Date: 20240112

Files: 568-02-48380 and 566-02-47327

Citation: 2024 FPSLREB 5

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

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BETWEEN

DEREK OSBORNE

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Indexed as
Osborne v. Treasury Board (Department of Fisheries and Oceans)

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* and an individual grievance referred to adjudication

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

For the Grievor: Elissa McCarron, counsel

For the Employer: John Mendonça, Treasury Board of Canada Secretariat

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Decided on the basis of written submissions,
filed June 26, July 9 and 24, August 22, September 27, and October 4, 2023.

REASONS FOR DECISION

I. Outline

[1] This decision is about the timeliness of this grievance and, if the grievance is untimely, whether I should grant an extension of time to file it.

[2] The two issues about the timeliness of the grievance are whether ongoing discussions between an employee and the employer extend the time to file a grievance and determining the "anchor date" (to use the grievor's term) of this grievance. As I will describe in greater detail later in this decision, ongoing discussions do not extend the time limit to file a grievance. Additionally, the anchor date of this grievance was December 1, 2020, the last day of the acting appointment that can form the subject matter of this grievance. The grievance was filed late.

[3] I have also decided not to grant an extension of time to file this grievance. The grievor has not provided a compelling explanation for the delay, and the other factors that the Board typically considers when deciding whether to grant an extension of time are evenly balanced and do not offset the lack of a compelling explanation.

[4] As a result, I have dismissed the application for an extension of time and have dismissed the grievance as untimely.

II. Procedure followed for this decision

[5] 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 FPSLREB 141 at para. 3 (upheld in 2022 FCA 159 at para. 10).

[6] The employer objected to this grievance as untimely. The grievor responded by stating that the grievance was not untimely, but also asked for an opportunity to apply for an extension of time to file the grievance should the Board conclude that it was untimely. The employer filed a short reply to the grievor's position. Upon reviewing those submissions, I decided that the issue of timeliness could be resolved in writing. I also decided that any application for an extension of time (if necessary) could also be

decided in writing alongside my decision about the timeliness of this grievance. I set out a timetable for the parties to exchange written submissions on that application and allowed them to supplement their existing submissions on the timeliness of the grievance. Finally, I asked the parties to file copies of two emails (dated February 26 and March 4, 2021) that were referred to in both parties' written submissions. The grievor filed those copies, as asked.

[7] After reviewing the parties' written submissions, I remain convinced that this preliminary objection and the related application for an extension of time can be decided in writing. There are no facts about the timeliness of the grievance that require an oral hearing or cross-examination of witnesses to resolve.

III. Nature of the grievance

[8] In this decision, I have summarized the allegations in the grievance and its surrounding context only for the purposes of ascertaining its subject matter. I have not addressed its merits.

[9] The grievor was employed in the Department of Fisheries and Oceans ("DFO"). His substantive position was classified at the BI-04 group and level, and he held the position of Section Head. The grievor also acted as the Division Manager of Aquatic Resources for approximately eight months in total, including five months intermittently between May 2019 and March 2020. At the onset of the COVID-19 pandemic in March 2020, the grievor asked to step away from this acting role so that he could address his family's immediate childcare needs. The employer agreed, and his acting appointment ended on March 31, 2020 at his request. The grievor took a leave of absence between June 15 and September 15, 2020 to care for his children and then returned to his substantive position. The grievor was not given any other opportunities to act as the Division Manager except for a five-day period from November 16 to 20, 2020.

[10] DFO ran an external advertised appointment process to appoint employees to the position of Division Manager (classified at the REM-02 group and level). The grievor and other colleagues applied. The grievor and other colleagues were found qualified for the position. Ultimately, DFO did not appoint the grievor. Instead, it appointed the employee who had been acting in the position between August 4 and December 1, 2020. The employer describes that it offered the position to that employee on

November 17, 2020, and that it extended the acting appointment of that employee from December 1, 2020 to January 15, 2021 to give it time to finalize that appointment.

[11] There have been no acting appointments to the Division Manager position since the one commencing on December 1, 2020.

