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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

PATRICK BOLOMEY

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Bolomey v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Sandra Gaballa and Pamela Sihota, Public Service Alliance of Canada

For the Employer: Philippe Lacasse and Valerie Taitt, analysts, Treasury Board Secretariat

Decided on the basis of written submissions, filed June 12, July 6 and 20, and August 10, 2023, and May 29 and June 19 and 26, 2024.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On August 21, 2021, Patrick Bolomey ("the grievor") was horrifically assaulted by an inmate while he was working in the kitchen at Stony Mountain Institution, a correctional facility of his employer in Stony Mountain, Manitoba. He suffered severe injuries, including to his head, which continue to this day to impact his daily functioning.

[2] On May 2, 2022, the grievor filed a grievance with the employer, the Correctional Service of Canada, alleging that it failed and that it continued to fail to protect him and asking to be compensated for the psychological and physical damages that he had suffered. He referred the grievance to adjudication with the Federal Public Sector Labour Relations and Employment Board ("the Board") on May 23, 2023.

[3] The employer objected that the grievance is untimely, as it was presented to the employer long after the 25-day delay provided in the Operational Services (SV) collective agreement between the Public Service Alliance of Canada ("the bargaining agent") and the Treasury Board (expiry date August 4, 2021; "the SV collective agreement"). The employer stated that in any event, the grievor had been compensated through the workplace accident compensation scheme, and it had complied with orders that flowed from an investigation carried out under the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*).

[4] This decision deals with the employer's preliminary timeliness and jurisdictional objections.

II. Background

[5] The grievor worked as a food services supervisor in the Food Services Department (FSD) at Stony Mountain Institution, a multi-security correctional facility. The FSD is located within the medium-security site. Through a work program, inmates work with employees, to prepare food.

[6] Until 2007, a correctional officer had been posted in the kitchen, for safety reasons. The practice was discontinued, and in 2008, an employee was assaulted by an inmate. Following another incident, a provincial court judge held an inquiry. She recommended that the employer develop a written policy and implement minimum

staffing levels in the kitchen as well as minimum ratios of staff to inmates. Staffing levels remained a concern for the staff, and the grievor raised the issue around March 15, 2021.

[7] On August 21, 2021, an inmate attacked the grievor with a metal bar and severely beat him. The grievor remains unable to work due to the sequalae of his injuries.

[8] Following that attack, another FSD employee filed a work refusal, alleging unsafe work conditions, under s. 128 of the *CLC*. A ministerial delegate from the department responsible for the investigation, Employment and Social Development Canada (ESDC), issued directions for the employer to comply with the criteria that the investigator proposed, before normal operations could resume at the FSD. The directions were complied with.

[9] The grievor's bargaining agent appealed the ministerial decision to the Occupational Health and Safety Tribunal, which dismissed the appeal.

[10] The grievor received injury-on-duty leave until November 30, 2022. He then started receiving benefits from the Workers Compensation Board of Manitoba (WCB), in accordance with the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5; *GECA*).

III. Summary of the arguments

[11] Both parties cited case law to support their arguments. I will return to the relevant case law in my analysis.

A. For the employer

[12] The basis of the objection is twofold: the grievance is untimely, and under s. 208(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), an individual grievance cannot be presented when there is an administrative procedure for redress under any other Act of Parliament. In this case, two Acts of Parliament offered redress: the *CLC* and *GECA*.

[13] The grievance speaks of unsafe working conditions, which are covered by the relevant provisions of the *CLC*. The employer describes its compliance with the *CLC* in the following manner:

…

> *Following the accident of August 21, 2021, a section 127.1 complaint pursuant to the* Canada Labour Code *(*CLC*), Part II was submitted by 22 employees on August 22, 2021, on behalf of the Food Services Department (FSD) and was investigated by the Joint Health and Safety Committee. A work refusal was also filed pursuant to section 128 of the* CLC.
>
> *On August 27, 2021, as the employees' concerns remained unresolved through the internal review process, the matter was referred to Employment and Social Development Canada (the Labour Program) for investigation. The Employer removed offenders from the FSD work program during the course of the Labour Program's investigation.*
>
> *On September 13, 2021, the Labour Program issued a direction stating that management must comply with paragraph 145(2)(a) of the* CLC *and satisfy the criteria imposed by the investigator before the FSD returned* [sic] *to normal operations with offenders.*
>
> *On October 21, 2021, the Labour Program advised that based on the training submissions and plans made by the CSC, the danger direction and danger tag could be removed, and inmates could be returned to positions in the FSD kitchen. This confirms that management fully complied with the directions issued by the Labour Program.*

