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File: 566-34-11678

Citation: 2024 FPSLREB 24

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

NADA BASTASIC

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Bastasic v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Herself

For the Employer: Lauren Benoit, counsel

Decided on the basis of written submissions, filed October 6 and 20 and November 24, 2023.

REASONS FOR DECISION

I. Outline

[1] This decision is about a notice of status review. Nada Bastasic ("the grievor") filed this grievance in February 2014 and referred it to the Board in September 2015. The Board has adjourned the hearing of this grievance three times at the grievor's request. After the grievor missed a deadline in December 2022 to file a written response to a preliminary issue raised by the employer, the Board issued a notice of status review and asked her to both explain the delay processing this case and provide a plan to move the case forward.

[2] I have deemed the grievance withdrawn. The grievor has not provided a satisfactory explanation for her delay dealing with this grievance. Additionally, she has not provided a reasonable plan to move this grievance forward.

II. Basis of the Board's jurisdiction

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* (SOR/2005-79) to, respectively, the Federal Public Sector Labour Relations and Employment Board

("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

III. Procedural history

A. Dispute and grievance

[5] On January 10, 2014, the grievor was advised in writing that the Canada Revenue Agency ("the employer") was placing her on sick leave and prohibiting her from entering the workplace. The employer stated that it was concerned about some of the grievor's behaviour. The grievor denies some of the behaviour and states that other behaviour was appropriate. She refused to provide a medical certificate and went on unpaid leave after her sick leave expired.

[6] The grievor filed a grievance against the decision prohibiting her from entering the workplace without first obtaining medical clearance on February 20, 2014. The grievance stated that the employer's decision violated article 19 of the collective agreement between the grievor's bargaining agent (the Public Service Alliance of Canada) and the employer that was in force at that time. The grievor was represented by her bargaining agent throughout the grievance process. The employer denied her grievance at the final level of the grievance process on July 21, 2015. The grievor referred her grievance to the Board on September 18, 2015.

B. The grievor's duty-of-fair-representation complaint

[7] The grievor's bargaining agent stopped representing her after the employer dismissed her grievance at the final level. The grievor filed a complaint with the Board, alleging that her bargaining agent breached its duty of fair representation toward her. The Board tentatively scheduled that hearing for October 11 to 13, 2016, rescheduled it for June 6 to 8, 2017, and then rescheduled it again for October 31 to November 2, 2017 — each time at the grievor's request. The Board finally scheduled a hearing of that complaint for November 14 to 16, 2018. The grievor again requested an adjournment. This time, the Board refused, stating this:

> …
>
> *Given that this is your fourth request for postponement and that there is no apparent change in your medical condition and only a hope on the part of your doctor for you to be ready for a hearing*

> *in approximately one year, I have determined that a fourth postponement of your complaint hearing is not warranted.*
>
> *As each year passes with a complaint awaiting hearing, the risk grows that evidence will be lost due to frailty of human memory or loss of documents.*
>
> …

[8] The Board heard that complaint over two days (November 14 and 15, 2018; the third day was not needed) and dismissed the complaint on February 1, 2019; see *Bastasic v. Public Service Alliance of Canada*, 2019 FPSLREB 12.

C. Attempts to schedule the hearing of this grievance

[9] As I stated earlier, the grievor referred this grievance to adjudication on September 18, 2015. The grievor alleges that the Board has jurisdiction over this grievance under s. 209(1)(b) of the *Act* — namely, that the employer's actions were a disciplinary matter that was tantamount to a suspension.

[10] The Board scheduled this grievance for a hearing from August 23 to 26, 2016. The grievor wrote to ask that it be postponed and rescheduled to May or June of 2017. She also stated that she was uninterested in returning to the workplace at that time because she was caring for her elderly parent. The employer objected to this request, alleging that it would be prejudiced by this delay because of the risks of the unavailability of witnesses and that their recollection of events would deteriorate. The Board agreed to remove this grievance from its schedule for those dates despite the employer's objections.

[11] The Board scheduled this grievance to be heard from June 20 to 23, 2017, as requested by the grievor. She asked that the hearing be postponed again because she was still caring for her elderly parent. She was also concerned that the hearing might overlap with preparations for Canada's 150th anniversary. The employer did not object, and the Board removed this grievance from its schedule.

[12] The Board did not hear again from the grievor with any update about her availability. The grievor states that she spoke with a Board registry officer in February 2019 (although in some correspondence, she states that it was in March 2019), to request a copy of the Board's file about her duty-of-fair-representation complaint. The grievor states that the registry officer told her that she would not be entitled to a

hearing of this grievance because she was not successful in her complaint against her bargaining agent.

