

Date: 20131009

File: 568-02-287
XR: 566-02-7651 and 7652

Citation: 2013 PSLRB 125



*Public Service
Labour Relations Act*

Before the Chairperson of the Public
Service Labour Relations Board

BETWEEN

ALFRED LEGERE

Applicant

and

**TREASURY BOARD
(Correctional Service of Canada)**

Respondent

Indexed as

Legere v. Treasury Board (Correctional Service of Canada)

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: Renaud Paquet, Vice-Chairperson

For the Applicant: Himself

For the Respondent: Zorica Guzina, counsel

Heard at Moncton, New Brunswick,
September 12, 2013.

REASONS FOR DECISION

I. Application before the Chairperson

[1] Alfred Legere (“the applicant”) was the warden of the Nova Institution of the Correctional Service of Canada (CSC or “the respondent”) until May 11, 2008. He is now the assistant warden of management services at the Springhill Institution. On November 22, 2011, he filed a series of grievances against the CSC. All those grievances were denied by the CSC between July 19, 2012 and July 26, 2012. Mr. Legere referred four of those grievances to adjudication on September 28, 2012. The same day, he applied for an extension of time since he was late in referring the grievances to adjudication.

[2] The Public Service Labour Relations Board (“the Board”) File No. 566-02-7651 includes one grievance. The CSC replied to that grievance at the final level on July 19, 2012. File No. 566-02-7652 includes three grievances. The CSC replied to those grievances at the final level on July 26, 2012. According to subsection 90(1) of the *Public Service Labour Relations Board Regulations* (“the *Regulations*”), a grievance may be referred to adjudication no later than 40 days after the final-level grievance replies has been received. On the basis of the date indicated on the final-level grievance replies, which is the earliest date on which the final-level grievance replies could have been received by Mr. Legere, the referral to adjudication of the grievance in file No. 566-02-7651 was untimely by 29 days, and the referral to adjudication in file 566-02-7652 was untimely by 22 days.

[3] Pursuant to section 45 of the *Public Service Labour Relations Act* (“the *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

[4] The parties jointly presented in evidence a series of 10 documents. The applicant also presented four documents in evidence. He testified. The respondent did not call any witnesses.

[5] The parties drew my attention to the four grievances contained in the two Board files for which extensions of times are required. The essence of these grievances is well

summarized in the following abstracts. The first abstract comes from the grievance in file 566-02-7651, and the three others from the grievance in file 566-02-7652.

...

I grieve the fact that I received no formal performance bonus during my tenure at RHQ. . . . I was not assessed properly and formal objectives were not set. I have complained to the Commissioner of Corrections and it was delegated to the RDC Atlantic who has had no communication with me. I have offered to be involved in ICMS and no offer has come forth.

...

I request to be reinstated to an EX-1 position at Nova Institution, or NHQ. The TBS policy on Career Transition for Executives was not followed and I accepted a double demotion. My demotion to an AS-7 position was made under duress and I was subjected to harassment and gross mismanagement. . . .

...

I grieve that I was not placed on priority status at the completion of my Special Deployment as Special Advisor to ADCIO in May 2011. . . . It should be noted that this omission has led to me missing several unilingual EX-1 opportunities during the period in question. I have asked for ICMS to address this issue and it has not been made available.

...

I grieve that I was not provided salary maintenance for the first year after my voluntary demotion to AS-7 level. I also grieve that I have not been afforded the opportunity at informal conflict management as requested in my letter to the Commissioner dated 11/08/12. . . .

...

[6] These grievances were filed on November 22, 2011. The parties agreed in early December 2011 that they be transmitted directly to the final level of the grievance procedure. They were put in abeyance until mediation could take place between the parties. On June 13, 2012, the applicant requested that the grievances be taken out of abeyance and be processed since the mediation had been cancelled. On July 19 and July 26, 2012, the respondent rejected the grievances at the final level of the grievance procedure. Mr. Legere was then on sick leave. He does not remember exactly when he received the final-level grievance replies but he believes it was shortly after the date

indicated in the final-level grievance replies. The respondent had no evidence to produce on that point.

