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*Parliamentary Employment and
Staff Relations Act*



Before an adjudicator and
Board Member

BETWEEN

NICOLA DE FRANCO

Grievor

and

HOUSE OF COMMONS

Employer

Indexed as
De Franco v. House of Commons

In the matter of a grievance referred to adjudication

REASONS FOR DECISION

Before: [Ian R. Mackenzie, adjudicator and Board Member](#)

For the Grievor: [Lorenzo De Franco, representative](#)

For the Employer: [Steven R. Chaplin, counsel and Chantal Paquette](#)

Decided on the basis of written submissions
filed February 17, March 1 and 25, and April 6 and 16, 2010.

REASONS FOR DECISION

I. Grievance referred to adjudication

[1] Nicola De Franco (“the grievor”) filed a grievance in January 2008 alleging that he had retired on the basis of misrepresentations made by the House of Commons (“the employer”). He also alleged a breach of human rights. Mr. De Franco retired in 2006. The employer rejected the grievance at all levels of the grievance process on the basis of timeliness and has objected to the grievance being referred to adjudication on that same basis. Mr. De Franco submits that his grievance was timely, and in the alternative, he made an application for an extension of time. I determined that the employer’s objection to timeliness and the application for an extension of time could be addressed through written submissions.

[2] The Public Service Labour Relations Board (PSLRB) has the authority to extend time limits under paragraph 79(b) of the *P.E.S.R.A. Regulations and Rules of Procedure*, SOR/86-1140 (“the *PESRA Regulations*”). Therefore, I have been appointed both as an adjudicator (to determine the timeliness of the grievance) and as a board member (to determine the application for an extension of time).

[3] The employer raised an additional objection to jurisdiction on the basis that there was no termination of employment. I determined that the objection on timeliness and the application for an extension of time would be addressed first.

[4] During the grievance process, Mr. De Franco was represented by Rick Cloutier. Mr. Cloutier was acting in his personal capacity and not as a bargaining agent representative. During the grievance process, Mr. Cloutier advised the employer that Mr. De Franco’s bargaining agent (the Public Service Alliance of Canada) was not supporting the grievance.

II. Background

[5] I have summarized the facts relevant to the objection on timeliness and the application for an extension of time. For the purposes of this decision, I have assumed that the facts as alleged by the grievor are true unless otherwise noted. I have also accepted that the facts as alleged by the employer are true except as otherwise noted.

[6] The time limit for filing a grievance is 20 days from the date on which the employee becomes aware of the circumstances giving rise to the grievance (clause

32.07 of the Operational Group bargaining unit collective agreement between the Public Service Alliance of Canada and the House of Commons).

[7] Mr. De Franco started working at the House of Commons in 1982 as a tailor.

[8] Mr. De Franco was advised by his supervisor in December 2005 that the tailor shop would close and that his position would be moved to the sub-basement. In addition, he was told that he would have to take on extra duties in the Upholstery Department. He was advised that these changes would occur on January 9, 2006. Mr. De Franco expressed his concerns to his supervisor both verbally and in writing, but he received no reply. Mr. De Franco states that he could not work in the sub-basement for health reasons and that his employer was aware of that fact. Mr. De Franco believed that he had no choice but to retire. He alleges that his employer was fully aware that he was retiring against his will.

[9] Mr. De Franco retired from the House of Commons on June 30, 2006.

[10] Mr. De Franco alleges that he did not grieve his “forced retirement” for health reasons. He stated that his health deteriorated through the remainder of 2006 and 2007, and he provided a medical certificate from his doctor, dated September 24, 2007, which stated as follows: “[t]hese problems did continue throughout the rest of 2006 and the entire year of 2007. It is my opinion that during this time, Mr. De Franco's medical difficulties precluded him from filing a grievance or complaint against his employer.”

[11] In June 2007, Mr. De Franco’s representative, Mr. Cloutier, met with Art St-Louis, Senior Manager, to discuss Mr. De Franco’s situation and to secure his return to work. The employer alleges that in that meeting Mr. Cloutier was advised that the time for filing a grievance had expired.

[12] On July 12, 2007, Mr. De Franco made a human rights complaint with the Canadian Human Rights Commission (CHRC). He signed the complaint form on July 4, 2007. He claimed that he was discriminated against on the basis of his age and his health and that he was forced to retire. In the complaint, he stated as follows:

...

