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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

DIMITRI GREKOU

Grievor

and

**TREASURY BOARD
(Department of National Defence)**

Respondent

Indexed as

Grekou v. Treasury Board (Department of National Defence)

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

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

For the Grievor: Aaron Lemkow, Public Service Alliance of Canada

For the Respondent: Glenn MacDougall and Peter Hooley

Decided on the basis of written submissions,
filed April 3, 2019, and July 17 and September 11, 2020.
(FPSLREB Translation)

REASONS FOR DECISION**FPSLRB TRANSLATION**

I. Application before the Board

[1] Dimitri Grekou (“the grievor”) was rejected on probation while working at the Department of National Defence (DND). He was part of a bargaining unit represented by the Public Service Alliance of Canada (PSAC), which is a party to a collective agreement concluded with the employer, the Treasury Board. For the purposes of this decision, the employer designated DND as the employer to which the Treasury Board delegated its authority.

[2] The letter of rejection on probation is dated January 3, 2018. On December 10, 2018, the grievor filed a grievance against the rejection on probation. The grievance was referred to adjudication before the Federal Public Sector Labour Relations and Employment Board (“the Board”) on February 20, 2019. On April 3, 2019, the employer sent a letter to the Board. It shared two objections, which were the delay filing the grievance and the fact that the rejection on probation, which was carried out under the aegis of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), could not be referred to adjudication, under s. 211 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *Act*”). On July 17, 2020, the grievor filed an application for an extension of time with the Board under s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; “the *Regulations*”).

[3] This decision is limited to the objection to the delay and the grievor’s extension application. I am aware that in principle, a grievance about a rejection on probation cannot be referred to adjudication. In practice, this type of grievance is often submitted to the Board, which decides based on the evidence whether it should intervene, in keeping with the Federal Court’s ruling in *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, and according to the Board’s case law, specifically *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134. Consequently, I believe that if I grant the extension application, a hearing will have to be held to deal with the employer’s objection to the Board’s jurisdiction. If the extension application is dismissed, the grievance file will be closed.

II. Background

[4] The grievor was rejected on probation on January 3, 2018. He immediately contacted his bargaining agent, according to a number of emails from January 2018.

The collective agreement provides that a grievance must be filed within 25 days of the action giving rise to it. A communication from the bargaining agent states that therefore, the time limit would have been January 28, while another states February 7 (excluding Saturdays and Sundays). There is no need to decide this issue in this case because the parties agree that the grievance's filing on December 10, 2018, greatly exceeded the time provided by the collective agreement.

[5] The grievor expected the bargaining agent to file the grievance, which was not done. He made a complaint with the Board on March 8, 2018, against the PSAC for failing in its duty of fair representation. On April 5, 2018, the PSAC shared the draft grievance with the grievor's lawyer, for the grievor to approve. The PSAC had already informed the lawyer and the grievor on March 26 that the bargaining agent's approval was not required to file a grievance.

[6] In October 2018, the grievor's lawyer withdrew from the complaint file. In November 2018, Board Member Stephan Bertrand heard the complaint in part. The hearing was suspended because the parties suggested that they could settle the matter. Board Member Bertrand, who unfortunately has since passed away, reportedly told the parties that he would dismiss any employer objection based on the delay if the bargaining agent filed a grievance and referred it to adjudication.

[7] The bargaining agent and the grievor settled his complaint on November 19, 2018. The bargaining agent argued that Board Member Bertrand's promise to set aside any employer objection about the lateness of the grievance filing was a factor in settling the complaint and filing the grievance in the grievor's name on December 10, 2018.

III. Summary of the arguments

[8] On April 3, 2019, the employer responded to the grievance being referred to adjudication before the Board by raising two objections, one about the delay filing the grievance, and the other about the Board's jurisdiction. As I stated earlier, in this decision, I will deal only with the objection to the delay.

A. The respondent's objection

[9] According to the respondent, the grievance was filed well beyond the 25 days provided in the collective agreement, and the employer duly dismissed it because of the delay, pursuant to s. 95(2) of the *Regulations*.

B. The application for an extension of time

[10] The delay is not in dispute. The grievor asks for an extension of time to file the grievance 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 Board or an adjudicator, as the case may be.

[11] Generally, the Board applies the following criteria, drawn from paragraph 75 of *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSLRB 1, to decide applications for extensions of time:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the grievor against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance.

[12] The grievor argued that although the criteria are useful, they are not definitive. Considering all the circumstances, in the interest of fairness, the Board should grant the extension. Nevertheless, the grievor reviewed each criterion.

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

[13] The grievor argued that until April 5, 2018, it was up to the bargaining agent to file a grievance on his behalf; after that date, the duty fell to the lawyer he had hired and whose advice he followed.

2. The length of the delay

[14] There was a 10-month delay. This delay is not insignificant, but in other cases, the Board has granted extensions after even longer delays.

3. The due diligence of the grievor

[15] For his part, the grievor argued that he acted diligently. He was in frequent contact with the bargaining agent, he never gave up his right to file a grievance, and he relied on his lawyer to act in his interests.