[12] DFO appointed a second candidate to another Division Manager position on February 19, 2021. That second appointment triggered a meeting later that day between the grievor and the Regional Director of Science at DFO to discuss the appointment decisions. The grievor sent an email on February 26, 2021 to follow up on that meeting and outline his concerns. The Regional Director responded by email on March 4, 2021. The grievor contacted his bargaining agent's steward on March 10, 2021, and then prepared and signed this grievance on March 31, 2021 with his steward's assistance. While the grievor sometimes states that he filed his grievance on March 31, 2021, he clarified in his reply submissions that he filed it on April 6, 2021. Fortunately, nothing in this case turns on whether the grievance was filed on March 31 or April 6, 2021 (which is a difference of only one working day).

[13] The parties agree that the time limit for the grievor to file this grievance was 25 working days from the date that the grievor was notified of or first became aware of the "… action or circumstances giving rise to the grievance." The collective agreement between the Treasury Board and Professional Institute of the Public Service of Canada for the Applied Science and Patent Examination (SP) bargaining unit (expired September 30, 2022; "the collective agreement") setting out this time limit reads as follows:

…	[…]
35.12 *A grievor may present a grievance to the first step of the procedure in the manner prescribed in clause 35.06, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance.…*	***35.12*** *L'auteur du grief peut présenter un grief au premier (1er) palier de la procédure de la manière prescrite au paragraphe 35.06, au plus tard le vingt-cinquième (25e) jour qui suit la date à laquelle l'auteur du grief est informé ou devient conscient de l'action ou des circonstances donnant lieu au grief* […]

… […]

[14] To determine the "… action or circumstances giving rise to [this] grievance", I have followed the approach in *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at para. 37 which was to determine that action or circumstance by reviewing the grievance form along with the submissions filed by both parties. In this case, this also means that I considered the two emails (February 26 and March 4, 2021) that describe the nature of this case.

[15] The grievance reads as follows:

> *I grieve the employer's failure to ensure fairness, equity, and transparency in the allocation of acting assignments for the period of March 2020 to present.*
>
> *This is in violation of the SP Group0* [*sic*] *Collective Agreement, including but not limited to article 5 (Management Rights) and article 44 (No Discrimination), as well as the Canadian Human Rights Act.*

[16] The grievor's position is that he was not afforded a fair or equal opportunity to compete for the Division Manager position because he was not given an opportunity to act in that position upon his return to work in September 2020. The grievor states that he was prevented from acting in that role because he had taken time off to address his family needs flowing from the COVID-19 pandemic and that DFO did not appoint him to an acting position after his return because it wrongly assumed that he was not interested in acting anymore. The grievor states that, as a gay father, he was treated differently from female workers who prioritize their families in the face of a crisis. The Regional Director's email of March 4, 2021 disputes that claim and points out that there were two main acting periods, one from April 1 to May 15, 2020 (i.e., the period in which the grievor had asked to stop acting in that position), and another from the end of July (i.e., the one that started on August 4, 2020) to December 1, 2020 which started while the grievor was on leave.

IV. Timeliness of the grievance

[17] The employer objects to the timeliness of this grievance. The employer states that the last acting appointment was made on December 1, 2020, and that even that was a temporary measure to ensure a smooth transition to the permanent appointment. The grievance was filed more than 25 working days from that date.

[18] The grievor states two things in response to the employer's argument, described below. I have rejected those two arguments.

1. Discussions with management do not extend a time limit

[19] First, the grievor states that his informal discussions with management extended that 25-day period so that it began to run only on March 4, 2021.

[20] I disagree. In the absence of an agreement to suspend time limits, "[o]ngoing discussions between a bargaining agent and the employer do not suspend the time limit unless the parties have agreed to suspend it" (see *Tuplin v. Canada Revenue Agency*, 2021 FPSLREB 29 at para. 49). This rule applies equally to discussions between an individual grievor and their employer. Similarly, the Board has concluded that "… the time limit to file a grievance is not unilaterally extended by an employee's attempts to convince the employer to reverse or modify its decision" and that "[o]ngoing discussions about the employer's decision …" do not extend the period in which to file a grievance (see *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34 at paras. 22 and 27.

[21] The grievor's ongoing discussions with management did not extend the deadline to file a grievance.

