

Date: 20141212

File: 568-02-297

XR: 569-02-131

Citation: 2014 PSLREB 04

*Public Service Labour Relations
and Employment Board Act and
Public Service Labour Relations Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

TREASURY BOARD

Respondent

Indexed as

Professional Institute of the Public Service of Canada v. Treasury Board

In the matter of an application for an extension of time referred to in paragraph 61(b)
of the *Public Service Labour Relations Regulations*

REASONS FOR DECISION

Before: David P. Olsen, a panel of the Public Service Labour Relations and
Employment Board

For the Applicant: Marie-Hélène Tougas, Professional Institute of the Public Service
of Canada

For the Respondent: Stéphane Ferland, counsel

Decided on the basis of written submissions,
filed July 16 and 31 and August 6, 2013
and August 18 and September 8 and 11, 2014.

REASONS FOR DECISION

I. Application before the Chairperson

[1] On July 16, 2013, the Public Service Labour Relations Board (“the former Board”) received from the Professional Institute of the Public Service of Canada (“PIPSC” or “the bargaining agent”) an application for an extension of time to refer a grievance to adjudication pursuant to subsection 61(b) of the *Public Service Labour Relations Board Regulations* (SOR/2005-79).

[2] The PIPSC explained that it had filed a policy grievance against the Treasury Board of Canada Secretariat (“TBS” or “the employer”) on March 27, 2013 in which it contested the employer’s interpretation and application of the Shift Change Schedule provision found in clause 8.16(a) of the SP (Applied Science and Patent Examination) collective agreement. According to the documentation filed with the former Board, the grievance had been prompted by the fact that the employer had modified its interpretation of the article in question, thus changing a practice which had been established in 2002.

[3] The employer issued its final and only grievance response on May 24, 2013, dismissing the grievance. The response was signed by Marc-Arthur Hippolyte, Assistant Deputy Minister of Compensation and Labour Relations at the TBS, on behalf of the TBS. In its response, the employer denied the grievance on its merits and on the basis of timeliness.

[4] The PIPSC received the response on May 28, 2013 and authorized the referral of the grievance to adjudication on July 3, 2013. Unfortunately, an error occurred in the process of referring the grievance to adjudication, and rather than send the referral to the former Board, the request for referral was instead sent to the attention of Mr. Hippolyte. Mr. Hippolyte is the designated recipient of all policy grievances that are initially filed by the bargaining agent.

[5] The referral was effected by email dated July 7, 2013 and sent directly to Mr. Hippolyte. The subject line of the email read “Notice of Reference to Adjudication of SP Collective Agreement 8.16(a),” and the body of the email indicated that the attached documents were for his “information in reference to the subject line.”

[6] The PIPSC only realized its error on July 11, 2013. The following day, it referred the policy grievance to adjudication and filed this application for an extension of time.

The former Board acknowledged receipt of the application for an extension of time on July 19, 2013. On July 31, 2013, the employer acknowledged receipt of the former Board's letter and advised that it considered the referral of the policy grievance to be untimely.

[7] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On November 3, 2014, the *Public Service Labour Relations Board Regulations* (SOR/2005-79) were amended to become the *Public Service Labour Relations Regulations* ("the Regulations"). Pursuant to paragraph 61(b) of the *Regulations*, the new Board may, in the interest of fairness, extend the time prescribed by Part 2 of the *Regulations* 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.

II. Summary of the arguments

A. Argument of the applicant

[8] In its application for an extension of time, the PIPSC addressed the typical factors that are at play in decisions regarding applications for the extension of time limits. It first argued that the former Board had consistently granted extensions of time in cases where the tardiness was caused by administrative errors beyond the applicant's control or due to the inadvertence of the applicant's representatives, citing *Riche v. Deputy Head (Department of National Defence)*, 2010 PSLRB 107, *Hendessi v. Treasury Board (Canada Border Services Agency) and Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 29, and *Perry v. Canadian Institutes of Health Research*, 2010 PSLRB 8.

[9] The applicant also stated that the PIPSC had acted diligently in attempting to correct the error once it became aware of it and argued that the delay caused by virtue of the error was "insignificant" in that it amounted to less than one week. It therefore concluded that the employer had been aware of the bargaining agent's contestation of the employer's application of the clause in issue and knew or ought to have known

that the applicant would be referring the grievance to adjudication, citing *Riche, Hendessi* and *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101. Given the brief delay, the applicant stated that there was therefore no prejudice to the employer.

[10] On the issue of the impact of denying the extension, the bargaining agent argued that it would be “of the utmost prejudice” since the employer’s decision had an impact “on a number of the Applicant’s members working in the Meteorological Services Bureau in the Quebec Region” and that this prejudice outweighed the prejudice to the employer in the circumstances.

[11] Finally, it submitted that the grievance was neither trivial nor vexatious and was a matter of collective agreement interpretation that warranted being heard. For the proposition that this Board should consider the nature of the grievance and its seriousness when assessing whether to grant the application, the applicant cited both *Riche* and *Hendessi*.

