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Citation: 2022 FPSLREB 39

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

MICHAEL FRAGOMELE

Applicant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Fragomele v. Canada Revenue Agency

In the matter of an application for an extension of time pursuant to section 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Himself

For the Respondent: Nicholas Gualtieri, Noémie Fillion, and Alexandre Toso, counsel

Decided on the basis of written submissions, filed September 27 and November 2, 2020, January 7, February 10, March 1, and December 13, 2021, and January 18, 2022.

REASONS FOR DECISION

I. Application before the Board that

[1] Michael Fragomele ("the applicant" or "the grievor") is employed by the Canada Revenue Agency ("the respondent" or "the employer") as a senior audit examiner/officer SP-04 in Sudbury, Ontario.

[2] On or about August 26, 2020, he presented an individual grievance with the employer, alleging that his substantive position level was impeded through a selection process for SP-05 positions (i.e.: the employer interfered with his career progression). The selection process was held in November of 2016. He alleged that the employer arbitrarily changed the minimum educational requirements for the positions without informing the applicants, contrary to the corporate policy instrument entitled *Directive on Terms and Conditions of Employment*, at parts 2.1, 2.4, 5.3, 8, and Appendix A

[3] It should be noted that the grievor did not apply to the process as he did not possess the prerequisite educational requirements stipulated in the position poster.

[4] He alleged that the minimum educational requirements were changed and that potential candidates (such as him), who were excluded by that requirement, were excluded arbitrarily. Furthermore, all successful candidates were awarded SP-05 positions by the end of the selection process. He was aggrieved, as the SP-05 process was not completed in a fair, transparent, or consistent manner.

[5] As corrective action in his grievance, he is seeking an extension of time to present his grievance as well as full redress, including but not limited to retroactive compensation at the SP-05 level from the time the appointments were made from the selection process.

[6] He states in the grievance that the date on which he became aware of the acts or omissions giving rise to it was February 5, 2020.

[7] The employer declined to accept the grievance, based on timeliness.

[8] On September 28, 2020, he made an application with the Federal Public Sector Labour Relations and Employment Board ("the Board") for an extension of time to present his grievance. He submitted that the Board should consider the exceptional circumstances he was confronted with; namely, the employer did not make the

individual grievance procedure open and transparent for employees, the bargaining agent (the Public Service Alliance of Canada) refused to represent him, and the global pandemic required him to stay at home without access to the information required to present a grievance.

[9] Clause 18.11 of the collective agreement (between the employer and the bargaining agent for the Program Delivery and Administrative Services group, signed on October 25, 2016 ("the collective agreement")) specifies the time limits for filing a grievance as follows:

> ***18.11*** *An employee may present a grievance to the first (1st) level of the procedure in the manner prescribed in clause 18.06, not later than the twenty-fifth (25th) day after the date on which he or she are notified orally or in writing or on which they first become aware of the action or circumstances giving rise to the grievance.*

[10] Initially, on November 2, 2020, the employer objected to the Board's jurisdiction to hear the matter as the grievance was not properly before the Board. The employer argued that s. 209(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") provides that an employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process.

[11] As the grievor did not exhaust the grievance process, the matter was not properly before the Board. He received a response at the first level of the grievance process but failed to present his grievance up to and including the final level. Therefore, the grievance should be returned to the employer and addressed at the appropriate level of the grievance process.

[12] The employer stated that once the grievance process is completed, the grievor will be free to refer the grievance to adjudication.

[13] On January 7, 2020, the employer advised the Board that it maintained its position that the Board was without jurisdiction to hear the matter. The employer advised that it had issued a reply at the second level of the grievance process, which the grievor signed on November 30, 2020. Also, on November 30, 2020, management signed and accepted a third-level transmittal form.

[14] The employer reiterated its position that the grievance should be returned to it to be addressed at the appropriate level of the grievance process. When the process is completed, the grievor will be free to refer the matter to adjudication.

[15] The grievor responded to the employer's reply by claiming that it had confused this grievance with another.

[16] A conference call with the parties and the Board was held on January 19, 2021, to ascertain which grievance was before the Board and to discuss procedure.

[17] During the conference call, both parties agreed that the grievance described in paragraph 2 of this decision was the subject of the employer's reply.

[18] Both parties agreed that the grievance is not one that could be referred to adjudication on its merits as it is not related to the matters set out in s. 209(1) of the *Act*.

[19] At the conclusion of the conference call, the employer maintained its position that as the grievance is not one that may be referred to adjudication, it is not properly before the Board. Therefore, the Board is without jurisdiction to grant an extension of time to file it.

[20] After the call, I determined that the Board's jurisdiction to hear this grievance could be decided through written submissions. In this decision, I have summarized the facts pertinent to the employer's objections. I have not addressed the merits of the grievance. I have summarized the allegations only to provide context in which to consider the application.

