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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

ALI GUIDARA

Applicant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Guidara v. Canada Revenue Agency

In the matter of an application for an extension of time under section 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Marie-Hélène Tougas, Professional Institute of the Public Service of Canada

For the Respondent: Véronique Newman, counsel

Case heard by videoconference,
October 27, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **(FPSLREB TRANSLATION)**

I. Application before the Board

[1] Ali Guidara, ("the applicant"), was a technology research advisor at the Canada Revenue Agency ("the employer" or "the respondent"). His position was classified at the CO-02 group and level, and was part of a bargaining unit whose members were represented by the Professional Institute of the Public Service of Canada ("the union").

[2] The employer imposed a 25-day suspension without salary, which the applicant served in January 2015, revoked his reliability status on January 27, 2015, and terminated his employment on February 6, 2015. On January 7, 2015, the applicant filed a grievance, in which he challenged the 25-day suspension. On February 17, 2015, he filed another grievance that challenged the revocation of his reliability status and his termination. On July 20, 2015, the employer dismissed the two grievances at the final level of the grievance procedure. The applicant and the union were informed of this on July 27, 2015.

[3] The applicant's grievances were not referred to adjudication within the prescribed time limits. On February 3, 2017, the union asked the Federal Public Sector Labour Relations and Employment Board ("the Board") for an extension of time under s.61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") so that the grievances could be referred to adjudication.

[4] In its March 9, 2017, response, the employer objected to the application for an extension of time. On March 20, 2017, the union replied to the employer. A hearing was subsequently scheduled for July 2020 but was postponed until October 2020 due to the COVID-19 pandemic.

II. Summary of the facts and the evidence submitted by the parties

[5] Unless otherwise stated, the parties agreed on the facts surrounding this application for an extension of time as stated in their written submissions. Some factors were also specified at the hearing, during which the applicant was the sole witness. Several documents were also adduced into evidence during the hearing.

[6] The applicant was represented by his union from the beginning of the grievance procedure. A union representative signed the two grievance forms. The grievance statements read as follows:

[Translation]

I grieve my employer's disciplinary measure of a 25-day suspension without pay, dated December 16, 2014. The suspension is abusive, unfounded, and unreasonable. The suspension is based on conclusions in the investigation report, and those conclusions are erroneous and false. The content of the report is prejudicial.

…

I grieve the revocation of my reliability status and my termination. The termination is unjustified and excessive. The revocation of my reliability status is the result of a lack of procedural fairness or bad faith and was not carried out for the true purpose stated by the employer.

[7] The applicant obtained advice from his union, which included the matter of referring his grievances to adjudication after the employer dismissed them at the final level of the grievance procedure. In its February 3, 2017, written submission, the union stated that it told the applicant that his grievances would be referred to adjudication. The applicant also admitted that the union sent him the two referral-to-adjudication forms for his signature.

[8] According to the February 3, 2017, submission, the union and the applicant discussed the chance of success of the grievance that challenged the termination and the revocation of the reliability status. The applicant apparently understood from that discussion that the referral to adjudication would be inadmissible because the revocation of the reliability status was an administrative action. According to him, as there was no point in going through with the process, he did not sign the referral-to-adjudication forms. The applicant confirmed this during his testimony. He concluded from his discussion with the union that the referral to adjudication would be pointless. During cross-examination, he stated that it was not worth referring the grievance that challenged the 25-day suspension to adjudication, as he could not grieve his termination.

[9] The applicant testified that at the end of August 2015, he tried to contact a lawyer to find out what could be done. After several attempts, he finally found a law office in the summer of 2016 that was willing to help him. Thus, on July 11, 2016, Yasmina Boukossa brought a suit for damages before the Superior Court of Québec, in

which she claimed $690 000. from the employer in compensation for loss of salary and damages suffered by the applicant.

[10] In a November 21, 2016, decision, the Superior Court of Québec dismissed the applicant's claim on the grounds that the grievance and adjudication process in place deprived the Court of jurisdiction. However, in its decision, the Court criticized the employer for not having informed the applicant that he could have referred his grievance to adjudication under s. 209(1)(d) of the *Act*, which deals with "… termination for any reason that does not relate to a breach of discipline or misconduct" for an employee of a separate agency.