As I understand it, the tailor shop where I worked is still currently being used by employees that work in the

Building/Accommodation Services Department today - it has not been officially 'closed' as I was told it would be. This raises the question, why couldn't they have allowed me to reach my 25 years of service in my position as a Tailor for the House of Commons? I feel it is because they wanted me out due to my age.

...

[13] The CHRC forwarded the complaint to the employer, along with a covering letter, on September 13, 2007. In the letter, the CHRC stated the following:

...

- (a) *the complainant states that he was incapacitated at the time of the alleged incident, due to stress, and that he was unable to pursue a grievance or complaint at that time; he has indicated that he will provide a doctor's certificate to that effect;*
- (b) *on August 21, 2007 the union representative, Rick Cloutier advised that the grievance process is no longer available to the complainant; and*
- (c) *Mr. Cloutier also confirmed that the tailor shop is still open and performing the same duties as those of the complainant. This supports the complainant's allegations and suggests that there is a public interest in proceeding.*

...

[14] On September 26, 2007, the House of Commons responded to the CHRC and stated that the CHRC was without jurisdiction to accept the complaint, based on *Canada (House of Commons) v. Vaid*, 2005 SCC 30. That decision held that human rights complaints must be dealt with under the *Parliamentary Employee Staff Relations Act* (the "PESRA").

[15] Mr. De Franco filed his grievance on January 31, 2008. He grieved "... a violation of my Canadian Human Rights and any other relevant articles. . ." of the collective agreement. He requested that the grievance be referred directly to the second level of the grievance process. During the grievance process, Mr. De Franco was assisted by Mr. Cloutier, acting in his personal capacity.

[16] The grievor states that, after his retirement, he heard rumours that the tailor shop still existed in the same location as before. However, he alleges that he was unable to confirm it until "well after [his] retirement" and shortly before he signed his

grievance on January 31, 2008. The grievor provided a signed statement from his representative, Mr. Cloutier, dated July 14, 2008, which states as follows: “I also pointed out that the grievor first became aware that his particular place of work did not ‘move’ as indicated by management within the 15 days of filing this grievance (January 2008).” The statement was submitted by Mr. Cloutier to the House of Commons at the third-level grievance hearing.

[17] On February 28, 2008, Mr. De Franco was advised at the second level of the grievance process that his grievance was out of time. At the third level of the grievance process, the employer replied that the grievance was not timely. The reply stated that, even were the employer to accept the medical evidence (that there was a period of time when Mr. De Franco might have been unable to turn his mind to filing a grievance), it was evident that he was able to address the issues when he made his complaint with the CHRC in July 2007, some seven months before he filed his grievance.

III. Summary of the arguments

[18] The written submissions are on file with the PSLRB. I have excerpted the relevant sections below.

A. Submissions of the grievor

[19] In his submission received by the PSLRB on February 17, 2010, the grievor stated that his delay in filing his grievance was due to “health reasons.”

[20] The grievor’s representative submitted the following, on March 25, 2010:

...

6. *I could only submit a grievance once I became aware of the facts and circumstances upon which I had a basis to grieve. This is in accordance with article 32.07 of the Operational Group Bargaining Unit collective agreement: “An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause 32.04, not later than the twentieth (20th) day after the date...on which the employee first becomes aware of the action or circumstances giving rise to the grievance.” As confirmed by Mr. Cloutier in his statement of July 14, 2008, I did not become aware of the fact that the tailor shop was still functioning until January 2008.*

7. *... [the statements] from Mr. Cloutier which I believe were presented at the various levels of the grievance. . . .*

attest to the fact that I was diligent in pursuing this issue and outline compelling reasons for the timelines leading up to the filing of the grievance in January, 2008.

8. Both grievance decisions of February 28, 2008 and June 17, 2008 ... indicate that since I filed a complaint with the Canadian Human Rights Commission (CHRC) on July 4, 2007, my medical condition should not have prevented me from filing a grievance similarly in July 2007. The complaint to the CHRC was on alleged discrimination on the grounds of age and disability and was not on a workplace grievance in a labour relations context. As stated ... above, I was unable to confirm the circumstances upon which a grievance could be presented until January 2008.

