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Files: 566-02-46041 and 568-02-47443

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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

CHYLOW HALL

Grievor and Applicant

and

**TREASURY BOARD
(Department of National Defence)**

Employer and Respondent

Indexed as
Hall v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication and 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: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor and Applicant: James L. Shields and Sogol Naserian, counsel

For the Employer and Respondent: Lyne Poulin, analyst, Treasury Board Secretariat

Decided on the basis of written submissions,
filed December 9, 2022, and February 10, May 30, and June 13, 2023.

REASONS FOR DECISION

I. Introduction

[1] On May 10, 2022, a grievance was filed on behalf of Chylow Hall (“the grievor and applicant”), challenging the decision made by the Department of National Defence (“the employer and respondent”) to deny her request for accommodation for religious reasons under the employer’s then newly introduced *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (“the Vaccination Policy”).

[2] The grievance was referred to adjudication on November 9, 2022, and resulted in the creation of Board file no. 566-02-46041.

[3] This decision does not address the merits of the grievance. Rather, it concerns a preliminary objection raised by the employer, which claimed that the grievance should be dismissed on the basis that I lack jurisdiction to hear it as it was filed outside the time limit.

[4] The grievor is represented by Local 2228 of the International Brotherhood of Electrical Workers (IBEW or “the bargaining agent”) and is subject to the collective agreement between the Treasury Board and the IBEW for the Electronics (EL) group that expired on August 31, 2022 (“the collective agreement”). The collective agreement provides that a grievance must be presented no later than 30 days from the date on which an employee is notified, informed or otherwise becomes aware of the decision, situation or circumstances that is the subject of the grievance.

[5] The grievor’s representative disputed the employer’s claim that the grievance was untimely. They claimed that the employer’s initial decision dated February 15, 2022, to deny the accommodation request was under reconsideration after the grievor supplied the employer with additional information to support it. The employer claimed that the time to file a grievance started to run on February 15, 2022. The grievor’s representative, on the other hand, claimed that the time began to run only on April 20, 2022, after they were informed of the employer’s decision on the reconsideration request.

[6] As an alternative argument, the grievor’s representative requested that I exercise my authority under s. 61 of the *Federal Public Sector Labour Relations*

Regulations (SOR/2005-79; “the *Regulations*”) to extend the time limit to file the grievance, in the interest of fairness. After receiving that request, the registry of the Federal Public Sector Labour Relations and Employment Board (“the Board”) opened Board file no. 568-02-47443.

[7] This decision addresses the employer’s preliminary objection under Board file no. 566-02-46041 and the grievor’s application for an extension of time under Board file no. 568-02-47443.

[8] For the reasons in this decision, the employer’s preliminary objection is dismissed. I also find that an extension of time would have been warranted had the preliminary objection not been dismissed.

II. Summary of the relevant facts

[9] In their written submissions, the grievor’s representative provided an overview of the chronology of events. They also provided as exhibits a copy of the employer’s February 15, 2022, decision and several email exchanges that followed between them and the employer. In its response to the grievor’s submissions, the employer did not object to or contradict her chronology of events. Therefore, I take her overview of the facts as uncontested.

[10] The following is a summary of the relevant facts on which I base my decision.

[11] On October 8, 2021, the grievor was informed of the employer’s then new *Vaccination Policy*, which provided for exceptions, among them accommodations based on religious grounds.

[12] On January 24, 2022, the grievor requested such an accommodation. On February 15, 2022, the employer provided her with a letter informing her that her request was denied. In its letter, it reviewed all the information that she had provided to support her accommodation request and explained why that information was insufficient. The letter then stated as follows:

...

To date, you have not yet complied with the Policy; therefore, you are required to receive your first dose prior to 1 March 2022. Should you not comply with the Policy by 1 March 2022, you will be placed on administrative leave without pay until such time as you comply with the Policy. Any additional request for

accommodation will not delay the date of required vaccination nor the administrative leave without pay.

...

Should you have any questions regarding the process, please feel free to contact me

...

[13] On March 2, 2022, the grievor was placed on leave without pay (LWOP).

[14] On March 11, 2022, the bargaining agent, on the grievor's behalf, provided additional information to the employer to support a request to reconsider her request for an exemption from the *Vaccination Policy* and an accommodation. The employer replied that "... the director will communicate with Ms. Hall directly as to the decision on the new information."

[15] The bargaining agent followed up with the employer on April 19, 2022, as it had not received any communication from the employer with respect to the supplemental information. The employer replied on that same date that it was "reviewing the matter now".

[16] On April 20, 2022, the employer wrote to the bargaining agent stating that the supplemental information that the grievor provided was the same information that had been provided previously. It stated that that information had already been analyzed and that its decision on that information had been communicated to the grievor on February 15, 2022.

[17] On the same day, the bargaining agent asked the employer whether a letter to that effect was sent to the grievor, as she was on LWOP and not in the workplace. The employer subsequently informed the bargaining agent that she was informed of the denial before being placed on LWOP (i.e., before March 2, 2022).