[21] The parties were provided with a further opportunity to provide written submissions to the Board on the issue of its jurisdiction to extend time limits.

[22] On February 10, 2021, the employer provided its additional submissions. It argued that the grievance process consists of a maximum of four levels, that the grievance was heard and denied at the first and second levels on the basis that it was untimely, and that despite the timeliness issue, it would still have been denied on its merits. The employer advised the Board that the grievance is in abeyance, waiting to be heard at the third level.

[23] With respect to whether the Board has jurisdiction to grant an extension of time for filing a grievance in circumstances in which the grievance is not one that may be referred to adjudication under the *Act*, the employer acknowledged that the language in s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") could possibly be interpreted to permit the Board to extend timelines regardless of a matter's adjudicability. Nevertheless, the employer submitted that the Board should not extend the timelines in the circumstances of this case.

[24] In sum, the employer argued that the application for an extension of time is premature, the grievance is not adjudicable on the merits, the Board is not properly seized of the matter, the question of an extension of time is already covered by the collective agreement, and that in any event, it would have denied the grievance on its merits.

[25] On March 1, 2021, the grievor responded. He observed that the employer had conceded that s. 61 of the *Regulations* can be interpreted such that the Board may extend timelines regardless of a matter's adjudicability. He concluded that the employer did not provide evidence to support its argument that the Board does not have jurisdiction to make a ruling on this application for an extension of time and that it ought to ask the parties to submit arguments on the merits of the application.

[26] On December 13, 2021, the employer made submissions to the Board on the merits of whether the grievor's application for an extension of time to present a grievance should be granted.

[27] On January 18, 2022, the grievor filed submissions in reply in support of granting his application for an extension of time.

II. Issues to be determined

[28] These are the issues to be determined in this decision:

1) Is the application for an extension of time premature?
2) As the grievance is not adjudicable on the merits, is the Board properly seized of the application?
3) As the collective agreement has provisions that cover extending time limits, is the Board precluded from applying s. 61 of the *Regulations*, which empowers it, in the interests of fairness, to extend time limits?
4) As the employer would have denied the grievance on its merits, is the application for an extension of time fruitless?

5) Do the facts of the case justify extending the timelines, in accordance with s. 61 of the *Regulations*?

III. Summary of the evidence

[29] At the time of the events that gave rise to his grievance, the grievor was a compliance service officer in Sudbury with the employer. His position was classified SP-04.

[30] He was subject to the collective agreement.

[31] A staffing process for a senior office auditor/examiner office audit, Sudbury TC/TSO-English, position ran from November 7 to 18, 2016, during which time the employer's employees were able to submit applications.

[32] The grievor states that applicants who sought to apply for the position were required to meet educational requirements set out in Appendix A of the employer's corporate policy instrument entitled, "Procedures for Staffing" ("the staffing program").

[33] The staffing program document states that the acceptability of courses is determined by comparing employees' accounting courses to those considered transfer credits or prerequisites by a recognized professional accounting association.

[34] The grievor did not apply to the process as he did not possess the requisite educational requirements.

[35] Successful candidates were chosen from the selection process.

[36] The grievor states that in March 2019, he had a discussion with a colleague, who was one of the successful candidates in the staffing process, about the minimum educational requirements applicable to that process. His colleague advised him that the professional accounting association did not recognize courses that the colleague had taken at a local community college, and consequently, he did not meet the education requirements, but nevertheless, he was a successful candidate.

[37] The grievor approached the employer and inquired about the discrepancy between the corporate policy and the information that his colleague had provided to him.

[38] Subsequent to March 2019, he and the employer had informal discussions concerning the discrepancy. The grievor states that the informal discussions concluded on January 23, 2020, at which time the employer advised him that the successful applicants to the staffing process did meet the prerequisite educational requirements. He informed the management team that he was aggrieved and that he wished to seek a formal resolution.

[39] The employer acknowledged that informal discussions did take place. However, it has no record that the grievor invoked his recourse to the informal dispute resolution process under clause 18.01 of the collective agreement or s. 62 of the *Regulations*.

[40] Following the conclusion of the informal discussions on January 23, 2020, the grievor approached the bargaining agent, seeking representation and the filing of a formal grievance. On January 30, 2020, the bargaining agent advised him that it would not represent him.

[41] The grievor states that on February 8, 2020, the bargaining agent provided him with its final written response stating that it would not represent him. It advised him that as his issue did not relate to the application or interpretation of the collective agreement, he did not require bargaining-agent support to file a grievance. He acknowledged that the bargaining agent expressed concerns about the timeliness of a grievance.

[42] The grievor complained to the Board that the bargaining agent failed its duty of fair representation when it did not agree to represent him in filing a grievance against the employer. The Board dismissed his complaints in *Fragomele v. Public Service Alliance of Canada*, 2021 FPSLREB 117.