9. As an alternative argument, I submit that if there was a delay, which is not admitted, the delay was a minor one: six months. This length of the delay is confirmed in the grievance decision of June 17, 2008 by the authorized employer representative who accepted my medical condition as reasons for not filing a grievance in 2006 and the first half of 2007. The representative states that I should have filed a grievance in July 2007, the same month that I filed my complaint with the CHRC. In the last paragraph of the decision, the representative concludes that "...I must conclude that you were well enough and capable of filing a grievance at least six months before January 30, 2008".

10. As I understand it, the tailor shop where I worked is still currently being used by employees that work in the Building/Accommodation Services Department today - it has not been officially 'closed' as I was told it would be. If I had not been misled into believing that the tailor shop would be closed, I could have worked for another two years and would not have retired when I did. The fact that the tailor shop still exists, and that I was neither informed nor recalled convinced me that I was forced to retire. At no time was I informed by the employer that the tailor shop was not closing.

11. The fact that I was forced to retire earlier than planned had an impact on my pension and my financial situation as a whole. My concerns were properly addressed and were not properly accommodated by my superiors at the House of Commons. Prior to my retirement, I was never given any opportunity by my employer to attend any retirement courses in order to make my transition into retirement more rewarding personally and financially. These circumstances outlined above amount to an injustice and far outweigh prejudice to the employer, if any. In the interests of justice, I request an extension of time under. . . .

. . .

[Sic throughout]

B. Reply submissions of the employer

[21] In its submissions filed with the PSLRB on March 1, 2010, the employer stated the following:

...

... while there may have been some health issues, which the employer does not admit, they do not explain the inordinate delay of over two years between the time of Mr. De Franco's decision to retire and the filing of his grievance... The employer believes that the health problems raised by Mr. De Franco do not demonstrate that he could not file a grievance on time. ...

...

[22] In its submissions filed on April 6, 2010, the employer stated as follows:

1. *... The position of the employer is that the grievance is out of time since the events giving rise to the grievance occurred between December 14, 2005 (when Mr. DeFranco was advised of changes to his job and he made a decision to retire) and January 9, 2006 (when he decided to retire) , or June 30, 2006 at the latest (the date of his retirement). His grievance was filed on January 31, 2008. The collective agreement applicable to Mr. DeFranco at the relevant time required him to file a grievance within 20 days of the circumstances giving rise to the grievance. ...*

2. *There is a delay of between 19 and 25 months in this case between the alleged facts [that give] rise to the grievance and the filing of the grievance.*

...

12. *The Board has a discretion to extend the time limits to file a grievance. The Board jurisprudence has clearly established the basic criteria for determining whether or not the discretion should be exercised. The criteria are:*

- *The length of the delay;*
- *Clear, cogent and compelling reasons for the delay;*
- *The due diligence of the grievor;*
- *Balancing the injustice to the employee against the prejudice to the employer in granting the extension; and*
- *The chance of success of the grievance*

[Schenkman v Treasury Board (Public Works and Government Services Canada), 2004 PSSRB 1, cited and followed in Chan v Treasury Board (Office of the Chief Electoral Officer), 2008 PSLRB 86]

The length of the delay

13. *The essence of Mr. DeFranco's grievance is that he was discriminated against on the basis of age and disability and was forced to retire in June 2006. Throughout the grievance process, and until his most recent written argument, Mr. DeFranco and his representatives have acknowledged that the facts giving rise to the grievance occurred prior to his retirement in June 2006 when he ceased to be an employee of the House of Commons.*
- a) *In a Human Rights Complaint dated July 4, 2007 Mr. DeFranco complained that he was discriminated against and forced to retire on that basis; ...*
- b) *In its initial report dated September 13, 2007 the Acting Deputy Secretary General of the Canadian Human Rights Commission wrote to the Clerk of the House of Commons that "The complaint is based on facts that took place between December 2005 and January 9, 2006". The complaint was attached to the letter ...; and*
- c) *Following the second level grievance decision, Mr. Rick Cloutier, representative of Mr. DeFranco, in his letter requesting that the matter of timeliness be referred to the third level of the grievance process wrote "the grievor was incapacitated at the time of the incident [referring to the medical letter]" and that "the discriminatory labour practices took place around 2004 up to and including retirement"...*
14. *There is no evidence, or no details of any acts, omissions or comments of, or by, the employer following the date of Mr. DeFranco's retirement in 2006 that suggests a continuing grievance.*
15. *There is some attempt in the Submissions of the grievor dated March 23, 2010 to stretch the "knowledge of the circumstances giving rise to the grievance" to within some days of the filing of the grievance by indicating "I had heard rumours that the tailor shop where I had worked still existed in the same location as before. However, I was unable to confirm this until well after my retirement and shortly before I filed the grievance on January 31, 2008" and that "I did not become aware of the fact that the tailor shop was still functioning until January 2008." There is clear evidence that this is not true, and that the grievor knew and attempted to rely on*

