.Date: 20091124

Files: 568-02-167, 168 and 183

Citation: 2009 PSLRB 157

Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

TERRY RICHE

Applicant

and

TREASURY BOARD
(Department Of National Defence)

Respondent

Indexed as
Riche v. Treasury Board

In the matter of applications for extensions 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: Alan Phillips, Professional Institute of the Public Service of Canada

For the Respondent: Richard Fader, counsel

Heard at Halifax, Nova Scotia,
January 28 and 29, 2009.

I. Applications before the Chairperson

[1] Pursuant to section 45 of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the Chairperson 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 extensions of time.

II. Nature of the matters

[2] This decision concerns an application pursuant to paragraph 61(*b*) of the *Regulations* to extend the time limit for the transmittal of grievance LAB-07-01-A-CPSC-03554-0382, disputing a three-day suspension, to the second level of the grievance process (PSLRB file No. 568-02-183). The first-level reply of the Department of National Defence ("the employer") was received on March 3, 2008. The union representative received it on March 6, 2008. Although the second-level transmittal document was faxed on March 17, 2008, the applicant, Terry Riche, did not submit it to his supervisors until April 1, 2008, nine days after the required transmittal date specified in the collective agreement.

[3] This decision also concerns an application under paragraph 61(*b*) of the *Regulations* to extend the time limit to file two grievances (PSLRB file Nos. 568-02-167 and 168) disputing a one-day suspension dated March 5, 2007 and a two-day suspension dated April 4, 2007, respectively. The Board received the applications on August 15, 2007.

[4] The grievances under review are related to progressive disciplinary actions against the applicant. It is alleged that the failure to file or transmit these grievances within the time limits specified in the collective agreement was due to the applicant's medical conditions, described later in this decision, which prevented him from fully appreciating the requirement to file grievances within the period specified in the collective agreement. The applicant's evidence is that he was confused by the parallel paperwork concerning the three grievances that are the subject of this decision and other ongoing grievances. On April 1, 2008, the applicant filed an "omnibus" grievance disputing all previous and continuous discipline concerning his attendance at work.

[5] The employer takes the position that a disciplinary hearing was held for each disciplinary action grieved, that the applicant was represented by either his local or the regional union representative and that his right to grieve was made clear in each disciplinary letter. The applicant's union representative was copied on each letter. Therefore, the employer objects to all three applications for extensions of time.

[6] The issue to be decided is whether I should exercise my discretion to extend the periods to file or transmit each of the three grievances.

III. Summary of the evidence

A. For the applicant

[7] The applicant has been a federal government employee since 2000 and has been employed by this employer since March 6, 2006. He is a naval architecture project engineer in the Naval Architecture section of The Fleet Maintenance Facility Cape Scott.

[8] The applicant left his family and friends in Ottawa to accept this employment opportunity. The difficulties caused by the separation from his social ties caused him to become anxious and eventually clinically depressed. He sought treatment and was prescribed medication. A change of supervisors coincided with the beginning of the applicant's attendance problems. Starting August 28, 2006, the applicant was counselled several times about his use of sick leave and his repeated lateness and absence from work. He was advised that continuing that behaviour would lead to disciplinary action. A letter of reprimand was issued on September 8, 2006. His erratic attendance at work became the subject of investigations into "alleged misconduct." On February 21, 2007, the applicant was issued a second letter of reprimand for his failure to report his absence from work on two separate days in a timely manner. The letter states that because the absences were justified by a medical confirmation, the absences themselves would not constitute misconduct.

[9] On March 5, 2007, the applicant was issued a one-day suspension for failing to report to work on three separate occasions. On April 4, 2007, the applicant was issued a two-day suspension for failing to report to work on March 23, 2007. On June 5, 2007, the applicant was issued a notice concerning his frequent absence from work. On June 28, 2007, the applicant received a five-day suspension for a one-day absence on June 13, 2007.

[10] On June 29, 2007, the applicant sent an email to his supervisor, Lieutenant Robyn Locke, stating as follows his wish to grieve:

. . .

