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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

RUDY CHERID

Grievor

and

DEPUTY HEAD

(Department of Employment and Social Development)

Respondent

Indexed as

Cherid v. Deputy Head (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Kalapi Roy, Public Service Alliance of Canada

For the Respondent: Brigitte Labelle, Treasury Board of Canada

Decided on the basis of written submissions,
filed June 12, July 4 and 21, and December 19, 2023.

REASONS FOR DECISION

I. Overview

[1] The respondent has objected to this grievance on the basis that it was filed late. The grievor agrees that his grievance was filed late but has applied for an extension of time to file it.

[2] I have denied that application for an extension of time and have dismissed the grievance as a result.

II. Procedure followed for this decision

[3] The Federal Public Sector Labour Relations and Employment Board (“the Board”, which in this decision also refers to any of the current Board’s predecessors) is empowered to decide a complaint on the basis of written submissions because of its power to decide “... any matter before it without holding an oral hearing” in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365); see also *Andrews v. Public Service Alliance of Canada*, 2021 FPSLRB 141 at para. 3 (upheld in 2022 FCA 159 at para. 10).

[4] The respondent objected to this grievance in writing on three grounds: timeliness, the changing nature of the grievance, and the Board’s jurisdiction to hear a grievance against a probationary dismissal. The grievor filed a written response on each ground and applied for an extension of time to file his grievance and transmit it to the second level of the grievance process. The respondent replied to the application for an extension of time. After reviewing those submissions, I decided that the first two objections could be dealt with in writing. There was one factual issue about timeliness that I requested that the grievor clarify, which he did. I also permitted the grievor to reply to the respondent’s response to his application for an extension of time, which he did.

[5] I remain convinced that the application for an extension of time can be decided in writing. There are no facts about the extension of time or the nature of the grievance that require an oral hearing or the cross-examination of witnesses to resolve.

III. Timeline of the grievance

[6] The grievor was hired on July 8, 2021, and was then dismissed during his probationary period by letter dated September 28, 2021. The grievor was informed of this decision on September 29, 2021. The grievor filed his grievance on December 24, 2021. The deadline for filing a grievance is 25 working days, which expired on November 4, 2021.

[7] Additionally, the respondent responded to the grievance at the first level on January 14, 2022, but the grievor did not transmit the grievance to the second level until February 14, 2022. The grievor transmitted his grievance to the second level on his own, without his union (the Public Service Alliance of Canada (PSAC)) which got back involved after he had done so. The deadline for transmitting a grievance to the next level of the grievance process is 10 working days, which expired on January 28, 2022.

[8] The respondent objected to the timeliness of both the initial grievance and its transmittal to the second level at each relevant step of the grievance process and again filed a timely objection with the Board.

[9] There is no dispute that the grievance was filed late and that it was transmitted late to the second level. However, in its response to the grievor's application for an extension of time, the respondent stated that it "... agrees that the delay in transmitting the grievance to second level appears to be timely." I cannot determine whether this means that the respondent now states that the transmittal was timely or whether it is consenting to the extension of time for that transmittal. Regardless, the respondent has focussed on the delay filing the grievance instead of its transmittal to the second level, so I will do likewise.

IV. Application for an extension of time

[10] The Board has the power to extend any time limit set out in a collective agreement or the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") "in the interest of fairness" (see s. 61(b) of the *Regulations*). Both parties referred to the so-called *Schenkman* factors (from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1), which the Board commonly applies when assessing whether to grant an extension of time, namely:

- whether there are clear, cogent, and compelling reasons for the delay;
- the length of the delay (and at what stage of the process did it occur);
- the due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the respondent 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).

[11] These criteria are not fixed, and the Board's overriding goal is to determine what is fair based on the facts of each case. These criteria are also not necessarily of equal weight and importance; see *Lewis v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 27 at para. 59, and *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 60 at para. 74.

A. Explanation for the delay in filing the grievance

[12] The respondent's main submission is that the grievor has not provided an adequate explanation for the delay. The grievor is represented by a union. The union blames itself for the delay. The initial application for an extension of time explained this as follows:

...

11. The delay in filing the grievance is accounted [for] by the Union's initial rejection of representation of a grievance asking that a member's ROE [record of employment] be altered. Under the grievor's persuasion and the Union's greater understanding of the facts, the Union eventually proceeded with the filing.

