Date: 20150506

File: 568-02-249

Citation: 2015 PSLREB 39

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

DONNA MARTIN

Applicant

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Respondent

Indexed as
Martin v. Treasury Board (Department of Human Resources and Skills Development)

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

Before: David Olsen, a panel of the Public Service Labour Relations and employment Board

For the Applicant: Vanessa Reshitnyk, counsel

For the Respondent: Amarkai Laryea, Public Service Alliance of Canada

Decided on the basis of written submissions, filed September 18 and October 2 and 17, 2014.

I. Application before the Chairperson

[1] On November 23, 2010, the applicant, Ms. Donna Martin, filed a grievance, MAN 2010-257, with her employer, Human Resources and Skills Development Canada ("HRSDC"), grieving discrimination based on disability in the workplace and a failure to meet their duty to accommodate. The grievance alleged that HRSDC ("employer" or "respondent") violated the *Canadian Human Rights Act*, as well as Article 19 and related articles of the collective agreement. It requests accommodation measures and compensation for lost wages and expenses incurred. It also sought $20,000 in damages for pain and suffering and $20,000 for reckless and willful discrimination suffered and a written apology.

[2] The grievance was set out as follows:

> *I grieve that my employer has denied me accommodation measures in the workplace as per the Treasury Board's "Duty to Accommodate" policy thus causing me serious financial, physical and psychological damages.*
>
> *I grieve that because of my disability, my employer has discriminated against me in an ongoing manner, thus the employer has violated the Canadian Human Rights Act, as well as Article 19 and all other related articles of the Technical Services agreement.*
>
> *I grieve that the employer has contravened the Treasury Board of Canada's policy on the prevention and resolution of harassment in the workplace by failing to provide a harassment-free workplace.*
>
> *I grieve that the employer has contravened Treasury Board Secretariat's Values and Ethics Code for the Public Service by failing to adhere to the application of the Code.*

[3] On December 11, 2011, the bargaining agent applied to the Public Service Labour Relations Board ("the former Board") for an extension of the time limit to file a grievance transmittal form to bring the grievance to the second or third level of the grievance procedure under Section 61 of the *Public Service Labour Relations Board Regulations* ("the former Regulations").

[4] 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.

[5] The *Public Service Labour Relations Regulations* were also amended on November 3, 2014. Section 61 of the former regulations was re-enacted as Section 61 of the current regulations without any change in wording or substance. SOR/2014-251, S. 23.

II. Summary of the evidence

[6] On November 23, 2010, the applicant, Ms. Donna Martin, filed a grievance, MAN 2010-257, with her employer, Human Resources and Skills Development Canada ("HRSDC"), grieving discrimination based on disability in the workplace and a failure to meet their duty to accommodate. The grievance was submitted along with a request that the grievance proceed directly to a third-level hearing. The grievance and the transmittal form were received by Ms. Arlene Forsyth.

[7] In requesting that the grievance be transmitted to the third level for hearing, it was the bargaining agent's position that a different level of authority, one above Ms. Forsyth, should respond to the grievance, as it was Ms. Forsyth who denied the applicant's request for accommodation in her capacity as regional director of the Labour program. Ms. Martin was the union local president at the time of filing the grievance. The employer acknowledges that Ms. Forsyth denied the applicant's request for accommodation.

[8] Ms. Forsyth received the grievance and signed the transmittal form on November 23, 2010. Nonetheless, on December 2, 2010, Ms. Forsyth emailed the bargaining agent's local representative, Alex Kozubal, and indicated that she had consulted with labour relations and it had been decided that she would proceed to hear this grievance through the regular grievance process and wanted to schedule a hearing at the first level of the grievance process. Mr. Kozubal agreed by email to have

a hearing on December 13, 2010. However, the applicant was not copied on the email and the hearing was held without her knowledge or presence. A first-level reply to the grievance was issued by Ms. Forsyth on December 17, 2010, denying the grievance due to non-compliance with timeframes and on its merits.

[9] Shortly after the application was filed, the Board, as per its procedure in such cases, sought the employer's position on the matter. The employer responded on January 31, 2012, attaching annexes to its response. The union was copied on this correspondence. Annex B is the employer's response at the first level of the grievance procedure and is dated December 17, 2010. While there was evidence that the applicant was not advised of Ms. Forsyth's email of December 2, 2010 or of the hearing on December 13, 2010, the employer's reply at the first level clearly bears the applicant's signature.