[43] The grievor states that on February 21, 2020, he retained legal counsel, who made a staffing complaint to the Board.

[44] On March 16, 2020, the employer informed all employees that they were not to report to work due to the COVID-19 pandemic, which resulted in the grievor staying home without access to his workstation and unable to work from home.

[45] On March 23, 2020, the Board advised him that the employer was not subject to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) and that it could not entertain his staffing complaint.

[46] On Monday, August 24, 2020, he returned to his office.

[47] On Wednesday, August 26, 2020, he presented his grievance.

IV. Summary of the arguments

A. For the grievor

[48] The grievor's submissions follow the criteria in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75.

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

[49] The grievor states that the bargaining agent and the employer both stated that the start date on which he could have presented a grievance was the time of the staffing process in 2016. He argues that this argument suggests that he ought to have known the information he learned from his discussion with his colleague in 2019 in 2016, even though he was not a part of the staffing board, was not privy to the screening process used by the employer, and did not know the courses that the other applicants submitted. Nor did he know which courses were accepted and which were not accepted.

[50] He submits that he engaged in an informal conflict management system with the employer, as contemplated in s. 62 of the *Regulations*, which suspended the time prescribed in the *Regulations* or the collective agreement for presenting a grievance until the employer rendered a decision on January 23, 2020.

[51] He argues that immediately after that, he stated to the employer that he was aggrieved. He asserts that he had 35 days to file a grievance from January 23, 2020, under the *Regulations*; however, the employer did not inform him of the applicable form to use to file a grievance, and the bargaining agent refused to represent him. He states that the 35th day was February 27, 2020.

[52] On March 16, 2020, he was advised not to return to work due to the pandemic.

[53] He notes that on March 20, 2020, the Board's chairperson directed that all regulatory time frames be suspended. That suspension was lifted on July 5, 2020.

[54] He returned to work on August 20, 2020. He presented his grievance to the employer on August 26, 2020.

2. The length of the delay

[55] He argues that the time that elapsed (after the 35 days expired) would be between February 27 and March 19, 2020, and July 5 to August 26, 2020, or a total of 73 days. However, considering his absence from work, the total time that elapsed from February 27 to March 16, 2020, and August 20, 2020, would be a total of only 24 days.

[56] He believes that his proposed timelines are the fairest, considering the exceptional circumstances he was confronted with.

3. The due diligence of the grievor

[57] In support of his contention that he exercised due diligence, the grievor argues that he attempted to follow every rule in the grievance process, including seeking an informal conflict resolution with management before filing a grievance, as well as with the employer's Human Resources department. He attempted to process a grievance through the bargaining agent, and when it opted not to represent him, he had to quickly inform himself of the rules and regulations and prepare and present all this information, all during the global pandemic.

4. Balancing the injustice to the employee against the prejudice to the employer in granting an extension

[58] The grievor argues that the prejudice to him outweighs any prejudice to the employer.

[59] The only prejudice to the employer is the acknowledgement that due to an oversight, ineligible applicants became successful candidates.

5. The chance of success of the grievance

[60] The grievance's chance of success rests on the objective evaluation of the applicants to the staffing process. The employer should provide the grievor and a third party the opportunity to review the courses that the applicants to the staffing process

submitted, which would meet the fair and transparent objective of validating the courses that the employer deemed met the necessary requirements.

B. For the employer

[61] Although the language in s. 61 of the *Regulations* can be interpreted such that the Board may extend timelines regardless of a matter's adjudicability, the Board should not extend the timelines in this case, for the following reasons.

1. Prematurity

[62] The application for an extension of time is premature. The grievance is in abeyance at the third level of the grievance process and has yet to be heard. As such, the grievor has not exhausted the grievance process, and the employer's decision is not final and binding.

[63] The grievance does not fall within the adjudicable matters set out under s. 209 of the *Act*. The central issue in the grievor's grievance is a staffing matter, which may not be referred to adjudication before the Board.

2. The grievance is outside the Board's jurisdiction

[64] The Board should rely on *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8, in which the former Board held that timelines ought not to be extended if the evidence clearly shows that an adjudicator has no jurisdiction and the grievance has no chance of success before an adjudicator. Unlike the facts in *Savard*, this case is certainly outside the Board's jurisdiction.

[65] The Board should also rely on *Boshra v. Canada (Attorney General)*, 2012 FC 681, which dealt with the former Public Service Staffing Tribunal dismissing a complaint because it had no jurisdiction over it and suggesting that there was no need to render a decision on the complainant's request for an extension of time to make the complaint.

[66] The Federal Court dismissed the judicial review application.