B. Argument of the respondent

[12] The employer, in its submission dated September 8, 2014, referred to the former Board’s decision in *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, which, in assessing the criteria for extension set out in an earlier decision of the former Board, held that if there were no clear, cogent and compelling reasons for the delay, the length of the delay, diligence of the applicant or injustice caused do not matter. The employer stated that “the length of the delay involved to refer this grievance file to adjudication should not carry any weight as the applicant did not submit any clear, cogent or compelling reasons as to why it was not referred within the prescribed delays”.

C. Rebuttal of the applicant

[13] The applicant took issue with the respondent’s allegation that it had not submitted clear, cogent and compelling reasons and stated that as it had corrected its error immediately upon becoming aware of it, the respondent’s position appeared to be unreasonable. It pointed out that nobody in the respondent’s office had contacted the applicant in order to bring to its attention the fact that the referral had been sent to the wrong office. The PIPSC alleged that the respondent’s position was

counterproductive to sound labour relations and inconsistent with the former Board's jurisprudence that it had cited in its original submissions. Finally, it pointed out that the respondent had not alleged that it would suffer any prejudice should the extension be granted.

III. Reasons

[14] Paragraph 90(1) of the *Public Service Labour Relations Regulations* establishes a deadline for the referral of grievances to adjudication, namely, 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.

[15] Time limits under the *Act* are prescriptive and should be extended only sparingly. However, under paragraph 61(b) of the *Regulations*, allowances are made to extend the time limits when it would be in the interest of fairness to do so.

[16] The criteria outlined in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, reflect principles of fairness that guide decision makers when applying paragraph 61 of the *Regulations*. Those factors are clear, cogent and compelling reasons for the delay; the length of the delay; the due diligence of the grievor(s); balancing the injustice to the employee(s) against the prejudice to the employer in granting an extension; and the chances of success of the grievance.

[17] The five factors may be interconnected, depending upon the circumstances in an application. It is also self-evident that a particular set of circumstances that define each case must dictate the weight to be given to any one of those five criteria, relative to the others. (See *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59, at paragraph 7.) In other words, an overly formulaic work or compartmentalized approach to weighing the factors will not assist in the determination of fairness within the meaning of paragraph 61(b) of the *Regulations*. See *IBEW, Local 2228 v. Treasury Board*, 2013 PSLRB 144.

[18] With respect to the argument of the respondent that if there are no clear, cogent and compelling reasons for the delay, the length of the delay, diligence of the applicant or injustice caused do not matter, as I stated in *IBEW, Local 2228 v. Treasury Board, supra*, at para 62, I do not agree. It is the circumstances of each case that will dictate

the weight to be given to any one of the relevant criteria when they are applied. The overall test for extending the time limit is fairness, as articulated in paragraph 61(b) of the *Regulations*. The criteria articulated in *Schenkman* bear no fixed presumptive calculations that prevent a decision maker from considering whether, in the interest of fairness, an extension of time ought to be granted. The factors that steer such inquiry are fact-driven and based on the underlying principle of what is fair in the circumstances.

[19] On the facts of this application, the PIPSC sought to refer a policy grievance to adjudication on July 7, 2013, the last day for referral, in accordance with the *Regulations*. However, rather than referring the grievance to adjudication to the former Board, in error, it sent the referral to the Assistant Deputy Minister of Compensation and Labor Relations, the designated recipient of all policy grievances that are initially filed by the bargaining agent.

[20] PIPSC realized its error on July 11, 2013, and the following day referred the grievance to adjudication together with the application for an extension of time to the former Board.

[21] In applying those which in my view are the relevant factors, I conclude on these facts that the PIPSC established clear, cogent and compelling reasons for the delay and that it exercised due diligence in attempting to correct its error once it became aware of it.

[22] The delay was less than one week.

[23] In balancing the injustice to the employees against the prejudice to the employer in granting an extension of time, I find that there could be potential prejudice to the employees arising from the employer's modification to the interpretation of the article of the collective agreement dealing with the shift leave schedule if the case is not heard on the merits. The employer did not allege that it would suffer any prejudice if the application for an extension of time was granted.

[24] With respect to the chances of success of the grievance, there is nothing to suggest that the grievance is frivolous or vexatious.

[25] Finally, the preamble to the *Act* fosters effective labour-management relations, encourages employers' and bargaining agents' collaborative efforts, affirms the Public Service Labour Relations and Employment Board Act and Public Service Labour Relations Act

Government of Canada's commitment to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment, and recognizes that the commitment from employers and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service. I accept the bargaining agent's argument that the respondent's position, given its timely knowledge of the referral and the apparent error that the bargaining agent had made, would run counter to sound labour relations were I to accept it.

[26] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[27] The application for an extension of time is granted.

[28] I direct the registry of the Board to schedule a hearing on the merits of the grievance.

December 12, 2014.

**David P. Olsen,
a panel of the
Public Service Labour Relations
and Employment Board**