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

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

MATTHEW DAIGNEAULT

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Daigneault 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: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Charlie Arsenault-Jacques, counsel

For the Employer: Jennifer Humphrey, Treasury Board of Canada Secretariat

Decided on the basis of written submissions, filed May 31, June 14 and 20, August 21, and October 3 and 12, 2023.

REASONS FOR DECISION

I. Outline

[1] This decision is about two preliminary issues in two related grievances. First, the employer objects to the grievances on the basis that they were referred to the third level of the grievance process late. The issue is whether the parties had agreed to hold the time limit to refer these grievances to the third level in abeyance. I conclude that the grievor has not met their burden to prove the existence of such an agreement and the grievances were referred to the third level out of time.

[2] Second, the grievor applied for a retroactive extension of time to refer these two grievances to the third level of the grievance process. I grant that extension of time. The confusion by both parties over whether these grievances were still in abeyance is a clear, cogent, and compelling justification for the delay referring them to the third level. Additionally, the employer has admitted breaching the collective agreement in one of the two grievances, which is a strong factor in favour of granting the extension of time so that the grievor can make their case about the appropriate remedy.

II. Timeliness issue - the referral to the third level was untimely

A. The collective agreement timeline and the Abeyance Agreement

[3] The collective agreement between the grievor's bargaining agent (the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN or "UCCO-SACC-CSN") and the employer for the Correctional Services Group (expired May 31, 2022; "the collective agreement") provides that the deadline to refer a grievance to the next level of the grievance process is 10 days from the later of (1) the grievance decision or (2) 15 days after the grievance has been presented at that lower level. Each day of this deadline is a business day and not a calendar day. The parties may also agree to extend this time limit; see s. 61(a) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[4] The UCCO-SACC-CSN and the employer have negotiated an agreement at the Warkworth Institution (where the grievor works) that all grievances at the second level of the grievance process will pause until they can be heard "… at the next scheduled Grievance Committee Meeting". The parties refer to this as grievances being "held in abeyance", and they call this agreement the "Abeyance Agreement". Finally, the

Abeyance Agreement also states that any grievance held in abeyance can be withdrawn from abeyance upon the written notification of either party.

[5] The existence of a Grievance Committee is laid out in article IV-B of the "Global Agreement between Correctional Service Canada (CSC) and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)". Each correctional institution has its own Grievance Committee composed of an equal number of union and management representatives. The Grievance Committee is supposed to meet monthly to discuss problems in the application of the collective agreement as well as any grievances originating from the institution.

B. Nature of the grievances

[6] This case involves two related grievances. The grievor was ordered to work 3.25 hours of overtime on June 17, 2022 and again on June 18, 2022. The grievor obeyed the orders and worked those overtime shifts, but then grieved both orders. The employer states that the June 17, 2022 involuntary overtime shift did not violate the collective agreement. The employer admits that the grievor should not have been ordered to work involuntary overtime on June 18, 2022 (as another officer should have been ordered to work it instead), but denied the grievance on the basis that the grievor had been paid for that overtime and was not prejudiced by having to work it.

C. Processing of the grievances

[7] The grievor grieved both involuntary overtime orders almost immediately on June 21, 2022. The employer denied both grievances at the first level of the grievance process on July 11, 2022, and the grievor referred the grievances to the second level on July 21, 2022, which was within the 10-day period to do so.

[8] Since the grievances were at the second level, this triggered the Abeyance Agreement, which placed the grievances in abeyance until the next scheduled Grievance Committee meeting.

[9] There was a meeting on August 23, 2022. The parties disagree about the nature of that meeting. Their submissions are also contradictory about its nature.

[10] The employer states in its initial submissions that the August 23, 2022, meeting was a Grievance Committee meeting. That would mean that the grievances were no longer in abeyance. That started the 15-day period for the employer to decide the

grievance, which ran out on September 14, 2022. Once that period ran out, the grievor had 10 days to refer the grievances to the third level. Therefore, the deadline to refer these grievances to the third level expired on September 28, 2022.

