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

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

BETWEEN

ALEXANDRE POPOV

Applicant

and

CANADIAN SPACE AGENCY

Respondent

Indexed as
Popov v. Canadian Space Agency

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

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Himself

For the Respondent: Zorica Guzina, counsel

Heard at Montreal, Quebec,
April 17 and 18, 2018.

I. Application before the Board

[1] Alexandre Popov, the grievor, grieved his termination from the Canadian Space Agency ("CSA" or "the respondent"). The termination letter was dated April 28, 2014, and the termination was effective as of that date. The grievance was heard by Luc Brûlé (vice-president of the CSA) at the final level of the grievance process on June 9, 2014. On June 30, 2014, Mr. Brûlé issued his decision dismissing the grievance.

[2] The respondent conceded at the hearing that the grievor had received a copy of Mr. Brûlé's letter only on August 6, 2014.

[3] 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 (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) 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*.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*"). The *Public Service Labour Relations Regulations* became the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[5] Pursuant to s. 90(1) of the *Regulations*, "… a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process." The grievor referred his grievance to the Board on October 21, 2015, more than 14 months after he had received the reply at the final level of the grievance process.

[6] Pursuant to s. 61(b) of the *Regulations*, in the interest of fairness, the Board may extend the time prescribed by Part 2 for referring a grievance to adjudication. The grievor applied to the Board for an extension of time. This decision deals only with that application.

[7] For the following reasons, I find that the grievor has not met the criteria that justify granting an extension.

II. Preliminary matters

[8] On several occasions before the hearing and again at the hearing, the grievor requested that the grievance be heard at the same time as his request for an extension of time. The respondent opposed this consolidation request, arguing that the nature of the evidence was very different and that it would be more efficient to deal with the grievance only once it was clear that an extension of time had been granted. The Board did not grant the consolidation request, as it would be preferable to first decide the extension request.

[9] The grievor requested the issuance of five summons, for the following witnesses (the titles are as he gave them): General Walter Natynczyk (retired), former CSA President (August 2013 - November 2014); Gilles Leclerc, Director General, Space Exploration (January 2010 - current), Acting CSA President and Vice-president, 2013-2014; Luc Brûlé, Vice-president (April 1, 2014 - current), Acting CSA President (November 2014 - March 2015); Sylvain Laporte, CSA President (March 2015 - current); and Stuart Wright, Analyst, Office of the Chief Human Resources Officer, Treasury Board Secretariat.

[10] The justification for each witness was as follows:

…

> [General Walter Natynczyk:] *… could tell about and confirm the circumstances resulted in the delay of my grievance submission to the FPSLREB. Responding to questions in a honest manner and being cross-examined during the testimony procedure at the upcoming hearings Gen. Walter Natynczyk should be able to shed a light on true causes of and exceptional reasons behind the extraordinary delay of the grievance submission to the FPSLREB. His testimony could also shed a light on my failure to resolve the issue on amicable basis.*

…

[Gilles Leclerc:] … *Being the Director General who signed and commented his letter on the wrongful termination of my eleven-year-long employment Mr. Gilles Leclerc could confirm his comments and the circumstances resulted in the delay of my grievance submission to the FPSLREB. Responding to questions in a honest manner and being cross-examined during the testimony procedure at the upcoming hearings Mr. Gilles Leclerc should be able to shed a light on true causes of and exceptional reasons behind the extraordinary delay of the grievance submission to the FPSLREB. His testimony could also shed a light on my failure to resolve the issue on amicable basis, since the failure caused the delay.*

…

[Luc Brûlé:] … *Being the CSA Vice-President and running in 2014 the only grievance hearing on the wrongful termination of my eleven-year-long employment with CSA Mr. Luc Brûlé could confirm his comments made during the hearing (including the particular "Alex, keep your CSA identification card (government ID card) with you. You will need it soon.") and the circumstances resulted in the delay of my grievance submission to the FPSLREB. Responding to questions in a honest manner and being cross-examined during the testimony procedure at the upcoming hearings Mr. Luc Brûlé should be able to shed a light on true causes of and exceptional reasons behind the extraordinary delay of the grievance submission to the FPSLREB. His testimony could also shed a light on my not receiving the hearing results in a timely fashion.*