4. The injustice to the grievor by refusing an extension compared to the prejudice to the employer due to an extension

[16] According to the grievor, it is obvious that he would suffer more from the consequences of a refusal because this is his only recourse for challenging what he considered an unjust dismissal. There is no indication of prejudice to the employer.

5. The chance of success of a grievance

[17] In the absence of evidence, this criterion cannot be decided. However, the grievor stressed that the employer did not characterize the grievance as frivolous or vexatious.

[18] Therefore, the grievor asks that the Board grant the extension of time. The bargaining agent asks that if the Board grants the employer's objection and dismisses the extension application, it specify when the delay became excessive.

C. The respondent's reply

[19] The respondent replied to the extension application as follows:

[Translation]

...

... Although the bargaining agent argues that there are clear, cogent, and compelling reasons for the delay, the employee-grievor was represented by Mtre Blanchard-Beauchemin as of April 5, 2018, and a grievance could have been filed with the employer at that time. However, the grievance was filed only on December 10, 2018. No evidence was presented to the effect that the employee was unable to do it before that date.

...

IV. Analysis

[20] In his application, the grievor submitted several decisions that deal specifically with the application of s. 61(b) of the *Regulations* when granting an extension of time. All those decisions are distinct with respect to the facts at issue.

[21] In both *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144, and *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLRB 79, the grievance was about the interpretation or application of a collective agreement, so the union's support was essential to filing it. In both cases, it was deemed that the delay was entirely attributable to the union and that it would have been unjust for the grievor to pay the price for the union's lack of diligence.

[22] In this case, the grievor relied on his bargaining agent to file a grievance, which was not done. Still, he could have filed the grievance himself, which he knew as early as March 26, 2018, but did not. He was then represented by a lawyer, who did not file a grievance on his behalf either, despite the bargaining agent sending the text of the grievance to the lawyer's attention on April 5.

[23] This failure to file the grievance after March 26 or April 5 was not explained. The only circumstance that could explain it is that a complaint had been made against the bargaining agent for a failure to represent, related to the failure to file the grievance. However, the grievance process was independent of the complaint, and once again, the grievor did not require the union's support to file the grievance.

[24] In the other decisions that were brought to my attention, each decision maker deemed that the delay was explained either by a medical situation (*Richard v. Canada Revenue Agency*, 2005 PSLRB 180), particularly difficult circumstances (*Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101), or a delay attributable to the union that the grievor could not have known of (*Rinke v. Canada Food Inspection Agency*, 2005 PSSRB 23). In each of the three cases, the prejudice to the grievor far outweighed the potential harm to the employer.

[25] I believe that there are no clear and compelling reasons to explain the 10-month delay. In addition, and this goes hand in hand with the lack of clear and compelling reasons, it seems to me that the grievor did not show diligence in this matter. It is true that initially, he communicated with the bargaining agent, but there is no indication

that he then took other actions, except to hire a lawyer and make a complaint against the bargaining agent.

[26] The 10-month delay is quite significant. Once again, there is no explanation as to why the grievance was not filed in March or April, when the grievor made the complaint against his bargaining agent. It would still have been late at that time, but the delay could have been explained by his expectation that the union would file a grievance on his behalf. The bargaining agent asks me to specify when the delay became excessive. That is not the issue. In the past, the Board has granted extensions for much greater delays; the delay still must be explained, which was not done in this case.

[27] For the purposes of my analysis, I do not apply the *Schenkman* criterion on the chance of success. It is impossible to rule on that issue in the absence of any evidence pertaining to the grievance itself.

[28] The only *Schenkman* criterion favourable to the grievor is the one that deals with the prejudice to the grievor compared to the harm suffered by the employer. Certainly, the loss of employment is a serious situation for the grievor. Nevertheless, the employer has a right to expect that the absence of any challenges for 10 months means that the file is closed.

[29] The bargaining agent argued that Mr. Bertrand had reportedly committed to rejecting any employer objection based on the delay filing the grievance. Yet, the employer was not a party to the complaint in which context Mr. Bertrand supposedly said those words. While the complaint affected only the bargaining agent and the grievor, any decision about the delay affected the employer.

[30] I find it unlikely that Mr. Bertrand would have promised a result when the employer was not one of the parties to the dispute that he was hearing. It seems more likely that Mr. Bertrand would have said that despite the delay, it was still possible to apply to the Board for an extension, without committing the Board in advance. The first rule of administrative law is to hear both parties impartially before making a decision.

[31] In any case, it has no relevance to the issue I must decide, which is whether there are reasons that justify granting an extension of time. In the absence of clear and

cogent explanations for the 10-month delay, and given the grievor's lack of diligence, I find that granting the extension of time would not be justified. I grant the employer's objection based on the delay, and the extension application is dismissed.

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

(The Order appears on the next page)

V. Order

[33] The objection is allowed.

[34] The application for an extension of time is dismissed.

[35] The grievance file bearing number 566-02-39873 is closed.

November 2, 2020.

FPSLREB Translation

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