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Citation: 2022 FPSLREB 42

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

YVON BARBE AND ÉTIENNE LACHAINE

Applicants

and

TREASURY BOARD (CORRECTIONAL SERVICE OF CANADA)

Respondent

Indexed as
Barbe v. Treasury Board (Correctional Service of Canada)

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

For the Applicants: Charlie Arsenault-Jacques, union advisor

For the Respondent: Lyne Poulin, analyst, Treasury Board Secretariat

Decided on the basis of written submissions filed January 12 and March 15, 24, and 25, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] On November 11, 2021, the applicants, Yvon Barbe and Étienne Lachaine, each referred a grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board") about their right to be paid their salaries during injury-on-duty leave. The applicants are represented by a bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agent correctionnels du Canada - CSN ("the bargaining agent"), which is the signatory of a collective agreement with the employer, the Treasury Board. The applicants are correctional officers with the Correctional Service of Canada, which, for the purposes of this decision, is designated as the respondent as the Treasury Board has delegated its human resources management authorities to it.

[2] On December 6, 2021, the respondent objected to the grievances' referrals to adjudication based on timeliness. According to the respondent, the grievances should have been referred to adjudication no later than March 2, 2020, meaning that they arrived before the Board over 20 months late. So, the respondent asked that they be denied because they do not comply with the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[3] On January 12, 2022, the bargaining agent replied to the respondent's objection. It conceded that there was a delay referring the grievances to adjudication but provided explanations. It also asked the Board to grant an extension of time under s. 61(b) of the *Regulations*.

[4] This decision concerns the application for an extension of time. If the Board allows it, the grievances will proceed before the Board at a later time.

II. The respondent's objection

[5] The respondent cited ss. 90(2) and 95(1)(b) of the *Regulations* to support its request to summarily dismiss the grievances as late. Those provisions read as follows:

> ***90(2)*** *If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another*

> *period set out in a collective agreement, under the collective agreement.*
>
> …
>
> ***95(1)*** *A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication:*
>
> …
>
> ***(b)*** *raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.*

[6] The applicants filed their individual grievances at the final level of the grievance process on December 4, 2019. The collective agreement provides for a period of 30 business days for the employer to respond. Thus, the response was due on January 20, 2020. No response had been issued as of the referral to adjudication.

[7] Pursuant to s. 90(2) of the *Regulations*, with no final-level response, the grievances had to be referred to adjudication by no later than March 2, 2020. However, they were referred only on November 11, 2021, which was more than 20 months late.

[8] That delay is significant and is not justified by clear, cogent, and compelling reasons. In this respect, the employer cited *Grekou v. Treasury Board (Department of National Defence)*, 2020 FPSLREB 94 (judicial review application dismissed in *Grekou v. Canada (Procureur général)*, 2021 CAF 220).

III. Application for an extension of time

A. For the applicants

[9] The bargaining agent replied to the respondent's objection by providing explanations and by making an application for an extension of time. I have reproduced the explanation for the delay, as follows:

> [Translation]
>
> *From December 2019 to December 2020, the president of the local, Ms. Lucie Godin, believed that the local grievance officer, Mr. Jérémy Deschamps, properly sent these two grievances with the Form 20s to Ms. Constance Godin, an administrative assistant at the CSN's regional office, for referral to the Board. The grievors believed the same thing. Mr. Jérémy Deschamps had minimal grievance representation experience and was not familiar with the procedure. During that period, he never asked about the next steps for the grievances.*

In December 2020, Mr. Stéphane Dicaire, Regional Vice-President, and the former president of the La Macaza local until May 2019, asked the local grievance officer, Mr. Jérémy Deschamps, about the two grievances' status. On December 15, 2020, Mr. Deschamps replied that the grievances were at the third level and asked about the next step in the procedure. Mr. Dicaire informed him of the procedure and sent him the Form 20 that the two grievors had to complete and that Mr. Deschamps then had to send with the rest of the file to Ms. Constance Godin, who would send everything to the Board. Mr. Deschamps said that he did not know that that was the procedure (Tab 3).

On December 27, 2020, Mr. Deschamps emailed Ms. Constance just two Form 21s, one for Mr. Barbe, and the other for Mr. Lachaine, and an Excel file containing the list and status of **all** *the local's grievances (Tab 4). On January 6, 2021, Ms. Constance Godin told Mr. Deschamps that documents were missing (Tab 5).*

On January 11, 2021, Ms. Lucie Godin sent documents related to **other** *grievances by the same grievors (Tab 6). The grievances in question in that email were referred to the Board in 2011(!) and 2017.*

On January 14, 2021, Ms. Lucie Godin sent other documents to Ms. Constance Godin related to the two grievances before us (Tab 7). However, some documents were still missing for the referral to adjudication, including the Form 20s and the forms for the referral to the third level.