…

[Sylvain Laporte:] … *Being the CSA President and denying to my meeting requests to resolve on amicable basis the issue with the wrongful termination of my eleven-year-long employment with CSA Mr. Sylvain Laporte could tell about a reason, if any, for such responses and the circumstances resulted in the delay of my grievance submission to the FPSLREB. Responding to questions in a honest manner and being cross-examined during the testimony procedure at the upcoming hearings Mr. Sylvain Laporte should be able to shed a light on true causes of and exceptional reasons behind the extraordinary delay of the grievance submission to the FPSLREB. His testimony could also shed a light on his effort failure on putting the CSA team on the ISS program (ISSP) back on track in order to meet the ISSP standards and requirements, since the failure was one the exceptional reasons for and resulted in the delay of my grievance*

> *submission to the FPSLREB.*
>
> …
>
> [Stuart Wright:] … *could tell about false statements he made in his responses to our requests in 2015 and the circumstances resulted in the delay of my grievance submission to the FPSLREB. Responding to questions in a honest manner and being cross-examined during the testimony procedure at the upcoming hearings Mr. Stuart Wright should be able to shed a light on true causes of and exceptional reasons behind the extraordinary delay of the grievance submission to the FPSLREB.*
>
> …
>
> [*Sic* throughout]

[11] The Board declined to issue a summons for Mr. Brûlé, as the respondent had committed to calling him as a witness. As I explained to the grievor at the hearing, it was to his advantage to have Mr. Brûlé appear as the respondent's witness, since this would allow the grievor to ask him any type of question he wished, as opposed to dealing with evidentiary restrictions when examining his own witness.

[12] The Board issued summonses for the other four witnesses on March 20, 2018. On March 23, 2018, the respondent asked that they be rescinded, since the testimony had little relevance to the issue to be decided; that is, the extension of time. In addition, for each witness, the respondent added the following comments.

[13] General Natynczyk was not directly involved in any decisions that followed the filing of the grievance.

[14] Mr. Laporte did not meet with the grievor to discuss a possible settlement, and therefore, his testimony "would be of little to no value", according to the respondent. Moreover, on the same dates as the hearing, he was to attend, as the CSA's president and the head of the delegation, the 34th Space Symposium in Colorado Springs, Colorado. His role was described in the following terms:

> …
>
> *… The President's role at this event is to represent Canada to the large international audience of space experts. He is part of the official symposium program, having been invited to take part in a panel discussion with other heads of space agencies. He will meet bilaterally and in multi-lateral*

> *meetings with the heads of space agencies and companies to discuss collaboration on major space projects. The contacts that result from these meetings are critical for Canadian industry in terms of developing innovative technology and access to foreign markets.*
>
> …

[15] Mr. Leclerc had signed the termination letter but had not been involved during or after the grievance process. Therefore, he would have no evidence to offer on the events surrounding the grievance and its referral to adjudication.

[16] Finally, Mr. Wright's involvement had simply been to raise the technical issue of timeliness; he had no involvement in the CSA's termination and grievance processes.

[17] Despite the grievor's objection, the Board rescinded the summonses, essentially for the reason the respondent raised, which was the lack of relevance. Except for Mr. Brûlé, whom the respondent intended to call, the witnesses seemed unlikely to provide any evidence relating to the delay referring the grievance to adjudication.

III. Summary of the evidence

[18] The grievor testified for himself. The respondent called one witness, Mr. Brûlé.

[19] Both parties were well aware that the Board determines whether to grant an extension of time based on the criteria found in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75, as follows:

> …
>
> - *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.*
>
> …

[20] The evidence was therefore presented with a view to answering the questions underlying the criteria. The grievor wished to establish that there was a very good chance of success for his grievance, and he sought to introduce evidence related to his work as an engineer at the CSA.