[11] After the September 2016 hearing, the applicant's counsel asked the employer to voluntarily agree to grant an extension of time to allow the grievances to be referred to adjudication. The applicant testified that the employer refused to grant the extension.

[12] The applicant testified that he had no contact with the union between August 2015 and November 2016.

[13] He also testified that he waited "[translation] endlessly" for six years, which caused him stress and made him feel insecure. In the interest of fairness, he asked for an opportunity to bring his case to a third party.

III. Summary of the arguments

A. For the applicant

[14] The applicant argued that the 25-day suspension imposed on him was unfounded and unreasonable. He also argued that the decision to terminate his employment was unjustified and excessive.

[15] He worked with his union throughout the grievance procedure to assert his rights. The applicant's lack of understanding about the admissibility of the grievance that challenged the revocation of his reliability status was the main reason he did not sign the referral-to-adjudication forms. Therefore, he asked the Board to find that he acted with diligence and that he intended to refer his grievances to adjudication.

[16] According to the applicant, the Board and the organizations that preceded it have granted several applications for extensions of time when the reasons for the

delays resulted from the applicant's administrative errors or could be attributed to the union.

[17] It was unequivocal for the employer that since the grievances were filed, the applicant challenged its decisions. Therefore, referring those grievances to adjudication could not have been a surprise to the employer; it would have been expected. In addition, the applicant undertook an action against the employer in the Superior Court of Québec as he believed that he could not refer his grievances to adjudication.

[18] The impact of refusing the application for an extension of time would cause irreparable harm to the applicant because his grievances concerned the 25-day suspension and the termination of his employment. That harm greatly exceeds the prejudice the employer would suffer. Although it would be difficult to anticipate the chances of success of the grievances, the Board should consider their nature when analyzing the application for an extension of time.

[19] The applicant argued that the application for an extension of time should be accepted in the interest of fairness because it met the criteria established in case law. The criteria of compelling reasons, length of the delay, and due diligence should be analyzed together, and on those grounds, the application for an extension should be accepted.

[20] Finally, the applicant added that the Board should have heard the application for an extension of time and made a decision about it long before now. The applicant is paying the price.

[21] The applicant referred me to the following decisions: *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1; *Tremblay v. Treasury Board (Department of Public Works and Government Services)*, 2020 FPSLREB 82; *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79; *International Brotherhood of Electrical Workers, local 2228 v. Treasury Board*, 2013 PSLRB 144; *Riche v. Deputy Head (Department of National Defence)*, 2010 PSLRB 107; *Hendessi v. Treasury Board and Deputy Head* (*Border Services Agency*), 2012 PSLRB 29; *Perry v. Canadian Institutes of Health Research*, 2010 PSLRB 8; and *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101.

B. For the respondent

[22] The employer alleged that the applicant's argument that the grievances were not referred to adjudication because he did not understand what could be sent to adjudication, did not hold. Instead, he made a strategic choice to apply to the Superior Court of Québec. After he assessed his chances of success, he knowingly decided to bring an action for damages and interest before the Court rather than availing himself of the appropriate remedy namely, referring his grievances to adjudication. In addition, the argument of incomprehension cannot reasonably be applied to the 25-day disciplinary measure.

[23] Almost 2 months after the Superior Court of Québec's decision and more than 18 months after receiving the response to his grievances at the final level of the grievance procedure, the applicant opted for a referral to adjudication. Time limits are set out in the law, and their extension is an exceptional measure. Time limits contribute to labour relations stability by determining the final point in time for any remedy that might arise from an employer's decision. The Board cannot disregard applicable time limits on the grounds that the remedy did not suit the complainant, in this case the applicant.

[24] The application for an extension of time did not meet the criteria established by the case law. There are no clear, cogent, and compelling reasons for the delay. Instead, the applicant chose another remedy that seemed more favourable to him. He could very well have completed the applicable forms and referred his grievances to adjudication; he only did so after losing his case in court. Furthermore, more than 18 months had passed after the employer's decision at the final level of the grievance procedure.

[25] The Superior Court of Québec criticized the employer for not informing the applicant that he could have referred his grievance to adjudication under s. 209(1)(d) of the *Act*. The employer argued that providing advice to an employee about recourse to adjudication was not its role. The applicant was represented by his union and then by a lawyer he hired; it was up to him and his representatives to decide on a remedy.

