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File: 568-2-191

Citation: 2010 PSLRB 5



*Public Service
Labour Relations Act*

Before the Chairperson

BETWEEN

**DEPUTY HEAD
(Public Health Agency of Canada)**

Applicant

and

DEMETRIOS ANGELIS

Respondent

Indexed as

Deputy Head (Public Health Agency of Canada) v. Angelis

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: Ian R. Mackenzie, Vice-Chairperson

For the Applicant: Virginie Emiel-Wildhaber, counsel

For the Respondent: Aleisha Stevens, Canadian Association of Professional Employees

Decided on the basis of written submissions
filed August 24, September 14 and 28, 2009.

REASONS FOR DECISION

I. Application before the Chairperson

[1] The Deputy Head of the Public Health Agency of Canada (PHAC) has made an application for an extension of time to reply to a grievance at the final level of the grievance process. Demetrios Angelis, the respondent, grieved an indefinite suspension and referred this grievance to adjudication on June 1, 2009, which became Public Service Labour Relations Board (“the Board”) File No. 566-02-2901. The Deputy Head has also objected to the referral to adjudication on the basis that it was premature.

[2] 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* (“the *Regulations*”) to hear and decide any matter relating to extensions of time.

A. Background

[3] Mr. Angelis is an employee of the PHAC. He is represented by the Canadian Association of Professional Employees (CAPE). He was charged with a criminal offence on June 9, 2008. On June 12, 2008, the Deputy Head of the PHAC suspended Mr. Angelis without pay. A grievance was filed by the CAPE on his behalf and was then put in abeyance pending the outcome of a bail hearing. Mr. Angelis notified the CAPE on February 18, 2009 that he had been released on bail, and the CAPE then notified the Deputy Head that the grievance should be referred to the appropriate level.

[4] After sending a reminder email on February 26, 2009, the CAPE representative was advised by the Deputy Head that a final-level hearing would be scheduled “shortly” with the Senior Assistant Deputy Minister.

[5] On March 20, 2009, the CAPE representative advised the Deputy Head that Mr. Angelis was prepared to extend the time to respond to the grievance until April 17, 2009 and proposed a final-level hearing in the week of March 30, 2009. The Deputy Head responded on March 24, 2009, stating that it intended to schedule a hearing. No dates were suggested. Following further discussions, a hearing was scheduled for April 28, 2009.

[6] On April 27, 2009, the CAPE representative received an email from a labour relations advisor for the Deputy Head requesting a postponement due to the outbreak of the H1N1 virus. A further email was sent by the Chief of Corporate Labour Relations advising that the hearing was cancelled because all resources were being dedicated to the emergency operations centre. Mr. Angelis did not agree to the postponement. The hearing did not proceed on April 28, 2009.

[7] The CAPE representative wrote to the Chief of Corporate Labour Relations on May 7, 2009 and advised that Mr. Angelis was not in agreement with a further extension of time to reply to the grievance. The CAPE representative determined that the 20-day time limit for the grievance reply would run from the date of the scheduled but cancelled hearing, April 28, 2009. The CAPE representative advised the Deputy Head that if the CAPE did not receive a reply by May 26, 2009, “. . . it would exercise its rights as appropriate under the collective agreement.”

[8] The Deputy Head responded on May 11, 2009 that it intended to have a final-level hearing and issue a reply, but not before May 26, 2009. Mr. Angelis referred his grievance to adjudication on June 1, 2009.

[9] On September 17, 2009, the Chief of Corporate Labour Relations sent an invitation to Mr. Angelis’ representative to attend a final-level grievance hearing on September 22, 2009. Mr. Angelis’ representative declined the invitation. Another invitation was made through correspondence to the Board, copied to Mr. Angelis’ representative, to attend a hearing on either October 19 or October 21, 2009.

B. Collective agreement, regulatory and statutory provisions

[10] The collective agreement between the Treasury Board and the CAPE for the Economics and Social Science Services Group (EC), expiry date June 21, 2011 sets out the following provisions related to the filing of grievances and replies:

. . .

40.04 The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the employee and, where appropriate, the Association Representative.

. . .

40.13 An employee may present a grievance at each succeeding level in the grievance procedure beyond the first (1st) level either:

(a) where the decision or offer for settlement is not satisfactory to the employee, within ten (10) days after that decision or offer for settlement has been conveyed in writing to the employee by the Employer,

or

(b) where the Employer has not conveyed a decision to the employee within the time prescribed in clause 40.14, within twenty (20) days after presenting the grievance at the previous level and within twenty-five (25) days after the grievance was presented at the final level.

