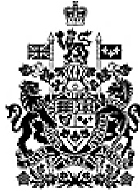
Date: 20160817

File: 568-09-308 and 309

Citation: **2016 PSLREB 75**



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

DAVID DUNCAN AND JOLANTA KANABUS-KAMINSKI

APPLICANTS

and

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent and Employer

Indexed as

Duncan v. National Research Council of Canada

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

Before: David Olsen, adjudicator

For the Grievors and Applicants: Christopher Rootham, counsel

For the Employer and Respondent: Michel Girard, counsel

Heard at Ottawa, Ontario,
July 20 to 22, 2015.

I. The extension of time applications

[1] David Duncan filed a grievance dated December 9, 2013. He grieved that the employer had incorrectly calculated the value of his WFA benefits as announced to him on June 19, 2013.

[2] On February 21, 2014, the employer responded to the grievance at the final level, noting that he was notified of his surplus status and was provided with information about the WFA exercise, including his WFA termination benefits, on June 19, 2013, and that the grievance was not presented within the prescribed time limit of 35 days as per his collective agreement, making it untimely. The employer denied the grievance on that basis.

[3] Despite the timeliness issue, the employer stated that the relevant articles of the collective agreement had been properly interpreted and applied at the time his WFA benefits calculations were made.

[4] Dr. Jolanta Malgorzata Kanabus-Kaminska filed a grievance dated December 10, 2013. She grieved that the employer had incorrectly calculated the value of her WFA benefits as announced to her on October 24, 2013.

[5] On February 21, 2014, the employer responded to the grievance at the final level, noting that she was notified of her surplus status and was provided with information about the WFA exercise, including her WFA termination benefits, on October 24, 2013, and that the grievance was not presented within the prescribed time limit of 35 days as per her collective agreement, making it untimely. The employer denied the grievance on that basis.

[6] Again, despite the timeliness issue, the employer stated that the relevant articles of the collective agreement had been properly interpreted and applied when her WFA benefits calculations were made.

[7] On March 27, 2014, the RCEA applied under s. 12 of the *Public Service Labour Relations Board Regulations* (SOR/2005-79; "the former *Regulations*") for an extension of time to file the grievances of Mr. Duncan and Dr. Kanabus-Kaminska.

[8] On April 10, 2014, the employer advised the Public Service Labour Relations Board ("the former Board") that it maintained its position that the grievances were untimely and that it was ready to present its timeliness arguments.

[9] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* came into force, creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Board and the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40), also came into force, which provided that proceedings commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, were to be continued under that Act as amended. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the Board.

[10] The bargaining agent called three witnesses, Joan Van Den Bergh, a negotiator, Mr. Duncan and Dr. Kanabus-Kaminska in support of the applications for extensions of time. The employer called one witness, Benoit Chartrand, a senior labour relations advisor to the NRC.

II. Summary of the evidence

1. Ms. Van Den Bergh

[11] Ms. Van Den Bergh handles all the labour relations issues for the RCEA and was involved in the interest arbitration that led to the collective agreement at issue. She testified in support of the applications to extend the time limits.

[12] She referred to two documents, entitled respectively "Business Case - Workforce Adjustment National Research Council - National Science Infrastructure" and "Business Case - Workforce Adjustment National Research Council - Construction Portfolio", which outline the business rationale for staff reductions.

[13] She explained that the NRC's WFA policy requires that a consultation take place with the RCEA before a WFA occurs. It requires that the NRC provide a business case that sets out the explanation and rationale for a WFA for each part of the NRC.

[14] The business case sets out the human resources implications, lists affected employees and members of the bargaining agent, and provides dates when different steps in the process will occur.

[15] She stated that the NRC did not advise her of the amount of WFA benefits being provided to affected employees.

[16] On December 4, 2013, Mr. O'Neil, a technical Officer in Halifax, Nova Scotia, and a union steward, telephoned her to advise her that he had been declared surplus and that he had been provided an estimate of his WFA benefits. He advised her that he thought the NRC was misapplying the collective agreement.

[17] Ms. Van Den Bergh had been aware that Mr. O'Neill would be declared surplus; however, she had not seen any of the WFA calculations. He then emailed her, stating in part as follows:

…

> *Well, I cannot say I am surprised. Attached is a copy of my and Cindy Leggiadro's WFA benefits statement. They did deduct the 12 weeks from my entitlement and then deducted it again from the 70 week cap [as well with Cindy's] they removed it twice. How to proceed?*

[18] Ms. Van Den Bergh then went back through her records and looked at those parts of the organization for which WFAs had taken place since January 15, 2013.

[19] She decided to contact the union stewards at all locations at which WFAs had taken place to ascertain whether the WFA calculations for other TOs had been done the same as Mr. O'Neill's.

[20] On December 5, 2013, she spoke with Serge Carrier, the manager of labour relations at the NRC, at a regularly scheduled national consultation meeting.

