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

Before the Chairperson of the Public Service Labour Relations and Employment Board

BETWEEN

ANNA CHOW

Applicant

and

TREASURY BOARD
(Public Health Agency of Canada)

Respondent

Indexed as
Chow v. Treasury Board (Public Health Agency 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 Regulations* and in the matter of an individual grievance referred to adjudication

Before: Catherine Ebbs, Chairperson

For the Applicant: Herself

For the Respondent: Geneviève Ruel, counsel

Decided on the basis of written submissions filed June 24 and July 15 and 27, 2015.

Introduction

[1] Anna Chow ("the applicant") was hired by the Public Health Agency of Canada ("the respondent") on February 16, 2009, as a human resources assistant. The applicant was subject to a 12-month probationary period. The respondent ended her employment by letter dated August 6, 2009.

[2] On September 8, 2009, the applicant grieved the termination of her employment. The grievance proceeded directly to the second level, and the respondent denied it by letter dated January 24, 2011.

[3] The parties disagree on the date that the applicant's grievance was transmitted to the third and final level of the grievance process. The respondent contends that it was transmitted on February 10, 2011; Ms. Chow claims that the proper date was March 30, 2011. For reasons that will be explained later, the discrepancy as to when the grievance was transmitted to the final level is immaterial to my decision. The respondent issued the third- and final-level written response, denying the grievance, on April 25, 2012.

[4] Before the respondent rendered its final-level decision on the grievance, Ms. Chow referred her grievance to the Public Service Labour Relations Board ("the former Board") for adjudication. After the former Board received it on March 27, 2012, the respondent raised a preliminary objection, stating that the reference to adjudication was untimely and that an extension should not be granted.

[5] The parties were asked to present written submissions on the preliminary objection. Ms. Chow filed her submissions on June 24, 2015. The respondent filed its submissions on July 15, 2015, and the applicant filed her rebuttal submissions on July 27, 2015. I note that I have also taken into consideration the written submissions of the applicant's then-counsel, dated July 31, 2012, in reaching my decision.

[6] After reviewing the written submissions, I directed the parties to attend an in-person pre-hearing conference (PHC), which the applicant was informed she could participate in by telephone. The parties were advised that if they failed to attend the PHC, a decision could be issued without further notice. The applicant did not attend

the PHC, and the parties were informed that my decision would be rendered on the basis of the existing record and that no further submissions would be accepted.

[7] For the purposes of this decision, I must decide two issues, namely, whether the applicant's reference to adjudication was timely, and if not, whether I will grant an extension of time within which to refer the grievance to adjudication so that it can be heard on the merits. For the reasons set out later in this decision, I have determined that the reference to adjudication was untimely and that an extension of time should not be granted.

[8] 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 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.

Was the reference to adjudication timely?

[9] The first point that I need to address is the applicant's contention that her reference to adjudication was not late since she sent a completed reference to adjudication form to the former Board before transmitting her grievance to the final level.

[10] The applicant presented conflicting submissions on this point. She first claimed that she ". . . delivered in person a letter to the PSLRB requesting a referral of [her] grievance to the Board" (her letter to the former Board, dated March 27, 2012). However, in her June 24, 2015, submissions, the applicant states as follows:

> *On October 1, 2009, Ms. Chow sent the Public Service Labour Relations Board ("the PSLRB") an envelope enclosing the Grievance and completed Form 21. The documents together constituted Ms. Chow's request to have her grievance referred to adjudication. Attached is a copy of Ms. Chow's Affidavit swearing that the Form 21 was sent to the PSLRB on October 1, 2009 along with the grievance (attached hereto at tab 3).*

[11] The new Board has no record of receiving the applicant's completed reference to adjudication form before March 27, 2012. However, even if I accept the applicant's submission that she presented a reference to adjudication to the former Board in 2009, it would have been premature. As section 225 of the *Public Service Labour Relations Act* (*PSLRA*) states: "No grievance may be referred to adjudication until the grievance has been presented at all required levels in accordance with the applicable grievance process."

