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XR: 566-02-46850

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

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

BETWEEN

MAGALIE CHARLEBOIS-CHAURET

Applicant

and

TREASURY BOARD
(Public Health Agency of Canada)

Respondent

Indexed as
Charlebois-Chauret v. Treasury Board (Public Health Agency of Canada)

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

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

For the Applicant: Bernard Desgagné, representative

For the Respondent: Erin Saso, analyst

Decided on the basis of the documents on file and on written submissions, filed April 3, 2023, and March 1, 15, and 22, May 2, June 28, and July 2, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] On February 28, 2023, Magalie Charlebois-Chauret ("the applicant") referred a grievance to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board"; Board file no. 566-02-46850). Accompanying the grievance was an application for an extension of time.

[2] The Public Health Agency of Canada, the applicant's employer ("the respondent"), objected to the grievance's referral to adjudication because it was done well after the date set out in the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"). The respondent is part of the core public administration, the legal employer of which is the Treasury Board.

[3] Under s. 61(b) of the *Regulations*, the Board may grant an extension of time for any stage of the grievance process, including a referral to adjudication.

[4] This decision relates only to the extension application. For the following reasons, the application is dismissed.

II. Background

[5] On November 5, 2021, the applicant filed a grievance against the mandatory vaccination policy that the Treasury Board put in place in 2021 to fight COVID-19 ("the vaccination policy"). The grievance was denied at the final level of the grievance process on April 1, 2022.

[6] The respondent submitted that the grievance was referred to adjudication long after the time limit to do it expired, since the time limit set out in the *Regulations* is 40 days. The grievance was referred to adjudication only on February 28, 2023.

[7] The applicant explained that she was ill advised by counsel who was supposed to represent her and who recommended that she not refer the grievance to adjudication before the Board but instead make a judicial review application of the employer's decision before the Federal Court. The case is still pending before that Court.

[8] In February 2023, the counsel who had advised the applicant and represented her before the Federal Court ceased to represent her. She followed the advice of Bernard Desgagné, who represents many public servants who have challenged the vaccination policy, and referred her grievance to adjudication, with the extension-of-time application.

[9] According to the respondent, by choosing to bring the matter before the Federal Court, the applicant waived her right to adjudication. The extension application was an abuse of process.

III. Summary of the arguments

[10] To avoid excess repetition, I will deal with the parties' arguments directly in the analysis.

IV. Analysis

[11] The application was made under s. 61(b) of the *Regulations*. Section 61 reads as follows:

61 *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*	***61*** *Malgré les autres dispositions de la présente partie, tout délai, prévu par celle-ci ou par une procédure de grief énoncée dans une convention collective, pour l'accomplissement d'un acte, la présentation d'un grief à un palier de la procédure applicable aux griefs, le renvoi d'un grief à l'arbitrage ou la remise ou le dépôt d'un avis, d'une réponse ou d'un document peut être prorogé avant ou après son expiration :*
(a) *by agreement between the parties; or*	***a)*** *soit par une entente entre les parties;*
(b) *in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.*	***b)*** *soit par la Commission ou l'arbitre de grief, selon le cas, à la demande d'une partie, par souci d'équité.*

[12] From that text, which authorizes the Board to extend time limits, I retain that the fundamental principle is fairness.

A. Analysis under the *Schenkman* decision

[13] The notion of fairness was clarified in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSLRB 1, and is based on a balance between the two parties' respective rights. The *Schenkman* decision examines five criteria, to determine whether an extension of time should be granted.

1. The delay is justified by clear, cogent, and compelling reasons

[14] According to the respondent, the applicant was bound by her counsel's actions, who chose, on her behalf, to not refer the grievance to adjudication but instead to make the judicial review application. A party may not escape the positions taken by counsel who was its agent.

[15] The applicant submitted that she was misadvised.

[16] Being able to explain the delay is essential. The only explanation was that the applicant chose one remedy over another — the judicial review application rather than a referral to adjudication. Only when her counsel ceased to represent her before the Federal Court did she seek advice from another representative, who recommended that she refer the grievance to adjudication.

[17] Listening to the advice of one counsel and then that of another representative explains the delay but does not justify it. The applicant was free to refer her grievance to adjudication; she did not, preferring the option of referring it to the Federal Court. She must face the consequences of her choice. I note that the recourse to the Federal Court is still active.

[18] It is well established in the case law that counsel acts as the agent for their client (see *Moutisheva v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 988 (C.A.)(QL)). In *Moutisheva*, the applicant party before the Federal Court of Appeal relied on its counsel's actions to overturn a judgment of that Court that rejected its appeal. The Federal Court of Appeal stated this at paragraph 12:

> ***12*** *… counsel for a party to a case is that party's agent. He acts on his behalf and as such assumes a number of obligations including those of conduct of the proceedings and receipt and issue of documents required by the proceedings….*
>
> [Footnotes omitted]

[19] At paragraph 16 of *Moutisheva*, the Federal Court of Appeal added that its role was neither to assess counsel's behaviour or competence nor the quality of the services rendered.

[20] In addition, in a recent decision, the Federal Court of Appeal reiterated that a represented party "… must live with the consequences of the actions of his counsel …" (see *Verreault v. Canada (Attorney General)*, 2023 FC 1019 at para. 43, quoting *Singh v. Canada (Citizenship and Immigration)*, 2016 FCA 96 at para. 66).