…

[14] The grievance also seeks compensation for the grievor's pain and suffering. Under the *GECA*, compensation is paid to an employee for an injury caused by a workplace accident. In September 2021, the WCB accepted his claim. He was provided injury-on-duty leave from the date of the incident to November 2022, when he started receiving benefits directly from the WCB. Thus, he was provided with substantive redress. According to the employer, s. 12 of the *GECA* precludes any further action related to the workplace injury.

[15] Consequently, the employer submits that redress was provided by two Acts of Parliament and that a grievance could not be filed.

[16] The employer disputes the grievor's position that the grievance is continuing. For a grievance to be continuing, a recurring breach is required. There must be a regular obligation that is recurrently breached (such as a salary payment). If there is no regular duty, and the harm simply continues, then the grievance dates from the initial damage.

[17] Therefore, the grievance is untimely, and the requested extension of time should not be granted. The delay filing it has not been properly explained. The employer sympathizes with the grievor's plight, but the fact is that he met with its commissioner on September 3, 2021, to discuss the August 21, 2021, incident. He should have been able to file a grievance or to ask his bargaining agent to file one on his behalf. The bargaining agent was aware of the situation, since it made a complaint under s. 127.1 of the *CLC* on the next day. It could have acted to determine if the grievor wished to grieve.

[18] The criteria derived from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, do not favour granting the extension. The criteria are the following:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the grievor from denying the extension against the prejudice to the employer from granting it; and
- the grievance's chances of success.

[19] There are no clear and compelling reasons for the delay; either or both the grievor and the bargaining agent could have filed the grievance in time. Seven months is a long delay, especially when it is entirely unexplained. There is no evidence of the grievor's due diligence. Granting the extension would unfairly burden the employer and would send the wrong message that timelines need not be respected.

[20] Finally, the employer submits that the grievance has no chance of success, since redress has already been provided through the *CLC* and *GECA*.

B. For the grievor

[21] The grievance is timely as there is an ongoing failure by the employer to conform to the SV collective agreement. Therefore, according to the grievor, it is a continuing grievance.

[22] The violation of the SV collective agreement, namely, article 22, which makes the employer responsible for employees' health and safety, continues to this day. It has not taken the serious measures that would ensure that another incident of the same kind will not take place.

[23] Should the Board find that the grievance is not a continuing grievance, it can grant an extension to the time limit to file it. It would be fair to grant an extension in the circumstances, as the grievor was still recovering from his significant injuries before he filed the grievance.

[24] The criteria derived from *Schenkman* favour granting the extension.

[25] The delay is attributable to the grievor's injuries; that is a cogent and compelling reason. He faced significant challenges due to his injuries. It took him six months to recover. The injuries have severely affected his capacity to focus on tasks, such as filing a grievance.

[26] The length of the delay is not very significant, in light of the jurisprudence.

[27] Considering the harm that he suffered, the grievor was diligent in pursuing the grievance.

[28] Being denied recourse would be a much greater injustice to the grievor than would granting the extension prejudice the employer.

[29] Evidence is required to determine the outcome of the grievance; however, the case has arguable merit. Therefore, the extension of time should be granted.

[30] Responding to the employer's argument that alternative measures for redress exist under another Act of Parliament, the grievor submits that the scope of redress under the *CLC* and *GECA* is limited.

[31] The danger that the grievor and his co-workers identified was investigated; so was the refusal to work. Once the investigator recommended training, and the employer stated that it would provide more training, no further recourse was available.

[32] The employer's responsibility with respect to the grievor's injuries has never been considered. The *GECA* compensates work injuries on the principle of no-fault insurance.

[33] The grievor has not been heard on the substance of his grievance, which is that the employer failed to protect him from harm. The alternative recourses that the employer invoked failed to produce real redress of personal benefit to him.

[34] Article 22 of the SV collective agreement provides that the employer must ensure the safety of its employees. This it has failed to do.

[35] According to the grievor, following the brutal attack, the employer did not implement sufficient measures to truly protect its workers, which shows that this grievance is a continuing grievance.