[11] However, in its submissions responding to the grievor's application for an extension of time, the employer states that "… in practice, a grievance is heard at either a grievance hearing or a grievance committee if one is scheduled or required." The employer seems to be stating that the Abeyance Agreement is optional and that the parties can hold a second-level grievance hearing instead of discussing the grievance at the Grievance Committee meeting.

[12] The grievor, on the other hand, states that the meeting on August 23, 2022, was not a Grievance Committee meeting but instead a bilateral meeting between the warden and the local union president. However, the grievor later states in one set of submissions that this meeting was a second-level grievance hearing before reverting in their reply submissions to stating that it was just a bilateral meeting.

[13] The grievor also states that both parties considered the grievances to still be in abeyance as of February 17, 2023. In September and October 2022, there were no Grievance Committee meetings because there was to be a change of warden at the Warkworth Institution. There was a labour-management meeting in November 2022 at which the local union president asked about the outstanding grievances that were awaiting a response at the second level. The acting warden said that they would reach out to Labour Relations to ask about their status.

[14] The local union president did not hear back about the status of the grievances. On February 13, 2023, the local president of the UCCO-SACC-CSN wrote to a labour relations advisor at the Correctional Service of Canada (CSC) to ask about the status of these two grievances. The labour relations advisor responded on February 17, 2023, stating that both grievances "are in abeyance at second level."

[15] The grievor states that this email shows that both parties understood that the grievances were still in abeyance at that time. However, the employer states that its labour relations advisor was mistaken.

[16] The grievor referred the grievances to the third level of the grievance process on March 1, 2023.

D. The grievor has not proven the existence of an agreement to extend the timeline to refer the grievances to the third level

[17] As I stated earlier, the grievances were referred to the second level on July 21, 2022 and were referred to the third level on March 1, 2023. The deadline for this referral expired on August 12, 2022 (i.e., 15 business days after the grievances were presented at that lower level). This means that the referral to the third level was made well beyond the period to do so.

[18] The sole issue before me is whether there was an agreement to extend the timeline to refer these grievances to the third level of the grievance process. The burden rests on the grievor to demonstrate that there was an agreement to extend that timeline; see *Desloges v. Canada (Attorney General)*, 2007 FC 60 at para. 28.

[19] The parties agree that there was such an agreement for the period between July 21 and August 23, 2022. The employer's case is that the agreement ran out on August 23, 2022. It is, unfortunately, unclear to me why the employer says that the agreement ran out on August 23, 2022; I am not sure whether the employer is saying that there was a Grievance Committee meeting (in accordance with the Abeyance Agreement) or that there was a second-level grievance meeting. The employer appears to be saying both things at different times.

[20] The grievor's case is also unclear to me. How was there a second-level grievance hearing on August 23, 2022 if the grievances were still in abeyance, or was this just a bilateral meeting? If there was an agreement to extend the time beyond August 23, 2022 (in other words, to hold these grievances "in abeyance"), surely the grievor breached the Abeyance Agreement by referring their grievances to the third level on March 1, 2023 without giving notice to the employer? If the grievor's position is that the grievances were still in abeyance under the terms of the Abeyance Agreement, there is no evidence of a written notification to take it out of abeyance. Referring the grievances to the third level of the grievance process on March 1, 2023, was inconsistent with there being an agreement in place to hold these grievances in abeyance beyond August 23, 2022.

[21] The February 17, 2023, email from the CSC labour relations advisor is not evidence of an agreement to hold the grievances in abeyance — it indicates only that she believed that the grievances were still in abeyance. The grievor has presented no

evidence of an email, letter, telephone call, conversation, or any other communication constituting an agreement to suspend the time limits to refer these grievances to the third level after August 23, 2022.

[22] Therefore, I conclude that the grievor has not met their burden of proof that there was an agreement to extend the time limit to refer these grievances to the third level of the grievance process beyond August 23, 2022. This reference to the third level was untimely.

