Date: 20070719

File: 568-18-00141

Citation: 2007 PSLRB 74

Public Service Labour Relations Act

Before the Chairperson

BETWEEN

MICHEL DUMAS

Applicant

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Respondent

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

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: François Leduc, counsel

For the Respondent: Sonja Gonsalves, labour relations officer

Decided on the basis of written submissions
filed January 26 and 29 and March 7 and 14, 2007.
(P.S.L.R.B. Translation)

I. Application before the Chairperson

[1] Michel Dumas ("the grievor" or "the employee") is employed by the Staff of the Non-Public Funds, Canadian Forces ("the employer"), at Canadian Forces Base Valcartier in the Quebec Region as a community recreation director; he started September 15, 1998. He holds a non-unionized management position in the 5 Area Support Group.

[2] Mr. Dumas is dismissed on November 18, 2003 on the grounds that he allegedly misappropriated the employer's funds on several occasions.

[3] On January 23, 2004, Mr. Dumas files a grievance with respect to his dismissal at the third and final level of the grievance process requesting a reconsideration of the decision. The employer acknowledges receipt of the grievance on February 3, 2004.

[4] On February 11, 2004, through his lawyer, Raymond Lavoie, Mr. Dumas requests a reconsideration of the employer's decision to dismiss him. On March 31, 2004, Mr. Lavoie again asks the employer to take a position concerning the reconsideration of its decision to dismiss Mr. Dumas.

[5] On April 23, 2004, Mr. Dumas files an application introducing proceedings before the Superior Court of Quebec against three persons who took part in the investigation and against the decision to terminate his employment, alleging negligence and defamation of character by those individuals.

[6] On April 26, 2004, John Geci, President and Chief Executive Officer, confirms the decision to maintain the dismissal and rejects the grievance.

[7] On January 19, 2005, Mr. Dumas writes to the Director General, Appeals, of the Public Service Commission (PSC) asking for an examination of his complaint file and for an investigation. On February 23, 2005, the PSC informs Mr. Dumas in writing that it does not have jurisdiction to examine his complaint and that he must refer his grievance to adjudication before the Public Service Staff Relations Board ("the Board"), under section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former *Act,*" in force at that time).

[8] On April 5, 2005, the Attorney General of Canada files a defence to Mr. Dumas' application. Para 31 of that defence asserts that Mr. Dumas did not contest his

dismissal, which he could have done under section 92 of the former *Act*, and para 32 asserts that Mr. Dumas's recourse was to the Board and not to the Superior Court.

[9] On November 7, 2006, the Superior Court rejects Mr. Dumas' action for lack of jurisdiction. It states that the competent authority to hear Mr. Dumas' grievance is the Board.

[10] On November 28, 2006, Mr. Dumas, through his new lawyer François Leduc, files this application for an extension of time under section 61 of the *Public Service Staff Relations Board Regulations* ("the *Regulations*") so that he may refer his grievance to adjudication before the Board.

[11] Although Mr. Dumas' grievance was filed before the *Public Service Labour Relations Act* ("the new *Act*") came into force, given that this application was filed after the new *Act* came into force, it is governed by the new *Act*.

II. Summary of the arguments

A. For the employee

[12] The employee asserts that even though he was a manager, the employer's representatives (a) never informed him of his rights following his dismissal, nor of the recourse available to him under the former *Act*; (b) never provided him with the name or title of the persons associated with the applicable level of the grievance process for individual grievances; (c) did not post copies of the notice containing this information as stipulated in subsection 65(1) of the new *Act*; and (d) failed to provide him with the individual grievance form and the reference to adjudication form referred to in section 89 of the *Regulations*.

[13] The employee asserts that, despite repeated requests since January 2007, he has not obtained the written document that, according to the allegations of the employer's representative, would confirm that his lawyer, Mr. Lavoie, or that he himself was allegedly informed in writing of his right to refer his grievance to adjudication.

[14] In support of his position, the employee cites the following cases: *Peacock v. Union of Canadian Correctional Officers*, 2005 PSSRB 9; *Boulay v. Treasury Board (Correctional Service of Canada)*, PSSRB File No. 149-2-160 (19961125); *Guittard v. Staff of the Non-Public Funds, Canadian Forces,* 2002 PSSRB 18; *Rabah v. Treasury Board*

(Department of National Defence), 2006 PSLRB 101, in which applications for extension of time were allowed; and *McKinley v. BC Tel,* 2001 SCC 38.