[13] The Board scheduled this grievance for a hearing from May 25 to 27, 2022, and sent the parties a notification to that effect by email dated January 18, 2022. The Board also scheduled a case management conference for May 9, 2022, and sent the parties a notice of that case management conference (along with a request to provide the times that day that they were available) on April 26, 2022. The grievor states that she did not receive the notice of hearing until April 21, 2022. She emailed the Board on April 27, 2022, to acknowledge her receipt and to promise a more detailed email by the end of the following day. She did not send that promised email. Instead, on May 4, 2022, she sent a five-page letter to the Board to request another postponement of her hearing, this time to August 2023. She explained that she did not have Internet access at her residence and, therefore, received the hearing notice only on April 21, 2022. The grievor stated that she needed more time to prepare for the hearing, that she needed to care for an elderly parent, that the hearing would cause her stress and harm her health, that she had a case management conference with the Sun Life Assurance Company of Canada ("Sun Life") involving other litigation (presumably about her long-term disability benefits), and that since December 2013, she had "… been engrossed with eldercare issues and attempts at self care …".

[14] The employer did not oppose adjourning the hearing absolutely but asked for alternatives to a lengthy adjournment. The employer proposed that its preliminary objection to the Board's jurisdiction to hear the grievance be addressed in writing. The Board asked the grievor to respond to that proposal, but she did not.

[15] The Board agreed with the employer's suggested approach. On May 26, 2022, the Board ordered that the employer file its written submissions by June 16, 2022. The Board ordered that the grievor file responding submissions within six months of the employer's submissions (i.e., by December 16, 2022).

[16] The employer filed its submissions on June 16, 2022, as ordered. On December 14, 2022, the employer's previous counsel wrote to the Board to state that it would assign different counsel going forward.

[17] The grievor did not file any written submissions.

[18] The employer argues that the Board does not have the jurisdiction to hear this grievance. The grievance as filed alleges a breach of the no-discrimination article of the collective agreement. An individual employee may not refer a collective agreement grievance to adjudication without the approval of their bargaining agent (s. 209(2) of the *Act*). But the grievor filed this grievance with the Board under s. 209(1)(b), alleging that it is about a disciplinary action resulting in her suspension. The employer states that during the grievance process, the grievor never alleged that the order that she not attend the workplace was disciplinary. The employer states that the grievor cannot change the nature of her grievance when it is referred to adjudication; therefore, she cannot rely on s. 209(1)(b).

[19] I am not ruling or commenting on this jurisdictional objection; I have summarized the employer's argument simply for context.

D. Procedure followed with the notice of status review

[20] I was assigned to this matter on July 7, 2023.

[21] On July 12, 2023, I issued the notice of status review ("the status notice"), requiring the grievor to file representations by September 1, 2023 stating why the grievance should not be deemed withdrawn. The status notice also stated this:

> …
>
> *… The representations shall include an explanation for the failure to respond to the employer's written submissions by December 16, 2022 as required. Finally, these written representations will provide a deadline by which the grievor will provide her response to the employer's objection to the jurisdiction of this Board to hear this grievance.*
>
> …

[22] On August 2, 2023, the employer filed a motion to dismiss the grievance as having been abandoned. On August 3, 2023, I ordered that the grievor still file her response to the status notice as required but stated that I would consider the points raised by the employer in its motion to dismiss when deciding the status notice.

[23] On August 30, 2023, the grievor wrote to the Board to request an extension of time to file her submissions in response to the status notice. She did not propose a new deadline for her submissions but asked for "several months". She did not copy the employer's representatives with that request. When the Board's Registry pointed this

out, the grievor requested that her request not be provided to the employer because the request included personal medical information. The Registry reminded the grievor that parties must copy each other on all communications with the Board.

[24] The grievor filed a response to the status notice on September 1, 2023. She wrote to the Registry again on September 5, 2023, when she realized that she had sent the wrong document to the Board and emailed the correct document a few minutes later. The grievor did not copy the employer's representative on any of her submissions. She also wrote that the response was sent purely to meet the deadline and that she still wanted an extension of time to provide more "coherent responses" (in her words).

[25] On September 5, 2023, I granted the grievor until October 3, 2023, to file her full response to the status notice and ordered that any submissions filed with the Board be provided to counsel for the employer, failing which the Board would forward them to the employer without notice to her. I also stated that I would not consider the submissions filed between September 1 and 5, 2023. I also tried to provide some guidance in this matter by stating as follows:

> …
>
> *I also remind both parties about the purpose of a Status Notice. The purpose is two-fold. First, it is an opportunity for the grievor to provide a justification for the failure to move to the case forward. Second, it is designed to allow both parties to provide their plan for how the case should move forward. In this case, the next step is for me to decide the employer's jurisdictional argument. The employer filed its written submissions over a year ago, which is why the grievor is required to provide a deadline for her to respond to those submissions. The employer may also have submissions to make about the best way forward. I suggest that both parties focus on those two issues (whether the delay is justified, and how to make sure the case moves forward quickly) in their submissions.*

[26] The grievor emailed the Board (copying the employer's counsel) on October 3, 2023, stating that she had prepared handwritten submissions. While that email stated that she sent a scan of those handwritten submissions, no scan was received. Therefore, I provided her with a short extension to October 6, 2023, to provide that scanned document. Instead, she sent 5 documents between October 6 and 10: her handwritten notes (roughly 32 pages) on October 6; a typed copy of them on October 10; another copy, this time spellchecked (14 pages long); an email setting out the

"basics" of her typed notes on October 10, and an email on October 10 suggesting that I search the YouTube website and watch videos about different medical conditions.

