**Date:** 20210607

**File:** 568-02-42428
**XR:** 566-02-42109

**Citation: 2021 FPSLREB 62**

*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

**JENNA MARTIN**

Applicant

and

**TREASURY BOARD**
**(Correctional Service of Canada)**

Respondent

Indexed as
*Martin v. Treasury Board (Correctional Service of Canada)*

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:** Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Applicant:** Sheryl Ferguson, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

**For the Respondent:** Marylise Soporan, counsel

Heard at Ottawa, Ontario, via teleconference,
March 22, 2021.

## REASONS FOR DECISION

### I. Application before the Board

[1] The applicant, Jenna Martin, seeks an extension of time under s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79) to refer her grievance, in Board file no. 566-02-42109, to adjudication. Section 90(1) of those regulations specify that a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process. The applicant seeks leave to refer her grievance to adjudication 6.5 years beyond the date on which she should have exercised her right to do it, which expired on February 12, 2014. She referred it to adjudication in September 2020.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On November 3, 2014, the *Public Service Labour Relations Board Regulations* were amended to become the *Public Service Labour Relations Regulations*.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[4] Pursuant to s. 61(b) of the *Regulations*, the Board may, in the interest of fairness, extend the time prescribed by Part 2 of the *Regulations* or provided for in a grievance process 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.

## II. Summary of the evidence

[5] The only evidence provided was this written agreed statement of facts:

…

1. *The Correctional Service of Canada (CSC) operates 4 penitentiaries within the Atlantic region: Atlantic Institution, Dorchester Penitentiary (which includes the Shepody Healing Centre), Springhill Institution and Nova Institution for Women;*
2. *The Grievor was hired as a Correctional Officer I (CX-01) at the Atlantic Institution on April 6, 2009;*
3. *At the time of the events, the Grievor still occupied the above-mentioned position;*
4. *On **August 13** and **September 5, 2013**, the Grievor submitted medical notes identifying work restrictions and limitations imposed by her Doctor for the duration of her pregnancy. As of **September 5, 2013**, the Grievor was approximately 16 weeks pregnant;*
5. *On **October 9, 2013**, the Grievor and the Bargaining Agent filed grievance #51666, alleging that the employer discriminated against the Grievor by not providing accommodation according to her provided medical note;*
6. *On **October 18, 2013**, the grievance was denied at the first level of the applicable grievance procedure;*
7. *On **October 29, 2013**, the Grievor signed a "Return to Work Plan – Accommodation Plan";*
8. *On **October 31, 2013**, the grievance was transferred to the second level of the applicable grievance procedure;*
9. *On **November 14, 2013** the grievance was denied at the second level of the applicable grievance procedure;*
10. *On **November 19, 2013**, the grievance was transferred to the third and final level of the applicable grievance procedure;*
11. *On **December 3, 2013**, a confirmation of reception of the grievance at the third and final level titled "Subject: Final Level Grievance(s)" was shared with the Bargaining Agent;*
12. *As of yet, no final level response has been emitted for this grievance;*
13. *At CSC, final level grievances are handled by the labour relations team based at the National Headquarters (NHQ) in Ottawa;*
14. *On **February 10, 2014**, while the grievance was still pending at final level, the Bargaining Agent contacted Employer representatives in the NHQ Labour Relations team to engage in potential settlement discussions;*

> 15. *This file concerns an accommodation request based on family status, for a specific period of time, when the grievor was pregnant. There is no outstanding accommodation request;*
> 16. *The grievance was referred to adjudication on* ***September 24th, 2020****.*
>
> …

**III. Summary of the arguments**

**A. For the applicant**

[6] The applicant was a correctional officer (classified CX-01) at the Correctional Service of Canada's (CSC or "the respondent") Atlantic Institution ("the institution") in Renous, New Brunswick, when in 2013, she submitted an accommodation request due to her pregnancy. Her initial request was submitted at the 12-week point of her pregnancy, in August 2013. A second request was submitted 3 weeks later, adding the condition that she have no inmate contact due to the impact it was having on her and her fetus. This condition was to last until the end of her pregnancy. On October 7, 2013, the applicant notified the respondent that she had been totally incapacitated from September 30 to October 4, 2013.