[26] The respondent referred me to the following decisions: *Schenkman; Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39; *Crête v. Ouellet and Public Service Alliance of Canada*, 2013 PSLRB 96;

Edwards v. Deputy Head (Canada Border Services Agency), 2019 FPSLREB 126; *Featherston v. Deputy Head (Canada School of Public Service) and Deputy Head (Public Service Commission)*, 2010 PSLRB 72; *Professional Institute of the Public Service of Canada v. Treasury Board*, 2014 PSLREB 4; *Legge v. Treasury Board (Department of National Defence)*, 2018 FPSLREB 71; *Popov v. Canadian Space Agency*, 2018 FPSLREB 49; and *Popov v. Canada (Attorney General)*, 2019 FCA 177.

IV. Analysis and reasons

[27] Section 90(1) of the *Regulations* stipulates that a grievance may be referred to adjudication no later than 40 days after the day of receipt of the decision made at the final level of the grievance procedure. The applicant applied for an extension of that time to be able to refer his grievances to adjudication some 18 months after he received the response at the final level of the grievance procedure.

[28] This application was submitted under s. 61(b) 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.*

[29] The facts of this application for an extension of time are relatively straightforward. The union supported the applicant in the context of his grievances. In August 2015, the union told him that it would refer his grievances to adjudication but explained the limits of adjudication for revocations of reliability status. As the applicant concluded from those explanations that adjudication would be pointless, he made a conscious decision not to refer his grievances to adjudication. On July 11, 2016, he commenced an action against the employer in the Superior Court of Québec. After that hearing, but before the Court delivered its decision, the applicant tried to get the employer to voluntarily grant him an extension of time to refer his grievances to adjudication. The employer refused, and on November 21, 2016, the Court dismissed his claim. He then found himself back at square one, and he wanted to refer

his grievances to adjudication. To that end, the union applied for an extension of time. I also note that the applicant had no contact with the union between August 2015 and November 2016.

[30] The *Schenkman* criteria for analyzing an application for an extension of time have been reflected on several occasions in the Board's case law. The criteria are the following: clear, cogent, and compelling reasons for the delay; the length of the delay; the due diligence of the applicant; the balance between the injustice to the applicant and the prejudice to the respondent in granting an extension; and the chances of success of the grievance.

[31] Furthermore, the criteria are assessed in their entirety, but the importance of each is not necessarily equal. The submitted facts must be reviewed to decide the evidentiary value of each criterion (*Martin* at paras. 59 and 70). Sometimes, not all criteria are applicable, or only one or two weigh in the balance.

[32] First consider the applicant's reasons for not referring his grievances to adjudication within 40 days of receiving the response at the final level of the grievance procedure.

[33] According to the evidence submitted, the union was prepared to refer the applicant's grievances within the prescribed time limit. In fact, it sent him the referral-to-adjudication forms. The applicant chose not to sign the forms. He claimed that he understood from his discussion with the union that the grievance that challenged the revocation of his reliability status and his termination would be inadmissible. He also testified that it was not worth referring his grievance that challenged the 25-day suspension to adjudication, and he decided instead to seek legal action in the Superior Court of Québec.

[34] Therefore, it was the applicant's choice, not his union's, not to go to adjudication. Subsequently, it was also his decision to go to the Superior Court of Québec, which the lawyer he hired advised and supported. The evidence also revealed that there was no contact between the applicant and his union between August 2015 and November 2016. Therefore, it cannot be claimed here, as was the case in several previous Board decisions, that there were administrative or other errors on the part of the union.

[35] It is clear that a Board adjudicator had the jurisdiction to decide the grievance that challenged the 25-day suspension. The other grievance, signed by the applicant and the union, challenged the revocation of his security clearance on the grounds that it resulted from a lack of procedural fairness or bad faith. Unless there is evidence to the contrary, which was not presented to me, it seems unlikely that the union could have led the applicant to believe that he could not refer his grievances to adjudication, even if the state of law in August 2015 was taken into account.

[36] I agree with the employer's argument that the applicant's decision to apply to the Superior Court of Québec instead of referring his grievances to adjudication was a strategic choice that he made. After concluding that he could not win his case at adjudication, he consulted a lawyer and made a conscious decision to launch a suit for damages and interest before the Superior Court of Québec. After that Court's decision, he realized that it was clearly not a good remedy; nor was it a good strategy.

