

Date: 20220713

File: 568-02-44047

XR: 566-02-43769

Citation: 2022 FPSLREB 58

*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

ERIN GEE

Applicant

and

**DEPUTY HEAD (DEPARTMENT OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS)**

Respondent

Indexed as

Gee v. Deputy Head (Department of Public Safety and Emergency Preparedness)

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

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

For the Applicant: Natalie Malcom, labour relations officer, Canadian
Association of Professional Employees

For the Respondent: Philippe Lacasse, analyst

Decided on the basis of written submissions,
filed December 16, 2021, and January 21 and February 7, 2022.

REASONS FOR DECISION

I. Application before the Board

[1] On November 12, 2021, Erin Gee (“the applicant”) referred a termination grievance to adjudication with the Federal Public Sector Labour Relations and Employment Board (“the Board”). The applicant had been employed at the Department of Public Safety and Emergency Preparedness (“the respondent”).

[2] The applicant was part of a bargaining unit represented by the Canadian Association of Professional Employees (“the bargaining agent”). The relevant collective agreement that covers the bargaining unit to which the applicant belonged at the time of her termination was the Economics and Social Science Services collective agreement (“the collective agreement”), expiring on June 21, 2022.

[3] On December 3, 2021, the respondent filed an objection based on timeliness, stating that the Board was without jurisdiction to hear the matter since the grievance had been referred late.

[4] On December 16, 2021, the bargaining agent filed an application for an extension of time on behalf of the applicant under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; “the *Regulations*”).

[5] This decision deals only with the application for an extension of time. If it is granted, the grievance bearing file number 566-02-43769 will be scheduled for a hearing before the Board. If it is denied, the grievance file will be closed.

II. Summary of the arguments

[6] The facts are not in dispute. The applicant was terminated on June 22, 2021. With the support of her bargaining agent, she filed a grievance against her termination on June 29, 2021. The grievance was heard at the final level on August 11, 2021, and the final-level grievance decision was received on September 15, 2021.

[7] The collective agreement provides that the referral to adjudication is done in accordance with the *Regulations*, which state at s. 90(1) that a grievance may be referred to adjudication no later than 40 days after the final reply has been received. Therefore, the deadline was October 25, 2021. The grievance was referred on November 12, 2021, 18 days after the deadline.

[8] The parties' arguments follow. The relevant case law will be discussed in my analysis.

A. For the applicant

[9] The applicant asked the Board to exercise its discretion pursuant to s. 61(b) of the *Regulations*, in the interest of fairness. The lateness was entirely due to the bargaining agent, and the applicant should not be penalized for the administrative error.

[10] To support her arguments, the applicant reprised the criteria established in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which the Board has consistently applied in applications for extensions of time.

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

[11] The bargaining agent made an administrative error, which resulted in the grievance being referred to adjudication late. The applicant was informed that the bargaining agent would prepare the paperwork to refer the grievance to adjudication and, therefore, had no reason to doubt that the grievance would be referred on time. The bargaining agent stated that the error might have occurred due in part to the tremendous influx of work caused by the vaccine mandate that the federal government was about to impose on its employees. The applicant cited *Fortier v. Department of National Defence*, 2021 FPSLRB 41, as an example of an extension of time being granted despite an error by a bargaining agent, in the wider context of work complications created by the COVID-19 pandemic.

2. Length of the delay

[12] The delay is only 18 calendar days. The applicant cited *Gagné v. Canadian Food Inspection Agency*, 2016 PSLREB 3, as an example of a decision in which an extension of time was granted in the circumstances of a delay that was similarly short.

3. Due diligence of the applicant

[13] The applicant and bargaining agent acted with due diligence in presenting the grievance. On her receipt of the final-level reply, the applicant expressed her desire to refer the matter to the Board and believed that the bargaining agent had done so.

4. Balancing the injustice to the applicant against the prejudice to the respondent

[14] Since the delay is short, the respondent would suffer no real prejudice. However, the harm to the applicant if the application is denied would be severe: she would have no recourse to challenge the termination of her employment. She cited *Dionne v. Canada Revenue Agency*, 2021 FPSLREB 39, as an example of an extension of time being granted where no indication was given of potential harm to the employer.

5. Chances of success

[15] According to the applicant, the chances of her grievance succeeding are positive, as the respondent failed to truly assess her right to freedom of expression.

[16] In conclusion, the applicant submitted that she should not be penalized for the bargaining agent's error.

B. For the respondent

[17] The respondent in turn also addressed the *Schenkman* criteria in its response.

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

[18] The respondent submitted that the applicant provided no justification for the lateness, save for saying that the bargaining agent had committed an administrative error. The respondent relied on *Grekou v. Treasury Board (Department of National Defence)*, 2020 FPSLREB 94, and *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110, to argue that an administrative error is not a sufficient reason.

2. Length of the delay

[19] The fact that there is a delay is important. Time limits are prescribed and meant to be respected, especially when there is no justification that the bargaining agent or the applicant were prevented from referring the grievance to adjudication within the deadline.

3. Due diligence of the applicant

[20] It was not shown how the applicant had been diligent, as she did not seek to ensure that the bargaining agent had respected the timeline.

