

Date: 20170714

File: EMP-2016-10763

Citation: 2017 FPSLREB 9

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



Before a panel of the Federal
Public Sector Labour Relations
and Employment Board

BETWEEN

NALINI NAIPAUL

Complainant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

and

OTHER PARTIES

Indexed as

Naipaul v. President of the Canada Boarder Services Agency

In the matter of a request for extension of time to file a reply to the complaint

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Herself

For the Respondent: Julie Burke, Canada Border Services Agency

For the Public Service Commission: Louise Bard, Public Service Commission

Written submissions filed
July 4, 2017.

REASONS FOR DECISION

Introduction

[1] On October 17, 2016, the complainant, Nalini Naipaul, filed a complaint in which she alleges that the President of the Canada Border Services Agency, (CBSA or “the respondent”), abused its authority with respect to both the choice process and the application of merit in appointing Katarzyna Zajeziński, the appointee, on an indeterminate basis to an FB-05 Investigator position in the CBSA’s Enforcement and Intelligence Operations Division in Mississauga, Ontario.

[2] This decision deals with the respondent’s application for an extension of time to file its reply to the complainant’s allegations.

[3] The complainant did not respond to the respondent’s extension of time.

[4] The Public Service Commission does not oppose the respondent’s request for an extension of time.

[5] For the reasons that follow, I find that the respondent did not establish that it would be in the interest of fairness to extend the time-lines to file its response the complainant’s allegations.

Background

[6] On October 28, 2016, the respondent filed a motion to dismiss the complaint, on the basis of timeliness. In her original complaint and in reply to the respondent’s motion, she explained that a tragedy had taken place at work in which she was involved in her capacity as a referral agent for the CBSA. In a letter decision dated January 20, 2017, the Board dismissed the respondent’s motion to have the complaint dismissed due to the complainant’s exceptional circumstances. Further, the Board noted that the complaint was filed only eight days after the complaint period ended, a relatively short period when considered in the context of the exceptional circumstances.

[7] On February 20, 2017, respondent made a request to the Board for an extension of time in order to complete the exchange of information. The reason provided was that “the parties were away from the office at varying times and they have been unsuccessful in booking a meeting before February 17, 2017”. The complainant did not object and the Board granted the extension until March 3, 2017.

[8] On March 3, 2017 at 4:02 p.m., the complainant sent an email to the Board, stating:

Please be advised that I provided the information requested, by email before and again on 14FEB2017. I have not received any information which I requested, not by email nor otherwise.

The first exchange meeting (prior to the extension request) was scheduled when the employer was aware that I was on leave and wasn't able to respond...The second exchange meeting scheduled for 28FEB (after the extension request) didn't happen as I was on sick leave that day. From the 14FEB to 28FEB the employer was unable to meet. For the exchange meeting (dialogue) to be more meaningful I requested (my union rep. also verbally requested) a copy of the documents ahead of the scheduled meeting. If the requested items were available for exchange on 28FEB, I'm thinking they would have been ready to be provided to me by email even today until another meeting date could be scheduled. However, I did not receive this so I don't know whether the employer was prepared for the exchange meeting of the 28th.

...Since the deadline for exchange has not been met, kindly advise if the deadline for my allegation submission is the same....

[9] By email dated March 7, 2017, the Board advised the complainant that her allegations were due on March 13, 2017. Her deadline had not been extended.

[10] On March 13, 2017, the complainant filed her allegations. On the same date, she also filed a request for an Order for Provision of Information (OPI). The Board ordered the respondent to reply to this request by March 27, 2017.

[11] On March 29, 2017, two days after the Board's stated deadline, the respondent wrote to the Board, requesting an extension until April 14, 2017, in order to reply to the OPI request. The respondent submitted the following to support its request for an extension: "an extension is being sought due to the absence of key individuals in HR, including myself for the past few weeks and the next". The complainant objected to this request. She provided a copy of her email exchanges with the respondent, to demonstrate that the respondent has been aware since February 14, 2017 of the list of information which the complainant had requested. In its decision dated April 5, 2017, the Board held that in the interests of fairness, and taking into account the public

holiday on April 14th, the respondent's request for an extension to respond to the OPI would be granted until April 13, 2017.

[12] On April 18, 2017, five days after the Board's stated deadline, the respondent wrote to the Board requesting an extension until April 21, 2017 to complete its response to the OPI, citing 'staff absences' as the reason for its request. The complainant responded stating, "although I would like this matter to be resolved at the earliest and without undue delay, I do not object to this request". In the interests of fairness, the Board granted the respondent's extension request to April 21, 2017.

[13] The respondent filed its response to the OPI on April 25, 2017, four days after the Board's stated deadline, together with a request for an extension to file this response. It stated that "due to competing priorities, it was not possible for us to submit [the response to the OPI] until today".

