Date: 20090129

Files: 568-02-178 and 179

Citation: 2009 PSLRB 11

Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

CHRISTIAN JARRY AND CONSTANTINA ANTONOPOULOS

Applicants

and

TREASURY BOARD (DEPARTMENT OF JUSTICE)

Respondent

Indexed as
Jarry and Antonopoulos v. Treasury Board (Department of Justice)

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: Marie-Josée Bédard, Vice-Chairperson

For the Applicants: Marissa Pollock, counsel

For the Respondent: Cécile La Bissonière, Employer Representation Advisor

Decided on the basis of written submissions filed January 31, February 25, March 11, October 31, November 21 and December 8, 2008.

I. Application before the Chairperson

[1] Christian Jarry and Constantina Antonopoulos (the "grievors"), who are members of the Association of Justice Counsel ("the bargaining agent"), each filed a grievance on January 15, 2007. Their grievances were not referred to the final level of the grievance procedure within the prescribed lime limit. On November 23, 2007, they requested, through their counsel, an extension of that time limit from the employer, which was refused on January 7, 2008. On January 31, 2008, they applied to the Public Service Labour Relations Board ("the Board"), for an extension of the time limit to refer the grievors' grievances to the final level of the grievance procedure.

[2] On February 25, 2008, the employer submitted its reply to the application, in which it indicated that it was opposed to the application. On March 11, 2008, the grievors submitted a rebuttal. On October 31, 2008, and on November 21, 2008, the employer filed additional submissions and on December 8, 2008, the grievors also filed additional submissions. Concurrently to that exchange of correspondence and despite its refusal to grant the extension of time, the employer replied to the grievance at the final level of the grievance procedure on August 29, 2008. In its reply, it dismissed the grievance on the merits and reiterated the untimeliness of the reference of those grievances at the final level of the grievance procedure. On October 8, 2008, the grievors referred their grievances to adjudication.

[3] Under section 45 of the *Public Service Labour Relations Act* (the "*Act*"), 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* ("the *Regulations*") to hear and decide any matter relating to extension of time.

[4] This decision deals only with the application for an extension of time.

II. Background to the grievances

[5] The grievors, who are lawyers based in Montreal, were formerly part of the Federal Prosecution Service ("the FPS"). In December 2006, the FPS was dismantled, at which time the Office of the Director of Public Prosecutions ("the ODPP") was created. Lawyers who were part of the FPS when the ODPP was created were transferred to the ODPP. The grievors allege that before the ODPP was created they, along with a group of

Toronto lawyers, were "transferred out" of the FPS and, therefore, remained in the Department of Justice when the ODPP was created.

[6] The grievors and the Toronto lawyers, who were in the same position, filed a grievance on January 15, 2007, challenging their alleged unilateral transfer out of the FPS as a result of which they were not transferred to the ODPP when it was created. The grievors contend that remaining in the Department of Justice has an adverse impact on their work opportunities and career advancement. In her letter of January 31, 2008, counsel for the grievors questioned the "transfer" in the following terms:

. . .

> *Through the grievances, the Toronto and Montreal grievors allege,* inter alia*, that the "transfer" was made to circumvent the intention and operation of the* Federal Accountability Act*, whereby all employees of the FPS were automatically to become members of the ODPP. The grievances further assert that the purported removal of these lawyers from the FPS on the eve of the creation of the ODPP constituted unjustified differential treatment which had a negative impact on these lawyers as compared to the majority of their colleagues who, by virtue of being part of the ODPP, were not as limited in their work opportunities. Finally, the grievors assert through their grievances that their purported transfer violated the prohibition under the* Public Service Employment Act *against deploying persons without their consent, and that this purported transfer was also contrary to the August 22, 2006 memo of the Deputy Minister, which stated that "regional counsel doing exclusively IAG litigation" would remain with the Department of Justice. None of the Montreal or Toronto grievors were, at the relevant time, performing exclusively IAG litigation.*

. . .

[7] Although not contesting the fact that the grievors were not transferred to the ODPP, the employer presented, as follows, its view of the events:

Excerpt of the February 25, 2008, letter:

. . .

