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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

NICHOLAS CHARLES LEGGE

Applicant

and

DEPARTMENT OF NATIONAL DEFENCE

Respondent

Indexed as
Legge v. Department of National Defence

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: Stephan J. Bertrand, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Ronald A. Pink, Q.C.

For the Respondent: Cristina St-Amant-Roy, counsel

Heard at Halifax, Nova Scotia,
February 13, 2018.

I. Application before the Board

[1] The grievor, Nicholas Charles Legge, grieved violations of article 36 and clause 38.01 of the agreement between the Treasury Board and the Federal Government Dockyard Trades and Labour Council (East) ("the bargaining agent") for the Ship Repair (East) Group, which expired on December 31, 2014 ("the collective agreement"), by the Department of National Defence (DND). The remedy he sought in his grievance was the removal from his personnel file of a letter of reprimand that the employer issued on September 29, 2016.

[2] The grievor referred the grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board") on September 5, 2017.

[3] The employer filed an objection to the Board's jurisdiction, stating that the grievance was not referred to adjudication within the 40-day statutory time limit set out in s. 90(1) of the *Federal Public Sector Labour Relations Regulations* (the *Regulations*). Under that provision, such a referral may be made no later than 40 days after the day on which the grievor received the decision rendered at the final level of the grievance process.

[4] The grievor subsequently made an application for an extension of time to refer the grievance to adjudication pursuant to s. 61 of the *Regulations*. Under that provision, the Board or an adjudicator may, in the interest of fairness, extend the time limit for referring a grievance to adjudication and may extend the time prescribed by Part 2 of the *Regulations* or provided for in a grievance process 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.

II. Summary of the evidence

[5] Yves Fournier testified on behalf of the grievor. He has worked with the DND for 26 years and has held the first vice-president position with the bargaining agent for the past 3 years.

[6] Mr. Fournier helped the grievor during the grievance process and attended the third-level hearing. He confirmed that a letter of reprimand had been issued to the grievor on September 29, 2016, for smoking in an unauthorized area.

[7] Mr. Fournier indicated that the employer's final-level response had been emailed to the grievor on May 18, 2017, and that he read it only on May 25, 2017. Documentary evidence filed jointly by the parties corroborated those facts.

[8] On May 26, 2017, Mr. Fournier attempted to refer the grievance to a fourth level of the grievance process. Later, in mid-June, he learned that the third was the DND's final level and that therefore, the grievance could not be transmitted to a fourth level for further reconsideration by the DND. After a number of discussions with Michael Barnes, a DND labour relations officer, Mr. Fournier understood that if the grievor was not satisfied with the employer's final response, the grievance would have to be referred to the Board for adjudication.

[9] Mr. Fournier explained that he had very little experience helping his members with grievances and that this was the first time he had been called upon to refer a grievance to adjudication.

[10] On June 26, 2017, Mr. Fournier emailed a Notice of Reference to Adjudication of an Individual Grievance (Form 20) to the Board. He indicated that he proceeded in that fashion because the fax machine in his office was broken. The next day, the Board informed him that such a notice could not be emailed but that a fax could be accepted, for timeline purposes.

[11] Since the fax machine was still broken, Mr. Fournier proceeded to mail the notice. The Board received it on July 6, 2017. Mr. Fournier conceded that he had not considered using another fax machine, such as one of the employer's machines or one located at an office supplies retailer.

[12] Mr. Barnes' testimony was not controversial. He confirmed his discussions with Mr. Fournier on the referral of the employer's third-level response. He and Mr. Fournier had discussed this issue in May and June of 2017 on at least four occasions and had exchanged emails about it. He confirmed that the employer was aware of the bargaining agent's intent to refer the grievance to adjudication, that it would have been unethical not to inform Mr. Fournier that he was attempting to transmit the grievance incorrectly to a fourth level, and that he had informed Mr. Fournier to refer the grievance to the Board on June 26, 2017. Two notes to file, one dated June 23, 2017, and the other June 26, 2017, corroborate the latter fact. He also indicated that although he had had dealings with Mr. Fournier in the past,

he was not aware of any previous referrals to adjudication by Mr. Fournier.

[13] Mr. Barnes indicated that he was not aware that the bargaining agent's fax machine was broken at the relevant time, that is, between June 26 and July 6, 2017, but that he did learn of it sometime after that.