that knowledge much earlier. In his signed statement to the Canadian Human Rights Commission on July 4, 2007 he states “As I understand it, the tailor shop where I worked is still being used by employees that work in the Building/Accommodation Services Department today—it has not been officially “closed” as I was told it would be.” . . . Similarly, Mr. Cloutier, Mr. DeFranco’s representative, at or about the same time “confirmed that the tailor shop is still open and performing the same duties as those of the complainant”. . . .

16. It is submitted that the fact of when or if Mr. DeFranco determined that the tailor shop was open post-retirement is irrelevant to the grievance, since what is at issue is his alleged “forced retirement” in December 2005, effective June 30, 2006. If there is an allegation that he was essentially forced to make a decision to retire in December 2005 based on misleading information, one can also ask oneself why Mr. DeFranco took no issue with the tailor shop still being open when he actually retired (June 2006) as he was supposedly told in December 2005 that the tailor shop would close January 9, 2006. ...
17. When considering when the time for filing a grievance can, and should, run the Board must consider when the grievor became aware that the decision of management adversely affected him, and when it would have been appropriate for a grievance to be filed. In this particular case a specific date can be considered. At its essence Mr. DeFranco is grieving that he was forced to retire... When did he first have these concerns? When was the first opportunity for him to grieve? In his letter to management on December 20, 2005 he wrote that “this change gives me the sense of being ‘pushed out’.”
18. There is clear evidence that the date of the incidents giving rise to the grievance took place in December 2005 to January 9, 2006, or June 30, 2006 at the latest, and that there was more than enough information for Mr. DeFranco to file a grievance during that time or within 20 days. In the alternative, it is abundantly clear that by July 4, 2007 (almost seven months before the date of the grievance--January 31, 2008) all information, including the knowledge of the ongoing tailoring work for the House of Commons in the same location was known to the grievor).

Clear, cogent and compelling reasons for the delay

19. In examining whether there are clear, cogent and compelling reasons for the delay it is submitted that the first step is to determine when the grievance ought, or

could have reasonably been filed and to examine any reasons given, if any, for not filing at the time.

20. In this case there were various dates that the Board can and ought to consider.

21. The first time period is December 20, 2005 to January 9, 2006. It is clear from his letter of December 20, 2005 that Mr. DeFranco had concerns that he was being “pushed out” and that he was also concerned about his health suffering (a possible reasonable accommodation issue). He did not grieve at that time and there is no explanation as to why not.

22. The second time period is the period from January 2006 to the date of his retirement on June 30, 2006. Throughout this period Mr. DeFranco remained an employee of the House of Commons whose employment was covered by a collective agreement. Throughout this period, if it had mattered to him, he had the means and ability to assess the fact that apparently the decision to move the tailoring shop was being delayed and that it continued to operate. He had the ability throughout this period to request that given the changed circumstances (if relevant) his retirement date be moved back. He did not do so. However, throughout this period the facts upon which he alleges in his grievance remained unchanged. If he felt that he was being pushed out and that management had somehow forced him to retire by indicating that the tailoring shop would move (but it did not), he could have grieved any time prior to his retirement. He did not, and the only explanation for this is some vague reference in a medical letter that he was under stress.