[12] I agree with the former Board's analysis in *Brown v. Deputy Head (Department of Social Development)*, 2008 PSLRB 46, at para 26 and 27, in which, when referring to subsection 209(1), section 225 (since amended, but the new wording has no effect on my decision) and subsection 241(2) of the *PSLRA*, it explained as follows:

> *. . . The scheme of the dispute resolution process set out for grievances in the* PSLRA *is that the parties to a grievance should try to resolve it between themselves before referring it to adjudication. To ensure this, the* PSLRA *sets out conditions that the grievor must meet before referring the grievance to adjudication. . . .*

[13] As I stated earlier, the parties disagree as to when the grievance was transmitted to the third and final level of the grievance process. The respondent states it was February 10, 2011, and the applicant contends it was March 30, 2011. Thus, even if I were to accept that Ms. Chow referred her grievance to the former Board in 2009, she would have done so before presenting her grievance to the final level. Accordingly, any reference to adjudication in 2009 would have been premature, and the former Board would have had no jurisdiction to consider it.

[14] I turn now to whether the applicant's reference to adjudication on March 27, 2012, was timely.

[15] For the following reasons, I find that the reference to adjudication was not filed within the prescribed time limits.

[16] Subsection 90(2) of the *Regulations*, which has not been amended, reads as follows:

> ***90.*** *(2) If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.*

[17] Clause 18.17 of the Program and Administrative Services Group collective agreement, which expired on June 20, 2011 "(the collective agreement"), and was in effect at the time of the applicant's referral of her grievance to adjudication, states that the respondent shall reply within 20 days when the grievance is presented at the final level.

[18] There is no dispute that the respondent did not reply within 20 days of the presentation of the grievance at the final level. I do not need to decide whether the applicant presented her grievance to the final level on February 10, 2011, as the respondent submits, or March 30, 2011, as she submits. Therefore, she had no later than 40 days after the expiry of the 20-day limit to refer her grievance to adjudication. Since she did not refer her grievance to adjudication until March 27, 2012, she was woefully out of time.

[19] Therefore, I conclude that the reference to adjudication was untimely.

Should the request for an extension of time be granted?

[20] At the same time that the applicant made her reference to adjudication to the former Board on March 27, 2012, she also requested an extension of time.

[21] The new Board's authority to extend the time to refer a matter to adjudication is found in section 61 of the *Regulations*, which states 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 Board or an adjudicator, as the case may be.*

[22] The parties did not agree to extend the prescribed timelines for referring the grievance to adjudication, and the respondent opposes the extension request. Thus, I have to determine whether I will exercise my discretion to grant the applicant's extension request, in the interest of fairness.

[23] *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, at para 75, noted that based on the prevailing jurisprudence, the following criteria are to be considered when deciding whether to grant an extension of time:

> . . .
>
> - *clear, cogent and compelling reasons for the delay;*
> - *the length of the delay;*
> - *the due diligence of the grievor;*
> - *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*
> - *the chance of success of the grievance.*
>
> . . .

[24] The former Board, in *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 31, at para 13, determined that requests to extend timelines should be allowed sparingly, as follows:

> *[13] . . . Although paragraph 61(*b*) of the* Regulations *allows that time limit to be extended, such applications are allowed sparingly so as not to destabilize the labour relations scheme created by the* Act *and the agreement between the parties.*

[25] The five *Schenkman* factors inform the new Board's analysis of whether fairness requires that it grant an extension of time. In each case, it examines the factors in the context of the particular facts and then determines the weight to give to each factor. As stated as follows in *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81, at para 51:

> *[51] These criteria are not always given equal importance. The facts of a given case will dictate how they are applied and how they are weighted relative to each other. Each criterion is examined and weighed based on the factual context of the case under review. In some instances, some criteria may not be relevant or the weight may go to only one or two of them.*

[26] In a more recent case on extension-of-time requests, *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19, at para 88, the former Board explained further as follows how the criteria apply to the analysis:

> *[88] The inquiry is fact driven and based on the underlying principle of section 61 of the* Board Regulations*: what is "in the interests [sic] of fairness." Flowing from this, there are no presumptive calculations or thresholds in the* Schenkman *criteria that pre-empt a decision maker from considering whether, in the interests of fairness, an extension of time ought to be granted.*

[27] After considering the parties' submissions and applying the *Schenkman* factors, I deny the request to extend the time limit to refer the grievance to adjudication.

