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Citation: 2013 PSLRB 97

Public Service Labour Relations Act

Before the Chairperson of the Public Service Labour Relations Board

BETWEEN

ROBERT SAFIRE

Applicant

and

TREASURY BOARD
(Department of Veterans Affairs)

Respondent

Indexed as
Safire v. Treasury Board (Department of Veterans Affairs)

In the matter of an application for 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: Douglas Hill, Public Service Alliance of Canada

For the Respondent: Magdalena Persoiu, counsel

Heard at Halifax, Nova Scotia,
August 7, 2013.

Application before the Chairperson

[1] Robert Safire ("the applicant") works for the Department of Veterans Affairs ("the respondent") in Halifax, Nova Scotia. From April 30 to October 31, 2007, the applicant was on an acting assignment as a senior parole officer for the Correctional Services of Canada (CSC) in Truro, Nova Scotia. The acting assignment was a temporary promotion of one level higher for Mr. Safire. At the time, Mr. Safire worked for the CSC.

[2] In February 2007, the CSC posted a job opportunity advertisement for acting positions for senior parole officers in CSC Nova Scotia districts. Mr. Safire applied and he qualified. Around mid-April 2007, Gisèle Smith, a director for the CSC, verbally offered Mr. Safire an acting appointment in Truro as a senior parole officer. Ms. Smith later confirmed the verbal offer in writing. The initial appointment was for four months, but it was later extended by two months.

[3] Mr. Safire lives in the Halifax area, 110 kilometers from Truro. During his discussion with Ms. Smith around mid-April 2007, Mr. Safire raised the issue of commuting to Truro. Ms. Smith informed him that he would have to use his own vehicle and that no expenses would be reimbursed to him. Mr. Safire believed Ms. Smith. He did not consult his union or research the relevant collective agreement or the National Joint Council (NJC) Travel Directive to verify Ms. Smith's decision. There is nothing in the initial acting appointment offer or in its renewals that deals with travel expenses.

[4] Mr. Safire absorbed the cost of commuting to Truro. He trusted Ms. Smith and believed her, at her word that he could not be reimbursed his travel expenses of commuting to Truro.

[5] In late February 2009, Mr. Safire went on a staffing course for managers. During the discussions at the course, the trainers advised him that it was not appropriate for a public service employer to use acting appointments to avoid paying travel expenses. In other words, according to him, he learned that Ms. Smith was wrong in her ruling that he was not entitled to travel expenses for the time that he commuted to Truro.

[6] On March 25, 2009, he talked to his director, Peter Wickwire, about the situation, and he explained to him that he thought that he was entitled to be reimbursed those expenses. His director suggested to him that he submit an expense claim and stated that he would look at it. On April 2, 2009, Mr. Safire submitted his

expense claim for 83 days of commuting to Truro (mileage and lunches) for a total of $ 9731.85. He also submitted detailed explanations as to why his claim should have been accepted.

[7] On April 22, 2009, Mr. Wickwire informed Mr. Safire that his claim was refused. On May 19, 2009, Mr. Safire filed a grievance challenging the decision not to accept his claim. The respondent rejected the grievance at each level of the grievance procedure on the basis that it was untimely. The Executive Committee of the NJC considered the respondent and the bargaining agent arguments concerning timeliness and reached an impasse. The grievance was referred to adjudication by the bargaining agent. On December 9, 2010, the respondent objected to the jurisdiction of an adjudicator on the basis that the grievance was untimely. In response, Mr. Safire submitted on January 6, 2011 that the grievance was filed within 25 days, as per the relevant collective agreement, and in the alternative applied for an extension of time.

[8] I was assigned to this case in July 2013. I advised the parties on July 16, 2013 that this hearing would be to hear evidence and arguments on whether the applicant was late in filing his grievance and, if he was late, whether I should grant his application for an extension of time.

[9] Pursuant to section 45 of the *Public Service Labour Relations Act* ("the *Act*"), the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") to hear and decide any matter relating to extensions of time in this case.

[10] The applicant is represented by his bargaining agent, the Public Service Alliance of Canada (PSAC). The applicable collective agreement is the one between the Treasury Board and the PSAC for the Program and Administrative Services Group (expiry date: June 20, 2011) ("the collective agreement"). A few days before the hearing, the respondent raised an objection to my jurisdiction on the basis that the acting position occupied by Mr. Safire between April 30 and October 31, 2007 was excluded from the bargaining unit and that consequently he could not refer to adjudication a grievance involving an interpretation of the collective agreement. I suggested to the parties that that objection would not be dealt with at the hearing because some of the relevant evidence was missing at the time. It was agreed that the objection would be revisited later if necessary.