[22] The grievor relied on clause 35.05(c) of the collective agreement in support of his argument, which reads as follows:

35.05	***35.05***
…	[…]
*c. The parties recognize the value of informal discussion between employees and their supervisors and between the Institute and the Employer to the end that problems might be resolved without recourse to a formal grievance. **When notice is given that an employee** or the Institute, within the time limits prescribed in clause 35.12, **wishes to take advantage of this clause**, it is agreed that the period between the initial discussion and the final response shall not count as elapsed*	*c. Les parties reconnaissent l'utilité d'une explication officieuse entre les employés et leurs superviseurs et entre l'Institut et l'employeur de façon à résoudre les problèmes sans avoir recours à un grief officiel. Lorsqu'un employé ou l'Institut annonce, dans les délais prescrits au paragraphe 35.12, qu'il désire se prévaloir du paragraphe présent, il est entendu que la période couvrant l'explication initiale jusqu'à la réponse finale ne doit pas être*

time for the purpose of grievance time limits.	*comptée comme comprise dans les délais prescrits lors d'un grief.*

[Emphasis added]

[23] The grievor never provided the required notice that he wished to take advantage of this clause. Therefore, clause 35.05(c) does not assist the grievor.

2. The anchor date of the grievance was no later than December 1, 2020

[24] Second, the grievor states that he became aware of the action or circumstances giving rise to the grievance only on March 4, 2021 when he received the email on that date in response to his February 26, 2021 email. I will quote the grievor's submissions on this point:

> …
>
> *… PIPSC* [the grievor's bargaining agent] *submits that the grievance was timely. As the employer has noted, the permanent appointment to the REM-02 position was made on January 15, 2021. Between that date and the submission of his grievance on March 31, 2021, the grievor was engaged in regular communication with senior management regarding the appointment and his concerns about how the staffing process was conducted. It was only through these communications that the grievor became aware that discrimination was a factor in the unequal allocation of acting assignments and that this led to the permanent appointment….*
>
> …
>
> *… The grievor became aware of the permanent appointment on January 15, 2021. However, it was only after meeting with Ms. Janes on February 19, 2021, and reviewing her correspondence on March 4, 2021, that it became apparent that the employer had relied upon the prior unequal assignment of acting opportunities as a central reason for making the permanent appointment. Further, it was through these exchanges that senior management made comments that revealed bias against the grievor based on his decision to take leave from work due to his caregiving obligations. Thus, the grievor only became "aware of the action or circumstances giving rise to the grievance" as described under article 35.12 of the SP Group Collective Agreement on March 4, 2021, which is the anchor date for his grievance….*
>
> …

[25] The grievor was more succinct in his reply submissions, as follows:

> …

> *… The relationship between his caregiving obligations and the unfair disadvantage only became apparent, however, through discussions with management on the subject between February 19, 2021, and March 4, 2021. Thus, the latter date serves as the cause of action or trigger for the grievance filed on April 6, 2021.*
>
> *…*

[26] I disagree again, for two reasons.

[27] First, the grievor's submissions about timeliness orient his case around the permanent appointment. The problem is that he did not grieve that appointment. Nor could he. Section 208(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") states that an employee may not present a grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament. The *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*") provides redress for employees aggrieved about indeterminate appointments — either to the Public Service Commission, if the appointment was made in an external appointment process (see s. 66 of the *PSEA*) as was the case with the indeterminate appointment, or to the Board if the appointment was made in an internal appointment process (see s. 77(1) of the *PSEA*).

[28] For that reason, the grievor could not grieve the indeterminate appointment.

[29] The grievance must be against a series of acting appointments made up to December 1, 2020. As the first two acting internal appointments were of less than four months in length, they were outside the complaint process set out in the *PSEA* (see s. 14(1) of the *Public Service Employment Regulations* (SOR/2005-334)), which is, presumably, why the grievor filed a grievance instead. Since there is no recourse against an acting appointment of less than four months' duration under the *PSEA*, the Board has the jurisdiction to hear a grievance alleging that such an acting appointment violates the non-discrimination clause in a collective agreement. For example, in *Haynes v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 85 the Board accepted that it had the jurisdiction to hear a grievance about the failure to offer an employee an acting position of less than four months because there was no recourse under the *PSEA* against these acting appointments, stating at paragraph 23 that "… as there is no recourse to the PSST [under the *PSEA*], its procedures cannot represent 'another administrative procedure for redress' in accordance with section 208's bar on the types of grievances which can be filed with the employer."

[30] However, the final acting appointment starting December 1, 2020, led to a cumulative period of an acting appointment of greater than four months, meaning that the complaint process in s. 77 of the *PSEA* was available — which in turn means that the grievor could not grieve that acting appointment.

