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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

PATRICK COWMAN

Applicant

and

TREASURY BOARD
(Department of Transport)

Respondent

Indexed as
Cowman v. Treasury Board (Department of Transport)

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: Daniel Weber, counsel

For the Respondent: Peter Doherty, counsel

Decided on the basis of written submissions, filed October 23 and December 20, 2019, and February 10 and June 2, 9, and 16, 2020.

REASONS FOR DECISION

I. Application before the Board

[1] Patrick Cowman ("the applicant") made this application to extend the timelines to file a grievance and refer it to adjudication. He seeks to grieve the termination of his employment with Transport Canada ("the respondent") where he worked for 13 years as a civil aviation inspector.

[2] The respondent argues that the applicant resigned from his employment and that he filed his grievance more than four years after the deadline had expired. Under article 35 of the Aircraft Operations collective agreement, he had 25 days to file a grievance after being notified on July 30, 2015, that the respondent's decision to accept his resignation would not change. He did not do so until October 23, 2019.

[3] The Federal Public Sector Labour Relations and Employment Board ("the Board") may grant an extension of time in the interest of fairness pursuant to s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"):

> ***Extension of time***
>
> ***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,*
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> ***(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.*

[4] On August 19, 2020, I granted the extension, with reasons to follow. These are my reasons.

II. Background

[5] Throughout April and May 2015, the applicant faced a number of health, family, and work-related issues. Following a January 2014 back injury, he experienced another one on April 28, 2015, and in mid-May, he began taking medication to address his increasing back pain. He also began planning to temporarily relocate to Calgary,

Alberta, to deal with issues arising from a death in the family, as well as his health issues.

[6] On June 9, 2015, he filed a conflict-of-interest declaration with the respondent as he had been offered a job in Calgary with Enerjet, a private-sector company in the aviation industry. He met with the respondent on June 16, 2015, to discuss the status of his declaration and to request a 12-month leave of absence.

[7] On July 15, 2015, despite warnings not to commence working for Enerjet until the deputy minister determined the conflict-of-interest issue, the applicant began working for the company.

[8] On July 17, 2015, Jamie Melo, Associate Director, Operations with the respondent, advised the applicant in an email that his new role as the manager of regulatory affairs at Enerjet and his official role as a civil aviation inspector at Transport Canada placed him in a conflict of interest. He was directed to immediately cease employment with Enerjet until an official decision was rendered and to confirm his compliance with that direction by the end of the day, failing which disciplinary action could follow, up to termination. Mr. Melo also told the applicant that his access to the respondent's electronic network system had been suspended. He further advised the applicant that his one-year leave-of-absence request had been approved.

[9] The applicant responded the same day, saying that, among other things, if Mr. Melo was not prepared to wait for the conflict-of-interest results, he would be left with no alternative but to resign.

[10] On July 17, 2015, the applicant received a medical restriction letter from the senior regional aviation medical officer restricting him from exercising his licence privileges due to his use of narcotic analgesics to control his back pain.

[11] On July 20, 2015, he contacted the respondent to determine its position on waiting for the conflict-of-interest determination.

[12] On July 24, 2015, the respondent advised the applicant that his resignation had been accepted. The applicant also learned that his back pain was due to a tumor in his spine.

[13] On July 25, 2015, the applicant attempted to clarify with the respondent that he had not intended to resign.

[14] On July 26, 2015, he asked the Canadian Federal Pilots Association ("the Association") for help. He was told that as it was a resignation, the Association could do nothing to assist him. The applicant advised that he had not submitted a formal resignation and that he had attempted to rescind it. The Association did not change its position. Nor did it tell him that he could file an individual grievance, or request that timelines be extended.

[15] On July 27, 2015, he was admitted to Foothills Hospital in Calgary for tests and treatment.

[16] On July 30, 2015, the respondent advised him that its decision to accept his resignation would not be changed. He contacted the Association again, to no avail.

[17] On July 31, 2015, the applicant received a follow-up medical restriction letter from the senior regional aviation medical officer about his use of medication to control his discomfort, also noting a possible effect on his judgment. The restriction on the use of his licence was continued.

[18] From September 2015 to February 2016, the applicant underwent a course of chemotherapy, followed by stem-cell treatment and therapy in February 2016.

[19] Despite the Association's initial response, the applicant continued following up and was in contact with it several times between July 26, 2015, and May 8, 2017.