[28] Most importantly, I find that the applicant has not presented clear, cogent and compelling reasons for the delay. She asserts that the delay was caused by the following factors: a lengthy battle with the respondent with respect to an access-to-information (ATIP) request, with final documents provided on March 12, 2012; the respondent's long delay in issuing its final-level grievance decision, which was rendered on April 25, 2012; and, the intransigence of her bargaining agent in refusing her request for representation in 2011 and 2012.

[29] None of these purported reasons is compelling.

[30] First, the applicant has failed to convince me that it was necessary for her to wait until her ATIP request was processed before referring her grievance to adjudication. She would have had the opportunity to rely on any relevant information received through the ATIP at other stages of the process.

[31] Secondly, while I certainly do not condone the respondent's delay in rendering its final-level decision in this matter, I note that the second reason the applicant provided is no reason at all. The applicable provision of the collective agreement and subsection 90(2) of the *Regulations* referred to earlier are specifically designed to provide a grievor with recourse when an employer's final-level decision is not conveyed in a timely manner.

[32] Finally, in her letter to the former Board on March 27, 2012, the applicant stated that ". . . the union responded via email that it will not be representing [her] grievance in May 2011." Thus, by her own admission, she knew of her bargaining agent's position at least 10 months before she referred her grievance to adjudication. Moreover, the reference to adjudication was brought under paragraph 209(1)(*b*) of the *PSLRA*; thus, she did not need to obtain her bargaining agent's approval to represent her in the adjudication proceedings. I further note that she initially retained counsel to represent her in the adjudication. Her bargaining agent's purported intransigence is neither a clear, cogent nor compelling reason on which I am prepared to exercise my discretion to grant an extension of time.

[33] I also find that the length of the delay in this case was excessive. Even if I accept that the applicant's grievance was transmitted to the final level on March 30, 2011, followed by extension requests and a request for an in-person hearing, according to the file the parties did not communicate about the matter after May 2011. Yet, she waited until March 27, 2012, to file her reference to adjudication.

[34] Turning to the remainder of the *Schenkman* criteria, while there is no indication in the file material that the applicant intended to abandon her grievance, I am not satisfied that she demonstrated due diligence. The timelines were clear, and her reasons for her delay are not compelling.

[35] The next criterion requires balancing the injustice to the applicant against the prejudice to the respondent in granting an extension. Although the reference to adjudication relates to a matter that occurred in 2009, and thus, the respondent may suffer some prejudice in marshalling its evidence, this criterion would seem to favour the applicant. However, in the face of the excessive delay, which has not been supported by compelling reasons, I placed little weight on this criterion in reaching my decision.

[36] Finally, I cannot determine at this point that the grievance has no chance of succeeding. As such, I have placed no weight on this criterion. Since I am addressing an extension-of-time request, and not a decision on the merits, I agree with the former Board's reasoning in *Schenkman*, at para 83, as it pertains to the last criterion, namely, the chance of success of the grievance:

> *. . . It is difficult to assess whether a grievance has a "serious" chance of succeeding without hearing all the evidence. A better characterization of this factor would be that the grievance has "no chance" of succeeding. If, on its face, the grievance is totally without merit, then this may be a factor to consider. . . .*

[37] My analysis of the *Schenkman* criteria with respect to the facts of this case has led me to place the vast majority of weight on the first two criteria. The excessive delay referring the grievance to adjudication was not supported by clear, cogent and compelling reasons to justify it.

[38] I conclude that it would not be in the interest of fairness to grant an extension of time. Accordingly, the new Board will not hear the grievance on the merits.

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

(*The Order appears on the next page*)

Order

[40] The reference to adjudication was untimely.

[41] The request for an extension of time is denied.

[42] Files 568-02-280 and 566-02-6802 are ordered closed.

October 5, 2015.

Catherine Ebbs,
Chairperson