[27] I reviewed the handwritten submissions and compared them to the spellchecked typed submissions, and they were the same. Therefore, I considered the typed spellchecked submissions when making this decision. I also considered the email listing the "basics" of the grievor's submissions, which I found were a helpful summary. I have not searched YouTube for videos about the medical conditions listed by the grievor, as I have been provided with no evidence that she suffers from the several ailments she lists; nor is a YouTube video any guarantee of the accuracy of medical advice.

[28] The employer filed its responding submissions on October 20, 2023.

[29] I initially set a deadline of November 6, 2023, for the grievor to file a reply. On November 2, 2023, she requested an extension of time "… to December 11, 2023 or perhaps even December 18th" to file her reply, on the grounds that she had to care for her elderly parent. The employer opposed that request but, in the alternative, suggested an extension of only seven days. I granted the grievor an extension of time to November 24, 2023.

[30] The grievor sent two more emails on November 24, 2023. The first email provided some personal context, explaining why a second email later that day might follow and included two attachments, a letter asking for a further extension to the November 24, 2023, deadline to February 2024, and an eight-page chronology of events between 2012 and the present day in support of that request for an extension of time. The second email was a two-page letter providing her reply to the employer's submissions of October 20, 2023.

[31] I did not grant the grievor another extension of time to file reply submissions. However, I considered both her two-page reply and her lengthier request for an extension of time, as her request for an extension of time provided more information about the reasons behind the delay in this case.

E. The parties' submissions

[32] As I mentioned earlier, the grievor's email providing the "basics" (in the grievor's words) of her response to the status notice was very helpful, particularly

because it summarized and organized her submissions. For ease of reference, those "basics" were as follows (omitting personal information about the grievor that is not relevant to my decision):

- *I had anticipated my present circumstances* [i.e., caring for an elderly parent] *long in advance — but had never been able to obtain an Accommodations Plan* [from her employer]
- *The allegations that were effected by the employer were false and have never been investigated.*
- *All the combined stressors I am and have been faced with compromise my health and my level of functioning.*
- *My* [medical condition] *mandates that I pace myself and selectively choose which responsibilities I select, however due to the status imposed upon me by my employer — I have not been able to be so selective. My functioning is being compromised and this is taking a toll on me.*
- *Due to comments made by PSLREB clerk I was under the impression that I was not entitled to a hearing against management and so did not communicate with PSLREB after DFR hearing except for Feb* [2019] *when requested a copy of my file and enquired about management hearing.*
- *Covid intervened.*
- *I was surprised to find the notice regarding a hearing in April 2022 in e-mail.*
- *The documents sent to me in late 2022 refer to a jurisdictional matter which I need qualified support in interpreting and providing me with an opinion on.*
- *The departure of the representative's lawyer from the scene (Amanda Bergman) left me with confusion as to whether there would be follow up from her replacement.*
- *Given my energy limitations I am only capable on focusing my attention on one crisis at a time.*
- *At the same time as having received the letter from the employer's representative my father began experiencing episodes of weakness and balance and my mental energies were focused on this care and medical appointments.*
- *At the same time Sunlife Assurance was requesting engagement in a Case Management process.*
- *I do not have counsel in the wings and have been seeking to access unbundled legal services. I am in the position of having to seek out counsel of my own because my bargaining unit has not ever been supportive of me or my prior quest to obtain an Accommodations Plan proactively.*

- *Adequate "Access to justice" is a well known concern and prevalent issue and I am sharing the lived experience of this.*
- *I need a qualified solicitor to review the comments forwarded regarding the "jurisdictional issue." I am not qualified to provide feedback*
- *It is my understanding that if a hearing is held before the FPSLREB this does not preclude a matter from being presented before Federal court.*
- *The function of the PSLREB is to provide an affordable and less complicated venue for Federal Public Service Employees to present labour matters for review. If this is meant to be available to Federal Public Service Employees then I should not be robbed of this opportunity and this venue just because I am vulnerable due to my restricted capacity to take on an inordinate number of stressors due to health issues and lack of supports to delegate the simplest issues to.*
- *I have been trying to manage multiple stressors since the summer of 2022 — many of which have grown more intense-namely issues with the decline of my father's capacity and the realization of his very advanced years and the acknowledgement that he may be close to his demise. Issues with my father impose psychological and emotional stressors.*
- *The various kinds of stressors that impose a debilitating sense of fatigue are various.*
- *The stressors can render me in a debilitated state. Explanation of* [medical conditions] *can be explained in a number of You Tube Videos and the CDC provides a thorough explanation of the definition of* [a medical condition].
- *I have been trying to do research on how to access counsel for specific legal matters and have been reaching out lawyers listed in a directory posted on the National –Self Represented Litigants Project website.*
- *It takes time and energy to issue correspondence to individual counsellors and appeal to them for their assistance.*
- *When focusing on one major responsibility/stressor another gets sidelined and my body and mind decide when they need to lie down and remove themselves from any activity.*
- *I do not feel that it is fair to have the opportunity to have a grievance against my employer heard before the FPSLREB heard because I have so many stressors present in my life and an insufficient amount of supports to assist in managing or deflecting them.*
- *I should not have to re-experience the scenario of having to choose between adequately caring for a parent and dealing with legal/labour responsibilities as I did as when my mother's health was in decline.*