40.14 The Employer shall normally reply to an employee's grievance at any level of the grievance procedure, except the final level, within ten (10) days after the grievance is presented, and within twenty (20) days when the grievance is presented at the final level.

...

[11] The *Regulations* contain the following provisions relating to time limits:

...

Extension of time

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,

(a) by agreement between the parties; or

(b) in the interest of fairness, on the application of a party, by the Chairperson.

...

Deadline for reference to adjudication

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.

Exception

(2) *If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.*

...

[12] The PSLRA provides as follows:

...

225. No grievance may be referred to adjudication, and no adjudicator may hear or render a decision on a grievance, until the grievance has been presented at all required levels in accordance with the applicable grievance process.

...

II. Summary of the arguments

[13] The parties have filed written submissions with the Board. I have summarized them below.

A. Submissions for the PHAC

[14] The PHAC made the following submissions:

...

· *... the grievor was in protective custody from June 9, 2008 to February 2, 2009. He was unavailable to attend a grievance hearing during that time.*

· *The final level grievance hearing was originally scheduled on April 28th. However, due to the H1N1 outbreak, all human resources were ordered to focus on the current pandemic issue and the grievance hearing had to be cancelled on April 27th.*

· *The emergency level within the Public Health Agency of Canada (PHAC) was raised to the highest level from February to July at which point it finally came back down. Scheduling Mr. Angelis' grievance hearing became again a priority. However, since many other priorities had been put aside to deal with the H1N1 crisis, PHAC had a backlog to deal with. In addition, many people whom [sic] vacation had to be cancelled during the winter, spring and part of the*

summer seasons were finally able to go on holidays. Again, PHAC had to deal with a shortage of resources.

· Finally, a grievance hearing invitation was sent to the Bargaining Agent for September 22nd at 4 pm. The Bargaining Agent declined this invitation.

The Employer remains committed to answering this grievance as soon as possible. Should the response to the grievance not be satisfactory to the grievor, a hearing date could be set up as soon as today with a date in the near future in order to make sure that this request for extension of time, should it be granted by the adjudicator, has no detrimental impact on Mr. Angelis.

...

B. Submissions for Mr. Angelis

[15] Mr. Angelis made the following submissions:

...

i) *Claim 1: Premature submission of the grievance*

15. In its e-mail of August 24th, the Applicant alleges that the grievance has been prematurely submitted to adjudication. The Applicant does not provide any particulars to support this position. It is the Respondent's position that the grievance has been submitted to adjudication in a timely fashion, in accordance with the provisions of the EC Collective Agreement.

...

17. The parties initially agreed to numerous extensions of the timelines pursuant to article 40.04. The Respondent and the grievor refused further extensions beyond April 28th, the date on which the final level grievance hearing was scheduled to take place. The grievance was considered presented on this day and, pursuant to article 40.14, the employer had 20 days from this date to provide a reply. When no reply was forthcoming within the 20-day time period, CAPE exercised the rights provided for in article 40.13(b) and referred the grievance to adjudication within the timelines specified therein. Accordingly, the grievance meets the requirements for referral to adjudication.

18. As noted, PHAC has not provided any particulars to support its allegation that the submission to adjudication was premature. It is possible this allegation rests on the fact that no oral representations were made at the final level. The Board has been clear, however, that there is no obligation to

make representations at each level: Hickling v. Canadian Food Inspection Agency, 2007 PSLRB 90 at para.10.

19. *Nor does an employer have the authority to unilaterally extend grievance deadlines: Sincère v. Treasury Board (National Research Council of Canada), 2004 PSSRB 2 at para 24.*

20. *For these reasons, it is the Respondent's position that the Applicant's allegation of premature submission is unfounded and should be dismissed by the Board.*

ii) *Claim 2: PHAC should be given an extension of time to provide a final level grievance response.*

...

22. . . . *Board decisions rendered under both the Public Service Labour Relations Act (the "Act") and the predecessor statute establish a set of criteria applied when determining whether to grant an extension of prescribed time limits under this section. These criteria are:*

- *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.*

Vidlak v. Treasury Board (Canadian International Development Agency), 2006 PSLRB 96 at para. 12 and Dumas v. Staff of the Non-Public Funds, Canadian Forces, 2007 PSLRB 74 at para. 46.

