Date: 20240919

File: 566-34-48688

Citation: 2024 FPSLREB 130

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

ISMAIL ELSAYED

Grievor and Applicant

and

CANADA REVENUE AGENCY

Employer and Respondent

Indexed as
Elsayed v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication and an application for an extension of time referred to in s. 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Frédéric Durso, representative

For the Respondent: Bryan Girard, representative

Decided on the basis of written submissions, filed January 9, February 4 and 19, and March 7, 2024.

REASONS FOR DECISION

I. Application before the Board

[1] Ismail Elsayed ("the applicant") is a former employee who retired from the federal public service in 2017 as a research and technology advisor. He filed a grievance on October 18, 2022, at the second level of the grievance process with the support of his former bargaining agent, the Professional Institute of the Public Service (PIPSC), to contest adjustments made to his pension that were retroactive to November 1, 2007, when he was still an employee.

[2] The grievance was presented at the second and final levels, and the Canada Revenue Agency (CRA or "the respondent") replied at both levels. It was referred to adjudication on November 29, 2023.

[3] The respondent objected to the referral to adjudication on three grounds. It submitted that the Federal Public Sector Labour Relations and Employment Board ("the Board") lacks jurisdiction to grant any remedy since pensions fall under the authority of Public Services and Procurement Canada (PSPC) and the Government of Canada Pension Centre ("the Pension Centre"). The respondent also noted that the grievance does not involve the interpretation or application of the collective agreement and that it is untimely because it was filed beyond the 25-day deadline prescribed in its collective agreement with the PIPSC for the Audit, Financial and Scientific group that expired on December 21, 2022 ("the collective agreement").

[4] In response, the applicant requested an extension of time under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") to file the grievance. He also alleged that it is a "continuing grievance". In response to the arguments about the nature of the grievance, he claimed that since it is ultimately about rates of pay, the Board has jurisdiction to deal with it as a matter involving the interpretation or application of the collective agreement.

[5] This decision deals only with the respondent's jurisdictional objections and the applicant's request for an extension of time under s. 61(b) of the *Regulations* to file the grievance.

[6] Based on the Board's authority to render decisions without a hearing under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c.

40, s. 365), it was determined that this matter could be decided on the basis of written submissions. The parties filed theirs on the jurisdictional objections and responded to the Board's request of March 1, 2023, for additional documents that they had cited but not provided in their submissions. The Board also provided the parties with an opportunity to make supplementary submissions by April 12, 2024. Neither one made any supplementary submissions.

[7] For the reasons that follow, the Board finds that it has jurisdiction to hear the grievance. The essential character of the grievance is about the rate of pay that was applicable at the relevant time. Applying the *Schenkman* factors (*Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, I have granted the requested extension of time in the interest of fairness.

II. Background

[8] Most of the material facts that form the basis of the dispute are not contested. I have summarized them in the following paragraphs.

[9] The applicant was in a position classified PM-06 until 2003, when it was reclassified CO-02. The PM-06 group and level was eventually abolished within the CRA as of November 1, 2007, with the introduction of the SP conversion. This resulted in salary protection for those who were reclassified. It also resulted in a change to the applicant's bargaining agent from the Public Service Alliance of Canada to the PIPSC.

[10] In a letter dated June 17, 2021, the respondent first notified the applicant that as a result of an error determining rates of pay in accordance with salary protection, a correction would be made to his rates of pay, retroactive to November 1, 2007. The applicant was informed that the error was identified in 2011 but due to ongoing collective bargaining and or the grievance related to the SP conversion, no action was taken earlier. The SP conversion refers to the comprehensive classification reform program, by the employer, of occupational groups represented by PSAC.

[11] The applicant was advised that the Pension Centre would be informed of the revised rates of pay.

[12] In a letter dated October 18, 2021, the respondent provided the applicant with details about revisions to his salary that were retroactive to November 1, 2007.