[7] Before receiving the final-level grievance replies, Mr. Legere wrote to the CSC labour relations branch on July 10, 2012 to enquire as to the steps that he would need to take to “move his grievances to adjudication” as the CSC had not respected the time frames to answer his grievances. The labour relations branch answered that it was not in a position to provide any advice to Mr. Legere and that he should consult the Board website for information on referring grievances to adjudication.

[8] Mr. Legere has been working for the CSC for 30 years. He started his career at CSC recreational services. He received an award for 25 years of exemplary service. During his career, he obtained several promotions. In 2005, he was appointed warden at the Nova Institution at the EX-01 group and level. He was the first man to be appointed as a warden in a female correctional institution, and he was proud of that accomplishment. His work at the CSC had always been appreciated. In his last performance appraisal for the 2007-2008 fiscal year, he was assessed as meeting all the expectations of the position. Mr. Legere testified that from 1982 to 2008, he had an exceptional career at the CSC. The respondent did not question or put that statement in doubt during cross-examination.

[9] Mr. Legere loved his job at Nova Institution. He had an excellent relationship with everybody. In 2007, things started to change following a hostage taking by inmates involving employees and a series of incidents related to a particular inmate. Mr. Legere became mostly focused on the well-being of his staff and on managing the institution’s operations. He did not focus on himself and his well-being. According to him, the CSC did very little to help him during those tough times and the next few years after that. He felt that he was left on his own.

[10] In early 2008, Mr. Legere became seriously ill as a result of the difficulties that he experienced at work in 2007. He took three months of sick leave. At his return from sick leave, he accepted a special assignment at the CSC regional office in Moncton at the EX-01 group and level. The special assignment was for the period of May 12, 2008 to May 11, 2010. Mr. Legere was not satisfied with that assignment. He was not used to working in an office environment. He felt that his superiors were not helping him to make the assignment successful. He believes that he might have become the scapegoat for some of the issues and controversies that were going on at the time. He said that

articles targeting him appeared in the media and nobody from the CSC defended him or helped him.

[11] Contrary to what was supposed to happen, according to Mr. Legere, the CSC did not offer him a position at the EX-01 group and level at the end of his special deployment. Rather, it left him with no choice but to accept a position at the AS-07 group and level at Springhill Institution. On April 21, 2010, Mr. Legere accepted that position, with an effective start date of May 1, 2010. However, Mr. Legere continued to work at the regional office for a few weeks after accepting the AS-07 position at Springhill.

[12] In June 2012, Mr. Legere went on sick leave again. He also filed a workers' compensation claim because he believed that events that happened at work made him sick and incapable of working. His claim was rejected. That decision has been challenged and the case has not yet been heard. Even though he still felt sick, Mr. Legere had no choice but to go back to work in October 2012, since he had no income.

[13] Mr. Legere testified that the period during which he was supposed to refer his grievance to adjudication is like a blur to him. He was completely depressed and lost interest in everything. He hardly talked to anybody. He had strong feelings of hopelessness, and he felt alone. He testified that it took him weeks to emerge from that psychological situation. Mr. Legere adduced in evidence detailed medical opinions signed by his physician and his psychologists. The respondent objected to those documents since the physician and the psychologist were not called as witnesses and their assessments could not be questioned. I accepted the documents in evidence, but I informed the parties that I would give them very little weight for the reasons argued by the respondent.

[14] Mr. Legere testified that he was led to believe by the CSC that he had no choice but to accept a demotion to the AS-07 group and level. He was under extreme stress at the time. He said that he signed the demotion offer under duress and harassment. He needed a job, and he did not know what would happen to him if he refused the demotion. He admitted in cross-examination that he could have refused the offer. He feels that the CSC wanted to punish him and that the demotion constituted disciplinary action.