Summary of the arguments

[11] Mr. Safire argued that he was not late in filing his grievance. He first learned that he could be entitled to travel expenses for his 2007 acting appointment in late February 2009. He talked to his director, who suggested that he submit an expense claim. That claim was rejected on April 22, 2009. That is when Mr. Safire became aware of the decision or the circumstances giving rise to his grievance, which he filed on May 19, 2009. He was well within the 25-day timeline specified in the collective agreement. Furthermore, nothing in the NJC Travel Directive limits the time to submit a travel claim. Consequently, the respondent's timeliness objection should be rejected.

[12] In the alternative, Mr. Safire argued that he should be granted an extension of time to file his grievance in the interest of fairness.

[13] Mr. Safire argued that he had a clear, cogent and compelling reason for the delay to file his grievance. He was misinformed by a person whom he trusted, and who informed him that he was not entitled to expenses for his acting appointment. When he learned that he could be eligible to have his travel expenses reimbursed, he acted diligently; he filed his claim and grieved shortly after that claim was denied.

[14] Mr. Safire argued that the length of the delay to file the grievance should be calculated from the time that he learned that he could be entitled to a reimbursement of his travel expenses. In the alternative, he submitted that the time that should be used to calculate the extension of time is the point at which his acting appointment ended on October 30, 2007. This was 18 months before he presented his grievance.

[15] Mr. Safire also argued that there is no prejudice to the respondent in granting the extension of time. To the contrary, if his grievance were not heard, he would potentially lose a substantial amount of money. He also argued that there is a fair chance that his grievance could be allowed by an adjudicator if it were heard.

[16] Mr. Safire referred me to the following decisions: *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1; *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59; *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65; *Richard v. Canada Revenue Agency*, 2005 PSLRB 180; and *Hamilton and Hutchinson v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 91.

[17] The respondent argued that Mr. Safire's grievance is late. The action or circumstances giving rise to his grievance happened in mid-April 2007, when Ms. Smith informed him that he would not be reimbursed his commuting expenses to Truro. He had 25 days to grieve from that time, not from April 2009, when Mr. Wickwire refused his claim. He could have consulted his union in 2007 or could have enquired about his rights under the collective agreement or under the NJC Travel Directive, but he did not.

[18] The respondent argued that extensions of time should be granted only in exceptional circumstances. According to the respondent, Mr. Safire had no cogent, clear and compelling reasons for being late in filing his grievance. He was informed in 2007 that he would not be reimbursed for his commuting expenses to Truro. He then made a conscious choice not to grieve that decision. The fact that he was told during a course in 2009 that he might have had the right to be reimbursed is not a compelling reason to grant him an extension of time.

[19] The respondent also argued that it would be prejudiced by the granting of an extension of time. The incidents at issue occurred in 2007, which is more than six years ago. Some witnesses might not remember what happened or what was said at the time. Also, it might be difficult to retrieve some of the relevant documents. The respondent also argued that, based on recent jurisprudence, the grievance has almost no chance of success.

[20] The respondent referred me to *Schenkman*; *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110; *Lagacé v. Treasury board (Immigration and Refugee Board)*, 2011 PSLRB 68; *Brady v. Staff of the Non-Public Funds (Canadian Forces)*, 2011 PSLRB 23; *Cloutier v. Treasury Board (Department of Citizenship and Immigration*), 2008 PSLRB 31; *Cowie v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 14; *Featherston v. Deputy Head (Canada School of Public Service) and Deputy Head (Public Service Commission)*, 2010 PSLRB 72; *Grouchy v. Deputy Head (Department of Fisheries and Oceans),* 2009 PSLRB 92; *Marks v. Canada Food Inspection Agency*, 2012 PSLRB 77; *Salain v. Canada Revenue Agency*, 2010 PSLRB 117; and *Vidlak v. Treasury Board (Canadian International Development Agency*), 2006 PSLRB 96.

Reasons

[21] The facts of this application are quite simple. Mr. Safire accepted an acting appointment for six months in 2007 in Truro, which is located about 100 kilometers from where he lives. Before the beginning of his acting appointment, he asked the director who was making the appointment offer whether he would be reimbursed for his travel expenses commuting to Truro. He was told that he would not, and he believed it. In 2009, he was told by trainers on a course that he could have been eligible for the reimbursement of his travel expenses during the 2007 acting appointment. In April 2009, he claimed those expenses, and his claim was refused. Within 25 days, he grieved that refusal.

[22] Clause 18.15 of the collective agreement establishes the timeline in which to file a grievance. It reads as follows:

> ***18.15*** *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance. . . .*

[23] Mr. Safire was told before his acting appointment in 2007 that he would not be reimbursed his travel expenses. He then had 25 days to grieve. He could have done some research at the time, verified the NJC Travel Directive, sought advice from his union, and grieved if he did not agree with the decision. However, he trusted that Ms. Smith's response was correct and agreed to commute to Truro at his own expense. He did not acquire a new right to grieve when he heard from a trainer in 2009 that he could be entitled to be reimbursed those expenses. The actions and circumstances that gave rise to the grievance are not what he heard in 2009 but rather the decision made in 2007 not to reimburse his commuting expenses. On that basis, Mr. Safire exceeded the 25-day timeline to file his grievance by more than 2 years. In May 2009, he grieved a decision already made by Ms. Smith in April 2007. It does not matter if he filed a claim in 2009. The decision not to pay him travel expenses was made in 2007, and it was communicated to him at the time.

