refusing her access to adjudication clearly outweighs any prejudice the respondent might suffer incidentally from allowing this matter to be heard on its merits.

5. <u>The chances of success of the grievance</u>

[17] In my opinion, this criterion is not particularly helpful here. Without hearing a case on its merits and being able to objectively examine all of the evidence, it is extremely difficult to assess the chances of success of any given grievance. This is perhaps possible where only questions of law are at issue, but certainly not where questions of fact and witnesses have to be evaluated.

[18] In this case, the alleged misconduct is indeed very serious, but at this stage the record before me contains nothing more than allegations of misconduct, and only evidence can substantiate how well founded they are. Consequently, no assessment will be made of the grievance's chances of success.

6. <u>Conclusion</u>

[19] In applying the five criteria set by the jurisprudence to the facts of this case, only one has a predominant impact on my decision. Fairness in this instance dictates that the applicant not be penalized by the action or inaction of Mr. Warren in whom she had placed her full confidence. Moreover, she had every reason to rely on his ability to serve her needs because that is the statutory relationship between the bargaining agent and its representatives on the one hand and the employees in the bargaining unit on the other.

[20] While I firmly believe that the collective agreement is the law of the parties and must be respected, the *Regulations* also make allowances for exceptional circumstances. This case qualifies as such for the reasons described above.

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

(The Order appears on the next page)

III. Order

[22] The application for the extension of time is granted.

June 5, 2007.

Casper Bloom, Q.C., Ad. E.,
Chairperson