[36] The grievor concludes his June 2024 submissions in the following manner:

> …
>
> *The grievance addresses the Employer's persistent failure to ensure employee safety, a responsibility outlined in the collective agreement. The administrative procedures under the CLC and GECA did not offer a comprehensive solution to the systemic safety issues highlighted by Mr. Bolomey's attack, nor did they adequately address the personal harm and injury he suffered.*
>
> …

IV. Analysis

[37] The parties have raised these three issues: whether this is a continuing grievance; if not, whether an extension of time should be granted in the interest of fairness; and whether another administrative procedure for redress is applicable in this case.

[38] The grievance is worded as follows:

> *I grieve that my employer has been negligent in their duties by failing to properly train employees, not following procedure and policies and communicating wrong or incomplete information during the investigation thus causing serious and ongoing physical, psychological, professional and financial damages.*
>
> *I grieve that my employer has violated the Canada Labour Code Part II 145(2)(a), as well as the code of discipline and all related code* [*sic*] *and other related articles of our collective agreement.*

[39] The following remedies were requested in the grievance:

> *That management put in measures* [*sic*].
>
> *That I am compensated by my employer for pain and suffering ….*
>
> …

[40] Therefore, the grievance is related to two situations — the allegedly ongoing dangerous situation, and the wrong done to the grievor.

[41] The employer's defence is that the dangerous situation was dealt with through *CLC* processes and that the grievor has no further recourse, since his workplace injury has been compensated through the *GECA*.

A. Continuing grievance

[42] According to the SV collective agreement, a grievance must be filed within 25 working days of the event giving rise to it. However, there is an exception if a collective agreement breach recurs.

[43] The Board and its predecessors have dealt with arguments as to whether a grievance was continuing.

[44] In *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93, the grievance concerned the removal of a border services officer's defensive equipment. She was placed in a position in which the equipment was not a requirement, with no loss of salary; however, she argued that the situation prevented her from obtaining overtime opportunities.

[45] The adjudicator stated that the removal of the equipment had been a one-time action and that it could not be the subject of a continuing grievance. However, offering overtime was a recurring obligation for the employer; the recurring alleged breach could be the basis of a continuing grievance.

[46] The facts in *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 1, offer a greater similarity to the situation in the present case. In *Galarneau*, the grievance concerned ongoing exposure to second-hand smoke. The employer objected to the grievance, since the exposure had been ongoing for several years, and thus, the grievance was untimely.

[47] The adjudicator saw it otherwise. According to her, exposing the employees to second-hand smoke every time they came to work was a repeated breach of the health-and-safety provision of the collective agreement at issue in that case. The following extract summarizes her reasoning:

…

18 As well, in their reference work Droit de l'arbitrage de grief*, 5th edition, Blouin and Morin cover the concept of a continuing grievance at page 311:*

> *[Translation]*
>
> V.55 - In certain cases, a limitation period may only be for the past, not for the future. This is the case in a continuing grievance. It is also the case when benefits under a collective agreement are claimed in a context where the services rendered that form the basis of the claim are performed successively and where the violation of the collective agreement is recurring or repetitive (III.50). In other words, the event that gives rise to the grievance is repeated episodically. When the grievance is filed, the event is not a past fact but rather a current practice of the employer. Thus, the complainant may not be criticized in the future for failing to make a claim in the past: in such a situation, the limitation period operates only on a day-to-day or periodic basis …

19 I am of the view that the concept of a continuing grievance applies to this case. In their grievances, the grievors allege that the employer has exposed them to second-hand smoke since the dates indicated, which vary from one grievance to another.

20 The wording of the grievances itself suggests that the grievors allege that the circumstance giving rise to the grievance, that is, "[translation] exposure to second-hand smoke," began at a given point in time and continued at least until the date the grievances were filed. The grievors allege that exposure to second-hand smoke violates clause 18.01 of the collective agreement, which reads as follows:

> **18.01** The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Union, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.

21 Without determining at this stage whether clause 18.01 of the collective agreement confers substantive rights on the employees, I am of the opinion that the obligation cited by the grievors is of a continuing nature. If, in accordance with that provision, the employer has an obligation to take every reasonable measure for the occupational safety and health of employees, in my opinion, what is involved is a continuing obligation that is repeated each time the employees are called on to render services. If clause 18.01 confers on the grievors the substantive right to reasonable measures by the employer for their occupational safety and health, that right exists at all times, and its violation may occur each time the employer fails to take reasonable measures for employees' occupational safety and health.

