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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

JULIE TREMBLAY

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

Indexed as
Tremblay v. Treasury Board (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication and an application for an extension of time

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

For the Grievor: Eric Langlais and Tia Hazra, Professional Institute of the Public Service of Canada

For the Employer: Adam C. Feldman, counsel

Decided on the basis of written submissions,
filed June 5 and 26 and July 3, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Objection in the context of a grievance referred to adjudication and an application for an extension of time

[1] Julie Tremblay ("the grievor") referred a grievance to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board"). The Department of Public Works and Government Services ("the employer"), where she worked as of the events that gave rise to the grievance, objected to the referral, given the significant delay between the events that gave rise to the grievance and its filing. Her view is that in reality, there was no delay, given how the subsequent events unfolded. In the event that the Board deems that there was a delay, she asked for an extension of the prescribed time.

[2] After a pre-hearing conference, the parties agreed that it would be preferable if I dealt first with the delay issue. Normally, an application would have been made for an extension of time, the employer would have responded, and the grievor would have replied. Instead, in this case, the starting point was the employer's objection. Therefore, the issue was dealt with as follows: the employer stated its objection, the grievor responded, and the employer replied. In their arguments, both parties considered the application for an extension of time. Therefore, this decision is about the employer's objection with respect to the time limit and the grievor's application for an extension of it. For the reasons that follow, I grant the application for an extension of time.

II. Background

[3] In November 2009 and for personal reasons, the grievor consulted the employee assistance service. The federal government, as the employer and as part of its Employee Assistance Program (EAP), offers a psychological consultation service to its employees in which the confidentiality of the information the employees provide is guaranteed. However, that confidentiality can be breached by an EAP employee who deems that information received from a client provides reasonable grounds to believe there is danger to the client or to others.

[4] The grievor made the consultation because she was having disturbing thoughts about her father, with whom she had a conflict-ridden relationship. The EAP intervenor interpreted her words as a genuine threat to the father. She called the police to have

the grievor taken to a hospital for a psychiatric assessment. According to the assessment results, she posed no danger to herself or her father.

[5] The brief session with the intervenor had major consequences for the grievor. The things she had said in confidence to the intervenor did not remain confidential. On the contrary, they were shared with her managers and the security services. Her employer demanded a fitness-to-work assessment, despite the fact that she had never had the slightest difficulty at work.

[6] The grievor returned to work after a time, but she had the impression that everyone was aware of her psychological problems. Even after she changed jobs to work in another area of the federal government, she continued to feel that people were talking about her and her problems. She has been on leave since 2013.

[7] In December 2009, the grievor considered filing a grievance to complain about the treatment she had received from the EAP. Her bargaining agent implied that she could not file a one because the EAP was a service offered outside her workplace, even though the employer provided the service on its premises during working hours. Instead, the bargaining agent advised her to launch a civil action, which she did.

[8] On October 6, 2014, the Superior Court of Québec ruled in her favour and granted her claim against two EAP employees and the federal government for a breach of confidentiality, the psychological damage inflicted, and the loss of salary. In its ruling, the Court set aside the employer's argument that any claim related to working conditions had to be submitted as a grievance. According to the Court, with respect to the EAP, the federal government acted as a service provider and not as an employer. Consequently, the Court deemed that the grievor did in fact have a civil claim that could be submitted to a court of law.

[9] On July 20, 2016, the Court of Appeal of Quebec ("the Court of Appeal") ruled otherwise. It did not address the merits of the case; the only issue it dealt with was the appropriate forum for the grievor's legal action. Relying on s. 236 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), it ruled that the only recourse available to the grievor was to file a grievance under s. 208 of the *Act*.

[10] On September 15, 2016, the grievor applied to the Supreme Court of Canada for leave to appeal the Court of Appeal's decision. On October 21, 2016, to preserve her

right to file a grievance, she filed one with the employer. Since she no longer had an immediate supervisor, the grievance was addressed to Human Resources. The employer refused to deal with it at the first and second levels of the grievance process but finally dealt with it at the third and final level. It raised the excessive delay at the third level and as of the referral to adjudication.

III. Summary of the arguments

[11] The parties dedicated part of their arguments to the issue of whether the grievance was filed after the prescribed time limit had expired. According to the employer, even if it were agreed that the start date for calculating the time limit was the date of the Court of Appeal's decision, the grievance would be late, since it was filed only on October 21, 2016, three months after that decision was made and not within the 25-day limit. The grievor's response to that argument was that the start date for the calculation should be September 15, 2016, when she decided to appeal the decision to the Supreme Court of Canada.