[67] As the Board is not properly seized of the matter, s. 61 of the *Regulations* should not be applied. In addition, since the grievance cannot be referred to adjudication as the Board lacks jurisdiction to address its merits, the implication in considering an extension of time at this stage is fruitless.

3. The collective agreement provisions should govern extensions of time

[68] Since the grievance is not adjudicable on its merits, the question of an extension of time at this stage should be dealt with by considering the collective agreement.

[69] Clause 18.03 of the collective agreement reads as follows: “The time limits stipulated in this Article may be extended by mutual agreement between the Employer and the employee and, where appropriate, the Alliance representative.”

[70] As the grievance is still at the third level and is not referrable to the Board, the employer submits that the collective agreement should dictate whether an extension of time is possible in these specific circumstances.

[71] Aside from the timeliness issue, the employer affirmed in its reply to the grievance that it would have denied the grievance independently, on its merits.

[72] In its reply to the grievance, the employer stated that it was satisfied that the staffing process was administered in a fair, consistent, and transparent manner. It confirmed that the minimum educational requirements remained unchanged during the period in which the poster was published. It also confirmed that no policy changes occurred from the posting being published until the appointments were made.

[73] Once the grievance has been decided at the final level, the grievor may apply for judicial review at the Federal Court, where the timeliness issue can be addressed. See *Adamidis v. Canada (Attorney General)*, 2019 FC 331 at para. 19.

4. The merits of whether an extension of time should be granted

[74] With respect to the merits of whether the extension of time to present the grievance should be granted, the employer submits that the grievance is clearly untimely as it was presented in August 2020, nearly four years after the staffing process being grieved had concluded. None of the factors that would normally justify granting an extension of time are present in this case.

[75] While s. 61(b) of the *Regulations* empowers the Board to grant an extension of time, it must assess the factors set out in *Schenkman*, which are reviewed in the next section.

5. There are no clear, cogent, and compelling reasons for the delay

[76] The Board has stated several times that as a general rule, time limits in collective agreements are meant to be respected by the parties and that they should be extended only in exceptional circumstances. The grievance was late by nearly four years. See *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at para. 77; *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92 at para. 46; and *Salain v. Canada Revenue Agency*, 2010 PSLRB 117 at para. 44.

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

[77] The grievor advanced no clear, cogent, or compelling reason for the lengthy delay. While he suggests that he learned about his alleged right to apply to the staffing process only during discussions with an unnamed colleague in 2019, it does not constitute a clear, cogent, and compelling reason. Even were it true, it is irrelevant that he learned in 2019 that he could have applied to the staffing process. New deadlines are not created as a matter of course by the fact that an employee learns about a past entitlement to a benefit. What is relevant is that the grievor did not apply to that staffing process and did not even inquire during it or after it closed as to whether he would qualify. See *Safire v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 97 at paras. 28 to 31.

[78] The fact that the grievor did not know that he could present a grievance sooner or that he engaged in informal discussions are not compelling reasons for the delay (see *Salain*). In particular, informal discussions do not justify the untimely filing of a grievance (see *Bowden*). The grievor should have presented one, if only to protect his rights.

[79] There is no evidence that the grievor participated in an informal conflict management system established under s. 207 of the *Act* in March 2019 pursuant to s. 62 of the *Regulations*. Even if that were the case, he was already over 2 1/2 years late to present his grievance at that time. Recourse to an informal conflict management system can suspend a deadline but does not reset or renew it.

[80] The grievor also alleges that the pandemic was a factor in the delay in presenting his grievance. However, the bulk of the delay occurred before the onset of

the COVID-19 pandemic. In fact, in March 2020, at its onset, the grievor was already 3 1/2 years late.

[81] The grievor also alleges that the grievance form was not readily available, despite the fact that admittedly, he was able to access it on his own. This cannot be a compelling reason for the delay, especially since the collective agreement does not require a grievance to be presented using any particular form (see clause 18.05).

[82] In the absence of a cogent and compelling reason for the delay presenting the grievance, there is no need to assess the other factors. However, none of them favours the grievor.

b. The length of the delay

[83] The length of the delay is significant.

[84] Pursuant to clause 18.11 of the collective agreement, the grievor had 25 days to present a grievance. That 25-day deadline applies, not the 35-day deadline in the *Regulations*, since the grievor is not in an excluded position.

[85] The delay in this case is not merely measured in days or weeks but in years. Extending the delay in these circumstances are contrary to the principal that labour relations disputes should be resolved in a timely manner.

[86] The Board has previously referred to a 6-month delay and an almost 10-month delay as significant. It also referred to a 13-month delay as a very long time. A delay measured in years, such as in this case, is excessively long and out of the ordinary in applications for extensions of time.

[87] It is relevant to note that in the decision dismissing the grievor's unfair-labour-practice complaint against the bargaining agent, the Board commented that it was reasonable for the bargaining agent to come to the view that this grievance "… would more than likely be dismissed on timeliness grounds alone."

c. The due diligence of the grievor

[88] The grievor did not exercise due diligence.