23. If one considers that the trigger for any grievance is the “termination” of employment, notwithstanding the facts noted above, Mr. DeFranco’s employment, by way of retirement occurred on June 30, 2006. There was no indication to the employer that Mr. DeFranco would like to rethink his retirement decision, or to return to work until a meeting with management (Mr. Art St. Louis) in June 2007. For this delay there appears to be some evidence, which the Board can assess, and which was considered at the third level, that Mr. DeFranco’s health precluded him from filing a grievance. There are few details in the letter that indicate how or why the medical conditions precluded Mr. DeFranco from pursuing a grievance. The sufficiency of the evidence in this regard is a matter for the Board to determine in the overall context of the facts of this case. In examining the conclusions and weight to give the conclusions of the doctor, it is noted that he writes in September indicating that the inability of

the grievor to deal with the matter lasted for all of 2007. As noted in the next paragraph, this was not the case even in September.

24. *What is clear from the facts is that by June 2007 when Mr. DeFranco engaged a representative to discuss his situation with management, and definitely by July 4, 2007 when he was able to have prepared and signed a human rights complaint with the Canadian Human Rights Commission, his health did not preclude him from filing a grievance. Therefore, even accepting the medical evidence there is an almost seven month delay in filing the grievance for which the grievor is required to provide clear, cogent, and compelling reasons. The submissions of the grievor provide no explanation whatsoever for this delay.*
25. *The only comment made by the grievor in his submissions is that "if there was a delay,...,the delay was a minor one: six months." Six months is not a minor delay and is clearly a length of time that requires clear, cogent, and compelling reasons and explanation by the grievor. None is given. The onus is on the grievor and he has failed to meet this onus.*

The due diligence of the grievor

26. *For the various reasons set out above relating to the various opportunities that the grievor had to address the issues at the time he was advised (December 2005), throughout his employment and for more than a year after his retirement. . . .*
27. *It is also of note that the grievor or his representative was aware of the need to grieve throughout the summer of 2007 when advised by management, and determined by the representative. The knowledge that the matter could have been grieved and that the time had expired was acknowledged by the grievor's representative to the Human Rights Commission on or about August 21, 2007...*
28. *It is submitted that this admission by the grievor's representative can be taken as evidence that the grievor, at that time, accepted and decided not to pursue a grievance in this matter.*
29. *Any argument that the grievor can demonstrate that he was diligent from July 2007 because he sought to pursue this matter at the Human Rights Commission should be rejected. A similar argument was made in the case of Chan v Treasury Board and rejected by the Board*

[para. 14]. The question is whether the grievor was diligent in pursuing a grievance.

Prejudice to the employer

30. In the event that [the] Board finds that there is no clear, cogent and compelling reasons for the delay the issue of prejudice to the employer does not need to be addressed. [Chan , para. 20]
31. Whether or not there are clear, cogent and compelling reasons for the delay, the events at issue took place almost 4 years ago. This a significant period of time for witnesses and management to reconstruct events and evidence [for] any possible hearing. In Chan a delay of 15 months was considered significant when considering prejudice.
32. In particular it is noted that at least two possible key witnesses, Mr. André Sabourin (manager and addressee of the Decemebr 20, 2005 letter) and Mr. Art St. Louis (senior manager with whom Mr. Cloutier met in June 2007), have retired from the House of Commons.

Likelihood of success of the grievance

33. While it is not the place, in these submissions, to address the merits of the grievance, the Board is to consider the nature of the grievance and allegations and consider the likelihood of success.
34. In so doing, it is submitted that the Board ought to consider that the essence of the grievance is that the grievor did not voluntarily retire from his position in January 2006, with a retirement date of June 30, 2006. In this case Mr. DeFranco had six months to reconsider his decision to retire and did not do so.
35. As noted in the employer's earlier submission there is a serious question of whether an Adjudicator has jurisdiction over a grievance relating to a decision to retire. The jurisdiction of an adjudicator is limited to a termination of employment, and there is a live issue as to whether a retirement is a termination as contemplated by the Act.
36. There is no case law that we were able to find on the issue of "forced" retirement based on alleged erroneous information provided to the employee. There may be cases where one could argue that an employee believing they face disciplinary discharge chooses to retire and then brings a grievance alleging "disguised discipline", but there are no such allegations in this case.