[10] The collective agreement stated in clause 18.16(a) that:

> ***18.16*** *A grievor may present a grievance at each succeeding level in the grievance procedure beyond the first level either:*
>
> *(a) Where the decision or settlement is not satisfactory to the grievor, within ten (10) days after that decision or settlement has been conveyed in writing to the grievor by the Employer.*

[11] The employer, having heard nothing in response from the bargaining agent regarding its first-level reply to the grievance during the ten-day period referred to above and believing the transmittal form to have been signed prematurely, considered the grievance to have been abandoned. Neither the bargaining agent nor the grievor were informed of the employer's position. As per the bargaining agent's procedure, the file was then transferred to the grievor's component at the bargaining agent, the Union of National Employees, in early 2011 as the Component provides representation on grievances above the first level of the grievance procedure.

[12] On August 12, 2011, Gail Myles, a Labour Relations Officer with the Component, emailed Kristel Larouche, a Labour Relations Advisor with HRSDC, requesting a third-level hearing for Martin's grievance. Myles was informed by Larouche 5 days later that pursuant to clauses 18.16 and 18.26 of the collective agreement, the employer considered that the grievance was abandoned. Myles replied that the grievance was timely and that it should proceed, failing which the bargaining agent would file another similar grievance, given that it alleged that the grievor was the subject of

ongoing discriminatory treatment. Larouche responded that the grievance was abandoned and that the case could be brought to the Department as a complaint. Myles responded that there was a misunderstanding and requested that HRSDC accept the transmittal form as timely or grant an extension. Larouche denied the request to accept the transmittal forms as timely and again affirmed the Department's proposal to continue the matter through the complaint process.

[13] On August 23, 2011, Myles contacted Danica Shimbashi, the Director General of Regional Operations and Compliance Directorate at HRSDC, with a request to allow the extension of Martin's grievance, advising her that if her request was not accepted, a second grievance would be filed. A second grievance was filed by the bargaining agent on September 21, 2011, prior to Shimbashi's response. Shimbashi replied on September 23 and reaffirmed that the employer considered that the first grievance was abandoned and would not agree to an extension but advising that the second grievance would be heard at the second level of the grievance procedure.

[14] On December 12, 2011, the bargaining agent applied to the former Board for an extension of time.

III. Summary of the arguments

A. Submissions of the applicant and bargaining agent

[15] The applicant requests that the application be granted and the grievance be ordered to proceed to the third level of the grievance process. The bargaining agent submits that it took appropriate action to protect the timelines set out in the collective agreement by submitting the transmittal form along with the grievance on November 23, 2010.

1. Waiver of grievance level

[16] It is the applicant's position that because the grievance was submitted at the first level to the very manager named as the perpetrator of harassment and discrimination that the first-level hearing should have been waived, in accordance with the terms of clauses 19.02 (a) and (b) of the collective agreement. Those clauses read,

> ***19.02*** *(a) Any level of the grievance procedure shall be waived if a person hearing the grievance is the subject of the complaint.*

> *(b) If by reason of paragraph (a) a level in the grievance procedure is waived, no other level shall be waived except by mutual agreement.*

[17] Further, because the employer did not communicate that the transmittal was premature, the fact that the transmittal was signed by Forsyth should have brought the grievance to the third level. The applicant noted that clause 19.02(a) does not require mutual agreement between the parties in order to waive a grievance level and that the use of "shall" means that the article requires such action. Thus, the grievance hearing should have proceeded above the first level, as per the transmittal request form.

2. The grievance was not abandoned

[18] The bargaining agent argued that at no time in the grievance process did the applicant give notice that she had abandoned the grievance. Clause 18.25 reads; "A grievor may by written notice to the immediate supervisor or officer-in-charge abandon a grievance."

[19] The bargaining agent noted that throughout the grievance process, the applicant intended to transmit the grievance to the third level within the proper timelines, as is evidenced by her having submitted her transmittal notice with her original grievance.

3. Fairness considerations in extending timelines

[20] The bargaining agent argued that the inquiry for extending timelines is what the Board considers "in the interest of fairness" and that there "are no presumptive calculations or thresholds in the *Schenkman* criteria that pre-empt a decision maker from considering whether, in the interest of fairness, an extension of time ought to be granted." It relied on *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19, at para 88.