[37] Based on the analysis of the facts and the relevant case law, I find that the applicant did not present me with clear, cogent, and compelling reasons to accept his application. He chose a poor remedy. He received advice and representation throughout the process, from the time he filed his grievances to the hearing on his application for an extension of time. The union suggested that he refer his grievances to adjudication, but he decided that it was not worthwhile, and he chose another remedy, which led nowhere. He then tried to obtain an extension of time, which cannot be considered a compelling reason. A person cannot make a conscious decision not to refer a grievance to adjudication because the chances of success is not good, then go elsewhere to seek a remedy, and finally return to adjudication when that remedy is unsuccessful.

[38] It seems to me that basically, there must be clear, cogent, and compelling reasons for the delay, without which the other criteria lose some of their relevance. In *Featherston,* at para. 84, the Board went further and stated that in the absence of such reasons, there is no need to assess the other criteria. I note that *Featherston* was decided by the same Board Member who decided *Schenkman*.

[39] What would be the purpose of time limits to which the parties to a collective agreement have agreed, or that have been established by parliamentary regulations, if the Board could extend them following an application that is not based on solid

justification? I do not believe that s. 61(b) of the *Regulations* was written with that in mind.

[40] In *Martin,* at para. 70, the Board concluded its analysis as follows:

> *70 … In this case, I have found that the applicant has not established clear, cogent and compelling reasons for the delay nor has the applicant established that she exercised due diligence in pursuing her grievance. Even though I have not found actual prejudice to the employer if an extension were to be granted, in the circumstances of this case the failure of the applicant to establish clear, cogent and compelling reasons for the delay nor due diligence in the pursuit of the grievance, on balance in the interests of fairness to both parties I am not inclined to grant the extension.*

[41] But in any event, I will focus on the other criteria established in *Schenkman.*

[42] In this case, the delay and due diligence criteria are interrelated. The evidence reveals that the applicant never abandoned the idea of challenging the employer's decisions. By contrast, there was an 18-month delay. In previous decisions, on occasion, the Board agreed to extend even longer delays, but it also refused to extend shorter delays. Let us review what happened during those 18 months. The applicant received the response at the final level of the grievance procedure on July 27, 2015. The 40-day delay took it to around September 8, 2015. The applicant did not apply to the Superior Court of Québec until July 11, 2016, almost one year after the response at the final level. The Court rendered its decision on November 21, 2016. It was not until February 3, 2017, some 10 weeks later, that the applicant submitted his application for an extension of time. In such circumstances, and with such delays, I find that the applicant did not show due diligence, which is defined, it should be recalled, as the timely performance of a task.

[43] On the one hand, it goes without saying that the prejudice suffered by the applicant in not being able to refer his grievances to adjudication was significant, which is always the case when an application for an extension involves a grievance challenging a termination. On the other hand, the employer already defended itself in the Superior Court of Québec against the damages suit. Given the employer's resources, that was not a significant prejudice. That said, I am not prepared, based solely on a more serious harm suffered by the applicant, to accept his application. It seems to me that in this case, the lack of a compelling reason outweighs the criterion of prejudice.

[44] The chances of success of the grievance cannot be estimated, given that I have not heard the grievances on their merits. As is almost always the case with Board decisions, I will not consider this criterion, except to find that the grievances are not frivolous.

[45] Based on these reasons, and above all because there are no clear, cogent, and compelling reasons for the delay, I dismiss the applicant's application for an extension of time.

[46] It is difficult to compare the facts of the applicant's application to those at the core of the decisions he referred me to, which gave rise to the applications for extensions of time.

[47] In *Riche*, the grievance proceeded from the first to the second level 14 days late. The applicant had health-related issues. As well, the employer did not send a copy of the first-level response to the union. The employer provided no explanation for its failure to send its response to the union, which had represented the applicant at the first level. The union acted with due diligence by dealing with the grievance as soon as it was informed of the first-level decision.

[48] In *Hendessi*, the applicant and the union challenged the applicant's termination and an alleged violation of the collective agreement at the time of the termination. The union should have completed two referral-to-adjudication forms, but it completed only one. It realized its error 30 days after the time limit expired, at which time it completed the second form. The applicant clearly stated in her grievance that she challenged her termination and that she alleged a violation of the collective agreement.