[21] I explained to the grievor that since I was deciding only the extension of time, I would not hear any evidence on the merits of the grievance. As I will explain further in my reasons, the fifth criterion is essentially neutral and is often given little weight, unless it is clear that the underlying grievance has no chance of success.

[22] The grievor is an engineer. He started working at the CSA in 2003, after three years of employment with a contractor that worked for the CSA. According to him, at one point, the CSA decided to integrate the contractor's employees.

[23] On April 28, 2014, the grievor received a letter of termination for unsatisfactory performance, which stated the following reasons for the termination:

…

> *This is further to the letter you received from your Director, Pierre Jean, dated March 17, 2014, outlining the problems with your work performance over the past 21 months (July 1, 2012 to present). Your unsatisfactory work performance has caused management serious concerns and has resulted in constant and significant efforts to provide additional training and coaching to assist you in meeting performance expectations. An action plan has been established accordingly. In spite of these measures, you have failed to demonstrate significant and sustained improvement.*
>
> *I have reached the conclusion that you are not meeting the performance requirements to perform the full range of duties of your position as an Operations Engineer at the ENG-3 level. Further, since all previous efforts to assist you in improving your performance have been unsuccessful, I have determined that it is unlikely that any amount of additional training would overcome the identified deficiencies. As well prior to July 2012, attempts to place you in three other positions have failed since you did not meet the performance requirements of those positions.*
>
> *In view of the above, and in accordance with Section 12 (1)(d) of the* **Financial Administration Act**, *I am terminating your employment with the Canadian Space Agency, for reasons of unsatisfactory performance, effective April 28, 2014.*

> *Should you consider this action to be unjustified, you have the right to file a grievance.*
>
> …
>
> [Emphasis in the original]

[24] Mr. Leclerc had signed the letter. The grievor testified that he received it upon returning from vacation. He was completely surprised since, according to him, there had been no warning that the CSA was dissatisfied with his work. At the hearing, he requested that I refer to the unsatisfactory performance as the alleged unsatisfactory performance. As I explained, in this decision, I will not pronounce on whether the respondent was right or wrong in its decision to terminate the grievor. From his point of view, the unsatisfactory performance was only alleged and would need to be established at the Board's hearing of the grievance. I agree that the respondent would then have to prove cause for the termination. However, for the purposes of the termination letter, in the respondent's mind, the poor performance was not alleged; it was established. Therefore, I will not qualify the use of "unsatisfactory performance", but it is understood that I am not deciding the merits of the grievance.

[25] After receiving the letter, the grievor filed a grievance on May 21, 2014. He addressed it to Mr. Brûlé in an email that reads in part as follows:

> …
>
> *I failed to understand a reason(s) behind the groundless decision made so I sent my Director General, M. Leclerc, an email in response to his letter. The email was supported with attached pieces of evidence telling opposite to controversial statements of the letter. It has appeared that my Director General was probably misinformed (since it was happened before) and the decision was made by mistake. There is no doubt that having received my email with number of pieces of evidence Mr. Leclerc and CSSP management have changed their mind and would like to cancel the ill-informed decision on termination my employment with CSA, the decision made by mistake. Correct me if otherwise please. But I understand that the only way to cancel the ill-informed decision is a grievance procedure. I was informed by HR that in order to reverse/cancel the decision the grievance has to be sent directly to the final step of the grievance procedure and you as the Vice President of the Canadian Space Agency is the official representative for the final step.*

…

> *Please note that I am out of country from June 11 to August 2. Your inviting me for the discussion before June 11 or after August 2 will be appreciated. But following your positive decision I will cancel my trip and back in office to work.*
>
> *Please note also that no bargaining agent representative is required, since I trust that your decision on my grievance supported with the pieces of evidence will be positive so the mistaken decision on termination of my employment with CSA shall be cancelled.*
>
> …
>
> [*Sic* throughout]

[26] On June 5, 2014, Mr. Brûlé invited the grievor to the final-level grievance hearing, to be held on June 9, 2014. In his email, Mr. Brûlé stated that he would be accompanied by his human resources advisor. He reminded the grievor that he had the right to be accompanied by his bargaining agent representative and provided the name, phone number, and email address of that representative.