4. Consideration of the *Schenkman* factors

[21] The bargaining agent submitted that the five criteria in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, ought to be considered when deciding whether to grant the extension of time. The five *Schenkman* factors as follows are outlined at para 75:

1. clear, cogent and compelling reasons for the delay;
2. the length of the delay;
3. the due diligence of the applicant;
4. balancing the injustice to the applicant against the prejudice to the respondent; and
5. the chances of success of the grievance.

[22] The bargaining agent made arguments regarding two factors, specifically the first factor, compelling reasons for delay, and the fourth factor, balancing the injustice to the applicant against the prejudice to the respondent.

a. <u>There are clear, cogent and compelling reasons for the delay</u>

[23] The bargaining agent argued that there are clear, cogent and compelling reasons for the delay. It pointed to their expectation that the grievance was proceeding to a third-level hearing after the transmittal form was signed by Forsyth on November 23, 2010. It noted that after the transmittal form was signed by the applicant's supervisor, the applicant and the bargaining agent understood there were no issues of timeliness of the submission of the transmittal form. This position is supported by the fact that they were not made aware of the employer's objections until after trying to set up a date for the third level hearing months later.

b. <u>Balancing the injustice to the applicant against the prejudice to the respondent</u>

[24] The bargaining agent argued that the employer cannot submit that they would be prejudiced by allowing the timeline extension. It argued that because the employer recognized the seriousness of the grievance and sought to hear the grievance through another administrative process, the complaint process, that they cannot take the position they would be prejudiced.

[25] Further, the potential injustice to the grievor is significant, as she could be unable to bring a grievance to gain accommodation of her disability and would lose claim to hours of sick leave without pay she was forced to utilize while the employer, she alleges, refused to accommodate her disability.

B. Submissions of the employer

[26] The respondent submits that the Board should not exercise its discretion in favour of extending the time limits to permit the applicant to transmit her grievance to the next level. The employer maintains that an extension of time is not warranted in this case for the following reasons, based on the *Schenkman* criteria.

1. No clear, cogent and compelling reason for delay

[27] In considering the first *Schenkman* factor, the employer argued that there are no clear, cogent and compelling reasons for the delay. It argued that the applicant had the opportunity and all the information necessary to transmit the grievance to the next level of the grievance procedure in a timely manner after the first-level decision by Forsyth.

a. No agreement between the parties to transmit the grievance to the third level of the grievance procedure

[28] The employer argued that the fact Ms. Forsyth signed the grievance transmittal form is not indicative of an agreement between the parties to transmit the grievance directly to the third level. Rather, the employer argued, Section 4 of the transmittal form only indicates that Ms. Forsyth received the form on behalf of management and did not, as the bargaining agent asserts, effectively agree to the elimination of the lower levels of the grievance procedure. Filing the transmittal form at the same time as the grievance was considered premature by the employer, who proceeded to hold a first-level grievance hearing.

b. The bargaining agent was told that the grievance would be heard at the first level

[29] The employer argued that the bargaining agent was informed in writing by email that the grievance would be heard in accordance with the regular grievance procedure and is evidence that the employer did not agree to transmit the grievance directly to the third level. The employer submits that the purpose of the December 13 meeting was understood and accepted by both parties, which was further demonstrated by Mr. Kozubal's response and attendance at the meeting. It was Mr. Kozubal's responsibility to inform the grievor that the grievance was being heard at the first level of the grievance process. The employer argued that it is unreasonable to assume that

the bargaining agent believed the grievance was transmitted to the third level of the process when it agreed to and attended the first-level hearing.

c. Ms. Forsyth was not the subject and/or reason for the applicant's grievance

[30] The employer submits that it was not required to waive the first and second level of the grievance procedure, per clause 19.02 of the collective agreement, because Ms. Forsyth was not the manager named as the harassing and discriminating manager. The employer submits, rather, that the subject of the grievance was the behaviour of her former manager and involved events dating back to 2009. This point, it argued, was supported by the summary of the December 13, 2010 meeting, a copy of which it attached to its submission as Appendix B. Further, it is also supported by the fact that there were no objections raised by Mr. Kozubal to Forsyth hearing the grievance at the first level.

d. Mistaken assumptions are not compelling reasons for delay

[31] In summary, the employer argued that the bargaining agent has not presented compelling reasons to justify not transmitting the grievance to the next level in a timely manner. The employer noted that "mistaken assumptions should not be the basis for extending timelines." The employer submits that the bargaining agent cannot rely on an unsubstantiated understanding that the employer agreed to transmit the hearing to the final hearing level in order to justify the delay. It relied on *Kunkel v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 28, at para 21, and *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, at para 29.

