Date: 20210414

File: 568-02-42709
XR: 566-02-42734

Citation: 2021 FPSLREB 41

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

STEEVE FORTIER

Applicant

and

DEPARTMENT OF NATIONAL DEFENCE

Respondent

Indexed as
Fortier v. Department of National Defence

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

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

For the Applicant: Kim Patenaude, counsel

For the Respondent: Philippe Giguère, counsel

Heard by videoconference,
March 22, 2021.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] Steeve Fortier, the applicant, is a firefighter at the Valcartier military base. He is represented by his bargaining agent, the Public Service Alliance of Canada ("the bargaining agent"), which entered into a collective agreement with the employer, the Treasury Board. For the purposes of this decision, the term "employer" means the Department of National Defence, to which the Treasury Board has delegated its authority over human resources management.

[2] On March 12, 2021, the applicant referred a grievance to adjudication, which challenged the employer's decision to require him to take leave without pay. The employer decided the grievance at the third and final level of the grievance procedure on June 23, 2020. Section 90 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") provides that a referral to adjudication may be made no later than 40 days after the final-level response was received or after the date on which it should have been received. Consequently, at first glance, the referral to adjudication exceeded the deadline. Nevertheless, the applicant requested that the grievance be heard when he applied for an extension of time.

[3] In fact, under s. 61(b) of the *Regulations*, the Federal Public Sector Labour Relations and Employment Board ("the Board") can, in the interest of fairness, extend any deadline provided in Part 2 of the *Regulations*, or a grievance procedure contained in a collective agreement, to refer a grievance to adjudication.

[4] It is important to note that I am seized of an unfair-labour-practice complaint that the applicant, with the support of the bargaining agent, made against the employer. The facts of the complaint are the same as the facts that gave rise to the grievance. The applicant alleged that the employer acted unreasonably by requiring him to take leave without pay pending the results of a medical evaluation to certify that he was able to perform his duties as a firefighter. The unfair-labour-practice complaint includes an allegation that the employer's actions were motivated by anti-union animus as the applicant was active in the Union of National Defence Employees (UNDE), a component of the bargaining agent.

[5] The hearing for the complaint was scheduled for March 22 to 26, 2021. The first day of the hearing was dedicated to this application for an extension of time. On March 23, 2021, I issued a verbal decision to determine whether the hearing would deal with both the complaint and the grievance.

[6] In my verbal decision, I allowed the application for an extension of time. I indicated that my reasons would be recorded in a written decision, which follows.

II. Summary of the evidence

[7] When the complaint was made in March 2019, the bargaining agent reported that a grievance had been filed and requested that it be included in the record if it were referred to adjudication. At the February 11, 2021, prehearing conference for the complaint hearing, I asked counsel for the applicant where the grievance was since the Board had not received a referral to adjudication. Counsel followed up with the bargaining agent, as will be shown in the evidence that follows.

[8] The applicant testified and called Daniel Verreault, a UNDE labour relations officer, to testify.

[9] Mr. Verreault testified that his role was to advise at the national level and to provide support to union locals. The applicant's grievance was heard at the first two levels of the grievance process, and he was represented by Johanne Roberge from the union local. For the hearing at the third and final level, Mr. Verreault represented the applicant. The hearing took place in February 2020. In March 2020, the employer's labour relations officer contacted Mr. Verreault to ask for an extension for the third-level response. The collective agreement provides for a response within 20 days of the hearing; the employer could not meet that deadline. Mr. Verreault granted the extension just before the lockdown measures for the COVID-19 pandemic began.

[10] As of mid-March 2020, federal public employees and bargaining agent employees and representatives were working from home. Mr. Verreault stated that he was not going to the office and that a clerk showed up occasionally to receive and take care of the mail.

[11] It was in this context that the employer's June 23, 2020, response at the third level was received by the UNDE. No one contacted either Mr. Verreault or the applicant to inform them that the response had been received.

[12] In October 2020, the UNDE prepared a long list of grievances for which responses were required from the employer. That list included the applicant's grievance. In November 2020, the UNDE's president asked Mr. Verreault for the list of his files that were awaiting a response from the employer; once again, the applicant's grievance was on that list since Mr. Verreault had not yet received a third-level response. I did not receive any evidence that the employer indicated at that time that it had responded to the grievance at the final level in June 2020.

[13] Only in early March 2021, when counsel for the applicant asked him whether the grievance had been referred to adjudication, did Mr. Verreault go to the office to check the paper file. At that time, he found that the employer's response was in the file. The letter, which was addressed to the applicant and indicated that a carbon copy had been sent to Mr. Verreault, had simply been slipped into the file. Contrary to the usual practice, it did not bear the date of receipt, and it had not been entered into a register.

[14] Mr. Verreault was very dismayed to see the letter and to have not been informed of it earlier. He immediately contacted counsel, who in turn referred the grievance to adjudication on March 12, 2021, 10 days before the scheduled hearing for the complaint began.