[15] The employee requests that his application for an extension of time be allowed and that he be allowed to refer his individual dismissal grievance to adjudication within 30 days of this decision.

B. <u>For the respondent</u>

[16] The employer argues that the factors set out in *Rattew v. Treasury Board (National Defence),* PSSRB File No. 149-2-107 (19920624), and in subsequent cases are relevant to the decision to allow or deny the application for an extension of time.

[17] The employer argues that the delay in this case is substantial. The employee should have referred his grievance to adjudication before May 26, 2004, but his application for an extension of time was filed 30 months later and 21 months after he was informed in writing that his grievance should be decided by adjudication. In addition, if the application were allowed, more than five years would pass between the dismissal and a possible decision of the adjudicator.

[18] The employer maintains that the employee has not provided any clear, cogent and compelling reasons to explain his delay in filing this application. Even if the delay is due to having chosen the wrong recourse and to his lawyer's actions, these reasons alone do not justify an extension of time. During his employment, the employee had access to the employer's grievance policy, which refers to the former *Act*, and he was represented by counsel. Since he did not act diligently after having been informed in February 2005 by the PSC and again in April 2005 by the employer that the appropriate recourse was to refer his grievance to adjudication, it must be assumed that the employee had abandoned his grievance. It was only after the Superior Court's decision that he tried to reactivate his grievance.

[19] It cannot be assumed that the employer is responsible for the fact that the employee was misinformed by his lawyer as to the actions he could have taken to overturn his termination of employment or the employee's decision not to seek recourse before the Board after having been informed accordingly by the employer. He must accept the consequences of the poor advice that he received.

[20] The employer further argues that the prejudice that it would suffer would be greater than that of the employee and that consequently, the application should be denied. After 39 months, the employer's ability to prepare a reasonable defence for the adjudication hearing is greatly diminished. Key witnesses have left the organization and memories are compromised with the passage of time. A favourable decision by the adjudicator could mean that the employer would have to reimburse more than four years of salary.

[21] All employees have access to a policy manual describing the right of non-unionized employees to file a grievance in accordance with the former *Act*, which was in force at the time. Those policies describe the time limits for presenting grievances, the grievance process levels, the titles of the persons designated to respond to grievances at each level and the office where grievance forms can be obtained or submitted. The policies refer to the former *Act* to ensure that employees know that this legislation gives them the right to present grievances and to refer them to arbitration. These policies are posted on the employer's intranet site and, as a management employee, the employee had his own copy of the policy manual. The employer therefore complied with the requirements of section 65 of the *Regulations*. The employer claims that neither the former *Act* nor the new *Act* requires it to provide the employee with a copy of the necessary form to refer his grievance to adjudication.

[22] The employer maintains that the request to produce documents showing that the employee or his lawyer were informed in writing of the right to refer the grievance to adjudication was not received until January 26, 2007, and that the information was sent to Mr. Leduc on January 29, 2007. In any event, this information was contained in the PSC's reply and in the employer's defence to the Superior Court proceedings.

[23] The employer argues that the decisions that the employee cited in support of his position contain facts and circumstances that differ from those of this case.

[24] The employer points out that the application for an extension of time should not be allowed because the employee does not meet any of the criteria set out in the Board's case law, along with the delay being excessive and the employee having failed to show due diligence in exercising his rights.

[25] In support of its position, the employer cites the following decisions: *Rattew*; *Stubbe v. Treasury Board (Transport Canada – Canadian Coast Guard)*, PSSRB File

No. 149-2-114 (19920710); *Anthony v. Treasury Board (Fisheries and Oceans Canada)*, PSSRB File No. 149-2-167 (19981214); *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1; *Rouleau v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 51; *Boulay*; *Chambers v. Treasury Board (Public Works Canada)*, PSSRB File No. 149-2-63 (19851125)*; Quigley v. Treasury Board (Citizenship and Immigration Canada),* PSSRB File No. 166-2-27258 (19961001), upheld under judicial review in *Quigley v. Canada (Treasury Board)*, [1997] F.C.J. No. 1248 (QL); and *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113.

C. Reply of the employee's representative

[26] The employee replies that, in the absence of a union, he did not have the tools or information to navigate the "legal-administrative maze" specific to the various recourses open to dismissed employees. He clearly indicated his desire to contest at all stages the employer's unreasonable decision at the first opportunity and within the legal time limits.

[27] Taking into account the work environment and the "non-unionized isolation," he was never informed of his right to pursue a specific process when he objected by his own means and when he demonstrated his desire to pursue his objection to its end with the assistance of a lawyer.

