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XR: 566-02-41345 and 41346

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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

DAVID LESSARD-GAUVIN

Applicant

and

TREASURY BOARD
(Canada School of Public Service)

and

DEPUTY HEAD
(Canada School of Public Service)

Respondents

Indexed as
Lessard-Gauvin v. Treasury Board (Canada School of Public Service)

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: Christine Dutka, Public Service Alliance of Canada

For the Respondents: Daniel Trépanier, Treasury Board Secretariat

Decided on the basis of the parties' written submissions, filed March 7 and April 7, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] The applicant, David Lessard-Gauvin, held a term position as an administrative assistant at the CR-04 group and level with the Canada School of Public Service ("the employer" or "the respondent") at its Québec offices. He was part of a bargaining unit with its members represented by the Public Service Alliance of Canada ("the Alliance").

[2] The employer's unionized employees are represented by the Alliance as the bargaining agent and are represented in the workplace by the Agriculture Union ("the union"), one the Alliance's components. The union represents the employer's unionized employees in the internal grievance process, and the Alliance represents them when a grievance is referred to adjudication.

[3] This application for an extension of time followed the employer's objection to the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board") to hear the grievance because it was filed well after the 25-day period set out in the collective agreement for the Program and Administrative Services group (expiry date June 20, 2021; "the collective agreement"). The applicant acknowledged that the grievance was filed after the time set out in the collective agreement.

II. Summary of the facts submitted by the parties

[4] The applicant submitted his version of the facts first, which the respondent did not dispute. Unless otherwise stated, the parties agree on the facts of this application for an extension of time, as summarized in this section.

[5] The applicant received a letter from the employer on September 5, 2018, informing him that his term appointment would not be renewed and would end when the office closed on October 5, 2018. On September 21, 2018, he emailed a grievance challenging his termination, which he had signed, to Sylvie Rochon, a union employee. She printed the documents without reading all the contents of the email chain. So, she did not notice that the employer had not signed the grievance; thus, it had not been filed with the employer. While the applicant believed that Ms. Rochon would file the grievance on his behalf, she believed that he had already done it as normally, grievances are filed with local management. However, the Alliance submitted that its local representative was not familiar with the procedures to follow.

[6] Between September 2018 and January 2019, Ms. Rochon spoke with the applicant several times, without realizing that the grievance had still not been filed. Then, on January 9, 2019, in a communication with the employer, the applicant learned from it that it had never received his grievance, which, in fact, had never been filed. He then informed Ms. Rochon.

[7] On January 9 or 10, 2019, Ms. Rochon contacted one of the employer's labour relations officers to explain things. She also filed the applicant's grievance. She took responsibility for the filing delay and asked the employer to accept the grievance without raising the delay issue. On January 11, 2019, the applicant also wrote to one of the employer's labour relations advisors, to request an extension of the time to file his grievance.

[8] Ms. Rochon represented the applicant at the first-level hearing of his grievance in the internal grievance process held on April 18, 2019. On May 8, 2019, the employer denied the grievance at the first level because it had been filed after the deadline set out in the collective agreement. It also denied the grievance on its merits. For the same reasons, it also denied the grievance at the final level of the internal grievance process on November 8, 2019.

[9] The Alliance referred the applicant's grievance to adjudication on December 17, 2019, using the Board's Forms 20 and 21, on one hand to challenge a violation of the collective agreement's no-discrimination clause, and on the other hand to challenge the termination of the applicant's employment (Board files 566-02-41345 and 41346). The applicant claimed that the termination of his employment was discrimination based on his disability. The employer objected to the referrals on July 22, 2020, because the grievance had been filed beyond the deadline set out in the collective agreement. After that objection, the Alliance applied for an extension of time with the Board on August 4, 2020.

[10] I also note that at the same time, the applicant made three complaints with the Board against the Alliance for breaching its duty of fair representation. One was allowed, and the other two were dismissed (see *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLREB 4). At that time, the Board found that the Alliance, specifically the union, had handled the applicant's grievance negligently.

III. Summary of the arguments

A. For the applicant

[11] The applicant signed his grievance shortly after receiving the letter stating that his term employment would not be renewed. He should not suffer the consequences of the union's negligence. He was diligent, and the delay filing the grievance was caused solely by the union's error.

[12] The applicant noted the criteria established in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, for deciding applications for extensions of time. However, they are not of equal importance. The facts of each application determine how they are applied and the probative value placed on them.

