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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

ELLE FREMIT

Applicant

and

**TREASURY BOARD
(Public Health Agency of Canada)**

Respondent

Indexed as

Fremit v. Treasury Board (Public Health Agency of Canada)

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

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

For the Applicant: Isabelle Roy-Nunn, counsel

For the Respondent: Peter Doherty, counsel

Decided on the basis of written submissions,
filed December 9, 2022, and February 13 and March 5 and 12, 2024.

REASONS FOR DECISION

I. Overview

[1] Elle Fremit (“the grievor”) has applied for an extension of time to refer her grievance to adjudication. She referred it approximately 13 months beyond the 40-day deadline for doing so because of the negligence of her representative with the Canadian Association of Professional Employees (CAPE). I have concluded that this negligence sufficiently explains the delay referring her grievance to adjudication and that I should grant the requested extension of time, in the interests of fairness.

[2] The respondent also states that the grievor was late (by 19 working days) transmitting her grievance from the second to the third level of the grievance process. The grievor states that her transmittal to the third level was not late because she transmitted the grievance months earlier, but, in the alternative, seeks an extension of time for any late transmittal. I have decided to grant an extension of time for the allegedly late transmittal to the third level as well, making moot the question of whether the previous transmittal was valid. According to the respondent, the grievor’s representative initially filed a transmittal form that was premature and then filed one that was late. I have concluded that the uncertainty over the status of the first transmittal explains the delay and that I should grant the extension of time, in the interests of fairness.

II. Procedural history to this application for an extension of time

[3] The Federal Public Sector Labour Relations and Employment Board (“the Board”, which in this decision also refers to any of the current Board’s predecessors) is empowered to decide a matter 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).

[4] As I stated in the overview to this decision, the respondent objected to two aspects of the timeliness of this grievance: that it was transmitted to the third level of the grievance process late, and that it was referred to adjudication late. The grievor denies that her grievance was transmitted to the third level late but acknowledges that it was referred to adjudication roughly 13 months late. Therefore, she applied for an

extension of time to refer her grievance to adjudication at the same time as she filed her reference to adjudication with the Board. The parties agreed that the grievor's application for an extension of time should be decided in writing. I am also convinced that the application for an extension of time can be decided in writing because there are no facts about the extension of time or the nature of the grievance that require an oral hearing or the cross-examination of witnesses to resolve.

III. Timeline of the grievance

A. Nature of the grievance

[5] The respondent filed a copy of the grievor's written submissions at the third level of the grievance process as well as its responses at the second and third levels, so I have used those documents for context to understand the nature of this grievance.

[6] This grievance is about an ergonomic chair dating back to 2015.

[7] The grievor had developed some pain in her neck and arm that year. Therefore, the respondent arranged for an ergonomic assessment on November 9, 2015. That ergonomic assessment made seven recommendations, one of which was for the grievor to have a chair with a ball base. The respondent denied the request for that chair several months later. In its second-level grievance decision, the respondent states that its occupational health and safety unit categorized the chair as exercise equipment, and therefore, it was not approved for use as standard office equipment. There is also an indication that the respondent told the grievor that ball-based chairs are unsafe.

[8] The respondent arranged for a second ergonomic assessment on April 15, 2016. That second assessment recommended the same chair. The second assessment also made an alternative recommendation for a different chair. The respondent ordered that different chair, but the grievor still experienced pain after trying it for a short time. She pointed out to the respondent that it had four ball-based chairs already (those chairs did not have backs or armrests, and the chair recommended for the grievor had a back and armrests), but the respondent refused to order one anyway. Instead, it ordered a third ergonomic assessment. The recommendation was the same, but the respondent still refused to order the ball-based chair. Instead, the grievor agreed to try a third type of chair. The respondent ordered that chair, but when the grievor tried it, she had two chair-based accidents that day, requiring her to go on sick leave for roughly a week.

[9] Rather than order a ball-based chair, the respondent allowed the grievor to telework (where she used the chair that she wanted). According to her, the respondent ordered a ball-based chair for her in the summer of 2017 but still refused to give her permission to sit on it because it was unsafe.

