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File: 568-18-223

Citation: 2011 PSLRB 23



*Public Service  
Labour Relations Act*

Before the Chairperson

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BETWEEN

**BARB BRADY**

Applicant

and

**STAFF OF THE NON-PUBLIC FUNDS (CANADIAN FORCES)**

Respondent

Indexed as

*Brady v. Staff of the Non-Public Funds (Canadian Forces)*

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:*** Michele A. Pineau, Vice-Chairperson

***For the Applicant:*** Herself

***For the Respondent:*** Sonja Gonsalves, National Manager, Labour Relations

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Decided on the basis of written submissions  
filed December 13, 2010 and January 6, 25 and 28, 2011.

## REASONS FOR DECISION

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

[1] The applicant, Barb Brady, was an administrative assistant employed by the Staff of the Non-Public Funds of the Canadian Forces (“the respondent”) in Shearwater, Nova Scotia. The applicant is a non-unionized employee. On June 11, 2010, the applicant’s employment was terminated following a workplace reorganization. She was one of three employees affected by the reorganization and was unsuccessful in securing employment in one of the two remaining positions.

[2] On July 5, 2010, the applicant filed a grievance at the third level of the grievance process disputing the conduct of the selection process for the two remaining positions, and alleging that her skills were not properly evaluated, that her experience was not appropriately considered and that she had not been afforded priority right for employment as the spouse of a member of the Canadian Forces in accordance with the employer’s employment policy.

[3] The employer replied to the applicant’s grievance on July 23, 2010 and dismissed it, stating that the selection process had been conducted appropriately and consistently for all candidates, that the successful candidates had been chosen according to merit, and that priority rights did not apply in her case.

[4] The applicant referred her application for extension of time to file a grievance on November 23, 2010. It was received by the Public Service Labour Relations Board (“the Board”) on December 1, 2010. She also applied for an extension of time because her referral was made outside the 40-day period provided in section 90 of the *Public Service Labour Relations Board Regulations* (“the *Regulations*”). The applicant states that her referral was delayed because she had to think about the employer’s response and, not being a union member, was unaware that the next step was to refer her grievance to the Board for adjudication. The applicant states that she first contacted the office of the Ombudsman in early August 2010 and that she was referred back to her supervisor, who in turn directed her to the Board. The applicant submits that the basis for her grievance is that she believes that she was unfairly, inconsistently and unreasonably treated compared to the other two applicants in the selection process.

[5] On December 13, 2010, the employer objected to the application for an extension of time. The employer submits that the applicant had all the information necessary to refer her grievance to adjudication in a timely manner. Before filing her

grievance, the applicant was provided with the employer's human resources policy manual, which outlines the right of employees to grieve and to refer grievances to adjudication with the Board. In addition, the employer argued that the grievance was without merit and that it was not adjudicable under subsections 209(1) and (3) the *Public Service Labour Relations Act (PSLRA)*.

[6] On January 6, 2011, the applicant contested the employer's objection. On January 13, 2011, the parties were asked to provide the following information before proceeding any further with the application for an extension of time: (a) for the applicant, a response to the employer's first objection that she had been provided with information about referring her grievance to adjudication "[m]onths before the time limits to refer her grievance to adjudication had expired" and that she could have filed her referral within the required time limits; and (b) for the employer, a copy of its grievance policy and evidence that it had provided a complete copy of its human resources policy manual to the applicant, as stated in its objection.

[7] The applicant submitted the following:

...

*In response to request in letter dated 13Jan11, notwithstanding any assertions by the employer with respect to whether or not I was in possession of the information, I submit the following:*

*1. The series of events during this time created a significant degree of stress and mental anguish.*

*2. The stress created gaps in memory and my ability to function at a normal level.*

*3. The continued stress created by management has not allowed me to fully understand or appreciate the necessary steps involved or required, and*

*4. The Human Resource Manager failed to provide guidance on and interpretation on grievance procedures as was her responsibility under 11.25 d (i) of the accountability of grievances.*

*5. Although management put forward a case that the onus was on me to know what the rules were with respect to grievances, the fact that the HRM failed in her obligation gives merit to an extension being granted.*

...