> *These three lawyers were working for the Extradition sector in Montreal. Prior to the creation of the Office of the Director of Public Prosecution in December 2006, the employer*

> *retained their sector within the department of Justice Canada.*
>
> *These grievors filed grievances because they were not transferred to the newly formed Office of the Public Prosecution Director, as they remained within the Department of Justice.*
>
> . . .

Excerpt of the November 20, 2008, letter

> [Translation]
>
> . . .
>
> *Here is a brief history of the situation.*
>
> *On April 11, 2006, the Government of Canada tabled the* Federal Accountability Act*, which received royal assent on December 12, 2006. As of that date, the* Director of Public Prosecutions Act *and the Office of the Director of Public Prosecutions (ODPP), which is independent of the Department of Justice, were created. Some lawyers from the former Federal Prosecution Service of the Department of Justice were transferred to the new Office of the Director of Public Prosecutions, with the exception of the complainants in Montreal and certain lawyers in Toronto who remained with the Department of Justice.*
>
> . . .

[8] The Montreal and the Toronto grievors also filed a complaint under section 190 of the *Act*.

III. Relevant facts with respect to the delays

[9] The request for an extension of time relates to the time limit for referring the grievances to the final level of the grievance procedure. It is not disputed that the grievances were originally filed in a timely manner at the first level of the grievance procedure.

[10] Paragraph 68(2)(*a*) of the *Regulations* provides that a grievance may be presented at each succeeding level "no later than 15 days after the day on which the decision of the previous level was received. . . ." In her letter of January 31, 2008, counsel for the grievors presented the course of events that led to the filing of the request for an extension of time as follows:

. . .

(ii) First Step Grievance Meeting

Because the Toronto and Montreal grievances arose out of the same facts and raised identical issues, the parties agreed that they should all be dealt with together as a single group. The first step grievance meeting was held on March 22, 2007. At this meeting, the employer was represented by Terrance McCauley from the Ontario Regional Office and Solange Marion from the Quebec Regional Office.

(iii) Employer Response at the First Step

The employer denied the grievances at the first step. Through discussions between myself and Terrance McCauley, it was agreed that the second step of the grievance procedure should be skipped and that the grievances should proceed directly to the final step. The final step grievance was scheduled for November 2, 2007, but was ultimately adjourned in light of settlement discussions that were taking place as part of a mediation being held in connection with the section 190 complaint referred to above. As part of the mediation, the parties were attempting to resolve both the section 190 complaint and the Toronto and Montreal grievances. The Montreal grievors participated in the mediation by teleconference on October 18, 2007.

2. Discovery of Error in Transmittal of the Grievances

On October 22, 2007, counsel for the AJC received an e-mail from the employer in connection with the final step grievance meeting then scheduled for November 2, 2007. The email referred only to the Toronto grievors, and not to the Montreal grievors. It then emerged that the employer was expecting to be meeting at the final step only on the Toronto grievances, and not on the Montreal grievances, because the employer had only received transmittal forms moving the grievances to the next step from the Toronto grievors. Upon investigation, the AJC learned that although the grievance transmittal forms were duly completed on May 15, 2007, they were not forwarded to the employer. Unfortunately, when the transmittal forms were faxed to AJC counsel on behalf of the Montreal grievors, counsel believed that the employer had already received its copies and so did not forward them to the employer. This error was discovered six months after the deadline for the transmittal of the grievance forms had passed, just before the scheduled grievance meeting.

> *Upon learning of this error, the AJC contacted the employer and requested an extension of time limits. Following several exchanges of correspondence, the employer informed the Union on January 7, 2008, that the request had been denied.*
>
> [Emphasis in the original]

[11] The employer does not dispute these facts, but its representative added the following elements:

- On April 20, 2007, the grievors received the first-level reply to their grievances;
- On May 15, 2007, the grievors had their grievance transmittal forms signed by an acting manager, but did not leave a copy of the transmittal forms with the acting manager;
- On June 14, 2007, a labour relations advisor advised the grievor's counsel that the grievances from the Toronto Regional Office had been received;
- On October 23, 2007, the employer informed the bargaining agent that it considered the Montreal grievances to be abandoned; and
- On January 28, 2008, the employer received the grievors' transmittal forms.