[49] In *Perry*, counsel for the applicant stated that she mailed the referral-to-adjudication form to the Board and that on the same day, she faxed a copy to the employer, which admitted that it received the form on the day in question. Counsel for the applicant realized four months later that the Board had not received the form that was mailed four months earlier. She completed the form again and sent it to the Board. She subsequently submitted an application for an extension of time.

[50] In *Rabah*, the applicant applied for an extension of time to file a grievance against his rejection on probation 17 months after his rejection. The Board accepted his application on the grounds that he had no idea that his Department of National

Defence position was unionized, even less that he could challenge his rejection. The applicant immigrated to Canada about 15 years earlier. Since that time, he held several paid and unpaid positions but he was never a union member.

[51] In *D'Alessandro*, the applicant explained that on several occasions, he had asked his union to grieve his layoff. The union failed to do so. He then made a complaint with the Board, alleging that the union had failed in its duty to represent. The union did not file grievances on his behalf until after his complaint.

[52] In *International Brotherhood of Electrical Workers, local 2228*, the union filed a group grievance on behalf of some of its members about a compensation issue. The union failed to refer the grievance to adjudication within the time limit. When it became aware of that matter several months after the time limit, it submitted an application for an extension of time. The grievors believed that the union had referred the grievance to adjudication. Given the nature of that grievance, they could not do it themselves.

[53] In this case, the applicant's representative placed particular emphasis on *Tremblay* as the facts partially resembled those in his application. In *Tremblay*, the grievor consulted the employer's employee assistance program (EAP). The external EAP worker shared the grievor's confidences with the employer's managers. Since December 2009, the grievor planned to file a grievance to complain about how the EAP had treated her. The union informed her that she could not file a grievance since the EAP was an externally provided service. The union advised her to launch a civil action, which she did. The Superior Court of Québec found in her favour and accepted her claims of breach of confidentiality, psychological damages, and loss of salary. The employer appealed the decision, and the Court of Appeal of Quebec decided otherwise; it found that the grievor should have filed a grievance instead of applying to the courts. The grievor applied for leave to appeal the decision to the Supreme Court of Canada; that application was later dismissed. While awaiting the Supreme Court of Canada's decision, the grievor decided to file a grievance with the employer. Seven years had gone by since the matters in question. The employer objected to the grievance on the grounds of untimeliness. The grievor then applied for an extension of time.

[54] Based on the criteria established in *Schenkman*, the Board accepted the application for an extension of time in *Tremblay*. The information provided by the union suggested that the grievor could not file a grievance and had to apply to the courts. The grievor was diligent throughout the grievance process. The Board also noted that the facts that would be presented as part of the grievance had been already presented to the Superior Court of Québec. The Board was not bound by the Court's decision but it noted that the Court ruled in favour of the grievor on the merits of the case and at the very least this factor of the analysis leaned more in favour of the extension of time.

[55] Some key factors in the applicant's application differed sufficiently from the facts in *Tremblay* and instead make me more inclined to dismiss his application. The most significant factor is that the applicant himself decided not to refer his grievances to adjudication. His union did not tell him that his grievances could not be adjudicated. He alone decided to apply to the Superior Court of Québec. The union also sent him the referral-to-adjudication forms for his signature. Furthermore, it is clear that in *Tremblay*, the Superior Court of Québec's finding for the grievor on the merits of the dispute influenced the Board's decision. In this case, the Superior Court of Québec limited its analysis to its jurisdiction to hear the case.

[56] The applicant drew my attention to the fact that the Superior Court of Québec criticized the employer for not informing him that he could have referred his grievance to arbitration under s. 209(1)(d) of the *Act*. I agree with the employer that providing advice to an employee about his or her recourse to adjudication is not its role. The applicant was represented throughout the procedure; it was up to him and his representatives to decide which recourse to pursue.

[57] The applicant mentioned that the Board should have heard and decided this application much sooner. He claimed that he paid the price for that, and he is quite correct on that point. If this decision had been made earlier, he could have moved on long ago. Nevertheless, this is obviously not a reason that I can use as a basis for accepting his application for an extension of time. I can only apologize on behalf of the Board.

V. Order

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

[59] The grievance files bearing the numbers 566-34-13758 and 13759 are closed.

December 2, 2020.

FPSLREB Translation

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