[15] The applicant testified that he received by hand the responses at the first and second levels of the grievance procedure; he adduced into evidence the copies he had signed. He testified that he never received the third-level response.

III. Summary of the arguments

A. For the grievor

[16] The applicant submitted two decisions in support of his argument: *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, and *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144. I will return to that second decision in my analysis.

[17] *Schenkman* is fundamental to the Board's analysis of requests for extensions of time. However, as the applicant pointed out, the *Schenkman* criteria are not exhaustive, and the principle that must guide the Board is the interest of fairness referred to in s. 61 of the *Regulations*, for which the Board may grant an extension.

[18] The criteria set out in *Schenkman* for analyzing an application for an extension of time are as follows:

> *1) Are there clear, cogent, and compelling reasons for the delay?*
>
> *2) How long is the delay?*
>
> *3) Did the employee who filed the grievance exercise due diligence?*
>
> *4) Who would suffer the worst injustice: the employer in granting the extension or the employee if it is not granted?*
>
> *5) What are the grievance's chances of success?*

[19] The applicant argued that there are clear and compelling reasons for the delay. The pandemic shook up the practices of the UNDE office such that the third-level response was never received.

[20] According to the applicant, the eight-month delay is not that long, given that because of the pandemic, everything was delayed. The Board has granted extensions in the past despite much longer delays.

[21] The applicant and the bargaining agent demonstrated diligence as the grievance was referred to adjudication as soon as Mr. Verreault read the third-level response. It was expected from the time the complaint was made that if the grievance was referred to adjudication, it would be joined with the complaint.

[22] The harm to the employer if the grievance were to proceed is far less than that suffered by the applicant if it did not proceed. The facts in the grievance are the same as those in the complaint, for which both parties are about to proceed. According to the applicant, not being able to refer his grievance to adjudication would mean that he could not argue his alleged human rights violation.

[23] For reasons of fairness, the Board should grant the extension of time.

B. For the employer

[24] The employer also referred to *Schenkman* to support its argument. According to the employer, there are no clear, cogent, and compelling reasons for the delay. It cited two Board decisions: *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102, and *Copp v. Treasury Board (Department of*

Foreign Affairs and International Trade), 2013 PSLRB 33, to support its argument that the first *Schenkman* criterion is fundamental to the analysis.

[25] The applicant could have proceeded in the absence of a response from the employer, but he did not. The inconvenience caused to the applicant of not having his grievance heard is minor since the Board will hear his complaint, which deals with the same facts. However, the employer must defend itself on two fronts as it learned of the referral to adjudication shortly before the hearing. As well, the request for an extension of time could have been made earlier since the referral of the grievance was discussed during the pre-hearing conference on February 11, 2021.

IV. Analysis

[26] Both sides cited case law in support of their arguments. Except for *Schenkman*, the case law does not really enlighten me in this situation, given the specific facts in this case. However, it may be useful to provide a brief overview.

[27] In *International Brotherhood of Electrical Workers*, an administrative error was made, and the bargaining agent failed to refer a group grievance to adjudication. The application for an extension of time was filed approximately 19 months after the deadline expired, in which it could have been referred to adjudication. I agree with the following statement from this decision:

…

> 62 *… it is important to emphasize that the* Schenkman *criteria merely serve to assist the decision maker in coming to a determination as to whether an extension of time ought to be granted. Those five factors arose in the jurisprudence and decisions of this Board and its predecessor, the PSSRB. They were consolidated by the PSSRB in the* Schenkman *decision and later transported into an inquiry before the Board under the* Regulations*. With the greatest respect, these criteria bear no fixed presumptive calculations that prevent a decision maker from considering whether, in the interests of fairness, an extension of time ought to be granted. The factors that steer such an inquiry are fact driven and based on the underlying principle of what is fair in the circumstances.*

…

[28] The employer highlighted the following passage in *Brassard*, which refers to the importance that should be given to the first criterion in *Schenkman*, namely, "clear, cogent, and compelling reasons":

> …
>
> *26 Those criteria are not always of equal importance. If there are no clear, cogent and compelling reasons for the delay, then the length of the delay, the diligence of the applicant, the balancing of the injustice to the applicant against the prejudice to the respondent and the chances of success of the grievance would not matter that much in most cases. A solid reason is needed for the delay. The Board has consistently taken that approach in the past two years (see, for example,* Lagacé *or* Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110). Furthermore, as I wrote in* Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, in the past, the Board rarely agreed to grant extensions of time without clear, cogent and compelling reasons justifying the delay.*
>
> …

[29] In *Copp*, the Board refused to find that the union's administrative error could be a clear, cogent, and compelling reason for the delay in referring a grievance to adjudication. At paragraph 27, the Board wrote: "Neither the applicant nor her union were prevented from referring the grievances to adjudication."