[31] Therefore, the most recent acting appointment that could have been grieved was the one from August 4 to December 1, 2020. The grievor does not suggest that he was unaware of this acting appointment when he returned from his leave of absence on September 15, 2020. Therefore, he was aware of the action or circumstance giving rise to the grievance — i.e., the acting appointments — well more than 25 days before he filed the grievance.

[32] The grievor argues that he became aware of the impact of the unequal distribution of acting appointments only on March 4, 2021. However, this "impact" was the impact of acting appointments on the assessment of candidates for the permanent appointment. He could not grieve that assessment. Additionally, the limitation period in which to file a grievance commences when an employee becomes aware of the "… action or circumstances giving rise to the grievance" — not of the impact of that action or those circumstances.

[33] For these reasons, I agree with the employer that the anchor date of this grievance is no later than December 1, 2020, when the grievable acting appointment ended.

[34] Second, the grievor argues that he "… became aware that discrimination was a factor in the unequal allocation of acting assignments …" only after his discussions with his Regional Director took place. The grievor's argument is that the acting appointments were discriminatory on the basis of sexual orientation or family status because employees with family commitments are less able to take on acting appointments and that this impact is particularly acute for gay male parents. But in his case, he opted out of an acting appointment in March 2020 because of family commitments. I cannot agree with his submission that he became aware that family commitments would lead to an unequal allocation of acting assignments only in 2021, given what happened in March 2020.

[35] Regardless, the verbal discussion with the Regional Director took place on February 19, 2021. Twenty-five working days from February 19, 2021, is March 26,

2021. Therefore, even if I am wrong and the grievor became aware of the action or circumstance giving rise to the grievance only on February 19, 2021, his grievance is still untimely.

[36] This leaves an email sent by his Regional Director on March 4, 2021. I have concluded that this email does not assist the grievor's argument on timeliness, for two reasons.

[37] First, the March 4, 2021, email was in response to the grievor's email of February 26, 2021, in which he says this:

> *…*
>
> *This email is a follow-up to our call last Friday (February 19, 2021) regarding the second recent appointment to a Division Manager position within Science Branch. As I clearly stated, I am extremely disappointed that yet again I have been overlooked for promotion. I believe the reasons to be firmly rooted in an archaic view of men as primary child caregivers and questionable due process.*
>
> *…*
>
> *I believe that I was prevented from further acting in the Division Manager role because I had earlier taken time to address my family needs as a direct result of the pandemic. I further believe that such an inequitable approach to the selection of the next Division Manager would not be tolerated in the case of a female candidate who prioritizes her family in the face of a crisis … At a time with so much discussion on the subject of breaking glass ceilings, it appears that the public service is not ready for competent and capable gay fathers to serve in regional senior management roles.*
>
> *… I will be seeking formal options to address the injustice that I have been dealt.*
>
> *…*

[38] In this email, the grievor accuses his Regional Director of discrimination on the basis of sexual orientation and/or family status and states that he will be commencing some proceeding as a result. The grievor also states that his complaint will be based on events culminating with the February 19, 2021 discussion. The grievor states clearly that he knew about his claim no later than February 19, 2021.

[39] Second, I have read the March 4, 2021 email in its entirety. At no point does the Regional Director admit to discrimination on the basis of sexual orientation or family status. Instead, she denies the grievor's allegations and states that "… all staffing

decisions are based on merit, and are conducted in an equitable, unbiased manner to adhere to high ethical standards.” She goes on to describe the indeterminate appointment process before turning to the acting appointments (the subject of this grievance) by stating this:

> …
>
> *You raised the two acting assignments that* [the successful candidate] *undertook in 2020. The first came about after you informed me that you did not want to extend your period of acting having acted for the month of March 2020 when the substantive DM was off sick. As a result,* [the successful candidate] *was afforded an opportunity to act during the remainder of the substantive DM's period of sick leave, between April 1 and May 15, 2020. The second period of acting, set up for four months less a day to ensure operational continuity at a challenging time, came about after the substantive DM notified the department of his intention to retire and finished work at the end of July 2020 at which time you were on an extended period of leave. While* [the successful candidate] *undertook these periods* [*sic*] *acting, I note that, positively, you have also enjoyed opportunities to act for significant periods of time in the recent past.*
>
> …

[40] The grievor has not identified anything in this email that would trigger a discrimination claim. The Regional Director denied wrongdoing and explained her denial. A denial of wrongdoing does not restart a limitation period. The grievor was aware of the circumstances giving rise to his grievance before the Regional Director denied his allegations on March 4, 2021.