- *My family status and disability should not trigger retaliation from my employer the CRA, Treasury Board or the Department of Justice.*
- *I seek the capacity to fully and completely care for my father … who has recently descended into a decreased physical capacity, is no longer independent and ambulatory and requires constant attention from me without the distraction of impending and looming legal deadlines.*
- *I request that I not be deprived of the opportunity to have a hearing before the FPSLREB simply because I have physical challenges with* [medical condition]*, an absence of supports and no current legal counsel*
- *I respectfully request that my grievance be kept open and that scheduling of any hearing only occur once I have attained suitable counsel that would have sufficient capacity to provide opinion and counsel with regards to the specific matter of jurisdiction which the employer's representative had brought forth related to the grievance files as well as the Sunlife Disability claim denial.*
- *I request this such that I might be able to focus my full attention on my father's care in the last year or years of his life and avoid the kind of horror/trauma and regrets I have in my memory regarding my mother's care (not admitting her to hospital in time due to being distracted by the egregious actions and harassment by my employer).*
- *In summary, I did not provide a response to the employer representatives comments because I have had a deluge of stressful responsibilities I have had to deal with. Being overwhelmed with multiple stressors induces episodic bouts of incapacitation impeding my ability to meet expectations. Furthermore, I need to have the capacity to access the services of a lawyer that can provide an informed opinion on the specifics of the argument.*
- *I respectfully request that I not be penalized for the circumstances that I find myself at this time which I am finding quite overwhelming.*

[*Sic* throughout]

[33] In addition to those "basic" points (to use the grievor's term), she stated a number of things in her submissions, including these:

- She was involved in other legal cases involving her municipality, including filing a human rights complaint in August 2022. That case involved what she referred to as "property standards". She also said that she was focused on yard maintenance work in the summer of 2022 (as part of her litigation against the municipality).

- She confirmed that she received documents from the employer in advance of the hearing scheduled for May 2022 (namely, the employer's list of documents for the case).
- She received the employer's submissions and book of authorities dealing with the preliminary jurisdictional objection, but these documents only "came into her consciousness" around September 2022. She does not deny receiving those submissions when they were sent in June 2022. She also said in her October 6, 2023, submissions that "[t]he Grievor intends to call Purlolator [*sic*] to determine exactly when they were received", acknowledging that she received a hard copy as well. In her reply submissions on November 24, 2023, the grievor did not say anything about her inquiries with Purolator.
- The communication from the employer's previous counsel on December 14, 2022, "… introduced a level of confusion with regards to any response that might be required …", but she "… is not aware of a **specific** and absolute reason that she did not reach out and respond to comments made by the employers [*sic*] legal representation after her departure from the case in December 2022" [emphasis in the original].
- She had a case management conference for her litigation against Sun Life in December 2022, and she was focusing on that litigation at that time. She also has other deadlines imposed on her by the Ontario Superior Court in her litigation against Sun Life.
- In terms of searching for counsel, the grievor states that she "… has been wanting to seek out suitable counsel but has not had sufficient stamina and strength to pursue this on a daily basis", that she is still looking for counsel to represent her against Sun Life, that she took no steps to look for counsel between 2019 and 2022, and that she is seeking an adjournment in this case until she can find counsel who will represent her in both this grievance and her Sun Life claim.

[34] The employer submits that the grievor has not adequately explained the delay in this case. It states that parties have an obligation to pursue their cases with diligence and to remain active participants in the process and that the grievor has not done so. It also questions whether she is sincere in her request for more time to find counsel, but even if the request is sincere, she has had ample time to do it. The employer states that it is prejudiced by this delay because witnesses are no longer available, and those who are available have a diminishing recollection of events. Finally, the employer points out that the grievor still refuses to provide a date on which she will file a response to the jurisdictional objection, despite my order that she do so.

[35] In her reply submissions, for the first time, the grievor alleges that she was unable to open the electronic copy of the employer's submissions filed in June 2022. She denies that the employer is prejudiced by the delay in this grievance. Finally, she now states that she requests that "… no hearing … be scheduled until such time that the Grievor's employer engage the services of a Third Party to investigate the incidents of Workplace Violence that have been inflicted upon her."

IV. Framework for a notice of status review

[36] Section 11.1 of the *Regulations* was added in 2020. For ease of reference, it reads as follows:

> ***11.1*** *The Board may, on its own initiative, send a notice of status review to all of the parties that requires them to provide representations stating the reasons why the matter should not be deemed to be withdrawn and, if there is no response within the period determined by the Board, deem the matter withdrawn.*

[37] A virtually identical provision was added to the *Public Service Staffing Complaints Regulations* (SOR/2006-6; s. 8.2) in 2022.

[38] The Board has sent many notices of status review since those provisions were introduced and has dismissed some cases as a result of status reviews. However, those cases were all decided informally through letter decisions or other orders communicated to the parties. I have prepared this published decision to provide some guidance going forward about a notice of status review from the Board.

