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File: 568-02-42505

Citation: 2021 FPSLREB 83

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

ROSIE GAGNON

Applicant

and

TREASURY BOARD
(Department of Public Works and Government Services)

Respondent

Indexed as
Gagnon v. Treasury Board (Department of Public Works and Government Services)

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

For the Applicant: Émile Arsalane

For the Respondent: Philippe Giguère, counsel

Decided on the basis of written submissions, received May 28 and June 11 and 14, 2021.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] Rosie Gagnon, the applicant, held a translator position at the Translation Bureau, which is part of the Department of Public Works and Government Services, now known as Public Services and Procurement Canada ("the employer" or "the respondent"). On May 4, 2020, she filed a grievance challenging the employer's April 24, 2020, decision to reject her on probation. Her position was classified at the TR-02 group and level and was part of a bargaining unit whose members are represented by the Canadian Association of Professional Employees (CAPE).

[2] The employer dismissed the applicant's grievance at the first level of the grievance procedure. After the parties mutually agreed, the deadline to present the grievance at the second level was extended to January 31, 2021. At an unspecified time in 2020, the applicant ceased to be represented by the CAPE, and Émile Arsalane has represented her from then on.

[3] The applicant made this application on January 27, 2021. The Federal Public Sector Labour Relations and Employment Board ("the Board") sent a copy of the application for an extension to the respondent on February 5, 2021.

[4] When she submitted her application on January 27, 2021, the applicant identified the CAPE as a respondent. Based on the submissions to me, I see absolutely no reason to involve the CAPE. It has nothing to do with this application for an extension of time. The issue is extending the time to present a grievance to the employer for someone no longer represented by her bargaining agent. Therefore, I decided not to involve the CAPE in this procedure.

[5] The application for an extension of time is intended to extend the deadline to present the grievance at the second level of the grievance procedure. The provisions of the collective agreement between the CAPE and the Treasury Board for the Translation Group (TR) (expiry date: April 18, 2022) on grievance procedure time frames read as follows:

> ***30.19*** *A grievor may present a grievance at each succeeding step in the grievance procedure beyond the first step either:*

> *a. where the decision or settlement is not satisfactory to the grievor, within ten (10) days after that decision or settlement has been conveyed in writing to the grievor by the Employer;*
>
> *or*
>
> *b. where the Employer has not conveyed a decision to the grievor within the time prescribed in clause 30.20, within fifteen (15) days after presentation by the grievor of the grievance at the previous step.*
>
> ***30.20** The Employer shall normally reply to a grievance at any step of the grievance procedure, except the final step, within ten (10) days after the grievance is presented, and within twenty (20) days where the grievance is presented at the final step except in the case of a policy grievance, to which the Employer shall normally respond within thirty (30) days. The Association shall normally reply to a policy grievance presented by the Employer within thirty (30) days.*

[6] The applicant based her application on the fact that she needs time to obtain the documents she requires to adequately prepare the presentation of her grievance at the second level of the grievance procedure. In her application, she claimed that the employer removed documents and information or refused her access to documents and information she needs, to prepare. As part of her grievance, she stated that she has a heavy burden of proof, namely, to demonstrate that her rejection on probation was a camouflage or sham. She wishes to plead discrimination on the basis of "[translation] beliefs". To prepare properly, she requires a large quantity of documents that the respondent holds and that she has not yet received.

[7] According to the documents that the applicant submitted, she reportedly made a large number of access-to-information requests in 2020 and then more in 2021 to obtain the documents she states she needs to prepare to present her grievance. For several of her requests, she is still waiting for the requested information or for part of it.

[8] The respondent objected to the extension of time.

[9] After a conference call with the parties, the Board decided to deal with the application on the basis of written submissions from the parties, given that the relevant facts in the application do not seem in dispute.

[10] On March 5, 2021, the respondent replied to the grievance at the second level of the grievance procedure, denying it. At the start of its response, the respondent noted that it had set the grievance hearing for February 24, 2021. The applicant was reportedly notified of the hearing date by email on February 1, 2021. The respondent allegedly did not reply to the email and reportedly did not provide an availability date for the hearing at the second level of the grievance procedure.

II. Summary of the arguments

A. For the applicant

[11] The applicant alleged that the Board has jurisdiction to extend a deadline as part of the grievance procedure. On that point, she identified 76 decisions in which the Board or its predecessor determined that it had jurisdiction to review applications for extensions of time to file grievances or refer them to adjudication.

[12] According to the applicant, the principles of administrative law apply to procedures governing the hearing of grievances in the federal public service. One fundamental principle of Canadian administrative law is procedural fairness, particularly with respect to terminating public office holders and public servants.

[13] The very existence of the different grievance procedure levels implies that the applicant necessarily has the right to be heard at each level fully and completely. Procedural fairness implies that she shall have the right to any relevant documentation so that she may defend herself and plead her grievance in its entirety.