[20] In December 2015, he passed on legal advice that he had received about the possibility of filing a grievance. He was directed to return to the Association to file a grievance or to make a human-rights complaint. On February 1, 2016, the Association sent him a set of questions to help assess the circumstances of the resignation.

[21] Discussions of what could be done to help the applicant took place in July, September, and December 2015, February and December 2016, and February and May 2017. Throughout this time, the applicant was repeatedly given the impression that the Association remained prepared to assist him. He was, at the same time, dealing with his health issues and the effects of medication use.

[22] On May 8, 2017, the Association told the applicant that it would not represent him or file a grievance on his behalf unless he could provide sufficient medical documentation with respect to his state of mind when these events arose. He had previously provided two medical letters, but they had not been considered sufficient.

[23] On July 27, 2017, the applicant filed a duty-of-fair-representation complaint against the Association. The respondent received notice of it from the Board but did not participate in the proceedings.

[24] The applicant's legal counsel wrote to the Board several times, trying to expedite the matter, but it did not come on for hearing until July 23, 2019. The hearing resulted in a memorandum of settlement between the parties dated October 17, 2019, pursuant to which the Association agreed to produce a letter in support of a request for an extension of time to be filed by the applicant. The letter was signed by the National Chair of the Association. It sets out the following:

> …
>
> *The grievor requested* [Association] *assistance in respect of the matters giving rise to this grievance in July of 2015. At the relevant time, the grievor was not advised of his right to proceed with an individual grievance, pursuant to section 208 of the* Federal Public Sector Labour Relations Act. *The grievor was also not advised to make an application to extend or suspend timelines under the* Federal Public Sector Labour Relations Act. *Further, notwithstanding Patrick Cowman's request for assistance, the Association did not, until May 8, 2017, advise Patrick Cowman that it would neither represent him nor file a grievance on his behalf. The time limits for grievance and reference to adjudication have now expired. A duty of fair representation complaint was filed against the Association by the grievor, and the matter was settled, in the course of the related hearing, by way of a confidential Memorandum of Settlement, dated October 17, 2019.*
>
> *The grievor seeks an order for the extension of the time limits from the Chair, in the interest of fairness, for the referral of this grievance to adjudication. The grievor would be unfairly prejudiced if an extension of time for the referral of his grievance to adjudication is denied.*
>
> …

[25] On October 23, 2019, the applicant submitted his grievance and request for an extension of time.

III. Summary of the arguments

[26] The parties addressed the criteria to be considered in determining a request for an extension of time as set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 ("*Schenkman*"). They are as follows: clear, cogent, and compelling reasons for the delay; length of the delay; due diligence of the applicant; balancing injustice to the applicant against prejudice to the respondent; and the chances of success of the grievance.

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

[27] The applicant submits that although the Association initially advised that it could do nothing to assist him, it never advised him of his statutory right under s. 208 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) to proceed with an individual grievance. As a result, he was under a reasonable misapprehension that a grievance was not possible without Association representation.

[28] Further, despite its initial response, the Association continued to discuss the possibility of assisting him over a period of almost two years and did not tell him that it would neither represent him nor file a grievance on his behalf until May 8, 2017. During that time, it never advised him to file a grievance to meet deadlines or to request an extension of time.

[29] The Association's actions provide a clear, cogent, and compelling reason for the first two years of the four-year delay (see *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19 ("*Apenteng*") and *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144 ("*IBEW*")).

[30] Further, as the applicant had been unemployed for some time and was drawing a reduced pension due to his early departure from employment, it was reasonable for him to wait for the Association to be ordered to support both his grievance and his application for an extension of time. Waiting for the duty-of-fair-representation complaint to be resolved was a clear, cogent, and compelling reason for his delay filing the grievance, in light of the financial constraints and the Association's labour relations knowledge. The additional two-year wait for the Board to hear the complaint was not attributable to any fault of the applicant, who tried to expedite it through correspondence to the Board from his counsel.

[31] The applicant's health issue, treatment, and related fatigue throughout this period was also a clear, cogent, and compelling reason for the delay (see *Riche v. Treasury Board (Department of National Defence)*, 2009 PSLRB 157).

[32] The respondent submits that while an extension of time in the interest of fairness can be granted under paragraph 61(b) of the *Regulations*, it should be the exception (see *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39).