[89] The grievor never even applied to the staffing process that he grieved. He offered no evidence that he made any inquiries with the employer or the bargaining

agent at the time of the staffing process, after it closed, or when the appointees were selected. The Board has found a lack of due diligence when an employee does not make such inquiries.

[90] Even when he had a discussion with his colleague in March 2019, the grievor did not take any action to present a grievance for another 17 months, if only to protect his rights.

d. Balancing the injustice to the employee against the prejudice to the employer in granting an extension

[91] The prejudice to the employer outweighs any prejudice to the grievor.

[92] This case is unusual in that it involves limited, if any, prejudice to the grievor, as opposed to cases in which an employee was suspended or terminated. The grievor is still employed. Nothing has prevented him from applying to other staffing processes at the SP-05 level that have taken place since the one at issue.

[93] The significant delay in this case causes greater prejudice to the employer than dismissing the grievance would cause injustice to the grievor. The Board has previously found that a 15-month delay in and of itself causes significant prejudice to the employer.

[94] It would be unfair to submit the employer to a grievance process that it no longer expects.

e. The chance of success of the grievance

[95] This factor is inapplicable.

[96] The Board typically refrains from relying on this factor without having had an opportunity to hear evidence concerning a matter. An additional reason in this case is that the Board has no jurisdiction over the subject matter of the grievance.

[97] However, in this case, a grievance was likely the wrong recourse. The grievor should have applied to the staffing process and followed the employer's recourse process for staffing matters if he was dissatisfied with the outcome.

[98] In conclusion, the grievor did not meet his burden of showing that he had a cogent and compelling reason for the lengthy delay of nearly four years to present his

grievance; nor did he exercise due diligence. The prejudice to the employer due to the lengthy delay greatly outweighs the prejudice, if any, to the grievor.

C. The grievor's reply submissions

[99] The grievor repeated a number of the arguments that he made in his initial submissions in his reply to the employer. I have not reiterated them.

[100] With respect to the issue of whether the Board can review an application for an extension of time for a grievance that cannot be referred to adjudication, s. 61 of the *Regulations* makes no reference to any limit on the Board's power to extend time limits.

[101] Section 65 of the *Regulations* provides that the employer is responsible for keeping employees informed of the persons to whom grievances are to be presented and that this information is to be posted in a conspicuous place. Sections 66 and 67 of the *Regulations* provide that the employer must have a form prepared on which employees are to present their grievances and that employees must do so on that prescribed form.

[102] The staffing program contains policies that govern some conditions of employment.

[103] The reason the grievance was so delayed was that at the time of the staffing process, the grievor had no reason to believe that the employer would not follow its staffing policy.

[104] He was not aggrieved until March 2019, when he first learned of the occurrence or matter that directly affected his terms and conditions of his employment.

[105] Neither the *Act* nor the *Regulations* stipulates a time frame for the informal conflict resolution process. There is no jurisprudence that indicates that there ought to be a time constraint to that process. Both parties participated in the discussions.

[106] When the informal conflict resolution process concluded, he immediately informed the employer that he was aggrieved and that he wished a formal resolution. He received no direction from the employer on how to do so.

[107] He approached the bargaining agent but did not receive representation.

[108] He retained legal counsel, who made an inappropriate complaint.

[109] Due to the global pandemic, he was not in the office between March 16 and August 24, 2020.

[110] When the informal discussion concluded, he informed management that he felt aggrieved and that he wanted a formal resolution.

[111] He states that the employer did not provide any guidance on how to do so.

[112] He claims that he emailed the employer to inform them that he felt aggrieved. He acknowledges that an email is not the appropriate form to use to present a grievance. However, the email should be considered a valid document as s. 241(1) of the *Act* provides that no proceeding is invalid by reason only of a defect in form or a technical irregularity.

[113] He attempted to file a grievance with the bargaining agent. When that was unsuccessful and after he returned to the employer's office, he presented his grievance on the employer's official form.

1. Balancing the injustice to the employee against the prejudice to the employer in granting an extension

[114] The injustice to the grievor significantly outweighs any prejudice to the employer. The employer accepted applicants that did not meet the educational requirements and then appointed them to positions that they were not entitled to. The grievor states that he was unable to apply to the staffing process as he did not meet the educational requirements.

[115] The only prejudice to the employer is hearing the grievance.

2. The chance of success of the grievance

[116] The grievor argues that despite the evidence to the contrary, the employer accepted courses completed in the certificate program known as the "Advanced Certificate in Accounting and Finance" and the "Chartered Professional Accountant Program" as meeting the educational requirements for the positions.

V. Analysis

[117] Section 61 of the *Regulations* 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.*

[118] The relevant provisions of the collective agreement read as follows.