[39] Neither party disputed that s. 11.1 of the *Regulations* applies to this case despite it having been enacted in 2020 and this grievance having been referred to the Board for adjudication in 2015. Section 11.1 is a purely procedural amendment to the *Regulations* because it alters the method by which a proceeding at the Board is conducted and does not operate independently of litigation. Since the provision is purely procedural, it applied immediately as of its introduction and can be applied to grievances filed before 2020. I rely on *R. v. Chouhan*, 2021 SCC 26, for this conclusion, in particular paragraph 92 for the differences between procedural and substantive law, and paragraphs 90 and 103 for the proposition that purely procedural amendments apply immediately to existing cases.

A. Contextual matters when determining the approach to a notice of status review

[40] There are three contextual matters that I considered when determining the proper approach to a notice of status review.

1. The purpose of a notice of status review

[41] First, the purpose behind s. 11.1 of the *Regulations* is to ensure that cases proceed expeditiously and that they do not languish, unheard and unresolved.

[42] I draw this purpose in part from the "Regulatory Impact Analysis Statement", which said the following about the purpose behind s. 11.1 of the *Regulations*: "The Regulations were amended to include a new status review provision for 'dormant cases' to enable the Board to better manage its caseload." A Regulatory Impact Analysis Statement may provide evidence of the purpose of a regulation (see *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 156 and 157, and *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 138). Therefore, the notice of status review is intended to deal with cases that are not proceeding in a timely fashion (i.e., "dormant cases").

[43] I also draw this purpose from the purposes of the *Act* as a whole, which include that "… the public service labour-management regime must operate in a context where protection of the public interest is paramount …". There is a public interest in the efficient administration of justice and in resolving disputes expeditiously. The public interest in the efficient administration of justice applies to the Board's hearings; see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119 at para. 15, *Brennan v. Deputy Head (Statistics Canada)*, 2016 PSLREB 104 at para. 29, and *Fletcher v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 39 at para. 36 (all cited by the employer in this case). There is equally a public interest in the expeditious resolution of workplace disputes that animates the process followed by the Board (see *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223 at para. 55) and all labour boards (see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 at para. 50, and *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 69).

2. Status review in the *Federal Courts Rules*

[44] Second, the term "notice of status review" in the *Regulations* is the same term used in Rule 380 of the *Federal Courts Rules* (SOR/98-106). Therefore, the Board can look to the Federal Court's application of status reviews to determine the similar process in this case.

[45] When determining the appropriate action after a status review, the Federal Court is concerned primarily with these two questions (see *Baroud v. Canada*, 1998 CanLII 8819 (FC)):

1) What are the reasons that the case has not moved forward faster, and do they justify the delay that has occurred?
2) What steps is the party responsible for the case (a plaintiff or applicant in Federal Court — but a grievor, applicant, or complainant before the Board) proposing to move the matter forward?

[46] Those two questions are related in the sense of the weaker the explanation for the delay, the better the plan to move the case forward must be; see *Baroud*, at para. 5. However, the answer to either question can be dispositive. If there is no explanation for a delay, the case can be dismissed. Additionally, if the party responsible for the case does not provide any plan to move it forward, it can also be dismissed (see *Liu v. Matrikon Inc.*, 2010 FCA 329 at para. 2, and *St. Hilaire v. Canada (Attorney General)*, 2020 FCA 87 at para. 6). The Federal Court has also recognized that dismissing a case should be the exception and not the rule, stating this in *Roots v. HMCS Annapolis (Ship)*, 2015 FC 1339 at para. 28:

> *[28] The law is clear that proceedings should only be dismissed on status review in exceptional circumstances, and where no other remedy would suffice. Given the draconian effect of dismissing a claim for delay, the focus should be on the overall interests of justice in the case. The overarching concern should be whether the party in default recognizes its responsibility to move the action along and is taking steps to do so.*

[47] Given the use of the same phrase "notice of status review" in the *Regulations* and the *Federal Courts Rules*, I have concluded that these principles apply to s. 11.1 of the *Regulations* as well.

[48] I acknowledge that s. 11.1 of the *Regulations* is not identical to the *Federal Courts Rules*. For example, the *Regulations* state that the consequence could include that the matter is "deemed to be withdrawn", while Rule 382.1(2)(a) in the *Federal Courts Rules* states that the consequence could include that the court "dismiss the proceeding". But the practical consequence remains the same under both provisions — the matter will be at an end. Therefore, I am still comfortable having regard to the Federal Court's administration of status reviews under the *Federal Courts Rules* when considering how the Board should treat status reviews under the *Regulations*.

3. The broader legal context behind status reviews

[49] Third, I draw upon the larger context of this issue, which includes the following three elements.

[50] First, the Board, like other administrative tribunals, is the "master of its own procedure" (see *Gal v. Canada (Revenue Agency)*, 2015 FCA 188 at para. 5), which gives it the authority to appropriately manage its cases. As a notice of status review is one way for the Board to manage its caseload and its procedures, it has significant discretion about when to issue one and how to deal with one.