[12] I have no difficulty acknowledging that the grievance is late. It was filed almost seven years after the events that gave rise to it. If the legal action is incorporated in the events, the grievance should have been filed within 25 days of the Court of Appeal's decision. The grievor maintained that since the employer did not respond at the first and second levels of the grievance process, it could not object on the grounds that the time limit was not met, under s. 95(2) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"); s. 95 reads as follows:

> ***95 (1)*** *A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication,*
>
> > ***(a)*** *raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the presentation of a grievance at a level of the grievance process has not been met; or*
> >
> > ***(b)*** *raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.*
>
> ***(2)*** *The objection referred to in paragraph (1)(a) may be raised only if the grievance was rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason.*

[13] The employer argued that under the rather unusual circumstances of the grievance's filing, the fact that it did not respond at the first two levels should not

have prevented it from raising an objection to the delay. I find that the circumstances are unusual and that the grievance did not follow the normal course. On one hand, I think that the grievance was properly filed with Human Resources. On the other hand, I cannot hold it against the employer for not responding at the first and second levels, since the grievance was not filed with the immediate supervisor. The employer raised the time limit issue in its response to the grievance and at the referral to adjudication.

[14] The employer also objected that the grievance is flawed, that it was not filed as it should have been with the immediate supervisor, and that it was not presented at all levels of the grievance process before being referred to adjudication. I do not accept those arguments. Given the elapsed time, the grievor chose to send her grievance to Human Resources, which is a representative of the employer. It is true that s. 225 of the *Act* provides that a grievance must be presented at all required levels. However, the employer did not respond to the grievance at the first and second levels because it had not been filed with the immediate supervisor. Under the circumstances, I believe that the bargaining agent properly referred the grievance to the third and final level of the grievance process, which the employer accepted. The grievance was heard at the final level, and the employer had an opportunity to respond to it. I agree that under the circumstances, the employer could have raised an objection about the time limit. However, I do not think that technical deficiencies should prevent the grievance from being heard.

[15] Consequently, the only issue I must decide is whether the extension of time should be granted. I will summarize the parties' arguments on this point, and my analysis will address only this issue.

A. For the employer

[16] The employer cited the five criteria in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSLRB 1, which the Board applies each time it reviews the question of an extension of time. They are the following:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the diligence of the grievor;
- balancing the injustice to the grievor if the extension of time is refused and the prejudice to the employer if it is granted; and
- the chance of success of the grievance.

[17] According to the employer, there were no clear, cogent, and compelling reasons for the delay. First, the grievor did not file a grievance; instead, she sought redress before a civil court, on the bargaining agent's advice. Second, once the Court of Appeal clearly ruled on the necessity of a grievance, the grievor still waited before filing one, which it was clear she had to do.

[18] The delay filing the grievance was excessively long; it was almost seven years after the events that gave rise to it. According to the employer, nothing prevented the grievor from filing a grievance to preserve her rights, despite the action before the courts.

[19] The grievor lacked diligence, first by not preserving her right to a grievance and then by waiting almost three months after the Court of Appeal's decision to file one.

[20] With respect to the balance of injustice, the grievor would not suffer any injustice were the extension not granted because the employer responded to her grievance. Furthermore, the employer would suffer prejudice as a result of the delay, which is completely attributable to the grievor.

[21] With respect to the chance of success of the grievance, the employer argued that it could not be said that the grievance has merit, since the Court of Appeal invalidated the Superior Court's decision.

B. For the grievor

[22] The grievor argued that the reason for the delay was clear, cogent, and compelling. She concluded a civil action that her bargaining agent had advised her to follow.

[23] The grievor maintained that there was no delay because she acted within 25 days of the final stage of her civil action, namely, the application for leave to appeal to the Supreme Court of Canada.

[24] The grievor consistently demonstrated diligence and tirelessly pursued her recourse.

[25] With respect to the balance of injustice, it is clear that refusing the grievor the possibility of a grievance would be a profound injustice since it is her only recourse. In

reality, there is no prejudice to the employer, since it was always aware of her efforts. It was not taken by surprise, and the case has long been prepared.

[26] Finally, with respect to the chance of success, a judicial decision that supports the grievor already exists. Therefore, it would be unjust to deprive her of the opportunity to be heard by the Board.

[27] Contrary to the employer's statement, the Superior Court's decision on the merits was not called into question. The Court of Appeal ruled on the appropriate forum but not on the merits.

IV. Analysis

[28] Section 61 of the *Regulations* provides the following:

> ***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 a 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.*

[29] The grievor applied for the extension of time under that section. I note the following in the section's wording: "in the interest of fairness".

