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XR: 566-02-49109 and 49110

Citation: 2024 FPSLREB 98

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

WINFRED RISSER

Applicant

and

TREASURY BOARD
(Canadian Transportation Accident Investigation and Safety Board)

Respondent

Indexed as
Risser v. Treasury Board (Canadian Transportation Accident Investigation and Safety Board)

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

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Eve Berthelot, Public Service Alliance of Canada

For the Respondent: Maryse Allain, analyst

Decided on the basis of written submissions,
filed March 19, April 18, and May 9, 2024.

REASONS FOR DECISION

I. Overview

[1] On February 19, 2024, Winfred Risser ("the applicant") referred a grievance to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board"). He referred it under s. 209(1)(c) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), which allows an employee of the core public administration to refer a grievance to adjudication that pertains to the termination of his or her employment for a reason other than a breach of discipline or misconduct. He also referred his grievance to adjudication under s. 209(1)(a), which allows an employee who is represented by his or her bargaining agent to refer a grievance to adjudication that pertains to the interpretation or application of a collective agreement provision. The collective agreement provisions at issue pertain to "leave with or without pay for other reasons" (article 55) and "no discrimination" (article 19), and the collective agreement was between the Treasury Board and the Public Service Alliance of Canada for the Technical Services (TC) group that expired on June 21, 2021 ("the collective agreement").

[2] The relevant facts, as described by the parties, can be summarized succinctly, as follows.

[3] The applicant was an investigator with the Canadian Transportation Accident Investigation and Safety Board, commonly known as the Transportation Safety Board of Canada ("the respondent"). He was injured in October of 2017. After he exhausted his annual and sick leave credits, he was placed on sick leave without pay, which he remained on for some time. On or around June 1, 2020, the respondent sent him what is commonly referred to as an "options letter". On June 25, 2020, the applicant responded, indicating that he would not select any of the options provided to him at that time, as he needed more time "… to get [his] medical treatment in place to help [his] recovery." According to his letter, the COVID-19 pandemic had made it more difficult for him to receive medical treatments. In his submissions, he indicates that the pandemic also made it more difficult for him to access email, printers, scanners, and fax machines.

[4] On July 30, 2020, the applicant received a letter dated July 28, 2020, informing him of the respondent's decision to terminate his employment under s. 12(1)(e) of the

Financial Administration Act (R.S.C., 1985, c. F-11). According to the applicant, the letter acknowledged his request for additional time to respond to the options letter but did not reply to the request.

[5] It appears that on August 24, 2020, the applicant communicated with a bargaining agent representative. He submitted an email that he sent that day to a person whose title, position, or email address is not identified. For the purposes of this analysis, I will accept as true his statement that his email was addressed to his bargaining agent. The email does not have a subject line. Its body reads, "Hi Chris, Call me when you receive this. Thank you, Win".

[6] On September 11, 2020, the applicant again emailed the bargaining agent representative, this time with the subject line "Re: grievance". He provided the contact information of the person who had terminated his employment. It appears that the email included an attachment, but it was not submitted to the Board.

[7] On September 15, 2020, the applicant presented a grievance to the respondent challenging the termination of his employment. He alleged that his termination constituted discrimination based on disability. Given the nature of the grievance, the respondent's internal grievance procedure had only one level. The first level was also the final level.

[8] On November 21, 2023, the respondent rejected the grievance on the basis that it was untimely.

II. Timeliness objection, and the request for an extension of time

[9] On March 19, 2024, the respondent raised an objection, arguing that the Board did not have jurisdiction to adjudicate the grievance because it was untimely. The respondent argued that under the terms of the collective agreement, a grievance had to be presented at the first level of the grievance procedure no later than the 25th day after the date on which the applicant became aware of the action or circumstances that gave rise to it. According to the respondent, the 25-day deadline was September 3, 2020. The grievance was filed on September 15, 2020.

[10] Shortly after receiving the respondent's objection, the Board sought the applicant's position with respect to it. No response was received.

[11] On April 4, 2024, the Board wrote to the parties, informing them that it was considering rendering a decision on the respondent's timeliness objection based on written submissions. The parties were provided the chance to make those submissions. The respondent filed its submissions on April 18, 2024. The applicant did so on May 9, 2024. His submissions contained a request for an extension of time. A new file was opened with respect to that request (Board file no. 568-02-50121).

