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Citation: 2019 FPSLREB 79

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

ANTONIO D'ALESSANDRO

Applicant

and

TREASURY BOARD
(Department of Justice)

Employer

Indexed as

D'Alessandro v. Treasury Board (Department of Justice)

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: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Andrew Beck, Public Service Alliance of Canada

For the Employer: Barbara Di Brita

Decided on the basis of written submissions,

filed January 12, 2018, February 21, 2019 and June 26, 2019.

I. Introduction

[1] The Department of Justice (the employer) objects to the Federal Public Sector Labour Relations and Employment Board's (the Board) jurisdiction to hear four grievances which the union filed on behalf of the applicant, because they are untimely. They were not presented to the first level of the grievance process within the prescribed time limit.

[2] As a result, the Public Service Alliance of Canada (the union) seeks an extension of time, pursuant to s. 61(b) of the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79; ("the *Regulations*"), within which to file the four untimely grievances on behalf of the applicant, Antonio D'Alessandro.

[3] The employer objects to the extension and also says that the applicant was not an employee when grievance 1242 was filed and that, therefore, he had no right to file it under s. 2(1) of the *Federal Public Sector Labour Relations Act* ("the *Act*").

[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 Public Service Labour Relations and Employment Board 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 Federal Public Sector Labour Relations and Employment Board Act, and the Federal Public Sector Labour Relations Act.

II. Background

[5] Mr. D'Alessandro was a compensation advisor with the Department of Justice in Toronto, Ontario. In the fall of 2014, he received a workforce adjustment notification that his position would be discontinued. He was to be given priority on upcoming vacant positions for the next year, and if unsuccessful, he would be laid off and maintained on a priority list for another year.

[6] Mr. D'Alessandro began applying for positions. He believed that his lack of success was linked to a history of problems with the employer and to harassment

complaints that he had filed. He kept his union informed and requested, but did not receive, assistance.

[7] On March 29, 2016, he was told that he would be laid off pursuant to the "Work Force Adjustment Agreement." His employment would end on March 27, 2017 unless, before then, he secured an appointment or was deployed to another indeterminate position within the core public administration. Mr. D'Alessandro again contacted his union.

[8] On a number of occasions, throughout this period, he asked the union to file a grievance on his behalf, but the union failed to do so. On July 6, 2016, he filed a duty of fair representation complaint against the union, under s.190(1)(g) of the *Act* (Board file 561-02-806). His unsuccessful efforts to get assistance from his union are set out in detail in the Board's decision on that complaint (see *D'Alessandro v. Public Service Alliance of Canada*, 2018 FPSLREB 90 (*D'Alessandro*)).

[9] Only after Mr. D'Alessandro had filed his duty of fair representation complaint did the union file grievances on his behalf. On December 19, 2016, the union filed the grievances numbered 1241, 1242, and 1243 (Board files 566-02-14629, 14630, and 14631). On February 2, 2017, the union filed a fourth grievance, numbered 1249 (Board file 566-02-14632). On November 24, 2017, the grievances were referred to the Board for adjudication.

[10] On January 12, 2018, the employer objected to the Board's jurisdiction to hear the grievances because they were untimely and because the applicant was no longer an employee and therefore had no right to file them.

[11] On March 26, 2018, the union asked that the adjudication of the grievances be held in abeyance pending the Board's decision on the duty of fair representation complaint. On April 19, 2018, the Board granted the request.

[12] On December 10, 2018, the Board allowed the applicant's duty of fair representation complaint and found that the union had violated its duty to fairly represent him.

[13] On February 21, 2019, the union asked the Board to remove the grievances from abeyance and responded to the employer's timeliness objection by asking the Board to grant an extension of time within which to file the grievances. The union also asked the Board to dismiss the employer's objection that the applicant had no right to file the grievances because he was no longer an employee when they were filed.

[14] On June 26, 2019, at the Board's request, the employer replied and made further submissions with respect to the union's request for an extension. The employer also clarified its objection regarding the impact of the applicant's employee status on his right to grieve. The employer now says that this objection relates only to grievance 1242 (Board file 566-02-14630).

III. Should the Board exercise its discretion to grant an extension of time to file the grievances?

[15] The parties agree that there is no dispute that the grievances were filed beyond the time limit stipulated in the collective agreement.

[16] Section 61 of the *Regulations* states that the time limit for filing a grievance may be extended:

> ***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.*

[17] To determine whether an extension should be granted in the interest of fairness, the Board assesses the situation according to the criteria established in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. These are:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;

- the grievor's due diligence;
- balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance.

[18] The circumstances of each case determine how the factors are weighed relative to each other. In this case, a key factor is the balance of injustice to the employee against prejudice to the employer.

A. Applying the *Schenkman* criteria

1. Clear, cogent, and compelling reasons for the delay

[19] In *D'Alessandro*, the Board found that the delay in filing these grievances was due solely to the union's negligence. As well, the union states that the applicant is blameless with respect to this failure. It submits that but for its failure, the grievances would have been filed in a timely manner. Therefore, it is of the view that this constitutes a clear, cogent, and compelling reason for the delay.

