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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

JESSICA ENS

Grievor

and

**TREASURY BOARD
(CORRECTIONAL SERVICE OF CANADA)**

Employer

Indexed as

Ens v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication and an application for an extension of time referred to in paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Corinne Blanchette, Professional Institute of the Public Service of Canada

For the Employer: Adam C. Feldman, counsel

Heard via videoconference,
September 8, 2021.
(written submissions filed September 10 and October 15, 2021.)

REASONS FOR DECISION

I. Individual grievance under consideration and application for extension of time

[1] Jessica Ens (“the grievor”) is a correctional officer with the Correctional Service of Canada (“the employer”). She works at the Kent Institution, located in the lower mainland area of British Columbia. She lives in Summerland, British Columbia, several hundred kilometres away.

[2] As per the collective agreement in place, if the grievor is summoned on a day of rest to work overtime, she is entitled to be paid her mileage to and from work. The employer’s failure to pay this mileage is the subject matter of her grievance.

[3] The hearing took place by way of videoconference, with the parties participating from Summerland, British Columbia, and from Ottawa, Ontario. The hearing began on September 8, 2021 and was scheduled to run for three days.

[4] Shortly after the grievor’s direct examination began, an anomaly came to light. The grievance referred to adjudication in Board file number 566-02-40227 pertains to events on October 18, 2018. However, the parties were prepared to litigate events that took place ten days later, on October 28, 2018. In light of this anomaly, the employer raised an objection.

[5] Written submissions were made on the issue of failing to properly refer the matter of October 28, 2018, to adjudication, and whether an extension of time should be granted to permit that matter to be properly referred to adjudication.

[6] The employer submitted its argument on September 10, 2021. The grievor responded on October 15, 2021.

[7] For the following reasons, the grievance before the Board, dealing with events occurring on October 18, 2018, is deemed abandoned. Board file number 566-02-40227 is to be closed.

[8] Further, in the circumstances of this case, granting an extension of time to refer to adjudication a grievance concerning events taking place on October 28, 2018, is not an option.

II. The grievor's testimony on September 8, 2021

[9] The grievor testified to receiving a call from the operations desk at Kent Institution on October 28, 2018, to work an overtime shift. She was on a day of rest. She attended work as requested and filed an overtime claim as well as a claim for the 581 km she travelled to and from work, as per the collective agreement. Her mileage claim was refused.

[10] During her direct examination, the grievor claimed that the date mentioned in the first-level decision that the employer rendered on her grievance in Board file number 566-02-40227 was incorrect. The employer objected that it was the first time that this discrepancy was raised. The date identified in the first- and second-level decisions refers to a mileage claim on October 28, 2018. The employer had prepared for adjudication on the basis of the facts alleged in the Form 20, which, in its book of documents, indicated an internal file number of 63456(18). I note that that the Form 20 in question is not the one by which the grievor referred a grievance to adjudication in Board file number 566-02-40227.

[11] In the employer's book of documents, the grievance is articulated as follows: "I grieve that on 2018-10-28, I was denied the correct amount of kilometers to and from my place of residence while reporting to work for an overtime shift." I note that that grievance is not the one that the grievor referred to adjudication in Board file number 566-02-40227.

[12] Indeed, the Form 20 by which the grievor referred her grievance to adjudication in Board file number 566-02-40227 carries internal file number 63456, not 63456(18), and the grievance is articulated as follows: "I grieve that on 2018-10-18, I was denied the correct amount of kilometers to and from my place of residence while reporting to work for an overtime shift." I note that the Board's record indicates a Form 20 and a grievance were provided to the employer by the Board's Registry on May 3, 2019. I also note that, despite the requirements of s. 96 of the *Federal Public Sector Labour Relations Regulations* and a reminder from the Board's Registry in that regard, the employer has failed to file, prior to the hearing, a copy of the decision that it made on the grievance at each level of the grievance process.

[13] The employer objected to the hearing proceeding because all the disclosure it received from the grievor pertained to events taking place on October 28, 2018. The

employer's witnesses had been summoned to address issues occurring on that particular date. The employer questioned why two different Form 20 referrals were signed.