[27] By way of an email dated June 6, 2014, the grievor also tried to convince the then-president of the CSA, General Natynczyk that the termination was a mistake that should be corrected. General Natynczyk responded curtly that the grievance process was the appropriate mechanism to review the decision to terminate the grievor.

[28] At the grievance hearing, the grievor was unrepresented. When questioned about it at the Board's hearing, he answered that he did not see the need for bargaining agent representation, since his competence as an engineer was surely sufficient to convince Mr. Brûlé that there had been a mistake. Since the representative probably knew nothing about engineering, she would have been of little help.

[29] The grievance hearing was held as scheduled on June 9, and Mr. Brûlé committed to providing a written response to the grievance within three weeks. His response, dated June 30, 2014, denied the grievance and ended with the following sentence:

> *Should you be unsatisfied with this decision, you may refer your grievance to adjudication in accordance with the provisions of the* Public Service Labour Relations Act *and*

> Regulations *and this, no later than 40 days after you received* [sic] *the present decision.*

[30] The grievor very much insisted on the fact that at the grievance hearing, Mr. Brûlé had refused to take the grievor's CSA ID card, saying, "Keep it, Alex, you'll need it soon." The grievor was convinced that this meant that Mr. Brûlé intended to allow the grievance and to reinstate him in his position.

[31] At the hearing before the Board, Mr. Brûlé was asked about that comment. His response was that he did not remember saying exactly that. Rather, he had told the grievor that he did not need to hand back his ID card immediately, since the access card had already been deactivated. According to Mr. Brûlé, the reason for not asking for the ID card's return was that he did not want the grievor to think that he had a closed mind. He wanted to make an informed decision, after reviewing all the evidence, both from the respondent and from the grievor. Therefore, the idea was to project neutrality but certainly not to signal an intent to reinstate the grievor.

[32] The response was mailed to the grievor. Evidence at the hearing before the Board clearly established that at that time, the grievor was in Moscow, Russia, visiting his ailing mother. On July 2, 2014, Mr. Brûlé advised him by email that the response would be mailed to his home address rather than being emailed, as it contained personal information. He also offered to send it out of the country by courier service. The grievor provided his mother's address in Moscow. Accordingly, the respondent sent the response to that address by courier service and to the grievor's home in Canada by express post. Proof of delivery to the Moscow address was not filed in evidence but, according to Canada Post documents, the response was received at his Canadian address on July 4, 2014. The grievor testified that he did not receive it in Moscow and first saw it only when he returned home at the beginning of August.

[33] I accept his evidence on this subject, and the respondent has agreed to set the date on which the grievor was notified as August 6, 2014. In the respondent's response to the referral to adjudication, Mr. Wright wrote that the grievor had been notified on July 4, 2014. There is no evidence that the grievor received the final-level reply on that date. For the purposes of determining the extension of time, the starting date is August 6, 2014. This means that the referral to adjudication should have been

made by September 16, 2014.

[34] The grievor presented evidence that he was traveling from September 19 to 29, 2014, again to Moscow, which means that he was in Canada between August 6 and September 19. At the hearing, he stated that he was very concerned by his mother's failing health. She died two years later.

[35] The grievor replied to Mr. Brûlé's response on August 6, 2014 in a long and detailed email in which he reiterated that he did not understand the termination or the subsequent denial of his grievance and provided several examples of his contributions to the space program.

[36] After that reply, there is no further evidence of any attempt by the grievor to follow up on the grievance or the termination until July 31, 2015, when he contacted the CSA's new president, Sylvain Laporte. When asked at the Board's hearing why there was no communication until then, the grievor answered that there was no use contacting the CSA until there was a change of president, since General Natynczyk and Mr. Brûlé had not been receptive to his explanations. When asked why he did not consider referring the grievance at that time, the grievor explained that in the area of space research, informal conflict resolution is much preferable to formal processes.