37. *It is submitted that there is significant doubt that the grievance as framed as a mere claim that Human Rights were violated without further particulars would succeed.*

Conclusion

38. *The events took place approximately two years before the grievance was filed.*

39. *There is limited evidence or argument of a clear, cogent and compelling nature put forward to explain the delay of two years.*

40. *At its best there may be an explanation for the time up to June or early July 2007. But as of that time it is clear that the grievor was able to address the matters at issue, as demonstrated by his human rights complaint signed July 4, 2007. There is no explanation whatsoever for the last approximately seven months of the delay.*

41. *The employer will be prejudiced by both the passage of four years in being able to fully to present its case, and in particular at least two key witnesses have since retired from their employment and may not be available, or capable, of testifying.*

42. *Finally, the nature of the grievance is one that does not easily or readily fit into the type of grievance heard by adjudicators since, it is submitted, there is significant doubt that the facts allow the matter to proceed under the Act. There is little likelihood of success.*

43. *As a result the application for an extension of time to file a grievance ought to be dismissed and the Board file closed.*

...

[Sic throughout]

C. Reply submissions of the grievor

[23] The grievor submitted the following on April 15, 2010:

...

1. *...This application for extension of time involves a determination of when the grievor first became aware of the circumstances upon which he could grieve. The answer to that will determine whether the grievor submitted the grievance on time and, if not, was the delay in submitting the grievance a reasonable one.*

2. *The grievor submits that the he based retirement on the fact that the tailor shop would have been closed pursuant*

to representations made to him by his supervisor. The grievor made it clear to his supervisor that he would have continued to work in the tailor shop until he had reached 25 years of service.

3. As stated in the grievor's submissions ... the grievor was not able to confirm the rumours that the tailor shop existed until well after his retirement and shortly before the grievance was filed on January 31, 2008. This has been confirmed by Rick Cloutier in his statement dated July 14, 2008: which states as follows: "I also pointed out that the griever first became aware that this particular place of work do not "move" as indicated by management within the 15 days of filing this grievance (January 2008)." This letter was filed at the 3rd Level hearing. Mr. Cloutier is available to testify as a witness.

4. In the grievance decision of June 17, 2008, the authorized employer representative accepted the grievor's medical condition as reasons for not filing a grievance in 2006 and the first half of 2007. The decision stated that the grievance should have been filed in July 2007. In the last paragraph of the decision, the representative states: "...I must conclude that you were well enough and capable of filing a grievance at least six months before January 30, 2008". The employer, therefore, confirms that if there was a delay in the filing of my grievance, the delay was six months. Based this decision of the employer, the employer cannot now submit that the delay was between 19 and 25 months.

5. The employer relies on statements made in the complaint [to the CHRC]. The complaint to the CHRC was on alleged discrimination on the grounds of age and disability. It was not on workplace grievance and the context of that complaint was not one in labour relations. The grievor was not able to confirm the circumstances upon which he could present a grievance until January 2008. The grievor proceeded immediately to file the grievance.

6. The employer characterizes ... the grievor's retirement as "forced retirement" in December 2005 and that this is the issue. The grievor's position is that this is not the issue. If the tailor shop had been closed as the employer represented, there would have been no reason for Mr. De Franco to submit a grievance. However, the fact is that the tailor shop was never closed. There was a misrepresentation by the employer and it is this misrepresentation that is the issue before the board.

7. The Board has broad discretion to grant applications for extensions of time. It is not necessary for the grievor to form the intent to grieve before the time expired. The

grievor's state of mind is a factor to be taken into consideration by the Board. The grievor has filed a letter from Dr. Pitrobon as to his state of mind. The grievor's length of service is another factor that the Board can take into consideration. The grievor had been employed by the House of Commons for 24 years.

Richard v. Canada Revenue Agency, 2005 PSLRB 180).

8. *There is also an issue of fairness in the matter before the Board. Decisions by an employee are made because of representations made the employer. In addition to retirement, such decisions could also involve, for example, job opportunities. The employer-employee relationship and the resulting trust that is developed is greatly jeopardizes if employers are allowed to misrepresent circumstances or mislead employees. Integrity needs to be maintained at all times.*

9. *In the submission on "Prejudice to the Employer"... , the employer offers the reconstruction of events and evidence as prejudice. These would go to the credibility and weight of witness which is within the ambit of the board to decide. The only prejudice the employer submits [is] ... that two witnesses, André Sabourin and Art St. Louis, have retired from the House of Commons and that these witnesses "... may not be available, or capable, of testifying"... . The employer offers no explanation whatsoever as to why they may not be available or incapable or if in fact they are unavailable or incapacitated.*

10. *The submissions of the employer [on the likelihood of success of the grievance] ... are submissions that relate to the merits of the case and are issues that would be before the Board in the event there a hearing is held as to the merits of the grievance.*

11. *In January 2008, the grievor became aware of the circumstances upon which he could grieve. The grievor proceeds immediately to submit his grievance.*

12. *In the event the Board finds that the grievor became aware of the circumstances before January 2008, the grievor submits that his medical condition prevented him from filing a grievance. This was confirmed in the employer's grievance decision of June 17, 2008 which stated that "...I must conclude that you were well enough and capable of filing a grievance at least six months before January 30, 2008". The delay of six months was a reasonable one.*

...