[14] On the same date, the complainant emailed the Board, stating:

Kindly advise of the next steps here as the respondent has failed to meet the deadline and in spite of extensions being granted, the time from 14FEB2017 to 25APR2017 has resulted in the provision of only a poster and a statement that they are willing to provide some of the requested items. The respondent's response was sent after the deadline and still did not meet the Order. I don't know whether this was because the respondent didn't understand the request or is simply reluctant to provide the requested items.

I am getting the feeling that the respondent feel [sic] that they do not need to adhere to the timelines set out by the Board based on the correspondence provided to date. I'd like to know what is the follow up action when the respondent fails to comply with the Order to provide information.

[15] On May 24, 2017, the Board issued its decision on the complainant's request for an OPI. The Board ruled that the complainant failed to explain why some of the information requested was arguably relevant to the complaint; further, as the respondent had agreed to provide the complainant with the remaining information, the Board's order would be limited to imposing the date on which the information was to be provided. The Board ordered that the respondent provide the complainant with the information specified in its decision by May 31, 2017; the respondent's reply to the complainant's allegations was required to be provided by June 15, 2017.

[16] On July 4, 2017, 19 days after the Board's stated deadline, the respondent requested an extension until July 14, 2017. The only explanation proffered being: "the respondent intends on submitting the deputy head response as soon as possible, however will require additional time to complete all verifications".

[17] On July 4, 2017, the Public Service Commission wrote to the Board, indicating that it did not object to the request. The complainant made no submissions.

[18] On July 14, 2017, the respondent submitted its reply to the complainant's allegations. It reiterated its request for an extension of time to file its response and requested that the Board accept its reply indicating it had been "faced with ongoing challenges related to workload and expertise in managing complaints". It did not provide any explanation as to why it could not make a timely request for an extension of time.

Reasons

[19] This is the Board's fifth decision in relation to an application for an extension of time by the respondent.

[20] According to s. 22 of the *Public Service Staffing Complaints Regulations*, complainants are required to provide a detailed explanation of the allegations upon which they intend to rely and full particulars of the relevant facts. This is important to inform respondents of the nature of the complaint and the evidence they will have to refute (See *Laroche v. Deputy Minister of Foreign Affairs*, 2009 PSST 17, at para. 13). The Board may dismiss a complaint for failure to submit allegations in a timely manner. The complainant in the present case complied with this duty and filed her allegations within the applicable timelines.

[21] As also noted in *Laroche* at para. 14, procedural fairness requires that respondents fully reply to the allegations to ensure that complainants are well-informed of the respondent's response and the nature of the evidence the respondent plans to produce to refute the allegations. A respondent's duty to provide its reply is therefore not to be taken lightly. A delay or failure to file a reply is not an administrative matter, but a potential denial of procedural fairness to the other parties.

[22] The respondent did not file its reply in accordance with the deadline set by the Board. It ignored the clear orders of the Board on when the reply is due. The extension request currently under review was filed 19 days after the reply's due date.

[23] Pursuant to s. 5(3) of the *Regulations*, the Board may extend timelines in the interest of fairness. The respondent has not established that it would be in the interest of fairness to grant this latest extension request. The due dates set down by the *Regulations* and any extensions ordered by the Board must be respected.

[24] Throughout the process thus far, the respondent has shown complete disregard for the Board's procedure. In *Archibald v. Canada*, 2017 FC 674, the Federal Court considered an applicant's attempt to obtain an extension of the deadline for commencing an application for judicial review. The Court reviewed the facts in that case which bear a striking similarity to the history of this complaint. At paragraphs 11 and following the Court stated:

[11] ...the missed deadline for the filing...is not an isolated incident, but rather part of a pattern. At each stage of this proposed proceeding, the applicants have failed to respect the applicable deadline...

[12 In my view, the failure of the applicants to respect the deadline for filing the supplementary affidavit and reply submissions is not the result of an excusable accident or mistake, but another manifestation of a general lack of diligence by the applicants in this matter.

[25] The respondent here too has displayed a dismaying pattern. At virtually each stage of this proceeding, the respondent has failed to respect the applicable deadlines. Its minimal explanation accompanying this most recent request for an extension of time has failed to demonstrate that it would be in the interests of fairness to allow the extension. Accordingly, the Board denies the respondent's untimely request for an extension to file its reply to the allegations.

[26] Consistent with the fundamental principles of procedural fairness, the respondent will not be entitled to raise any issue or lead any evidence at the hearing in response to the allegations, without first obtaining the prior leave of the Board. In effect, unless such leave is granted, the respondent cannot participate at the hearing in the same way that other parties cannot participate when they do not file replies (see s. 25(1) of the *Regulations*).

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

(The Order appears on the next page)

Order

[28] The respondent's request for an extension to file its reply to the allegations is denied.

[29] The respondent will be precluded from raising any issue or lead any evidence at the hearing in response to the allegations, except with the prior leave of the Board and subject to any conditions determined by the Board.

[30] The Public Service Commission's and other parties' replies to the allegations are now due within ten days of this decision.

July 14, 2017.

**Chantal Homier-Nehmé,
a panel of the Federal Public Sector Labour
Relations and Employment Board**