[13] In this case, the delay is justified by clear, cogent, and compelling reasons. The applicant did not commit any error or omission with respect to the deadline for filing his grievance not being complied with. The error is attributable solely to the union. He sincerely believed that the union had filed his grievance with the employer within the required time.

[14] The Board should give significant weight to the applicant's diligence challenging his termination and the application of his collective agreement. Additionally, in past decisions, the Board has already established that the applicant's due diligence can be enough in itself to grant an extension of time.

[15] Approximately four months passed from when the applicant was first informed that his term employment would not be renewed to the grievance being filed late. In many cases, the Board or the Public Service Labour Relations Board ("the former Board") granted extensions of time for much longer delays based on the weight given to other factors.

[16] The applicant maintained that not granting an extension of time would cause him significant prejudice as he would lose his only recourse to challenge the termination of his employment. Alternatively, granting the extension of time would cause very little prejudice to the employer. The four-month delay would not affect its ability to fully present its case at adjudication.

[17] The applicant's opinion is that the grievance's chances of success should be considered only if the grievance is frivolous or vexatious or if the issue of true jurisdiction is extremely clear. This grievance does not fall into those categories. He believes that he has an arguable case that cannot be qualified as frivolous or vexatious.

[18] Based on all this, the application for an extension of time should be allowed, and the grievance should be heard on its merits.

[19] The applicant referred me to the following decisions: *Schenkman*; *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79; *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144; *Riche v. Deputy Head (Department of National Defence)*, 2010 PSLRB 107; *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101; *Trenholm v. Staff of the Non-Public Funds*, 2005 PSLRB 65; *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81; *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8; *Prior v. Canada Revenue Agency*, 2014 PSLRB 96; and *Richard v. Canada Revenue Agency*, 2005 PSLRB 180.

B. For the respondent

[20] Based on the facts in the file and the criteria set out in *Schenkman*, the respondent submitted that the application for an extension of time should not be allowed, for the following reasons.

[21] In its past decisions, the Board has recognized that the importance placed on each of the five *Schenkman* criteria is not necessarily the same. If the first factor requiring justification on clear, cogent, and compelling reasons is absent, the other four factors to consider when determining the relevance of granting an extension of time are irrelevant, which results in the application being dismissed.

[22] In *Lessard-Gauvin* (2022 FPSLREB 4), involving the applicant, the Board found that the bargaining agent acted arbitrarily by filing the applicant's grievance after the prescribed time. However, a bargaining agent's administrative errors do not necessarily constitute clear, cogent, and compelling reasons to explain a delay filing a grievance within the allotted time.

[23] The respondent indicated that it did not wish to submit an argument about the length of the delay due to the relatively elevated weights of the other factors involved

in this application. Moreover, the respondent did not dispute the applicant's diligence. However, it noted that without a clear, cogent, and compelling reason, the applicant's degree of diligence is irrelevant.

[24] According to the applicant, not granting an extension of time would cause him significant prejudice, as he would lose his only recourse to challenge the termination of his employment. The respondent submitted that he tried to shift responsibility to it for the union's failure and the prejudice that it caused him. He also exercised recourse against his bargaining agent, and the respondent could not be responsible for remedying the hypothetical prejudice that he suffered.

[25] The respondent objected to the Board's jurisdiction to hear the grievance based not only on the filing delay but also because the grievance cannot be referred to adjudication because it is not related to discipline but rather a term employment ending. Thus, the applicant would suffer no prejudice because, regardless, the Board has no jurisdiction to hear his grievance. In that sense, the grievance has no chance of success.

[26] In conclusion, the respondent's opinion is that it would be inappropriate to grant an extension of time under s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"). Its opinion is also that the applicant's grievance must be dismissed because he was not subjected to discipline, particularly as he did not raise that ground when his grievance was filed.

[27] The respondent referred me to the following decisions: *Schenkman*; *Savard*; *International Brotherhood of Electrical Workers, Local 2228*; *Martin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 62; *St-Laurent v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 4; *Edwards v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 126; and *Sonmor v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 20.

IV. Analysis and reasons

[28] This application was made under s. 61(b) of 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.*

[29] This application is for an extension of the 25-day period set out in the collective agreement for filing a grievance. On September 5, 2018, the applicant was informed that his term employment was not being renewed. Thus, he had to file his grievance no later than October 10, 2018. However, although he submitted his grievance to the union on September 29, 2018, the union did not file it with the employer until four months later, on January 9, 2019. Therefore, this application's objective is to extend by 4 months the deadline for filing the grievance.

