Date: 20191219

File: 566-02-40448

Citation: 2019 FPSLREB 126

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

NOELLE EDWARDS

Griefor

and

DEPUTY HEAD (Canada Border Services Agency

Employer

Indexed as
Edwards v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Christopher Schulz

For the Employer: Richard Fader, counsel

Decided on the basis of written submissions, filed June 12, 2019, and July 4, 2019.

REASONS FOR DECISION

I. Background

[1] On September 14, 2006, Noelle Edwards ("the grievor") grieved that the Canada Border Services Agency ("the employer") discriminated against her on the basis of disability. The grievance is numbered 79183 and has the file number 566-02-6477 of the Federal Public Sector Labour Relations and Employment Board ("the Board").

[2] On December 2, 2006, the grievor filed a grievance requesting a harassment-free workplace. It is numbered 79802 and has Board file number 566-02-6478.

[3] On April 1, 2009, the grievor was terminated, and she filed a third grievance, to contest the termination. It is numbered 97391, has Board file number 566-02-40448, and is the subject of this decision. It will be referred to as "the third grievance" throughout this decision.

[4] The first two grievances were forwarded in due course, in a timely manner, to adjudication by the grievor's bargaining agent, the Public Service Alliance of Canada (PSAC).

[5] The final-level grievance reply was issued to the grievor with respect to the third grievance on November 21, 2011. The employer granted the grievance and returned the grievor to work, but there were issues surrounding her reinstatement that the grievor wanted to bring forward for adjudication. The matter was not referred to adjudication until May 17, 2019.

II. The employer's objection to jurisdiction based on the untimely filing of the third grievance

[6] On June 12, 2019, the employer raised an objection to the timeliness of the referral to adjudication of the third grievance.

A. The bargaining agent's reply

[7] The bargaining agent's reply was extensive and was filed on July 4, 2019. In it, the bargaining agent acknowledges that the third grievance was referred beyond the time limit stipulated in the regulations but requests that the Board exercise its discretion to grant an extension to the time limits in the interest of fairness, pursuant

to s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[8] In its July 4, 2019, pleadings, the bargaining agent assumes full responsibility for the grievor's failure to refer her grievance to adjudication in a timely manner.

[9] The bargaining agent provided a detailed timeline to illuminate how the third grievance was received. For example, the timeline indicates that on November 29, 2011, the Customs and Immigration Union (which is the grievor's PSAC component) forwarded the third grievance to the PSAC for analysis and review.

[10] The timeline indicates the grievor's continuous efforts to learn more from her bargaining agent about the status of the third grievance. References are made to communications dated February of 2012; August, October, and December of 2013; November 2, 2015; August and September of 2017; and March of 2018.

[11] According to the bargaining agent, it was only during a pre-hearing conference call with the Board on April 24, 2019, in relation to the other two grievances, that counsel for the bargaining agent learned that the third grievance had never been referred to adjudication.

[12] As indicated, the third grievance was finally referred to adjudication on May 17, 2019. At that time, the bargaining agent requested that it be joined with the grievor's other two grievances.

[13] The grievor has subsequently filed an unfair labour practice complaint with the Board, alleging that the bargaining agent acted in a manner that is arbitrary or discriminatory or that is in bad faith in its representation of her, pursuant to ss.190(1)(g) and 187 of the *Federal Public Sector Labour Relations Act* (the *Act*). The grievor and bargaining agent have agreed to hold that complaint in abeyance pending the outcome of this decision.

[14] The bargaining agent acknowledges that the grievor is clearly blameless with respect to the failure to refer the third grievance to adjudication in a timely manner and that the reason for the delay was its negligence.

[15] The bargaining agent acknowledges that in fact the third grievance was allowed at the final level but emphasizes that the matter is far from moot because the heart of

the grievance is the employer's failure to reinstate the grievor correctly, which caused serious complications with her permanent disability benefits, issued by a third-party insurer.

[16] The bargaining agent submits that not granting the extension of time would result in a significant injustice to the grievor because she would lose her only recourse to reclaim the quantum of damages she feels she is due, owing to the employer's failure to properly reinstate her after it found that she had been improperly terminated.