12. When the Union hesitated before transmitting the grievance to the second level, with physician statement in hand, the grievor again persuaded the Union to continue representing the grievance at the second level.

...

[13] I pointed out to the grievor that this explanation did not state that the grievor had provided timely information to the union about his case. In other words, there was nothing to indicate that the grievor had approached the union within 25 working days of his rejection on probation.

[14] In reply, and at my invitation, the grievor filed an email to his union dated September 30, 2021. While the grievor redacted parts of that email (without explaining why), it does say this: "I would like to submit a grievance and/or a complaint." The grievor's reply submissions go on to explain the delay as follows:

...

5. *The union local's delay can be attributed to its consideration of various factors, including the entitlement of a member employed for fewer than three months to present a grievance. The actual subject of the grievance was also under consideration, be [sic] the subject discrimination and termination or the grievor's eligibility to claim EI under an appropriate Record of Employment (ROE).*

6. *The grievor's ROE manifested as the subject of the grievance presented on 24 December 2021.*

7. *During the period of delay, from the day after the grievor's awareness of their termination, the grievor's initiative and continued diligence successfully persuaded the union local to provide representation in resolving the conflict and seek some measure of remedy. The Union reiterates that the delay in presenting the grievance can be attributed solely to the Union.*

...

[15] To provide some context for that submission, the grievance filed on December 24, 2021, states this: "I would like my ROE to reflect that I quit and not show that I was terminated in the probationary period" and seeks as corrective action that the respondent do this: "... please correct my ROE to indicate quit." In essence, the grievor states that he requested leave without pay for personal needs and that he intended to quit if that leave was not granted. The respondent's first-level response responds to that claim. However, the grievance evolved at the second and third levels of the grievance process. The second-level response indicates that the grievor argued that his probationary dismissal was unwarranted and that he was discriminated against. At the third level, the grievor formally requested reinstatement, accommodation of a medical condition, and backpay. The response at the third level addressed those claims.

[16] The cases in which the Board has attributed the delay in a case to a union and not a grievor have involved situations of a clear mistake or error by the union. For example:

- a) in *Guenther v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLRB 85, the union's officer responsible for filing a reference to adjudication with the Board missed (or forgot about) the deadline to make the referral, despite the necessary paperwork having already been drafted;
- b) in *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLRB 42, the union simply lost track of some grievances as a result of being confused and therefore thought that it had filed a reference to adjudication when it had not;

- c) in *Slusarchuk v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 22, the delay referring a grievance to the final level was the result of inability, absence, or negligence on the part of the union's grievance officer;
- d) in *Gee v. Deputy Head (Department of Public Safety and Emergency Preparedness)*, 2022 FPSLREB 58, the delay referring a grievance to adjudication was caused by an administrative oversight in the union's office;
- e) in *Lewis*, the delay referring a grievance to adjudication was the result of the union simply forgetting to file the required paperwork;
- f) in *Hannah v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 87, the delay referring a grievance to adjudication was due to an error by the union; and
- g) in *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79, the delay filing a grievance was entirely the result of a union's negligence.

[17] The common feature in those cases is that the delay was attributable to a mistake or negligence by the union. In this case, PSAC does not say that it made a mistake or that it was negligent.

[18] The explanation for the delay in this case is anything but clear. The grievor's initial submission (which I quoted earlier in its entirety) was that the union did not file the grievance on time because it did not want to represent a member in a grievance about a record of employment (ROE). Yet, this is exactly what it did — the grievance as filed was only about the ROE and allowing the grievor to claim that he had quit instead of having been dismissed.

[19] In his reply submissions, the grievor states that the delay is the result of the union local having to consider "various factors", including whether the grievor was eligible to file a grievance (he was) and its subject matter (which evolved after the grievance was filed anyway).

[20] The line of authorities I cited earlier to the effect that a union's mistake can constitute a clear and compelling reason for missing a deadline derives from two ideas. First, as explained in *Prior v. Canada Revenue Agency*, 2014 PSLRB 96 at para. 127:

127 Most jurisdictions in Canada, including this jurisdiction, have expressly codified the duty in their collective bargaining statutes. The scope of the duty of fair representation has been found to include a duty of trade unions to avoid serious negligence in representing employees in the grievance procedure. Where complaints concerning the failure of the union to pursue a grievance to arbitration have been found to contravene the duty, labor boards have ordered trade unions to take the grievance to arbitration and ordered the employer to waive preliminary objections to arbitration, such as a failure to comply with the time

limits. See G.W. Adams, Canadian Labour Law (second edition), chapter 13.36.2.