2. The length of the delay is significant

[32] The employer argued that it legitimately considered the grievance abandoned as the grievance was not transmitted in a timely manner, per clause 18.16(a) of the collective agreement. After the first-level decision was issued on December 17, 2010, the bargaining agent had ten days to transmit the grievance to the next level. There was no communication regarding the grievance until August 12, 2011, more than seven months later.

[33] The employer argued that in light of the ten-day limit negotiated between the parties, the seven-month delay is significant. For the Board to extend the time limit

would undermine the time limits negotiated between the parties in the collective agreement and would undermine the principle that labour relations disputes should be resolved in a timely manner. *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*; 2009 PSLRB 92.

[34] Further, the employer argued that employees are "responsible for being aware of their rights," and that both the applicant and the bargaining agent representative were responsible for the applicable timelines for transmitting their grievance to the next level in the grievance process. For this, it relied on *Schenkman*, at para 77.

3. The applicant and bargaining agent did not act with due diligence

[35] The employer argued that the applicant did not pursue her grievance with due diligence in not arranging for timely transmittal of her grievance by not submitting the required forms for transmittal after the first-level hearing or by inquiring with her bargaining agent representative or the employer as to the status of her grievance.

[36] The employer also argued that the bargaining agent did not act with due diligence as it should have known the rules applicable to the grievance process and transmitted the grievance within the legal time frame.

4. Balancing injustice to the applicant against the prejudice to the employer

[37] The employer argued that an extension of the timeline would be prejudicial based on the fact that the events grieved took place in January 2009, almost six years ago. Such a passage of time would create problems for the employer, as many witnesses may have forgotten many of the events contained in the grievance. Further, many of the parties involved in the grievance, particularly Ms. Forsyth and her former manager, have retired from the public service.

[38] The employer argued that the length of delay relates directly to prejudice to the employer and if significant can outweigh the injustice to the employee. It relied on *Schenkman*, at para 81, and *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 31, at para 21.

[39] The employer also argued that granting an extension of time whenever a deadline was missed by a bargaining agent because of an oversight or error would be

contrary to section 187 of the *Public Service Labour Relations Act*, relating to unfair labour practices.

[40] Further, the employer argued that the denial of the extension would not cause an injustice to the applicant. It noted that the applicant did in fact file a second grievance on September 21, 2011. The subject matter of that grievance relates to many of the same matters covered in the grievance at issue here. The employer argued that the applicant would not be prevented from bringing forward her human rights grievance if an extension of time is not granted by this decision.

[41] Regarding the applicant's argument that the employer believed, when responding to a request on August 18, 2011, that there were live issues raised, the employer argued that it offered to hear the applicant's allegation as a complaint because of the seriousness of the issue raised, not because it believed there were "live" issues to be resolved.

5. Chances of success of the grievance

[42] The employer argued that the Board should not grant an extension, even if the grievance has some merit, because the applicant has not presented a clear and compelling reason for delay.

[43] The employer argued that the former Board has held that the *Schenkman* criteria are not always equally important, and each factor's importance must be examined in relation to the facts of each case. It relied on *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110, at para 20, and *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102, at para 26 and 30, that without a clear and compelling reason for the delay, an extension of time should not be granted, despite the grievance potentially having some merit.

C. Response by the applicant and bargaining agent

[44] The bargaining agent argued that, contrary to the employer's position, Ms. Forsyth was the subject of the grievance, as is demonstrated by the fact that she was alleged to have told Martin that she would deny her accommodation request and that she could grieve that if she wanted. The bargaining agent also argued that documentation it had submitted demonstrated that the applicant had requested a new reporting relationship until the matter of her grievance was resolved. Further, it argued

that the grievance did not reference specific individuals or events dating back to 2009, as was argued by the employer.

[45] The bargaining agent argued that no agreement between the parties was necessary to eliminate the lower levels of the grievance procedure, per clause 19.02, given its use of the word "shall".

[46] The bargaining agent noted that, in response to the employer's claim that the bargaining agent and applicant were required to be diligent in following up on their grievance, that the meeting between Mr. Kozubal and Ms. Forsyth was never brought to the attention of Ms. Martin, despite the fact that it was her own grievance.

[47] The bargaining agent also noted that after the transmittal form was submitted with the grievance in November 2010, and signed by Ms. Forsyth, the applicant and the bargaining agent did not believe any issues were raised regarding the timeliness of the transmittal form or that another transmittal form was required for the grievance to move to the second or third stage of the grievance process.