[14] The respondent had to suspend the procedures involving the applicant once the Board notified it that an application for an extension of time had been submitted. Yet, the respondent ignored this application and decided to reply to the grievance at the second level. Replying to the grievance without waiting for the Board's decision was a denial of procedural fairness and natural justice.

[15] The applicant reviewed the principles in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, and alleged that they are difficult to apply to this situation. In fact, she was not late, and she met all the deadlines. Instead, she requests the extension of a future deadline.

[16] The applicant referred me to the following decisions: *Schenkman*; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Bergeron v. Canada (Attorney General)*, 2020 FC 1090; *Renaud v. Canadian Association of Professional Employees*, 2009 PSLRB 177; *Kruse v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 85; *Cowman v. Treasury Board (Department of Transport)*, 2021 FPSLREB 36; *Ouellette v. Saint-André, an incorporated rural community*, 2013 NBCA 21; *Fontaine v. Robertson*, 2021 FPSLREB 19; *Bremsak v. Professional Institute of the Public Service of Canada*, 2014 FCA 11; *Baker v. Canada (Minister Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Hussain v. Canada (Citizenship and Immigration)*, 2012 FC 1199; and *Venkata v. Canada (Citizenship and Immigration)*, 2017 FC 423.

B. For the respondent

[17] The respondent alleged that several times, it agreed to extend the deadline for the applicant to present her grievance at different levels of the grievance procedure. In total, she received more than an extra year to present her grievance to the employer. She continues to systematically delay presenting her grievance and asked the Board to intervene even before adjudication to grant her another extension. The respondent objected to the request.

[18] The respondent's view is that the Board must rely on the criteria developed in *Schenkman* to decide whether it will allow this application. According to the first criterion, the application must be based on clear, cogent, and compelling reasons. If not, the Board need not consider the other criteria to deal with the application.

[19] The applicant justified her request by the lengthy delays obtaining documents and a lengthy debate after access-to-information requests. That is not a good reason to allow this request. The Board should not allow a party to paralyze the grievance procedure. Nothing prevents the applicant from moving her grievance forward and arguing discrimination or disguised disciplinary actions. She would also have that opportunity, if needed, at adjudication.

[20] The deadline to present a grievance at the next level is 10 days, which the parties to the collective agreement negotiated. They believed that that amount of time was sufficient and reasonable. They wanted to ensure efficiency and finality in the

grievance procedure. In this case, the respondent has already granted the applicant many extensions of time, and there are no convincing reasons to grant a new one.

[21] The Board's refusal to allow this request will in no way prejudice the applicant. She will still be able to pursue her grievance at the final level of the procedure. Conversely, were the request allowed, federal public service labour relations would be prejudiced. In fact, the parties are entitled to expect that a grievance will move expeditiously through the grievance procedure.

[22] According to the respondent, the grievance has a very weak chance of success, given that it involves a rejection on probation, over which the Board has no jurisdiction at adjudication.

[23] Finally, the respondent reminded the Board that it has several pending cases. In such a context, parties should not be encouraged to initiate recourse on procedural issues but instead to resolve the issues themselves. It would be preferable to use the Board's resources to hear cases that have been referred to adjudication.

[24] The respondent referred me to the following decisions: *Schenkman*; *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39; *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113; *Leboeuf v. Treasury Board (Department of Transport)*, 2007 PSLRB 27; *Brown v. Deputy Head (Department of Social Development)*, 2008 PSLRB 46; *Van Duyvenbode v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2008 PSLRB 90; *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33; and *Chow v. Treasury Board (Public Health Agency of Canada)*, 2015 PSLREB 81.

III. Analysis and reasons

[25] According to the applicable collective agreement, a grievor may present a grievance at each level of the grievance procedure after the first one within 10 days of the date on which the employer conveyed the decision in writing to the grievor. The applicant requested extending that deadline.

[26] This application for an extension was made under the terms of s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "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.*

[27] The facts of this application for an extension of time are relatively simple. The applicant wishes an extension of time to present her grievance at the second level of the grievance procedure. She claimed that she does not currently have all the information she requires to present her arguments in support of her grievance. Several times already, the respondent voluntarily agreed to the extent allowed by s. 61(a) of the *Regulations* to extend the time to present the grievance. It refuses to do it any longer.

[28] The criteria developed in *Schenkman* to analyze an application for an extension of time have been reflected time and again in the Board's case law. They are the following: the delay is justified by clear, cogent, and compelling reasons; 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 if the extension is allowed; and the chance of success of the grievance.

[29] Even if the criteria are assessed in their entirety, the importance assigned to each criterion is not necessarily the same. Sometimes, some criteria do not apply, or only one or two of them come into play. For example, it would be surprising for an application for an extension of time to be allowed if it did not rely on clear and cogent reasons (see *Featherston v. Deputy Head (Canada School of Public Service)*, 2010 PSLRB 72). After all, in this case, what would be the point of the time frames that the parties to the collective agreement agreed to if the Board could extend them by a request that is not firmly justified?