[51] Second, a notice of status review is primarily about managing delays in processing a case. The issue of a delay in administrative proceedings has been recently addressed by the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29. In that case, the Supreme Court of Canada confirmed that there are two categories in which a delay in an administrative proceeding will result in the dismissal or stay of that proceeding because proceeding further would amount to an abuse of process. First, if the delay impacts the procedural fairness of a hearing, continuing the proceeding would amount to an abuse of process. The fairness of the hearing may be compromised when the delay impairs a party's ability to answer the case against them, such as when memories have faded, essential witnesses are unavailable, or other evidence has been lost (at paragraph 41). Second, even if there is no prejudice to hearing fairness, a delay may amount to an abuse of process when the delay is inordinate and it has caused significant prejudice other than in a procedural fairness sense. When either requirement is met, there may be an abuse of process if continuing the matter would bring the administration of justice into disrepute (at paragraph 43).

[52] A status review occurs only when there has been some delay processing a case. The decision after a status review should consider whether the delay means that the proceeding amounts to an abuse of process, as "… decision makers have, as a corollary to their duty to act fairly, the power to assess allegedly abusive delay" (*Abrametz*, at para. 38).

[53] Third, I have considered a status notice in light of the concern about delay in the broader justice system. All administrative tribunals are suffering from delays. Cases that used to take weeks now take years to resolve. Administrative tribunals are grappling with how to ameliorate delay. One way is to deal with cases that are not proceeding expeditiously because one or both parties are not following directions or meeting their deadlines.

[54] The approaches taken by other adjudicative bodies in dealing with a delay of this nature can be instructive. One example is the approach by the Canadian Human Rights Tribunal (CHRT). The CHRT has two complementary ways of deciding whether to dismiss a complaint due to a delay. The first approach (which it calls the "classic test") is 1) whether there has been an inordinate delay, 2) whether the delay is inexcusable, and 3) whether the defendants are likely to be seriously prejudiced by the delay (see *Chisholm v. Halifax Employers Association*, 2019 CHRT 38 at para. 18) — an approach similar to *Abrametz*. The second approach is to consider whether there has been "wholesale disregard" for the CHRT's time limits and rules in cases that have remained static for an unreasonable time and in which the complainant appears to have no intent to bring the case to a conclusion. The impact of the delay is thus "… not only to be considered from the viewpoint of the litigants, but also in terms of an abuse to the administration of justice, separate and apart from any prejudice caused by inordinate and inexcusable delay"; see *Chisholm*, at para. 19.

[55] The CHRT's second approach reflects a broader legal principle that a court or tribunal may dismiss a case when a party does not demonstrate an intention of carrying the case to a hearing; see *Grovit v. Doctor*, [1997] UKHL 13, and *Seitz v. Canada*, 2002 FCT 456. As the Manitoba Court of Appeal put it recently in *Papasotiriou-Lanteigne v. Tsitsos*, 2023 MBCA 66 at paras. 63 and 68:

> *[63] … A plaintiff does not have the unilateral right to file an action, put it on ice and reactivate it when it is convenient.*
>
> *…*
>
> *[68] The situation here is not one of mere delay but of warehousing; that is, the issuing and maintaining of proceedings for an extended period with no present intention of pursuing the proceedings save possibly at some unspecified future date of convenience to the plaintiff. That practice leads to "stale proceedings which bring the litigation process into disrespect" (*Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd *(1997), [1998] 2 All ER 181 at 192 (CA (Eng))).*

[56] In conclusion, the purpose behind and context surrounding s. 11.1 of the *Regulations* is to assist the Board in resolving cases expeditiously and to give it a tool to ensure that cases are not warehoused indefinitely. As the CHRT put it in *Dorey v. Employment and Social Development Canada*, 2023 CHRT 23 at para. 32:

> *[32] Administrative tribunals also have an obligation to use their resources efficiently. Parliament chose to delegate decision-making in specialized areas such as human rights to administrative tribunals and expects them to proceed expeditiously and efficiently ….*

B. Approach to a notice of status review: four issues that the Board will decide

[57] With that purpose and context in mind, there are four issues to address in this status review:

1) **Have the parties satisfactorily explained the delay?** The onus will be on the grievor, complainant, or applicant (depending on the type of case being heard) to explain the delay that has occurred in the case — in this case, it is the grievor. I will refer to that party as the "party responsible for the case". To be clear, if the party responsible for the case does not respond to the notice of status review, its failure to respond is dispositive, and the case will be deemed withdrawn.
2) **Has the party responsible for the case provided a reasonable path forward to resolve the case?** The failure to provide a path forward will demonstrate that the party does not have a real intention to carry the case forward to a hearing. The party responsible for the case need not provide a perfect path forward; the Board may disagree with the party's proposal and employ a different path. For example, if a party that is late filing submissions proposes to file them within 90 days but the Board feels that 45 days is more appropriate, then the party responsible for the case will have met its onus to provide a reasonable path forward, even though the Board imposes a shorter timetable.
3) **Would proceeding with the case violate the rules of procedural fairness because the delay has impaired a party's ability to answer the case against them?** This is the first type of "abuse of process" set out in *Abrametz*.
4) **Would proceeding with the case constitute an abuse of process and bring the administration of justice into disrepute?** This is the second type of abuse of process set out in *Abrametz*.

