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**Citation:** 2008 PSLRB 86



*Public Service  
Labour Relations Act*

Before the Chairperson  
and adjudicator

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BETWEEN

**PUIYEE CHAN**

Applicant and Grievor

and

**TREASURY BOARD  
(Office of the Chief Electoral Officer)**

Respondent and Employer

Indexed as  
*Chan v. Treasury Board (Office of the Chief Electoral Officer)*

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* and of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Ian R. Mackenzie, Vice-Chairperson and adjudicator

***For the Applicant and Grievor:*** Jon Peirce, Professional Institute of the  
Public Service of Canada

***For the Respondent and Employer:*** Lourena Prud'homme and Karine Renoux,  
employer representation advisors

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Decided on the basis of written submissions  
filed July 9, 23 and 30, 2008.

## REASONS FOR DECISION

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### **I. Application before the Chairperson**

[1] Puiyee Chan (“the applicant” or “the grievor”) has referred a dispute to adjudication involving a request by the Office of the Chief Electoral Officer (“the respondent” or “the employer”) on November 16, 2005, that the applicant undergo a Fitness to Work Evaluation by Health Canada. On July 9, 2008, the employer objected to the Public Service Labour Relations Board’s (“the Board”) jurisdiction on the basis that the grievance was not filed within the prescribed time limits set out in her collective agreement (Professional Institute of the Public Service of Canada and the Treasury Board, Research group: expiry date September 30, 2006). The respondent also stated that there was no evidence to demonstrate that the applicant sought an extension of time for filing her grievance.

[2] The applicant sent material to the Board on January 11, 2008, stating that she wished to complain about “wrongdoing, bullying, excess use of authority, harassment and discrimination . . . .” Since no grievance had been filed with the respondent, the material was returned to the applicant, following Board practice. The applicant was advised that the time limits for filing a grievance might have expired and was advised of her right to apply for an extension of time. The applicant was further advised that “any application should be filed without delay.”

[3] The applicant is now represented by the Professional Institute of the Public Service of Canada (PIPSC). She filed a grievance on April 18, 2008.

[4] On July 23, 2008, the applicant’s representative replied and asked that the respondent’s objection be dismissed. Although the applicant’s representative did not directly make an application for an extension of time, the Chairperson inferred from the representations that an extension of time was being sought.

[5] Pursuant to section 45 of the *Public Service Labour Relations Act (PSLRA)*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under paragraph 61(b) of the *Public Service Labour Relations Board Regulations* to hear and decide any matter relating to extensions of time.

[6] The applicant has also filed a human rights complaint, and she alleges discrimination in her grievance. The Canadian Human Rights Commission (CHRC) was provided with a notice (Form 24) and advised of the application for an extension of time. On August 12, 2008, the CHRC stated that it did not intend to make submissions.

## **II. Summary of the evidence**

[7] The applicant was advised that she needed to obtain a fitness to work evaluation on November 16, 2005. She made an enquiry about her rights to the CHRC on November 6, 2006. In December 2006, the CHRC wrote to her as follows:

*I am writing further to your enquiry received on November 6, 2006, against Elections Canada. We understand that there is a grievance process available to you, and that the process will deal with the allegations raised in your complaint.*

*Section 41(1)(a) of the Canadian Human Rights Act (the Act) states that the Canadian Human Rights Commission may refuse to deal with a complaint where the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available. In your situation, the Public Service Labour Relations Act gives you the right to file a grievance on the issues you raise; the grievance can include allegations of discrimination. That being the case, the Commission is not accepting your complaint at this time, and suggests that you file your grievance through your union in order to address these issues. For your information, you will find the Public Service Labour Relations Board's website at the following address: [www.pslrb-crtfp.gc.ca /main\\_e.asp](http://www.pslrb-crtfp.gc.ca/main_e.asp).*

*If, at the termination of the grievance process, you are not satisfied with the results, you may request that the Commission deal with your complaint. In that case **you should contact the Commission within 30 days of the completion of the grievance process, with documentation to show that the grievance process has been concluded** (typically this would involve a written decision). Commission staff will assess at that time whether a complaint is appropriate and timely, and whether it meets the requirements set out in the Act for the Commission's jurisdiction. Commission staff will also examine the outcome from the other process to determine whether it has addressed the allegations of discrimination. An officer will then make a recommendation about whether the Commission should deal with the complaint or not.*