> *I wish to grieve the decision to suspend me and the process by which the Letter of investigation was issued. The application of these rules is causing too much financial and workplace stress and as such constitute a transgression against my Human Rights. The onus for this is my position that the application of this harsh form of discipline is at least partly if not wholly responsible for the high rate of absenteeism. This is supported in many HR documents that I have reviewed. It is well established and* [*sic*] *known fact that workplace stress causes absenteeism.*

[11] The applicant continued to receive notices of alleged misconduct due to absenteeism. On December 11, 2007, the applicant was given a three-day suspension for misconduct due to unjustified absences on November 15 and 16, 2007. He continued to receive notices of alleged misconduct for repeated absences throughout 2008. The applicant explained that, during that period, his anxiety, depression and other medical problems caused him to have trouble getting up in the morning to go to work. He was also experiencing side effects from his medication. He consulted the Employee Assistance Program (EAP) on two or three occasions, but it was of little assistance as he was referred back to his health professional and to a co-worker trained in counselling.

[12] The employer first sought information about the applicant's fitness for work from his health practitioner on December 15, 2006. Dr. Alison Wiebe replied that the applicant was struggling with medical issues and that he needed to remain off work until the end of January 2007. On April 3, 2007, the employer requested that the Occupational Health and Safety Agency (OHSA) carry out a special fitness-to-work assessment to determine the applicant's fitness to work and whether workplace accommodation was required. The applicant did not attend that appointment. The applicant's explanation was that he understood that it was just one more step in the disciplinary process and that he did not want to compromise staying employed. On June 22, 2007, after the applicant consented, the employer wrote once more to the OHSA to schedule an appointment for him. In July 2007, the applicant underwent a sleep study. He was diagnosed with a severe case of sleep apnoea. The applicant

followed the recommended treatment, but it only partially relieved his symptoms. The applicant informed the employer of his illness.

[13] On August 9, 2007, the OHSA provided a preliminary evaluation that the applicant's medical issues could have resulted in the behaviour that the employer had observed but specified that further medical information was required. Nonetheless, the OHSA noted that the applicant appeared to understand the consequences of missing work or arriving late to work but that it may not have been the case in the past. On October 2, 2007, after obtaining information from the applicant's treating physician, the OHSA confirmed its earlier observations but added that the applicant's medical issues had been major stressors in his life and that anything that could help relieve stress would be of benefit to him. The OHSA confirmed that the applicant was fit for his substantive position without restrictions.

[14] On February 1, 2008, the OHSA provided the employer with another opinion about the applicant after receiving a specialist's report. Although the Medical Officer considered the applicant to be fit to work without limitations, she stated that the applicant had had health difficulties in the past year because of stress issues. The problem was a vicious cycle of stress issues leading to medical issues that led to work-related problems and in turn to more stress issues. The applicant was found to understand the consequences of his health issues on his work. The Medical Officer was of the view that the applicant would be able to improve his attendance once he had his medical issues under control. She recommended that his work performance be handled through the usual administrative tools rather than with further medical evaluation.

[15] In response to the employer's request on August 11, 2007 for a further assessment of the applicant's fitness for work, Dr. Wiebe replied on October 8, 2008, that the applicant had had ongoing medical problems for a number of years that could have prevented him from attending work and that could have affected his judgment. Due to the nature of his symptoms in the past, his long-term prognosis remained unknown.

[16] In the meantime, the applicant's financial situation deteriorated significantly. He was netting less and less pay because he had run out of sick leave, even though the employer had advanced him a full year of sick leave credits in December 2006. As a consequence, every additional day taken as sick leave was deducted from his paycheque, and the employer recovered not only the advance of sick leave credits but

also deducted pay for days imposed as disciplinary measures. In 2007, the applicant was barely receiving one-half of his paycheque. The applicant eventually had to resort to living in a run-down rooming house that did not have a telephone. When he called work in the morning to report an absence or lateness, he would have to get up and use a pay phone at a distance from the rooming house, something he had great difficulty doing. He took the bus to work, but there were often delays on the bus route, which caused him to be late.