[30] The applicant alleged that the criteria in question are difficult to apply to this situation. I do not agree with that position. The criteria, as is often the case in an application for an extension of time, simply must be adjusted somewhat, for analysis

purposes. Of course, as she stated, she is not late; she met all the deadlines and instead asked for an extension of what she terms a future deadline. Even so, in this case, she seeks an extension of time to present her grievance at the second level.

[31] The applicant submitted clear, cogent, and convincing reasons for me to agree to extend the time to present the grievance at the second level of the grievance procedure. She said that she needs time to obtain the documents she requires to properly prepare to present her grievance at the second level. She claimed that the respondent removed documents and information or refused her access to the documents and information that she requires to argue that her rejection on probation was a camouflage or sham. She wishes to plead discrimination based on "beliefs". The respondent presented nothing to counter the facts supporting the request. Clearly, a party cannot properly prepare if it does not have what it requires. It would be against fairness to force it to. And precisely in the interest of fairness, the Board can agree to extend a time limit.

[32] It is possible that the applicant will find nothing through her access-to-information requests and that she will be unable to support a discrimination allegation. If she is making such an effort, it is because she believes that, rightly or wrongly, she was discriminated against. In the interest of fairness, she should be able to access in advance all the documentation she deems relevant before presenting her grievance. That is quite a clear, cogent, and compelling reason to justify an application for an extension of time to present her grievance at the second level.

[33] The criteria involving the length of the delay and the diligence must be reworded somewhat in this case. First, the applicant is not late. The deadline to present at the second level was extended after a mutual agreement until January 31, 2021. On January 27, 2021, four days before then, she submitted this application. She did not even wait until after the January 31 deadline, which demonstrates diligence. I am not sure what she could have done to accelerate things. She still not does have the information she stated she requires to present her grievance at the second level. Agreeing to go faster would mean agreeing to make what might be an incomplete presentation of her arguments.

[34] I do not accept the respondent's argument that the Board's refusal to allow this application would not prejudice the applicant. On the contrary, the refusal could

prevent her from presenting her arguments in full at the second level and then at the third, I might add. Moreover, it is possible that were she unable to present her discrimination argument, the respondent would reproach her at adjudication by alleging that, based on *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), she attempted to alter her grievance. Therefore, my view is that the prejudice is squarely on the applicant's side.

[35] Nor do I accept the respondent's argument alleging that allowing this application would prejudice federal public service labour relations. Extensions of time, sometimes for lengthy periods after the parties mutually agree, are the current practice. It is also current practice for employers to respond very late to grievances, especially at the final level of the grievance procedure. Of course, deadlines exist, and the parties must make efforts to respect them. That is why applications under s. 61 of the *Regulations* are allowed sparingly (see *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 31 at para. 13). However, if an extension is made for good reasons, then labour relations are no worse off as a result.

[36] Clearly, the grievance's chances of success cannot be estimated, given that I did not hear the grievance on the merits. As is almost always the case in Board decisions, I will not consider this criterion, except to find that the grievance is not frivolous. Of course, it will be difficult for the applicant to succeed with her grievance, which involves a rejection on probation. Nevertheless, I cannot judge that on the basis of the submissions I received.

[37] I carefully reviewed all the case law that both parties submitted. I see no need to comment on it, except for *Chow*, which the respondent submitted, since some of its contents resemble those presented in this case. In *Chow*, the Board found that the applicant had not presented clear, cogent, and compelling reasons to justify the delay. Among other reasons, she claimed that the delay had been caused by a prolonged debate over an access-to-information-and-privacy request. In that case, she did not convince the Board that it was necessary to wait for her access-to-information request to be dealt with before referring her grievance to adjudication. But the situation is quite different in this application. The applicant convinced me that she needs the information that she has not yet been able to obtain to ensure a complete presentation of her grievance.

[38] I cannot ignore the somewhat disrespectful way in which the respondent acted when it responded to the grievance at the second level on February 24, 2021, given that the Board had notified it on February 5, 2021, of this application for an extension of time to present the same grievance at the second level. When it received the application, it should have put everything on hold and waited or contacted the applicant to try to resolve the matter.

[39] Based on the foregoing, I allow the applicant's application for an extension of time. However, I find it important to set an end date to the extension, to not let things drag on unduly. Therefore, I allow the extension until January 17, 2022, which is six months from the date of this decision. That should suffice for the applicant to obtain all the documents she stated she needs to present her grievance at the second level. If documents are still missing on that date, I suggest that the parties work together to resolve the issue.

[40] The presentation of the grievance at the second level is postponed to a date that the parties agree to but to not later than January 17, 2022.

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

(The Order appears on the next page)

IV. Order

[42] The application for an extension of time is allowed.

[43] The presentation of the grievance at the second level is postponed to January 17, 2022, at the latest.

July 15, 2021.

FPSLREB Translation

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