[14] The employer further objected to not having received a "Final Level Grievance Transmittal Form" with regard to the October 28, 2018, events until the evening before the hearing before me. That form is undated and does not contain any grievance particulars. Nor does it contain an internal file number. In fact, stated the employer, there is no evidence that any grievance pertaining to events occurring on October 28, 2018, was ever presented at the final level of the grievance process.

[15] I adjourned the hearing on September 8, 2021, to permit a more fulsome treatment of the issues by the parties by way of written submissions.

III. The employer's objection

[16] On September 10, 2021, the employer wrote the following:

...

The above grievance should relate to mileage claims on October 28, 2018

During direct examination of the Grievor, the Grievor's Representative claimed the date in question on the Employer's first level response was incorrect. This was the first the Employer had been informed of this discrepancy. Consistently, the date identified in the first and second levels of the grievance procedure refer to a mileage claim on October 28, 2018 (TAB 32 in the Employer's Book of Documents (EBOD)). As is custom, the grievance was responded to on the basis of the facts alleged on the Form 20 (TAB 32 EBOD, page 133/.pdf).

The Grievor's Representative was involved in the internal process and the documentation bears her name. The record also shows that this Representative was present at a second level review meeting on November 8, 2018 in relation to mileage claims "on 2018-10-28" (Tab 32 EBOD, page 140/.pdf). In light of this, it would strain credulity for the Representative to continue in its claim that any other date than October 28, 2018 apply to this grievance.

The Grievor's Book of Documents contains a different Form 20 than that received by the Employer. The Grievor's Form 20, which was then sent to the Board in reference to adjudication, is the cornerstone for suggesting October 18, 2018 factors in the grievance before the Board.

Three things are unclear in relation to the Grievor's Form 20: where the Grievor's Form 20 came from, why it is different from the Employer's, and why the Grievor signed two Form 20s bearing the same grievance number ... These discrepancies are not of the Employer's making and seriously prejudice its defense.

The Grievor should be estopped from changing factual assertions during the hearing that are at odds from what was presented throughout the grievance process. The Employer's TAB 32 consistently defends against allegations relating to October 28, 2018. The Employer engaged in a thorough investigation at the time of the alleged events, and the Grievor did address mileage for October 18, 2021 until the day of the Hearing. Estopping this change of dates would sustain key pillars of the grievance process. Namely, the resolution of labour and employment disputes contemporaneously to when they occur, expeditiously, and efficiently. An estoppel would also signal against the misuse of legal and judicial resources.

The Employer maintains the date in question for the mileage grievance should be October 28, 2018. To attribute another date to the grievance would circumvent the balances inherent to the internal grievance process. The employer would be deprived of engaging in an investigation contemporaneous to the allegations; it would be forced to initiate an investigation with a delay of almost three years.

During the hearing, the Grievor's Representative posited that the errors are merely technical and may have happened because of the number of grievances sent on behalf of Ms. Ens. It is part of a representative's duties to assure proper reference to adjudication. This responsibility was miscarried in the instance. The consequences of remedying the anomalies retro-actively are dire for the employer in the instance but also as a precedent. In essence, the Grievor's Representative is asking the Employer to initiate an investigation nearly three years after the alleged facts.

The grievance was never transmitted to the Final Level

As with the Form 20 (in the GBOD), the Employer did not receive the Final Level Grievance Transmittal Form, which is undated and does not contain any grievance particulars ... The Grievor's Representative sent the attached document the evening before the hearing. This document was not in the pre-hearing disclosure list for the above grievance. It is unclear where it came from since it was not originally attached to the document list for this grievance.

The lack of a final level transmittal for this grievance file is not simply a technical issue. It was not received by the Employer; that is, it is not about a delay. If it was properly transmit, it would have elicited a reply, as were issued with all other of Ms. Ens' mileage grievances.