[Sic throughout]

[8] The employer provided the response that follows, together with a copy of the “Human Resources Policy Manual” and the affidavit of Ms. Ellen Mary McKay:

*The Employer acknowledges receipt of your letter dated 13 January 2011 regarding the above noted matter.*

*In response to the Board's request, the Employer has enclosed, as Annex A to this letter, a copy of its grievance policy. Paragraphs 11 B.21 to 11 B.23 found in a Annex B of the Employer's grievance policy explain to employees their right to refer their grievances to adjudication before the Board in accordance with the Public Service Labour Relations Act and the Public Service Labour and Relations Regulations.*

*An electronic copy (in word format) of the Employer's grievance entire policy was given to Ms. Brady on 11 June 2010 via email to [barbbrady@eastlink.ca](mailto:barbbrady@eastlink.ca), which is the email address that Ms. Brady has been employing to correspond with the Board on this matter (see Annex B). The statutory declaration found in Annex C confirms that following this, during the week of 14 June 2010 Ms. Brady asked the local Human Resources office to email her a complete copy of the Employer's Human Resources Policy Manual (referred to as HRPOL). As the manual is too large to be emailed, Ms. Brady attended this HR office and downloaded the entire policy manual onto an external drive, belonging to Ms. Brady. The successful downloading of this policy manual onto Ms. Brady's external drive was verified before Ms. Brady left.*

*Between the week of 14 June 2010 and 5 July 2010, Ms. Brady has several conversations with the local Human Resources Manager regarding the grievance process and the Human Resources Manager responded to questions and requests for information relating to this process. At no time did Ms. Brady inquire about what her options were if she was not satisfied with the response at the third level nor did she ask any questions regarding the adjudication process.*

*On 5 July 2010, Ms. Brady submitted a 3<sup>rd</sup> level grievance. The statutory declaration found at Annex D confirms that when she dropped off the grievance, she advised the Human Resources Manager that she had read the Employer's entire Human Resources Policy Manual, had no trouble reading it and found it all quite interesting.*

*Following the denial of her grievance, Ms. Brady did not have any further contact with the Employer regarding her grievance nor did she seek any information regarding her options following this denial.*

...

[Sic throughout]

[9] Ms. McKay's affidavit states the following:

...

*1. On 5 July 2010 at approximately 1220 hrs, Ms. Barb Brady hand delivered a Third Level Grievance form to the NPF HR Manger [sic]. Ms. Brady made a comment about having read the entire HR POL which she had previously copied onto a USB drive as a reference for the submission of her grievance. I, the NPF HR Manager, was quite surprised that she had actually read the entire manual as it is almost 500 pages long, and then made a comment to the effect, that that must have been pretty dry reading given that it was policy information. Ms. Brady responded and said something to the effect that she actually had no problem reading it and found it all quite interesting.*

*2. I also noted that she made reference to and had partial copies of at least three different sections of HR POL in her grievance submission.*

...

## **II. Reasons**

[10] Subsection 90(1) of the *Regulations* states as follows that the deadline for referring a grievance to adjudication is 40 days after the response at the final level of the grievance process:

*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.*

[11] Under paragraph 61(b) of the *Regulations*, the Chairperson of the Board has the discretionary power to allow a party recourse to a redress process even after the expiry of the prescribed time, if the consequences of non-compliance with the prescribed time would lead to an injustice:

*61. Despite anything in this Part, the time prescribed by this Part . . . for . . . the referral of a grievance to adjudication . . . 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.*

[12] Under section 45 of the *PSLRA*, the Chairperson of the Board delegated to me, as Vice-Chairperson, the authority set out in paragraph 61(b) of the *Regulations* to examine and decide this application for an extension of time.