[12] The respondent did not reply to the applicant's written submissions, even though the Board had previously set a deadline for filing one. On May 21, 2024, and once the deadline had passed, the Board wrote to the parties, requesting that the respondent confirm that it did not intend to file a reply. No response was received.

[13] Under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may render a decision on the basis of written submissions. I am satisfied that the parties' written submissions are sufficient to constitute a basis for a decision on the respondent's objection and the applicant's request for an extension of time.

III. Reasons

[14] The applicant did not deny that his grievance was presented beyond the 25-day period set out in the collective agreement. He acknowledged that he was terminated on July 28, 2020. The respondent's final level grievance response indicates that the applicant received the termination letter on July 30, 2020. As of that date, he knew of the respondent's decision to terminate his employment. His grievance was presented more than 25 days after the date on which he learned of the decision that gave rise to the grievance. The grievance is untimely. On that basis, the Board does not have jurisdiction to adjudicate it.

[15] Section 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79) allows the Board to exercise its discretion to extend prescribed time limits "in the interest of fairness".

[16] The applicant requested an extension of time. Were the Board to grant his request, his grievance would be deemed timely and could proceed to a determination on the merits.

[17] The Board normally assesses requests for extensions of time against what are commonly referred to as the "*Schenkman*" criteria (see *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1). The five criteria are the following: whether a clear, cogent, and compelling reason for the delay has been provided; the length of the delay; the applicant's due diligence; balancing the injustice to the applicant if the request is denied against the prejudice to the respondent if it is granted; and the grievance's chances of success. The criteria are not necessarily of equal weight and importance (see *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at para. 55). The overriding objective is for the Board to determine what is fair based on the facts of each case. The burden of proof rests with the applicant.

[18] The respondent's written submissions, which were filed before the applicant's written submissions that contain his request for an extension of time, addressed only the first *Schenkman* criterion, which is whether the applicant has provided a clear, cogent, and compelling reason for the delay. The respondent's view was that the applicant did not explain that first criterion. Accordingly, the respondent indicated that it did not believe that it had to address the other criteria. It relied on *Featherston v. Deputy Head (Canada School of Public Service)*, 2010 PSLRB 72, specifically paragraph 84, where the former Board held that "… if there are no clear, cogent or compelling reasons for the delay, there is no need to proceed to assess the other four criteria."

[19] As previously indicated, the applicant requested an extension of time and provided arguments with respect to the *Schenkman* criteria after the respondent had filed its submissions. Although the respondent was provided an opportunity to file a reply, it did not, which leaves the applicant's submissions unaddressed.

[20] I will review the *Schenkman* criteria based on the applicant's arguments and submissions and the respondent's initial submissions. I will begin with the *Schenkman* criterion that requires me to determine whether the applicant has provided a clear, cogent, and compelling reason for the delay.

[21] The only information provided by the applicant about this criterion was a brief reference indicating that the delay was "mainly" due to compelling and cogent reasons.

[22] Although the applicant wrote to a bargaining agent representative within the applicable time limits, he provided the Board no information as to why a grievance was presented only weeks later, well beyond the 25-day period set out in the collective agreement. He did not identify a reason for the delay, which leaves the Board guessing as to what the reason could be.

[23] The onus is on the applicant. When an applicant provides no reason or explanation for a delay, he or she does so at their own peril.

[24] The next *Schenkman* criterion pertains to the length of delay in presenting the grievance to the respondent. The length of the delay was 12 days. It was not a significant delay.

[25] I will now turn to the applicant's due diligence.

[26] The applicant submitted that he acted with due diligence by emailing his bargaining agent on August 24, 2020. For the purposes of this analysis, I accept that he wrote to his bargaining agent before the 25-day period to present a grievance had elapsed. However, his submissions do not indicate that he asked his bargaining agent to advocate on his behalf or file a grievance at that time. They only indicate that he "was in contact with his union" before September 3, 2020. His email of August 24, 2020, contains a single sentence that reveals only that he wanted a bargaining agent representative to call him about something. Unlike his second email, sent on September 11, 2020 — after the 25-day period to present a grievance had expired — his earlier email does not include a subject line that clearly indicates that it pertains to a grievance. Based on the August 24th email and the nature of the applicant's written submissions, I am unable to conclude that he asked his bargaining agent, within the applicable time limits, to file a grievance on his behalf.