[28] Therefore, the employee is requesting that his application for an extension of time be granted.

III. Reasons

[29] Subsection 90(1) of the *Regulations* states that the time limit for referring a grievance to adjudication is 40 days after the response at the final level of the grievance process:

> ***90.****(1) Subject to subsection (2), a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process.*

[30] Under paragraph 61(*b*) of the *Regulations*, the Chairperson of the Board has the discretionary power to allow a party recourse to a redress process even after the expiry of the prescribed time, if the consequences of non-compliance with the prescribed time would lead to an injustice:

> ***61.*** *Despite anything in this Part, the time prescribed by this Part . . . for. . . the referral of a grievance to adjudication . . . may be extended, either before or after the expiry of that time,*
>
> *(*b*) in the interest of fairness, on the application of a party, by the Chairperson.*

[31] Under section 45 of the new *Act*, the Chairperson of the Board delegated to me as Vice-Chairperson the authority set out in paragraph 61(*b*) of the *Regulations* to examine and decide this application for an extension of time.

[32] The Board's adjudicators have considered on many occasions the elements relevant to exercising their discretionary power to grant an extension of time in the case of an application for referral to adjudication. Nevertheless, no standard solution emerges for deciding a given matter except for the general principle that the party making the extension application has the burden to convince the Board that it acted with diligence to assert its rights. The decision of whether to extend the time is affected by the length of and reasons for the delay and the prejudice that will be caused to one or the other of the parties; each case has to be decided on its merits. It is clear that these criteria are assessed based on each application's circumstances. The case law cited by the parties indicates the parameters by which these criteria have been judged in the past.

[33] In *Rattew*, the adjudicator denied the application to file a grievance that was presented after two years given the absence of a "clear and cogent" explanation for the delay. The adjudicator determined that at the time the employee had freely agreed to resign and that his only reason for requesting an extension of time was to be released from the consequences of a poor decision.

[34] In *Stubbe*, the adjudicator did not find the employee's reasons for the three-month delay in filing his dismissal grievance to be credible, specifically that his lawyer had delayed providing him with advice and that he was unaware of the prescribed time for presenting a grievance, despite his once being a union representative. The adjudicator maintained that, while the employer would not suffer any serious prejudice if the extension was allowed, prejudice is only one of the factors that the Board weighs when deciding to exercise its discretionary power.

[35] In *Anthony*, the adjudicator was of the opinion that the employee had not been diligent in seeking redress. The employee had contacted his province's ombudsman and his MP and Human Resources Canada. Although he had a copy of the union's documentation, he did not make the effort to read it and was content to continue his discussions with the employer to obtain reimbursement of his moving expenses but without seeking redress when he felt he had been aggrieved.

[36] In *Schenkman*, the employee presented a grievance to the employer for its refusal to pay him overtime for the 15 years preceding the date of his grievance. To support his explanation for the delay in filing the grievance, the employee invoked the fact that he had been deliberately misled by his supervisors and that there were language and cultural barriers related to his status as a recent immigrant. The adjudicator denied the grievance, firstly, because employees must assume responsibility for informing themselves about their rights and for reading the document that governs their working conditions and, secondly, because, after five years of employment, the linguistic and cultural disadvantages had disappeared.

[37] In *Rouleau*, the complainant asked for an extension of the time to file a grievance 21 months after having been declared as having abandoned her position. Even though she might have engaged in constant correspondence with the employer, she stated that she was unable to take the necessary steps regarding her dismissal for medical reasons until the time she filed her application for the extension. The adjudicator was of the opinion that, even though she was ill, she was allegedly well enough to write to the employer within the prescribed time to contest her dismissal. The adjudicator mentioned that it was preferable for the employer to clearly state in its letters what the applicable time limit was for filing a grievance. However, its failure to do so "does not result in an automatic right for the applicant to succeed . . . ."

[38] In *Boulay*, the applicant, who had been declared surplus, asked the Board to authorize the filing of a dismissal grievance seven years after she resigned. The applicant alleged, among other things, that she only recognized the disciplinary nature of her layoff after having obtained documents through an access-to-information request concerning a breach of contract in another matter. Even giving her the benefit of counting the time from the moment that she said she first learned of the situation giving rise to her grievance, and not the preceding seven years, she still had not filed a grievance or her application within the prescribed 25 days. The adjudicator was of the

opinion that the fact that she had followed the advice of two lawyers did not excuse her lack of diligence in exercising her rights.