[18] On April 22, 2022, the bargaining agent wrote to the employer inquiring whether a further letter ought to have been sent to the grievor, given that she had submitted additional information on March 11, 2022, after she was placed on LWOP.

[19] On April 27, 2022, the employer replied that the grievor had been informed of its decision on February 15, 2022, and as such, added this: "... to my knowledge there

is nothing outstanding with respect to Ms. Hall's request for accommodation to the Vaccination Policy."

[20] On April 28, 2022, the bargaining agent advised the employer that given that additional information was submitted after the February 15, 2022, denial letter, the bargaining agent would consider the April 20, 2022, email as a subsequent denial of the grievor's request for an exemption from the Policy and an accommodation.

[21] The grievor filed her grievance on May 10, 2022, and stated the following:

I grieve that my religious exemption application has been unreasonably denied.

I grieve the Employer's refusal to grant me an opportunity to perform my duties by way of telework/remote work or leave with pay, given that I am not permitted to work regular hours as a result of the Employer's mandatory vaccination policy relating to COVID-19.

I grieve the Employer's punitive action taken against me as a result of my vaccination status. The practical result of the Employer's decision is that I am at risk of being left destitute and/or without income or benefits as a result of the Employer's refusal to permit me to work or, in the alternative, grant me leave with pay.

This is a violation of Article 07 - Managerial rights, Article 18.19 - Leave with or without pay for other reasons, Article 61 - No Discrimination or Harassment.

[22] The corrective actions requested are as follows:

A declaration that the Employer has breached the collective agreement;

That I be provided with telework and/or remote work duties as a reasonable accommodation;

Alternatively, that I be granted leave with pay for the period of time that I am not permitted to work regular hours as a result of the Employer's mandatory vaccination policy related to COVID-19;

That I be compensated for all losses, including lost wages and benefits, that resulted from the Employer's refusal to grant me paid leave;

That the Employer ceases this discriminatory refusal and take measures to redress the practice and/or to prevent the same or similar refusal from occurring in the future;

That the Employer makes available to me the rights, opportunities, and privileges that are being or were denied as a result of the refusal;

That I be made whole

III. Summary of the arguments

A. For the employer

[23] The employer argued that I am without jurisdiction to hear the grievance as it is untimely.

[24] It referred to clause 39.04 of the collective agreement, which provides the following:

39.04 Right to present grievances

...

A grievance must be presented not later than thirty (30) days from the day on which the employee was notified, informed or otherwise became aware of the decision, situation or circumstance that is the subject of his or her grievance.

...

39.04 Droit de présenter des griefs

[...]

Un grief doit être présenté dans les trente (30) jours qui suivent la date à laquelle l'employé-e a été avisé ou à laquelle il a eu, pour la première fois, connaissance de l'action ou de la situation qui donnent lieu au grief.

[...]

[25] It argued that the grievor had 30 days after February 15, 2022, when she was notified that her accommodation request had been denied. However, it was filed only on May 10, 2022, which was outside the time limit set out in the collective agreement.

[26] Consequently, the employer requested that the reference to adjudication be dismissed without a hearing for lack of jurisdiction.

B. For the grievor

[27] The grievor's representative submitted that the employer's objection should be dismissed.

[28] The grievor did not dispute that on February 15, 2022, she was informed that her accommodation request was denied. However, she provided the employer with additional information and requested a reconsideration of its February 15, 2022, decision. After doing so, on March 11, 2022, the employer informed the grievor's representative that it would communicate its decision on the new information directly

to the grievor. As a result, her representative argued that they did not consider the February 15, 2022, decision as the employer's final decision since it was still under review.

[29] The grievor's representative argued that only on April 20, 2022, were they informed that the grievor's reconsideration request was denied. They argued that this is not a case in which they, or the grievor, failed to act in a timely manner. Rather, it is a case in which they relied on the employer's word that a decision on the new information was forthcoming. They argued that they rightfully waited for the reconsideration request to be exhausted, fully and finally, before filing a grievance.

[30] The grievor's representative argued that the timeline to file a grievance started only on April 20, 2022, and as such, they had until May 20, 2022, to file the grievance under clause 39.04 of the collective agreement. As the grievance was filed on May 10, 2022, they submitted that the grievance was timely and that the employer's objection should be dismissed.

[31] In the alternative, the grievor's representative argued that, in the interest of fairness, I should exercise my authority under s. 61 of the *Regulations* to extend the time to file this grievance. They relied on *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, and *Legge v. Department of National Defence*, 2018 FPSLRB 71.

[32] They submitted that the length of the alleged delay, between the date on which the employer alleged that the grievance ought to have been filed and the date on which it was filed, was not long.

[33] They stated that they had provided a clear, cogent, and compelling reason for filing the grievance on the date they did. The reason was that they were waiting for the employer's final decision on whether the grievor's accommodation request would be granted, as she had submitted additional information on March 11, 2022, after the initial denial on February 15, 2022. They submitted that not only was that a clear, cogent, and compelling reason but also that the bargaining agent acted reasonably in these circumstances.