[119] Article 18 of the collective agreement contains the provisions of the grievance procedure. The relevant provisions of the article are as follows:

> ***18.01*** *The parties recognize the value of informally resolving problems prior to presenting a formal grievance or using alternative dispute resolution mechanisms to resolve grievances that are presented in accordance with this Article. Accordingly, when an employee:*
>
> ***(a)*** *within the time limits prescribed in clause 18.11, gives notice that he or she wishes to take advantage of this clause for the purpose of informally resolving a problem without recourse to a formal grievance and facilitating discussions between the employee and their supervisors, it is agreed that the period between the initial discussion and the final response shall not count as elapsed time for the purpose of grievance time limits ….*
>
> *…*
>
> ***18.03*** *The time limits stipulated in this Article may be extended by mutual agreement between the Employer and the employee and, where appropriate, the Alliance representative.*
>
> *…*
>
> ***18.05*** *A grievance shall not be deemed to be invalid by reason only of the fact that it is not in accordance with the form supplied by the Employer.*
>
> *…*
>
> ***18.06*** *An employee who wishes to present a grievance at any prescribed level in the grievance procedure shall transmit this grievance to the employee's immediate supervisor or local officer-in-charge who shall forthwith:*
>
> ***(a)*** *forward the grievance to the representative of the authorized to deal with grievances at the appropriate level, and*

> ***(b)*** *provide the employee with a receipt stating the date on which the grievance was received by the employee.*
>
> …
>
> ***18.07*** *Subject to and as provided in section 208 of* the Public Service Labour Relations Act *(PSLRA), an employee who feels that he and she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer, in matters other than those arising from the classification process, is entitled to present a grievance in the manner prescribed clause 18.06 except that:*
>
> > ***(a)*** *where there is another administrative procedure for redress provided by or under any act of Parliament other than the* Canadian Human Rights Act *to deal with the employee's specific complaint, such procedure must be followed, and*
> >
> > ***(b)*** *where the grievance relates to the interpretation or application of this Agreement or an arbitral award, the employee is not entitled to present the grievance unless they have the approval of and is represented by the Alliance.*
>
> ***18.08*** *There shall be no more than a maximum of four (4) levels in the grievance procedure:*
>
> > ***(a)*** *Level 1-first (1st) level of management;*
> >
> > ***(b)*** *Levels 2 and 3-intermediate level(s), where such level or levels are established in the CRA;*
> >
> > ***(c)*** *Final level-the Commissioner or his or her authorized representative.*
>
> *Whenever there are four (4) levels in the grievance procedure, the grievor may elect to waive either Level 2 or 3.*
>
> ***18.09 Representatives***
>
> > ***(a)*** *The Employer shall designate a representative at each level in the grievance procedure and shall inform each employee to whom the procedure applies of the title of the person so designated together with the title and address of the immediate supervisor or local officer-in-charge to whom a grievance is to be presented.*
> >
> > ***(b)*** *This information shall be communicated to employees by means of notices posted by the Employer in places where such notices are most likely to come to the attention of the employees to whom the grievance procedure applies, or otherwise as determined by agreement between the employer and the Alliance.*
>
> …
>
> ***18.11*** *An employee may present a grievance to the first (1st) level of the procedure in the manner prescribed clause 18.06, not later than the twenty-fifth (25th) day after the date on which he or she is*

> *notified orally or in writing or on which they first become aware of the action or circumstances giving rise to the grievance.*
>
> ***18.12*** *The employer shall normally reply to an employee's grievance at any level of the grievance procedure, except the final level, within ten (10) days after the grievance is presented, and within thirty (30) days when the grievance is presented at the final level.*
>
> ***18.13*** *An employee may present a grievance at each succeeding level in the grievance procedure:*
>
> > ***(a)*** *where the decision or offer for settlement is not satisfactory to the employee, within ten (10) days after that decision or offer for settlement has been conveyed in writing to the employee by the Employer, or*
> >
> > ***(b)*** *where the Employer has not conveyed a decision within fifteen (15) days from the date that a grievance is presented at any level, except the final level, the employee may, within the next ten (10) days, submit the grievance at the next higher level of the grievance procedure.*
>
> …
>
> ***18.15*** *The decision given by the Employer at the Final Level in the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication.*
>
> …

A. The interpretation of s. 61(b) of the *Regulations*

[120] Apart from its submissions with respect to the merits of the application for an extension of time to file the grievance, the employer advanced a number of submissions related to the interpretation of s. 61 of the *Regulations*.

[121] The employer argues that the application is premature as the grievance is in abeyance at the third level of the grievance process and has not been heard and as the employer's decision is not final and binding.