[39] In *Chambers*, the application for extension was allowed on the grounds that the prejudice suffered by the employee in question was greater than that of the employer. In an incidental comment, the adjudicator indicates that the time devoted to writing to other bodies (namely, the Canadian Human Rights Commission and the Minister of Labour) cannot be invoked to explain the delay in undertaking the necessary steps to file a grievance with the appropriate officer of the employer. The adjudicator cites *Gourlie* (PSSRB File No. 149-2-17) in which it is stated: "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."

[40] In *Quigley*, the employee asked for an extension of time to refer his grievance to adjudication 13 years after the end of the grievance process and after the Federal Court ruled that it did not have jurisdiction to hear his application for damages following an illegal dismissal. The adjudicator ruled that the grievance, in practice, should be considered abandoned both because of the long delay and because of the fact that the grievor had rejected the adjudication process, choosing instead to file an application for redress before the Federal Court.

[41] In *Wyborn*, the employee applied for an extension of time to file a dismissal grievance almost six months after his dismissal and after he had been apprised of the results of a police investigation indicating that the charges against him had been withdrawn. The employee had assumed that the legal action and his dismissal were part of the same proceedings and did not take into account the 25-day time limit for filing a grievance. Citing *Boulay* in support, the adjudicator felt that the employee had not intended to file his grievance before the time limit expired and did not accept the employee's excuse that the late filing was due to a lack of diligence by his union representative.

[42] In *Peacock*, the adjudicator allowed an extension of time because the employee had acted with due diligence in asserting her rights despite the negligence of the union representative. She took concrete action to have her grievance sent to the employer during the prescribed time; she did not wait for the criminal charges to be decided before contesting the employer's decision to dismiss her, and she maintained contact with her union representative and then union management when the representative

stopped replying to her. The adjudicator also concluded that there was no evidence indicating that the employer would suffer any prejudice if the matter were referred to adjudication.

[43] In *Rabah*, the employee was rejected on probation. The application to extend the time for filing a grievance was allowed. Given the facts of that matter, the adjudicator concluded that despite the fact that the complainant had not been properly informed of his recourse, he had nevertheless tried to seek remedy. The prejudice to the employer was less than that to the employee and the employee had a defensible case.

[44] In *Guittard*, the adjudicator concluded that the five-month delay between the dismissal and the request for an extension was minimal and that the prejudice suffered by the employer would be negligible if the grievance were heard. It was the adjudicator's opinion that the employee had sought by several means to contest his dismissal from the outset.

[45] *Vidlak v. Treasury Board (Canada International Development Agency),* 2006 PSLRB 96, which was not cited by the parties, effectively summarizes all of these decisions:

. . .

> [11] *The jurisprudence of the former Public Service Staff Relations Board (PSSRB), the precursor of the present PSLRB, is long-established in matters of allowing or denying an application such as this one. The new* Public Service Labour Relations Act (PSLRA)*, which established the PSLRB states that an extension of time can be granted in the interest of fairness. Under s.63 of the former* PSSRB Regulations and Rules of Procedures, 1993, *the PSSRB had the power to extend time limits "on such terms and conditions" as the PSSRB deemed advisable. Over the years, the PSSRB developed principles concerning the application of this section, which principles are of the same nature as the fairness doctrine contained in paragraph 61(*b*) of the new* Regulations*. As such, the PSLRB is still relying on the criteria that were developed over the years to assist decisions made in this regard.*
>
> [12] Schenkman v. Treasury Board (Public Works and Government Services Canada), *2004 PSSRB 1, provided an analysis of the case law up to that time and identified the following basic criteria for determining whether to exercise*

> *the PSSRB's discretion under subsection 63(*b*) of the former* Public Service Staff Relations Board Regulations *(now 61(*b*) of the new* Regulations*):*
>
> - clear, cogent and compelling reasons for the delay;
>
> - the length of the delay;
>
> - the due diligence of the grievor;
>
> - balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
>
> - the chance of success of the grievance.
>
> . . .

[46] In light of the above case law, I must therefore consider the following elements in exercising my discretionary power: (1) the reasons for the delay and whether they are clear, cogent and compelling; (2) whether the employee's actions reflect due diligence in exercising his rights; (3) the length of the delay; (4) whether the injustice to the employee is greater than that to the employer if the matter is referred to adjudication; and (5) the chance of success of the grievance. Since the first and second criteria are linked under the circumstances of this case, they will be dealt with together.