[34] The grievor's representative further submitted that they relied, in good faith, on the employer's statement that it would provide a decision to the grievor on the new

information (the March 11, 2022, email). They argued that to take the position that she and they ought to have acted based on the February 15 decision was contradictory to the employer's March 11 communication and that it would unfairly deprive the grievor of the opportunity to have her grievance heard.

[35] The grievor's representative submitted that there would be no prejudice to the employer were the timeline to file the grievance extended.

[36] They argued that they acted diligently in pursuing the accommodation request, which was evidenced by providing the additional information to support the grievor's accommodation request, the bargaining agent sharing that information with the employer, and the bargaining agent following up with the employer after not receiving a response. They submitted that the bargaining agent demonstrated throughout that it was interested in the subject matter that gave rise to the grievance and that it was willing to pursue all appropriate avenues.

[37] While the grievor's representative considered that the grievance has a good chance of success, they relied on *Santawirya v. Deputy Head (Canada Border Services Agency)*, 2017 FPSLRB 10 at para. 165, and submitted that this factor ought to be given minimal weight.

[38] The grievor's representative submitted that as all the *Schenkman* criteria are met, I ought to grant the requested extension of time.

C. The employer's reply

[39] The employer reiterated its position and argued that no clear, cogent, or compelling reason prevented the grievor and her representative from respecting the timeline set out in the collective agreement.

IV. Analysis and reasons

[40] Having reviewed the chronology of events and the parties' submissions, I find that the grievance was filed within the time limit in the collective agreement.

[41] The employer's reply on March 11, 2022, stating that "... the director will communicate with Ms. Hall directly as to the decision on the new information", created a reasonable expectation that its February 15, 2022, decision was under review and as such was not final. It also created a reasonable expectation that another decision

would be rendered since that was exactly what was stated. The fact that the employer subsequently changed its mind and decided that no such decision was necessary cannot be used to change the timeline within which to file the grievance. Had the employer not made that representation, the outcome of this decision would be different. However, since it created the expectation that the February 15, 2022, decision would be reconsidered and that a new decision would be rendered, I find that the time limit to file a grievance commenced on the date on which the grievor and her bargaining agent were informed that the employer would not reconsider its February 15, 2022, decision.

[42] Had I not ruled that the grievance was timely, nonetheless, I would have granted the application for an extension of time using my discretion under s. 61 of the *Regulations*.

[43] Section 61 of the *Regulations* states the following:

Extension of time

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,

(a) by agreement between the parties; or

(b) in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.

Prorogation de délai

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) soit par une entente entre les parties;

b) soit par la Commission ou l'arbitre de grief, selon le cas, à la demande d'une partie, par souci d'équité.

[44] When determining whether to exercise its authority under s. 61 of the *Regulations*, the Board considers what have come to be known as the *Schenkman*

criteria (see *Schenkman*, at para. 75). These criteria are summarized in *Legge* as follows:

...

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance.

...

[45] The employer claimed that the timeline to file a grievance should have commenced on February 15, 2022, when it initially informed the grievor of its decision to deny her accommodation request. If that were so, the deadline to file the grievance would have been March 17, 2022.

[46] Before that date, on March 11, 2022, the grievor requested a reconsideration of the February 15 decision and provided the employer with additional information. In response, the employer informed her bargaining agent on that same date that a decision would be rendered based on the additional information that had been provided. That representation was made before the March 17, 2022, deadline. However, only after the March 17, 2022, deadline passed did the employer change its mind and inform the grievor's representative that no such decision would be rendered. Therefore, the employer's action greatly prejudiced the grievor and her representative as they relied on the employer's representation that a subsequent decision was forthcoming.

[47] Conversely, in its submissions, the employer made no representations as to any potential prejudice to it. As a result, I find that the injustice to the grievor greatly outweighs any potential prejudice to the employer in granting the requested extension of time.

[48] I also find that the delay filing the grievance was relatively short, given the circumstances and the parties' ongoing discussions. The grievor and her representative demonstrated a sustained interest in working with the employer to resolve the matter and diligence moving it forward.

[49] I agree with the grievor's representative that little weight should be given to the grievance's chance of success in making this decision as it is not the subject matter of this decision.

[50] Finally, I find that the rationale provided by the grievor's representative for their actions, described earlier in this decision, amounts to a clear, cogent, and compelling reason for the delay.

[51] For all those reasons, the employer's objection is dismissed, and the matter shall proceed to adjudication before a panel of the Board for a hearing on its merits.

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

(The Order appears on the next page)

V. Order

[53] The employer's preliminary objection on timeliness, in Board file no. 566-02-46041, is dismissed.

[54] The grievor's application for an extension of time to file her grievance, in Board file no. 568-02-47443, is granted.

[55] The grievance in Board file no. 566-02-46041 will be placed on the Board's hearing schedule in due course.

May 24, 2024.

**Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board**