[41] For these reasons, I have concluded that the grievance is untimely.

V. Application for an extension of time

[42] 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 oriented their submissions around the so-called *Schenkman* factors (from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1), which are commonly applied by the Board 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;
- 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).

[43] As the Board stated in *Bowden*, 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 grievor also cited *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144, and *Duncan v. National Research Council of Canada*, 2016 PSLREB 75, in support of these two propositions — that not all factors are weighted equally and that the overriding concern is fairness. I agree.

[44] Both parties addressed the five *Schenkman* factors in order, and I will do likewise.

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

[45] Typically, this is the most important factor in an application for an extension of time. As the Board stated in *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102 at para. 26:

> *[26] … If there are no clear, cogent and compelling reasons for the delay, then the length of the delay, the diligence of the applicant, the balancing of the injustice to the applicant against the prejudice to the respondent and the chances of success of the grievance would not matter that much in most cases. A solid reason is needed for the delay. The Board has consistently taken that approach in the past two years (see, for example,* Lagacé *or* Callegaro v. Treasury Board (Correctional Service of Canada), *2012 PSLRB 110). Furthermore, as I wrote in* Copp v. Treasury Board (Department of Foreign Affairs and International Trade), *2013 PSLRB 33, in the past, the Board rarely agreed to grant extensions of time without clear, cogent and compelling reasons justifying the delay.*

[46] Or, more bluntly, "… in most cases, the remaining criteria do not matter much …" (see *Bowden*, at para. 82).

[47] The grievor states this:

…

> *… the only reason for the delay was due to the grievor's good faith efforts to raise his concerns directly with senior management. It was only after these conversations led to an impasse, and indeed, demonstrated to the grievor that the unequal and discriminatory allocation of acting assignments was a central factor in the permanent appointment of another candidate to the REM-02 position, that he contacted his union and filed a grievance.*
>
> …

[48] The employer says that the grievor could have filed a grievance earlier and that he has offered no cogent, coherent, or compelling reason as to why he did not.

[49] As a general approach, the Board has concluded that ongoing discussions are not a compelling explanation for a delay filing a grievance. For example, it has stated that "[d]iscussions to resolve issues do not justify the untimely filing of grievances. Once filed, a grievance can always be held in abeyance pending the outcome of discussions between the parties" (see *Salain v. Canada Revenue Agency*, 2010 PSLRB 117 at para. 45). More recently, the Board has been just as blunt that "… informal discussions do not justify the untimely filing of a grievance …" (from *Fragomele v. Canada Revenue Agency*, 2022 FPSLREB 39 at para. 148).

[50] Even if I accepted the grievor's submissions that an ongoing discussion justifies a delay (which I do not), I am concerned that the grievor did not provide a clear, cogent, and compelling justification for the entire period of the delay.

[51] In other jurisdictions, decision makers have required a party asking to excuse a delay to provide an adequate explanation for the entire period of the delay. For example:

- The Federal Court requires that an applicant show "… that there was some justification for the delay throughout the whole period of the delay …" (see *Beilin v. Minister of Employment and Immigration* (1994), 88 F.T.R. 132 (TD) at para. 6, and *Doray v. Canada*, 2014 FCA 87).
- The Manitoba Court of Appeal refused to grant an extension of time to file an appeal because the appellant's health "… does not satisfactorily explain the entire period of delay …" (see *Delichte v. Rogers*, 2018 MBCA 79 at para. 25).
- The Ontario Court of Appeal requires that a party seeking an extension of time to opt out of a class proceeding must show that "… the entire period of delay, from the missed deadline to opt out through the making of the request for an extension, was the result of excusable neglect" (see *Johnson v. Ontario*, 2022 ONCA 725 at para. 40).