[30] Therefore, the grievance was filed late to due an error by the union. Indeed, on September 21, 2018, Ms. Rochon should have noted that the applicant's grievance had not been filed with the employer's local representative. The union acknowledged its error and accepted responsibility for it, in that Ms. Rochon contacted the employer and explained the situation as soon as she noticed the error. She then filed the applicant's grievance and asked the employer to accept it without raising the deadline issue. The applicant also formally asked the employer to extend the filing deadline. It refused and denied the grievance based on the filing deadline not being respected and on the merits.

[31] The parties rightly noted that usually, the Board uses the criteria developed in *Schenkman* to analyze applications for extensions of time. The criteria are as follows: clear, cogent, and compelling reasons for the delay; the length of the delay; the applicant's due diligence; balancing the injustice to the applicant against the prejudice to the employer by granting the extension; and the grievance's chances of success.

[32] Although the criteria are assessed as a whole, they are not necessarily equally important. The submitted facts must be examined to determine the weight to give each criterion. Sometimes, some of the criteria do not apply, or only one or two weigh in the balance. On this point, the respondent referred me to *St-Laurent* and *Sonmor*.

[33] First in the analysis is the reason the applicant did not file his grievance within the 25 days set out in the collective agreement. It is very simple. He believed that Ms. Rochon had filed it on or about September 21, 2018, after he sent her a signed and dated version of it. She did not examine the documents and failed to notice that the grievance had not been filed with the employer. She realized it only on January 9, 2019, when he informed her of it based on information received from the employer. The reason for the delay is clear and cogent but does not convince me that the application for an extension of time should necessarily be granted. Indeed, the applicant expected the union to file the grievance within the time set out in the collective agreement, and it was reasonable of him to expect that. Thus, I must assess all the circumstances before me to determine the weight to be given in this case to each of the five *Schenkman* criteria as I am responsible for assessing everything in the interest of fairness under s. 61(b) of the *Regulations*. With that in mind, I will review the jurisprudence that the parties submitted.

[34] The applicant and Ms. Rochon showed diligence when on January 9, 2019, four months after the 25-day period set out in the collective agreement expired, they realized that the union had failed to file the applicant's grievance. As soon as he learned from the employer that his grievance had not been filed, he informed Ms. Rochon. She then filed it with the employer and asked it to accept it despite it being out of time. The applicant also formally asked the employer to extend the filing time. He and Ms. Rochon took those steps on the same day or on the day after he learned from the employer that his grievance had not been filed.

[35] Next is examining the decisions that the parties referred me to.

[36] In *Trenholm*, the grievance was referred to adjudication five months after the applicable period expired, due to an error by Mr. Trenholm's bargaining agent. The former Board granted an extension of time based on the fact that Mr. Trenholm should not have been deprived of the opportunity to file his termination grievance with a neutral and impartial adjudicator due to his bargaining agent's errors.

[37] In *Gill*, the former Board's chairperson granted an extension of time to file a grievance, given the negligence of Mr. Gill's bargaining agent to file it within the time limit set out in the applicable collective agreement. Mr. Gill sincerely believed that his grievance had been filed within that time.

[38] In *Prior*, the grievance was referred to adjudication seven months after the required period expired. The former Board's chairperson granted an extension of time. The delay was due to obvious negligence by Ms. Prior's bargaining agent. She had shown due diligence, and there was no compelling evidence that her employer would suffer prejudice.

[39] In *Savard*, Mr. Savard demonstrated that the delay sending his grievance to the second and third levels of the grievance process was attributable to his bargaining agent. Its error arose from the fact that Mr. Savard's grievance seemed related to the resolution of a group grievance involving over 1000 grievances. So, it was understandable that the grievance might be overlooked. And at that time, the former Board's chairperson found that Mr. Savard had shown diligence by following up on his grievance. The former Board's chairperson found also that there were clear, cogent, and compelling reasons to justify the application for an extension and to explain the delay.

[40] In *Edwards*, Ms. Edwards had shown due diligence, and her bargaining agent was solely responsible for the delay. However, the Board dismissed the application for an extension of time because the bargaining agent's administrative errors did not necessarily constitute clear, cogent, and compelling reasons for allowing it.

[41] In *Martin*, the Board noted that the existence of s. 61 of the *Regulations* does not relieve a bargaining agent of its obligations to the employees in the bargaining unit that it represents. Indeed, employees are not without recourse against their bargaining agents' errors or omissions if the Board dismisses an application for an extension of time. They can make a complaint under s. 190 of the *Act*.