III. Extension of time application - the requested extension is granted

[23] Section 61(b) of the *Regulations* grants the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision refers to the current Board and any of its predecessors) the power to extend any period set out in a collective agreement or the *Regulations* "in the interest of fairness". The Board typically applies the so-called *Schenkman* factors (from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1) when deciding whether the interests of fairness justify granting an extension of time. These five factors are as follows:

- whether there are 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 an extension; and
- the chance of success of the grievance (often expressed as whether there is an arguable case in favour of the grievance).

[24] These criteria are not weighted equally; nor are they each important in every case. As the Board stated in *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at para. 55, "These criteria are not fixed, and the overriding goal is to determine what is fair based on the facts of each case … The criteria are also not necessarily of the [*sic*] equal weight and importance …". The Board in *Parker v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 57 quoted *Bowden* with approval at paragraph 28, which I mention as the employer relied upon *Parker* in support of this proposition.

A. Reasons for the delay

[25] Turning first to the reasons for the delay, the grievor states that the delay flowed from the confusion or misunderstanding over the nature of the meeting on August 23, 2022, and whether the grievances were still under abeyance. The employer suggests that it was "unsustainable" for the grievor to suggest that the bargaining agent representative thought that the grievances were still in abeyance because of the following (to quote its submissions):

> …
>
> *i. There is no evidence that the parties agreed to keep the grievances in abeyance following the second-level consultation held on August 23, 2022;*
>
> *ii. In February 2023, namely 6 months after the consultation had occurred, the Bargaining Agent* [representative] *followed up with the Employer to inquire about the status of the grievances given that second-level responses had yet to be issued;*
>
> *iii. If the grievances were still in abeyance pending a Grievance Committee Meeting as suggested by the Bargaining Agent, the Bargaining Agent would not have followed up regarding the second-level responses to be issued, but would have rather followed up in order to schedule the said Grievance Committee Meeting. This alone demonstrates that the grievances were not in abeyance pending a Grievance Committee Meeting as the Bargaining Agent was waiting for the Employer to issue the second-level responses, hence the February 2023 follow up.*
>
> …

[26] I agree with the grievor that there are clear, cogent, and compelling reasons for the delay in this case.

[27] For one thing, the employer's submissions ignore the bargaining agent's follow-up in November 2022 about the grievance. The bargaining agent acted as if the grievances were still waiting for a second-level grievance hearing by following up in November 2022.

[28] I was even more influenced by the confusion of the employer's labour relations representative over whether these two grievances were still being held in abeyance. If, as the employer submits, the labour relations representative was mistaken about the status of these grievances, I am prepared to accept that it was also reasonable for the local union president to be confused about the status of these grievances. The

employer's submissions also still disclose some confusion in its mind over what happened on August 23, 2022 (i.e., whether it was a Grievance Committee meeting or a second-level grievance hearing). I am prepared to accept that the confusion over whether the grievances were still in abeyance was real and is a clear, cogent, and compelling reason for the delay.

B. Length of the delay

[29] The length of the delay in this case was roughly five months. The employer characterizes this length as "important." However, in *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59 at para. 14, the Board referred to a delay of four or five months as neither short nor long. In *Guittard v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 18 at para. 28, the Board found a delay of four months "not unduly excessive." In *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8 at para. 67, the Board characterized a five-month delay as "not an inordinate amount of time". In *Duncan v. National Research Council of Canada*, 2016 PSLREB 75 at para. 147, the Board called a four- to five-month delay "not excessive". I agree with the tenor of these cases that a delay of five months is neither egregious nor minimal. I have assigned no weight to the length of the delay as a result.

[30] Additionally, in *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 60 at para. 75, the Board reformulated this part of the *Schenkman* factors slightly by also considering the stage of the grievance process in which the delay occurred. The Board stated at paragraph 80 of that case that a delay in the initial filing of a grievance or in its referral to adjudication is more serious than a delay in the transmittal between grievance levels, "… given that the employer's consideration of the issues raised in the grievances had already begun and was not yet completed."

[31] I agree.