1. <u>Clear, cogent and compelling reasons for the delay</u>

2. <u>Employee's due diligence in exercising his rights</u>

[47] In support of his application for an extension of time to refer his dismissal grievance to adjudication, the employee points out that he was unable to file his application for reference to adjudication in a timely manner because the employer did not inform him of his rights, of the possible recourse once the grievance process was complete or of the forms that would have enabled him to know which authority to approach. As a non-unionized employee, he says that he was at a disadvantage because of his lack of knowledge of where to exercise his rights.

[48] I am not convinced by these arguments. As shown in *Stubbe, Chambers* and *Boulay*, relying on the incorrect advice of his lawyer is not an excuse in itself to explain why the employee did not file his grievance or his application for reference to

adjudication within the prescribed times, although in *Guittard* a delay of five months because of that same reason was not considered unreasonable.

[49] However, it is my opinion that the error attributable to the advice from the employee's lawyer as to the recourse chosen does not fully dispose of the question of the delay in this case. In fact, the question raised in *Quigley* is more relevant to this case: can the employee's decision to choose a recourse other than the Board be considered as abandonment of his intent to pursue adjudication?

[50] In the circumstances of this case, two undeniable facts argue against the alleged ignorance of the employee as to the appropriate recourse. First, on February 23, 2005, the PSC clearly informed the employee that the Board had jurisdiction:

> [Translation]
>
> *More specifically, as Ms. Kurin tried to explain to you, the appropriate forum to contest a disciplinary measure would be referral of a grievance to an adjudicator of the Public Service Staff Relations Board (PSSRB), under paragraph 92(1)(b) of the Public Service Staff Relations Act (PSSRA).*

[51] Second, on April 5, 2005, the Attorney General of Canada's defence to the employee's legal action provided the same information, at para 31 and 32:

> [Translation]
>
> *31. The applicant did not object to his dismissal as he could have done under section 92 of the Public Service Staff Relations Act (R.S.C. 1985, c. P-35), before the Public Service Staff Relations Board.*
>
> *32. In any event, by filing this action against the respondent, the applicant is trying to do indirectly what he cannot do directly, which is to contest his dismissal before the Superior Court when he should have filed an application to that effect before the Public Service Staff Relations Board.*

[52] Despite the fact that he had this information, the employee did not act on it. Instead, he waited for the ruling of the Superior Court concluding that it did not have jurisdiction before making his application. Moreover, there was no impediment to him making an application to the Board while his action before the Superior Court ran its course. The employee did not provide any explanation to justify his inaction. As was

decided in *Anthony*, the time spent seeking recourse other than that set out in the former *Act* is not an excuse for failing to approach the Board within the prescribed time.

[53] However, there is more. In a letter dated November 27, 2003 and sent to Mr. Lavoie, the employee indicates that he is still in contact with the Human Resources Manager while his grievance runs its course:

> [Translation]
>
> *This morning, Ms. Ann Martell informed me that she never received information about me during my suspension. . . . Ms. Martell is the human resources manager at Valcartier. It was mentioned in the letter of suspension that I could contact her to obtain information . . .*

[54] Even though it would have been preferable for the employer to indicate to the employee in its reply to the grievance that adjudication was a possible recourse following the denial of his grievance (see *Rouleau*), the above facts show that the employee was in a position to obtain the necessary information to seek recourse independent of his lawyer, by consulting Ms. Martell. Accordingly, the failure to refer the grievance to adjudication within the prescribed time is not due solely to the incorrect action taken by Mr. Lavoie, but also to the employee's failure to act on the advice he received concerning his recourse and his failure to take steps to inform himself. Thus, the employee must assume part of the consequences of the advice that he received from his lawyer.

[55] I also share the opinion of adjudicator Galipeau in *Boulay*. In her view, partially excusing the applicant for his failure to act within the prescribed time solely because of errors made by a lawyer would open the door to a series of applications that would bring forward not only errors by lawyers but also those by union representatives and any other person representing a party before the Board (see *Boulay*, page 12).

[56] There is also a negligence factor. On his dismissal date, the employee had been a manager for five years. In that capacity, he had access to the employer's rules and policies on the resolution of grievances for all employees, including a personal copy and the electronic version on the intranet. In the notes appended to the employee's reply to the Board dated March 14, 2007, there is a boxed comment that specifies that after his dismissal, the employer removed the employee's access to his office and,

presumably, to the human resources management policies and procedure, which would likely explain why he was unable to file his application for reference to adjudication in the prescribed time.