[13] The Board's adjudicators have often considered the principles relevant to exercising their discretionary power to grant extensions of time for referrals to adjudication. There is no standard solution except for the general principle that the party requesting the extension has the burden of convincing the Board that it acted diligently to assert its rights. The length of and reasons for the delay in referring a grievance to adjudication and the prejudice that would be caused to either party are determining factors, and each case is decided on its merits. The following decisions are relevant to deciding this case.

[14] In *Anthony v. Treasury Board (Fisheries and Oceans Canada)*, PSSRB File No. 149-02-167 (19981214), it was stated that the grievor had contacted his province's ombudsman, his Member of Parliament and Human Resources Development Canada, seeking redress for an unfulfilled appointment. Although he had a copy of his union's documentation, he did not make the effort to read it and was content to continue his discussions with the employer to obtain the reimbursement of his moving expenses but to not seek further redress. The adjudicator decided that the grievor had not been sufficiently diligent in seeking redress.

[15] In *Chambers v. Treasury Board (Public Works Canada)*, PSSRB File No. 149-02-63 (19851125), the adjudicator indicated that time that the grievor devoted to writing to other bodies (namely, the Canadian Human Rights Commission and Labour Canada) could not be invoked to explain the delay in undertaking the necessary steps to file a grievance with the appropriate officer of the employer. The application for an extension of time was allowed in that case on the grounds that the prejudice suffered by the grievor was greater than that of the employer.

[16] In *Guittard v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 18, the adjudicator concluded that the five-month delay between the applicant's dismissal and the request for an extension of time was minimal and that the prejudice suffered by the employer would be negligible if the grievance were heard. The adjudicator's opinion was that the employee had sought from the outset to contest his dismissal by several means.

[17] In *Dumas v. Staff of the Non-Public Funds, Canadian Forces*, 2007 PSLRB 74, the dismissed applicant brought an action before the Quebec Superior Court against those who took part in the decision to dismiss him. It was only after the Court dismissed his legal action for lack of jurisdiction that he approached the Board and applied for an extension of the deadline to refer the grievance to adjudication. Although the employer had failed to mention the recourse of referring the grievance to adjudication, the adjudicator found that this did not excuse that applicant's three-year delay in exercising his right. The applicant had demonstrated no clear, logical and convincing reasons for that delay and a lack of reasonable diligence in the exercise of his rights.

[18] Following *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, the following elements are usually considered by adjudicators in exercising their discretionary power to extend the time to refer a grievance to adjudication: (a) the reasons for the delay in referring and whether they are clear, cogent and compelling; (b) whether the employee's actions reflect due diligence in exercising his or her rights; (c) the length of the delay; (d) whether the injustice to the employee is greater than that to the employer if the grievance is referred to adjudication; and (e) the chance of success of the grievance. Since the first and second criteria are linked in the circumstances of this case, they will be dealt with together.

**A. Clear, cogent and compelling reasons for the delay and the applicant's due diligence in exercising her rights**

[19] In support of her application, the applicant states that she was unable to file it in a timely manner because events during the relevant time created a significant degree of stress and mental anguish. The stress created gaps in her memory and affected her ability to function at a normal level, and she did not fully understand or appreciate the necessary steps involved.

[20] Although I am sympathetic to the stress caused to the applicant by her loss of employment, I am not persuaded by this argument. Apparently, she was well enough to contact the employer in June 2010 and to obtain and read a copy of its “Human Resources Policy Manual.” She filed a grievance on July 5, 2010, within the period provided in the employer’s grievance. There is no evidence that supports the contention that she was unable to refer her grievance to adjudication, such as that she was under a doctor’s care or that she was in similar compelling circumstances that made it impossible for her to refer her grievance to adjudication.

[21] The applicant’s argument that the Manager of Human Resources failed to provide guidance on the grievance process and the referral to adjudication is also unpersuasive. The fact that the applicant was given a copy of the “Human Resources Policy Manual” argues against any alleged ignorance on her part of how to proceed. The applicant was able to file a grievance without the involvement of the Manager of Human Resources. The applicant had computer skills and access to the Internet. Therefore, she had access to the information on the Board’s website and could have referred her grievance to adjudication on the basis of that information.