Where the Grievor's Representative points to Section 95 of the FPSLRB Regulations, the Employer reiterates the importance of the Final Level during in the grievance process. Section 209 of the

FPSLR Act states that an employee “may refer to adjudication an individual grievance that has been presented up to and including the final level”.

A grievance that was not transmit to, and therefore not presented to the final level, should not simply slip through; yet this is what the Grievor’s Representative is asking for when pointing to the Regulations.

*Section 237 (1)(f) of the Act states the Board may make regulations respecting the processes for dealing with grievances, including regulations concerning “the circumstances in which any level **below the final level in a grievance process may be eliminated**” (emphasis added). This section places a burden on the Grievor or their Representative to carry the allegations to the Final Level, and in proper form - which was not done here. Neither is this a case where the grievance was presented directly to the final level.*

...

[Sic throughout]

[Emphasis in the original]

IV. The grievor’s submissions in response to the employer’s objection

[17] On October 15, 2021, the grievor submitted the following:

...

The issue is fairly simple. Over time, Ms. Ens, has filed several grievances (more than fifteen) disputing her mileage reimbursement in relation to working overtime shifts. The parties were scheduled for an oral hearing starting on September 8, 2021. During the hearing, it came to light that the Union and the Employer have a different date associated with the same internal grievance number (#63456), board number 566-02-40227. The grievance referred to adjudication deals with payment of mileage for an overtime shift on October 18, 2018. On the employer’s side, this grievance deals with an overtime shift of October 28, 2018.

What appears to have happened here is an administrative error where internal grievances # 63456 and # 63564 have been interchanged at the time of the referral to adjudication. This error only became apparent during the hearing and the search to understand this mix up. The grievance numbers are quite similar and so are the issues under dispute. Following the referral to adjudication, in accordance with Section 96 of the Regulations, the employer was to provide all response to the grievances. At no point, since the Board’s acknowledgement receipt on May 2, 2019, did the employer raised an issue with the wrong number identification. To its detriment, the Union has relied on this and prepare its case to proceed with October 18, 2018 as the date at issue.

As discussed during the hearing, from our end, we have an undated and unnumbered third level transmission. We did verify with the local union representatives at Kent Institution and are told that it is not uncommon to have signed “ghost” transmittals by management.

I do not accept Mr. Feldman’s comment about my presence to a second level hearing for Ms. Ens’ grievances on November 8, 2018. Reaching conclusions without having all the facts is always risky and this case is a good illustration. On November 8, 2018, I participated in a monthly grievance committee meeting at Kent Institution as required by the Global Agreement negotiated between UCCO-SACC-CSN and CSC. This was not a second level hearing.

That said, we believe that moving forward and in the interest of fairness, the Board should exercise its power under Section 61(1)(b) of the Regulations to extend time limits to allow the grievor and the representatives to refer to adjudication Ms. Ens’ grievance dealing with the issue of October 28, 2018 (Internal # 63456). When dealing with application for extension of time, the Board has continuously applied the criteria set in Schenkman v. Treasury Board (Public Works and Government Services Canada), 2004 PSSRB 1. In the present case, there is a clear, cogent and compelling reason to explain the delay. An error was made at the time of the referral to adjudication and the error was not discovered until the hearing due, in part, to reliance on the respondent’s conduct. With respect to the length of the delay, given the parties’ backlog of grievances, the delay is not out of the norm. Since the error was discovered, the grievor has been diligent applying for an extension of time. With respect to the next criteria, the chances of success, this has always been a criteria that adjudicators have found less determinative as it is very difficult to estimate. Finally, with respect to the prejudice to the other party, we can say that all records still exist and are in possession of the employer. Furthermore, the employer’s witness is still available.

In conclusion, given the administrative error, it would be beneficial to the labour relations to allow this extension of time.

...

[Sic throughout]

V. Decision and reasons

[18] The Board scheduled a hearing September 8 to 10, 2021, inclusive, to hear a grievance arising out of events that occurred on October 18, 2018. This is the grievance referred to adjudication, and the only grievance in Board file number 566-02-40227. The grievance pertaining to events of October 18, 2018 is therefore the only grievance before me.