[33] The applicant provided no clear, cogent, and compelling reason for the delay. He knew that his resignation was accepted on July 24, 2015, and that that decision was confirmed on July 30, 2015. He knew that the Association was not prepared to file a grievance on his behalf and, therefore, he should have presented an individual grievance. An employee does not need the Association's support to file a grievance relating to discipline or termination. Nor did he have to await the outcome of his duty-of-fair-representation complaint before filing a grievance or making an application for an extension of time.

[34] The applicant in *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102, had experienced health issues during an eight-month delay to file a grievance. However, her application to extend timelines was denied because, nevertheless, she had made a duty-of-fair-representation complaint and a human-rights complaint and had taken legal action against her former managers. Despite his health issues, the applicant was also able to obtain legal counsel and pursue a duty-of-fair-representation complaint and a workers' compensation claim.

B. Length of the delay

[35] The applicant submits that each case must be decided according to its special circumstances, with a view to fairness (see *Apenteng*, at para. 99). Time is relative, and a delay may be deemed short or long in relation to its context (see *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59 at para. 14). In some situations, a delay may be lengthy, but an extension of time will be granted when it is in the interest of fairness to do so (see *IBEW*, at para. 52).

[36] Considering the Association's actions, the applicant's health, and the procedural delay of approximately two years to have his duty-of-fair-representation case heard by the Board, the delay, if any, is minimal.

[37] As well, since August 10, 2017, the respondent has been aware of the applicant's intent to grieve and the duty-of-fair-representation complaint he filed so that he could do so. It could not have been surprised by the extension request (see *IBEW*, at para. 57 and *Guittard v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 18 at para. 21).

[38] The respondent notes that the length of the delay was considerable — over four years from the respondent's confirmation that it would not change its decision to accept the applicant's resignation. It cites *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92 at para. 46, for this proposition:

> *46 … In principle, time limits set by the* Act *and the* Regulations *are mandatory and should be respected by all parties. Having relatively short time limits is consistent with the principles that labour relations disputes should be resolved in a timely manner and that parties should be entitled to expect that an issue has come to an end when a prescribed time limit has elapsed. Time limits are not elastic, and extending them should remain the exception and should occur only after the decision maker has made a cautious and rigorous assessment of the circumstances.*

C. Due diligence of the applicant

[39] The applicant submits that although a prospective grievor remains accountable, even when represented by a bargaining agent, when a grievance is in the hands of a bargaining agent that is assessing the matter, the due diligence criterion is satisfied. Once a bargaining agent takes carriage of a prospective grievance, there is no reason for a grievor to follow up to determine if the procedural requirements of filing a grievance are being met (see *IBEW*, at paras. 40, 45, and 50).

[40] However, the respondent argues that although he was represented, the applicant still had an obligation to be aware of his rights and to keep himself informed. And while he might not have been specifically advised of his right to file an individual grievance in this matter, he had filed individual grievances in 2008 and 2012, respectively related to pay and compensation and to the Professional Aviation

Currency Program. This demonstrates that the applicant was aware that he could file individual grievances.

[41] Further, he did not demonstrate that due to health concerns, he was unable to file a grievance and refer it to adjudication. As noted earlier, like the applicant in *Brassard*, he was able to attend to other such matters. The respondent also cites *Popov v. Canadian Space Agency*, 2018 FPSLREB 49 at para. 52, for the proposition that "[t]o explain the delay the grievor would have had to show that during all the time at issue, he was unable to refer the grievance to adjudication …".

D. Balancing injustice to the applicant against prejudice to the respondent

[42] The applicant submits that the injustice to him is greater than any prejudice faced by the respondent because he lost his employment, and his only recourse is this application (see *Prior v. Canada Revenue Agency*, 2014 PSLRB 96 at para. 143, *Riche*, at para. 41, and *Thompson*, at para. 16).

[43] Further, there does not appear to be any issue with the availability of evidence. Most of it is documentary, and Mr. Melo is still employed by the respondent. And, if the respondent faces any prejudice, it is minimized by its awareness throughout that the applicant wished to file a grievance, and by its failure to raise any issue with that course of action (see *Riche*, at para. 39).

[44] As well, the applicant's 13 years of discipline-free employment should be considered (see *Apenteng*, at para. 97).