[17] The bargaining agent referred me to the following cases: *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59, and *Prior v. Canada Revenue Agency*, 2014 PSLRB 96.

B. The employer's response

[18] The employer responded on August 20, 2019. It refers to two cases, *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, and *Sonmor v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 20. In summary, the employer's position is that the bargaining agent's negligence does not amount to clear, cogent, and compelling reasons to explain why the grievance was referred to adjudication seven and one-half years after the employer issued its final-level reply to the termination grievance. According to the employer, an extension of time under such circumstances cannot be justified.

[19] In the many years that have passed, argues the employer, memories have faded, key witnesses may no longer be available, and records may have been destroyed, in keeping with retention and disposal policies, given that since November of 2011, no further action was taken relating to the grievor's termination.

[20] The employer also submits that the issues raised in the grievor's other two grievances are unrelated to the termination grievance.

III. Analysis and Reasons

[21] Applications for extensions of time are made under s. 61 of the *Regulations*, which 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 Chairperson.*

[22] Obviously, the parties did not agree to an extension, so the application must be considered in the interest of fairness to both parties. The criteria to consider are clearly articulated as follows in *Schenkman*:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;
- balancing the injustice to the applicant against the prejudice to the respondent in granting the extension; and
- the chances of success of the grievance.

[23] Considering the *Schenkman* criteria, I will not pronounce upon the chances of success of the grievance. I can observe only that since it pertains to the termination of the grievor's employment, it is obviously not frivolous or trivial in nature.

[24] The grievor exercised due diligence; she did everything expected of her. The responsibility for the delay in referring the grievance to adjudication rests entirely with the bargaining agent. However, I agree with the adjudicator in *Copp* that administrative errors by a union do not necessarily constitute clear, cogent and compelling reasons.

[25] As indicated in *Thompson*, it is the particular set of circumstances defining each case that must dictate the weight to be given to any one of the *Schenkman* criteria relative to the others. The decision in *Prior* further specifies that in a situation where negligence of the bargaining agent is present and a grievor has exercised due diligence in pursuing their grievance, fairness should drive the application to extend time limits.

[26] The length of the delay is a significant factor. The cases submitted speak of delays of weeks or perhaps months. The delay in this matter is measured in years. Many, many years. The situation is similar to the fifteen-year delay in *Schenkman*, and I find I agree with Board Member Mackenzie's statement at paragraph 81 that "[t]his is an excessively long delay and far out of the ordinary… Both bargaining agents and employers are entitled to some closure on disputes. There is a time to grieve and a time to move on."

[27] I accept that given the length of the delay, there would be some prejudice to the employer, who has been operating under the premise for many years that there is no grievance on termination, to suddenly have to go far back in time to prepare to address this issue.

[28] The bargaining agent argues that this prejudice is minimal because the employer was aware of the nature of the dispute, as it is tied to the other two grievances. The bargaining agent submits that the delay in hearing the two properly-referred grievances and the delay in referring the third grievance are the same delay.

[29] Aside from the delay in hearing the two other grievances, it is not clear how the nature of the dispute in the termination grievance is tied to the other two grievances, which allege harassment and discrimination. The issues surrounding the termination of employment may not be moot, but I find the bargaining agent's argument that the issues it raises are in some way connected to the other two grievances to be somewhat tenuous.

[30] While I sympathize with the grievor's predicament, I must balance the interests of both parties. In so doing, I find that the grievor has a proper avenue of recourse under s. 187 of the *Federal Public Sector Labour Relations Act*, which she has already exercised.

[31] I agree with the finding in *Copp*, to the effect that *"… errors or omissions from the union are not clear, cogent and compelling reasons for justifying not respecting the timelines."*

[32] In all of the circumstances, I find that it is not in the interests of fairness to grant the extension to refer the grievance to adjudication. I therefore make the following order:

(The Order appears on the next page)

IV. Order

[33] The application for an extension of time is denied.

December 19, 2019

James R. Knopp,
A panel of the Federal Public Sector
Labour Relations and Employment Board