[10] The grievor accepted an assignment with Health Canada and took the ball-based chair that had been ordered with her. Her new department allowed her to sit on that chair. The grievor then took another assignment with the Department of National Defence, which allowed her to sit on her ball-based chair. As far as I can tell from the materials filed, the grievor never returned to work for the respondent, and she remains employed in a different department, perched safely on her ball-based chair.

[11] While the respondent's grievance responses acknowledge that there was a delay accommodating the grievor's disability, it denies that there was bad faith and states that allowing her to telework shows its good faith and genuine concern for her health and well-being.

B. Processing the grievance and transmitting it to the third level

[12] The grievor filed a grievance that she signed on August 21, 2017, but according to her written submissions, it was filed on September 27, 2017 — after she had been teleworking for roughly a year and after she began her assignment with Health Canada. In its second- and third-level grievance responses, the respondent stated that the grievance was untimely. However, it has not maintained its objection to the timeliness of the grievance; therefore, I do not need to consider whether the grievance was untimely when it was originally filed.

[13] The grievance then moved through the grievance process with a speed that made the almost two-year quest for a chair look like a sprint.

[14] The parties agreed that the grievance would be referred directly to the second level of the grievance process. The parties also agreed to try to resolve the dispute but were unsuccessful. Eventually, the respondent heard the grievance at the second level on September 11, 2018. There appear to have been further discussions to try to resolve the dispute, but those discussions came briefly to an end in November 2018. The grievor's representative sent a transmittal to the third level of the grievance process on November 20, 2018. The respondent refused to accept that transmittal because it said

it was premature, as it had not yet issued its second-level decision. The grievor's representative responded on November 21, 2018, with this: "I would rather we recognise the abeyance be in play, following the transmittal to level 3 being issued" — by which I think the representative meant that the transmittal would be treated as valid after further discussions to resolve this dispute took place. The respondent did not respond to that request, as the next email exchanges were about resolving the dispute and not about the grievance process itself. However, the employer did send an email on December 6, 2018, which was in part about resolving the dispute but that concluded by stating, "[s]hould the offer not be accepted, we will prepare a second level response **and schedule the final [third] level hearing for late next week**" [emphasis added in the grievor's submissions]. There were then more emails indicating that the parties were not available in December and, therefore, would not schedule "... the next level hearing till February." There then followed some emails about holding the grievance in abeyance pending a decision at the second level, culminating in an email dated January 16, 2019, from the grievor's representative, stating that the grievor no longer consented to holding the grievance in abeyance.

[15] The respondent issued its second-level decision on February 6, 2019. When it did so, it wrote as follows:

...
In addition, I've attached the original transmittal form you submitted that was placed aside as the grievance was in abeyance at the time and we were still discussing informal resolution and no reply had been provided. Can you please include an updated transmittal document should your member wish to bring this ahead to the next level.
...

[16] The grievor's representative did not send an updated transmittal document within the 10-working-day period required. Instead, the representative appears to have taken her November 21, 2018, email (which the respondent did not reply to) to mean that the transmittal to the third level had already been made. When on March 15, 2019, the respondent wrote that it considered the matter closed because it had not received a transmittal to the third level, the grievor's representative sent a copy of the transmittal (on March 18, 2018) — but this time, the representative crossed out the original date of November 19, 2018, and replaced it with February 19, 2019 (i.e., nine working days after the date of the second-level grievance response). When the

respondent's representative asked for a copy of any correspondence dated February 19, 2019, with the transmittal form, the grievor's representative did not reply.

[17] At the third level of the grievance process, the grievor's representative asked for the grievance to be heard in writing (after it had originally been scheduled for an oral hearing in December 2019 and again in January 2020), and the respondent agreed, on January 14, 2020. The grievor's representative did not file those submissions until August 25, 2020. I have received no explanation for why it took seven months to prepare those submissions. The respondent then took over a year to prepare its response and did so only after being asked for one by the grievor's representative on July 13, 2021.