*You should know that Commission staff have not assessed the facts which gave rise to your approaching the Commission. Specifically, we have not determined whether a human rights complaint would be appropriate or timely in these circumstances, or whether the Commission has jurisdiction to deal with the situation you describe. Please note that no human rights complaint has been filed.*

[Emphasis in the original]

[8] The applicant filed a complaint with the CHRC on November 30, 2007. The CHRC wrote to the applicant on December 18, 2007:

*This is further to the documentation you delivered to the Canadian Human Rights Commission on November 30, 2007, as well as our telephone conversations of December 18, 2007.*

*As was stated in the letter sent to you by Fiona Keith, Acting Manager, on December 4 2006, the Public Service Labour Relations Act gives you the right to file a grievance on the issues you raise. If you are having difficulty addressing your issues through your grievance process, it should be noted that, in certain cases, it is possible to file an individual grievance directly with the Public Service Labour Relations Board (PSLRB). We would suggest you try to do so. . . .*

. . .

*Please be reminded that pursuant to section 41(1)(a) of the Canadian Human Rights Act, the Canadian Human Rights Commission may refuse to deal with a complaint where the victim of the alleged discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available. Therefore, before the Commission is able to proceed with your complaint, we would require a written confirmation of the decision made by your union or the PSLRB, or a letter from the PSLRB stating that . . . it is not able to deal with your grievance.*

[Emphasis in the original]

### **III. Summary of the arguments**

[9] The submissions of the parties have been edited. The full submissions are on file with the Board.

**A. For the applicant and grievor**

[10] In correspondence dated July 23, 2008, the applicant's representative stated:

*We are requesting that the Employer's objection be overruled based on the explanations provided by Mrs. Chan. She filed two complaints with the Canadian Human Rights Commission (CHRC) and both are related to the subject matter of the grievance.*

*She had been attempting to have her issues resolved through the complaint process at the CHRC and was informed on December 18, 2007, that she would need to exhaust the grievance procedures before the Commission could proceed with her complaint and Mrs. Chan was not aware of the time limit for filing a grievance. Her case was complicated and compounded with health issues, resulting in the delay in filing her grievance. The Employer bears no prejudice in proceeding with this grievance at this time.*

*For all of the above reasons and the explanations provided by our member in the attached documents, we respectfully request that the Employer's objection be overruled and that a hearing be scheduled forthwith.*

[11] In the attached document, the applicant submitted as follows:

*I am requesting that the Employer's objection be overruled based on a fact that I did not miss any deadline. Below are the events in chronological order:*

*2006/11 —*

*I filed 2 harassment and discrimination complaints. One went to Elections Canada (Employer), and another to Canadian Human Rights Commission (CHRC).*

*They are related to the same subject matter of the grievance.*

*I went to CHRC because I did not trust Employer's internal investigation, and was not aware of the existence of your Board.*

*2006/12 —*

*Employer promised an investigation.*

*2006/12/04 —*

*CHRC informed me they will wait for Employer's investigation result, They instructed me to contact them after Employer's investigation, if I do not like the investigation result. They gave me 30 days to do so. . . .*

*In the letter, they [CHRC] mentioned PSLRB but on the phone I was told that [the] Employer's investigation is the same as PSLRB's.*

*To confirm the phone conversation, please call Courtney Powless of CHRC.*

*2007/11/5—*

*I filed another complaint to CHRC. Twenty four (24) days after the investigation. . . .*

*2007/12/18 —*

*CHRC informed me I should exhaust all complaint avenues and try PSLRB.*

*. . .*

*2008/01/11 —*

*I filed a complaint to . . . PSLRB.*

*2008/01/14 —*

*Susan Mailer of PSLRB replied. . . .*

*2008/04/16 —*

*My union PIPSC helped me start the process of grievance.*

*ONE, I have not missed the 25-day deadline after the investigation. I followed CHRC's 2006 instruction and filed a complaint in 24 days.*

*While filing a complaint the first time in 2006, I learned that there can only be 1 investigation at a time. Since I started with CHRC in 2006, I continued with CHRC in 2007 without coming to you yet. To me, since I have filed a complaint to one authority (CHRC) after the investigation, I have done my job to meet the 25-day deadline.*