[52] This Board's decision in *Prior v. Canada Revenue Agency*, 2014 PSLRB 96, may appear, at first glance, to reject this proposition at paragraphs 133 and 139, which read as follows:

> ***133*** *The respondent referred to a number of decisions of the Federal Court of Canada in support of the proposition that a justification for an extension of time requires that there exist a reasonable explanation for the delay* ***and in some cases for the whole period of the delay.***
>
> …
>
> ***139*** *It is apparent that the* Federal Courts Rules *do not stipulate the factors on which the Courts' discretion to extend time limits is to be based, and the Courts therefore have developed and established factors in the case law to be applied. The provision in the* Income Tax Act *expressly requires that a judge be satisfied that the application was made as soon as practicable.* ***These cases, in my view, are very different from this case, where the*** **Regulations*****, as subordinate legislation, mandate that extensions of time be granted if it is in the interests of fairness to do so.***
>
> [Emphasis added]

[53] However, in *Prior*, the Board did not go on to say explicitly that the failure to provide an explanation for the entire period of the delay was irrelevant. The Board ended up saying two things: that the negligence of a union could constitute an explanation for a delay and that the overriding principle in granting or denying an extension of time is fairness.

[54] I also note that the Board in *Featherston v. Deputy Head (Canada School of Public Service)*, 2010 PSLRB 72, rejected an application for an extension of time because the applicant's health difficulties did not explain the entire period of the delay. This is consistent with the principle that gaps in the explanation for a delay are relevant.

[55] In light of these cases, I have concluded that the failure to provide a clear, cogent, and compelling explanation for the entire period of delay is a relevant factor when assessing an application for an extension of time. The fact that an explanation does not cover the entire period of delay is not dispositive, but it remains relevant.

[56] In this case, the discussions relied upon by the grievor occurred between February 19 and March 4, 2021. The grievor has provided no explanation for the delay between December 1, 2020, and February 19, 2021 — more than 25 days — as there

were no discussions during that time. The failure to provide an explanation for the entire period counts against the grievor; what is worse, the explanation does not cover the first 25-day period of the delay during which the grievor had to file a grievance. Even if I had accepted that there was a clear and compelling reason for the delay, the fact that this explanation only applied after the 25-day limitation period expired is a factor against granting that extension of time.

[57] This factor weighs against an extension of time.

2. Length of the delay

[58] The grievor submits that the length of the delay in this case was not excessive. However, the grievor bases that submission on the anchor date for the grievance being the first permanent appointment, on January 15, 2021. As I have explained earlier, that is not the anchor date for the grievance. At the risk of repeating myself, the grievance is about the unequal distribution of acting appointments to the Division Manager position. The employer submits that the anchor date for this grievance was December 1, 2020. In my view, that is the latest possible anchor date for this grievance, for the reasons I set out above when discussing the timeliness of this grievance.

[59] Taking December 1, 2020 as the starting point for the deadline to file a grievance, this means that the delay filing the grievance was just over four months (meaning that as the employer put it, the grievance was roughly eight weeks late). 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* at para. 147, the Board called a four to five-month delay "not excessive". I agree with the tenor of these cases that the delay in this case is not excessive but also not short. This factor favours granting an extension of time — but only slightly, and I give it little weight.

3. Due diligence of the grievor

[60] The grievor submits that he acted diligently after he was "… first advised that the unequal and discriminatory allocation of acting assignments was of central relevance to the employer's permanent appointment in his meeting with the RDS on

February 19, 2021." The grievor also submitted that his diligence should be considered in the context of the employer's dilatory treatment of this grievance, particularly the employer's delay making a third-level decision on the grievance. The employer denied the grievance at the second level on June 25, 2021, but did not issue a third-level decision until April 16, 2023. The grievor submitted that this was a delay of "nearly a year" — however, on my calculations, this was a delay of almost two years (which would only help the grievor further). The grievor cites *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 60 at paras. 83 and 90, for this proposition.

[61] The employer says that the grievor did not demonstrate due diligence because ongoing discussions do not suspend time limits. I have already addressed that issue earlier when discussing the grievor's explanation for the delay. Otherwise, the employer does not say anything about the grievor's diligence.

[62] The grievor's submissions on due diligence treat the grievance as about the impact of acting appointments on the permanent appointment. That is not what the grievance is about — at the risk of repeating myself, it cannot be what the grievance is about because the permanent appointment cannot be grieved. The grievance must be about the allocation of acting appointments of less than four months' cumulative duration, the last of which ran out on December 1, 2020. Therefore, I am looking for due diligence by the grievor from the day he learned about the unequal acting appointments until the day he filed his grievance — not just due diligence after he learned that the acting appointments were a factor in a staffing action. Extensions of time are about fairness; however, *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not the sleeping).