[18] The respondent provided its third-level response on September 1, 2021, just under four years after the grievor first filed her grievance.

C. Reference to adjudication

[19] The grievor did not refer this grievance to adjudication until October 26, 2022.

[20] In her written submissions, the grievor explained that her grievance had been passed around between six different representatives at CAPE: one assisted her in preparing the grievance, the second actually filed it, a third was assigned in March 2018 and had the grievance placed in abeyance, a fourth was assigned in April 2018 and was involved in the second- and third-level grievance decisions, a fifth was assigned in July 2021 (and sent the email that triggered the third-level decision), and a sixth representative was assigned in October 2022, at the grievor's request. Finally, CAPE retained external counsel in October 2022, who referred this grievance to adjudication and applied for this extension of time.

[21] The grievor submits that she consistently inquired about the status of her grievance, and frustrated by the lack of clarity provided by her representative, she escalated the matter within CAPE, which assigned a new representative in October 2022. That new representative discovered that the grievance had not been referred to adjudication and so arranged to hire the external counsel who did so.

[22] I am still not entirely clear about exactly how this grievance had "fallen through the cracks" (to borrow the phrase used by the grievor's representative when writing to the respondent on July 13, 2021) at the reference to adjudication stage.

[23] The respondent sent a copy of its third-level decision to the grievor's representative on September 1, 2021. That representative confirmed that he would forward a copy to the grievor. I do not know whether he ever did.

[24] The grievor's submissions state that "[t]he bargaining agent failed to refer the grievance to adjudication within the timelines prescribed. The representative in this matter left for vacation shortly after the final level response was received and the referral was simply overlooked" — which certainly implies that the grievor received a copy of the third-level decision and requested that her representative refer it to adjudication. Her submissions later state that the sixth representative "... surmised that the grievance had not been referred to adjudication, **despite the repeated requests of the applicant [grievor]**" [emphasis added], which also implies that the grievor received a copy of the third-level decision.

[25] However, the grievor also submits that her representative "... erroneously, continued to act as though the grievance was consensually in abeyance **and advised the applicant [grievor] of such**" [emphasis added]. The grievor also argues that the respondent advised her representative in July 2022 that the grievance had been in abeyance since 2018.

[26] At my request, the grievor provided me with emails from June and July of 2022 to explain this.

[27] In terms of the representative's confusion about the status of the grievance, there is an email from the grievor's representative on June 20, 2022, to the respondent stating this: "I am trying to figure out where we are with this process: did we finish the third level? I took over from a colleague who is no longer with us (CAPE), and I'm not sure where she left it." I note that this is incorrect; this same representative (not their predecessor) received the third-level decision on September 1, 2021, and promised to deliver it to the grievor. The respondent replied by attaching some correspondence from July 2021 (but not the third-level decision). The grievor's representative then wrote roughly three weeks later (on July 12, 2022) to say this: "... I am trying to figure out if the third level hearing was held, or if CAPE put the grievance in abeyance before a hearing could be held." The respondent replied two days later to remind this representative that "... the grievance was responded to at the final level on September 1, 2021."

[28] The confusion was entirely on the part of the grievor's representative, not the respondent.

[29] The grievor also provided emails dated December 8 and 9, 2021, and January 19, March 16, April 19, and June 20, 2022, in which she asked her representative for an update. The email of March 16, 2022, included a request that the representative provide confirmation that her file had been placed in abeyance as her representative stated, indicating that the grievor had begun to doubt her representative's assurances. Each email asked for an update on an "arbitration date" (by which she meant an adjudication hearing date). She also refers to a box full of documents she obtained through an access to information and privacy request and provided to CAPE, asking for them to be returned to her so that she could review them, to prepare for adjudication.

[30] As I mentioned earlier, the grievor's sixth representative finally caught the lack of any referral to adjudication in October 2022 and retained external counsel to refer this grievance to adjudication and to apply for an extension of time to do so.

