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Public Service Labour Relations Act

Before the Chairperson

BETWEEN

CORNELL FONTAINE

Applicant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Fontaine v. Treasury Board (Canada Border Services Agency)

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: Linda Gobeil, Vice-Chairperson

For the Applicant: Ray Domeij, Public Service Alliance of Canada

For the Respondent: Jeff Laviolette, Treasury Board

Decided on the basis of written submissions
filed May 26 and June 29, 2010, October 20 and 25 and November 1, 2011.

I. Application before the Vice-Chairperson

[1] This is an application for an extension of time to file a grievance by Cornell Fontaine ("the applicant") pursuant to paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*"). This grievance alleges a breach of article 20 on sexual harassment of the Program and Administrative Services Collective Agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") which expired on June 20, 2007 ("the collective agreement").

[2] 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 *Regulations* to hear and decide any matter relating to extensions of time.

II. Summary of the evidence

[3] The applicant is a member of the Border Services (FB) Group and is employed by the Canada Border Services Agency (CBSA). On January 25, 2008, he filed a grievance with the CBSA, alleging that it failed to provide him with a workplace free of sexual harassment in violation of article 20 of the collective agreement. As for the remedy sought, the applicant asked, among other things, that his supervisor be removed from the workplace.

[4] On February 8, 2008, the CBSA denied the grievance at the first level of the grievance process on the basis that it was untimely. The CBSA also rejected the applicant's grievance at the second and third levels of the grievance process, again, on the basis that it was untimely since it was not filed within 25 days after the applicant became aware of the action or circumstances that gave rise to it.

[5] In its third level reply, the CBSA specified that the issue covered in the applicant's grievance had also been the subject of a harassment complaint. The decision made on that complaint was communicated to the applicant in August 2007, five months before the grievance was filed. In its decision, the CBSA held that the complaint was unfounded.

[6] The representative for the respondent submitted that the CBSA had become aware of the alleged violation of the collective agreement on November 23, 2006, when the applicant had filed his harassment complaint, and that the matter referred to in this grievance had been thoroughly investigated in the investigation of the complaint. The CBSA's decision on the complaint was communicated to the applicant on August 13, 2007. Only on January 25, 2008, five months later, did the applicant file the grievance in issue. On that basis, the respondent's representative objected to the Public Service Labour Relations Board's ("the Board") jurisdiction to hear the grievance on the basis that it was untimely.

[7] On May 26, 2010, the bargaining agent, on behalf of the applicant, wrote to the Board stating that the grievance was timely since it was a continuing grievance. It stated that following the release of the investigation's findings, the CBSA returned the applicant's supervisor – and his alleged harasser – to her former position. This had prompted written objections to various individuals on the applicant's part, without success. As well, for the period of September 4 to October 9, 2007, the applicant either switched shifts or took sick leave whenever his shifts coincided with those of his supervisor. Finally, on January 25, 2008, he filed the present grievance. His representative argued that the CBSA had, in so doing, "continued to breach its duty" to the applicant to provide him with a work environment free from sexual harassment.

[8] Alternatively, the applicant's representative contended that if the grievance was found untimely, then the applicant was applying for an extension of time under paragraph 61(*b*) of the *Regulations.*

[9] On September 29, 2011, the Board informed the parties that they were to provide written submissions on the issue of extension of time.

III. Summary of the arguments

[10] On October 19, 2011, the applicant's representative provided the Board with the following submissions:

> *It is and always has been the union's position that the grievance in question is a continuing grievance. The subject matter of the grievance namely the Employer's obligation to provide a safe healthy workplace free of sexual harassment is an ongoing and continuing obligation. The failure to provide such is also continuing a failure and continuing breach and not an isolated breach of a collective agreement*

> *provision. The damage to the grievor and the union is recurring in both kind and nature.*
>
> *The grievor, Mr. Cornell Fontaine, availed himself of all the internal avenues to address his concerns yet the employer refused to separate him and the abuser, even after an investigation, or provide adequate protection or redress.*
>
> *To file a grievance while there were efforts being made to resolve the differences might have been seen as premature and perhaps counterproductive. When it was clear and certain that the grievance procedure and adjudication would be the only opportunity of justice, a grievance was filed in a timely manner.*
>
> *The fact that he gave the employer every opportunity to correct the situation should be seen as a positive factor, even though it ultimately proved unsuccessful. This can not and should not shield the employer from their contractual obligations.*
>
> *To deny a hearing would be a travesty, denial of justice and further perpetuate the injustice already inflicted on this member.*
>
> [*Sic* throughout]

[11] In addition, on the time limit issue, the applicant's representative referred me to Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. at para 2:3128. The applicant's representative also referred me to M*cNeil v. Treasury Board (Department of National Defence*), 2009 PSLRB 84, and *Galarneau et al. v. Treasury Board (Correctional Service of Canada*), 2009 PSLRB 1.

[12] On October 25, 2011, the respondent's representative reiterated that an adjudicator has no jurisdiction to hear the grievance since it is untimely and referred me to *Schenkman v. Treasury Board (Public Works and Government Services Canada*), 2004 PSSRB 1, for the criteria to apply to determine whether a request for an extension of time should be granted.