[7] The applicant's accommodation needs were not met. On October 28, 2013, she emailed CSC representatives, raising issues with the accommodation that she had been provided. She reported to the CSC that the work environment was causing her anxiety and stress. She received an accommodation plan in September 2013, but the parties did not sign it until October 29, 2013. When she did sign it, she attached a list of her concerns.

[8] The grievance that the applicant seeks to refer to adjudication was filed on October 9, 2013. It alleged that the CSC discriminated against her when it refused to allow her to telework during her accommodation period. The work she had been assigned during that period was scheduling and training correctional officers. It was to be done outside the institution's secure area and could have been done via telework. She sought damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) and the reimbursement of 92.5 hours of sick leave.

[9] The applicant began her maternity leave on February 10, 2014. Before she left on that leave, she was very attentive and did her job to ensure that Jack Haller, the

union representative assigned to her, had what he needed to move her grievance through to the final level of the grievance process.

[10] Mr. Haller left the employ of the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent) in December of 2013. He was replaced by André Legault in January 2014. Mr. Legault left in the summer of 2017 after several prolonged absences due to illness. As a result, the CSC's Atlantic Region had inconsistent union representation from January 2014 to July 2017, when Sheryl Ferguson moved to Moncton, New Brunswick, and assumed the role.

[11] On February 20, 2014, Ms. Ferguson was in Halifax, Nova Scotia, and working on a different file when she emailed an offer to settle the grievance to the CSC's labour relations officer, Andrew Crane, assigned to the applicant's file at the CSC's regional office. She included the administrative assistant from the union's Moncton office in the email, assuming that the CSC would include her on all future correspondence.

[12] Mr. Crane forwarded Ms. Ferguson's email to his colleague, Erica Tessy-Constant, at the CSC's national office. Ms. Tessy-Constant replied to Ms. Ferguson only while Ms. Ferguson was away on leave. Ms. Ferguson was not aware that the respondent had ever replied to her February 20, 2014, email until she received the respondent's disclosure in preparation for the hearing of the grievance.

[13] According to the applicant's representative, only in the summer of 2020 did the union realize that her assumption was wrong that the grievance had been settled or that it was being held in abeyance, pending the implementation of a settlement. Her last dealings with the file in February 2014 left her to believe an offer to settle was on the table, on which Mr. Legault would follow up. Only in the summer of 2020 did she discover that her colleague had not followed up, that the grievance had not been settled, and that it had not been referred to adjudication. At that point, Ms. Ferguson referred the matter to adjudication. The applicant's representatives had erred when they assumed that the informal dispute resolution process postponed the grievance process time frames.

[14] The applicant signed the notice of reference to adjudication in 2013 and emailed the management team, indicating her intention to continue to move her grievance forward, in November 2013. She did not return to the workplace until the end of 2014, when a package was put together to move things forward, which clearly

indicated her intention to proceed with her grievance. The parties engaged in settlement discussions, but the CSC provided no clear response to the offer to settle until 2020, when it sought to have the grievance deemed abandoned.

[15] It reached the point that in 2020, the CSC had still not issued its final-level response, which was due within 30 days of receiving the grievance at the final level, according to clause 20.15 of the relevant collective agreement. The applicant is still waiting for an answer to her grievance. She is willing to settle her grievance on the same basis as the award in *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 51, which would be the return of her used sick leave.

[16] When deciding whether an application for an extension of time should be granted, the rules set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, should be applied. The criteria for determining whether to exercise the Board's discretion under s. 61 of the *Regulations* are listed as follows at paragraph 75 of the *Schenkman* decision:

- 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 in granting an extension; and
- the chance of success of the grievance.

[17] The applicant was very attentive to pursuing her need for accommodation and raised her medical needs immediately, providing proof in the form of doctor's notes. The bargaining agent failed to refer her grievance to adjudication in a timely fashion. The Board and its predecessors have provided applicants with relief in other similar situations and have allowed grievances to proceed when they had a chance of success and the bargaining agent admitted its error (see *Peacock v. Union of Canadian Correctional Officers*, 2005 PSSRB 9, and *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81).