…

[48] In this case, the grievor argues that article 22 of the SV collective agreement has been breached and that it continues to be breached. It reads as follows:

22.01 *The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Alliance, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*	***22.01*** *L'employeur prend toute mesure raisonnable concernant la santé et la sécurité au travail des employé-e-s. Il fera bon accueil aux suggestions de l'Alliance à cet égard, et les parties s'engagent à se consulter en vue d'adopter et de mettre rapidement en œuvre toutes les procédures et techniques raisonnables destinées à prévenir ou à réduire les risques d'accidents de travail.*

[49] As in *Galarneau*, an alleged continued exposure to a dangerous situation can be the basis of a continuing grievance.

[50] Further evidence is required to determine if the employer has conformed with article 22 of the SV collective agreement.

[51] The bargaining agent, on the grievor's behalf, pointed out several deficiencies in the protection afforded to the kitchen staff. It started in 2007 with the withdrawal of the correctional officer.

[52] As the employer argues, it may be that it has fulfilled its duties under the *CLC*. However, it is unclear to what degree it has welcomed suggestions from the bargaining agent or consulted it, to adopt measures designed to prevent injury.

[53] The grievance is not based on the single event of the grievor's injury but rather relates to the ongoing breach of the SV collective agreement's health-and-safety article. The grievor and bargaining agent continue to see inadequate protection of the kitchen staff.

[54] That protection is an ongoing duty, which the employer is allegedly continually breaching. Its timeliness objection is based on the grievor's workplace injury. But the grievance reads otherwise: rather, it is the employer's failure to afford sufficient protection to the kitchen staff working with offenders in a medium-security

institution. On this basis, I believe that the grievance can be considered a continuing grievance.

B. Whether an extension of time should be granted

[55] As I consider this grievance to be a continuing grievance, I will not pursue the analysis of whether an extension should be granted for filing it.

C. Is s. 208(2) of the *Act* applicable in this case?

[56] The employer's main argument is that no grievance can be presented if there are other avenues of redress under other Acts of Parliament. Section 208(2) of the *Act* reads as follows:

> ***208 (2)*** *An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.
>
> ***208 (2)*** *Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la* Loi canadienne sur les droits de la personne.

[57] I think that the grievance must be considered in two different lights: the alleged continuing breach of the relevant health-and-safety article, and the remedy that the grievor seeks for pain and suffering.

[58] In *Chickoski v. Canada (Attorney General)*, 2017 FC 772, the applicant grieved an action plan that his supervisor had imposed and that he saw as unfair, punitive, and harassing. He also made a complaint under the *CLC* for harassing and bullying behaviour on the supervisor's part. His employer refused to deal with the grievance, invoking s. 208(2) of the *Act*. He applied to the Federal Court for judicial review.

[59] The Federal Court allowed the judicial review application. The employer had not seriously considered whether the situation was, in fact, a case of workplace violence. In addition, it had not turned its mind at all to the question of available redress under the *CLC*. The Federal Court addressed the issue of redress as follows:

> …
>
> *[81] The Attorney General says that subsection 208(2) of the* PSLRA *is a non-discretionary bar to pursuing a grievance where another administrative procedure is available. The word "available" however stops well short of the nature of the administrative*

> *process which is required in order to supplant the right to an individual grievance. The factors identified in* Byers Transport, Boutilier, *and* Johal *combine to yield the following principles that assist in determining whether an alternate administrative procedure falls within subsection 208(2) of the* PSLRA*:*
>
> – *the procedure for redress elsewhere does not have to yield exactly the same remedies;*
>
> – *the remedies do not have to be as good or better than the ones being ousted;*
>
> – *differences in the administrative remedy, even if it is a lesser remedy, do not change it into a non-remedy;*
>
> – *it has to:*
>
> *(1) deal meaningfully and effectively with*
>
> *(2) the substance of the employee's grievance;*
>
> – *the administrative procedure must:*
>
> *(1) be capable of producing some real redress which*
>
> *(2) could be of personal benefit to the same complainant.*
>
> …

[60] In the end, the Federal Court concluded that the decision was unreasonable as it was "bereft of analysis" (see paragraph 89).

[61] In this case, there is no doubt that this is a case of workplace violence. As redress measures in his grievance, the grievor asks for better protective measures from his employer. According to him, the measures that were implemented after the ESDC's investigation are insufficient.

