Date: 20201104

File: 568-32-41353
XR: 566-32-39845 &
566-32-39939

Citation: 2020 FPSLREB 95

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

NADEEM QASIM

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Qasim v. Canadian Food Inspection Agency

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: Crystal Stewart, employment relations officer

For the Employer: Michel Girard, counsel

Decided on the basis of written submissions, filed January 20 and February 3 and 11, 2020.

REASONS FOR DECISION

I. Application before the Board

[1] This is an application for an extension of time to present two grievances, one bearing Board file number 566-32-39845 (referred to as "the Phoenix grievance"), and one bearing Board file number 566-32-39939 (referred to as "the human rights grievance"). The employer objected to the jurisdiction of the Board to adjudicate both grievances, alleging that they were not presented in a timely manner. The grievor's bargaining agent (the Professional Institute of the Public Service of Canada) submitted that they were timely, and in the alternative, if it is determined that they were not timely, it requested an extension of time.

[2] For the following reasons, I find that the presentation of the human rights grievance was untimely and that an extension is not justified. The presentation of the Phoenix grievance was also untimely. However, the bargaining agent and the employer subsequently came to an agreement establishing a process for dealing with grievances of this nature, according to which they are to be withdrawn. As a result, the question of an extension is rendered moot.

II. The human rights grievance

[3] This grievance alleged that the employer discriminated against the grievor on the basis of disability by declaring him a surplus employee on May 2, 2016, upon his return to work from sick leave without pay.

[4] Establishment 14, the facility where the grievor worked for the Canadian Food Inspection Agency ("CFIA" or the "employer") in a VM-01 position, closed on May 6, 2014.

[5] According to the grievance responses, which the bargaining agent did not challenge, a letter went out to all affected employees on May 20, 2014, advising them that a staffing assessment process would be conducted to determine which employees would be retained and which would be declared surplus. It also indicated what would be expected if an employee were unavailable for the assessment process. For an employee on sick leave, medical documentation of his or her fitness would be required for the employee to participate in the assessment process. Were the employee unable

to participate, his or her employment status would be reviewed when the employer received medical documentation indicating that the employee was fit to return to work.

[6] The grievor completed the first part of the assessment process on June 19, 2014, but indicated that he was having medical issues. It was determined that he should not continue with the process until he was deemed medically fit. He was advised that to continue with the assessment process, he would have to submit medical certification from his treating physician. No certificate was submitted.

[7] On August 18, 2014, the grievor was advised that the CFIA was preparing to finalize the assessment process and make reasonable job offers for available VM-01 positions. He was further informed that his employment status would be reviewed once medical documentation was received.

[8] On February 23, 2016, as a result of a fitness-to-work evaluation, the grievor's doctor confirmed that he was fit to return to work on May 2, 2016.

[9] On March 29, 2016, in preparation for his return to work, the employer conducted a search for a vacant, funded VM-01 position in the Ontario area, but none was identified.

[10] Accordingly, the grievor was declared a surplus employee effective May 2, 2016. He was required to select one of his employment-transition entitlement options within 120 days, in accordance with the employer's *Employment Transition Policy*.

[11] The grievor's last day of employment was September 30, 2016. Therefore, the employer argued that to be timely, this grievance ought to have been submitted by November 4, 2016. It was not presented until May 1, 2017. The employer raised this objection at all levels of the grievance procedure.

A. The bargaining agent's submission on timeliness

[12] The bargaining agent submitted that within his 120-day opting period, the grievor reached out to the employer to raise his concerns with the workforce adjustment process and the decision to declare him surplus. The employer's response did not address those concerns and merely granted him a short extension to the deadline by which he had to choose his option. He did so, and September 30, 2016,

was confirmed as his last day of employment, although he remained on unpaid leave for the duration.

[13] The bargaining agent submitted that this grievance is not subject to the time limits in the collective agreement between the employer and the bargaining agent for the Veterinary Medicine (VM) group ("the collective agreement") because it alleges violations of both the no-discrimination clause of that agreement and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). Therefore, the grievor benefitted from the longer time limit to file it in the *CHRA*, which was one year from the date of the last discriminatory act or omission that is the subject of the grievance. The grievance was timely under s. 41(1) of the *CHRA*, which in this instance takes precedence over the collective agreement clause.