[13] In a letter dated May 3, 2022, the Pension Centre notified the applicant about the adjustments that were made to his pension benefits following the salary revisions to a lower rate of pay.

[14] In a letter dated May 24, 2022, and sent in response to a letter from the applicant, the Pension Centre detailed the calculation and breakdown of his pension revision based on corrected rates of pay. He was advised to contact it if he had any more questions.

[15] On October 18, 2022, the applicant contested the decision to make retroactive adjustments to his pension "… based on factually and legally incorrect information provided by [his] employer." The grievance read as follows:

> *I hereby contest the decision to make retroactive adjustments to my pension based on factually and legally incorrect information provided by my employer.*
>
> *This decision and the resulting pension adjustments are prejudicial to me as I have not been employed by the CRA for several years. In no case do I have to suffer any prejudice because of my former employer's error or negligence.*

[16] As corrective action, the applicant requested the following:

> *…*
>
> *– any future deductions from my pension for alleged overpayments be stopped immediately;*
>
> *– any amount deducted from my pension for alleged overpayments be repaid to me in full plus interest at the applicable statutory state [sic];*
>
> *– that any other measures be taken to make me whole.*

[17] The grievance was heard and rejected at the second and final level on the basis of timeliness. The respondent also replied to the grievance on the merits and noted that its retroactive adjustments to the rates of pay were calculated correctly and in accordance with the CRA's *Directive on Terms and Conditions of Employment*. Further, the respondent lacked jurisdiction to grant any corrective action since the determination of pension benefits fell under PSPC and the Pension Centre.

III. Summary of the arguments

A. For the respondent

[18] The parties provided written submissions, which I have briefly summarized in the following paragraphs.

[19] Firstly, the respondent argued that the Board lacks jurisdiction to hear the grievance because it is about pensions, and the Board lacks the authority to grant any of the requested remedies. The determination of pension benefits, including the calculation and interpretation of pensions, falls under the authority of PSPC and the Pension Centre, which administers the Public Service Pension Plan in accordance with the *Public Service Superannuation Act* (R.S.C., 1985, c. P-36; *PSSA*).

[20] Secondly, the respondent argued that the grievance does not involve the interpretation or application of the collective agreement. It noted that its pay adjustments, for which the Pension Centre was notified, were made in accordance with its *Directive on Terms and Conditions of Employment*, including the provision on reclassification to a lower maximum rate of pay. That directive did not form part of the collective agreement.

[21] Thirdly, the respondent claimed that the Board lacks jurisdiction because the grievance is untimely. Clause 34.11 of the collective agreement requires that a grievance be filed within 25 days of the action or circumstances giving rise to it. In this case, the applicant was informed as early as June 2021 that there would be changes to his rate of pay that could affect the calculation of his pension benefits. He was provided with details of the retroactive corrections on May 3, 2022, and filed his grievance only on October 18, 2022.

[22] Further, in response to the applicant's request for an extension of time, the respondent argued that he failed to meet any of the criteria set out in *Schenkman*. He demonstrated no clear, cogent, and compelling reason for the delay. The delay is not insignificant, and the applicant did not show that he exercised due diligence pursuing his grievance.

B. For the applicant

[23] The applicant argued that the Board has jurisdiction because the grievance is essentially about the rate of pay that applied to him at the relevant time. This involves

the interpretation and application of the applicable collective agreement. Pension benefits flow from the rates of pay. Further, the respondent's final-level reply established that it is understood that the salary scale in the collective agreement is at the heart of the grievance. The applicant cited *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55 at para. 38, to support his position that the respondent reasonably understood the nature of the grievance that was filed.

[24] The applicant also noted that the nature of the grievance is similar to the grievances in *Motamedi v. Canada Revenue Agency*, 2013 PSLRB 50, and *Farhan v. Canada Revenue Agency*, 2021 FPSLREB 48, which were about the grievors' salary-protection status after their PM-06 positions were reclassified to CO-02 positions.