[58] The party responsible for the case bears the burden to satisfy the Board of the first two requirements. This means that if the party responsible for the case does not provide a satisfactory explanation for the delay or does not propose a reasonable path forward to resolve the case, the Board will deem the case withdrawn.

[59] If the party responsible for the case provides satisfactory answers to those questions, the burden shifts to the responding party to show that continuing with the case would be procedurally unfair or would bring the administration of justice into disrepute.

[60] The burden on the party responsible for the delay is only to provide a satisfactory explanation and a reasonable path forward — not a perfect explanation or a perfect path forward. Proceedings should be deemed withdrawn after a status review only in exceptional circumstances. The quality of the explanation and the reasonableness of the path forward should be examined in light of cases being deemed withdrawn only in exceptional circumstances.

[61] This burden means that it is not necessary for the Board to consider all four requirements in every case. For example, it is unnecessary to consider the third and fourth issues if the party responsible for the delay fails to satisfactorily explain the delay and provide a reasonable path forward.

[62] These four issues are also not exhaustive. The superordinate principle is fairness. In an appropriate case, other factors or issues may be relevant, if they address whether it would be unfair to deem a case withdrawn.

[63] Finally, one practical matter is that the usual practice in the Federal Court is to prohibit taking further steps in a proceeding during a status review. This means that after the Court has issued a notice of status review, the defendant or respondent may not bring a motion to dismiss the case; see *Winnipeg Enterprises Corporation v. Fieldturf (IP) Inc.*, 2007 FCA 95 at paras. 12 and 13. This approach is also appropriate for the Board.

[64] In this case, the employer filed a motion to dismiss this grievance on the grounds that it has been abandoned. That motion was superfluous, given the nature of a status review that I have set out in this decision. This is not a criticism of the employer. This is a relatively new provision in the *Regulations*, and as I said earlier, I am providing some procedural and substantive guidance on how to apply it going forward. But in the future, the responding party should not file motions to dismiss a case during a status review. Instead, the responding party can explain why the case should be deemed to have been withdrawn in its submissions in response to the notice of status review. The responding party can also identify preliminary motions (including to dismiss a case) that should be resolved when it makes its submissions about a reasonable path forward for the case.

V. Reasons for decision deeming this grievance withdrawn

[65] After considering the parties' submissions carefully, I have decided to deem this grievance withdrawn. I have concluded that the grievor has not provided a satisfactory explanation for the delay in this case and that she has no real intention to carry the case forward to a hearing, as demonstrated by her refusal to provide any path forward to deciding this case.

A. No satisfactory explanation for the delay

[66] This grievance was filed on February 20, 2014, and was referred to the Board on September 18, 2015. The Board scheduled it to be heard three times: in 2016, 2017, and 2022. All three times, the grievor asked for the hearing to be postponed, for similar reasons. All three times, the Board agreed.

[67] Since the Board already agreed to postpone the hearing of this matter on those three occasions, I will not second-guess those decisions. Therefore, the grievor has already satisfactorily explained the delay in this matter between 2015 and December 16, 2022 (the deadline for her to file her written submissions in response to the employer's jurisdictional objection), although I may take that lengthy period into account when assessing the adequacy of her explanation for the delay after December 16, 2022.

[68] However, the grievor has not satisfactorily explained her failure to file written submissions on that jurisdictional objection. She has provided five main explanations, none of which withstands scrutiny.

[69] First, the grievor states that she has to care for her elderly parent. The problem with that argument is that it is the same reason she gave to adjourn this case in 2016, 2017, and 2022 with no indication that she has taken any steps to allow her to ameliorate that difficulty. She also admits that she is running two other pieces of litigation (cases against Sun Life and her municipality). She does not explain how she can do that but cannot prepare a written response to the employer's jurisdictional objection.

[70] Second, the grievor blames some health conditions for her delay filing her written submissions. The problem is that she has not filed any evidence to substantiate these medical conditions. She simply asserts that she is suffering from a medical

condition that leaves her fatigued and suggests that I look it up on YouTube. I have no basis on which I can conclude that her medical conditions are debilitating enough that she could not file a written response to the employer's jurisdictional objection — particularly as she states that she continues to suffer from these conditions, yet she prepared over 30 pages of submissions in response and reply to the status notice. I do not know whether she has a doctor's note but refuses to provide it or whether she is self-diagnosing her medical conditions based on YouTube videos. Either way, I cannot accept her health conditions as a satisfactory explanation for the delay filing a written response to the employer's jurisdictional arguments. Finally, the Board already refused her adjournment request for her duty-of-fair-representation complaint in 2018 based on the same medical explanation (that time, supported by a short doctor's note). That explanation is no stronger today than it was in 2018.