23. *While these criteria have typically been applied to determine the merits of an application for extension of time filed by a grievor, the criteria are generic and have not been expressly limited to situations where the grievor is the applicant. It follows that the criteria can reasonably be applied to evaluate an application for an extension of time filed by an employer. Applying these factors to the present application, the Respondent submits as follows:*

a) *The reasons for the delay are not compelling*

24. *PHAC submits that it did not participate in a final level because resources were focused exclusively on*

addressing the swine flu. The Respondent notes that PHAC has submitted no particulars to support the position that the representative could not attend a one-hour hearing within the stipulated time-limits.

25. The delay in question was unilaterally imposed by the Applicant; the Applicant knew it would miss the deadline for issuing a reply, and accepted or was reckless as to the consequences thereof. Where an Applicant knowingly breaches timelines, it is the author of the situation in which it finds itself, and the Board should apply a high standard when evaluating the explanations for the breach before it is prepared to release such an Applicant from the consequences of its decision.

26. The Respondent submits that, even by regular standards, PHAC's explanation for the delay is not compelling. It is part of PHAC's mandate to prepare for and respond to situations such as the H1N1 virus. Fulfilling a departmental mandate is not a compelling reason to indefinitely delay a final level grievance hearing on a matter as serious as suspension without pay. Furthermore, granting an extension of time for such a reason runs the risk of opening the door to further applications citing any number of departmental tasks as justification for having set aside labour relations.

27. In sum, the Respondent argues that PHAC's inability or unwillingness to allocate the necessary resources to labour relations does not constitute compelling circumstances, and such practice should not be condoned through an extension of time limits.

b) The length of the delay is excessive given the context

28. Determining whether the length of delay is excessive is not achieved through application of objective measures of time; rather, such a determination requires the delay be examined subjectively, in light of relevant facts. As an illustration, in one case the Board refused to qualify a four-month delay as insignificant, stating, "It is a fact that time is relative and a delay may be deemed short or long only in relation to its context": *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59 at para. 14.

29. In the present case, although the period of time between the initial request for a hearing and the cancellation of the hearing may appear short, the context reveals a grievor who was - and remains - without pay and without meaningful work. Postponement of a resolution, however short it may appear, causes personal and financial hardship to the grievor equivalent to significant delay.

c) *The Applicant was not diligent with respect to the timelines*

30. *The Applicant demonstrated a general disregard for grievance process timelines from the date the grievance was taken out of abeyance. It was the Respondent, not the Applicant, that initiated timeline extensions and proposed possible hearing dates so as to allow the Applicant an opportunity to respond.*

31. *When notified of CAPE's intention to refer the grievance to adjudication if no reply was forthcoming, PHAC made no attempt to communicate with CAPE in order to establish a possible hearing date. The hearing remained indefinitely delayed. To grant an extension now in light of the Applicant's demonstrated laxity would not be in the interest of fairness.*

d) *The injustice to the grievor should the extension be granted outweighs any prejudice to the Applicant should the extension be denied.*

32. *Granting an extension of time limits in the circumstances of this case would result in an injustice to the grievor which is disproportionately greater than any conceivable prejudice to PHAC in refusing the extension.*

33. *PHAC has not provided any particulars as to how it would be prejudiced by a decision to proceed to adjudication. Should the Board refuse this application, PHAC would still have an opportunity to respond to the grievance, either informally through mediation or formally before the Board.*

34. *In contrast, the grievor awaits a determination on the issue of a suspension without pay; delays in the process aggravate the already negative impact this situation has had on his career prospects and financial situation. Furthermore, the Respondent anticipates the grievor's case will rely heavily on witness testimony; continued delays in the process increase the likelihood that witnesses will relocate and testimony will become less reliable with the passage of time.*

e) *The chances of success of the grievance: The grievor has an arguable case*

35. *The weight to be attributed to each of the five criteria depends on the factual context of the case under review. In support of this position, the Board has stated in Thompson at para. 7:*

It is self-evident that the particular set of circumstances defining each case must dictate the weight to be given to any one of the above criteria

relative to the others. It would be patently unfair to attribute the same weight to each of these criteria irrespective of the factual context.

36. Pursuant to this principle, the Respondent submits that little or no weight should be applied to this final criterion in a case such as the present. A proper assessment requires a consideration of questions of fact and credibility of witnesses, which would be an inappropriate undertaking in the context of an extension of time application. The Board has in the past been comfortable abstaining from an assessment under this criterion in similar circumstances.

37. In the alternative, the Board has held that this final criterion addresses whether the grievor has an arguable case: *Jarry and Antonopoulos v. Treasury Board (Department of Justice)*, 2009 PSLRB 11 at para. 38.

38. The Respondent submits that the grievor has an arguable case, as the criminal charges on which the suspension without pay is based remain nothing more than allegations.

f) Labour relations principles that inform the criteria

39. The Respondent submits that the application of these five criteria to the facts must be informed by established labour relations principles on time limits.