In October 2021, Mr. Dicaire inquired with the undersigned about the two grievances' status. After checking into it, I confirmed with Mr. Dicaire that the grievances had still not been referred to adjudication and that documents were still missing.

On October 14, 2021, Mr. Dicaire asked Mr. Deschamps if he had sent the Form 20s, as requested in December 2020, to refer the grievances to adjudication (Tab 8). In response to that question, Mr. Deschamps forwarded to Mr. Dicaire the December 27, 2020, email (containing the wrong forms) and the January 11, 2021, email related to other grievances (Tab 9). It is clear that until mid-October 2021, Mr. Deschamps had no idea that the grievances bearing the internal numbers #63527 for Mr. Barbe (Board file 566-02-43767) and #63528 for Mr. Lachaine (Board file 566-02-43766) had to be referred to adjudication in December 2020. According to the correspondence, he also did not seem to understand that grievances #63527 and #63528 had never been referred to adjudication.

In October 2021, Lucie Godin forwarded the Form 20s and the third-level responses for the two grievances to Ms. Constance Godin, and everything was sent to the Board on November 11, 2021.

[Emphasis in the original]

[10] After making that explanation, the bargaining agent applied for an extension of time, insisting that the Board should act, based on the wording of s. 61(b) of the *Regulations* (under which the application was filed), "in the interest of fairness". The bargaining agent cited the criteria set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which the Board applies consistently when deciding such applications.

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

[11] The bargaining agent admitted at the outset that its processing of these files was characterized by complete confusion. It must be noted that the applicants always believed that their grievances had been referred to adjudication and that they trusted the bargaining agent. It would be unfair to punish them for its error.

2. The length of the delay

[12] The bargaining agent conceded that the delay is 20 months, but there is an explanation for it. For 13 months, the local and the applicants believed in good faith that the grievances had been referred to adjudication. After a follow-up was done, confusion continued as to the exact grievances. The bargaining agent is entirely to blame.

[13] In addition, the significance of the length of the delay lies in the potential harm to the employer from a grievance that arises without warning. However, a delay referring to adjudication is not the same as a delay filing a grievance. In this case, the employer was aware of the grievances and was not taken by surprise.

3. The applicants' diligence

[14] The applicants always collaborated with the bargaining agent and sincerely believed that their grievances were moving forward. In this respect, the bargaining agent cited *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79, which I will return to in my analysis.

4. The balance between the injustice caused to the applicants if the application is dismissed and the prejudice suffered by the employer if the application is allowed

[15] Refusing the extension would mean the end of the applicants' recourse. In addition, the bargaining agent stated that there are about 30 similar grievances before

the Board. Thus, not only was the respondent already aware of the grievances, but also, it is likely that a few representative grievances will serve to decide all the grievances. As a result, the respondent would suffer no prejudice from these two grievances being referred.

5. The chances of success of the grievances

[16] As the Board has not heard the evidence, it is impossible to predict the chances of success of the grievances. Instead, this criterion would be used to dismiss an application if, on their face, the grievances had no chance of success. But that is not so.

B. For the respondent

[17] The respondent replied to the applicants' arguments as follows.

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

[18] According to the respondent, confusion is not an excuse for an experienced bargaining agent, and a bargaining agent's error that leads to an excessive delay can cause a grievor to lose his or her recourse before the Board. In that respect, it cited the following decisions: *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33; *Martin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 62; and *Edwards v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 126, which I will return to in my analysis.

2. The length of the delay

[19] The length of the delay is considerable. The employer is entitled to expect a file to be closed when it is not referred to adjudication within the required time limits.

3. The applicants' diligence

[20] There is no indication of the applicants' due diligence. Although it was up to the bargaining agent to act, the applicants continued to bear some responsibility for their grievances. In that respect, the respondent cited *Martin*, in which the Board allegedly placed some of the responsibility for the delay on the grievor. I will return to it in my analysis.

4. The balance between the injustice caused to the applicants if the application is dismissed and the prejudice suffered by the employer if the application is allowed

[21] The applicants are not without recourse. They can make a complaint against their bargaining agent for its lack of representation.

[22] As for the argument that the employer is already facing similar grievances, which will likely be joined, it is not an excuse for not complying with the *Regulations*.

5. The chances of success of the grievances

[23] The respondent argued that without clear, cogent, and compelling reasons, the other tests become less relevant.

IV. Analysis

[24] *Schenkman* is very useful when deciding an application for an extension of time as a reminder that two points of view must be considered —the grievor's and the employer's. However, the starting point must be the regulatory text that gives the Board the power to extend a time limit; namely, the text of 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.*

[25] I point this out because it seems essential to me to first be concerned with fairness. Sometimes, a party may display so little diligence or provide such a confusing or illogical explanation that the Board cannot in good conscience grant an extension of time. Deadlines exist for a good reason, which is to ensure the most efficient process possible. Therefore, a good reason is necessary to waive them. However, in some cases, while there may be some doubt as to the clarity of the explanations or the parties' diligence, the concern for fairness prevails.