[25] Citing the *Schenkman* factors, the applicant argued that the extension of time should be granted because there is a clear, cogent, and compelling reason for the delay, notably, his retiree status, insufficient information in the Pension Centre's letters, and the respondent's negligence of waiting 14 years to proceed with the salary revisions.

[26] The applicant also argued that although the delay may appear long (11 months from the first notice that the CRA sent him and the letter detailing the impact of the rate of pay changes on his pension), it was due to the lack of information. He claimed that he maintained communication at every step and that he requested a follow-up.

[27] The applicant noted that the damage that he would suffer were the extension not granted would be lifelong, since the salary recalculation affects his retirement income.

[28] The applicant cited *Motamedi* and *Farhan* to support his position that the grievance's chances of success are high.

[29] Finally, the applicant added that the Board should consider the continuous nature of this grievance due to the recurring effect of the reduction on his pension benefits (see *Farhan*, at paras. 70 and 71).

IV. Reasons

[30] In the past, the Board has heard grievances filed by retired employees about alleged collective agreement breaches that occurred while they were still employees.

What makes this case uncommon is that, due to the respondent's 14-year delay allegedly correcting the applicant's rate of pay, the event that triggered the grievance arose nearly 4 years after he retired.

[31] Sections 209(1) and (2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") allow referring a grievance to adjudication that involves the interpretation and application of a collective agreement. Such grievances require a bargaining agent's prior approval. The provisions read as follows:

209 (1) *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*	***209 (1)*** *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un* membre, *au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada, *peut renvoyer à l'arbitrage tout grief individuel portant sur :*
(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*	***a)*** *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*
(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*	***b)*** *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*
(c) *in the case of an employee in the core public administration,*	***c)*** *soit, s'il est un fonctionnaire de l'administration publique centrale :*
(i) *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*	***(i)*** *la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la* Loi sur la gestion des finances publiques *pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,*
(ii) *deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*	***(ii)*** *la mutation sous le régime de la* Loi sur l'emploi dans la fonction publique *sans son consentement alors que celui-ci était nécessaire;*

(d) *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*	***d)*** *soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).*
Application of paragraph (1)(a)	***Application de l'alinéa (1)a)***
(2) *Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*	***(2)*** *Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.*

[32] Section 113 of the *Act* is also relevant:

113 *A collective agreement that applies to a bargaining unit — other than a bargaining unit determined under section 238.14 — must not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if*	***113*** *La convention collective qui régit une unité de négociation qui n'est pas définie à l'article 238.14 ne peut pas avoir pour effet direct ou indirect de modifier, de supprimer ou d'établir :*
(a) *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or*	***a)*** *une condition d'emploi de manière que cela nécessiterait l'adoption ou la modification d'une loi fédérale, exception faite des lois affectant les crédits nécessaires à son application;*
(b) *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act.	***b)*** *une condition d'emploi qui a été ou pourrait être établie sous le régime de la* Loi sur l'emploi dans la fonction publique, *la* Loi sur la pension de la fonction publique *ou la* Loi sur l'indemnisation des agents de l'État.

A. The respondent's objection to the Board's jurisdiction

[33] The respondent characterized the grievance as involving pension benefits and thus being outside the Board's jurisdiction under s. 209(1) of the *Act*, while the

applicant submitted that it is essentially about the rates of pay that were applied to him at the relevant time; thus, it falls squarely within s. 209(1)(a).

[34] Thus, the Board must determine the essential character of the grievance which can be summed up as reviewing the grievance and the arguments and allegations advanced by the grievor to determine whether the matter falls squarely within the Board's jurisdiction under s. 209(1) of the *Act* (See *Swan v. Canada Revenue Agency*, 2009 PSLRB 73, See also *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development*), 2013 PSLRB 115 at para. 98, *Dansou v. Canada Revenue Agency*, 2020 FPSLREB 100 at para. 25).