[24] Mr. Safire also argued that there is no time limit in which to submit a travel claim. He submitted his claim in 2009 for expenses incurred in 2007. However, section 1.1.2 of the NJC Travel Directive normally requires prior approval of travel. It is clear

that Mr. Safire did not obtain that approval. To the contrary, Ms. Smith explicitly refused reimbursement for his commuting expenses during the time of the assignment. That section of the NJC Travel Directive reads as follows:

> *1.1.2 Government travel shall be authorized in advance in writing to ensure that all travel arrangements are in compliance with the provisions of this directive. . . .*

[25] 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.*

[26] 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 chances of success of the grievance.

[27] Those criteria are not necessarily of equal importance. If there are no clear, cogent and compelling reasons for the delay, 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 chances of success of the grievance would not matter that much in most cases. At minimum, a solid reason is needed for the delay in order to justify an extension of time in the interest of fairness. The Public Service Labour

Relations Board ("the Board") has consistently taken that approach in the past two years (see, for example, *Lagacé* or *Callegaro*). Furthermore, as I wrote in *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, in the past, the Board rarely agreed to grant extensions of time without clear, cogent and compelling reasons.

[28] Mr. Safire did not convince me that he had a clear, cogent and compelling reason to explain the two-year delay to file his grievance. His only reason was that he heard from a trainer in February 2009 that he was entitled to be reimbursed his travel expenses commuting to Truro during his acting appointment. I agree with him that from that time he acted diligently, but he did not act diligently when management made its decision on travel entitlements in 2007, and it is that point in time that matters for the purposes of determining whether an extension of time should be granted. New deadlines are not created, as a matter of course, by the fact that an employee learns something about his or her past entitlement to a benefit. If that were the case, there would rarely be closure to any labour relations decisions. That is one of the reasons why provisions like clause 18.15 exist in collective agreements.

[29] Management makes decisions, and employees have 25 days to challenge them. Employees cannot file grievances outside that delay on the basis that they suddenly learn later on that the employer's interpretation of the collective agreement or of the law was wrong. As noted in *Allard et al. v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB File Nos. 166-02-6012 to 6039 (19791115), at page 86, ignorance of the law is no excuse.

[30] The applicant referred me to *Thompson* and to *Richard*, in which applications for extensions of time were granted. The facts in those cases are quite different from this case. In *Thompson*, the applicant's employment was terminated. The application was granted on the basis that the applicant should not have been penalized for the inaction of her bargaining agent. Obviously, that it is not so in this case. In *Richard*, the application was allowed on the basis that the applicant suffered post-traumatic stress disorder, which was a cogent and compelling reason to justify her delay. In this case, the reason for the delay is that Mr. Safire learned about his alleged rights to be reimbursed expenses only in 2009.

[31] Having already determined that Mr. Safire had no clear, cogent and compelling reason for the delay to file his grievance, I will reject his application for an extension

of time. He might have acted diligently after he received that information from a trainer in 2009, but that is not relevant. What is relevant is that he acted two years after being informed that he would not be reimbursed his commuting expenses to Truro. He should have done it within 25 days. I cannot comment on the merits of Mr. Safire's grievance because I have not heard the evidence on it. However, it does not matter that much. Without clear cogent and compelling reasons justifying the delay, I would not grant an extension of time on the basis that the grievance has some merits. That would supersede the law of the parties, namely, the collective agreement, which states that grievances must be filed within 25 days of the actions and circumstances that give rise to them. Extensions of time are granted in exceptional circumstances, when compelling and cogent reasons justify them in the interest of fairness.

[32] I should add that, even though it does not enter in the rationale of my decision, I disagree with the respondent's argument as to prejudice. It might have been more than six years ago that Mr. Safire was refused reimbursement for his commuting expenses. However, he is responsible for only one-third of the delay, namely, from April 2007 to May 2009. After that, it took more than one year for the grievance to be dealt with and referred to adjudication. This Board took close to three years to hear the case. Mr. Safire had no control over that.

[33] Considering that I denied the application for an extension of time, there is no need to deal with the respondent's objection that Mr. Safire could not grieve at the time because he was in an excluded position.

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

(The Order appears on the next page)

Order

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

[36] The grievance in PSLRB File No. 566-02-4845 is closed.

August 21, 2013.

Renaud Paquet,
Vice-Chairperson