[48] With regards to any injustice suffered by the applicant, the bargaining agent noted that the second grievance, filed in September 2011, would not relate to the incidents covered by the present grievance, which had been filed in November 2010. Thus, prejudice would result to the applicant.

[49] Further, the bargaining agent noted that the employer has not established that their witnesses would have any trouble recollecting events and reminded the Board that both her former managers could appear as witnesses despite having retired.

IV. Reasons

[50] On November 23, 2010, the applicant filed her grievance alleging discrimination based on disability in the workplace and failure to meet the duty to accommodate with Ms. Arlene Forsyth, the director of the Labour program, together with a request that the grievance proceed directly to a third-level hearing on the basis that pursuant to clause 19.02 of the collective agreement, the first level of the grievance procedure must be waived as Ms. Forsyth was one of the subjects of the complaint.

[51] Ms. Forsyth, rather than waiving the hearing at the first level and forwarding the grievance for hearing at the third level, proceeded with a hearing at the first level of

the grievance procedure with the bargaining agent's local representative and without notice to the applicant. A grievance hearing was held on December 13, 2010, and the employer issued a first-level reply to the grievance on December 17, 2010, denying the grievance, a copy of which was provided to the applicant on December 17, 2010

[52] While the bargaining agent argued that the application of clause 19.02 meant that the first-level hearing should have been waived, the employer disputed its application to the present circumstances, arguing that Ms. Forsyth was not the subject of the grievance even if she was now involved in it by virtue of the position she occupied. I note that there was no evidence that the bargaining agent, on behalf of the grievor, filed any grievance which alleged any breach of clause 19.02. Further, even though the bargaining agent may now argue that clause 19.02 should have applied to this situation, it did not raise the issue with Ms. Forsyth when she scheduled a first-level hearing, despite the grievor's request that she apply the terms of clause 19.02. Nor was I presented with evidence indicating that either the bargaining agent or the applicant had raised the issue following their receipt of the first-level reply to the grievance. Instead, the issue appears to have been raised for the first time some seven months after the reply at the first level of the grievance process, and only once the employer had apprised the bargaining agent of its position regarding timeliness. I therefore find that the bargaining agent has waived its right to raise this issue in this application.

[53] The employer, believing the transmittal to the third-level hearing had been signed prematurely and not receiving any response to the first-level grievance reply, considered the grievance to have been abandoned.

[54] The applicant and the bargaining agent were not informed of the position of the employer.

[55] The applicant's grievance file was transferred by the local to the Component at the bargaining agent that provides representation on grievances above the first level of the grievance procedure.

[56] On August 12, 2011, the bargaining agent requested a third-level hearing for the grievance, at which time it was advised by the employer that it considered the grievance to be abandoned. After some attempts between the bargaining agent and the

employer to resolve the issue, on September 23, 2011, the employer reaffirmed its position that the grievance was abandoned and would not agree to an extension.

[57] Time limits under the *Act* are prescriptive and should be extended only by exception.

[58] Pursuant to paragraph 61(*b*) of the Board's *Regulations*, time limits may be extended if it is in the interest of fairness to do so.

[59] The previous Board has developed criteria that it considered in extending time limits, as outlined in *Schenkman*, *supra*, namely, clear, cogent and compelling reasons for the delay; the length of the delay; the due diligence of the grievor; balancing of the injustice to the employee against the prejudice to the employer; and the chances of success of the grievance. The criteria are not necessarily of equal importance, not all of the criteria are relevant and weighting is situational, depending on the facts in the case at hand. See *Prior*.

[60] I see no reason to depart from this criteria as section 61 of the *Regulations* has been re-enacted without any change in wording or substance.

[61] The applicant's representative argued that as the alleged perpetrator of the harassment was the manager who was the focus of the grievance, clause 19.02 of the collective agreement should have been applied and the first level hearing should have been waived. While there is some merit to the argument, the fact remains that the employer clearly denied the request to transmit to a higher level in the grievance process and clearly communicated that denial to the bargaining agent, who did not protest but instead attended the first level hearing, argued the case and accepted the first level response without comment. While Ms. Forsyth signed the transmittal form when she received the grievance, she subsequently consulted Labour Relations and changed her mind, choosing to follow the normal grievance process and hear the grievance at the first level of the grievance procedure. Having accepted the employer's actions and having proceeded with the grievance hearing at first level is apparent that the bargaining agent cannot now argue that the actions of the employer, to which it acquiesced, should be ignored. There was no evidence presented to suggest that the bargaining agent objected to the employer's decision to follow the normal grievance process and the employer was therefore within its rights to proceed under the assumption that its denial of the union's request had been accepted.