[37] The grievor solicited help from colleagues to support his claim that the termination was wrongful. He included in his email to Mr. Laporte letters of support from Dr. Serguei Bedziouk, Vice President of UrtheCast Corporation, dated December 4, 2014, as well as a letter from Ivan Kozhukhov, International Space Station Flight Controller at the Johnson Space Center in Houston, Texas, dated December 26, 2014. Finally, the grievor also included a "Letter of Intent", apparently prepared on March 12, 2015, and signed by Russian, American, and Canadian space scientists attached to various organizations at different moments in 2015. This letter expressed the following goals:

> *… preparing and conducting a collaboration project of series of joint US-Russian-Canadian space experiments at the Russian Segment of the International Space Station (ISS RS) titled as "PHM for Astronauts" in order to deploy, utilize, and validate an autonomous health support technology, that based on wireless handheld devices (Autonomous Medical Decision technology [NASA designation]) as well as an Integrated Biomedical Informatics technology*

> *[NASA designation] with predictive diagnostics capability based on crew's electronic health records (EHR)*

[38] The letter then outlined several measures that could be taken to reach those goals.

[39] At the hearing, the grievor mentioned for the first time as an explanation for the delay referring the grievance to adjudication the fact that he had been diagnosed in 2013 with a viral disease. He had not wished to disclose this to his employer, which is why he had never mentioned it. He introduced three documents: a diagnosis from a lab test done on August 6, 2013, a prescription dated August 22, 2017, and a lab test result that shows a negative test for the virus, dated January 18, 2018. According to the grievor, the viral disease diagnosis, combined with the stress of his mother's illness and the stress of not having a job, explained why he had not referred the grievance to adjudication earlier. A preference for informally resolving the situation was also part of the explanation.

[40] The series of exchanges with the grievor led Mr. Laporte to state clearly in an email dated September 5, 2015, that he refused to reconsider the termination decision. The grievor testified that he contacted the bargaining agent, which according to him refused to help. Eventually, he contacted a lawyer, who recommended that he refer the grievance to adjudication with a request for an extension of time; the Board received the referral and request on October 21, 2015.

IV. Summary of the arguments

[41] The grievor presented his arguments, followed by the respondent. The grievor asked to be allowed to reply to the respondent's arguments as they were being made rather than having to take notes and make a general reply at the end. I allowed it, with the consent of counsel for the respondent, to facilitate matters for the grievor. Therefore, for clarity's sake, I will present both parties' arguments for each of the five *Schenkman* criteria.

A. Clear, cogent, and compelling reasons

[42] The grievor argued that there are clear, cogent, and compelling reasons for the delay. The overarching and most compelling reason is that he suffered from a viral disease that prevented him from following the formal process, which required a great deal of energy. Along with his authorities, at the hearing he presented a document

from the Internet that describes a general state of confusion that may affect people diagnosed with that disease. The other two reasons for the delay were his mother's severe illness (she has since passed away) and his quest to informally resolve his work situation. According to the grievor, it was important to consider those factors together, rather than separately.

[43] The respondent argued that the medical evidence was inadequate to support the delay. There was no expert evidence to make the link between the diagnosis, which the respondent accepted, and the grievor's inability to refer the grievance to adjudication, if only to preserve his rights. The absence of a link was paramount in dismissing the medical evidence as insufficient. The respondent referred to *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68, in this respect. In that decision, the adjudicator found that the absence of any independent medical corroboration defeated the disability claim.

[44] There was sympathy for the illness of the grievor's mother, but that too did not explain his inability to refer the grievance to adjudication on his return to Canada and on being informed of the CSA's decision to deny his grievance. Finally, the case law is clear that settlement attempts did not exempt the grievor from securing his rights in the formal process.