[27] Moreover, the applicant did not suggest that he was under the impression that his bargaining agent would present a grievance on his behalf following his August 24, 2020, email. Nothing suggests that he took steps to follow up with his bargaining agent between August 24 and September 3, 2020 (the end of the 25-day period), to inquire about the status of his file or presenting his grievance.

[28] Much of the applicant's submissions focussed on the next *Schenkman* criterion, the balancing of the injustice to the applicant if the request for an extension of time

were denied against the prejudice to the respondent if it were granted. The applicant argues that the injustice to him far outweighs the prejudice to the respondent.

[29] I agree with the applicant that the injustice to him if his request for an extension of time were denied as untimely would be significant. He would be deprived of the opportunity to challenge the termination of his employment and to seek remedies for lost wages and benefits.

[30] I turn now to the last *Schenkman* criterion, the grievance's chances of success. As of this preliminary stage of the proceedings, the Board has not received evidence on the merits of the grievance. It is premature for it to assess those merits. However, at first glance, a grievance challenging the termination of an employment relationship does not appear frivolous.

[31] The applicant has indicated that as early as June 25, 2020, the respondent was aware that he did not agree with the decision to terminate his employment. That is the date on which he requested more time to respond to the options letter. It is unclear which of the *Schenkman* criteria, if any, this submission relates to. However, whether the respondent had knowledge of a disagreement before terminating the applicant's employment is not determinative. Whether or not there was a disagreement, the applicant did not present his grievance in time. The respondent was entitled to believe that the decision to terminate his employment was unchallenged. The only issue to be determined in this case is whether the applicant has demonstrated that it is in the interest of fairness for the Board to grant his request to extend the time to present the grievance.

[32] The applicant relied on *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65, for the proposition that relief may be granted from mandatory deadlines in cases in which an applicant has been diligent, the grievance has merit, and the injustice to the applicant from denying the request for an extension outweighs the prejudice to the respondent from granting it.

[33] In *Trenholm*, the extension of time was being sought for the last step in the grievance process, at the referral to adjudication. The grievance had been presented in time and heard by the employer in the internal grievance procedure. That fact was, arguably, of significant importance to the former Board. It dedicated an entire

paragraph of its reasons to the fact that in that case, the delay occurred at the last step of the process (see *Trenholm*, at para. 46). That is not so in this case.

[34] A request for an extension of time is not granted automatically, and a party requesting an extension is required to provide fulsome submissions to support its request. Such a request will be granted only after the decision maker has rigorously assessed the circumstances and the parties' submissions. That is done because timelines serve an important labour relations purpose. They contribute to labour relations stability by ensuring certainty or closure with respect to labour relations disputes (see *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92 at para. 46, and *Trenholm*, at para. 54).

[35] A review of the *Schenkman* criteria as a whole, considered in light of the overarching principle of fairness, leads me to conclude that the applicant's request for an extension of time should be denied. The burden was his. He was represented by a sophisticated and experienced bargaining agent. Yet, he provided no explanation for the delay presenting his grievance. To grant a request for an extension of time where no explanation whatsoever has been provided for the delay would be contrary to the objective of ensuring certainty or closure in labour relations disputes.

[36] I do not make this decision lightly. I am cognizant of the fact that this decision will deprive the applicant of the opportunity to have the Board review the termination of his employment. That is a significant prejudice. Although the length of the delay presenting the grievance was not significant, and he provided some argument to support his claim of due diligence and the prejudice to him, the applicant's failure to provide an explanation for the delay that occurred at the grievance-presentation stage leads me to conclude that it is not in the interest of fairness to grant the request for an extension of time.

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

(The Order appears on the next page)

IV. Order

[38] The request for an extension of time is denied.

[39] The respondent’s timeliness objection is granted.

[40] The files shall be closed.

July 29, 2024.

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board