Date: 20211215

File: 568-02-42960

Citation: 2021 FPSLREB 137

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

JILL ANDREWS

Applicant

and

DEPUTY HEAD (DEPARTMENT OF FISHERIES AND OCEANS)

Respondent

Indexed as
Andrews v. Deputy Head (Department of Fisheries and Oceans)

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

For the Applicant: Herself

For the Respondent: Catherine Birch

Decided on the basis of written submissions, filed July 23 and 28, 2021.

REASONS FOR DECISION

I. Application before the Board

[1] Jill Andrews ("the applicant") applied to the Federal Public Sector Labour Relations and Employment Board ("the Board") for an extension of time to present a grievance against her termination from the Department of Fisheries and Oceans. The applicant was part of a bargaining unit subject to a collective agreement between her bargaining agent, the Public Service Alliance of Canada, and the legal employer, the Treasury Board. For the purposes of this decision, the Deputy Head of the Department of Fisheries and Oceans is the respondent.

[2] Under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79), the Board may allow an extension of the deadline in which to present a grievance, despite what is provided for in the collective agreement, "in the interest of fairness".

[3] For the reasons that follow, the application is dismissed.

II. Background

[4] The respondent terminated the applicant effective January 31, 2020. She did not grieve her termination within the 25-day time limit provided by the collective agreement; nor, during that time, did she advise her bargaining agent that she had been terminated. Only in July 2020 did she contact her bargaining agent about her termination and a possible grievance; the bargaining agent said that it was too late to present a grievance.

[5] The applicant later learned that it was possible to apply to the Board to request an extension of time. She asked her bargaining agent for help, but she alleges that it refused. These actions are the subject of a complaint against the bargaining agent that is also before the Board. On May 4, 2021, the applicant applied to the Board for an extension of time to present a grievance against her termination.

III. Summary of the arguments

A. For the applicant

[6] In her application, the applicant reprises the well-known criteria of *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, to

argue that the Board should exercise its discretion to grant an extension in her favour. In the following paragraphs, I summarize her arguments under each of the *Schenkman* criteria.

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

[7] Even before her employment was terminated, the applicant had started to compile documentation on her work conditions. She submits that it took her from March 2019 (when she was placed on leave without pay pending a fitness-to-work evaluation) to the end of April 2021 to amass and organize all the information (review of over 1975 pages of documents) she needed to be able to fully represent herself in relation to the grievance. This endeavour was complicated by the fact that from March 2019, she no longer had access to her work email.

[8] I quote from her application: "…due to my extensive notes, I did not have my documents ready to support my case within the allowable time limit."

2. The length of the delay

[9] As to the length of the delay, the applicant submits that it took her two years to review the 1975 pages of documents and to prepare her case.

3. The due diligence of the grievor

[10] I quote directly from the applicant's application:

> …
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> *It has taken me over two years (from March 18, 2019 to April 28, 2021) to do a complete review of the 1,975 pages of documents related to my employment case, and prepare comprehensive electronic documents. During that time period, I was also liaising with the federal government and the union via phone, e-mail, text and letter related to my employment case, and making contacts by phone with the Pay Centre trying to resolve my pay issues. Throughout the whole time, I was the only person working on the review of these documents and the preparation of comprehensive electronic documents.*
>
> …

4. Balancing the injustice to the employee against the prejudice to the employer

[11] This is the opportunity for the applicant to have her case heard as to why the respondent's decision to terminate her should be reversed. The termination has caused her much hardship. Also, a decision on her termination may prevent the same alleged egregious behaviour from being made concerning other employees.

5. The chance of success of the grievance

[12] Again, I will quote directly from the applicant's application:

> …
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> *The March 18, 2019 meeting, which should never have occurred, in which my Regional Director initiated a functional abilities assessment, thereby forcing me to comply, was an egregious abuse of authority, and was done without due diligence prior to the meeting. I was blindsided by the meeting and had no time to organize my thoughts, put things in perspective, or draw on all the information relevant to my employment case. That, combined with the fact that my Regional Director was in a position of authority over me, as was my Regional Manager who was also in attendance, and there was no union representative present, placed me in an extremely vulnerable position and at a disadvantage. Furthermore, I was forced to sign documents, one of which was an Employee Consent Form, which gave my Regional Director the authority to speak with my physician.*
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> …

[13] The applicant made no other argument under this heading.

B. For the respondent

[14] The respondent submits that the relevant collective agreement provides for a period of 25 days in which to present a grievance after the employee is notified of the action giving rise to the grievance. The applicant was notified on February 7, 2020, of her termination effective January 31, 2020, at close of business. The termination cause was the abandonment of her position.

[15] No grievance was filed. The applicant applied for an extension of time well over a year after the termination.

[16] The respondent also presented its arguments following the *Schenkman* criteria, and I will summarize them with the same headings.

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

[17] According to the respondent, the applicant has not provided clear, cogent, and compelling reasons for her lateness filing the grievance.

[18] The applicant was told in March 2019 she would have to undergo a fitness-to-work evaluation, and she was placed on leave without pay. Although she was declared fully fit to work without any functional limitations in July 2019, the applicant never returned to her position in St. John's, Newfoundland. Between July 2019 and January 2020, the respondent requested numerous times that she choose between four options: return to work in her position in St. John's, take leave, resign, or retire. According to the respondent, she never responded to these options; rather, she insisted that she wanted to telework from Ottawa, Ontario. The respondent did not consider that a viable option. Her bargaining agent intervened at one point to request that the respondent provide the applicant with more time to consider her options, which was granted. Finally, when she did not return to work or respond to the options presented to her, she was terminated for abandoning her position.