[21] She expressed her outrage to him at how the NRC was calculating WFA benefits for laid-off employees and asked him to provide information with respect to how many TOs had been affected.

[22] She followed up on her conversation with an email. Mr. Carrier responded by email the same day and undertook to provide all the information that he could, bearing in mind the provisions of the *Privacy Act* (R.S.C., 1985, c. P-21).

[23] Ms. Van Den Bergh then detailed her attempts to reach individual employees. On December 5, 2013, she sent an email to Jim Jennings, the RCEA's British Columbia steward, asking him to track down the contact information of two employees who had been laid off so that the RCEA could verify whether they had received the proper WFA benefits.

[24] One of the laid-off employees, Mr. Duncan, provided her with a phone number. She called him, explained the situation, and asked him to send her his surplus letter and the calculations of the WFA adjustments, which he did. He also sent completed grievance forms.

[25] Ms. Van Den Bergh corresponded by email with Dr. Kanabus-Kaminska and requested that she provide her with a copy of her letter outlining her WFA termination benefits so that the RCEA could verify whether she had received the benefits to which she was entitled. Dr. Kanabus-Kaminska forwarded her notice of surplus status, including the WFA termination benefits calculations, and she confirmed that she was willing to participate in a grievance.

[26] In cross-examination, Ms. Van Den Bergh acknowledged receiving copies of the business cases for several parts of the organization and "Annex A", which lists surplus employees. She agreed that she was informed about who was being laid off but not about the compensation packages they would receive.

[27] She did not recall asking the NRC for information about the WFA benefits calculation. She stated that at one time, the RCEA had been provided with that information routinely with every WFA notification; however, the NRC had stopped providing that information, for privacy reasons.

[28] She acknowledged that when employees are declared surplus, they are given a benefits breakdown; however, the RCEA does not receive a copy of the breakdown.

[29] She was referred to a letter dated June 19, 2013, and addressed to Mr. Duncan by the general manager at the NRC's Herzberg location, advising him of his notice of surplus status. The letter advised Mr. Duncan of his surplus and layoff dates.

[30] The letter also outlined his benefits in accordance with the WFA policy. In particular, she was referred to the first paragraph on page 2 of the letter, which stated as follows:

> *Please note that the maximum total for the above benefits shall not exceed the equivalent of 70 weeks of regular pay. If you have already received severance termination payments following the elimination of severance pay for voluntary departures, the number of weeks for which you have received payment will be included in the WFA calculations with respect to the maximum total layoff benefits of 70 weeks.*

[31] Ms. Van Den Bergh acknowledged that Mr. Duncan was informed of the NRC's position when he received the letter but stated that he had no knowledge that there was an issue between the bargaining agent and management.

[32] Ms. Van Den Bergh signed the policy grievance on December 9, 2013, and filed it on December 13, 2013. On December 16, 2013, the RCEA asked to have the grievances heard at the final level of the grievance process.

2. <u>Mr. Duncan</u>

[33] Mr. Duncan worked for the NRC in Victoria, British Columbia, as a mechanical technologist and technical photographer.

[34] He was called to his director general's office on June 19, 2013. Also present was the head of Human Resources. His director general explained to him that due to budget cuts, his position had been identified as surplus to requirements, and that he would be laid off on August 28, 2013. He was presented with a letter entitled, "Notice of surplus status". Attached to the sheet was a letter outlining his WFA termination benefits.

[35] He was asked whether he had read the sheet. He answered that he did but stated that his mind had begun spinning on realizing that his final date of employment would be August 28, 2013.

[36] He was asked whether he had had any questions about the package. He stated that he had known both the director general and the head of Human Resources for many years and that he had trusted what was placed in front of him. He stated that he had had no reason to think there were any problems.

[37] He recalled being contacted by Ms. Van Den Bergh concerning a problem with the calculations of the WFA benefits. She advised him that she would send him some grievance forms to complete, which he did.

[38] He stated that he did not file a grievance before December 13, 2013; because he did not know the detailed ins and outs of the collective agreement and that he trusted his director general and the head of Human Resources.

[39] Mr. Duncan signed his grievance on December 9, 2013. The bargaining agent approved the presentation of the grievance on December 10, 2013. Its receipt was acknowledged on December 13, 2013. The grievance alleged that the employer had incorrectly calculated the value of his WFA benefits as announced to him on June 19, 2013, contrary to clauses 56.7, 56.1, and 55.1 of the collective agreement as well as the terms of the WFA policy.

3. Dr. Kanabus-Kaminska

[40] Dr. Kanabus-Kaminska holds a PhD in chemistry and chemical engineering and held the position of senior technical officer at the Fire Research Program in the Institute for Research in Construction at the NRC.

[41] Dr. Kanabus-Kaminska was informed on October 24, 2013, by Human Resources and the director general of the Construction Portfolio Fire Unit that her TO position had been identified as surplus to requirements and that her surplus date was to be November 7, 2013, and her layoff date January 8, 2014.

[42] The notice of surplus status letter set out her WFA termination benefits.