[42] In *Rabah*, Mr. Rabah applied for an extension of time to file a grievance against his rejection on probation 17 months after being dismissed. The former Board's chairperson allowed his application because Mr. Rabah had no idea that he was unionized in his job, even less that he could challenge his rejection. He had immigrated to Canada about 15 years earlier. He had held several paid and unpaid jobs but had never been unionized.

[43] In *D'Alessandro*, Mr. D'Alessandro explained that several times, he had asked his bargaining agent to file a grievance to challenge his layoff. His bargaining agent failed to. He then made a complaint with the Board about his bargaining agent's breach of

the duty of fair representation. Only after he made that complaint did his bargaining agent file grievances on his behalf.

[44] In *International Brotherhood of Electrical Workers, Local 2228*, a bargaining agent had filed a group grievance on behalf of certain employees in the bargaining unit it represented about a compensation dispute. It failed to refer the grievance to adjudication within the prescribed time. When it realized as much several months after the deadline had expired, it made an application for an extension of time, which the former Board's chairperson allowed. The grievors in question believed that the grievance had been referred to adjudication. They could not do it themselves due to its nature.

[45] The facts of this application are hard to compare to those in *Riche*, *Rabah*, or *Richard*, which the applicant referred me to and that allowed extension applications. Thus, I will not return to those decisions.

[46] Clearly, the applicant could not file his grievance within the required time, due to the union's negligence. On its own, this error would not justify the Board allowing the application for an extension. But in the past, the Board and its predecessors have sometimes allowed extensions due to delays caused by a bargaining agent's error or negligence but have sometimes also refused such extensions. The reason for the delay, in this case the union's error, is obviously not the only factor I must consider when determining whether I must grant an extension.

[47] The applicant showed diligence when he realized that his grievance had not been filed within the allotted time. He also took action on the same day he learned of it. Then, the next day, his grievance was filed at the first level of the internal grievance process. He also asked the respondent to process the grievance even though it was out of time.

[48] The delay filing the grievance was four months. In the decisions submitted to me, the Board and its predecessors allowed applications for extensions of time after much longer delays.

[49] It goes without saying that the injustice that the applicant would suffer were I to dismiss his extension application would be decisive under the circumstances as it would result in him losing his ability to act with respect to referring his grievance to

adjudication (see ss. 209(1) and 241 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). And his extension application is related to a grievance challenging a termination of employment, with an allegation of discrimination in contravention of the collective agreement. It is not a trivial matter. Certainly, the employer could argue that it was not a termination but rather term employment not being renewed. Clearly, those issues cannot be decided in this decision. While on one hand, the applicant would suffer a serious injustice were I to dismiss his application, on the other hand, the prejudice that the employer would suffer were I to allow it would simply be to have to defend its decision at adjudication. Given its resources, this is not a serious prejudice for the employer. Therefore, I find that the effect of dismissing the applicant's requested extension would be disproportionate in the circumstances of this case.

[50] The grievance's chances of success cannot be estimated as I have not heard the grievance on its merits. However, accepting the applicant's allegations as true for the purpose of this analysis, I cannot find that there is no arguable case that the termination of his employment was unjustified or was discriminatory, based on his disability. On its face, this grievance is not frivolous. It is related to discrimination and to a term position not being renewed. I do not share the respondent's position on the Board's alleged lack of jurisdiction. This issue must be decided later as needed.

[51] Therefore, in the interest of fairness, I allow the extension application. In this case, and in light of everything before this, it would be unfair for the applicant to suffer the consequences of his bargaining agent's negligence. The extension of time is less prejudicial to the employer in this case than the injustice that the applicant would otherwise suffer. This way, at adjudication, he will be able to challenge the employer's decision to terminate his employment and the employer will be able to defend its position. Of the decisions that the parties submitted, the facts behind this application are comparable in many respects to those in *Trenholm*, *Gill*, and *Prior*. In each of those cases, the Board or its predecessors allowed the applications for extensions of time.

[52] In its written arguments, the respondent raised a new objection to the Board's jurisdiction to hear the applicant's grievance. It will be added to the file, and the Board will decide it at adjudication, of which the parties have already been informed.

(The Order appears on the next page)

V. Order

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

[54] The Board will place files 566-02-41345 and 41346 on the hearing roll as soon as possible.

May 19, 2022.

FPSLREB Translation

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