III. Summary of the arguments

A. For Mr. Legere

[15] Mr. Legere argued that his application for an extension of time be allowed. He admitted that he was some three weeks late to refer his grievances to adjudication. However, he was very depressed and sick at the time when he should have referred his grievances to adjudication. That explains why he was late. He argued that he always had the intent to pursue his grievances and that he did not want to abandon them.

[16] Mr. Legere argued that he views his demotion as disguised discipline. He sees no other explanation as to why the CSC took no action to ensure his return to an EX-01 position following his special deployment, as required by the Treasury Board directive on the management of executives. He asked that his application for an extension of time be allowed in order to prove his point that the demotion was disciplinary.

[17] Mr. Legere referred me to *Jarry and Antonopoulos v. Treasury Board (Department of Justice)*, 2009 PSLRB 11; *Richard v. Canada Revenue Agency*, 2005 PSLRB 180; *Palmer v. Canadian Security Intelligence Service*, 2006 PSLRB 9; *Riche v. Treasury Board (Department of National Defence)*, 2009 PSLRB 157; and *Riche v. Deputy Head (Department of National Defence)*, 2010 PSLRB 107.

B. For the respondent

[18] The respondent argued that Mr. Legere's application should be rejected. Extensions of time are granted only on an exceptional basis when some well-established criteria are met. The grievor had the burden to prove that he met those criteria, and he did not.

[19] The respondent argued that the applicant did not have clear, cogent and compelling reasons for the delay. His medical evidence should not be accepted since the physician and the psychologist did not testify at the hearing. In addition, the applicant did not explain how his health prevented him from referring his grievance to adjudication. The respondent pointed out that, during that period, the applicant was capable of acting. On June 13, 2012, he asked that his grievance be taken out of abeyance. On July 20, 2012, he wrote an email, enquiring about how to refer his grievances to adjudication.

[20] The respondent admitted that the prejudice would be greater to Mr. Legere were his application denied. However, the respondent argued that Mr. Legere's grievances have no chance of success because an adjudicator would have no jurisdiction to hear them. According to subsection 209(1) of the Act, Mr. Legere could only refer to adjudication a grievance related to a disciplinary action or a demotion for unsatisfactory performance. His grievances are not adjudicable since they do not deal with those matters. Mr. Legere argued at the hearing that he was demoted for disciplinary reasons. According to the respondent, there is absolutely no evidence to support that allegation. To the contrary, Mr. Legere referred to his voluntary demotion in one of his grievances. In addition, he accepted that demotion on April 21, 2010. Mr. Legere wrote in another of his grievances that he accepted that demotion under duress. The respondent argued that accepting something under duress does not equal discipline. There is a major difference between the two concepts.

[21] The respondent referred me to *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1; *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68; *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92; *Safire v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 97; *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110; *Kunkel v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 28; *Featherston v. Deputy Head (Canada School of Public Service) and Deputy Head (Public Service Commission)*, 2010 PSLRB 72; *De Franco v. House of Commons*, 2010 PSLRB 69; *Salain v. Canada Revenue Agency*, 2010 PSLRB 117; *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 31; *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68; and *Sturdy v. Deputy Head (Department of National Defence)*, 2007 PSLRB 45.

IV. Reasons

[22] I see no dispute between the parties on the facts of this case. Mr. Legere admitted that he was late referring his grievances to adjudication. He was 22 days late for one file and 29 days late for the other file. However, that does not take into account the date on which Mr. Legere received the CSC's final-level grievance replies but rather the date on which those replies were signed. The parties did not know the date on which Mr. Legere received the grievance replies. Mr. Legere believes that it was shortly after the dates indicated on the replies.

[23] Applications for extensions of time are made under section 61 of the *Regulations*, which reads as follows:

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.