[43] The same day, Dr. Kanabus-Kaminska wrote to Human Resources, raising what she termed the questionable mathematics with respect to the calculations of the table of benefits and in particular the calculation of the in-lieu-of-notice period.

[44] Human Resources responded to her on October 25, 2013, stating in part as follows:

> *What is not explained in that sheet in column 2 but explained in the WFA policy is in terms of the 70 week Of benefits, as stated here:*
>
> *…*
>
> *3.6.1 3.1 An employee who is identified as surplus is entitled to receive layoff benefits which include:*

> - *"a notice period of 20 weeks plus one week for every year of continuous service or portion thereof;*
> - *an outplacement benefit equivalent to 8 weeks' pay or $8000 whichever is greater;*
> - *severance pay on layoff as per the applicable collective agreement."*
>
> *The maximum total benefits to which a surplus employee is entitled under the policy shall be an amount not exceeding the equivalent of 70 weeks of pay. In cases where a surplus employee has opted to receive the $8000.00 versus the 8 weeks' pay as an outplacement benefit, the $8000.00 will be deemed to represent 8 weeks' pay for the purpose of determining the maximum 70 weeks of pay entitlement.*
>
> *"3.6.13.4 The employees notice period entitlement, comprised of either notice worked, a lump sum in lieu of notice or a combination thereof, will be reduced as necessary to maintain a cap of 70 weeks of pay entitlement."*
>
> *The calculation is therefore a very simple one, I have confirmed with Mary who provides the numbers on this Benefit Statement that her calculations are verified before they are disseminated. In your case, she did double-check and she assures me the numbers are correct.*
>
> [*Sic* throughout]

[45] She stated that she understood there was a policy of a 70-week cap on benefits; however, she also understood that there seemed to be more than one way "to skin the cat."

[46] She requested a face-to-face meeting with Human Resources to discuss the calculation of her termination benefits, as well as other issues.

[47] On December 5, 2013, Ms. Van Den Bergh wrote to her and requested a copy of her letter with respect to WFA termination benefits so that the RCEA could verify whether she had received all the benefits to which she was entitled.

[48] She replied the same day, attaching a scanned version of her notice of surplus status, including the WFA termination benefits. The letter stated in part as follows:

> *I would like to bring your attention to the overall cap of 70 weeks and the subtraction from the total "standard" severance pay of the partial payment that I took this past summer. It seems that the 5 weeks payment was subtracted*

> *promptly from the 70 weeks maximum as you described below….*

[49] Before receiving Ms. Van Den Bergh's email, she did not ask anyone at the RCEA about the severance benefits calculation. She had had discussions with her colleagues, and she expected that she was not the only one affected. Everyone who was laid off was informed personally, and they all kept to themselves.

[50] The reason that she did not file a grievance earlier was that she was not aware that the NRC was doing something questionable.

[51] She signed her grievance on December 10, 2013. The bargaining agent approved it for presentation on December 11, 2013, and it was presented on December 13, 2013. She grieved that the employer had incorrectly calculated the value of her WFA benefits as announced to her on October 24, 2013, and claimed that the calculation was contrary to clauses 56.7, 56.1, and 55.1 of the collective agreement as well as the terms of the WFA policy.

4. <u>Mr. Chartrand</u>

[52] Mr. Chartrand acknowledged that the bargaining agent would be aware when employees are declared surplus but that it likely would not be aware of the individual WFA benefits calculations.

[53] He stated that the calculations might have been shared in the past, but he had little doubt that that they were not currently being shared on account of privacy concerns. He stated that once the grievances were filed, the NRC provided full tables of WFA benefit calculations to the bargaining agent.

[54] Mr. Chartrand agreed that it was not until December 2013 that the NRC provided meaningful information with respect to the individual grievors' WFA benefits calculations.

III. <u>The submissions on timeliness</u>

1. <u>For the RCEA</u>

[55] The RCEA submitted that there is no need for an extension of time because of the unique wording in the collective agreement.

[56] Clause 17.9 of the collective agreement deals with time limits. Clause 17.9.7 deals with policy grievances. It provides that the RCEA may present a policy grievance not later than the 35th day after the date on which it was notified either verbally or in writing or first had knowledge of the action or circumstance that gave rise to the grievance. The policy grievance is timely.

[57] Clause 17.9.4 provides that an individual grievance may be presented directly at the final level of the grievance process without it having been presented at a lower level if it relates to classification, a demotion, or a termination of employment.

[58] The two grievances that are allegedly out of time, Mr. Duncan's and Dr. Kanabus-Kaminska's, relate to terminations of employment and were referred to the final level of the grievance process. There are no time limits set out in the collective agreement for filing such individual grievances.

[59] The Federal Court of Appeal, in *Re Dunham*, |1982| F.C.J. No. 11, determined that an article in a collective agreement with wording similar to clause 17.9.4 did not prescribe a time to file an individual grievance.