[14] Section 41(1) of the *CHRA* provides as follows:

> ***Commission to deal with complaint***
>
> ***41 (1)*** *Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> ***(a)*** *the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;*
>
> ***(b)*** *the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;*
>
> ***(c)*** *the complaint is beyond the jurisdiction of the Commission;*
>
> ***(d)*** *the complaint is trivial, frivolous, vexatious or made in bad faith; or*
>
> ***(e)*** *the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.*

[15] The bargaining agent points out that s. 208(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) states as follows: "An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*."

[16] According to the bargaining agent, this language recognizes that the *CHRA* is to be read into and forms part of the collective agreement and that employees have access to recourse for violations of the *CHRA* through the grievance procedure. The substantive rights conferred on employees by the *FPSLRA* are deemed part of the collective agreement. Accordingly, the one-year time limit by which to file a complaint under s. 41(1) of the *CHRA* is a substantive right conferred on the grievor by that Act and forms part of the collective agreement.

[17] In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 ("*Parry Sound*"), the Supreme Court of Canada said the following:

> …
>
> *… The Board was correct to conclude that the substantive rights and obligations of the* Human Rights Code *are incorporated into each collective agreement over which an arbitrator has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the* Human Rights Code *and other employment-related statutes. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.…*
>
> …

[18] The bargaining agent submitted that the one-year time limit by which to file a complaint set out in s. 41(1) of the *CHRA* establishes a floor beneath which an employer and union cannot contract. As a result, when dealing with a grievance alleging a violation under the *CHRA*, the 35-day time limit in the collective agreement has no application; applying it in this situation would be prejudicial to the statutory rights conferred on the grievor by s. 41(1).

[19] According to the bargaining agent, s. 41 of the *CHRA* directs grievors to exhaust their grievance procedures before seeking a determination from the Canadian Human Rights Commission (CHRC) or the Canadian Human Rights Tribunal. This grievance was filed on May 1, 2017, and the grievor made a complaint to the CHRC on August 29, 2017, as a result of the employer's grievance responses stating that the grievance was

untimely. On December 13, 2017, the CHRC advised the grievor that it could refuse to deal with his complaint unless he had exhausted the grievance procedure, stating: "As an employee in the public service, you need to file a grievance under the *FPSLRA* first."

[20] The 35-day time limit to file a grievance is set out in the collective agreement and in the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "*FPSLR Regulations*") but not in the *FPSLRA*. The quasi-constitutional status of the *CHRA* means that it trumps not only the collective agreement but also the *FPSLR Regulations*. Parliament intended that the human rights issues of unionized federal public servants would be dealt with using the grievance procedure.

[21] To reject jurisdiction on a human rights grievance because the collective agreement deadline for filing was not met would not accord with the intention behind the legislative directions. The Board can interpret the *CHRA* and make findings on the grievance in accordance with the *CHRA*. Therefore, the Board should accept a grievance that complies with the *CHRA*'s one-year time limit so that it can be fully determined in the appropriate forum for a unionized public servant.

B. The employer's submission on timeliness

[22] The employer submitted that the one-year time limit for filing a human rights complaint under the *CHRA* is not the time limit that applies to filing a grievance, even if discrimination is alleged. The grievor can file a grievance and a human rights complaint, but they are two distinct avenues of recourse, governed by different statutory rules.

[23] The *CHRA* does not govern the timelines for filing a grievance. S. 41(1)(a) states that the CHRC shall deal with a complaint unless it "… appears to the Commission that … the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available …". The *CHRA* recognizes that there is a separate and distinct grievance procedure.

[24] The grievance procedure in the federal public service is governed by the *FPSLRA*, the *FPSLR Regulations*, and any group-specific collective agreement that an authorized bargaining agent and an employer may enter into. In the collective agreement, those parties agreed that a grievance could be presented not later than the 35th calendar day after the date on which the grievor was notified orally or in writing,

or on which he or she first became aware, of the action or circumstances giving rise to the grievance.

[25] It is without question that the grievance was untimely, that the employer deemed it so, and that the employer raised the issue at all levels of grievance procedure.