[30] Both parties relied on *Schenkman* as a framework for analyzing the application for an extension of time. *Schenkman* is a convenient tool that is even more useful if it is applied in a flexible rather than a rigid manner, and is based on the facts of the situation and in the interests of fairness as emphasized by the Board in *International Brotherhood of Electrical Workers*.

[31] The facts in this case are rather particular. The pandemic context cannot be overlooked. I note that as of March 16, 2020, federal government employees could not go to their offices to work and that a similar instruction was given for the offices of the bargaining agent. As of March 22, 2021, the date of the hearing, things had still not returned to normal. Telework continues to be the rule due to public health guidelines, and all Board hearings are held virtually.

[32] The employer argued that there were no clear, cogent, and compelling reasons for the delay referring the grievance to adjudication. On the contrary, it seems clear to me that the grievance was not referred to adjudication earlier for a simple reason: the

employer's response was not received. It is true that the applicant or his bargaining agent could have referred the grievance to adjudication once the deadline for the employer's response had passed, but Mr. Verreault had clearly explained the reluctance to, as part of a larger number of grievances that were still awaiting a response from the employer. As well, Mr. Verreault had agreed to an extension for the employer's response. Contrary to *Copp*, it seems to me that in this case, the applicant and his representative could not refer the grievance to adjudication in the apparent absence of a response from the employer.

[33] The employer criticized the applicant's timeliness when he referred the grievance to adjudication. Usually, the delay is obvious. It starts once the grievor has received the response. This is one of the difficulties in this situation; it is impossible to know when the employer's response was received at the UNDE office. What is certain is that neither the applicant nor Mr. Verreault was aware that the employer had responded at the third level of the grievance procedure. It is clear that the applicant and the bargaining agent intended to refer the grievance to adjudication so that it could be heard with the complaint. This desire was demonstrated as soon as the complaint was made in March 2019.

[34] It seems to me that it must also be recognized that the employer played a role in the delay, first of all by not communicating the final-level decision to the grievor, as was done for the first two levels, and then by not responding when the bargaining agent requested updates on the grievances that were awaiting a response in October and November 2020.

[35] The employer pointed out that the bargaining agent could have acted more quickly; that is, the day after the prehearing conference for the applicant's complaint hearing. I do not think that the delay was significant at that point. There was a follow-up that enabled Mr. Verreault to see that a response had indeed been received. A few weeks did not change anything; the application for an extension of time would still have been necessary.

[36] Consequently, it seems to me that there are clear, cogent, and compelling reasons for the delay. Again, the very specific context of the pandemic is important. The response was received but it is not known by whom or when. The applicant was not informed of the response either by the bargaining agent or by the employer. It is

clear that an error was made by someone associated with the bargaining agent and that was admitted, but that error is not attributable to either the applicant or Mr. Verreault, his representative. It is likely that in the context of the pandemic, people with little experience could receive the mail and not know how to process it. I cannot blame the bargaining agent for this state of affairs; ensuring appropriate follow-up was not clear since health guidelines required as few interactions at work as possible.

[37] In my view, as in *Brassard*, the other *Schenkman* criteria seem less important in this case. The employer stressed the importance of clear and compelling reasons, and I agree. The other matters to consider are the delay, the applicant's diligence, and the prejudice to either party based on whether the grievance will proceed.

[38] The delay in this case is not as clear as the employer claims or the bargaining agent admits. The employer responded on June 23, 2020, but there is no evidence as to the date it was received. What is certain is that neither the applicant nor his representative received it; once Mr. Verreault read it, he contacted counsel for the bargaining agent to refer the grievance to adjudication. The delay was explained to my satisfaction; I do not see why it would prevent a referral to adjudication.

[39] The applicant's diligence pursuing his grievance is not in doubt. The applicant was waiting for a response from the employer on the advice of his representative who deemed it preferable to have the employer's response before proceeding to adjudication. I also have no doubt about the diligence of Mr. Verreault, who continued to seek a response from the employer as demonstrated in his November 2020 correspondence with the employer and the applicant. It was also clear that the applicant and the bargaining agent wanted the Board to hear the complaint and the grievance at the same time, as indicated when the complaint was made.

[40] Finally, I do not see the prejudice caused to the employer if the grievance proceeds to adjudication. The employer is prepared to proceed with the complaint, and the facts are essentially the same. However, if the grievance does not proceed, the applicant will miss the opportunity to claim damages under s. 226 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), which refers to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; (*CHRA*), since he alleged a violation of his rights. The Board may hear representations under the *CHRA* when it is seized of a grievance but not when it is seized of a complaint.

[41] The *Schenkman* analysis includes a final point, namely, the chances of success. In the absence of evidence, I cannot rule on this matter. As the Board highlighted in *International Brotherhood of Electrical Workers*, this final point is instead used to set aside grievances that do not appear to have any basis. There is, at the very least, an arguable case here.

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

(The Order appears on the next page)

V. Order

[43] The application for an extension of time to refer the grievance bearing the file number 566-02-42734 to adjudication is allowed.

April 14, 2021.

FPSLREB Translation

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