[60] In that case, the relevant collective agreement provided a 25-day limit for grievances to be presented at the first level; however, it did not prescribe the time to present a grievance with respect to disciplinary action resulting in discharge, which had to be presented only at the final level.

[61] In the alternative, if the Board concludes that the grievance was filed under clause 17.9.1 of the collective agreement, then the language used in that clause is directory and not mandatory.

[62] Brown and Beatty, in *Canadian Labour Arbitration*, state as follows at paragraph 2:3128, which deals with time limits:

> *However, more commonly, the question of whether the time limit is directory or mandatory is not dealt with explicitly and so in determining its effect, it must be interpreted in the context of the agreement. In doing so, generally arbitrators have held that where the word "may" is used in the time-limit provision, failure to comply strictly will not render the grievance inarbitrable. However, where the word "shall" is used, the matter is less certain. One line of authority has held that "shall" is imperative or mandatory and that non-compliance with such a provision is a bar to arbitration,*

> *particularly in connection with statutory expedited arbitration provisions. The more prevalent view now, however, is that notwithstanding that the imperative character of the word "shall", whether it is mandatory or directory ultimately will turn on the construction of each agreement….*

[63] The parties alternated between directory and mandatory provisions and deliberately used "may" and "shall" in different contexts. In clause 17.9.3(a), dealing with the presentation of an individual or a group grievance at succeeding levels in the grievance process, they used the word "shall" to provide that a grieving party shall not be entitled to present a grievance at a succeeding level after 15 days have elapsed from the date on which the decision was conveyed in writing.

[64] In *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65, an adjudicator looked at the issue of whether time limits were directory or mandatory. In that case, a grievance concerning a termination of employment was filed within the time limits for filing a grievance under the collective agreement. It was heard at the third level of the grievance process and was denied.

[65] The bargaining agent was unaware of the proper process to initiate a reference to the former Public Service Staff Relations Board (PSSRB) for adjudication and followed the customary process of setting up a private-sector labour arbitration. The employer objected to the adjudicator's jurisdiction to hear the grievance as the bargaining agent had not followed the proper procedure in the P.S.S.R.B. *Regulations and Rules of Procedure*, 1993, SOR/93-348 as am. SOR/96-457 (*Regulations*).

[66] The adjudicator interpreted articles in the relevant collective agreement and sections of the *Regulations* that read in part as follows:

…

> *[15] Section 76 of the* P.S.S.R.B. Regulations and Rules of Procedure *… sets out the time limits to file a reference to adjudication:*
>
> > 76. (1) An employee may refer a grievance to adjudication under section 92 of the Act by filing with the Secretary in duplicate a notice in Form 14 of the schedule, together with a copy of the grievance that the employee submitted to the employee's immediate supervisor or the local officer-in-charge pursuant to paragraph 71(1)(a) or (b) or paragraph

> 71(2)(a) or (b), no later than the thirtieth day after the earlier of
>
> (a) the day on which the employee received a reply at the final level of the grievance process, and
>
> (b) the last day on which the authorized representative of the employer was required, pursuant to the provisions of a collective agreement or arbitral award or pursuant to section 74, to reply to the grievance at the final level of the grievance process.
>
> …

[67] The adjudicator observed that the parties had adopted this process in the collective agreement and stated that there appeared to be strong and clear language that a reference to adjudication had to be made using the process specified by the *Regulations* within the time limits prescribed in the relevant regulations. This language is mandatory and not directory.

[68] The language the parties used in the collective agreement in this case is directory and not mandatory.

[69] In the further alternative, the RCEA submitted that the Board should grant an extension of time in which to file the two individual grievances under s. 61 of the *Regulations*, which provides 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.*

[70] One of the basic criteria for determining whether to exercise the Chairperson's powers to extend a time limit is the length of the delay at issue. See *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1.

[71] Assuming without conceding that there is a 35-day period in which to file an individual grievance, Mr. Duncan received his layoff letter on June 19, 2013. He filed his grievance on December 13, 2013, about 142 days after the date on which the time limit expired. Dr. Kanabus-Kaminska received her layoff letter on October 24, 2013, and filed her grievance on December 13, 2013, a period of 15 days after the time limit expired.

[72] One of the basic criteria set out in *Schenkman* for determining whether to exercise the Board's discretion to extend a time limit is the prejudice it would cause to the employer. The employer submitted no evidence that it would suffer any prejudice were the time limit extended.

[73] Another of the criteria set out in *Schenkman* is whether there are clear, cogent, and compelling reasons for the delay. The two grievors testified concerning the reasons they did not file their grievances earlier. They stated that they had trusted their employer's calculations of the WFA benefits and were not aware of the dispute between the bargaining agent and the employer over the calculations. Only on December 4, 2013, did the RCEA find out that the NRC had taken the approach it did with respect to the WFA benefits calculations. The RCEA immediately tried to contact its stewards to determine which of its members had been affected and to obtain information from the employer. The grievances were filed within two weeks and two days after the RCEA first learned of the situation.

