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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

BARBARA CHALMERS

Grievor

and

**TREASURY BOARD
(Department of Fisheries and Oceans)**

Employer

Indexed as

Chalmers v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Lisa Greenspoon, Public Service Alliance of Canada

For the Employer: Joel Stelpstra, counsel

Decided on the basis of written submissions,
filed March 25 and April 16, 2021.

REASONS FOR DECISION

I. The employer's objection to the referral of a grievance to adjudication

[1] Barbara Chalmers ("the grievor") filed a grievance against her employer's decision to deny her parental leave. She works for the Department of Fisheries and Oceans. The legal employer, the Treasury Board, concluded a collective agreement ("the collective agreement") with the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services group, which the grievor belongs to. For the purposes of this decision, I will refer to the Department of Fisheries and Oceans as the employer since the Treasury Board has delegated to the department its human-resources management authority. The collective agreement expired on June 20, 2018.

[2] Since this grievance is related to the interpretation of the collective agreement, the bargaining agent is representing the grievor in these proceedings (see s. 209(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2)). On January 13, 2021, the bargaining agent referred the grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board"). The employer objected to that referral on the basis that the grievance was untimely. The parties were asked for their submissions on only that issue.

[3] For the reasons that follow, the employer's objection is dismissed.

II. Context

[4] The facts are not in dispute.

[5] In October 2017, the grievor and her husband applied to be part of the Foster-to-Adopt program with the Sarnia-Lambton Children's Aid Society. On October 2, 2019, they were informed that they were eligible. At the same time, they were told that if they confirmed their commitment, a foster child would be placed with them immediately. They made the commitment.

[6] On the same day, the grievor asked her supervisor whether she could apply for parental leave. She was told that she could not.

[7] The foster child (aged 3) was placed with the grievor and her husband on October 3, 2019. The grievor took vacation days for the following week to apply for

parental leave under both the Employment Insurance (EI) plan and article 40 of the collective agreement. She received a response from the employer on October 23, 2019, stating that according to clauses 40.01 and 40.02, she was not eligible for parental leave or the parental allowance since to that date, no legal proceedings had been held with respect to adopting a child. The employer advised her that she should take "... Leave without pay for the care of family ...".

[8] On November 19, 2019, the grievor emailed her supervisor to request a review of the decision, based on her bargaining agent's interpretation of the parental leave article. She also informed the employer that EI had approved her parental leave from October 9, 2019, to June 22, 2020, based on her participation in the Foster-to-Adopt program and on the fact that a foster child had been placed in her care.

[9] On January 17, 2020, the grievor followed up with her supervisor as she had not yet received an answer to her request to review management's decision. Her supervisor answered the same day, stating that an interpretation had been requested from the Treasury Board's Labour Relations branch and adding, "Unless we are informed otherwise by LR and TB our official response stands ...".

[10] On January 22, 2020, the grievor was informed that a Treasury Board Secretariat (TBS) negotiator would provide his or her interpretation of the relevant articles. The grievor asked for further details, as her three-month leave without pay was coming to an end, and she risked having to return to work. Were that leave extended, it would disrupt her "continuous employment". At the same time, she believed that her foster child needed her full-time care.

[11] She received a response on January 27, 2020, stating that the employer was still waiting for the TBS's legal interpretation. On February 26, 2020, she was informed that the TBS's legal interpretation had been received and that it confirmed the employer's position that she was not entitled to parental leave under the collective agreement. She filed her grievance on March 12, 2020.

III. Summary of the arguments

A. For the employer

[12] The employer objected to the filing of the grievance, since it was done more than five months after the grievor was first made aware that the employer had denied

the request. If the Board considers the grievance out of time, the grievor has requested an extension of time. Yet, the case law is clear that attempts at informal resolution do not present clear and compelling reasons for a delay.

[13] The employer first denied the request on October 2, 2019, and provided a final decision on October 23, 2019. On November 19, 2019, the grievor requested a reconsideration of the decision. In its submissions, the employer notes that even by that date, the 25-day limit in the collective agreement for filing a grievance had expired.

[14] The employer maintained its position throughout of denying the leave. It disputes that the final answer arrived only on February 26, 2020. It emphasizes the words, "... [date] on which the grievor first becomes aware ..." of the action or circumstances giving rise to the grievance, per clause 18.15 of the collective agreement.