[122] The grievance does not fall within the adjudicable matters under s. 209 of the *Act*, the central issue being a staffing matter that cannot be referred to the Board. Therefore, timelines ought not to be extended if the evidence clearly shows that an adjudicator has no jurisdiction and the grievance has no chance of success.

[123] The employer also argues that as the grievance is not adjudicable on the merits, the question of an extension of time should be dealt with according to the provisions

of the collective agreement, which provides that the time limits in the grievance process may be extended by mutual agreement between the employer and the employee.

[124] The employer also asserts that aside from the timeliness issue, it affirmed in its reply that it would have denied the grievance on its merits.

[125] The right of individual employees to grieve matters set out in s. 208 of the *Act* is quite broad. If an employee feels aggrieved by the interpretation of a provision of a statute or regulation, direction, or other instrument made or issued by the employer that deals with terms and conditions of employment, or as a result of any occurrence or matter affecting his or her terms and conditions of employment, the employee is entitled to present a grievance.

[126] It is not disputed that that the grievance in this case falls within the matters described in s. 208 of the *Act* as it relates to directions or other instruments made or issued by the employer that deal with the terms and conditions of employment.

[127] Both the employer and the grievor acknowledge that the grievance is not one that may be referred to adjudication under the provisions of s. 209 of the *Act*.

[128] On one hand, the *Act*'s statutory provisions confer on individual employees the right to present grievances on a broad range of matters related to terms and conditions of employment. On the other hand, they restrict the nature of grievances that may be referred to third-party adjudication. Section 61 of the *Regulations* must be interpreted in that context.

[129] The express words in s. 61 empower the Board or an adjudicator, in the interests of fairness, to extend the time prescribed in the *Regulations* or provided for in the grievance procedure contained in a collective agreement for the doing of any act, **the presentation of the grievance at any level of the grievance process**, the referral of the grievance to adjudication, or the providing or filing of any notice, reply, or document.

[130] In this statutory context and based on the clear language in the section at issue, no restriction limits the power of the Board or an adjudicator to extend time limits for presenting a grievance at any level of the grievance process to situations in which the grievance may be referred to adjudication on its merits under s. 209 of the *Act*. As the

Board or an adjudicator is expressly empowered to extend time limits for presenting a grievance at any level of the grievance process, the application is not premature.

[131] The employer also argues that the question of an extension of time is already covered by the collective agreement and that the Board or an adjudicator should defer to that agreement's provisions.

[132] The collective agreement does not contain a provision conferring on the Board or an adjudicator the power to extend the time limits for presenting grievances or referring them to adjudication.

[133] Clause 18.03 limits extensions of time to situations of mutual agreement between the employer and employee and, if appropriate, the bargaining agent.

[134] Section 61 of the *Regulations* expressly confer on the Board or an adjudicator the power to extend time limits provided for in a grievance procedure contained in a collective agreement in two circumstances, which are agreement between the parties or **in the interests of fairness on the application of a party.** It is trite law that the parties to a collective agreement cannot contract out of a statutory provision.

[135] The employer also argues that in any event, it would have denied the grievance on its merits, and as the Board has no jurisdiction over the merits of the case, there is no need to render a decision on the grievor's request for an extension of time to file the grievance.

[136] My understanding of the facts is that the grievance is in abeyance at the third level of the grievance process and has yet to be heard at that or the final level. The employer's decision dismissing the grievance at levels one and two is not final and binding. The grievor has the right to present the grievance and to be heard at both the third and final levels. The employer's decision at the third and final levels cannot be predetermined at this stage, assuming that the employer has an open mind. Granting an extension of time in which to file the grievance in these circumstances would not necessarily be fruitless or purely academic.

B. The merits of whether an extension of time should be granted

[137] The parties have agreed that the five *Schenkman* factors can guide the Board or an adjudicator in exercising its or his or her discretion as to whether an extension of

time ought to be granted. They are outlined as follows at paragraph 75 of that decision:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the employer in granting extension; and
- the chances of success of the grievance.

[138] Time limits in collective agreements are meant to be respected by the parties and should be extended only in exceptional circumstances. Those circumstances depend on the facts of each case. See *Bowden*, at para. 55.

[139] The five factors may be interconnected, depending upon the circumstances in an application. It is also self-evident that the particular set of circumstances that defines a case must dictate the weight to be given to any one of those five criteria, relative to the others. See *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59 at para. 7, and *Jarry v. Treasury Board (Department of Justice)*, 2009 PSLRB 11 at para. 27.

[140] In other words, an overly formulaic or compartmentalized approach to weighing these factors will not help determine fairness within the meaning of s. 61(b) of the *Regulations*. See *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144.