[74] These are appropriate cases for the Board to exercise its discretion and to extend the time limit for filing the two grievances.

2. <u>For the employer</u>

[75] The employer submitted that the two grievances at issue were not referred to adjudication in a timely fashion and that they were considered untimely when it addressed them in the internal grievance process.

[76] Clause 17.9.1 of the collective agreement states that individual grievances may be presented no later than the 35th day after the date on which the grieving party was notified or first had knowledge of the action or circumstance giving rise to the grievance.

[77] Contrary to the bargaining agent's submissions, clause 17.9.4 does not apply to the individual grievances since they are not about terminations. The grievors challenged not their terminations but the layoff benefits calculation pursuant to the collective agreement.

[78] These grievances were referred to the final level on consent of the parties pursuant to clause 17.8.6. The 35-day limit applies when grievances are referred to the final level on consent. In that case, the employer agrees to waive the level but believes the time limit that normally applies is still in effect. Furthermore, the bargaining agent understands that the 35-day time limit applied to the grievances.

[79] When considering whether to extend the time for filing a grievance, the Board must consider when the grievor became aware that management's decision had adversely affected him or her and when it would have been appropriate to file a grievance.

[80] In this particular case, the two relevant dates are the dates on which the grievors received their respective notices of surplus status, which set out the calculations of their termination benefits under the NRC's WFA policy, and the dates on which they filed their grievances.

[81] In Dr. Kanabus-Kaminska's case, the evidence shows that she received her notice of surplus status letter on October 24, 2013. At the bottom of the first page, the employer set out the benefits to which she was entitled under the WFA policy, which were detailed in a chart on the last page of the letter. At the top of the second page, the employer explained how the benefits were calculated and noted that "[t]he maximum total for the lay-off [*sic*] benefits shall not exceed the equivalent of 70 weeks of regular pay …".

[82] If an employee has already received severance payments, the number of weeks for which he or she received a payment was included in the WFA calculations with respect to the maximum total layoff benefits of 70 weeks.

[83] Clearly, as of the date of receiving this letter, Dr. Kanabus-Kaminska was aware of the calculation the employer used to determine the total amount of her layoff benefits, and she had the right to grieve that calculation within the next 35 calendar days.

[84] Dr. Kanabus-Kaminska's grievance shows that she signed her grievance on December 10, 2013, and that the bargaining agent signed it on December 11, 2013. According to clause 17.9.1, she should have filed her grievance by November 28, 2013.

[85] As for Mr. Duncan, the letter shows that he received his notice of surplus status on June 19, 2013. His letter was structured and worded like Dr. Kanabus-Kaminska's letter. As of the date he received his letter, he was aware of his layoff benefits and of how the employer calculated them.

[86] Mr. Duncan signed his grievance on December 9, 2013, and it was presented to management on December 13, 2013. He should have filed it by July 24, 2013, in keeping with the prescribed 35-day time limit.

[87] Taking into account all these facts, the employer submitted that the grievances were not filed until well after the prescribed 35-day deadline.

[88] As for the applicable legislation, under s. 61(b) of the *Regulations*, allowances may be made to extend a time limit if doing so would be in the interest of fairness.

[89] It has been repeatedly held by former PSLRB chairpersons that time limits should be extended only sparingly and only after a review of the relevant facts; see *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, and *Safire v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 97 at para. 31.

[90] Since these are individual grievances, the grievors bore the responsibility of diligently presenting their respective grievances to each level of the grievance procedure. As employees, it was their responsibility to file their grievances in a timely manner.

[91] In this case, the grievors had the burden of justifying why they were unable to present their grievances in accordance with the time limit set out in the collective agreement; see *Lawrence v. Canada Revenue Agency*, 2007 PSLRB 65 at para. 44.

[92] Prior jurisprudence, in particular *Schenkman*, has established the basic criteria for determining whether discretion should be exercised and an extension granted under s. 61(b) of the *Regulations*.

[93] It has been repeatedly held that the criteria listed in *Schenkman* are not necessarily of equal importance; see *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33 at para. 22.

[94] With respect to the weighting of the criteria, the PSLRB Chairperson in *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102, held as follows at paragraph 26:

> *[26] … If there are no 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 chances of success of the grievance would not matter that much in most cases. A solid reason is needed for the delay.…*

[95] See also *Bertrand v. Treasury Board*, 2011 PSLRB 92 at para. 42; *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68 at para. 47; and *Fontaine v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 39.

[96] Neither grievor provided a compelling reason as to why his or her grievance could not have been filed within the prescribed time limit.

[97] The grievors' counsel argued that they should be granted the extension because they did not know that the employer's calculation of their termination benefits was incorrect, according to their bargaining agent. That is not a sufficiently compelling reason for the delays. In *Safire*, at para. 29, the PSRLB Chairperson held that "[e]mployees 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 … ignorance of the law is no excuse [emphasis added]."