*TWO, I have not missed any deadline after receipt of the letter from Ms. Mailer (of PSLRB) either. In her letter, there was no mention of any time limit.*

*I am not an expert in this area knowing any deadlines and procedures; I just follow instructions. Had I known any deadline, I would have met it regardless.*

*The proof is my meeting CHRC's deadline in 24 days, even though I had a chest and stomach pain at that time. (see my family doctor, Dr. L. Tang's diagnosis and referral to Dr. J.G. Boulais, a psychologist.)*

*After receipt of Ms. Mailer's instruction, I relaxed a bit for the sake of my health which was still not well at the time. I still*

went to see Dr. Boulais. My latest visit to Dr. Boulais was on April 15, 2008. (see receipt; the rule is to pay per visit)

As you can see, I relaxed because (1) I was not told of any deadline and (2) I had a health problem.

If you want, I can get a testimony from Dr. Boulais. (note Dr. Tang already told you about my health in her referral.)

THREE, I do not know how Employer counts two years. They knew there is a complaint from me since November 2006. CHRC further informed them of a follow-up if I do not like their investigation. (see CHRC's 2006 letter)

...

They finished their own investigation in November 2007 and should expect CHRC to proceed after that. How does Employer count two years?

The only thing Employer can argue is that I should have grieved within 6 months after the incident. I missed the 6-month [deadline] because I was devastated by the incident in which I was forced out of work for a reason I did not know and suffered a series of health problems after that (medical evidence available upon request and will be presented at hearing). It took me months to get myself composed. Because of the sudden loss of work, my priority was survival in terms of finance, not complaint. Therefore I unknowingly missed the 6-month deadline. However, I did not miss the 1-year deadline.

Perhaps the best way is for you to communicate with Ms. Powless of CHRC. She knows why in 2007 she asked me to come to you, as well as why in 2006 they advised me to contact them after Employer's investigation.

CHRC has reserved a time for me, even if you allow Employer to use "untimely" as an excuse. There must be a reason why CHRC would like you to hear me before they proceed with theirs.

For all of the above reasons, I am requesting that the Employer's objection be overruled.

[Sic throughout]

**B. For the respondent and employer**

[12] The respondent responded on July 30, 2008, as follows:

...

*Although the employer appreciates the grievor's situation, the employer submits that she has offered no clear, compelling or cogent reason for the delay in filing her grievance.*

*Ms. Chan's grievance related to the employer's request to attend a fitness to work evaluation, [an] event that took place on November 16, 2005 as well as the allegation that the employer breached article 44 of the applicable Collective Agreement. The fact that she filed a harassment complaint, which led to a lengthy investigation, is irrelevant to the grievance as filed by Ms. Chan on April 17, 2008. It is in November 2005, that the grievor became aware of the facts that gave rise to her grievance and as such, the grievance is untimely by approximately 2 1/2 years.*

*In her letter dated July 22, 2008, the grievor claims she was unaware of the grievance process. The grievor also claimed that she was somehow "misled" in her interpretation of the direction provided by the Canadian Human Rights Commission (CHRC). In its letter to the grievor dated December 4, 2006, the CHRC clearly advised her of her right to file a grievance under the Public Service Labour Relations Act (PSLRA) in addition [to providing] her with a way of seeking additional information:*

*In your situation, the Public Service Labour Relations Act gives you the right to file a grievance on the issues you raise; the grievance can include allegations of discrimination. That being the case, the Commission is not accepting your complaint at this time, and suggests that you file your grievance through your union in order to address these issues. For your information, you will find the Public Service Labour Relations Board's website at the following address: [www.pslrb-crtfp.gc.ca/main\\_e.asp](http://www.pslrb-crtfp.gc.ca/main_e.asp) (emphasis is mine).*

*The CHRC in its December 18, 2007, letter to the grievor reiterates the content of the December 4, 2006, letter. It is the employer's position that the grievor knew as early as December 2006 of the existence of the grievance process and her right to grieve. The grievor did not file a grievance in or around December 2006 nor did she contact her union, despite the CHRC's recommendation.*



*Furthermore, following Ms. Mailer's letter of January 11, 2008, the grievor waited an additional 3 months before filing her grievance. This is indicative of the grievor's lack of diligence.*