[35] In the Board's recent decision on jurisdiction, *Toth v. Treasury Board (Canada Border Services Agency)*, 2024 FPSLREB 108, the Board was similarly tasked with determining the essential character of grievances. In that case, the grievors challenged the employer's discretion to disallow grievors working part-time or job-sharing, while caring for children, to participate in the pension plan as if they were working full time. The employer characterized the grievances as being about whether relevant pension legislation and regulations are discriminatory on the basis of gender. The grievors claimed that the pith and substance of the grievance was about the exercise of the employer's discretion when structuring work arrangements or administering pension legislation. Ultimately, the Board conducted the "essential character analysis" by reviewing the arguments of the parties and the grievance language. It concluded that it had jurisdiction over the grievances because they were about how the employer characterizes employees under the *Financial Administration Act* (R.S.C., 1985, c. F-11) (as part-time or full-time), and this did not directly or indirectly alter the *PSSA* or its regulations.

[36] In *Dodd v. Canada Revenue Agency,* 2015 PSLREB 8, the Board also applied the "essential character" or pith and substance analysis. The grievance challenged the employer's decision to recover pension arrears following a deficit in pension contributions. The grievor did not challenge his rate of pay at any time. The grievor characterized the grievance as being about the employer's use of the payroll system to recover payments that were statute barred. The employer characterized the grievance as being about pension contributions and the recovery of a deficiency, as required by the *PSSA*. After conducting an analysis of the parties' arguments, including a review of the communication from the pension administrator, the Board determined that the

essential character of the grievance was about the recovery of pension arrears beyond the time limit in the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50). Therefore, the Board concluded that it lacked jurisdiction to deal with the matter since it determined it would require altering terms and conditions established under the *PSSA* and its regulations.

[37] While it may seem on its face that *Dodd* is similar to the case before me, I find that it can be distinguished on the basis of its facts. In *Dodd*, there was no allegation of an error in rates of pay that triggered a change to pension contributions. While I should not be read as agreeing with the Board's conclusions in *Dodd*, this is a significant difference.

[38] In this matter, the employer acknowledges repeatedly in correspondence in June and October 2021 and May of 2022 that it made an error in the grievor's rate of pay, which was subsequently revised or "corrected".

[39] In other words, in this case, I find there are multiple indications in the grievance, the arguments of the grievor and the responses of the employer that the essential character of the grievance is about the rate of pay in the collective agreement that applied to the grievor at the relevant time. The fact that pension contributions are calculated and corrected based on rates of pay does not turn a rate of pay grievance into one about pensions.

[40] There is no dispute that the applicant's position, classified at the PM-06 group and level, was reclassified in 2003 to CO-02 and that it was salary-protected. As of November 1, 2007, the PM-06 classification was abolished within the CRA. However, the applicant's salary remained protected at the PM-06 group and level.

[41] On reviewing the grievance's wording, it is clear that the applicant contested "… the decision to make retroactive adjustments to [his] pension **based on factually and legally incorrect information** …" [emphasis added].

[42] The respondent's final-level reply to the grievance contained an acknowledgement that the information that it provided to the Pension Centre was about the applicant's allegedly corrected rate of pay.

[43] The respondent explained as follows its claim of what the applicant was entitled to, in terms of rate of pay, as of November 1, 2007:

…

… As a result, from that date, you were entitled to your protected PM-06 rate of pay ***as adjusted by the occasional salary revisions negotiated between CRA and PIPSC for the CO-02 group and level. I am of the opinion that the retroactive corrections made by the employer to the rates of pay to which you were entitled as of November 1, 2007, due to your salary protection at the PM-06 level granted in 2003, were calculated correctly*** *and in accordance with the provisions of the Directive and its previous versions.*

…

[Emphasis added]

[44] The applicant explains, in his response of February 4, 2024, to the employer's objection, why this is a grievance about the applicable rate of pay in the collective agreement and not about the interpretation or application of the *PSSA*.