[13] Reviewing the five criteria set out in *Schenkman*, the respondent's representative submitted that this case does not involve a continuing grievance but, the following:

> *Rather, it is a matter related to the ongoing, continuing dissatisfaction of the grievor with the findings of the investigation into the sexual harassment complaint he filed*

> *in November 2006 and the manner in which his employer addressed its ongoing obligation to provide him with a workplace free of sexual harassment.*

[14] The respondent's representative concluded by stating that the applicant had not demonstrated a clear, cogent and compelling reason to explain the delay in filing his grievance.

[15] The respondent's representative also contended that the incidents related to the grievance occurred between 2004 and 2006. The applicant brought the matter to the CBSA through a harassment complaint on November 2006. The CBSA investigated the harassment complaint and provided him with the results in August 2007, five months before he filed his grievance. The respondent's representative maintained the following:

> *Therefore, whether the action or circumstances giving rise to the grievance be incidents that occurred between 2004 and 2006, the date he first brought this matter to the attention of management (November 2006) or the date on which he was advised of the findings of the investigation of his harassment complaint (August 2007), this grievance is untimely.*

[16] Finally, the respondent's representative concluded that the prejudice to the deputy head would outweigh any injustice to the applicant if the request for an extension of time were granted. He also noted that the incidents that gave rise to the grievance were thoroughly investigated and that, although improper behavior was identified, it did not constitute sexual harassment.

[17] On November 1, 2011, the applicant's representative reiterated that the grievance is continuing and therefore, is not untimely. Alternatively, the applicant's representative reviewed the five *Schenkman* criteria and insisted that a hearing would demonstrate that the applicant first tried to settle the harassment issue in the workplace by raising it with the Minister and CBSA's senior management, but to no avail. This demonstrates that he acted diligently. The applicant's representative also contended that much of the delay in filing the grievance was due to the fact that the applicant received either late replies or none at all, from the CBSA, with respect to his harassment complaint.

[18] The applicant's representative noted that the allegations of sexual harassment are serious. In this case, the prejudice to the applicant, if the grievance is not heard on its merits, clearly outweighs any prejudice that the deputy head may suffer.

[19] Finally, the applicant's representative contended that it would be unfair to judge the chances of success of a grievance without the benefit of a hearing.

IV. Reasons

[20] Before deciding whether to grant the extension of time, I must first consider the representative for the applicant's argument that the grievance filing was not untimely since the grievance is continuing one.

[21] Clause 18.10 of the collective agreement reads as follows:

> *A employee may present a grievance to the first level of the procedure in the manner prescribed in clause 18.05, not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance…*

[22] On January 25, 2008, after pursuing his allegations through a harassment complaint and other correspondence with senior management, the applicant filed his grievance. The applicant's representative did not dispute that the allegations in the harassment complaint are the same as those in the grievance. In this case, the applicant would have first become aware of the actions or circumstances giving rise to the grievance in November 2006, which is when he brought his complaint to the CBSA. Therefore, on its face, the grievance is untimely, since it was not filed within 25 days after the applicant became aware of the actions or circumstances that gave rise to the grievance.

[23] The issue then becomes, as argued by the applicant's representative, whether the grievance is continuing in nature.

[24] *Canadian Labour Arbitration* at paragraph 2:3128 defines a "continuing grievance" as follows :

> *Where the violation of the agreement is of a* continuing nature*, compliance with the time-limits for initiating a grievance may not be as significant unless, of course, the collective agreement specifically provides that in those*

> *circumstances the grievance must be launched within a fixed period of time. Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. . . . In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages.*
>
> . . .

[25] In my view, there is simply no evidence or reference, in either the grievance or supporting arguments, that there have been "… repetitive breaches of the collective agreement. . . ."

[26] I would also add that, while finding that a grievance is a continuing grievance has an impact on time limits, such a finding does not allow a grievor to dispense with time limits entirely and to file a grievance years after the situation has ceased. At 2:3128 (page 2-104), Brown and Beatty affirm that,

> *Where it is established that the breach is a continuing one permitting the time period for launching a grievance to be measured from the latest occurrence, it has been held that a failure to initiate it within the stipulated time from the date of its first occurrence will not render it inarbitrable.*
>
> [Emphasis added]

[27] Thus, a finding that a grievance is a continuing grievance will not dispense entirely with time limits, but will allow the filing of a grievance if it is filed within the applicable time limits as calculated from the most recent breach.

[28] For example, take a clear case of a continuing grievance such as an illegal lock-out. If an employer locks out employees on June 1 and the parties settle in August, the union only has 25 days from the last day of the lockout in which to file a grievance alleging that it was illegal. It cannot, two years down the road, file a grievance which contests the employer's actions. A continuing grievance allows a grievor to file a grievance past the time limit calculated from the first breach, and allows them to file one based on later breaches.

[29] As far as I can see, the applicant is complaining about one of two possible things: (1) the continuation of the same harassment that he alleged he had suffered between 2004-2006 and against which he had filed a complaint that was, following

investigation, deemed unfounded, or (2) the fact that his supervisor was placed back in the workplace in late September 2007. In either case, I conclude that there is no continuing grievance arising out of the two possible allegations outlined above.