[17] On April 1, 2008, the applicant filed an omnibus grievance contesting the sequence of disciplinary measures and the entire administrative process for imposing discipline, on the basis that the measures and the process were misguided given the effects of his illness and the stressors in his life.

[18] Gordon Grant is a shop steward for the Professional Institute of the Public Service of Canada (PIPSC). On August 25, 2006, Mr. Grant met the applicant during a meeting with the employer concerning the conditions that the employer was imposing to control the applicant's absenteeism. No grievance was discussed. The applicant appeared to be exhausted and disturbed by the employer's action. The applicant explained that he had health issues and that he was stressed because of his move to Halifax and asked for leniency. Mr. Grant attended a number of subsequent meetings where the employer alleged misconduct because of the applicant's absenteeism. The discipline discussed at each meeting was subsequently confirmed in a written letter that was sent to the applicant through the internal mail system. Mr. Grant usually got copies. Mr. Grant advised the applicant about filing grievances. The applicant told Mr. Grant that he considered the ongoing monitoring of his absence as a form of harassment. The applicant admitted that the employer had a good case against him. According to Mr. Grant, the applicant's attendance was poor during summer 2006, but after that, he really tried to improve. His attendance in summer 2007 was good, but at each disciplinary meeting, the applicant was reminded of his previous poor attendance, which served only to discourage him.

[19] Mr. Grant and the applicant met with Alan Phillips, the PIPSC's regional representative, on March 22, 2007, about the employer's refusal to accept the applicant's medical condition as the basis for his absenteeism. The employer insisted that the applicant go to the OHSA for an assessment. Mr. Grant and Mr. Phillips, as PIPSC officers, convinced the applicant to attend an OHSA assessment.

B. For the employer

[20] Paul Hartifen is the human resources manager for Fleet Maintenance in the Atlantic. He explained that the progressive discipline imposed on the applicant was meant to correct what was considered to be undesirable behaviour. The applicant visited Mr. Hartifen in December 2006 as he was upset with the continuing discipline concerning his attendance at work. Mr. Hartifen suggested to the applicant that some sick leave be advanced to him so that he could obtain some medical assistance and return to work with better attendance. Mr. Hartifen also granted the applicant a change in working hours so that he could start later in the day. Part-time work was offered, but the applicant declined as he needed more income to support his family. As more medical information became available, the employer offered the applicant a moratorium whereby discipline would be withheld for a month if he would attend counselling paid for by the employer. The applicant's attendance improved until the last day of the moratorium, when the applicant did not show up for work or call in. During one of the subsequent counselling sessions, the applicant was offered some time off work to take advantage of the gymnasium at work if it would help.

[21] The applicant's issues were viewed differently by his health professional (who considered his condition to be health related) and by human resources (who considered his condition to be stress related). In March 2008, the fact that his innocent absenteeism could jeopardize his employment came to the forefront. It was suggested to the applicant that he consult his union. The employer wanted the applicant to seek medical help. The applicant was told that, if he did not improve his absenteeism, he was risking termination. The applicant's attendance improved significantly after that.

[22] In Mr. Hartifen's view, poor attendance is undesirable behaviour that is culpable in the sense that an employee knowingly fails to notify his supervisor of his absence and knows that it is wrong to do so. The employer cannot operate without knowing when an employee is going to be at work. According to Mr. Hartifen, the applicant believed that he was to go to work only when he could and that he was not accountable for his actions. Mr. Hartifen admitted that management knew that the applicant suffered from several medical conditions and that he was taking medication to treat depression but hoped that the recommended treatment concerning sleep apnoea would improve his attendance at work.

IV. Summary of the arguments

A. For the applicant

[23] The applicant submits that the stress concerning his attendance at work commenced with the arrival of Lieutenant Locke as his supervisor. Although Lieutenant Locke was aware of his medical and mental illness, he bombarded the applicant with letter after letter alleging misconduct and threatening discipline. In December 2006, the applicant met with Mr. Hartifen. The meeting resulted in an alleviation of some of the work stressors. Even with Mr. Hartifen's assistance in advancing sick leave and changing his work hours, the applicant's anxiety and depression increased as his financial situation got worse. As discipline progressed, he felt that he was unable to react, other than to think that "they got me again."