[14] Mr. Barnes also acknowledged that the employer had upheld the grievor's grievance as it pertained to the alleged violation of clause 38.01 of the collective agreement both in the second- and final-level responses without granting the remedy he sought, which was removing the letter of reprimand from his personnel file.

[15] Mr. Barnes also confirmed that a one-day suspension was imposed on the grievor six months after the letter of reprimand was issued for smoking in an unauthorized area, which is the subject of another grievance that is being held in abeyance by the parties, pending the outcome of this grievance.

III. Summary of the arguments

A. For the grievor

[16] The grievor argued that s. 90(1) of the *Regulations* provides that the 40-day time limit starts from the time when the person who presented the grievance, in this case him, receives the employer's final-level decision. According to him, that means that the time limit should have started on May 25, 2017, when he opened and read the employer's email dated May 18, 2017.

[17] The grievor admitted that no matter which start date is used (May 18, 2017, or May 25, 2017), his grievance was referred to the Board for adjudication late, but that the delay is minimal in either case. The 40th day after May 18 would be June 27, and the 40th day after May 25 would be July 4. The Board received the mailed notice on July 6, 2017.

[18] The grievor argued that his grievance relates not only to the letter of reprimand issued by the employer within the meaning of s. 209(1)(b) of the *Act* but also to the interpretation or application of article 36 and clause 38.01 of the collective agreement within the meaning of s. 209(1)(a).

[19] Among other things, article 36, which is the "no discrimination" article, prohibits discrimination, harassment, or any disciplinary action based on any

prohibited ground that it enumerates.

[20] Clause 38.01 sets out the employees' right to receive at minimum two days' of notice of a disciplinary hearing and to be accompanied at it by a bargaining agent representative.

[21] The grievor submitted that although the employer upheld the part his grievance on the violation of clause 38.01, no real remedy had been issued, especially not the one he had sought. According to him, the Board can and should determine this issue on its merits, and it could lead to the letter of reprimand being rescinded.

[22] Similarly, the grievor submitted that on the interpretation of article 36 and whether the employer violated it, the Board also can and should determine this issue on its merits, and the employer did not thoroughly address it in the grievance process.

[23] The grievor's position is that his allegations, as they pertain to the violations of article 36 and clause 38.01, can and should be referred to adjudication pursuant to s. 209(1)(a) of the *Act*.

[24] As to whether the grievance can be referred to adjudication pursuant to subparagraph 209(1)(b) of the *Act*, the grievor argued that the documentary evidence clearly established that the letter of reprimand constituted a disciplinary action. He added that although the letter did not in and of itself result in a financial penalty, but for this unwarranted and illegal disciplinary action, he would not have received the one-day suspension six months later for similar conduct.

[25] Finally, the grievor submitted that an extension of time ought to be granted in this case, as all five criteria cited in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, have been met. Clear, cogent, and compelling reasons for the delay have been established by the evidence. The length of the delay was minimal. His representatives exercised due diligence during the entire grievance process. The employer has suffered no prejudice whatsoever. And the grievance, as detailed, could be successful, especially with respect to the alleged collective agreement violations.

B. For the employer

[26] The employer argued that an extension of time ought not to be granted in this case, as the grievor failed to meet the five *Schenkman* criteria.

[27] Firstly, it argued that the fact that the bargaining agent's fax machine was broken does not amount to a clear, cogent, and compelling reason for the delay, as it could have made efforts to use another fax machine or to use the services of an office supplies retailer. According to the employer, this amounts to negligence on the bargaining agent's part.

[28] Secondly, the employer argued that the grievor received its final-level response on the day it was emailed to him, May 18, 2017, which meant that his grievance should have been referred for adjudication no later than June 27, 2017. The nine-day delay was lengthy, according to the employer.

[29] Thirdly, it argued that the grievor did not exercise due diligence by failing to read its email of May 18, 2017, until May 25, 2017.

[30] Fourthly, it conceded that it did not suffer any prejudice from the delay.

[31] Finally, it argued that since no financial penalty had been imposed on the grievor, his grievance could not be referred for adjudication under s. 209(1)(b) of the *Act*, and therefore, it has no chance of success for lack of jurisdiction. When it was asked whether the grievance could be referred under s. 209(1)(a), the employer acknowledged that it could but submitted that the grievance, as it pertained to alleged violations of article 36 and clause 38.01 of the collective agreement, has no chance of success, since the employer remedied the grievor's claim based on clause 38.01, and it was addressed by the *de novo* hearings at the second and final levels.