[21] The Federal Court held as follows with respect to an extension of time at that Court (see *Singh v. Canada (Citizenship and Immigration)*, 2023 FC 380 at para. 37):

> *[37] Lastly, although counsel frequently argue that their clients should not suffer prejudice on account of their counsel's errors or negligence, counsel and client "are one" for the purposes of motions to extend time. Counsel are acting—or failing to act—in the shoes of their clients, and clients can therefore not expect to escape the consequences of their counsel's carelessness (*Chin v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1033, 22 Imm LR (2) 136, 69 FTR 77).*

[22] In her written submissions, the applicant quoted *Julien v. Canada (Citizenship and Immigration)*, 2010 FC 351 at para. 36, to support her argument that counsel's error militates in favour of extending the time. *Julien* dealt with an application to annul a decision, and Mr. Julien alleged that his counsel's error led to a breach of natural justice. The Court found that counsel would have had to demonstrate "extraordinary incompetence" to annul a decision due to a breach of natural justice.

[23] This case deals not with a decision that was allegedly tainted by a breach of natural justice. And, as in *Julien*, the applicant did not establish that her former counsel erred in any way by advising one remedy over another.

[24] In any event, the facts of each case are considered to determine what constitutes a clear, cogent, and compelling reason and to determine whether an extension is fair in the circumstances. For the purposes of this analysis, there is no doubt that counsel acted on the applicant's behalf. Thus, she could not dissociate herself from her former counsel's actions.

2. The length of the delay

[25] According to the respondent, the length of the delay is considerable, about nine months after the deadline for the referral expired. The applicant did not demonstrate what would have prevented her from referring her grievance to adjudication within the prescribed time limit.

[26] The applicant submitted that her counsel's advice at that time prevented her from acting, and therefore, she is not responsible for the length of the delay.

[27] The length of the delay is often analyzed in the context of the prejudice to the respondent. Was it entitled to expect that the matter would be resolved and that there would be no follow-up?

[28] In this case, I believe that the respondent was entitled to expect that no reference to adjudication would be made, especially since another recourse had been taken, against which the respondent must also defend itself.

[29] The length of the delay is rather unfavourable to the extension application.

3. The applicant's due diligence

[30] According to the applicant, as soon as she was advised to refer her grievance to adjudication, she did so, with diligence.

[31] In fact, I would conclude instead that there was a lack of due diligence. The applicant did not refer her grievance to adjudication in a timely manner because she did not consider that route and because she relied on her counsel's choice to go to the Federal Court. She could not then revisit her decision and state that she would have preferred doing something else. Diligence means looking at the options. The situation arose from the applicant's choice; she chose one remedy over another.

4. The balance between the injustice to the applicant if the application is denied and the prejudice to the respondent if it is granted

[32] According to the applicant, she would suffer considerable injustice were the recourse before the Board unavailable to her. Should the Board recognize the disciplinary nature of the measure that was imposed to compel vaccination, she would be directly entitled to compensation for her losses.

[33] The applicant submitted that the delay did not cause any prejudice to the respondent. A very large number of similar grievances before the Board are waiting to be dealt with. Adding one grievance would not change much for the respondent.

[34] I acknowledge that refusing to extend the time would deprive the applicant of her recourse to the Board. However, she is not without recourse — her case is still pending before the Federal Court.

[35] Moreover, after the time has elapsed, the respondent is entitled to expect finality in proceedings, especially since another process based on the same grievance was initiated against it at the Federal Court. It is true that a large number of such grievances are already before the Board. The fact remains that it is a prejudice to have to make a defence when it could rightly be believed that the applicant's grievance would not proceed before the Board.

[36] Thus, it seems to me that balancing the rights does not lean in favour of an extension.

5. The grievance's chances of success

[37] While the Board generally considers that it is impossible, in the absence of evidence, to determine a grievance's chances of success at adjudication, one could question this grievance's chances of success.

[38] The reference to adjudication in this case was made under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), which governs contesting discipline.

[39] In *Rehibi v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 47, the Board determined that the measure that the Treasury Board imposed, which was vaccination as a condition of employment, was administrative and not disciplinary. Therefore, the Board dismissed the grievances against the alleged disciplinary measure. According to the respondent, this means that the grievance in this case has no chance of success.

[40] However, the grievors in *Rehibi* made a judicial review application before the Federal Court of Appeal. Therefore, the fate of that decision is not assured. For that reason, this criterion does not play a part in this decision.

B. The additional argument

[41] One argument that according to the applicant militates in favour of an extension in the interest of fairness is that if the Federal Court grants the judicial review application, then the decision will be returned to the decision-making body, which in this case is the employer.

[42] That fact is the consequence of her choice. The return to the employer does not necessarily mean failure for the applicant; the Federal Court may attach directions if it finds that the employer erred in law.

[43] In any event, the Board's role is not to evaluate the different remedies but to decide whether the extension application should be granted. However, since the applicant chose freely to use one remedy instead of another and to not refer her grievance to adjudication in a timely manner, there is no need to intervene and extend the time.

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

(The Order appears on the next page)

V. Order

[45] The respondent's objection is allowed.

[46] The application for an extension of the time limit for the referral to adjudication is dismissed.

[47] Board grievance file no. 566-02-46850 is closed.

August 29, 2024.

FPSLREB Translation

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