[24] The criteria to consider when deciding whether an extension of time should be granted are outlined in *Schenkman*. They are the following:

- 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 in granting the extension; and
- the chance of success of the grievance.

[25] As stated in many of the decisions referred to by the parties and in more recent decisions made by the Board, those criteria are not always of equal importance. There first need to be clear, cogent and compelling reasons for the delay. Then the length of the delay, the diligence of the applicant, the balancing of the injustice to the applicant against the prejudice to the respondent and the chance of success of the grievance could matter. As written in past decisions, a solid reason is needed to justify the delay.

[26] In his evidence, Mr. Legere testified that the period when he should have referred his grievance to adjudication is like a blur to him. He was depressed, lost interest in everything, hardly talked to anybody, and had strong feelings of hopelessness. He testified that it took him weeks to emerge from that psychological situation. The respondent did not cross-examine him on his health at the time. It did

not question Mr. Legere's testimony and did not adduce any evidence to contradict him. The respondent pointed out some enquiries that Mr. Legere made on his grievances, but those enquiries were made before the final-level grievance replies were even issued in the case of File No. 566-02-7652. In the case of File No. 566-02-7651 one of the inquiries occurred before the final level grievance replies were issued. The other inquiry occurred just one day after the issuance of the decision in File No. 566-02-7651 but, as noted earlier in my reasons, the parties do not know the date on which the grievor actually received the grievance replies. Mr. Legere produced medical reports to support his testimony. I cannot assign any more weight to those reports, which largely support his testimony, since the medical experts were not called as witnesses. Nevertheless, I believe Mr. Legere's testimony that his health in the late summer of 2012 prevented him from referring his grievances to adjudication. That is a clear, compelling and cogent reason to explain the delay.

[27] Mr. Legere was diligent. He referred his grievances to adjudication when he felt capable of doing it. He was late only by some 20 days, which is a relatively short delay, considering his health at the time. To justify a much longer delay, I might have needed other evidence in support of Mr. Legere's testimony about his health. However, in this case, his testimony is sufficient to support that his health prevented him from acting for that short period.

[28] In *Riche* (2009), the application for an extension of time was allowed. The applicant was four months late filing his grievance. The applicant suffered from depression and sleep apnea during the relevant period. In *Riche* (2010), the application was allowed. The applicant was 14 days late referring his grievances to the next level. The Vice-Chairperson stated that the length of the delay was not that significant in that particular case. In *Richard*, the application was allowed. The applicant was five months late filing his grievances. The applicant suffered from post-traumatic stress disorder during the relevant period. The Vice-Chairperson found that the applicant's medical condition was a factor that should have been considered in her application.

[29] In *Lagacé*, the applicant was more than six months late filing his grievance. During the relevant period, he was depressed and experienced several health issues. The Vice-Chairperson denied the application because, during that relevant period, the applicant wrote to his employer several times to obtain information and to ask for funds. In *Brassard v. Treasury Board (Department of Public Works and Government*

Services), 2013 PSLRB 102, the applicant was eight months late. She also experienced several health issues during the relevant period. The Vice-Chairperson denied the application because, during that period, the applicant filed an unfair labour practice complaint and a complaint with the Canadian Human Rights Commission and took legal action against her former managers. In *Grouchy*, the applicant was 43 days late referring his grievance to adjudication. During the relevant period, the applicant suffered from high anxiety. He also thought that he had 90 days to refer his grievance to adjudication. During the relevant period, he was able to retain legal services with respect to criminal charges against him. The application was denied.

[30] The present case has more in common with *Riche* (2009), *Riche* (2010) and *Richard* than with *Lagacé*, *Grouchy* and *Brassard*. In those six cases, the applicants were experiencing health problems during the relevant periods. However, in the three latter cases, the evidence showed that the applicants were capable of taking legal or administrative actions during the relevant periods. In the three first cases, the evidence of the impact of the medical condition was not contradicted. In addition, in the present case, similar to *Riche* (2009) and *Riche* (2010) the length of the delay is relatively short. During those days, there is no evidence that Mr. Legere took any legal or administrative actions or that he asked for any information from the respondent or anybody else about the problems that he was experiencing in his employment relationship.