[12] The employer contends that since the grievors received the employer's reply on April 20, 2007, they had until May 6, 2007, to present their grievances at the final level. Therefore, when they signed their transmittal forms on May 15, 2007, and transmitted them to their counsel, they were already past the time limit.

[13] In her letter to the Board of March 11, 2008, which was sent in reply to the employer's letter of February 25, 2008, counsel for the grievors added the following facts:

. . .

> *The grievors were represented by us as counsel at the first step grievance meeting held on March 22, 2007. The decision denying the Toronto grievors' grievances at the first level was received by us as counsel on May 3, 2007, from Terrence McAuley. The deadline for submitting the grievance transmittal forms was thus May 17, 2007. Although the decisions denying the Montreal grievors' grievances at the first level were dated April 20, 2007, they were not received*

> *by us as counsel until May, 14, 2007, from Micheline Van Erum. Nevertheless, because the Toronto and Montreal grievors, were by agreement of both parties, to be treated as a single group, the AJC determined that the deadline for submitting the grievance transmittal forms for all grievors was May 17, 2007.*
>
> *It is important to note that on May 10, 2007, we sent an e-mail to Terrence McCauley and Solange Marion, the employer's representatives for the Ontario Regional Office and Quebec Regional Office, respectively, which stated in part as follows:*
>
> > *In addition, please note that we are assuming that any applicable time limits would start to run from the time we received the responses and the transmittal forms, which would make the deadline May 17, 2007.*
>
> *A copy of this email is attached hereto as Appendix "A". This e-mail was copied to all of the Toronto and Montreal grievors. The employer did not contradict or correct this statement.*
>
> . . .
>
> *On May 15, 2007, we received the Montreal grievors' transmittal forms. These transmittal forms were not provided to the employer because it was erroneously assumed that the employer had already received them. This error was not discovered until October 23, 2007.*
>
> . . .
>
> [Emphasis in the original]

IV. Summary of the arguments

A. For the grievors

[14] Counsel for the grievors insists on the fact that there is no issue with respect to the timeliness of the grievances at the initial filing stage. With respect to the referral of the grievances to the final level of the grievance procedure, she states that the grievors filed the transmittal forms within the time limit but that, due to an administrative error, the transmittal forms were not forwarded to the employer. Counsel for the grievors further states that this error was not discovered until shortly before the parties were scheduled to convene in a final-level grievance meeting. In her letter of January 31, 2008, counsel for the grievors submitted the following:

> *None of the Montreal grievors ever intended to abandon their grievance. Indeed, the Toronto and Montreal grievors remain complainants in the section 190 complaint which is before the Board and which arises out of the exact same set of facts as those which give rise to the Toronto and Montreal grievances. The Montreal grievors never did anything to suggest to their managers or anyone else that they were no longer objecting to the employer's actions.*

[15] Counsel for the grievors suggests that the Board should exercise its discretion under section 61 of the *Regulations* and allow the requested extension of time. In her letter of January 31, 2008, counsel for the grievors outlined that the Board usually considers the following factors when considering whether to extend a time limit:

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;
- balancing the injustice to the applicant, in denying an extension, against the prejudice to the respondent in granting an extension; and
- the chance of success of the grievance.

[16] Counsel for the grievors further submitted that the weight to be attributed to each factor depends on the circumstances of each case ". . . with a view to due process and fairness for each party."