[18] The applicant's grievance has a chance of success as is evidenced by the fact that the parties were in settlement discussions in February 2014. That alone is sufficient to merit the grievance proceeding. The applicant relied on the bargaining agent to move her grievance through the process. The bargaining agent had *bona fide* reasons for the delay. The applicant was completely unaware that her grievance had

not been settled or referred to adjudication. She understood that it had been, based on what she had been told before she went on maternity leave.

[19] According to *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19, and *Guidara v. Canada Revenue Agency*, 2020 FPSLREB 111, not all the *Schenkman* factors should be given equal weight. The applicant was not negligent by relying on the bargaining agent to refer her grievance to adjudication (see *Riche v. Deputy Head (Department of National Defence)*, 2010 PSLRB 107). There is no prejudice to the respondent since the applicant was still waiting for a response to her settlement proposal and for a response at the final level of the grievance process as required by clause 20.14 of the collective agreement. According to *Yayé v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 51, the respondent should not be allowed to argue its breach of the collective agreement as a reason to refuse the application for an extension of time. The ongoing settlement discussions are proof that the parties did not consider the grievance abandoned (see *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96).

[20] The Board has awarded extensions in cases in which the delay was very lengthy since the grievance process is an employee's only recourse. When a bargaining agent has a compelling reason for missing a deadline to refer a grievance to adjudication, for which it has the sole authority, the applicant should not bear the brunt of the bargaining agent's failure. Had the respondent issued a final-level response, or had it responded to the offer to settle, this application would not be before the Board.

[21] From the applicant's book of documents, it is clear that she was not accommodated by the time she left on maternity leave. Her only redress was through the grievance process. The error in this process was the bargaining agent's, but the respondent violated the collective agreement by not responding to the offer to settle and by not issuing a final-level response. The respondent cannot be allowed to disregard the collective agreement and abuse the process. The extension of time to refer the grievance to adjudication must be granted.

**B. For the respondent**

[22] On October 9, 2013, the grievance in question was filed. It was denied at the first level on October 18, 2013. On October 29, 2013, the applicant and her union signed an accommodation plan. On October 31, 2013, the grievance was filed at the

second level. The second-level decision denying it was issued on November 19, 2013, following which it was filed at the third level. There was no third-level response. Nothing happened with the grievance after that, so the respondent's premise is reasonable that the issue was put to rest. Then in 2020, the grievance was referred to adjudication.

[23] Grievances must be referred to adjudication within 40 days of when the final-level decision is due. Since the grievance was filed at the final level on November 19, 2013, the final-level decision was due on January 3, 2014, which means that the applicant had until February 12, 2014, to refer it to adjudication. Instead, it was referred in September 2020, 6.5 years later.

[24] The applicant relied on the *Yayé* decision to support her application. The facts of that case are clearly different. In *Yayé*, the delay was four months, and the grievor had been terminated. Clearly, the grievor in *Yayé* would have suffered a greater prejudice than the applicant would, who seeks compensation for a failure to accommodate a situation that had been accommodated. The applicant should have taken the lack of a reply at the final level of the grievance process as a rejection of her grievance and not as a procedural error (see *Veillette v. Canada (Revenue Agency)*, 2020 FC 544).

[25] The fact that a grievor has not received a final-level response does not prevent him or her from referring the grievance to adjudication within the prescriptive timelines set out in the *Regulations*. The Board has jurisdiction to grant extensions, but they should be granted only by exception and should be based only on clear, cogent, and compelling reasons for the delay. In the absence of such reasons, there is no need to assess the other criteria (see *Sonmor v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 20).

[26] Merely because there is a reason to explain the delay does mean that it is clear, cogent, and compelling, to satisfy the criteria in *Schenkman*. According to *Sonmor*, a union's errors and omissions are not reasons to extend the time limit to refer a grievance to adjudication. Both the grievor and the bargaining agent have a role in the grievance process, must be diligent, and are not separate entities in the grievance process (see *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33).