[45] Any respondent claim of prejudice due to the Association's actions or inactions should not sway the balance in its favour, as actions or omissions of a third party can constitute part of the rationale for extending time, particularly when employment is in jeopardy. The Association has a duty of fair representation to the employees it represents, arising out of its exclusive power to speak for them. The scope of the duty has been found to include a duty to avoid serious negligence when representing employees in a grievance procedure. When complaints about bargaining agents' failures to pursue grievances to arbitration have been determined to be founded, labour boards have ordered them to arbitrate and have ordered respondents to waive timeliness objections (see *Prior*).

[46] Whether or not an applicant has exercised due diligence pursuing a grievance, when a bargaining agent is involved, and there is no compelling evidence of prejudice to the respondent, fairness should drive an application to extend time (see *Prior*, at para. 140). Fairness to the applicant should take precedence over any prejudice to the respondent (see *Apenteng*, at paras. 97 and 98).

[47] The respondent submits that this criterion should carry little weight because the applicant has not established clear, cogent, and compelling reasons for the delay or shown that he acted with due diligence. It is entitled to some certainty of knowing that labour relations issues will be addressed in a timely manner.

[48] The respondent referred to *Sturdy v. Deputy Head (Department of National Defence)*, 2007 PSLRB 45 at para. 14 ("*Sturdy*"), for the proposition that there is "… a strong presumption in favour of a prejudice to the respondent when the delay is of the length in this case." The delay in *Sturdy* was two years. In this case, it was four years.

E. Chances of success of the grievance

[49] The applicant argued that his grievance had a high chance of success, because his alleged resignation had lacked the requisite intent. Alternatively, if he resigned, he did so under the duress of his situation.

[50] The respondent argued that the applicant's grievance had a low chance of success as he did not comply with the direction to end his employment with Enerjet which was a condition to resolve the conflict of interest. Further, he had not presented evidence that he was under coercion or duress when he made the decision to resign.

F. Waiver

[51] The applicant also argued that the respondent is estopped and has waived its right to make the timeliness objection by taking the fresh step of hearing the grievance and not raising the objection earlier than its first grievance reply. Both parties provided submissions on this, however, given my determination on the extension-of-time request, it is unnecessary to rule on that argument.

IV. Reasons for decision

[52] The criteria to extend the timelines to file a grievance and refer it to adjudication were outlined in *Schenkman* and are as follows: clear, cogent, and

compelling reason for the delay; length of delay; due diligence of the applicant; balancing injustice to the applicant against prejudice to the respondent; and the chances of success of the grievance.

[53] The applicant has demonstrated clear, cogent, and compelling reasons for the delay filing his grievance. It appears that he received poor advice, first from the Association, and then from his legal counsel at the time.

[54] The Association initially told the applicant that it could do nothing to assist him. But neither at that time, nor anytime later, did it advise him of his right to file an individual grievance or to apply for an extension of time. It then kept the file open for almost two years, reassessing and rediscussing the matter with him. At times, it indicated that it would file a grievance on his behalf. These discussions left the applicant with the reasonable understanding that he needed the Association's support to grieve, that his only option was to persuade it to take his case, and that that was still possible. By the time he had determined otherwise, he was out of time to grieve.

[55] It was not until May 2017 that the Association finally told the applicant somewhat definitively that it would not file a grievance for him. Even then, it was left open that it would still file a grievance if he could produce satisfactory medical evidence about his state of mind when the events leading to the grievance arose.

[56] At some point, the applicant sought legal advice. The duty-of-fair-representation complaint indicates that that occurred in or about December 2015. But even then, he was still not advised to file a grievance and to apply for an extension of time. Had he received this advice from his legal counsel in December 2015, the delay would have been only five to six months.

[57] Further, if not earlier, the applicant should at least have been advised to file a grievance and request an extension of time when the duty-of-fair-representation complaint was made. Instead, he spent another two years awaiting the outcome of his complaint hearing before doing so. It is unfortunate that the Board was not able to schedule the hearing for two years. However, that is not what added more time to the filing delay, as the applicant argued.

[58] In *Apenteng*, the Board found that a union representative failed to provide the information an applicant needed to make a fully informed decision and effectively

prevented him from exercising recourse. Such gaps in representation can be grounds for an extension of time. Similarly, in this case, the applicant was not well advised, either by the Association or by his legal counsel. However, I find that he was entitled to rely on the advice he received. This provides a clear, cogent, and compelling reason for the delay.

[59] This also relates to the degree of due diligence expected. In *IBEW*, the Board found that a bargaining agent error may not always be considered as a clear, cogent and compelling reason for a delay, but in certain circumstances it will be, particularly if the grievor has met the due diligence factor.