[45] The grievor replied that the medical evidence should be taken at face value. The diagnosis was established, and the document from the Internet on the confusion that may accompany the disease showed the link. His sworn testimony to the effect that his disease prevented him from referring the grievance to adjudication should be taken as true since it was given under oath. The doctor's testimony would have added nothing, since the doctor could only have reported the symptoms that the grievor would have disclosed to him, which were the same symptoms that the grievor disclosed at the hearing.

[46] The grievor brought up two cases in which the PSLRB extended the time limit, mainly for compelling reasons: *Richard v. Canada Revenue Agency*, 2005 PSLRB 180, and *Riche v. Treasury Board (Department of National Defence)*, 2009 PSLRB 157.

[47] In *Richard*, the grievor did not file a grievance after she was suspended without pay and then terminated. She grieved both, respectively eight months and six months after the events had occurred. She sought an extension to the time limit provided

in the collective agreement to file a grievance.

[48] In her case, there was a diagnosis of post-traumatic stress disorder, of which the employer was aware before dismissing her. In addition, she had been through very trying family events. The Vice-chairperson who heard the matter found that there were clear and compelling reasons to explain her inaction to file a grievance after her termination. Moreover, the grievor was convinced that her grievance would have no success, as she recognized the misconduct on which the termination was based. Only with the encouragement of her physician and the Employment Insurance Appeal Board did she consider filing a grievance.

[49] Similarly, in *Riche*, the medical condition that the grievor suffered from was found to have played a considerable role in delaying filing a grievance; in that case, the delay was four months.

B. Length of the delay referring the grievance to adjudication

[50] The referral to adjudication was received over 13 months after it was due. The grievor argued that the Board has granted extensions in other cases, such as *Richard* and *Riche*, for six and four months, respectively.

[51] The respondent argued that 13 months is an excessive period. There are sound labour relations reasons to enforce timelines. As stated in *Schenkman*, "[b]oth bargaining agents and employers are entitled to some closure on disputes." For this reason, the Board and its predecessors have granted extensions of time only sparingly.

[52] To explain the delay, the grievor would have had to show that during all the time at issue, he was unable to refer the grievance to adjudication, which he did not do. He managed to file the grievance on time. He was active in seeking support for his reinstatement.

C. Due diligence

[53] The employer argued that the grievor did not show any due diligence in pursuing the grievance. Seeking an informal resolution did not relieve him from the formal process timelines. He failed to act once he received a reply in August 2014, and he made no attempt to refer the grievance to adjudication until October 2015. Yet, he had contacted the CSA earlier, in July 2015.

[54] The grievor replied that he was unable to pursue the formal process because of medical reasons. His abilities were limited, which is why he could consider the informal process, which required less energy.

D. Balancing prejudice to the respondent and injustice to the grievor

[55] The respondent argued that it is entitled to rely on the principle of the finality of disputes once a long delay has passed. To ignore timelines undermines their purpose; that is, to ensure labour relations stability.

[56] The grievor replied that the Board has granted extensions of time in the past and that the reasons in his case were compelling enough to grant one to him. Moreover, it would be a grave injustice to him to not grant him the possibility of having the Board hear his grievance, while it would not cause prejudice to the respondent to reinstate him in his position, since his return to the CSA would benefit the respondent.

E. Chance of success of the grievance

[57] The respondent conceded that this factor was neutral in this case, since the termination grievance would properly have been before the Board had it been referred on time. Unless it is heard on its merits, it is impossible to assess its chance of success.

[58] The grievor argued that this criterion should be evaluated, as he considers that his grievance has an excellent chance of success.

V. Reasons

[59] I will address each of the *Schenkman* criteria in turn.

A. Clear, cogent, and compelling reasons

[60] When he applied for the extension, the grievor gave several reasons for the delay. He had been traveling when he received the reply, he did not know where to address the referral, and the Board was created only on November 1, 2014.

[61] When he applied for summonses for the hearing, the grievor gave as an explanation for calling those witnesses that they would be able to explain the very significant delay.