[141] The employer asserts that there are no clear, cogent, and compelling reasons for the delay as the grievance in this case was late by nearly four years. While the grievor suggests that he learned about his alleged right to apply to the staffing process only during discussions with an unnamed colleague in March 2019, it does not constitute a clear, cogent, and compelling reason. The facts that he did not know that he could present a grievance sooner and that he engaged in informal discussions are not compelling reasons for the delay. He should have presented a grievance, if only to protect his rights.

[142] The grievor also alleges that the pandemic was a factor in the delay presenting his grievance. However, the bulk of the delay occurred before the pandemic's onset in March 2020, when the grievor was already 3 1/2 years late.

[143] The grievor argues that he was made aware that the employer did not follow the staffing program's educational requirements only once he had a discussion with his colleague in March 2019, following which he immediately approached his manager and collaboratively worked to determine the facts, in accordance with the informal conflict resolution process contemplated by the collective agreement, the *Act*, and the *Regulations*.

VI. Conclusion

[144] While I can envisage fact situations in which an employee may not learn of a matter that adversely impacts his or her terms and conditions of employment for some time after the event, I am concerned about the 2 1/2-year delay bringing this matter to the employer's attention. The delay appears greatly excessive, considering the jurisprudence on point.

[145] Moreover, the jurisprudence is clear that if a Grievor has the facts or access to the facts and nothing has been hidden from him, that constitutes awareness of the "facts or circumstances giving rise to the grievance". In this case the facts and circumstances are the staffing process in issue and the results of that staffing process and the qualifications of those appointed and the employer's application of the prerequisite rules. The Grievor does not allege that there were no postings announcing successful candidates, that no one from human resources failed to answer his email queries regarding qualifications from the posting or that he was given improper information The Grievor assumed that he did not qualify for the positions sat back and came to the realization some years later that he was arguably aggrieved.

[146] Clause 18.01 of the collective agreement provides for situations in which the parties agree to suspend timelines for presenting a grievance when an employee gives notice to the employer within the time limits set out in clause 18.11, i.e., 25 days, for the purpose of informally resolving the problem without recourse to a formal grievance.

[147] The grievor states that during the time frame of March 2019 to January 2020, he and the employer had informal discussions concerning the alleged discrepancy between the corporate policy and the information provided to him by his colleague. The employer acknowledges that informal discussions did occur; however, it has no

record that the grievor sought recourse to the informal dispute resolution process provided for in the collective agreement.

[148] As stated, I am concerned about the 2 1/2 year delay bringing this matter to the employer's attention. I am also cognizant of the Board's jurisprudence that informal discussions do not justify the untimely filing of a grievance and that grievors should present grievances, if only to protect their rights. See *Bowden*. In the circumstances of this case and given the lengthy delays, in my view, the steps provided for in the collective agreement for the application of clause 18.01 should have been followed by providing timely notice to the employer.

[149] The additional delay of some 10 months occasioned during the period of informal discussions appears to me excessive, especially in light of the 2 1/2-year delay following the events that gave rise to the grievance.

[150] I must also consider whether the delays subsequent to his meeting with the bargaining agent in January 2020 and after that to August 26, 2020, the date on which he filed his grievance, constitute compelling and cogent reasons for delay.

[151] In January 2020, the bargaining agent advised the grievor that as his issue did not relate to the application or interpretation of the collective agreement, he did not require bargaining-agent support to file a grievance. At that time, it expressed concerns about the timeliness of a grievance.

[152] The grievor did not take any steps to file a grievance, even though he was expressly advised that he did not require bargaining-agent support and was cautioned that concerns about the timeliness of a grievance could arise.

[153] As opposed to filing a grievance, he made an ill-advised staffing complaint to the Board and also complained that the bargaining agent failed its duty of fair representation when it did not agree to represent him in filing a grievance against the employer.

[154] Only as a last resort and after his staffing complaint was denied, although the bargaining agent had advised him that concerns could arise with the timeliness of a grievance, did he, some eight months later, file a grievance. He argued that the reason he delayed that filing was that the employer did not provide him with a grievance form and that from March 16, the COVID-19 pandemic meant that he stayed at home.

[155] The employer could easily have dealt with any questions he might have had concerning the grievance form during his informal discussions or with the bargaining agent during his discussions with them in January 2020. Clause 18.05 of the collective agreement provides that a grievance shall not be deemed to be invalid by reason only of the fact that it is not in accordance with the form supplied by the employer.

[156] From the foregoing analysis, I am not prepared to conclude on the facts that the delay presenting the grievance of almost four years after the events that gave rise to it constitute cogent and compelling reasons for delay.

[157] Similarly, based on these findings of fact, I am not persuaded that the grievor exercised due diligence in pursuing his grievance.

[158] Given my conclusions on the first two criteria of the *Schenkman* test, it is not necessary to consider the other criteria.

[159] The application for an extension of time is dismissed.

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

(The Order appears on the next page)

VII. Order

[161] The grievance is denied.

May 16, 2022.

David Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board