4. Balancing the injustice to the applicant against the prejudice to the respondent

[21] Granting an extension despite lateness that is not explained would be prejudicial to the respondent. This would signify that extensions can be granted even when no cogent explanation is given for the delay.

5. Chances of success

[22] The respondent asserted that the Board has sufficient information to conclude that the termination grievance has no chance of success.

III. Analysis

[23] 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.

61 Malgré les autres dispositions de la présente partie, tout délai, prévu par celle-ci ou par une procédure de grief énoncée dans une convention collective, pour l'accomplissement d'un acte, la présentation d'un grief à un palier de la procédure applicable aux griefs, le renvoi d'un grief à l'arbitrage ou la remise ou le dépôt d'un avis, d'une réponse ou d'un document peut être prorogé avant ou après son expiration :

a) soit par une entente entre les parties;

b) soit par la Commission ou l'arbitre de grief, selon le cas, à la demande d'une partie, par souci d'équité.

[24] This application comes under s. 61(b); that is, the Board should consider whether it is in the interest of fairness to grant an extension of time.

[25] As the parties submitted, to determine whether an extension should be granted in the interest of fairness, the Board assesses the situation according to the criteria established in *Schenkman*. The circumstances of each case determine how those criteria are weighed relative to each other. Applying the *Schenkman* criteria, my observations are as follows.

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

[26] The explanation provided is that there was an administrative oversight at the bargaining agent's office, caused in part by a sudden influx of demands linked to the federal government's imminent adoption of a vaccine mandate for its employees. In those circumstances, it is understandable that paperwork might have been overlooked.

[27] It is true that the applicant could have referred the grievance on her own, as was the case in *Grekou*. However, I would distinguish *Grekou* (in which the applicant failed to refer his grievance to adjudication, despite knowing he could) and *Callegaro* (in which the applicant should have inquired about her grievance) because of the considerable time that elapsed before those referrals were done (10 months in *Grekou*, and 14 months in *Callegaro*). In *Grekou*, the Board found that there was no explanation for that delay. Similarly, in *Callegaro*, the Board did not accept that the bargaining agent's mistake was a compelling reason to explain a 14-month delay in referring the grievances to adjudication. On the other hand, in another decision, *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79, the Board found that the applicant's due diligence and reliance on the union to submit his grievances mitigated the significant length of the delay (see also, *Barbe v. Correctional Service of Canada*, 2022 FPSLREB 42; and *Lessard-Gauvin v. Treasury Board (Canada School of Public Service)*, 2022 FPSLREB 40). Again, the circumstances of each case must be considered in determining what is in the interest of fairness.

[28] In this case, I accept that the applicant was not responsible for the delay in referring the grievance to adjudication and that it was due to a mistake made by the bargaining agent. Again, while this administrative oversight is an understandable reason for the delay, it must also be weighed against the other *Schenkman* criteria.

B. Length of the delay

[29] In this case, the delay is rather short. This also has an impact on the fourth criterion, balancing the injustice to the applicant and the prejudice to the respondent. As in *Gagné*, the delay being less than a month is a factor that weighs in favour of the extension.

C. Due diligence of the applicant

[30] The applicant's diligence is not at issue. She pursued her grievance in time and let the bargaining agent know as soon as the final reply was received that she intended

*Federal Public Sector Labour Relations and Employment Board Act and
Federal Public Sector Labour Relations Act*

to go forward. She had the bargaining agent's support; it was normal for her to rely on it to refer the grievance to adjudication. She thought in good faith that the paperwork was complete.

D. Balancing the injustice to the applicant against the prejudice to the respondent

[31] In this case, the harm done to the applicant if the extension of time application were denied, which would be losing her recourse against her termination, would far outweigh the inconvenience to the respondent, which was notified a few days late of the referral of a grievance it had dealt with and did not explain how that delay would cause it any prejudice.

E. Chances of success

[32] I must say that I am a little puzzled by the respondent's assertion that the Board has sufficient information to know that the grievance has no chance of success. The Board has heard no evidence in this matter and therefore cannot pronounce on the merits of the grievance. However, a grievance against a termination based on misconduct for the exercise of free speech (according to the applicant's submissions) cannot be said to be on its face a frivolous matter that has no chance of success before an impartial adjudicator.

IV. Conclusion

[33] To conclude, in this case, I find that the applicant was not responsible for the delay in referring the grievance to adjudication and that the bargaining agent presented a clear and compelling reason for that delay; that the time delay is not a significant obstacle to the referral; and that the seriousness of the grievance, being a termination grievance, is for me a pivotal factor. In the interest of fairness, I believe that an extension should be granted for the referral of the grievance to adjudication.

[34] That said, this decision should not be interpreted to constitute an excuse for bargaining agents, if they have carriage of a referral to adjudication, not to respect the deadlines set out in the collective agreements and in the *Regulations*. Depending on the circumstances, the Board may be loathe to have grievors suffer the consequences of administrative errors made by their bargaining agents, but the respondent is also entitled to rely on deadlines set out in the collective agreement and regulatory instruments. In this case, the interests of fairness weigh in favour of granting an extension, but as *Grekou* and *Callegaro* demonstrate, that will not always be the case.

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

(The Order appears on the next page)

V. Order

[36] The application for an extension of time is granted.

[37] The grievance in Board file no. 566-02-43769 will be scheduled for hearing.

July 13, 2022.

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