[62] At the hearing, the grievor mentioned for the first time the fact that he had been diagnosed with a viral disease. He stated that he had not wanted to tell the respondent earlier, so as not to jeopardize his chances of reinstatement.

[63] There was no evidence that the disease impeded filling out a form to refer the grievance to adjudication. The grievor knew that he could ask the bargaining agent for help, as he had been told at the time the grievance was heard.

[64] Although I sympathize with the grievor's situation, including the viral disease diagnosis and the illness and death of his mother, these events do not add up to clear and compelling reasons. The diagnosis was brought up at the hearing, but it does not seem to have been part of his explanation before the hearing. The witnesses that he asked to summons had never been informed of the diagnosis.

[65] Upon his return from Russia, when he learned that the grievance had been denied, the grievor wrote a long and detailed email to Mr. Brûlé, arguing his case for reinstatement. I cannot accept the grievor's argument that this "informal" process was easier than the "formal" process, as he put it; that is, the adjudication before the Board. Again, he could have sought the bargaining agent's help and did not. During the 13 months before he finally applied for an extension of time, he was in touch with other scientists to obtain letters of recommendation and to draw up a letter of intent for scientific research relating to the International Space Station. Given his ability to engage in these activities, I cannot see his viral disease diagnosis as precluding a timely referral.

[66] The reasons are not compelling; nor are they clear and cogent. The grievor said that he sought to resolve his problem through a settlement, which is why he contacted the CSA's new president long before attempting to refer his grievance to adjudication. There is no explanation as to why the referral could not have proceeded at the same time, or earlier.

[67] As stated by the PSLRB in *Pomerleau v. Treasury Board (Canadian International Development Agency)*, 2005 PSLRB 148, seeking an informal resolution does not relieve the grievor from his obligations to proceed if he wishes to avail himself of the resources offered by adjudication. The underlying grievance in *Pomerleau* was very different (a claim for a foreign service premium, not a termination), but in that case as well, for a lengthy period, the grievor had sought to informally resolve the problem

rather than use the grievance process. The adjudicator wrote the following at paragraphs 27 and 28, an apt comment in the present circumstances:

> *[27] I would like to deal with the grievor's argument that he should not suffer as a result of his attempt to resolve the situation informally. It is clear to me that no one, whether the employer or the employee, should be criticized for taking this approach. Informal dispute resolution is to be encouraged at all levels. However, this approach coexists with the formal dispute resolution procedures.*
>
> *[28] Where a right to a formal process exists and is subject to prescriptive extinction, the wiser course will always be to take the informal route only after having secured that formal right. These two approaches coexist quite comfortably as long as one is not employed to the detriment of the other. The informal systems put in place under the* Public Service Modernization Act *and the systems that were already in place specifically recognize this procedural aspect and the importance of protecting the parties' rights….*

[68] Only when it became clear to the grievor that he would not be able to convince CSA management to reinstate him did he seek legal advice, to be told that the grievance referral was his only hope. Yet, he had already been advised of that recourse's availability to him in final-level reply that he had received when Mr. Brûlé denied his grievance.

[69] Unlike the grievors in *Riche* and *Richard*, the link between the grievor's health problems and the delay was not established. In addition, again unlike those two grievors, he had filed a grievance on time, so he was aware of the grievance process and the procedure to be followed.

B. <u>Length of the delay referring the grievance to adjudication</u>

[70] As stated in *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102, the lack of clear, cogent, and compelling reasons to explain the delay may be fatal to an application. In that case, the length of the delay (eight months) compounded the problem. The same would apply in this case. The grievor waited a very long time, without a compelling reason.

[71] It seems to me that the length of the delay is indicative of whether the grievor acted with due diligence. The longer the delay, the less likely it is that he was really concerned with referring the grievance to adjudication.

C. Due diligence

[72] I find no evidence of due diligence by the grievor. He did not believe in the grievance process and pursued it only because he was told very clearly that it was the only way to challenge the termination. He did not think he needed bargaining agent representation at the grievance hearing, since he was certain that he would convince Mr. Brûlé that the termination had been a mistake. He was diligent in seeking letters of recommendation, in setting up research projects, and in trying to convince CSA management that it should change its mind about the termination. However, no diligence was applied to the grievance adjudication process.