IV. Application for an extension of time

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

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

[32] These criteria are not fixed, and the Board's overriding goal is to determine what is fair based on the facts of each case. These criteria are also not necessarily of equal weight and importance; see *Lewis v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 27 at para. 59, and *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 60 at para. 74. However, in this case, the main dispute between the parties is whether there is a compelling explanation for the delay. I agree

with the parties that this is the most important factor in this case, and I have given it the most weight.

A. Explanation for the delay

[33] The grievor's explanation for the delay referring the grievance to adjudication is the negligence of her CAPE representatives.

[34] There are many cases in which the Board has attributed the delay in a case to a union and not a grievor and has accepted that a union's negligence adequately explained a delay. These cases include:

- a) *Guenther v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLRB 85, in which a union officer responsible for filing a reference to adjudication with the Board missed (or forgot about) the deadline to make the referral, despite the necessary paperwork having already been drafted;
- b) *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLRB 42, in which the union simply lost track of some grievances as a result of being confused and therefore thought that it had filed a reference to adjudication when it had not;
- c) *Slusarchuk v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLRB 22, in which the delay referring a grievance to the final level was the result of inability, absence, or negligence on the part of the union's grievance officer;
- d) *Lewis*, in which the delay referring a grievance to adjudication was the result of the union simply forgetting to file the required paperwork; and
- e) *Hannah v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLRB 87, in which the delay referring a grievance to adjudication was due to an error by the union.

[35] This case is very similar to those cases, and I have reached the same conclusion as the Board did in those cases — namely, the negligence of the grievor's representative explains the delay referring the grievance to adjudication.

[36] The respondent relied upon the Board's decision in *Cherid v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLRB 8, in which the Board refused to grant an extension of time despite a union's attempt to blame itself for the delay. That case is distinguishable in two respects.

[37] First, in *Cherid*, the union baldly asserted that it was responsible for the delay without disclosing any mistake or error that it made. In this case, by contrast, the

CAPE representative clearly just forgot to refer the grievance to adjudication and then forgot about it entirely for over a year, either through simple forgetfulness or because he was confused about whether it was still in abeyance. As I pointed out earlier, there is still some lack of clarity about the explanation for this delay. However, I agree with the Board in *Barbe*, at para. 25, which states that I may grant an extension of time even though “... there may be some doubt as to the clarity of the explanations ...”. This case is unlike *Cherid*, in which the union acted deliberately and not by mistake. The representative in this case was negligent.

[38] Second, *Cherid* involved a grievance that the grievor could have referred to adjudication on his own (and in fact, he referred it to one of the grievance levels on his own). This case, by contrast, alleges a breach of the collective agreement, and therefore, the grievor could not have referred it to adjudication on her own — CAPE had to refer it and must represent her at adjudication (see s. 209(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2)).

[39] The grievor’s explanation for the delay referring the grievance to the third level of the grievance process is that she and her representative believed that the transmittal form dated November 21, 2018, was effective despite the respondent not yet having made its second-level decision. This case is similar to *Daigneault v. Treasury Board (Correctional Service of Canada)*, 2024 FPSLREB 2, cited by the grievor, in which the confusion on the part of both parties about the status of a grievance adequately explained the delay in that case. In this case, the respondent’s emails in December 2018 scheduling a third-level grievance hearing (despite not having yet denied the grievance at the second level) led the grievor and her representative to believe that the respondent had prospectively accepted the transmittal to the third level. I appreciate that the respondent’s email of February 6, 2019, undid that acceptance to some extent; however, the respondent’s course of conduct in December 2018 adequately explains the confusion and hence explains the delay referring this grievance to the third level.

[40] The respondent, in essence, argues that the transmittal to the third level was both premature and late. Even were I to accept this argument, it is easy to understand the grievor’s confusion about why that would be the case — something is usually either premature or late, not both.

[41] Therefore, I conclude that the grievor has provided a clear, cogent, and compelling reason for both delays in this case.