[27] The applicant's representative argued that the applicant, then a grievor, was diligent in the grievance process. That explained her role in 2013, but nothing explained her role in pursuing her grievance between 2014 and 2020. It was incumbent on her to inquire into the status of her grievance. The lack of such an explanation is proof of her recklessness, and it demonstrates a lack of diligence in pursuing her rights.

[28] The respondent is entitled to certainty as to the disputes that will be addressed. It is difficult to address a dispute after a seven-year delay, due to the inability to reconstruct the facts (see *Edwards v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLREB 126). Even if the respondent suffers no prejudice, there is no clear, cogent, and compelling reason for the delay. The lack of a compelling reason for the delay outweighs the prejudice to the grievor (see *Guidara*).

[29] The chance of a grievance's success cannot be estimated unless the evidence has been heard. The applicant claimed that there was a problem with her accommodation. She was not entitled to a perfect accommodation that met her preferences, only one that met her limitations. There is no evidence of a proposal to settle, as her representative claimed. Furthermore, there is no evidence of an agreement between the parties to hold the timelines in abeyance. The applicant's representative claimed that the union was left waiting for a response to its proposal to settle when in fact, the last email correspondence was from the respondent and was in response to the union's emailed proposal.

[30] The formal deadlines and formalities of the grievance process cannot be ignored. Formal deadlines must be secured before pursuing a more informal settlement route (see *Vidlak*, at para. 13). In cases in which an extension has been granted, such as in *Yayé*, the delays have been brief, and the prejudice to the grievors would have been great.

**IV. Reasons**

[31] The applicant bears the burden of proof in an application for an extension of the time limits to refer a grievance to adjudication. In this case, she did not provide clear, cogent, and compelling reasons that the time limit for referring her grievance should be extended, when applying the *Schenkman* criteria.

[32] I can accept that some delay was caused by staff rotating through the bargaining agent's Moncton office. I can also accept that an email could be missed, which could cause confusion as to the status of the grievance, but that explains only a very brief period in 2014. Nothing explains the complete failure to pursue the grievance from the summer of 2014 to the point in the summer of 2020 when it was finally referred to adjudication.

[33] The applicant failed to discharge her burden of proof. In the absence of such an explanation, I need not even consider the remaining *Schenkman* criteria (see *Sonmor*). Not all that criteria are of equal weight (see *Arpenteng* and *Guidara*), but in my opinion, the clear, cogent, and compelling reason that the time limit was not respected is of primary importance.

[34] The bargaining agent's failure to pursue its obligations to the applicant is not a sufficient reason to allow this application, particularly when there is no reason or plausible explanation for the delay from the summer of 2014, when Ms. Ferguson assumed the local advisor role in the Moncton area, to 2020, when the grievance was finally referred to adjudication.

[35] I do not agree that the applicant was attentive to her obligation of ensuring that her grievance had been forwarded to the adjudication phase. While it may be understandable that during her maternity leave, she was not in touch with her bargaining agent, she did not question the status of the grievance upon her return in 2015. It was reasonable for the respondent to conclude that the matter was no longer an issue when she returned to the workplace and did not raise her grievance.

[36] The applicant also sought relief under the principles in *Yayé*. The case before me and the *Yayé* case are similar in that the respondent did not provide a final-level response and the bargaining agent was responsible for the delay referring the matter to adjudication. That is where the similarities end. A delay of a few months and for which there is a clear, cogent, and compelling justification cannot be treated the same as a delay of several years without a justification. The principle that the respondent must be held to its contractual obligation to respond to a grievance remains, but in addition, the bargaining agent must be attentive to its obligations to pursue adjudication in a timely manner.

[37] Section 61 of the *Regulations* is not intended to absolve bargaining agents of this obligation to their members when they fail to meet it. The applicant is not left without recourse if she is denied an extension of time to refer her grievance to adjudication. She may proceed against the bargaining agent under s. 190 of the *Act* for its failure to represent her effectively.

[38] The parties have cited many cases in support of their arguments. While I have read and considered each one, I have chosen to cite only those that are of particular significance to this case.

[39] For all these reasons, this application is dismissed.

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

*(The Order appears on the next page)*

## V. Order

[41] This application is dismissed. The file is closed.

June 7, 2021.

**Margaret T.A. Shannon,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**