[73] This same reluctance to use the grievance recourse is manifest in the absence of any action by the grievor after he received Mr. Brûlé's reply to the grievance, except for an immediate email, which was another attempt to convince Mr. Brûlé that an error had been made. For about 14 months, no attempt was made to follow up on the suggested action that ends the final-level reply. I see no sign of diligence to pursue the recourse offered by third-party adjudication.

D. Balancing prejudice to the respondent and injustice to the grievor

[74] In *Comparelli v. Canada Revenue Agency*, 2014 PSLRB 76, the referral to adjudication occurred 5 days after the 40-day deadline prescribed by the *Regulations*. The bargaining agent applied for an extension of time, as it had made an administrative error, which explained the delay.

[75] In that case, the Board ruled that denying the extension would be a serious injustice for the grievor, while granting it did not cause any prejudice to the employer; a difference of 5 days did not amount to a serious inconvenience, especially since the employer had taken 19 months to reply at the final level of the grievance process.

[76] This factor appears to be coloured by the preceding factors, especially the length of the delay. It is easy to see that the grievor could perceive being denied the opportunity to be heard as an injustice. However, the employer is entitled to turn the page when it believes a matter has been settled once and for all. The idea behind timelines is precisely to give the parties an idea of what can be expected. It would appear unfair to submit the employer to a grievance process that it no longer expects.

[77] The other preceding factors are also at play. In the face of clear and compelling reasons, with due diligence exercised by the grievor, the inconvenience for the employer might be superceded by the potential injustice to the grievor. However, in this case, having found that the grievor was simply too tardy in referring the grievance to adjudication, without a good reason, I find the inconvenience to the respondent outweighs the potential injustice to the grievor.

E. Chance of success of the grievance

[78] The Board does not often consider the fifth criterion unless it is clear that the grievance has little or no chance of success (as in *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, or *Cowie v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 14). Until the grievance is heard on the merits, it is impossible to predict its chances of success.

[79] In this case, despite the grievor's best efforts to convince me otherwise, I have no idea of the grievance's chances of success, as I have not heard any evidence on the circumstances of the termination. The respondent conceded that there was no jurisdictional objection to the grievance, except for the delay. I agree.

VI. Conclusion

[80] Overall, I think that the grievor very much believed that he would be able to convince CSA upper management that it had made a mistake by terminating his employment. Only when all attempts failed was the adjudication process considered. Even when preparing for the Board's hearing, the grievor wanted to show that the delay was caused by his settlement attempts, as shown by the justifications for the summonses. Although I have sympathy for his diagnosis and certainly for his mother's illness and death, I do not find compelling reasons that prevented making a referral to adjudication, especially in light of his puzzling refusal to seek help from the bargaining agent for the grievance hearing and, once the grievance was denied, for the referral to adjudication.

[81] The delay was very long, and there was no diligence at all to pursue the adjudication route. Yet, the grievor was still active enough to contact other space scientists for letters of recommendation and to pursue scientific research projects. Such efforts, and the utter disregard for the grievance adjudication process, reinforce the idea that he did not have a constant intent to refer the grievance to adjudication.

[82] The balance of convenience favours the respondent in this case. Termination is such a grave matter that it would weigh heavily, had the grievor shown interest during those 14 months in pursuing the formal adjudication route, or if serious independent evidence showed the impossibility to do so. However, in this case, the lengthy delay could certainly serve to reassure the respondent that it would not have to proceed to an adjudication hearing on the termination. There is no reason to set aside the requirements of the *Regulations*. Timelines exist to allow the parties to proceed with the understanding that matters have been settled. Uncertainty is not a desirable state of affairs.

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

(The Order appears on the next page)

VII. Order

[84] The application for an extension of time is denied. Files 568-02-359 and 566-02-11604 are ordered closed.

May 31, 2018.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board