[98] Of particular relevance is paragraph 28 of *Safire*, in which the PSLRB Chairperson stated the following:

> *[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.*
>
> [Emphasis added]

[99] Similar to the *Safire* case, the Board in this case should find that both grievors had ample time to carry out research or to consult with their bargaining agent as to the calculation of their layoff benefits in the 35 days after they received their notice of surplus letters.

[100] For the purposes of determining whether the extension of time should be granted, the time after the grievors received the letters is relevant, not the time after they learned of the union's concerns about how the employer was calculating layoff benefits.

[101] As for Ms. Van Den Bergh's testimony, she did not offer a compelling reason to justify the delays of Dr. Kanabus-Kaminska and Mr. Duncan in filing their grievances. She was aware of the dates they were to be made surplus and knew that they were going to receive an explanation as to how their benefits would be calculated.

[102] She could have asked the employer for copies of the benefit calculations, but she did not. The employer respectfully submitted that the RCEA's extension-of-time application should not be granted because it failed to take action and notify its members of perceived issues with the employer's benefits calculations under the WFA policy.

[103] In Dr. Kanabus-Kaminska's case, the email (entered as Exhibit 2, Tab 23) shows that in addition to the explanation provided in her notice of surplus letter, she received a further explanation from Nicole Giguère-Campbell as to the calculation of her layoff benefits on October 25, 2013. Ms. Giguère-Campbell's email cites the relevant section of the WFA policy, which pertains to the 70-week benefits cap.

[104] The evidence shows that Dr. Kanabus-Kaminska did have some conversations with NRC Human Resources and Ms. Van Den Bergh about her notice of surplus letter and her layoff benefits in the weeks that followed her being notified. However, after all her consultations, she chose not to file a grievance until mid-December 2013.

[105] In Mr. Duncan's case, he did not present his bargaining agent with his notice of surplus letter until December 9 and more importantly the bargaining agent knew that the employer would deem his grievance.

[106] Based on all those facts, neither grievor was diligent in pursuing his or her grievance. They both had 35 days after receiving their notice of surplus letters during which they could have filed a grievance.

[107] With respect to the length of the delays, Dr. Kanabus-Kaminska did not file her grievance until 50 days after receiving notification of her termination benefits under the WFA policy. Mr. Duncan waited almost six months before filing his grievance on the calculation of his termination benefits.

[108] The lengths of those delays are significant and require clear, cogent, and compelling explanations from each grievor. The collective agreement's 35-day time limit was considered a sufficient period in which a grievor could seek advice from his or her bargaining agent representative, consider his or her options, and decide whether to file a grievance.

[109] Furthermore, the purpose of s. 61(b) of the *Regulations* is to permit the Board to use its discretion to extend time limits in situations in which denying an extension would cause unfairness. The purpose of s. 61(b) is not to render meaningless the time limits the parties negotiated in the collective agreement.

[110] The Board has held that an applicant as well as his or her bargaining agent ought to have known the applicable time frames in which to file the applicant's grievance. In the *Schenkman* case, the PSSRB found at paragraph 77 that "… in a unionized environment, the expectation is that employees are responsible for being aware of their rights. This includes an expectation that employees will check whether the assertions by management are correct …"

[111] Thus, the employer's position is that the two grievors ought to have known the applicable deadline and that had they wished to challenge its calculation of their layoff benefits, they should have filed their grievances within the 35-day time limit.

[112] As noted earlier, it has been held that the prejudice to an employer does not need to be addressed in the absence of clear, cogent, and compelling reasons for a delay; see *Copp*, at para. 22; *Callegaro v. Treasury Board (Correctional Service of*

Canada), 2012 PSLRB 110 at para. 19; *Lagacé*, at paras. 47 and 53; *Fontaine*, at para. 39; and *Bertrand*, at para. 42.

[113] Nevertheless, the employer submitted that it would be prejudiced were an extension of time granted. Specifically, should the Board grant the application for an extension of time, the resulting decision would negatively affect labour relations stability between it and the bargaining agent. In other words, employees will be encouraged to file their grievances outside the prescribed time limits on the sole ground that they were not aware that a grievable issue existed in the first place.

[114] Although denying the application may appear unfortunate from the grievors' perspective, it would not be unjust, given the facts in this case.

[115] The employer's position is that the Board should not grant an extension even if it finds that both grievances may have some merit, since the grievors did not present clear and compelling reasons for their delays; see *Brassard*, at para. 26.

[116] With respect to the grievances' chances of success, previous chairpersons of the PSLRB have previously held that without a clear, cogent, and compelling reason justifying a delay, an extension of time will not be granted on the basis that the grievance might have some merit.

[117] The employer submitted that even if the grievances have some merit, the Board should not grant the extension of time requests because the grievors failed to present clear, cogent, and compelling reasons justifying their failures to file their grievances on time.