[17] Applying those factors to this case, counsel for the grievors argued the following:

> **(i)The Grievors Were Diligent After Discovering the Delay**
>
> *As noted, the delay was caused by an administrative error. The grievors completed the grievance transmittal forms in May, 2007. Although the error was not discovered until some months later, the employer was alerted to the problem when it came to the attention of the AJC.*
>
> *Given the ongoing (and pending) nature of both the Toronto grievances and the section 190 complaint, both of which arise out of the same facts as the Montreal grievances, the length of the delay is not significant.*
>
> **(ii) The injustice to the Grievors Outweighs any Prejudice to the Employer**

> *A refusal to extend time limits in the circumstances of this case results in injustice to the grievors which is disproportionately greater than any conceivable prejudice to the employer in granting the extension. As noted above, the Montreal grievances were initially filed in a timely manner. Furthermore, they were amongst a group of grievances, all dealing with the same substantive issues, which included companion grievances from LAs in Toronto. The employer dealt with all of the grievances (i.e. all of the Toronto and Montreal grievances) as one group at the first step. The employer continued to deal with the grievances as a single group even at the final step (the final step grievance meeting, which, as noted above, was scheduled for November 2, 2007 but was ultimately adjourned, was, even in the employer's view, a meeting to deal with all of the Toronto grievances as one group). Thus, it is clear that at all relevant time, right up to today, the employer has been aware that the identical substantive issue raised in all of the grievances is a live one. The employer has never had any cause to believe that this generic issue has been put to rest. Indeed, quite apart from the grievances, all of the grievors are also involved in the section 190 complaint before the Board. The Montreal grievors are all named in this complaint. Where, as in this case, the substantive issue is, to the employer's knowledge, clearly continuing to be advanced by the individuals in question, it cannot be said that the employer has suffered any prejudice as a result of not having earlier received the grievors' transmittal forms. Indeed, it cannot be said that the employer reasonably drew the conclusion that the issue was no longer a live one as far as the Montreal grievors were concerned.*
>
> *By comparison to the lack of prejudice caused to the employer by an extension of time limits, the injustice cause to the grievors by denying the extension of time is more severe. The issues raised by these grievances for the affected individuals are serious, negatively impacting on the grievors' work opportunities and career advancement. There would therefore be significant prejudice to the Montreal grievors if their grievances were to be prevented from proceeding on the merits. Nor, it is submitted, would refusing to entertain the grievances serve any labour relations purpose.*
>
> [Emphasis in the original]

[18] Counsel for the grievors contends that the Board has broad discretion to grant an extension of time that should be exercised under the circumstances, and relies on the following cases: *Richard v. Canada Revenue Agency,* 2005 PSLRB 180, *Guittard v. Staff of the Non-Public Funds Canadian Forces*, 2002 PSSRB 18, *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59, *Trenholm v. Staff of the*

Non-public Funds, Canadian Forces, 2005 PSLRB 65 and *Vincent v. Treasury Board (Solicitor General - Correctional Services)*, PSSRB File No. 166-02-21022 (19910515).

[19] In her letter of January 31, 2008, counsel for the grievors also submitted that the grievances have merits:

> *The Board has held that the applicant need only demonstrate an "arguable case", since it is not appropriate on an application for an extension of time to engage in a comprehensive review of the merits of the grievance:* Trenholm, supra *at para. 84. The AJC submits that the grievors have more than met this threshold and rely on this regard, on the text of the grievances and the section 190 complaint.*

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

[20] The employer agrees with the grievors that the factors to be considered by the Board were set in *Trenholm*. However, it submitted that in this case, the application of those criteria should lead the Board to refuse to grant the extension of time. In her letter of February 25, 2008, the employer's representative presented her arguments in the following terms:

> Reasons for delay
>
> *The union explained the delay in transmitting the forms to the final level as an error on their part but did not give further details. As states above, the employees and the union were both late in transmitting the forms.*
>
> Length of the delay
>
> *April 20, 2007: the employees received their first level grievances reply.*
>
> *May 6, 2007: last day until which the employees were allowed to transmit their grievances to the next level.*
>
> *May 15, 2007: The grievors from the Quebec Regional Office had the transmittal forms signed by an Acting manager, Chantal Sauriol and transmit their grievances to Marisa Pollock, SGM, in Toronto. The employees did not leave a copy of the transmittal forms to the acting manager on that day.*
>
> *June 14, 2007, Pascal Arcand, Labour Relations Advisor, indicated to Ms Pollock that the grievances from the Toronto Regional Office have been received at the National Office.*