[Sic throughout]

IV. Reasons

[24] The grievor has alleged that the grievance is timely, and in the alternative, he has asked for an extension of time. I have concluded that the grievance was not timely and that it is not appropriate, in the circumstances, to exercise my discretion to extend the time limit.

A. Was the grievance timely?

[25] To determine the timeliness of the grievance, it is first necessary to determine what was being grieved. The grievance is lacking in details. It simply alleges a breach of human rights. The reference to “other relevant articles” in the collective agreement is not at issue here, since the bargaining agent was not supporting the grievance. Since the grievance was filed after a human rights complaint was made, I can assume that the same grounds were the basis for the grievance. In this context, I understand that the grievance alleges that, “but for” the misrepresentation by the employer, the grievor would have continued to work for another two years. He is not alleging an involuntary retirement but a retirement based on false premises. On that basis, the time limit for filing a grievance commences when he became aware that there had been a misrepresentation — in other words, when he became aware that the tailor shop was still operating in the same place.

[26] It is difficult to pinpoint the actual date on which the grievor became aware of that fact. Given that the date for the move was to have been January 2006 and he remained employed until June 30, 2006, he may have been aware of this fact before he retired. However, in his human rights complaint signed on July 4th and made on July 12, 2007, he stated that the tailor shop was not “. . .officially ‘closed’ as I was told it would be.” This means that, by early July 2007, at the latest, he was aware of the circumstance that led to his grievance. Accordingly, the grievance was untimely.

B. Should an extension of time be granted?

[27] Under paragraph 79(b) of the *PESRA Regulations*, the Board can extend the time limits for filing a grievance, on application, “. . .on such terms or conditions as the Board considers advisable.” The jurisprudence developed by the Board under its jurisdiction to extend time limits under the *Public Service Labour Relations Act* is relevant for an assessment of the same discretion under the *PESRA Regulations* because the discretion to be exercised by the Board is similar.

[28] The following five criteria, used to determine whether to exercise discretion to grant an extension of time, are well known (see *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1):

- 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; and
- the chance of success of the grievance.

[29] The grievor has provided two reasons for his delay in filing his grievance. The first is his health, and the second is that he did not become aware that there had been a misrepresentation until shortly before filing the grievance.

[30] The grievor had health issues, and he provided a note from a doctor attesting to his medical condition. The medical note was dated September 24, 2007 and said that the grievor's medical condition "precluded him from filing a grievance or complaint" against the employer during the "entire year of 2007." This note is directly contradicted by the undisputed fact that the grievor did file a human rights complaint against his employer in July 2007. In July 2007, he was sufficiently healthy to prepare and file a human rights complaint. Therefore, his health is not a clear, cogent or compelling reason for the delay from July 2007 until January 2008.

[31] I have already concluded that the grievor must have been aware of the circumstances relating to his grievance by July 2007 at the latest since he raised this allegation in his human rights complaint. Therefore, his stated reason that he was not aware of the circumstances until a short time before filing his grievance is not a valid reason for the delay.

[32] Since I have concluded that there is no clear, cogent or compelling reason for the delay, I do not need to move on to assess the further criteria in *Schenkman*.

[33] In the absence of a clear, cogent or compelling reason for the delay, I will decline to exercise my discretion and will deny the application for an extension of time.

[34] Since the grievance is untimely and no extension of time will be granted, there is no need to determine the employer's remaining jurisdictional objection. Accordingly, the grievance will be dismissed.

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

(The Order appears on the next page)

V. Order

[36] The application for an extension of time is dismissed.

[37] The grievance is dismissed.

May 21, 2010.

**Ian R. Mackenzie,
adjudicator and Board Member**