[57] I find this to be a self-serving reason. As a manager, the employee must be presumed to have had knowledge of the employer's rules and policies necessary to perform his functions, including those on dispute resolution in the workplace, whether for unionized or non-unionized employees. The employee does not explain why he did not know this information. In this regard, the employee cannot blame the employer for his inadequate knowledge related to his job.

[58] The facts of this case are quite different from those in *Peacock*, where the employee, despite the obstacles encountered, relentlessly pursued avenues of recourse with her union, including moving to a higher level when she did not receive satisfaction. The facts are also different from *Rabah* because of the length of the delay.

[59] It is my opinion that *McKinley* is not relevant to the facts of this application because the Court deals with the merits of the case and not with a reasonable delay to apply for an extension of time.

3. Length of the delay

[60] Because of the circumstances described above, I am of the opinion that a delay of three years is excessive, taking into account the information to which the employee had access because of his functions, the information about recourse before the PSSRB that he had on February 23 and April 5, 2003 and the opportunity that he had to communicate with the Human Resources Manager at Valcartier. Moreover, using solely the reason of his lawyer's errors to excuse the delay in exercising his recourse is not supported by the case law. The employee has primary responsibility for exercising his rights. The fact that he trusted another person does not relieve him of that responsibility. Because of these elements, I conclude that the employee's decision to exhaust his recourse before the Superior Court before making an application for reference to adjudication must be interpreted as a decision to abandon adjudication of his grievance within the time prescribed by the new *Act* because he did not consider such action until the first recourse was complete (see *Quigley*). As in *Rattew*, the employee must accept the consequences of what was, in hindsight, an incorrect decision to seek recourse before a civil court rather than before the Board.

4. If the injustice to the employee is greater than that to the employer if the matter is referred to adjudication

[61] The employer asserted that after 39 months its ability to prepare a reasonable defence for the adjudication hearing was greatly diminished, that key witnesses had left the organization, that memories would be compromised by the passage of time and that in the event of a favourable decision, it might have to reimburse more than four years of salary.

[62] The employee did not respond directly to this assertion but raised the fact that he had always demonstrated his desire to pursue his objection to its conclusion, with the assistance of a lawyer.

[63] It is clear that the consequences of failing to have submitted his grievance to adjudication within the prescribed time are serious for the employee because he lost his job, and recourse before the Board is his only avenue of redress. This very serious consequence weighs in favour of the employee. However, this factor cannot be considered in isolation. I noted earlier that this was a long delay. The delay affects the prejudice suffered by the employer because it has the burden of proof during possible adjudication and no longer has the timely means to provide that proof, a fact not contested by the employee.

[64] I fully share the opinion of adjudicator Mackenzie in *Schenkman*, at para 81, when he states that there must be closure on disputes in the workplace and that there is a time to move on.

[65] In this case, the employee had many opportunities to exercise his rights, and he was counselled by a lawyer. He did not seize the opportunity to file an application for an extension of time until the proceedings before the Superior Court completed, although he was warned in the context of two different processes that his proper avenue of recourse was before the Board. Under such circumstances, the employer does not have to suffer the prejudice arising from errors by the lawyer or the lack of diligence by the employee in exercising his rights. If there is recourse, it is before the professional board of the lawyer who allegedly committed the errors in question. Moreover, as a manager, the employee must be presumed to have had knowledge of the recourse available. As noted previously, the employee cannot invoke his own negligence to justify the fact that he did not take the appropriate action. I therefore

conclude that the employer would suffer the greatest prejudice and that the employee cannot rely on this criterion to obtain an extension of time.

5. The grievance's chance of success

[66] In this grievance, the criterion of its chance of success is difficult to assess because there are not enough elements in the file to decide it. The facts invoked in support of the employee's dismissal have serious consequences but do not raise any particular question of law that would go beyond the questions of fact and justify a more detailed examination of the file. Regardless, the other four criteria are definitive in terms of the application for an extension of time, and this criterion does not add anything that might serve to reverse the conclusions already stated.

6. Conclusion

[67] Of all the criteria analysed, the first two — the lack of clear, cogent and compelling reasons and the lack of due diligence in exercising his rights — are determining factors in my decision not to exercise my discretionary power to extend the time so that the employee's grievance can be referred to adjudication.

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

(The Order appears on the next page)

IV. **Order**

[69] The application for an extension of time is denied.

July 19, 2007

P.S.L.R.B. Translation

Michele A. Pineau,
Vice-Chairperson