[19] As a result of confusion resulting from their own making, neither the grievor nor the employer was prepared to address those events.

[20] At the hearing, the grievor chose not to present evidence about her grievance in Board file number 566-02-40227 but decided to present evidence about other events. I therefore consider the grievor to have abandoned the grievance before me. I order Board file number 566-02-40227 closed on this basis.

[21] The parties later supplied arguments, which I found confusing, involving a request for an extension of time to refer to adjudication a different grievance pertaining to a completely different set of events, which apparently occurred on a completely different date, namely, October 28, 2018. At least, this is what I think the grievor is seeking.

[22] The following statement is inaccurate and confusing:

... the Board should exercise its power under Section 61(1)(b) of the Regulations to extend time limits to allow the grievor and the representatives to refer to adjudication Ms. Ens' grievance dealing with the issue of October 28, 2018 (Internal # 63456).

[23] The employer did concede that certain events of October 28, 2018, were the subject of another grievance, which was decided at the first and second levels of the grievance process. However, the employer did not concede that that other grievance was presented at the final level of the grievance process.

[24] For her part, the grievor presented no evidence that a grievance pertaining to the events of October 28, 2018, was presented at the final level of the grievance process. In fact, in her written submissions, the grievor recognized that it is uncertain whether that grievance was presented at the final level.

[25] Therefore, the grievor has not established that, but for untimeliness, she would be entitled to refer that other grievance to adjudication.

[26] Section 241(1) and (2) of the *Federal Public Sector Labour Relations Act* reads as follows:

241 (1) *No proceeding under this Act is invalid by reason only of a defect in form or a technical irregularity.*

...

(2) The failure to present a grievance at all required levels in accordance with the applicable grievance process is not a defect in form or a technical irregularity for the purposes of subsection (1).

[27] The failure to present the grievance relating to the events of October 28, 2018, at all required levels of the grievance process therefore would render invalid any referral of that other grievance to adjudication. In the circumstances before me, that failure prevents me from entertaining the grievor's application for an extension of time to refer that other grievance to adjudication.

VI. The parties' duty to help the Board manage its resources efficiently

[28] I feel very strongly that any decision made by an employer which a grievor feels is not in keeping with the terms of their collective agreement should be dealt with on its merits, as long as the legislation allows it. The Board plays a vital role in the airing and resolution of grievances.

[29] The Board is granted a certain amount of discretion to make allowances for matters which, for one reason or another, have fallen by the wayside, in order to permit such matters to still be heard.

[30] However, I also feel very strongly that the public interest must always play a part in the exercise of this discretion. The responsible management of publicly funded limited quasi-judicial resources is, without a doubt, in the public interest. It is therefore in the public interest that the Board's resources be used efficiently and fairly. The Board cannot achieve that goal by itself, without the cooperation of the parties appearing before it.

[31] The unfortunate reality is that at present there are quite literally thousands of grievances, which have been properly referred to adjudication, waiting to be heard by this Board. Some of the grievances in this queue pertain to very serious matters such as terminations of employment and others carry a significant financial impact, either to specific grievors or to federal public sector employers. It was unfair and contrary to the public interest, in my opinion, for the grievor to attempt to jump the queue at the 11th hour and push through a new referral to adjudication, ahead of all other matters, including the very serious ones that I just mentioned.

[32] The parties must diligently prepare for their hearing. In this case, there is no excuse for the grievor and for the employer to have prepared for a matter other than the one that has been set for a hearing. This confusion resulted in a waste of limited resources that could have been better used by the Board to hear other parties who were ready, willing, and able to address issues legitimately awaiting a hearing.

[33] The inability of the parties to proceed on September 8, 9, and 10, 2021, meant that those dates were lost to everyone, and other matters could not be heard. This is most unfortunate.

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

(The Order appears on the next page)

VII. Order

[35] I order Board file number 566-02-40227 closed.

[36] The application for an extension of time to refer to adjudication a grievance concerning events taking place on October 28, 2018, is denied.

December 8, 2021.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board