[24] Each letter that the applicant received suggested that he avail himself of the service of the EAP. He did so only to discover that he had to tell his story to another Department of National Defence employee, who in turn would refer him to counselling or to a psychologist. Since the applicant had to pay the money up front for the services, he could not afford them. His illness prevented him from making rational decisions.

[25] The applicant points out that all the medical opinions state that his past behaviour could be explained by his many medical conditions. The latest opinion from his health professional states that he could relapse in the future. While the applicant may be able to return to work without limitations and can be dealt with administratively, the applicant must deal with past discipline. The applicant now understands the requirement to file grievances and transmittal documents on time, but he reached that understanding only recently. The applicant was successful in having his five-day suspension overturned. His three-day suspension is still being processed. As there were several grievances in the works, the applicant was confused by the transmittal documents and should not be penalized. He has demonstrated all along his intention to present grievances for each of the disciplinary actions. The applicant wishes to have the opportunity to prove that his absence was not due to wilful misconduct and thus wishes the opportunity to reverse the progressive disciplinary sanctions meted out to him.

[26] The *Regulations* state that the time to present a grievance at any level of the grievance process may be extended after the expiry of that time "in the interest of

fairness". A nine-day delay in transmitting the grievance to the second level is not an insurmountable period of time. The case law submitted for consideration dealt with much longer periods, and many were granted. Given his past difficult circumstances, and given that the next disciplinary measure could lead to his termination, the applicant asks that I extend the time for the presentation and transmittal of his grievances in the interest of fairness.

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

[27] The employer takes the position that this case rests on the principle that there must be some finality to the grievance process and that the parties have agreed to time limits in the collective agreement for that very reason. The employer disagrees that it is trying to terminate the applicant. The employer underlines that the applicant admitted that the employer's case against him was airtight and that he did not have the intent to grieve during the grievance period. The fact that the applicant did not realize the importance of filing the transmittal form to the second level within the time limits does not meet any of the tests set out in the jurisprudence.

[28] The employer submits, as follows that there are no clear and cogent reasons for allowing the complaint:

- The applicant has been a federal government employee since 2000.
- The letter of offer refers to the terms of the collective agreement.
- The letters of discipline and the responses at each level of the grievance process mention the periods within which to further a grievance.
- The applicant had union representation throughout the grievance process.
- The applicant was at work during the relevant grievance period.

[29] Furthermore, the employer submits that the applicant must demonstrate that he was unable to make decisions or to instruct his representative, and he has failed to do so. The fact that the grievance against his 5-day suspension was not only filed but also successfully pursued is an indication that the applicant was in fact quite capable of making decisions and instructing his representative. The applicant did not act in timely a fashion for the first two grievances as he did with subsequent grievances.

[30] A delay of nine days to refer the grievance to the second level is not a sign of confusion, since after receiving the first level response to this grievance, the applicant filed another grievance on a timely basis.

[31] With respect to the one-day suspension that was imposed on March 5, 2007, and the two-day suspension that was imposed on April 4, 2007, the applicant did not file his application for an extension to file those grievances until August 15, 2007, four months after the end of the time limit provided for in the collective agreement.

[32] The employer argues that those delays are significant. The employer also argues that a considerable amount of time has passed and that there could be some difficulty in gathering evidence to pursue the matters. The applicant has not established a *prima facie* case that his grievances are likely to be successful. His only success in having disciplinary action reversed has been before the employer, not an adjudicator. Furthermore, the applicant has demonstrated that he understands the consequences of his absenteeism. The medical evidence does not support his claims that he was unable to file a grievance.