[31] Based on that, I find that Mr. Legere had clear, cogent and compelling reasons for the delay. The length of delay is relatively short, and I believe that Mr. Legere acted diligently when he was healthy enough to pursue his grievances and refer them to adjudication. The respondent admitted that the only prejudice against it in allowing the application would be that it would have to prepare for and to appear at the adjudication hearing. I find that the injustice to the applicant clearly outweighs that prejudice. These grievances involve a demotion from the EX-01 group and level to the AS-07 group and level, which implies an important reduction in the applicant's salary.

[32] The respondent argued that Mr. Legere's grievances have no chance of success because an adjudicator would have no jurisdiction to hear them. I partly agree with that. It is clear to me that according to subsection 209(1) of the *Act*, an adjudicator has no jurisdiction on the following issues raised in Mr. Legere's grievances: his claim for a performance assessment and a performance bonus while on special assignment, his access to the informal conflict resolution process, the non-respect of the Treasury

Board's "Directive on Career Transition for Executives", his allegations of harassment and mismanagement, the omission to place him on priority status, and his claim for salary maintenance for the first year of his appointment to the AS-07 group and level. Subsection 209(1) of the *Act* reads in part 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

...

[33] Considering the allegations made by Mr. Legere against his employer in his grievances and in this application, his testimony at the hearing and the fact that he is not a unionized employee, an adjudicator's jurisdiction is limited in this case to considering disciplinary action resulting in a demotion. Mr. Legere never raised or argued that his demotion was for unsatisfactory performance as per paragraph 209(1)(c) of the *Act*. Mr. Legere rather alleged that his demotion was made under duress and that it constitutes a disciplinary action imposed on him by his employer. To be demoted "under duress" does not equal disciplinary action resulting in a demotion. There is a significant difference between the two concepts. However, that does not mean necessarily that Mr. Legere was not demoted for disciplinary reasons. That question would need to be examined on the basis of evidence and arguments from the parties.

[34] I have already stated that Mr. Legere has no chance of success with many of the allegations that he made in his grievances because an adjudicator does not have jurisdiction on the specific issue raised by the allegations. However, an adjudicator has jurisdiction to determine whether he was disciplined, and if he was, whether there was cause to impose a demotion. Without evidence and detailed arguments, I cannot make that determination in this decision, and I am not prepared as the respondent suggested, to conclude that Mr. Legere's allegation on discipline has no merits. I note that these findings relate solely to the matter of the possibility of success due to jurisdiction of the adjudicator and not to what evidence might or might not be heard at the hearing,

[35] Having examined the five criteria outlined in *Schenkman*, I partly allow Mr. Legere's application for an extension of time, in the interests of fairness. Mr. Legere's health was a clear, cogent and convincing reason as to why he was some 20 days late to refer his grievance to adjudication. Under the circumstances, that delay was relatively short, and Mr. Legere acted diligently when he was capable of doing so. The respondent will suffer very little prejudice from the fact that this application is granted. Finally, based on the evidence, I cannot conclude that the four grievances have no chance of success.

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

(The Order appears on the next page)

V. Order

[37] The application for extending the time prescribed to refer the grievance in file 566-02-7651 to adjudication is denied.

[38] The grievance in file 566-02-7651 is denied.

[39] The application for extending the time prescribed to refer the grievances in file 566-02-7652 to adjudication is partly allowed.

[40] I direct the Registry of the Board to schedule a hearing on the merits of the grievance in file 566-02-7652 dealing with the applicant's alleged disciplinary demotion.

October 9, 2013.

**Renaud Paquet,
Vice-Chairperson**