[22] As shown in *Anthony, Chambers* and *Dumas*, writing to other bodies or exercising other recourses, in this case contacting the Ombudsman, cannot be invoked to explain the delay in undertaking the necessary steps to a grievance reference to adjudication within the prescribed times.

[23] The facts in this case demonstrate that the applicant was in a position to obtain the necessary information and to act for herself without going through a complex legal procedure. There is no evidence that her efforts were diligent or sustained, even if she contacted the wrong entity. In her letter of application to the Board, the applicant states that she began corresponding with the Ombudsman’s office in August 2010 but does not explain the delay until December 1, 2010, before the Board received her application.

#### **B. Length of the delay**

[24] While a delay of four months between the date of the employer’s reply to the applicant’s grievance and her referral of the grievance to adjudication may not seem excessive in light of decisions rendered by other adjudicators (see *Guittard*), for



reasons relating to the chances of success of the grievance, this factor alone does not compensate for the other shortcomings of the application.

**C. Is the injustice to the applicant is greater than to the employer?**

[25] Neither the applicant nor the employer insisted on this point. Therefore, I consider it of little relevance in view of my analysis of the chances of success of the grievance.

**D. The grievance's chance of success**

[26] Even though this application deals with the time limits for referring a grievance to adjudication, I nonetheless examined the merits of the grievance and its chance of success. I assess the applicant's grievance as a dispute over the fairness of the selection process to fill the two vacancies that followed the employer's reorganization of the workplace. The applicant argues that she was nonetheless entitled to priority consideration because her spouse is a member of the Canadian Forces. In its reply to the grievance, the employer explained that, because the applicant's loss of employment was due to a reorganization and not to a relocation of her military spouse, the provisions of section 29 of the "Human Resources Policy Manual" did not apply. The selection process was based on merit. In these circumstances; selection priority is not given to military dependents above other internal staff of the Non-Public Funds employees.

[27] The applicant was certainly entitled to file a grievance concerning the selection process that occurred as a result of the workplace reorganization. However, subsection 209(1) of the *PSLRA* limits the types of grievances that can be referred to adjudication to very specific circumstances, as follows:

*209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

*(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

...

[28] Specifically, paragraph 209(1)(b) of the *PSLRA* states that only grievances alleging disciplinary action resulting in termination, demotion, suspension or financial penalty may be referred to adjudication. The applicant's grievance does not comply with the circumstances enumerated in that paragraph that allow a grievance to be referred to adjudication. Consequently, even if the application for an extension of time were allowed and the grievance was referred to adjudication, an adjudicator would most likely declare himself or herself without jurisdiction to decide it.

[29] Moreover, pursuant to subsection 209(3) of the *PSLRA* and the *Public Service Labour Relations Act Separate Agency Designation Order* (SOR/2005-59) a separate agency must be designated for paragraph 209(1)(d) to apply. Section 209(1)(d) establishes an adjudicator's jurisdiction to determine grievances related to termination that is not related to a breach of discipline or misconduct. The Staff of the Non-Public Funds, Canadian Forces, although a separate agency, has not been designated by order for the purposes of paragraph 209(1)(d). Therefore, since the grievance relates to a termination for a reason that is not related to discipline or misconduct, an adjudicator would have no jurisdiction to hear it.

### **III. Conclusion**

[30] My analysis of the circumstances of this case have led me to conclude that not only has the applicant not provided clear, cogent and compelling reasons for being unable to refer her grievance to adjudication within the time provided in the *Regulations*, her grievance does not have any chance of success, given the provisions of section 209(1)(d) of the *PSLRA*. Accordingly, I have decided not to exercise my discretionary power to extend the time so that the applicant's grievance may be referred to adjudication.

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

*(The Order appears on the next page)*

**IV. Order**

[32] The application for an extension of time is denied.

February 23, 2011.

**Michele A. Pineau,  
Vice-Chairperson**