C. The applicant's reply

[33] In reply, the applicant argues that he always had the intention to grieve. He communicated his medical difficulties to the employer, which was not challenged. After discipline was imposed in March and April 2007, he continued to work but under a great deal of stress because of the employer's constant monitoring of his attendance. The medical letters are not detailed, as health professionals do not usually provide much detail for privacy reasons. However, all the health professionals agreed that the applicant's symptoms might have explained his behaviour. When the applicant's medication stabilized, he was able to make the reasoned decision to pursue his grievances. While the applicant acknowledges that the employer has been compassionate in many ways, that should not prevent him from obtaining an extension of time for his grievances.

V. Reasons

[34] A time limit for filing grievances that is specified as part of a collective agreement between the union and the employer is meant to provide some stability in labour relations. The rationale for a time limit is to prevent the employer from being under perpetual exposure to defend grievances against actions that have long since passed and the union from having to present and argue those grievances. That said, the *Regulations* provide the ability to exercise discretion as follows to extend time limits in the interest of fairness:

. . .

> ***61.*** *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document 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.*
>
> . . .

[35] This Board and its predecessor, the PSSRB, have developed, through jurisprudence, a number of guidelines for determining whether discretion ought to be exercised to extend the time limits for filing a grievance, including the following:

- 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.

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

[36] In addition, it is also appropriate to weigh the prejudice to the employer that might follow the granting of an extension of time in cases where the applicant had not

formed the intention to grieve until after the time to do so had expired, as in *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113.

[37] In this case, I am of the view that the applicant's medical condition provides at least a *prima facie* case for his failure to file his first two grievances within the time limits specified in the collective agreement. The evidence is to the effect that his medical condition might have contributed to his irregular attendance at work and the employer has accepted the evidence to the effect that the applicant suffered from depression and sleep apnoea during the relevant period. I am prepared to accept that the factual situation at the relevant time provides a clear, cogent and compelling reason to explain why the applicant failed to grieve on time.

[38] Another mitigating factor is that, the applicant was diagnosed with a severe case of sleep apnoea in July 2007, which the medical professional stated had been ongoing for quite some time. This condition, together with the medical opinions stated earlier, reasonably supports the applicant's argument that he was unable to file a grievance within the time limits set out in the collective agreement. Additionally, in an email dated June 29, 2007, and cited earlier in this decision, the applicant expresses an intention to grieve. Even though the email is imperfectly expressed, I am prepared to consider the applicant's statements as an overall expression of his intent to file grievances for the disciplines of March 5 and April 4, 2007. In that sense, the applicant was sufficiently diligent in pursuing his rights.

[39] I also take the view that, in the particular circumstances of this case, August 15, 2007 — four months after the expiry of the time limits — was not the passage of an excessive amount of time to have applied to the Board for an extension of time. Given that the employer was dealing regularly with the applicant concerning attendance issues in order to obtain a medical assessment to explain his behaviour and that the union was involved in the discussions, there is no element of surprise for the employer that the applicant would want to grieve his suspensions.

[40] With respect to the application to extend the filing of the grievance at the second level, I find that nine days is an insignificant delay indeed and that the application should be granted in light of the evidence before me.

[41] Given that, at this stage of progressive discipline, the applicant could soon face termination, fairness to the applicant should take precedence in this case over any

prejudice to the employer in granting an extension. While the employer raised the issue of faded memories, it was stated in abstraction and not because witnesses were unavailable. The same issue arises for the applicant in eventually proving his case before an adjudicator. With respect to the issue of the chances of success of the grievances in question, no evidence was presented.

[42] In conclusion, there is no dispute that the applicant has been through a very difficult personal experience. Hopefully, he now realizes that not only is attendance at work important, but also that the disciplinary process is to be taken seriously. While I have decided to extend the time limits for all three matters before me in the interest of fairness, this decision by no means decides the eventual merits of the applicant's grievances, and he should be well aware of that fact.

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

(The Order appears on the next page)

VI. Order

[44] The applications for extensions of time in PSLRB file Nos. 568-02-167, 168 and 183 are allowed.

November 24, 2009.

Michele A. Pineau,
Vice-Chairperson