[20] The Public Service Labour Relations Board (the former Board) found that a union's negligence can constitute a clear, cogent, and compelling reason for a delay. See *Prior v. Canada Revenue Agency*, 2014 PSLRB 96 at para. 127:

> *[127] … The scope of the duty of fair representation has been found to include a duty of trade unions to avoid serious negligence in representing employees in the grievance procedure. Where complaints concerning the failure of the union to pursue a grievance to arbitration have been found to contravene the duty, labor [sic] boards have ordered trade unions to take the grievance to arbitration and ordered the employer to waive preliminary objections to arbitration, such as a failure to comply with the time limits. See G.W. Adams, Canadian Labour Law (second edition), chapter 13.36.2.*

[21] ln *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59, the former Board found that the applicant's union had been negligent in failing to file a grievance in a timely manner and that the applicant had reasonably and sincerely believed that it had been filed. At paragraph 13, the former Board found that "… there is room for the exercise of discretion if negligence on the part of the agent is present or apparent."

[22] The employer does not dispute that a union's negligence can constitute a clear, cogent, and compelling reason for a delay, but takes the position that the delay was not entirely attributable to the union's negligence. It is unclear on what basis the employer makes this claim. The employer submits that the applicant had filed grievances in the past and was knowledgeable of the process for doing so. The employer refers to information provided by the applicant during the grievance procedure but does not say what that information was or how it shows that the delay was not entirely the union's fault. Nor does the employer cite any authority for the proposition that a delay must be entirely attributable to a union's negligence for the Board's discretion to be exercised in the interest of fairness.

[23] The union's statement, on the other hand, is unequivocal. It submits that the applicant is blameless. The Board in *D'Alessandro* is equally definitive: "But for its arbitrary treatment (or, more accurately, lack of treatment) of the complainant's file, I am satisfied based on the evidence before me that the grievances would have been filed on a timely basis" (see paragraph 53).

[24] I do not think that a delay must be entirely attributable to a union for the Board to extend timelines — it is a question of what is fair. Nevertheless, I accept the Board's finding in *D'Alessandro* that, in this case, the untimely filings were entirely attributable to the union's negligence. This constitutes a clear, cogent, and compelling reason for the delay.

2. The length of the delay and the grievor's due diligence

[25] Given the facts of this case, the union submits that these two criteria are related and ought to be considered together. I agree. The union says that the applicant diligently attempted to pursue his dispute and that he relied on the union to submit his grievances in a timely manner. He cooperated with the union in a diligent manner throughout the process. The *D'Alessandro* Board was also of the view that Mr. D'Alessandro showed due diligence. In my view, his due diligence mitigates the significant length of the delay.

3. Balancing injustice to the employee against prejudice to the employer

[26] The employer submits that two of the four grievances were filed three years late, which causes it "some prejudice". The union, however, says that three of

the grievances were filed eight months late and one was filed ten months late. There appears to be a different view of what triggered two of the grievances, but it is not at all clear what these different views are based on.

[27] Either way the delay is significant, however, the employer has not provided any information at all as to how it would be prejudiced. Not granting an extension would amount to a significant injustice to the applicant, who would lose his only possible recourse to challenge the termination of his employment after more than a decade of public service. As well, the employer was always aware of the existence and the nature of the dispute, despite the delay in filing a formal grievance. In this case, the evidence before me shows that the injustice to the grievor is greater than that to the employer.

4. The chances of success of the grievance

[28] The impact on the grievor is significant and it would be inappropriate to examine the merits of the case prematurely. The grievor should not be prevented from taking the next steps towards resolving this dispute, which include a hearing, should the matter not resolve before then.

B. Conclusion

[29] Fairness dictates that Mr. D'Alessandro should be able to pursue his grievances, despite his union's negligence. The delay was explained by clear, cogent and compelling reasons. Consequently, the employer's timeliness objection is denied and the applicant's request for an extension to file his grievances is granted.

IV. Did the applicant have the right to file grievance 1242?

[30] The employer argues that Mr. D'Alessandro was not an employee when grievance 1242 was filed and that, therefore, he did not have the right to grieve, pursuant to s. 2(1) of the *Act*. In this grievance, he alleges that the employer failed to provide a harassment-free workplace.

[31] The union submits, and the Board in *D'Alessandro* found, that all the grievances, including 1242, would have been filed while Mr. D'Alessandro was still an employee, but for the union's negligence.

[32] The applicant draws a link between the harassment he says he experienced and the loss of his employment. In its submissions, the union refers to *D'Alessandro* to set out the relevant facts of this matter:

> *[6] The complainant began applying for jobs but was unsuccessful. He believed that he was unsuccessful internally because he had a history of problems with his employer, the Department of Justice. According to his evidence, Janet Hauck, his local Union of Solicitor General Employees (USGE) representative, was fully aware of this as he had copied her on emails in which he had questioned why he had not be successful in securing a position (Exhibit 4, at 2.1). He testified that he had filed three harassment complaints and that he had asked Ms. Hauck to attend interviews with him but that she had refused to attend or to assist him with his workplace problems.*

[33] The alleged harassment occurred while the applicant was still an employee and the grievance would have been filed while the applicant was still employed by the employer had the union not violated its duty of fair representation. I find that the applicant has the right to file this grievance.

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

(The Order appears on the next page)

V. Order

[34] I dismiss the employer's objection that Mr. D'Alessandro had no right to file grievance 1242 because he was no longer an employee.

[35] I find that this is an appropriate case in which to exercise my discretion and, in the interest of fairness, extend the time limits for filing all four of the applicant's grievances to the dates on which they were filed.

August 7, 2019.

Nancy Rosenberg,

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