> *October 23, 2007: Ms Pollock realized that the grievances from the Quebec Regional Office were not transmitted to the final level.*
>
> *November 23, 2007: Ms Pollock requested an extension of the time limits for the grievances from the Quebec Regional Office to the Associate Deputy Minister, Ms. Donna Miller.*
>
> *January 28, 2009: Ms Pollock transmitted the Grievance Transmittal Forms for the Quebec Regional Office grievances to the Associate Deputy Minister, Ms. Donna Miller.*
>
> *January 31, 2008: Ms. Pollock requested en extension of the time limits for the grievances from the Quebec Regional Office to the Public Service Labour Relations Board.*
>
> Diligence of the grievors
>
> *The employees transmitted their grievances to the union nine (9) days after the time limit expired, on May 6, 2007.*
>
> Balance of injustice-Employee/Employer
>
> *The employees still have the Section 190 complaint that they filed under PSLRA. Therefore, the employees are not without a remedy.*
>
> Chance of success
>
> *The employer is of the opinion that the Board has no jurisdiction to hear these grievances as the employer retains the right to assign duties and to organize the federal public administration, pursuant to section 7 of the PSLRA In addition, the grievor have not been penalized in any way as they have retained the same level and the same salary as well as the same job description.*
>
> [*Sic* throughout]

[21] With respect to the jurisprudence referred to by the grievors, the employer suggests that the facts of this case are distinguishable from the facts in *Trenholm*, *Guittard* and *Vincent,* in which the Board granted the requests for extension of time.

V. Grievors' rebuttal arguments

[22] In her letter of March 11, 2008, counsel for the grievors replied as follows with respect to the employer's allegation that the grievors were already past the time limit when, on May 15, 2007, they signed the transmittal forms and sent them to their counsel:

> *Pursuant to subsection 68(1)(a) of the Regulations, a grievor may present an individual grievance at each succeeding level no later than 15 days after the day upon which the decision of the previous level was received. The grievors were represented by us as counsel at the first step grievance meeting held on March 22, 2007. The decisions denying the Toronto grievors' grievances at the first level was received by us as counsel on May 3, 2007, from Terrence McAuley. The deadline for submitting the grievance transmittal forms was thus May 17, 2007. Although the decisions denying the Montreal grievors' grievances at the first level were dated April 20, 2007, they were not received by us as counsel until May 14, 2007, from Micheline Van Erum. Nevertheless, because the Toronto and Montreal grievors were, by agreement of both parties to be treated as a single group, the AJC determined that the deadline for submitting the grievance transmittal forms for all grievors was May 17, 2007.*
>
> *It is important to note that on May 10, 2007, we sent an e-mail to Terrence McCauley and Solange Marion, the employer's representatives for the Ontario Regional Office and Quebec Regional Office, respectively, which stated in part as follows:*
>
> > *In addition, please note that we are assuming that any applicable time limits would start to run from the time we received the responses and the transmittal forms, which would make the deadline May 17, 2007.*
>
> *A copy of this email is attached hereto as Appendix "A". This e-mail was copied to all of the Toronto and Montreal grievors. The employer did not contradict or correct this statement. The AJC and individual grievors therefore reasonably proceeded based on the understanding that the deadline for submitting the grievance transmittal forms to the final step of the grievance procedure was, as stated in the email, May 17, 2007.*
>
> *On May 15, 2007, we received the Montreal grievors' transmittal forms. These transmittal forms were not provided to the employer because it was erroneously assumed that the employer had already received them. This error was not discovered until October 23, 2007.*
>
> [Emphasis in the original]

[23] With respect to the employer's argument that the grievors were not left without remedy since they still had their complaint under section 190 of the *Act*, counsel for the grievors submits that the issues in the two proceedings are different as follows:

> *Thus, the two parallel proceedings (grievances and Board complaint) will have distinct focuses, will examine distinct statutory regimes and lead to distinct remedies if any. Given the facts that the proceedings are governed by different statutes, the affected individuals may, based on identical facts, have a remedy pursuant to one statutory proceeding but not the other. In these circumstances, it cannot be said that the individuals are not being denied access to a remedy should the Board not grant an extension of time limits. In fact, the Board proceedings will not likely even consider the question of deployment without consent contrary to the PSEA, while the grievances do provide a vehicle for that determination, as well as the possibility of a remedy for breach of the PSEA.*

VI. Employer's additional submissions

[24] In its letter of November 20, 2008, the employer reiterated its position and insisted on the fact that the time limit starts when the grievors receive the employer's reply to the grievances and not when the bargaining agent receives the response. The employer also reiterated that the chance of success of the grievances must be considered and that an adjudicator does not have jurisdiction to hear the merits of the grievances. On that point, the employer's representative articulated her position as follows:

> [Translation]
>
> . . .
>
> *. . .Before the* Act *came into force, the complainants were notified that a national decision had been made that extradition and international mutual assistance matters would remain with the Department of Justice. Paragraph 7(1)(*b*) of the* Financial Administration Act *allows the employer to organize the federal public administration. In addition, no change has been made to the complainants' conditions of employment. They are still covered by the same work description as they were previously. In addition, when a position opens at the Office of the Director of Public Prosecutions (ODPP) or at the Department of Justice, employees of both entities may apply. Therefore, we submit that an adjudicator does not have jurisdiction to transfer these employees from the Department of Justice to the ODPP.*

VII. Grievors' additional submissions

[25] In her letter of December 8, 2008, counsel for the grievors replied as follows:

. . .

> *. . .There is no jurisprudential support for the proposition that the likelihood of success of a grievance at arbitration has any bearing on this exercise of discretion. Indeed, it would be contrary to the principle of natural justice for the Board, at this stage, to pronounce on the merits of a grievance it has not yet heard. This is particularly so since substantively identical grievances, raising no timeliness issues (the "Toronto Grievances"), have been referred to the Board for determination.*

VIII. Reasons

[26] Paragraph 61(*b*) of the *Regulations* provides that the Chairperson has the discretionary power to extend the time limits for presenting a grievance at any level of the grievance procedure "in the interest of fairness." Paragraph 63(*b*) of the *P.S.S.R.B. Regulations and Rules of procedure* empowered the Public Service Staff Relations Board ("the former Board") to extend time limits ". . . on such terms and conditions as the Board consider[ed] advisable." In *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, the former Board developed criteria for determining under which circumstances a time limit should be extended. Although the language differs in both versions of the regulations, the criteria that were developed by the former Board referred to principles that reflect the principle of fairness that guides the Chairperson when applying section 61 of the *Regulations*. It is well established that those criteria, to which both parties referred, apply when determining whether an extension of time should be granted "in the interest of fairness." The criteria are the following:

> 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 the extension; and
>
> e) the chances of success of the grievance.

[27] I agree with Vice-Chairperson Pineau, who discussed in *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81, the weight to be given to each of the criteria:

. . .

> *These criteria are not always given equal importance. The facts of a given case will dictate how they are applied and how they are weighted relative to each other. Each criterion is examined and weighed based on the factual context of the case under review. In some instances, some criteria may not be relevant or the weight may go to only one or two of them.*

. . .

[28] I will now apply these criteria to this case.

A) <u>Clear, cogent and compelling reasons for the delay</u>

[29] The grievors filed grievances that challenge the employer's decision to transfer their section out of the ODPP, and the grievances were originally filed in a timely manner. Their intent to contest the employer's decision was clear from the outset, and nothing leads the Board to conclude that, at any point, they changed their position.

[30] I agree with the employer that both the grievors and their counsel were late in transmitting the relevant forms when they referred the grievances to the final level of the grievance procedure. I conclude, however, that, on both occasions, the delays were due to an error made in good faith by the grievors' counsel and that the grievors should not be penalized by those errors.