[21] In other words, granting an extension of time because of a union's gross negligence avoids the need for a duty-of-fair-representation complaint in which the Board would grant an extension of time anyway to remedy the union's gross negligence.

[22] Second, there is a natural inclination against visiting a union's mistake on a grievor. Extensions of time are fundamentally about fairness; it often seems unfair for a person to bear the consequences of someone else's mistakes.

[23] However, not every situation in which a union tries to claim responsibility fits within those two ideas. It is not enough for a union to declare that it was responsible for the delay and that, therefore, the delay is excusable. A union that claims responsibility for missing a deadline still must show the Board why the delay occurred. If the delay was the result of a mistake (as in the seven cases I mentioned earlier), the union needs to explain what mistake occurred and how it happened.

[24] In this case, the grievor's submissions do not disclose any mistake or error by his union. Instead, the grievance was filed late because the union local took its time to consider the grievance and because it had concerns about whether the grievance was viable. This was a deliberate course of conduct, in both meanings of the word (i.e., it was intentional and unhurried).

[25] I also note that the grievance does not allege a breach of the collective agreement. This means that the grievor could have filed it without his union's support. While that is not determinative, it is relevant in this case — particularly when I have no evidence to suggest that the grievor was promised that his union would file this grievance or that he relied on his union to file it on his behalf, and given that the grievor transmitted it to the second level on his own.

B. Other factors

[26] The respondent submitted that since there was no clear and compelling reason for the delay, the other factors are no longer relevant. I disagree. As the Board said in *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FP SLREB 93, "I agree that in most cases, the remaining criteria do not matter **much** when assessing an

extension-of-time application” [emphasis added]. That does not mean that the remaining factors do not matter at all.

[27] In this case, the parties spent considerable energy arguing over whether I should treat this as a delay of 33 working days (the period between the due date and the grievance’s filing) or 58 working days (the period between the rejection on probation and the grievance’s filing). I do not care which way the delay is counted. The period of this delay is neither excessive nor trivially short.

[28] I do give some weight to the fact that the delay occurred at the outset of the grievance. As discussed in *Van de Ven*, a delay transmitting a grievance to a higher level is less prejudicial than a delay at other stages because the employer has started, but not yet completed, considering the issues raised. The converse is also true: a delay in the initial filing of a grievance weighs against granting an extension of time.

[29] Turning to the remaining three factors quickly, the grievor appears to have acted diligently by bringing this matter to his union’s attention the day after he was rejected on probation, and there is some indication that the grievor persuaded his union to carry on with this grievance at the second level after he personally transmitted it, so the diligence factor would favour granting an extension of time. The respondent has neither claimed nor demonstrated any prejudice it would suffer if I were to grant this extension of time, which is a strong factor in favour of the grievor’s application. Finally, I have nothing to indicate one way or another whether the grievor has an arguable case (aside from the preliminary objection based on the changing nature of the grievance). I have given no weight to this final factor.

C. Conclusion not to grant an extension of time

[30] On balance, I have decided not to grant the extension of time. The explanation for the delay is neither clear nor compelling. While the grievor’s union has attempted to take responsibility for the delay, this is not a case in which someone associated with a union made a mistake or forgot to file the grievance on time. Instead, the union took its time deciding whether to file the grievance. It could have asked the respondent to hold the deadline in abeyance while it investigated the grievance, but it did not. It could have filed the grievance and then asked for more time to investigate, but it did not. The grievor could have filed this grievance on his own, but he did not. I have been provided with no explanation for **why** the union took more than 25 working days to

decide whether to file this grievance on behalf of the grievor; I have been told only that it had initially decided not to help the grievor but that it changed its mind later. This lack of a clear and compelling explanation, coupled with the fact that the delay occurred at the outset of the case, outweighs the respondent's lack of evidence about any prejudice it has suffered because of the delay.

[31] In light of my decision not to grant the extension of time, I have decided not to address the respondent's other objections to this grievance.

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

(The Order appears on the next page)

V. Order

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

[34] The grievance is dismissed.

January 18, 2024.

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