[15] As to whether an extension of time should be granted, the employer submits that one should not. It reprises the criteria set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, as follows, to analyze whether such an extension should be granted:

- ...
- *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.*
- ...

[16] The employer argues that there are no clear and compelling reasons that the grievance was not filed earlier. It cites *Pomerleau v. Treasury Board (Canadian International Development Agency)*, 2005 PSLRB 148, and *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96, for the proposition that grievors' attempts to resolve matters informally do not serve to extend deadlines.

B. For the grievor

[17] According to the grievor, the grievance was filed in a timely manner, within the 25-day limit of the moment she knew she was aggrieved.

[18] According to the grievor, the employer's first response denying the leave was not definitive, as it did not know then that the EI parental-leave claim would be accepted. She submitted that new information, then waited for a response from the employer. On January 27, 2020, she was told that the employer would advise her once it had a definite answer from the TBS. The action giving rise to the grievance was the employer's final confirmation, based on the TBS's interpretation. The confirmation was received on February 26, 2020, well within the 25-day limit for the grievor to file her grievance on March 12, 2020.

[19] Should the Board consider the grievance untimely, then the grievor requests an extension of time to file it under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79).

[20] The grievor submits that there were clear, cogent, and compelling reasons for the delay. She believed that she was waiting for management to clarify its position in response to the fact that her EI parental-leave claim had been accepted. In response, the employer stated that it was waiting for the TBS's interpretation. Thus, the grievor waited for that interpretation, so she would know the employer's final response.

[21] The length of the delay, even if the October date is considered, is not inordinate. The grievor's diligence is obvious. She presented the necessary information to the employer and followed up for the response. The injustice to her of not being able to pursue a right she believes she is entitled to under the collective agreement is greater than any harm to the employer. The employer has been aware of the situation all along and was aware that she intended to file a grievance if the TBS's response was negative.

[22] The last criterion of *Schenkman*, the grievance's chance of success, is impossible to assess. At the very least, the case is arguable. There is no reason to see it as frivolous or vexatious.

IV. Analysis

[23] Clause 18.15 of the collective agreement reads as follows:

A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance....

[24] The parties disagree as to the action that triggered the grievance. According to the employer, it was as soon as the employer signalled to the grievor that it did not believe that she was entitled to parental leave. According to her, it was the date on which she was notified of the employer's definitive answer, after the TBS's collective agreement interpretation was received.

[25] The employer invokes *Pomerleau* and *Vidlak* as authorities for its statement that attempts to settle a dispute informally do not affect the timelines provided in a collective agreement.

[26] In *Pomerleau*, the employee sought a different response from the employer, despite a clear "no" supported by the Treasury Board's interpretation. The adjudicator found that the action that gave rise to the grievance was that initial denial.

[27] In *Vidlak*, the employee challenged a decision made four years earlier on the basis of a report that he obtained only later. The report was the basis for his grievance, yet he waited a further nine months after receiving it before grieving, in an attempt to resolve the matter amicably. The former Board's chairperson refused to grant his request for an extension of time, as the nine months were excessive, and informal discussions did not displace the need to secure his right to file a grievance.

[28] In this case, after the employer denied parental leave to the grievor, she applied for EI parental benefits and received a positive answer to her application. Since the entitlement to parental allowance under the collective agreement is conditional on receiving EI parental benefits (see clause 40.02(a)(ii)), it was understandable that the grievor thought that EI's positive response might impact the employer's assessment of her situation. She so informed the employer and waited for its response.

[29] The employer's response was that it was waiting for the TBS's interpretation. The employer could have changed its position had that interpretation been different. This has nothing to do with attempts to negotiate between the grievor and the employer. Contrary to the situation in *Pomerleau*, the initial denial of the grievor's

request was not supported by any Treasury Board interpretation. Contrary to *Vidlak*, the grievor filed her grievance within the prescribed time as soon as she knew that the employer's answer was definitive.

[30] In this case, it was reasonable for the grievor to wait for a definitive answer, given the facts that the employer had never responded to the added information that EI had granted her parental leave and that the employer had led her to believe that it was still waiting for TBS's definitive interpretation. The answer could still have changed, and thus, it would have been premature to file a grievance.

[31] Consequently, I find that the grievance was timely. It is not necessary to consider the request to grant an extension of time.

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

(The Order appears on the next page)

V. Order

[33] The employer's objection is dismissed.

[34] The grievance will be set down for a hearing in the Board's schedule.

June 9, 2021.

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