3. Reasons for decision with respect to extending time limits

[118] Clause 17.9 of the collective agreement deals with time limits. It reads in part as follows:

…

> *17.9.1 In the case of an individual or group grievance, the grieving party (the employee or the Association, as the case may be), may present a grievance to the first level of the grievance procedure in the manner prescribed in clause 17.10, not later than the thirty-fifth (35th) day after the date on which the grieving party was notified, either verbally or*

in writing, or first had knowledge of the action or circumstance giving rise to such grievance.

17.9.2 The Council shall normally reply to an individual or group grievance at any level of the grievance procedure, except the final level, not later than twenty (20) days after the grievance is received and within thirty-five (35) days where the grievance is presented at the final level.

17.9.3 An individual or group grievance may be presented for consideration at each succeeding level in the grievance procedure beyond the first level either

> *(a) when the decision or settlement is not satisfactory to the grieving party within fifteen (15) days after that decision or settlement has been conveyed in writing to the grieving party by the Council, but shall not be entitled to do so after the said fifteen (15) days have elapsed,*
>
> *or*
>
> *(b) when the grieving party does not receive a decision within twenty (20) days after the grievance is received, it may present the grievance for consideration at the next higher level within forty (40) days after the last day the grieving party was entitled to receive a reply but shall not be entitled to do so after the said forty (40) days have elapsed.*

17.9.4 An individual grievance may be presented directly at the final level of the grievance process without it having been presented at a lower level if the individual grievance relates to classification, a demotion or a termination of employment.

…

17.9.7 In the case of a policy grievance, the Association may present a grievance in the manner prescribed in clause 17.10, not later than the thirty-fifth (35th) day after the date on which the Association was notified, either verbally or in writing, or first had knowledge of the action or circumstance giving rise to such grievance.

17.9.8 The Council shall normally reply to a policy grievance not later than twenty (20) days after the grievance is received.

17.9.9 The time limits stipulated in this Article may be extended by mutual agreement between the Council, the griever [sic], and where appropriate, the Association.

[119] The RCEA submitted that the individual grievances were presented under clause 17.9.4 of the collective agreement as they relate to terminations of employment and that they were presented at the final level of the grievance process. As clause 17.9.4 does not stipulate any time limit for filing such individual grievances, they are not out of time; nor is there a need for the Board to exercise its discretion and extend the time limits.

[120] The employer argued that clause 17.9.4 does not apply to the individual grievances as they do not relate to any termination. In my view, clause 17.9.4 is inapplicable as the grievances do not challenge the grievors' layoffs but rather the benefits calculation under the WFA policy.

[121] The grievances were filed under clause 17.9.1 as individual grievances. That clause provides that a grievance may be presented to the first level of the grievance procedure not later than the 35th day after the date on which the grieving party was notified either verbally or in writing or first had knowledge of the action or circumstances giving rise to the grievance. The RCEA argued that in any event, the language in clause 17.9.1 is directory and not mandatory. The employer takes the position that the language is mandatory. It is not in dispute that both grievances were filed after the prescribed 35-day deadline.

[122] As noted, the question of whether time limits are directory or mandatory is not commonly dealt with explicitly in a collective agreement; that determination is made in the context of the collective agreement.

[123] It is appreciated that the parties used the word "may" in clause 17.9.1 of the collective agreement. The operative words are that grievances "may" be presented "… not later than the thirty-fifth (35th) day after the date on which the grieving party was notified …" In my view, the use of the word "may" in that context refers to the act of presenting a grievance, in the sense that an employee is not required to present a grievance; it is at the employee's discretion, if he or she wishes.

[124] These words, presented "… not later than the thirty-fifth (35th) day after the date on which the grieving party was notified, either verbally or in writing, or first had knowledge of the action or circumstance giving rise to such grievance", address the issue of the time in which a grievance may be presented. They impose a mandatory time limit of 35 days to file a grievance.

[125] I find support for this interpretation in clause 17.9.9 of the collective agreement, which provides that the parties may extend the time limits it stipulates, by agreement. If the time limits in the agreement were only directory, there would be no need for such a provision.

[126] The bargaining agent argued in the alternative that in the interest of fairness, I should extend the time prescribed in the grievance procedure for presenting grievances, pursuant to s. 61 of the *Regulations*.

[127] It is not disputed that the grievances were presented at the final level of the grievance procedure in the case of Mr. Duncan about 142 days or in excess of 4½ months from the date on which the 35-day time limit expired and in the case of Dr. Kanabus-Kaminska about 15 days after the time limit expired.

[128] I have found that time limits under the collective agreement are prescriptive and as the NRC submitted that they should be extended only by exception.

[129] In *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96, the PSRLB developed criteria, which were to be considered when deciding whether to extend time limits, as outlined in *Schenkman* as follows:

> (i) clear, cogent, and compelling reasons for the delay;
>
> (ii) the length of the delay;
>
> (iii) the due diligence of the grievor;
>
> (iv) balancing the injustice to the employee against the prejudice to the employer; and
>
> (v) the chances of success of the grievance.

[130] The criteria are not necessarily of equal importance, and weighting is situational, depending on the facts in each case.