[31] I agree with the employer that paragraph 68(2) of the *Regulations* implies that the time limit to present a grievance at a level other than the first level of the grievance procedure starts when the grievor, not his or her counsel, receives notice of the employer's reply from the previous level. Therefore, if the grievors received the employer's reply on April 20, 2007, they had until May 6, 2007, to present their grievances at the final level. Thus, when they signed their transmittal forms and sent them to their counsel on May 15, 2007, they were already beyond the prescribed time limit. However, I consider that the grievors sent their grievances within the time limit that they reasonably thought was applicable. In that regard, the grievors had received a copy of the May 10, 2007, email that their counsel sent to the employer's representative, in which she indicated that she was assuming that any applicable time

limit would start when she had received the responses, which would make the deadline May 17, 2007. In taking that position, I believe that counsel for the grievors misread paragraph 68(2) of the *Regulations* and unintentionally misled the grievors into thinking that they had until May 17, 2007, to send their referral forms.

[32] The fact that the documents received by the grievors' counsel on May 15, 2007, were not forwarded to the employer was also due to an administrative error. Counsel for the grievors submitted that she had mistakenly thought that the transmittal forms had already been transmitted to the employer. When counsel realized the mistake, she diligently requested an extension of time from the employer.

[33] In light of the circumstances, I consider that the grievors have clear, cogent and compelling reasons for the delay.

B. The length of the delay

[34] Counsel for the grievors realized that the grievances had not been transmitted to the final level almost six months after the deadline, and a month later she requested an extension of time from the employer. At first glance, the delay may appear significant. However, the delay has to be examined within the context of the process that was being followed with respect to the Toronto grievances. The Montreal grievances raise issues that are identical to the issues raised by the Toronto grievors. When counsel for the grievors first requested an extension of time from the employer, on November 23, 2007, the final-level meeting to discuss the Toronto grievances had not yet been held. Therefore, I conclude that at that time, the length of time under the circumstances was not unreasonable. The time that has passed since the grievors' initial request is due to the employer's refusal to allow the extension of time. Therefore, I find that this additional delay should not be considered.

[35] I further consider that the nature of the grievances do not raise questions of fact for which the passage of time could be prejudicial to the employer. I therefore conclude that under the circumstances, the delays are not significant.

C. The due diligence of the grievors

[36] It is clear that, at all relevant times, the grievors acted diligently. They respected the time limits as indicated to them by their counsel and sent their transmittal forms

within the period that they thought was applicable. They acted consistently throughout the process and never signalled that they had decided to abandon their grievances.

D. Balancing the injustice to the applicants against the prejudice to the employer

[37] In this case, I conclude that the prejudice and the injustice that the grievors would suffer should I not grant the extension outweighs any prejudice that the employer would suffer. As discussed earlier, I do not consider that the employer has been prejudiced by the additional delays. On the other hand, if the extension of time is denied, the grievors will be prevented from presenting the merits of a grievance that, from their perspective, may have an important impact on their careers.

E. Chance of success

[38] This point addresses whether the grievors have an arguable case. In assessing this factor, I must not engage in a comprehensive review of the merits of the grievances. In this case, I cannot conclude on the face of the grievance that the grievors do not have an arguable case. In assessing this factor, I also take into consideration the fact that identical grievances are still pending, and have been referred to the Board and have yet to be heard.

[39] For all of the above reasons, I conclude that the delays that occurred in referring the grievances to the final level of the grievance procedure were due to errors made in good faith by counsel for the grievors. I further conclude that, in light of their diligence, the grievors should not be deprived of their recourse or otherwise penalized by their counsel's error.

[40] Given that the employer replied to the final level of the grievance procedure and that the grievances were referred to adjudication, I conclude that all steps are completed and the grievances can be scheduled for a hearing on the merits.

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

(The Order appears on the next page)

IX. Order

[42] The application for extension of time is allowed, and the grievances are deemed to have been validly referred to the final level of the grievance procedure.

[43] I direct the registry of the Board to schedule a hearing on the merits of the grievances.

January 29, 2009

Marie-Josée Bédard,
Vice-Chairperson