[26] Both parties referred to the *Schenkman* criteria. Thus, I will begin my analysis by considering its five parts.

A. The *Schenkman* analysis

1. Clear, cogent, and compelling reasons

[27] The bargaining agent explained that these grievances were victims of complete confusion among those involved, including the first representative who handled them. They were indeed referred to the third level, but from then on, it seems that they were forgotten. The applicants believed that they were proceeding, the representative believed that he had to wait for the third-level response, and the local's president believed that the grievances were at the regional office, to be referred to the Board. When it became clear that the grievances had not been processed at the third level, the confusion continued, due to errors related to forms.

[28] The employer cited the text of the *Regulations*, which states that if there is no third-level response, a grievor has 40 days to refer a grievance to adjudication. However, the provision exists to protect a grievor's rights if the employer does not respond; otherwise, the employer could simply delay a referral to adjudication indefinitely.

[29] It is a bit paradoxical to use that provision against the applicants. As of today, the employer has still not responded to the grievances sent to the third level in December 2019 and now blames the delay on the applicants.

[30] It is hard to say that the confusion in this case is a clear, cogent, and compelling reason that explains the bargaining agent's actions. However, I note that the confusion is entirely attributable to it. The applicants could not refer their grievances on their own as the grievances are based on the collective agreement and therefore require the bargaining agent's support (see ss. 209(1)(a) and (2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2)). As for the applicants, the reasons are clear, cogent, and compelling— they trusted the grievance officer, who was waiting for the third-level response. They then waited for the bargaining agent to resolve the situation; they had no power to do it.

2. The applicants' diligence

[31] Clearly, the bargaining agent admitted from the start that the applicants' diligence is not the main reason; it is the bargaining agent's. The applicants filed their grievances within the required time. The delay occurred at the third level. The bargaining agent presented some excerpts from text messages that I did not consider as they are truly too unclear. However, once again, the applicants did what they should have done — they collaborated on the grievances and waited for further instructions from the bargaining agent, which was responsible for the referral to adjudication.

[32] *Martin*, cited by the respondent, unfortunately has a translation error at paragraph 35. In that case, the applicant, Ms. Martin, filed a grievance for a failure to accommodate her during her pregnancy. The grievance dated from 2014, and Ms. Martin returned from her maternity leave in 2015. The French version of paragraph 35 of that decision reads as follows:

> *[35] … Bien qu'il puisse être compréhensible qu'elle n'ait pas été en contact avec son agent négociateur pendant son congé de maternité,* ***elle ne s'est pas questionnée sur l'état de son grief jusqu'à son retour en 2015****. Il était raisonnable pour le défendeur de conclure que l'affaire n'était plus en litige au retour de la demanderesse au lieu de travail, alors que celle-ci n'a pas soulevé la question de son grief.*
>
> [Emphasis added]

[33] The English version (the original) of the paragraph reads as follows:

> *[35] … While it may be understandable that during her maternity leave, she was not in touch with her bargaining agent,* ***she did not question the status of the grievance upon her return in 2015****. It was reasonable for the respondent to conclude that the matter was no longer an issue when she returned to the workplace and did not raise her grievance.*
>
> [Emphasis added]

[34] In other words, and this was important in the Board's opinion, the grievance was not revived in 2015 but in 2020. Such a lapse of time becomes beyond unexplainable. Those are not the facts of which I am seized.

3. The length of the delay

[35] The length of the delay is quite significant but is not determinative.

4. Prejudice to either party

[36] In this respect, I feel that the balance is in favour of the applicants. Were they deprived of recourse, they could not claim the amounts to which they say they are entitled. The respondent said that they can make a complaint against their bargaining agent, but that recourse is not at all the same. And their salary claim is against the employer.

[37] The employer did not deny the assertion that it is also party to a number of other similar grievances. Therefore, the prejudice against it is not evident.

5. The chances of success of the grievances

[38] This final criterion could be used to not grant extensions of time for grievances that have no chance of success, in the interest of efficiency. That is not so in this case. It is impossible to predict the outcome of the grievances without evidence, but at first glance, they are not frivolous or absurd.

B. Conclusion

[39] Having reviewed the *Schenkman* criteria, which are not very conclusive in this case, my reasons follow for granting the extension of time, again in the interest of fairness.

[40] Not granting the extension of time would deprive the applicants of their recourse to have their grievances heard. I have not heard any of the evidence and therefore cannot determine the chances of success, but at the very least, the grievances are serious. The applicants claim that they were unfairly deprived of salary during injury-on-duty leave. The prejudice caused to them if their grievances are not heard is serious, and they are paying for an error that they did not make.