…

It was not until May 2022, when the grievor received two letters dated May 3 and May 24, that PWGSC informed him that his average salary for the last 5 years of employment (May 2012 to May 2017) had been revised downwards. This revision would have generated an overpayment of $3275 for the past years and a reduction in his retirement pension for future years. The letter provides no explanation of the reasons for the revision.

Although the grievance does not mention a specific article of the collective agreement, the wording clearly refers to the consequences of the employer's decision to make a retroactive salary adjustment. It is well known that salaries flows (sic) from the collective agreement*. Moreover, it is surprising that the employer should raise an objection in this regard when, in its response to the final level of the grievance procedure, it clearly refers to the salary revisions negotiated between CRA and PIPSC. This confirms that the employer clearly understood that the grievance referred to the salary scale included in the collective agreement, and that this aspect was at the heart of the grievance.*

As a result, from that date, you were entitled to your protected PM-06 rate of pay as adjusted by the occasional salary revisions negotiated between CRA and PIPSC for the CO-02 group and level. I am of the opinion that the retroactive corrections made by the employer to the rates of pay to which you were entitled as of November 1, 2007, due to your salary protection at the PM-06 level granted in 2003, were calculated correctly and in accordance with the provisions of the Directive and its previous versions….

…

[Emphasis added]

[45] In light of the grievance's wording and the content of the respondent's final-level reply and the arguments of the parties, I find that at its core, the grievance contests the rate of pay applicable to the applicant at the relevant time, which was between 2007 and the date of his retirement in 2017.

[46] The Board finds that the respondent knew or ought reasonably to have known that the grievance contests rates-of-pay provisions. In its final-level reply, the respondent asserted that the salary protection that the applicant was entitled to be subject to revisions that it negotiated with PIPSC and that this "corrected rate of pay" was provided to the Pension Centre. Further, the CRA's letters in 2021 and the Pension Centre's letters in 2022 that are mentioned in the final-level reply all refer to retroactive pay adjustments.

[47] Therefore, to the extent that the grievance contests the rates of pay that form the basis of the calculation of pension benefits, this matter falls squarely within s. 209(1)(a) of the *Act*.

[48] Further, unlike in *Dodd*, where the Board found that taking jurisdiction on whether the employer had the right to retroactively collect pension arrears beyond the statutory time limit would be akin to either directly or indirectly changing a term or condition of employment under the *PSSA*, I make no such finding here.

[49] I find that in this case the Board has jurisdiction to hear a grievance about the rate of pay that applied to the grievor before he retired.

[50] Further, I find that taking jurisdiction here does not in any way alter the collective agreement by changing a term or condition of employment under the *PSSA* and its regulations. It merely provides an opportunity to determine what rate of pay under the collective agreement was applicable to the grievor from the time that he was salary protected in November 2007.

[51] I cite the following other examples where the Board and its predecessor have taken jurisdiction on the basis that the essential character of a grievance concerns the pay an employee is entitled to receive: See *Harris v. Canada Revenue Agency*, 2006 PSLRB 106 at paras. 36 and 37. See also *Dansou v. Canada Revenue Agency*, 2020 FPSLREB 100 at paras. 23 to 27).

[52] While the respondent claims that its *Directive on Terms and Conditions of Employment* falls outside the Board's jurisdiction, rates of pay are referenced at Article 44 (Pay Administration) and Appendix A of the collective agreement, which is clearly within the Board's jurisdiction. Further, the Board finds it unnecessary at this preliminary stage to determine whether and to what extent that directive applies. The Board may determine it if a decision is eventually rendered on the merits.

[53] The respondent also claims that the Board is without jurisdiction to grant any of the remedies requested. I disagree. The last remedy cited in the grievance is not specific to pensions but is a common catch-all phrase in grievances: "… any other measures be taken to make me whole." This could include correcting the grievor's rate of pay for the prescribed period, if the Board found that the employer violated the collective agreement or simply a declaration that the employer violated the rate of pay provisions of the collective agreement.