[63] I am not satisfied that the grievor has demonstrated due diligence in this case for the entire period of the delay. He knew about the acting appointments but did nothing. After he learned about the first permanent appointment (January 15, 2021), he waited over a month until the second permanent appointment to express his concerns (February 19, 2021) — which were mainly about the first permanent appointment in any event. After the meeting in which he expressed his concerns and heard management's view, he waited another two-and-a-half weeks to contact his steward (March 10, 2021), then waited another three weeks to sign the grievance

(March 31, 2021), and just under another week (granted, most of which was composed of a weekend and holidays) to file it (April 6, 2021).

[64] I agree with the grievor in principle that I can consider an employer's dilatory treatment of a grievance when deciding whether an extension of time is fair. While the Board in *Van de Ven* considered the employer's delay when assessing other factors (namely, the length of the delay and the balance of prejudice caused by the delay), I agree with the grievor that I can take the employer's delay into account when assessing due diligence instead. As I have stated earlier, the overriding issue when deciding whether to grant an extension of time is fairness; I am unconcerned about where I "slot in" particular facts that speak to the fairness of granting an application for an extension of time.

[65] However, the grievor (through his bargaining agent) agreed to grant the employer a series of extensions of time to decide the grievance at the final level. This is not a situation like in *Zeleke v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 76, in which the employer simply did not provide a final-level grievance decision and never sought an extension of time from the grievor. Similarly, in *Van de Ven*, there was no agreement by the bargaining agent or grievor to hold the grievance in abeyance or extend the time for the employer to respond — in fact, the employer in that case did not engage with the grievor at all before issuing a final-level reply (see *Van de Ven*, at para. 85).

[66] I am not giving any weight to the employer's slow response to the grievance at the final level. The grievor consented to the delay; he cannot now weaponize the delay that he agreed to at the time.

[67] This factor does not favour granting an extension of time.

4. Balance of prejudice

[68] I quote the employer's submissions on prejudice in their entirety:

> …
>
> *The grievor's representative indicates that there would be no prejudice against the employer to provide an extension to the grievance. The Employer disagrees with this assessment, as the grievor has stated without any evidence, that the Employer had not provided any acting opportunities based upon the family status and the sexual orientation of the grievor. The decision to not offer*

> *the last acting appointment (December 1, 2020, to January 15, 2021) to the grievor was to ensure consistency as the current actor had been offered the job indeterminately. There was nothing discriminatory in this decision.*
>
> …

[69] The employer's argument boils down to this: it thinks that it will win.

[70] This is not what prejudice to the employer is about. Prejudice is about whether the employer would be harmed by the delay hearing this case, not about the strength of its case. Prejudice can be procedural in the sense of a delay preventing the employer from properly defending the case — such as documents being lost or witnesses becoming unavailable during the period of delay. Prejudice can also be substantive in the sense of the employer relying upon the failure to file a timely grievance when it made some decision or took some action. There are other forms of prejudice, but the strength of the employer's case does not cause it prejudice.

[71] The employer has not shown how it will be prejudiced if I grant the extension of time.

[72] The grievor's assertion of prejudice is as follows:

> …
>
> *If the grievance is deemed untimely, it will cause significant prejudice to the grievor. His grievance concerns a serious issue of discrimination based on family status and sexual orientation that has had lasting impacts on his career trajectory within the department. Shortly after the events transpired, he accepted a job offer outside of his region so that he might have some distance to reflect on what had transpired.* ***It has negatively impacted his faith in senior management*** *and his employer's ability to properly address issues of equality and discrimination in the workplace. He should not be deprived of recourse to pursue the merits of his grievance based on a relatively short delay in filing, especially considering the delays that he faced from the employer in processing his grievance.*
>
> …
>
> [Emphasis added]

[73] I also do not understand how the grievor will be prejudiced if the grievance is dismissed. The grievor has not identified any tangible or concrete benefit to him in this grievance. The corrective action he requested on the grievance form is that the

employer ensure that acting assignments are allocated fairly and without discrimination. However, the grievor has moved on to a different region, so any order that the Board would make based on the facts alleged in this grievance would have no benefit for him as they would only affect a region he has moved on from.

[74] The grievance form also asks that the grievor be "made whole." However, the Board cannot order that the employer appoint the grievor to a Division Manager position or even order that it appoint him to an acting position. As the Board has said, "An employee cannot claim the right to an appointment" (see *Santawirya v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 85 at para. 40 (overturned in 2019 FCA 248, but not on this point)). I am not sure what the Board is supposed to make whole in this case.