[41] The parties brought to my attention several Board decisions, which informed my thought process.

[42] In *Grekou*, Mr. Grekou was rejected on probation in January 2018. He expected his bargaining agent to file a grievance on his behalf, which was not done. However, as of March 2018, he knew that he could file the grievance himself but did nothing until December 2018. The Board did not grant an extension of time because there was no explanation for that delay.

[43] In Mr. Grekou's case, he could have filed his grievance himself. In the applicants' case, they filed their grievances within the required time and with the bargaining agent's support. They could not refer their grievances to adjudication on their own as they were related to the collective agreement; the bargaining agent had to do it. The applicants' responsibility was not the same as that of Mr. Grekou.

[44] In *Copp*, the applicant's termination grievance was referred to adjudication about 80 days late. The bargaining agent held up the file for administrative reasons. The Board found that granting an extension of time was not appropriate because the bargaining agent's administrative errors were not "clear, cogent and compelling reasons".

[45] In *Edwards*, the bargaining agent again made a mistake, which led to the grievance being referred to adjudication seven-and-a-half years late. The Board again found that the administrative errors could not constitute clear, cogent, and compelling reasons. The length of the delay was also an important factor as it caused serious prejudice to the employer.

[46] In *Martin*, the delay was six years. The explanation provided was even less clear than in this case. It seems that the grievance was simply forgotten. In this case, misunderstandings (waiting for a response and errors related to forms) at least explain the series of facts that contributed to the delay.

[47] In *D'Alessandro*, the Board found that the union's failure to file grievances on time was a clear, cogent, and compelling reason. The Board wrote the following at paragraph 29: "Fairness dictates that Mr. D'Alessandro should be able to pursue his grievances, despite his union's negligence."

[48] Clearly, the Board has two schools of thought — grievors can be held accountable for their bargaining agents' errors, or grievors must not be held accountable when they are adversely affected not only by their employers' actions but also by their bargaining agents' actions. The dichotomy is clearly explained in the following paragraphs from *Copp*:

…

> *[28] The applicant referred me to* Thompson [*Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59]. *Ms. Thompson grieved her termination of employment more than*

> *three months after the time to file a grievance had expired. She stated that the union had filed the grievance on time but that it had stayed on the desk of the respondent's representative for four months before being processed. The Chairperson did not believe the applicant on that point and found the grievance untimely. He granted the application for an extension of time on the basis that, even if the union were negligent, Ms. Thompson could not be faulted. He stated that the injustice to her of refusing the application outweighed any prejudice that the respondent might suffer for allowing the grievance to be heard. Finally, he stated that fairness dictated that the applicant not be penalized for the union's inaction of not filing the grievance on time.*
>
> *[29] I disagree with the decision in* Thompson. *That decision was written more than five years ago in a jurisprudential context that might not have been as clear as it is now. Since then, it has been decided often that a union's omissions, negligence or mistakes are not cogent and compelling reasons for extending time. In my opinion, as I stated in* Callegaro, *"… the applicant and her union cannot be considered as two separate entities…" In that context, the errors of the union are the errors of the applicant.*
>
> …

[49] I do not know what my decision would have been had the grievances been 6 years late, as in *Martin*, or 7.5, as in *Edwards*. The 20-month delay is significant but does not cause the employer undue prejudice.

[50] With respect, I disagree with the decision in *Copp*. I prefer the approach in *D'Alessandro*. If a grievor is not at fault, and if he or she diligently informed the union and helped file the grievance, I do not see how, in all fairness, he or she should then suffer the consequences of the bargaining agent's errors. I considered several factors: the elapsed time, which is not excessive as in *Martin* or *Edwards*; the fact that it is a referral to adjudication and not the filing of a grievance (therefore, the employer is informed); and the fact that the applicants could not have acted alone and thus were dependent on the bargaining agent's actions.

[51] I return now to my earlier comment that the applicants were waiting (and are still waiting) for the final-level response. It seems to me that a distinction should be made between a grievor who receives a final-level response but does not act (see *Popov v. Canadian Space Agency*, 2018 FPSLREB 49) and a grievor who is waiting for a final response. I am aware that the *Regulations* provide for making a referral within 40 days, but that still causes some unease when it comes to applying a provision against the applicants that is supposed to protect their interests. Under the circumstances, it

seems to me fair to waive the 40-day rule to grant the extension of time to refer the grievances to adjudication.

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

(The Order appears on the next page)

V. Order

[53] The application for an extension of time for referring grievances 566-02-43766 and 566-02-43767 to adjudication is allowed.

[54] The grievances will be placed on the Board's schedule at a later date.

May 25, 2022.

FPSLREB Translation

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