[54] However, since I have found that the grievance is ultimately with respect to the rate of pay that applied to the applicant from November 1, 2007, and the catch-all remedy is broad enough to fall within the Board's jurisdiction, the Board finds that it has jurisdiction over the grievance.

B. The extension of time

[55] Clause 34.11 of the collective agreement reads as follows:

34.11 *An employee may present a grievance to the first (1st) level of the procedure in the manner prescribed in clause 34.06, not later than the twenty-fifth (25th) day after the date on which he is notified orally or in writing or on which he first becomes aware of the action or circumstances giving rise to the grievance.*	***34.11*** *Au premier (1er) palier de la procédure, l'employé-e peut présenter un grief de la manière prescrite au paragraphe 34.06 au plus tard le vingt-cinquième (25e) jour qui suit la date à laquelle il ou elle est notifié, oralement ou par écrit, ou prend connaissance, pour la première fois, de l'action ou des circonstances donnant lieu au grief.*

[56] I find that on or around May 3, 2022, the applicant knew that information about his adjusted rate of pay had resulted in a change to his pension benefits, retroactive to November 1, 2007. Before that date, the respondent had essentially put him on notice in June and October 2021 that it had allegedly made an error in the calculation of his rate of pay in accordance with salary protection that could potentially affect his best

five years of salary and his pension benefits. However, nothing substantive changed for him in terms of his rate of pay.

[57] I agree with the applicant that perhaps he would have seen the change sooner to his rate of pay and the potential impact on his pension benefits had he still been an employee, but alas, it was not so.

[58] Instead, it took the respondent another year before the revised retroactive rates of pay that were communicated to the Pension Centre resulted in an adjustment to the applicant's pension benefits, as stated in its letters dated May 3 and 24, 2022.

[59] While the applicant obtained more details on or around May 24, 2022, about the breakdown of the revisions to his pension based on the changes to his rate of pay, I find that he knew or ought to have known of the actions that gave rise to the grievance by at least May 3, 2022, or soon after.

[60] The applicant conceded that the grievance was filed beyond the 25-day time limit prescribed in clause 34.11 of the collective agreement but asked for an extension of time to file it. He cited what the Board's jurisprudence has commonly referred to as the *Schenkman* factors. The respondent applied the same factors to support its argument that no extension ought to be granted.

[61] The Board has consistently applied the *Schenkman* factors when analyzing whether it ought to use its discretion to grant an extension. While some decisions have deemed some factors more important than others, I adopt the analysis that some factors may garner more weight based on the facts and circumstances of the case. In this case, I find that a key factor is balancing the injustice to the applicant against the prejudice to the respondent.

[62] Further, in decisions like *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42, *Mercier v. Correctional Service of Canada*, 2023 FPSLREB 113, and *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79, the Board has emphasized that fairness must prevail, since s. 61(b) of the *Regulations* specifically allows an extension to be granted "in the interest of fairness" or, as the *Regulations* in French prescribe, "*par souci d'équité*".

[63] "Fairness" is not defined anywhere in the *Regulations*; nor can it be found in the interpretation section or in any other part of the *Act*. The *Oxford Dictionary* defines it

as “the quality of treating people equally or in a way that is reasonable”. Synonyms in the online *Cambridge Dictionary* include equity, justice, and impartiality.

[64] For the reasons that follow, I find that it is in the interest of fairness to grant the extension.

C. A clear, cogent, and compelling reason for the delay

[65] Applying the *Schenkman* factors as a whole, with fairness as the central guide for my discretion, I find that the applicant provided at least one clear, cogent, and compelling reason for the delay. I do not accept the difficulties communicating with PIPSC due to his retirement status as that reason. In this day and age of fast and efficient electronic communication, there should have been little to no barrier to communicating with PIPSC that could vaguely have been attributed to “retirement status”. However, I find that the complexity of the decision to retroactively adjust the rate of pay and benefits over a 14-year period and PIPSC’s lack of sufficient information to enable it to respond adequately within the prescribed deadline are clear and compelling reasons for the delay.