C. The bargaining agent's submission on the extension of time

[26] The bargaining agent submitted that in the alternative, if it were determined that the grievances were untimely, then an extension of time to present them would be appropriate, considering the criteria set out as follows in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75:

> …
>
> - *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 … ; and*
> - *the chance of success of the grievance.*

[27] The bargaining agent identified balancing injustice as the most important criterion to consider. It took the position that there is no prejudice to the employer as it was aware of the grievor's concerns, given that he had written directly to the CFIA's president to voice them before the grievances were filed. The issues remained live and were never abandoned at any point. While there is no prejudice to the employer, it would be very prejudicial should the grievor be forced to start this process all over again with the CHRC, several years after the events that gave rise to his discrimination allegations.

[28] As for the fifth *Schenkman* criterion, the chance of success of the grievance, the bargaining agent submitted that it is difficult to determine if a matter has a serious chance of success without hearing all the evidence. Accordingly, the jurisdictional issue should not be bifurcated from the hearing on the merits but rather should be argued at the hearing.

[29] The grievor's clear, cogent, and compelling reason for not filing his grievance within the 35-day time limit in the collective agreement is that he understood that the *CHRA* provided him 12 months to file one.

[30] In addition, he had been thrown into a stressful situation upon the termination of his employment. He had no income, and due to the problems arising from the Phoenix pay system, he did not receive money that should have been forthcoming to him. He had also advised the employer that he was dealing with his son's critical health situation.

[31] The employer was aware that he had not abandoned his concerns with the workforce adjustment and human rights issues that were raised in May 2016 and again in August 2016, December 2016, and March 2017.

D. The employer's submission on the extension of time

[32] The employer submitted that applications for extensions of time are made under s. 61 of the *FPSLR 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.*

[33] It agreed that the criteria to consider for an extension of time are set out in *Schenkman* and further noted that the particular set of circumstances defining each case must dictate the weight given to any one criterion relative to the others.

[34] It submitted that the bargaining agent failed to show clear, cogent, and compelling reasons for the delay. No evidence was submitted to demonstrate due diligence on the part of the grievor. The length of the delay is a significant factor that would prejudice the employer, and there is considerably less prejudice to the grievor, given that he used another recourse mechanism by filing a CHRC complaint.

III. The Phoenix grievance

[35] The Phoenix grievance was presented to the employer on January 11, 2017. The grievor claimed that the transition support measure and education allowance to which he was entitled after being declared surplus had not been paid, ostensibly due to problems associated with the Phoenix pay system.

[36] The employer submitted that the grievor has since received the transition support measure payment he sought through this grievance, as well as most of the education allowance. The primary issue remaining is his contention that he is entitled to damages as a result of the late payment.

[37] The employer and the bargaining agent agree that the Phoenix grievance is covered by the memorandum of agreement (MOA) signed by the bargaining agent and the Treasury Board ("the Phoenix MOA", as adopted by the CFIA pursuant to an MOA between the Professional Institute of the Public Service of Canada and the CFIA, which was signed on June 12, 2019). With respect to timeliness, the agreement states that the employer will not seek to enforce any objection with respect to Phoenix-related grievances until two years from the date of signing of the MOA (i.e., until June 2021).

[38] As such, the employer could not make an objection based on timeliness at this time. That said, given that this grievance is covered by the Phoenix MOA, it must also be dealt with in accordance with its terms. As such, the Phoenix grievance that was referred to adjudication should not proceed; instead, the grievor may make a claim for damages under clause 25 of the Phoenix MOA. Accordingly, on that basis, the employer maintained its preliminary objection that this grievance should not be permitted to proceed to adjudication.

[39] For its part, the bargaining agent confirmed that the Phoenix grievance is covered by the Phoenix MOA and stated that the grievor will make a claim under it. However, the bargaining agent submitted that this grievance should be held in abeyance pending the outcome of the claims process under the Phoenix MOA.

IV. Reasons for decision

A. The human rights grievance

[40] The bargaining agent does not dispute that the human rights grievance was not presented in a timely way according to the 35-day time limit in the collective

agreement. However, it argued that because the Board is empowered to hear grievances like this one that allege *CHRA* violations, the *CHRA* trumps both the collective agreement and the *FPSLR Regulations* and provides the grievor with a one-year time limit to present such a grievance.