[32] In this case, the delay occurred in the transmittal between the second and third levels of the grievance process, which is a factor favouring granting the extension of time.

C. Due diligence of the grievor

[33] Both the grievor and the local union president acted with due diligence in this case. The grievor followed up with management and the UCCO-SACC-CSN in July 2022

about the status of these grievances and specifically asked where the grievances stood with respect to the time limits. Additionally, the local union president followed up on the status of these grievances in November 2022; when the interim warden did not respond, the local union president followed up again in February 2023. The employer suggests that since the July follow-ups occurred while the grievances were still at the first level (i.e., immediately before the first-level decision was issued), they are irrelevant to this issue. This submission ignores the November follow-up. Additionally, the July follow-up shows that neither the grievor nor the local union president simply filed the grievances and parked them; they both followed up diligently on its status in an effort to get the grievances resolved. This factor favours granting an extension of time.

D. No prejudice to the employer

[34] The employer submits only that "… the employer should be entitled to some certainty in knowing that labour disputes will be addressed in a timely manner", relying on *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, for the proposition that extensions of time should be exceptional and not the rule. Otherwise, the employer has identified no prejudice that it will suffer if I grant this extension of time but says that this factor should not carry much weight.

[35] The employer has not identified how it would be prejudiced in its ability to respond to these grievances in light of the roughly five-month delay referring it to the third level of the grievance process. The employer did not rely upon that delay, did not destroy any relevant documents, and has not identified any other way that its ability to argue the case has been prejudiced. I agree with the grievor's reply submissions that a delay is not automatically prejudicial to the employer — the employer must explain some specific harm that it would suffer as a result of the delay. This factor favours granting an extension of time.

E. Chance of success of the grievance

[36] Normally, this factor is given little weight unless the grievance on its face has "no chance of success"; see *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42 at para. 16. Therefore, this factor is usually a screening function to ensure that grievances with no arguable case are dismissed at an early stage.

[37] The employer submits that the chance of success of the grievances is low. However, the employer conceded that it breached the collective agreement in one of the two grievances, but it denied that grievance anyway. As long as the employer continues to admit its breach of the collective agreement, the only issue for the Board will be the appropriate remedy. Since victory for the grievor in some form is almost certain, I have given this factor significant weight in favour of granting an extension of time.

[38] To put this another way, if almost certain defeat is a strong if not dispositive factor against granting an extension of time, then an employer's admission of almost certain victory should be a strong if not dispositive factor in favour of granting an extension of time.

[39] I also note the Board's suggestion in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 22 at para. 195, which was that the issue of the appropriate remedy when a correctional officer is improperly ordered to work overtime should be addressed by individual grievances on a case-by-case basis. I am reluctant to deprive the grievor of an opportunity to pursue a remedy in the face of the employer's admission that it violated the collective agreement. This is not to say that a remedy will necessarily be forthcoming. However, when the sole issue is remedy, this favours granting an extension of time to permit a grievor to pursue that remedy.

IV. Conclusion

[40] After considering the five *Schenkman* factors, I grant the extension of time because none of those factors weigh against granting the extension.

[41] In light of my decision granting the grievor an extension of time, the objection to the timeliness of this reference to adjudication has become moot, and I dismiss it solely for that reason.

V. Addendum

[42] The parties' submissions in this case disclosed some differences between them over the meaning and application of the Abeyance Agreement. The Abeyance Agreement is a praiseworthy initiative by the parties to discuss issues candidly and in a timely manner. I encourage the parties to discuss the Abeyance Agreement to make

sure that they have a shared understanding of its terms, particularly which meetings are Grievance Committee meetings, informal bilateral meetings, or grievance hearings. That shared understanding will hopefully ensure that other grievances do not "fall through the cracks" and that the parties can use their resources more productively than drafting submissions about timeliness and extensions of time with the Board.

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

(The Order appears on the next page)

VI. Order

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

[45] The objection to the timeliness of the reference to adjudication is dismissed.

[46] The grievances will be returned to the Board's Registry for scheduling in the normal course.

January 5, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board