[66] The Board also notes that after putting the applicant on notice twice in 2021, the respondent took over a year to communicate information on the retroactive corrections to his pay. Clearly, it was a complex file, since the respondent alleged that it was an error in the rate-of-pay calculation in accordance with the salary protection that had been in effect since November 1, 2007. Further, in its June 17, 2021, letter, the respondent noted that the “error” was identified as early as 2011 but that nothing was done about it, due to either ongoing collective bargaining or the grievance related to the classification conversion.

D. The applicant’s due diligence

[67] I also find that under the circumstances, the applicant established his due diligence in the pursuit of this matter. He contacted PIPSC as early as 2021, followed up with the Pension Centre for details on the changes in May 2022, and continued to follow up with PIPSC as to the calculation of his pension benefits based on his revised rate of pay. Given that the grievance could have been advanced only with PIPSC’s approval, I find that the applicant demonstrated the required due diligence.

[68] I also reject the respondent's claim that there is no evidence of due diligence because the applicant and PIPSC did not follow up with it. All the communications from the Pension Centre in May 2022 about the adjustments to the rates of pay advised the applicant to follow up with the Pension Centre directly. I accept his submissions that both he and PIPSC followed up, as instructed.

[69] Further, to the extent that PIPSC's follow-up lacked the rigour required of an established bargaining agent, I adopt one of two schools of thought of the Board, which has concluded that based on the particular facts of a case, an applicant should not be held responsible for the negligence of their bargaining agent (see *Barbe*, *D'Alessandro*, and *Mercier*), especially if there is no evidence that the applicant had not been diligent.

E. Balancing the injustice to the applicant against the prejudice to the respondent

[70] There is no doubt that the injustice to the applicant, should the extension not be granted, far outweighs the prejudice to the respondent from granting the extension. The applicant could lose his right to challenge a decision that could potentially affect the financial security of his retirement. In its June 17, 2021, letter, the respondent noted "… the lengthy delay in addressing the error" and apologized for the "… stress and financial impact it may cause". It provided no evidence in its submissions that it would suffer any prejudice were the extension granted.

F. The length of the delay

[71] The length of the delay is just over five months. I agree with the respondent that the delay is not insignificant, but in light of all the circumstances, I do not find it determinative. The Board finds that it would certainly not be fair to deny the applicant the right to challenge a decision that took the respondent 14 years to make because he filed a grievance 5 months late.

G. The chances of success

[72] With respect to the chances of success of the grievance on the merits, as in most cases, the Board is unable to make that determination at this early stage and without the benefit of the parties' evidence. Further, although the applicant referred to two cases that addressed salary protection after a reclassification, none of the cases that he relied on to support the grievance's chances of success are helpful as to its arguable chances of success. In *Motamedi*, the grievance challenging the rate of pay applicable

after a conversion from a PM-06 to a CO-02 position was denied. In *Farhan*, the salary-protection grievance was also denied.

[73] The applicant also briefly raised the argument that it is a continuing grievance, and the respondent argued that there was no evidence of a recurring breach of a collective agreement obligation. I find no need to address the parties' arguments on this point since I have disposed of the application on different grounds and have granted the requested extension.

[74] For all the stated reasons, the request for an extension of time is granted, and therefore, the respondent's timeliness objection is moot.

[75] The grievance will be scheduled for a hearing in due course.

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

(The Order appears on the next page)

V. Order

[77] The respondent's jurisdictional objection is dismissed.

[78] The application for an extension of time is granted.

[79] The grievance will be scheduled for a hearing in due course.

September 19, 2024.

Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board