[62] The employer sees two avenues of redress — under the *CLC*, the measures taken in answer to the investigation, and under the *GECA*, the compensation awarded for a workplace injury.

[63] The employer, as detailed in its submissions, believes that it has fulfilled its obligations under the *CLC*.

[64] In *Public Service Alliance of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2012 PSLRB 84 ("*PSAC v. TB (DHRSD)*"), the adjudicator ruled that s. 215(4) of the *Act* ousted his jurisdiction; this section has the same import as s. 208(2) but applies to group grievances. In that case, the grievors

grieved their work conditions. The adjudicator found that recourse under the *CLC* would be sufficient to address their grievances.

[65] The grievor bases his argument on a breach of article 22 of the SV collective agreement, quoted earlier in this decision.

[66] The jurisprudence is unclear as to whether this article (found in all Treasury Board collective agreements) confers individual remedial rights or is rather a consultative obligation between the employer and the bargaining agent. In *Gaignard v. Canada (Attorney General)*, 2003 CanLII 40299 (ON CA), the Ontario Court of Appeal writes the following:

> …
>
> *[23] The facts raise a complaint by individuals who are acknowledged to be covered by the collective agreement. Their complaint is against their employer and its executive team and concerns the way the workplace was run by management. The facts centre on an alleged covert operation to stop contraband entering Kingston Penitentiary which employed methods that the appellants say poisoned their work environment and caused them physical and emotional harm. These allegations clearly engage the employer's obligation in Article 18 of the collective agreement to make reasonable provisions for the occupational safety and health of the employees.*
>
> *[24] The same reasoning makes it equally clear that the ambit of Article 18 extends to the facts which the appellants say underpin this dispute. The employer's obligation under the collective agreement to maintain a safe workplace is directly implicated by the covert operation and its consequences for the appellants as described in the statement of claim.*
>
> *[25] If this dispute were arbitrated and a breach of the collective agreement were established, the remedy at arbitration would undoubtedly include compensation to injured employees who grieved. That would remedy the wrong in very much the same way as would an award of damages in a court action. There would be no deprivation of ultimate remedy.*
>
> …

[67] In *Payne v. Treasury Board (Department of National Defence)*, 2021 FPSLREB 67, the adjudicator confirmed previous case law that the health-and-safety provision found in different collective agreements is a consultative right, not an individual remedial right. That would seem to contradict *Gaignard*. It seems to me that the arguments of the bargaining agent in *PSAC v. TB (DHRSD)* have some merit — the

provision affirms the employer's obligations and provides a mechanism for honouring those obligations. In any event, the obligations exist.

[68] Whether or not article 22 of the SV collective agreement is seen as conferring an individual right of redress, there is an arguable case that there may be a breach of it and that safety measures must be discussed further. The *CLC* measures may or may not be sufficient. Further evidence is required to decide the matter.

[69] Article 22 speaks to the employer's responsibility to ensure workplace health and safety and to its obligation to consult and discuss health-and-safety measures with the bargaining agent. As stated earlier, it is unclear to what degree the employer has or has not met its obligations under this provision.

[70] In this respect, the grievor has made out an arguable case.

[71] In his grievance, the grievor also references compensation for his pain and suffering.

[72] Compensation for his workplace injury has been provided under the terms of the *GECA*. The employer argued that s. 12 of the *GECA* precludes any further action related to the workplace injury. It reads as follows:

> ***12*** *Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.*
>
> ***12*** *L'agent de l'État ou les personnes à sa charge qui, par suite d'un accident du travail, ont droit à l'indemnité prévue par la présente loi ne peuvent exercer d'autre recours contre Sa Majesté ou un fonctionnaire, préposé ou mandataire de celle-ci pour cet accident.*

[73] Based on the wording of the legislation and the jurisprudence (see *Sarvanis v. Canada*, 2002 SCC 28 at paras. 34 and 35), I find that the grievance cannot serve to find the employer liable for the workplace injury and further damages related to that injury. This does not preclude finding that the employer has a continuing duty to offer greater protection to the kitchen staff or awarding remedies for a breach of the collective agreement.

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

(The Order appears on the next page)

V. Order

[75] The timeliness objection is dismissed. The grievance is a continuing grievance.

[76] The grievance will proceed as an alleged breach of the health-and-safety article of the SV collective agreement.

August 14, 2024.

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