[60] The respondent argued that, as in *Brassard*, the applicant, despite his health issues, was able to obtain legal counsel as well as pursue a duty-of-fair-representation complaint and a workers' compensation claim. That he was able to do so does not demonstrate that he should have been able to file a grievance. What prevented the applicant from filing a grievance was the belief that he could not do so. However, his illness, treatment, medication use and resulting fatigue undoubtedly made it more difficult to deal with the reticence of his bargaining agent, whose support he believed he required.

[61] The respondent also argued that the applicant had previously filed individual grievances on pay and professional licencing matters, showing that he knew he could file individual grievances. That he filed individual grievances in the past on such matters does not demonstrate that the applicant knew he could file an individual grievance on his alleged resignation/termination. The advice he received from both the Association and his legal counsel clearly led him to believe otherwise. He diligently kept following up with the Association despite its initial discouragement and ongoing reticence. His actions show that he believed he needed bargaining agent support and representation to file his grievance.

[62] Theoretically, the applicant could have continued to seek information and advice elsewhere. That would have been to his benefit, but that cannot be a requirement for an extension of time. In my view, the diligence required of the applicant was to ask the Association for help. He did so. He went beyond that when he first obtained legal advice in December 2015 and passed it on to the Association. He also followed the advice of legal counsel to await the outcome of his duty-of-fair-

representation complaint before filing a grievance or requesting an extension. The advice he received was unfortunate but due diligence was met.

[63] The length of the delay in this case is significant, and in some cases could be a determining factor to deny a request for an extension of time. However, every case must be decided according to its circumstances, and fairness must be the guiding principle. As the Board said in *Apenteng*, at paragraph 88:

> *[88] The inquiry is fact driven and based on the underlying principle of section 61 of the* Board Regulations*: what is "in the interests [sic] of fairness." Flowing from this, there are no presumptive calculations or thresholds in the* Schenkman *criteria that pre-empt a decision maker from considering whether, in the interests of fairness, an extension of time ought to be granted.*

[64] It has been established that the *Schenkman* criteria are not given equal weight in every case; the importance of each criterion depends on the factual circumstances. As stated in *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81, at para. 51:

> *[51] These criteria are not always given equal importance. The facts of a given case will dictate how they are applied and how they are weighted relative to each other. Each criterion is examined and weighed based on the factual context of the case under review. In some instances, some criteria may not be relevant or the weight may go to only one or two of them.*

[65] In this matter, the length of delay is a less important factor. No matter how long the delay, the fact remains that the applicant did not know what had to be done, applied due diligence to the problem by seeking appropriate advisors, and reasonably relied on them to tell him what to do.

[66] The length-of-delay criterion can be important to assess any resulting prejudice to the respondent. However, in this case, although the delay was long, the respondent argued no specific prejudice. The applicant, on the other hand, lost his employment, including his healthcare benefits, and is drawing a reduced pension. His only recourse is his grievance. It would be a serious injustice to him were his extension request denied and his grievance not heard.

[67] The respondent argued that little weight should be put on balancing injustice to the applicant against prejudice to the respondent because the applicant failed to provide clear, cogent, and compelling reasons for the delay. It submits that it is

entitled to have labour relations issues resolved in a timely way, and that given the length of the delay, a strong presumption of prejudice should be applied (see *Sturdy*). However, in this case, despite the length of the delay, any such presumption is rebutted by what I have found to be the applicant's clear, cogent and compelling reasons for the delay, none of which was attributable to him, but rather to his advisors.

[68] Finally, I have considered the parties' submissions on the chances of success of the applicant's grievance. However, it is not possible or appropriate to assess the relative merits of the case without hearing all the evidence. In my view, this criterion should only be applied when the Board is of the view that a grievance is frivolous, vexatious, or has no chance of succeeding. That is not my view of this case. The merits are yet unknown, but there is a serious issue to be tried.

V. Conclusion

[69] It is clearly in the interest of fairness to grant the request. Given the applicant's health and financial situation, and no prejudice to the respondent, it would not serve the interest of fairness to deny him the right to have his grievance heard simply because he received and followed poor advice.

[70] For these reasons, the Board makes the following order:

VI. Order

[71] The application for an extension of time to file the applicant's grievance and to refer it to adjudication is granted.

April 09, 2021.

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