40. An oft-cited statement when determining whether to grant an extension of time is that the party who seeks such relief should bear the burden of showing why it is proper in the circumstances: *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65 at para. 55 considering *Re Pacific Forest Products Ltd. (Sooke Logging Division)* and *I.W.A., Local 1-118 (1984)*, 17 L.A.C. (3d) 435.

41. It is respectfully submitted that the Applicant has failed to establish that any injustice would result should the Board refuse the application for an extension of time. In contrast, the Respondent has successfully demonstrated why granting the application would be contrary to the interests of fairness.

42. It is also a guiding principle that time limits set out in collective agreements are specific and should not be lightly set aside: *Mbaegbu v. Treasury Board (Solicitor General Canada - Correctional Services)*, 2003 PSSRB 9 at para. 70.

43. Furthermore, the Board's discretion to relieve against a failure to comply with time limits is an extraordinary form and not a routine form of relief: *Trenholm* at para. 58.

44. *It is submitted that PHAC has not demonstrated any compelling reason for the Board to exercise its discretion in favour of the Applicant pursuant to these fundamental principles.*

45. *It is finally an important labour relations policy that both the bargaining agent and employer have some certainty with regard to grievances. As the Board has rightfully noted, time limits contribute to stability in labour relations and should not be set aside lightly: Wyborn v. Parks Canada Agency, 2001 PSSRB 113 at para. 29.*

46. *In present case, the collective agreement time limits provide the Respondent with a means to forward a case and seek resolution where the Applicant's unilateral actions would otherwise have resulted in instability and uncertainty. PHAC's application, if granted, would counteract this legitimate goal.*

...

[Sic throughout]

III. Reasons

[16] The Deputy Head's position is that the referral to adjudication in PSLRB File No. 566-02-2901 is premature because the PHAC has not yet provided a reply at the final level of the grievance process. The Deputy Head has also applied for an extension of time to reply at the final level.

[17] There is no requirement that the PHAC or its deputy head reply to a grievance before its referral to adjudication. The only requirement is that the time limits for the reply as provided in the collective agreement or the regulations be respected; see *Hickling*. In this case, the grievor referred his grievance to adjudication after the time limit for a reply at the final level of the grievance process had passed. Accordingly, it was validly referred to adjudication.

[18] There is no requirement for a hearing at any level of the grievance process if the grievor does not wish to have one. When a grievor does not wish to have a hearing, the employer will issue a reply without the benefit of the submissions of the grievor. As of May 7, 2009, the Deputy Head was aware that Mr. Angelis did not intend to participate in a hearing.

[19] It is not open to an employer to delay the adjudication of a grievance by its failure either to schedule a hearing or to issue a reply.

[20] The *Regulations* do provide some discretion to the Chairperson or his or her delegate to extend time limits in collective agreements or under the *Regulations*. Section 61 refers to extensions of time for the “. . . filing of any . . . reply . . .” that is “. . . in the interest of fairness”

[21] Most of the jurisprudence on extensions of time relates to the presentation of a grievance or to the referral of a grievance to adjudication. The extension of time to file a reply does not fit well with the developed jurisprudence. This is because the failure to file a reply does not result in a loss of a right under a collective agreement. The Deputy Head is not prejudiced at all by a failure to file a reply to a grievance. The Deputy Head can still issue a reply to the grievance at any point, up to the start of the hearing of the grievance. It is also open to the Deputy Head to allow a grievance in whole or in part at any time before the commencement of the hearing. The Deputy Head also has an opportunity to make submissions at a hearing that can include all of what would have been included in its final-level reply. In the case of an untimely grievance, Mr. Angelis has no right to proceed to adjudication unless he is successful in an application for an extension of time. For this reason, it is not appropriate to use the same criteria for this application as for an application for an extension of time to file a grievance or to refer a grievance.

[22] Given that there is no restriction on the Deputy Head filing its grievance reply at any time before a hearing, I see no need to extend the time limit. In any event, the Deputy Head's reasons for its application are not valid. I agree with Mr. Angelis' representative that workload that is part of the mandate of an organization cannot generally excuse a failure to meet time limits set out in collective agreements. Given the nature of the grievance, it is also prejudicial to the grievor to delay the adjudication of his grievance to accommodate the failure of the department to appropriately organize its time and resources.

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

(The Order appears on the next page)

IV. Order

[24] The objection to the referral to adjudication is dismissed.

[25] The application for an extension of time to file a reply is dismissed.

January 12, 2010.

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