B. Other factors

[42] Assuming the first transmittal to third level was ineffective, the length of the delay transmitting the grievance to the third level was roughly 1 month, which is not significant. However, the length of the delay referring the grievance to adjudication (i.e., roughly 13 months beyond the deadline) is very significant and weighs against granting the extension of time.

[43] On the question of due diligence, the grievor's representative followed up on the transmittal to the third level on March 15, 2019, to inquire about the planned scheduling of a third-level grievance hearing. That shows sufficient due diligence, especially in light of the previous delays in the grievance and the efforts to resolve it.

[44] As for the reference to adjudication, the grievor's emails to her representative between December 2021 and June 2022 that I discussed earlier show that she remained personally involved in her case and that she was eager for it to proceed to adjudication. This case is unlike *Popov v. Canadian Space Agency*, 2018 FPSLRB 49, cited by the respondent, in which the grievor was not personally diligent in pursuing a grievance. In this case, the grievor is blameless and acted with due diligence. This factor favours granting the extension of time.

[45] On the balance of prejudice, the grievor would be prejudiced if I were to dismiss this case for untimeliness because her grievance will never be resolved. By contrast, the respondent could assert only that it ... "is prejudiced by the combined delays, prolonged exposure to liability, and the continuing need to defend itself." The respondent could have minimized its prejudice by issuing a third-level grievance decision in a timely fashion as opposed to waiting for over a year after receiving the grievor's written submissions, so I give little weight to the prejudice claimed by the respondent. I also note that the delay occurred after the grievor had already filed her grievance. As the Board noted in *Van de Ven*, at para. 80, a delay in the initial filing of a grievance or in its referral to adjudication is more serious than a delay in the transmittal between grievance levels because "... the employer's consideration of the issues raised in the grievances had already begun and was not yet completed." The

respondent has dropped its objection to the timeliness of the original grievance. The delay it still complains of occurred at a less-prejudicial stage of the process.

[46] Finally, both parties agree that the strength of the grievor's case is of limited relevance in most applications for an extension of time. I agree that that is so in this case.

[47] However, the respondent submitted that the grievor's admissions that it provided her with two (ineffective) ergonomic chairs and permitted her to telework mean that the grievor has a weak case. However, in its grievance decision, it acknowledged its delay accommodating the grievor. The Board when it hears this case on the merits may need to consider carefully whether telework is a proper substitute for providing an employee with the ergonomic chair recommended in three ergonomic assessments — if that is what happened. Finally, the Board will also have to decide whether the employer reasonably accommodated the grievor when it told her that the chair is unsuitable or unsafe, then bought it anyway but told her that she cannot sit on it — if this is what happened.

[48] In conclusion, it would be unfair for the grievor to bear the responsibility for the delay in this case. I have been provided with evidence of negligence by CAPE leading to the delay and I have seen a delay by the respondent (in particular by not providing a third-level grievance response in a timely fashion), but I have not seen anything indicating a delay by the grievor.

[49] There is only one thing in this application that gave me pause aside from the sheer length of the delay referring this grievance to adjudication, and that is the actions of the grievor's representative when transmitting the grievance to the third level. As I explained, when the respondent informed that representative of its position that it had not received a timely transmittal to the third level, rather than simply state that the original November 21, 2018, transmittal should be treated as effective (or at least that the representative believed it would be), the representative crossed out the date on the transmittal form and sent it in as if it had been emailed on February 19, 2019. That was not negligent; it was dishonest. It appears that the representative attempted to cover their tracks and hide the fact that they missed the respondent's email asking for a fresh transmittal form. However, there is no indication that the grievor participated in that dishonesty so I will grant the extension despite it.

[50] In conclusion, I grant both applications for an extension of time.

[51] Therefore, I will not decide whether the transmittal to the third level was in fact completed in November 2018, as my decision to grant an extension of time regardless of the result of that issue renders any decision I make on that issue moot.

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

(The Order appears on the next page)

V. Order

[53] I grant an extension of time to transmit the grievance to the third level and to refer it to adjudication.

[54] The grievance is to be placed on the Board's hearing schedule.

June 4, 2024.

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