[71] Third, the grievor states that she must hire legal counsel to prepare a response to the employer's jurisdictional objection. To be blunt, looking for a lawyer is not an explanation for a delay, particularly a delay of well over a year (from June 16, 2022, when the employer filed its written submissions, to the grievor's reply on November 24, 2023). Generally, problems finding a lawyer do not explain a delay proceeding with a case; see *Bodnarchuk v. Canada (National Revenue)*, 2007 FCA 253, and *Melekin v. Canada (Human Rights Commission)*, 2004 FC 1479. There may be exceptions to this general proposition (such as when a lawyer drops a client at the last minute or at a particularly delicate time), but none of those exceptions apply in this case. There is no indication that the grievor has approached any lawyers about her case since June 2022 and no explanation for why she is having trouble finding a lawyer. She does not claim that she is unable to afford a lawyer but simply that she cannot find one. Even if she is unable to afford one, she has not explained how that may change in the future in a way that justifies waiting an indefinite period.

[72] Fourth, the grievor states that she is preoccupied with other legal disputes, with Sun Life and her municipality. She has provided no information about those other disputes to indicate why she must prioritize them over this grievance.

[73] Finally, the grievor states that the email dated December 14, 2022, from the employer's then-counsel "… introduced a level of confusion with regards to any response that might be required …". I reject that argument for two reasons. First, her submissions were due on December 16, 2022. She does not suggest that she waited

until December 14, 2022, to start writing them; nor does she suggest that they are two days away from being done, and she has held off finishing them for almost a year because of that email.

[74] Second, the email is not confusing in any way. It reads as follows:

> …
>
> *Please be advised that this matter will be reassigned, as I will be departing my position shortly. All future correspondence on this matter should be sent to the attention of Judith at* [new email address] *until further notice.*
>
> *I would also like to confirm that the Board was able to access the documents sent on June 16, 2022, or if the Board requires me to resend/add another user to facilitate access? If you could confirm before this Friday it would be greatly appreciated.*
>
> …

[75] I fail to see how there can be any confusion about this email. The employer's lawyer simply states that correspondence must be sent to a new person. As for the second paragraph (about the Board's ability to access the electronic documents), the grievor admits that she received a copy of the documents no later than September 2022 — or at least that is when they "came into her consciousness". She also admits to receiving a hard copy of them via Purolator. While, for the first time in her reply she states that she could not open those documents in June 2022, she admits that she has had the documents since September 2022 at the very latest.

[76] For these reasons, the grievor has not provided a satisfactory explanation for the delay.

B. The grievor has not presented a reasonable path forward for the grievance

[77] While the absence of a satisfactory explanation for the delay is enough for me to decide this case, I would also deem the grievance withdrawn because the grievor has not provided a reasonable path forward to decide it.

[78] In the status notice, I specifically directed the grievor to provide a deadline by which she would provide her response to the employer's objection to the Board's jurisdiction to hear this grievance. She has refused to.

[79] The grievor's plan is to wait for the employer to investigate her situation and then hire a lawyer who can represent her in this grievance and against Sun Life. She has no plan for how to find a lawyer aside from reading a directory of lawyers. She has not said that she has contacted any lawyers in that directory. Also importantly, she never promises to respond to the employer's jurisdictional objection. Instead, she submits that there should be a hearing after she has acquired counsel. In short, she wants a hearing at some unknown point well in the future after she has found a lawyer who will also represent her against Sun Life and after the employer investigates her situation.

[80] The grievor states on many occasions that she still wants to pursue this grievance. I have no reason to doubt that she sincerely wants this case not to be dismissed. However, I have concluded that this situation is like the one described in *Tsitsos*: she is warehousing this grievance until some unspecified date in the future, at her convenience. She has not presented any path forward to resolve this grievance. Therefore, I deem the grievance withdrawn on this basis too.

C. Remaining factors: procedural fairness and the administration of justice

[81] The employer alleges that it is prejudiced by this delay. Its entire submission reads as follows: "… [It] has suffered prejudice as a result [of the delay], including witness availability and diminishing recollection of events."

[82] In light of my conclusions earlier, I do not need to determine this point.

[83] Had I been required to, I would not have been satisfied by the employer's submission. I would have required more detail before deeming this case withdrawn because otherwise it would be procedurally unfair to proceed. For example, which witnesses are unavailable, and why? Have the employer's representatives spoken with those witnesses to confirm their diminishing recollections, or is the employer just assuming that to be so? A party alleging procedural prejudice from delay "… must be prepared to adduce evidence to substantiate its claim" (see *Grover v. Canada (Attorney General)*, 2010 FC 320 at para. 30). This does not necessarily mean oral testimony (as occurred in *Grover*), but it means more than simply asserting in the abstract that memories fade and witnesses become unavailable over time. This is often a concern — but a party raising that concern still must demonstrate that the concern has manifested itself in that particular case. The employer has not done so in this case.

[84] I have not considered the fourth factor of whether continuing this case would bring the administration of justice into disrepute. That inquiry is so fact- and context-driven that any comments that I may have would likely not assist parties in future cases, and therefore, I will not address it further.

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

(The Order appears on the next page)

VI. Order

[86] This grievance is deemed withdrawn.

February 26, 2024.

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