[62] The bargaining agent also argued that the applicant had never intended to abandon her grievance. I accept that the grievor did not, under the terms of clause 18.25 of the collective agreement, advise the employer that she intended to do so. However, a grievor can abandon a grievance without recourse to clause 18.25. A grievor can also abandon a grievance by simply not proceeding to the next step in the grievance process within the time limits set for transmittal. A grievor can simply accept a response at the final level of the grievance process and not refer to the grievance to adjudication. I do not conclude an employee can only abandon a grievance by providing written notice to the employer. In any event, even if the grievor did not intend to abandon her grievance, the fact remains that the transmission to third level was untimely and it is necessary to address her request to extend the timelines

[63] The bargaining agent argues that there are clear, cogent and compelling reasons for the delay as it was the applicant's and the bargaining agent's expectation that the grievance was proceeding to a third-level hearing after the transmittal form was signed by Ms. Forsyth on November 23, 2010. It was only after the bargaining agent attempted to set a date for a grievance hearing at the third level in August 2011 that the applicant and the bargaining agent learned of the employer's position that the grievance had been abandoned.

[64] While the first level hearing may not have been brought to the attention of the applicant, the response by the employer was provided to her and she signed her copy of it on December 17, 2010. There was no evidence provided to suggest that she contacted either her union or the employer following reception of the reply. I am unable therefore to accept the bargaining agents contention that the applicant could in good faith believe that her grievance was to be processed as she had first requested. This is so particularly given the fact that the applicant was the union local president and can be presumed to have more experience in such matters than the average employee who has never dealt with grievances before. Regardless of her union experience, upon receipt of the employer's response, the applicant had a clear indication that the process she had requested was not being followed and it was incumbent on her at that time, to inquire regarding what was transpiring with her grievance. She cannot ignore a clear communication from the employer to the effect that they have rejected her request then claim to be surprised at such news some months down the road. I am not satisfied that the applicant exercised due diligence in pursuing her grievance.

[65] The bargaining agent argued that the applicant's expectation that the grievance was proceeding to third level constituted clear, cogent and compelling reasons for granting the extension. As I have found based on the facts that the applicant could not entertain such expectations in good faith I must reject the bargaining agents submissions on this point.

[66] The employer argued that the denial of the extension would not cause an injustice to the applicant, as the applicant did in fact file a second grievance, and that the employer is prejudiced by virtue of the retirement of potential witnesses. The second grievance would not relate to the incidents which are the subject matter of the grievance at issue in this case, and as well, the fact that witnesses may have retired is not unusual, and they may be subpoenaed to give evidence if the employer is so advised in this case. I am not satisfied that the employer has established a case for actual prejudice.

[67] The employer also argues that it should not be prejudiced because of the lack of diligence on the part of the applicant or the bargaining agent as the applicant has some recourse open to her for a lack of diligence on the part of the bargaining agent under the duty of fair representation provisions contained in section 187 of the *Public Service Labour Relations Act*.

[68] The Board is mandated under paragraph 61 of the *Regulations* to consider applications for extensions of time where time limits have been missed in the grievance process and to grant them in exceptional circumstances where it would be in the interest of fairness to do so.

[69] As noted in paragraph 131 in *Prior*, it may very well be that an applicant, in addition to or in the alternative, may file a duty of fair representation complaint against her bargaining agent seeking an order for a declaration that the bargaining agent has failed in its duty of fair representation. Nevertheless, the Board is mandated under section 61 to deal with this application on its own merits without regard to whether there is an application under section 187.

[70] As stated *supra* the *Schenkman* criteria are not necessarily of equal importance, not all of the criteria are relevant and weighting is situational, depending on the facts in the case at hand. In this case I have found that the applicant has not established clear, cogent and compelling reasons for the delay nor has the applicant established

that she exercised due diligence in pursuing her grievance. Even though I have not found actual prejudice to the employer if an extension were to be granted, in the circumstances of this case the failure of the applicant to establish clear, cogent and compelling reasons for the delay nor due diligence in the pursuit of the grievance, on balance in the interests of fairness to both parties I am not inclined to grant the extension.

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

(The Order appears on the next page)

V. Order

[72] The application for the extension of time is denied.

May 6, 2015.

David Olsen,
Vice-Chairperson