[131] The employer argued that the jurisprudence reflects a preponderance of weighting on one factor; namely, whether there exist clear, cogent, and compelling reasons for the delay, and if there are no compelling reasons, then the other factors will not matter much in most cases. It relied on a number of previous decisions as outlined in its argument.

[132] In *Chow v. Treasury Board (Public Health Agency of Canada)*, 2015 PSLREB 81, the PSLREB Chairperson stated as follows at paragraphs 25 and 26:

> *[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.

[133] In a more recent case on extension-of-time requests, *Apentang 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.

[134] See *Prior v. Canada Revenue Agency*, 2014 PSLRB 96 at para. 132, which is to the same effect.

[135] The bargaining agent argued that there are clear, cogent, and compelling reasons for the delays. The two grievors trusted their employer's calculations of the WFA benefits, and they were not aware of its dispute with the bargaining agent over the calculations.

[136] When the RCEA first learned of the employer's approach on December 4, 2013, it immediately tried to contact its stewards to determine which of its members had been affected. The policy grievance and the individual grievances were filed within two weeks after that.

[137] The employer argued that neither grievor provided a compelling reason as to why his or her grievance could not have been filed within the prescribed time limit.

[138] The employer argued that that is not a sufficiently compelling reason for the delays and relied on *Safire* as ignorance of the law is no excuse.

[139] In *Safire*, the Vice-Chairperson of the PSRLB relied on his decision in *Copp*, in which he had determined that the criteria for extending time limits were not necessarily of equal importance and that if there were no clear cogent and compelling reasons for a delay, the other criteria referred to in *Schenkman* would not matter that much in most cases.

[140] He found on the facts of that case that the grievor had not convinced him that he had a clear, cogent, and compelling reason to explain the two-year delay filing his grievance. His only reason was that he heard from a trainer some two years after the events in question that he was entitled to be reimbursed for travel expenses.

[141] In my view, the situation in *Safire* is distinguishable from the facts presented in this application for an extension of time. *Safire* was an individual grievance related to travel expenses reimbursement.

[142] This case relates fundamentally to a dispute between the bargaining agent and the employer concerning the negotiation of the collective agreement, during which the parties had been at impasse throughout the collective bargaining process, at negotiations, in mediation, and at the terms-of-reference hearing.

[143] The individual grievors had no particular knowledge of the dispute; however, it impacted them. It was not until December 2013 that the bargaining agent first learned of how the NRC was implementing the WFA benefits calculation under the new arbitral award, which was contrary to the bargaining agent's known position.

[144] Only in December 2013 did the NRC provide meaningful information to the bargaining agent concerning the WFA benefits calculation in the cases of individual employees, due to privacy concerns.

[145] The bargaining agent filed its policy grievance and the individual grievances as soon as it learned of how the NRC was calculating and applying the WFA benefits in individual cases.

[146] It was not argued that the policy grievance is out of time. It and the individual grievances are identically worded and raise exactly the same issue. I find in all the circumstances that clear, cogent, and compelling reasons exist for the delays and that in all the circumstances, the bargaining agent and the grievors exercised due diligence pursuing the grievances.

[147] The lengths of the delays, four to five months in one case and a little over two weeks in the other, are not excessive, after a review of the existing jurisprudence.

[148] The bargaining agent also argued that there has been no evidence that the employer would be prejudiced if the time limit were extended.

[149] The employer submitted that the jurisprudence indicates that prejudice to an employer does not need to be addressed in the absence of clear, cogent, and compelling reasons for the delay. Nevertheless, it would suffer prejudice as a decision to extend the time would negatively affect labour relations stability.

[150] Again, there are no presumptive thresholds. The employer did not adduce any evidence of actual prejudice or particular hardship that it would suffer if the time limit for presenting the two grievances were extended.

[151] I am not persuaded that the employer would suffer any prejudice from extending the time limit for these two grievors to file individual grievances, especially as the Board is mandated to hear the policy grievance as well as the other individual grievances filed about the same issue. In balancing the injustice to the employees against the prejudice to the employer, since I have found no actual prejudice in granting the extension, the balance favours extending the time limit.

[152] The last of the *Schenkman* criteria relates to the chances of success of the grievance. In *Chow*, the Board stated as follows at paragraph 36:

> *[36] Finally, I cannot determine at this point that the grievance has no chance of succeeding… 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 the 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….

[153] In my view, the grievances as presented raise a serious issue to be tried. With respect to the facts pertaining to the application for an extension of time, I have considered all the criteria outlined in *Schenkman*. In my view, they all, to differing degrees, support the application. The majority of the weight has been placed on the fact that I do not consider the delays excessive in the circumstances and the fact that there would be no actual prejudice to the NRC in having to defend the individual grievances. The application to extend the time limit to file the two grievances is granted.

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

(The Order appears on the next page)

IV. <u>Order</u>

[155] I grant the RCEA's application for an extension of time in which to file the untimely grievances in files 568-09-308 and 309.

August 17, 2016.

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