[32] On that point, it referred me to paragraph 109 of *Higgins v. Attorney General of Canada*, 2016 FC 32. It also submitted that the grievor's claim based on article 36 was weak and that the evidence has not demonstrated that discrimination occurred in this case.

IV. Reasons

[33] Subsection 209(1) of the *Act* defines the subject matter of a reference to adjudication. In the context of this grievance, the relevant portions of s. 209(1)

read as follows:

> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> > ***(a)*** *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
> >
> > ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty ….*

[34] Subsection 90(1) of the *Regulations* sets out the deadline for a reference to adjudication as follows:

> ***90 (1)*** *Subject to subsection (2), 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.*

[35] It is not disputed that the grievance was referred to adjudication after the applicable time limit expired. However, under s. 61 of the *Regulations*, this time limit can be extended. That provision reads 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.*

[36] The parties have agreed that the five *Schenkman* factors can guide me in exercising my discretion as to whether an extension of time ought to be granted. Those factors are outlined as follows at paragraph 75 of that decision:

> …
>
> - *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.*

[37] In my view, the evidence establishes that the grievor met all five factors.

[38] Firstly, I am satisfied that the delay was explained through clear, cogent, and compelling reasons. Mr. Fournier was unfamiliar with the referral-to-adjudication process. He mistakenly attempted to transmit the grievance to a fourth level, when the third level was in fact the final level of the grievance process. He attempted to refer the grievance to adjudication to the Board by fax, but his fax machine was broken. He emailed the Notice of Reference to Adjudication of an Individual Grievance (Form 20) to the Board, only to be told that referrals could not be done by email. Finally, he mailed the notice to the Board by regular mail, and it was stamped by the Board on July 6, 2017.

[39] Secondly, the delay in this case was extremely short. The employer's final-level response was emailed to the grievor on May 18, 2017. I note that it was not emailed to Mr. Fournier, despite that clause 19.18 of the collective agreement provides that it should have been. The documentary evidence established that the email to the grievor was read only on May 25, 2017. In my view, that is when he received it for the purposes of calculating the timeline referred to in s. 90(1) of the *Regulations*. The grievor was not asked to acknowledge receipt of the employer's final-level response, by signing for it or otherwise, before that day.

[40] This means that the grievance had to be referred to the Board by no later than July 4, 2017. It was referred on July 6, 2017, two days late. Even if I were to conclude that the grievor received the employer's final-level response on May 18, 2017 (the date of the employer's email containing the final-level response) and that the referral to adjudication was done nine days late, I would still consider that an extremely short delay.

[41] Thirdly, I am satisfied that the grievor and his representative exercised due diligence during the grievance process and in referring this matter to adjudication.

Mr. Fournier took steps to challenge the employer's decision and to protect the interests of his bargaining unit member. He communicated on several occasions with Mr. Barnes and other DND employees to refer this matter to adjudication. He made mistakes but took steps to correct them in a timely fashion. I disagree with the employer's suggestion that he acted negligently.

[42] Fourthly, I am satisfied that the delay in this case caused no prejudice to the employer. The employer even conceded this point in argument.

[43] Fifthly, I cannot conclude that the grievance has no chance of success. While I am not convinced that the letter of reprimand imposed any financial penalty on the grievor, despite his novel "but for" argument (that but for the issuance of the letter of reprimand, the one-day suspension would not have been imposed in connection with the subsequent misconduct), the claims he made pursuant to article 36 and clause 38.01 of the collective agreement may be referred to adjudication and could arguably be determined to have merit.

[44] Contrary to the circumstances in *Higgins*, this case is not about procedural fairness. The provision of article 36, which the grievor relied on, deals with a substantive right that the employer and the bargaining agent negotiated. The question of whether a substantive right was denied ought to be determined on its merits and, if substantiated, ought to be remedied appropriately.

[45] In any event, this factor should not be used to examine the merits of a case prematurely. In my view, this grievance is not frivolous or vexatious, and it is not exceedingly clear that the Board lacks the jurisdiction to adjudicate the grievance.

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

(The Order appears on the next page)

V. Order

[47] The application for an extension of time is granted.

[48] I direct the Board's Registry to schedule a hearing on the merits of the grievance.

August 28, 2018.

Stephan J. Bertrand,
a panel of the Federal Public Sector
Labour Relations and Employment Board