[30] If his grievance concerns, what I refer to as the "overall" issue, he has failed to point to a violation of any kind past the date on which he was given a copy of the investigation report and told that his complaint had been deemed to be unfounded. The fact that his supervisor was placed back in the workplace was merely the result of the investigation's findings, not an independent act in and of itself.

[31] If, however, given the wording of the remedy portion of the grievance and given the written submissions by the union, what is being grieved is in fact the employer's decision to put his supervisor back in the workplace, that decision was taken months before he grieved and his correspondence to management to protest this turn of events cannot serve to extend the time limits to file his grievance. This was a one-time decision made by the employer in late September 2007 and was not a decision which was repeatedly taken each new day, or week or month.

[32] In my view, arguing that employers have an ongoing obligation to provide a safe and healthy workplace is not sufficient to make a grievance "continuing". To argue successfully argue that this is a continuing grievance, the applicant needed to prove that when he filed the grievance (i.e. January 25, 2008), he was still a victim of sexual harassment. Again, no evidence or allegation, in the grievance or in the submissions, states that the applicant had been the victim of harassment on the employer's part within the 25 days preceding the filing of the grievance.

[33] Having decided that the grievance is untimely and is not continuing in nature, I will now examine whether, as alternatively argued by the applicant's representative, the Board should exercise its discretion in this case and grant the request for extension.

[34] It has been well established by the Board's jurisprudence that the following criteria ought to be considered when deciding whether an extension of time should be granted.

- 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 against the prejudice to the respondent and;
- the chances of success of the grievance

Those criteria were first applied in *Schenkman*. They were recently applied in *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, and in *Prévost v. Office of the Superintendent of Financial Institutions*, 2011 PSLRB 119. In *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68, the Vice-Chairperson stated that, "Each criterion is not necessarily equally important. The facts adduced must be examined to decide each criterion's weight. Some criteria might not apply, or only one or two might weigh in the balance." I agree with those comments.

[35] I would also like to point out, as did the Vice-Chairperson in *Salain v. Canada Revenue Agency*, 2010 PSLRB 117, at para 44, that "[t]ime limits are meant to be respected by the parties and should be extended in exceptional only circumstances." Those circumstances always depend on the facts of each case. In *Lagacé*, it was pointed out that the time limits negotiated by the parties need to be respected and extended only for exceptional reasons.

A. Clear, cogent and compelling reasons for the delay

[36] In this case, it is uncontested that the applicant first filed a complaint about harassment in the workplace on November 2006. The harassment complaint was investigated. According to the respondent's representative, although it was found that the respondent involved in the harassment complaint had demonstrated inappropriate behavior, the CBSA concluded that it did not constitute harassment. The applicant was informed of the decision in August 2007. As mentioned, the applicant did not dispute that the facts that gave rise to the grievance are those included in the harassment complaint filed in November 2006.

[37] The applicant filed his grievance on January 25, 2008, 14 months after he brought the issue of harassment in the workplace to the attention of the employer, and 5 months after the CBSA denied the harassment complaint on August 13, 2007.

[38] There was simply no valid explanation provided as to why the applicant waited so long before filing his grievance. Although his representative went to great lengths to explain the merits of the grievance, the delay in filing it was not explained, except than to say that the applicant had tried by other means to raise the issue with CBSA senior

management. In my view, that is not a valid reason. The applicant chose to raise the issue of harassment in the workplace, including sexual harassment allegations, via a complaint. He decided not to raise it through a grievance within the prescribed time limit. Only after five months had passed, following the CBSA's decision denying the complaint, did the applicant choose to file a grievance. No valid reasons were provided to explain the 14 month delay between when the applicant filed his complaint and when he filed his grievance, nor were any provided to explain the 5 month delay between when the applicant became aware of CBSA's decision to deny the complaint and when he filed his grievance.

[39] I must conclude that there are no clear, cogent or compelling reason for the delay. In *Lagacé,* the Vice-Chairperson decided as follows:

…

> *[47] Despite that, I believe that, in general, the delay must be justified by clear, cogent and compelling reasons; otherwise, the other criteria become irrelevant. What purpose would the time limits agreed to by the parties to a collective agreement serve if the Board's Chairperson could extend them based on an application not strongly justified? Granting an extension not based on a strong justification of the delay would amount to not respecting the agreement entered not by the parties to the collective agreement. Clearly, paragraph 61(*b*) of the* Regulation*s was not drafted in that spirit.*
>
> …
>
> *[53] Therefore, the applicant did not adduce evidence showing that he had clear, cogent and compelling reasons to file his grievance 198 days after the expiration of the time set out in the collective agreement Therefore, the other criteria become secondary, and I need not address them.*

[40] I agree with those comments. Therefore, I will not address the other *Schenkman* criteria.

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

(The Order appears on the next page)

V. Order

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

[43] PSLRB File No 566-02-3634 is to be closed.

March 26, 2012.

Linda Gobeil,
Vice-Chairperson