[30] The grievor pursued a civil recourse to defend her rights, and the Superior Court of Québec found in her favour. On appeal, the employer argued that the recourse must be by way of a grievance, and the Quebec Court of Appeal ruled that way. Following its logic, the Court of Appeal in no way ruled on the merits of the grievor's claim.

[31] As both parties noted, the Board has long adopted a systematic approach to determining whether an extension of time should be granted by relying on the *Schenkman* criteria. In the following paragraphs, I will analyze each criterion with respect to the grievor's situation.

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

[32] It is clear that the grievance was not filed within 25 days of the events of November 2009 because the grievor sincerely believed that she had to seek redress in a civil court, according to the information her bargaining agent provided. Using one recourse instead of another seems to me a clear and cogent reason not to have filed a grievance, since the grievor was led to understand that doing so would be pointless. The delay filing the grievance after the Court of Appeal's decision could be explained by a hesitation, after all those years, to do something that had originally been discouraged. I hesitate to say that the delay is justified, but it is understandable.

B. The length of the delay

[33] In fact, two delays are to be explained. The first is the almost seven-year delay between the events and the grievance being filed. The second is the two-month delay between the Court of Appeal's decision and the grievance being filed.

[34] The seven-year delay is certainly considerable but is fully explained by the legal proceedings in this matter. In addition, the delay is often considered prejudicial and unjust for the employer, which has a right to expect that a grievance will be filed and dealt with in due course. However, in this case, the employer was a party to the legal proceedings; it argued for a grievance, and consequently, at this point, it could not claim that the grievance caused it harm.

[35] The second delay is much shorter and could be explained, as mentioned earlier, by the change in approach, after six years, to a new process that at first had been advised against.

C. The grievor's diligence

[36] I think that there can be no doubt that throughout this matter, the grievor showed diligence. She represented herself before the Superior Court (where she won her case) and the Court of Appeal, which takes courage, determination, and organization for someone without legal training.

[37] When the Court of Appeal stated that her recourse had to be by way of a grievance, she considered her options and filed an application for leave to appeal to the Supreme Court of Canada and then a grievance, based on the Court of Appeal's

instructions, in the event that her application for leave was dismissed (it was dismissed, on January 26, 2017).

[38] One could argue a lack of diligence in the sense that at least, the grievor could have preserved her right to a grievance by filing one more timely. Nevertheless, once again, it is understandable that she chose the legal route, given the advice she received from her bargaining agent at the time. That action was performed diligently.

D. The balance of injustice

[39] In this case, it must be determined whether the grievor or the employer would suffer the greatest prejudice whether or not the extension was granted.

[40] The employer asked the Court of Appeal to set aside the decision in the grievor's favour because the appropriate recourse was the grievance. To now refuse her the opportunity to refer the grievance to adjudication would mean that she had no recourse against an action that according to her, caused her serious harm.

[41] The inconvenience caused to the employer by granting the extension would be real, since it would have to continue to defend itself. However, this consequence is the result of its action, since it advocated for the grievance as the recourse. In addition, the usual reasons invoked with respect to inconvenience do not hold in this case — the employer was not taken by surprise, and it cannot expect to turn the page without consequences, while since 2009, the grievor has insisted that she suffered harm, and she has pursued the case tirelessly ever since.

[42] Between the two, it is clear that the prejudice that the grievor would suffer were the extension refused, which would deprive her of all recourse, would be much more serious than the inconvenience to the employer of having to continue to defend itself.

E. Chance of success of the grievance

[43] The Board often sets aside this part of the analysis since evidence has not yet been heard, so it is difficult to comment on the grievance's chance of success. In this case, the facts that will be presented at the grievance hearing have already been presented to the Superior Court of Québec. The Board is not bound by that decision, but it remains that a careful review of the situation led the Superior Court to find in the grievor's favour. It is fair to say that at the very least, this part of the analysis leans more toward extending the time limit.

[44] The analysis under the *Schenkman* criteria that the Board generally applies to this type of situation is not entirely conclusive in this case. The delay was long, and the grievor should have proceeded by way of a grievance. Yet, I return to the fact that a judicial decision favoured her and was invalidated only because she had erred about which forum had jurisdiction. The *Regulations* provide that the Board has the authority to extend time limits in the interest of fairness. That seems to me the most conclusive argument for granting the extension. From a fairness perspective, it would seem iniquitous to deny the grievor the recourse that the Quebec Court of Appeal stated would be her only one.

[45] The time for filing the grievance is extended. The grievance was properly referred to adjudication.

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

(The Order appears on the next page)

V. Order

[47] The extension of time is granted. The hearing of the grievor's grievance will be scheduled with the Board.

August 10, 2020.

FPSLREB Translation

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