*Moreover, given the fact the grievor availed herself of the harassment complaint mechanism as well as the recourse under the Canadian Human Rights Act within their respective time limits, the employer suggests that she knew or ought to have known of the grievance process and its prescribed delays at the very least since December 4, 2006. As such, the grievor should have contacted the PSLRB or a union representative for more information or direction.*

*It is the employer's submission that at all material times the grievor failed to exercise due diligence, that she knew or ought to have known of the recourse available under the PSLRA and her Collective Agreement and that she offered no clear, cogent and compelling reasons to explain a lengthy delay.*

*With respect to the union's argument that there is no prejudice to the employer, it is our position that the mere passage of time is in itself a prejudice. Furthermore, given the nature of the grievance, the accuracy of the facts as related by witnesses would be an essential part of the employer's evidence. As such, should the PSLRB decide to hear the matter, the employer's evidence would be greatly affected by fading memories of potential witnesses.*

*For all the above reasons, the employer respectfully requests that this matter be dismissed without a hearing for lack of jurisdiction.*

...

#### **IV. Reasons**

[13] This application for an extension of time is for a matter that should have been grieved by the end of 2005 (the event that gave rise to the grievance occurred on or about November 16, 2005). Even if one accepts that the applicant's lack of knowledge of the grievance process and the existence of the Board are factors to be taken into consideration in calculating the start of the time limits for filing a grievance, the applicant was advised by the CHRC of the need to use the grievance process in December 2006. There was no ambiguity in its letter to her. Consequently, any unproven phone conversations that the applicant had with the CHRC are not relevant to my determination. Therefore, at best, the applicant has missed her deadline for filing a grievance by, at the very least, fifteen months.

[14] The applicant argues that in her opinion, she has not missed the 25-day deadline for filing a grievance. She argues that because she filed a complaint with the CHRC twenty-four days after the termination of the employer's investigation into her harassment complaint, she is not outside the time limits. The applicant's argument is that she has not missed the deadline for filing a grievance under the grievance process set out in her collective agreement because she filed a discrimination complaint with the CHRC. A complaint filed with the CHRC under the terms of the CHRA is not the same thing as a grievance filed with the employer under the terms of the *PSLRA*. This Act clearly requires that a grievor file a grievance with the employer within a specified timeframe and the utilization of another process before another tribunal does not constitute the fulfilment of the requirement set out in the *PSLRA* to file a grievance. I note that the applicant's representative has not argued that her grievance is timely. Clearly, the grievance is untimely and the issue in this decision is whether or not I should exercise my discretion to grant an extension of time.

[15] For the reasons set out below, I have concluded that it is not appropriate to exercise my discretion to extend the time limits in this case.

[16] Prior Board jurisprudence has clearly established the basic criteria for determining whether or not discretion should be exercised and an extension of time granted:

- 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.

(*Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1).

[17] The applicant's arguments, set out by both herself and her representative, rely on three of the factors enumerated above: clear, cogent and compelling reasons to explain the delay, the due diligence of the applicant and finally, the balancing of injustice to the employee against the prejudice to the employer.

[18] The applicant argues that her illness justifies the delay that occurred in filing her grievance. Although illness can justify some delay in filing a grievance, the extent of the illness as described by the applicant does not justify the lengthy delay in filing a grievance. The grievor has not, in this case, presented the Board with sufficiently clear, convincing and cogent reasons related to her health to explain and justify the delay in filing her grievance.

[19] The applicant and her representative argue that she was diligent in pursuing this matter and set out in detail the steps she has taken in order to have the issue addressed. It is my conclusion that the applicant was less than diligent in pursuing her rights before this Board. As stated above, the applicant had been advised of her right to file a grievance at the latest in December 2006, but did nothing about it until April 2008.

[20] In the absence of clear, cogent and compelling reasons for the delay, the issue of prejudice to the employer does not need to be addressed. However, it is my conclusion that the lengthy delay of approximately fifteen months in this case would be a significant prejudice to the respondent.

[21] Even if the explanations proffered by the applicant are considered together, I have concluded that there are not sufficient reasons to extend the time limits.

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

*(The Order appears on the next page)*

**V. Order**

[23] The application for an extension of time (Board File No. 568-02-185) is dismissed.

[24] The reference to adjudication (Board File No. 566-02-2097) is closed.

October 27, 2008.

**Ian R. Mackenzie,  
Vice-Chairperson  
and adjudicator**