[75] Therefore, for prejudice, I am left with the grievor's statement that these events have "… negatively impacted his faith in senior management …". Winning this grievance cannot change that. If the grievor wins, the Board will simply confirm his lack of faith in senior management. The grievor's prejudice if this application for an extension of time is denied is limited to whatever solace he may achieve by winning.

[76] This factor is relatively balanced in favour of and against granting an extension of time, with a slight edge to granting the extension of time (as there is some prejudice to the grievor if the grievance is denied, but no prejudice to the employer if the grievance proceeds to a hearing). I have given it relatively little weight as a result.

5. Whether the grievance raises an arguable case

[77] The grievor points out that this factor typically revolves around whether the grievance would serve no useful purpose because it has no chance of success or is frivolous or vexatious. The grievor also submits that it is difficult to assess the merits of this grievance without a full evidentiary record, but there is no indication that it has no chance of success.

[78] The employer says that this grievance is about acting opportunities that the grievor believes were unavailable to him, but in fact the grievor turned down one opportunity to act (in March 2020), and the second opportunity (starting on August 4, 2020) occurred while he was unavailable because he was on leave.

[79] I will admit to some concerns about the Board's jurisdiction to hear this grievance in the way that the grievor is arguing it. The grievor's submissions keep returning to the impact that acting appointments had on the permanent appointment; as I have said already, the permanent appointment is outside the Board's jurisdiction to deal with by way of a grievance.

[80] On the other hand, I also think that the employer has missed the point of the grievance somewhat. The grievor is not saying that he should have received more or a particular acting appointment (or at least, that is not all he is saying). The grievor's case is more nuanced and systemic than that. The grievor's case, as set out in his February 26, 2021, email and as hinted at in his submissions about timeliness, follows this syllogism:

1) The grievor was unable to act for lengthy periods in 2020 because of family commitments during the pandemic, and DFO used a lengthy acting appointment instead of a series of shorter ones.
2) This inability to act for lengthy periods is more pronounced for employees with childcare or other family commitments.
3) Therefore, using lengthy instead of shorter acting appointments constitutes adverse-effect discrimination on the basis of family status because employees with family commitments are less likely to be able to commit to longer acting appointments, which means that they are less likely to reap the benefits of acting appointments (which include, but are not limited to, access to promotions).
4) Additionally, the grievor is a gay man who is also a parent. The employer would have thought differently about a female straight parent taking time off to care for children during the pandemic, which is discrimination on the basis of sex and/or sexual orientation.

[81] The Board has no jurisdiction to hear a grievance about a particular indeterminate appointment. However, the Board has the jurisdiction to hear a grievance alleging that acting appointments of less than four months have been distributed in a way that violates the collective agreement's no-discrimination clause.

[82] It is at least arguable that rotating acting appointments every month (as the grievor suggested in his February 26, 2021, email) is necessary to ensure that employees who act for longer periods do not obtain a career advantage or other benefits (the most obvious of which is higher salary while acting) over employees who are unable to act for lengthy periods because of family related reasons. I am not saying that I agree or disagree with the argument, and I am not saying that I agree with the premise that an acting appointment of less than four months is lengthy; however, the

argument is not frivolous or vexatious. This factor favours granting an extension of time.

6. Conclusion on the extension of time

[83] In this case, there is an uncompelling explanation for the delay, a lack of due diligence, and no tangible prejudice to the grievor on the one hand and a complete absence of prejudice to the employer, an arguable case for the grievor, and a relatively short delay on the other hand. An application for an extension of time is not decided by simply adding up the factors for and against and siding with whoever “wins” the most factors — which is a good thing in this case, given that they are tied.

[84] As I discussed earlier, out of all the factors, the Board has typically given the most weight to the explanation for the delay. In this case, I have done likewise. The other factors in favour of granting the extension of time (the absence of prejudice to the employer, an arguable case for the grievor, and a relatively short delay) do not outweigh the uncompelling explanation for the delay filing this grievance. Even if they did, they in turn would be offset by the other factors (a lack of due diligence and a lack of tangible prejudice) that weigh against granting the requested extension of time.

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

(The Order appears on the next page)

VI. Order

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

[87] The grievance is dismissed.

January 12, 2024.

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