[41] The complaint procedure under the *CHRA* and the grievance procedure under the collective agreement are two distinct procedures. The bargaining agent cited *Parry Sound* for the proposition that a collective agreement cannot contract out of substantive human rights provided by legislation. That is certainly true. However, the time limit within which a grievance must be presented is a procedural matter. It is not a substantive right. As the respondent correctly pointed out, s. 41(1) of the *CHRA* is specific to the procedure that the CHRC must follow when a human rights complaint is filed with the CHRC.

[42] It is true that the parties to a collective agreement cannot agree to discriminate in violation of human rights legislation. But they can certainly agree to deadlines suitable to their operations and their labour-relations needs. The fact that a grievance alleges discrimination does not alter those timelines. Nor does the fact that the CHRC is likely to instruct grievors to exhaust their collective agreement options before proceeding with their complaints, in accordance with s. 41(1)(b) of the *CHRA*.

[43] The *FPSLRA* does not in any way alter the timelines of a grievance because it contains human rights allegations. With respect to an individual grievance, it simply provides that when a grievance raises human rights issues, notice is to be given to the CHRC, which has standing to make submissions about those issues at adjudication proceedings (see ss. 210(1) and (2)).

[44] The applicable time limit for this grievance was 35 days, as set out in the collective agreement. The grievor presented it six months after the deadline. Accordingly, it was not presented in a timely way. Given that, should the time for presenting the grievance be extended?

[45] According to s. 61(b) of the *FPSLR Regulations*, the Board may, in the interest of fairness, extend the time. To determine if the circumstances justify an extension, the Board considers the *Schenkman* criteria. The bargaining agent mentioned a number of challenges that the grievor faced at the time, such as the delayed receipt of his transitional funds due to Phoenix and his son's medical condition. Those were

unfortunate circumstances, but they do not explain or justify the six month delay. The grievor did not show due diligence.

[46] The bargaining agent stated that the grievor's clear, cogent, and compelling reason for the delay was that he thought he had 12 months to present the grievance, per the *CHRA*. If he delayed presenting it for this reason, notwithstanding the clear 35 day limit in his collective agreement, he either failed to show due diligence by verifying his assumption or he relied on bad advice. Either way, it is not a sufficient reason.

[47] With respect to the fourth criterion, the injustice to the employee must be balanced against the prejudice to the employer. The employer did not allege any specific prejudice. However, nor did the bargaining agent allege any specific injustice to the grievor except for having to start the process over at the CHRC after a number of years have passed. While I think that is unfortunate and that the matter should have been dealt with sooner, I do not think that an injustice resulted from it. The grievor still has the option to proceed with his CHRC complaint should he so choose.

[48] As for the grievance's chance of success, as most Board decisions have noted, it is difficult to comment on it at this stage, before any evidence as to the merits of the grievance has been heard. Besides, considering my findings with respect to the other criteria, this factor has little bearing. Given the length of the delay, the absence of any good reason for it, the lack of due diligence on the grievor's part, and no indication of an unbalanced injustice to the grievor, I do not find it is in the interests of fairness to extend the deadline for filing the human rights grievance.

B. The Phoenix grievance

[49] As for the Phoenix grievance, the parties agree that it should not move forward, and the bargaining agent confirmed that the grievor will make a damages claim under the Phoenix MOA. However, the bargaining agent asked that the matter be held in abeyance, pending that process.

[50] I note that by the Phoenix MOA, entitled "Damages Caused by the Phoenix Pay System" and signed in June 2019, the bargaining agent agreed to withdraw existing grievances, which were to be dealt with in accordance with the MOA's procedures, as follows:

…

> *31. Bargaining Agents must review and evaluate, prior to an employee filing a claim, all existing grievances submitted by their members in a manner consistent with their duty of fair representation. Bargaining Agents will make reasonable efforts to complete this review within one hundred and fifty (150) days of implementation of this agreement.*
>
> *32. Bargaining Agents will withdraw the grievances within one hundred and fifty (150) days of implementation of this agreement. Bargaining Agents retain carriage of their grievances subject only to the statutory duty of fair representation.*
>
> *…*

[51] As the bargaining agent has undertaken in the Phoenix MOA to withdraw this and other similar grievances, I see no reason to hold the Phoenix grievance in abeyance. The bargaining agent's request is denied.

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

(The Order appears on the next page)

V. Order

[53] The application for extension of time to present grievances 566-32-39845 and 566-32-39939 is denied. The files are ordered closed.

November 4, 2020.

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