[19] According to the respondent, the letter of termination stated the applicant's right to grieve. It also submits that her bargaining agent was aware of her situation, since its representative had negotiated with the employer a further 30 days (in December 2020) for the applicant to consider her options.

[20] The respondent submits that the applicant has presented no cogent, clear, or compelling reasons for the delay, given that she was made aware of her right to grieve as of the termination and given that her bargaining agent was aware of her situation.

2. The length of the delay

[21] The respondent notes that a considerable period, over a year, elapsed before the applicant applied to the Board for an extension of time. It quotes from *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, to the effect that short time limits are consistent with the principle that labour relations disputes should be resolved in a timely manner and that parties should be able to expect that issues have come to an end when prescribed times expire.

3. The due diligence of the grievor

[22] The respondent simply states that the applicant should have grieved within the time limits.

4. Balancing the injustice to the employee against the prejudice to the employer

[23] Given the absence of clear and cogent reasons to explain the delay, this factor, according to the respondent, has less weight. That said, the respondent is entitled to some certainty in its labour relations. In *Sturdy v. Deputy Head (Department of National Defence)*, 2007 PSLRB 45, the adjudicator found a strong presumption of prejudice to the employer in that case, in which the delay was two years.

5. The chance of success of the grievance

[24] The respondent is of the view that the grievance's chance of succeeding would be low. It believes that it acted reasonably and in good faith by giving the applicant many opportunities to continue in her position. She was duly warned that if she failed to comply, the result would be her termination for abandoning her position.

C. The applicant's reply

[25] A large part of the applicant's reply does not address the extension of time as such but rather the work situation and presumably the substance of her grievance.

[26] In her reply, the applicant mentions an email received from the bargaining agent on January 24, 2020 (before her termination), which concerns filing a grievance against a termination. The bargaining agent indicates, "The member will provide factual evidence supporting wrongful termination." She understood this to mean that she had to have all her evidence organized and ready before she could file a grievance.

IV. Analysis

[27] As noted in *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39, the *Schenkman* criteria are useful as signposts, but not all the criteria necessarily have equal weight when deciding whether the Board should exercise its discretion and grant an extension of time, in this case to present a grievance.

[28] I believe that the first criterion, whether there are clear, cogent, and compelling reasons to explain the delay, is an important starting point. Absent such reasons, it is

difficult to see how an extension of time, an exception to the rule set in the collective agreement, could be considered fair. In this case, I find that the applicant has not established clear, cogent, and compelling reasons to explain the delay filing a grievance.

[29] The only reason the applicant offers is that it took her two years to organize all the necessary material to support her grievance. At several points in her submissions, she refers to the fact that she had to organize the material to decide her way forward with her employment case.

[30] Although I sympathize with the applicant, the reason she gives for the delay simply does not explain why she did not file a grievance in time. She did not contest that the letter of termination outlined her recourse as being a grievance. She had been in touch with the bargaining agent concerning the grievance process. She does not offer any reason that she did not check the time limitations that applied to filing a grievance; nor does she explain why she did not immediately inform her bargaining agent of her termination.

[31] The time elapsed is considerable but would not be insurmountable. However, it is considerable enough that it affects another factor; that is, balancing the injustice to the employee against the prejudice to the respondent. Obviously, being deprived of the recourse to grieve a termination of employment is serious. However, given the absence of any indication that the applicant intended to file a grievance, despite being in contact with the respondent for different reasons, I consider that the balance goes to the respondent's right to rely on the absence of action as a sign of closure. Labour relations need stability and must be premised on certain expectations as to the other party's actions. The respondent acknowledges the employee's right to file a grievance. If no grievance is filed, the respondent is entitled to believe the case is closed.

[32] Despite the applicant's work putting together the documentation for her file, I do find a lack of diligence in her not determining from the start what was necessary for the grievance to proceed, including the time limitation. Again, the applicant did not dispute that the recourse was indicated in the letter of termination, and she had been in touch with the bargaining agent. Some action should have been taken to preserve the right to file a grievance.

[33] The last criterion, the chance of success of the grievance, is of little weight in evaluating the extension request in this case. This final point may be relevant where there is debate about the basis of a grievance, for example if it is frivolous or vexatious, which is not the case here.

[34] I find that the following passage in *Martin* reflects my reasoning in this case:

> …
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> ***70*** *As stated* supra *the* Schenkman *criteria are not necessarily of equal importance, not all of the criteria are relevant and weighting is situational, depending on the facts in the case at hand. In this case I have found that the applicant has not established clear, cogent and compelling reasons for the delay nor has the applicant established that she exercised due diligence in pursuing her grievance. Even though I have not found actual prejudice to the employer if an extension were to be granted, in the circumstances of this case the failure of the applicant to establish clear, cogent and compelling reasons for the delay nor due diligence in the pursuit of the grievance, on balance in the interests of fairness to both parties I am not inclined to grant the extension.*
>
> …

[35] Similarly, in weighing the *Schenkman* criteria in this case, I find that it is not in the interest of fairness to grant an extension. Namely, the applicant did not present a clear, cogent and compelling reason for the considerable delay in bringing the grievance forward and lacked diligence in this regard.

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

(The Order appears on the next page)

V. Order

[37] The application is dismissed.

December 15, 2021.

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