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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

NICOLE HUSKA

Applicant

and

**TREASURY BOARD
(Statistics Canada)**

and

**DEPUTY HEAD
(Statistics Canada)**

Respondents

Indexed as
Huska v. Treasury Board (Statistics Canada)

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: Brian Russell, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Applicant: Chantale Mercier, Public Service Alliance of Canada

For the Respondents: Erin Saso

Decided on the basis of written submissions,
filed February 17, 2023 and February 20,

and March 28, April 26, and May 24 and 30, 2024.

REASONS FOR DECISION

I. Application before the Board

[1] On January 17, 2023, Nicole Huska (“the applicant”) referred a grievance to adjudication with the Federal Public Sector Labour Relations and Employment Board (“the Board”). It was referred under both ss. 209(1)(a) and (b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”); therefore, two files were created. The applicant alleged a breach of article 19, entitled “No Discrimination”, and article 6, entitled “Managerial Responsibilities”, of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (“PA”) that expired on June 20, 2021 (“the PA collective agreement”) (Board file no. 566-02-46493) and discipline that gave rise to a termination, suspension, demotion, or financial penalty (Board file no. 566-02-46494).

[2] The grievance is with respect to the decision by Statistics Canada (“the respondent”) to deny the applicant’s request for accommodation, on religious grounds, with respect to its *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (“the Policy”).

[3] On February 17, 2023, the respondent acknowledged the referral to adjudication and raised a preliminary objection that the Board is without jurisdiction to hear the grievance because it is untimely. The respondent requested that the matter be dismissed without a hearing, for lack of jurisdiction.

[4] The parties were invited to make additional written submissions with respect to the timeliness issue, which each party did. In response to the respondent’s preliminary objection, the applicant took the position that the grievance is timely because it is continuing in nature and in the alternative filed an application for an extension of time.

[5] This decision deals with two preliminary issues: whether the grievance is continuing in nature, and the application for an extension of time.

[6] As per s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide any matter before it without holding an oral hearing.

[7] For the reasons that follow, I find that the grievance is not continuing in nature. However, I grant the applicant's application for an extension of time, in the interest of fairness.

II. Background

[8] On October 6, 2021, the Policy took effect. Under it, the applicant had until October 29, 2021, to attest to her vaccination status.

[9] On October 29, 2021, the applicant requested an exemption from the Policy, on religious grounds.

[10] On February 14, 2022, the respondent advised the applicant that her request was denied. It gave her a deadline of March 15, 2022, to comply with the Policy; otherwise, she would be placed on administrative leave without pay ("LWOP") effective the same date. She did not comply and was placed on LWOP.

[11] On May 5, 2022, the applicant filed her grievance, which states this: "I hereby grieve that I have been denied a religious [sic] exemption as per the mandatory vaccination policy." The requested corrective action states this: "That I be allowed a religious [sic] exemption to the mandatory vaccination policy. That I be made whole."

III. Summary of the arguments

A. Continuing grievance

1. For the applicant

[12] The applicant submits that the grievance is continuing; as such, it is timely. According to her, although she was first placed on LWOP on March 15, 2022, she remained out of the workplace on LWOP when the grievance was filed on May 5, 2022.

[13] The applicant further submits that article 19 (no discrimination) of the PA collective agreement bound the respondent to a recurring duty by not allowing discrimination and harassment to occur. She contends that the issue of accommodation remained "live" since she was not accommodated.

2. For the respondent

[14] The respondent submits that the grievance is not continuing. The February 14, 2022, decision to deny the applicant's request for a religious exemption was distinct

and unrepeatable and cannot be characterized as a recurring breach of the PA collective agreement. According to it, the decision was one action that happened to have continuing consequences.

[15] The respondent submits that the fact that the consequences of its decision might have been ongoing for the applicant does not make the grievance continuing.

[16] To support its position, the respondent cites *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLRB 93.

[17] Finally, the respondent submits that if the applicant's argument that the grievance is continuing in nature is accepted, then any remedy should be limited to the 25 days before the date on which it was filed.

B. The application for an extension of time

[18] Both parties submit that *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, is the authoritative case to determine whether to grant an application for an extension of time. It outlines the following criteria:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;
- balancing the injustice to the applicant against the prejudice to the respondent if the application is granted; and
- the grievance's chance of success.

1. For the applicant

[19] The applicant submits that when it granted recent applications for extensions of time, the Board used a more balanced approach with the *Schenkman* criteria. She cited *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLRB 60, and *Noor v. Treasury Board (Department of Indigenous Services)*, 2023 FPSLRB 86, as examples.

[20] The applicant submits that the application should be granted per s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"), in the interest of fairness.

[21] The applicant's submissions with respect to the *Schenkman* criteria are as follows.

a. Clear, cogent, and compelling reasons for the delay

[22] The applicant submits that she continuously tried to reconcile whether to comply with the Policy but that she could not bring herself to do it because of her Indigenous ancestry. In addition, the grievance-process deadlines were not "top of mind" because of the following:

- The respondent did not provide her and her cohort, who were hired with her, with proper onboarding or access to bargaining agent information and support, and the decisions and direction that it offered were unclear.
- She contracted COVID-19 in March 2022 and sought guidance from the respondent as to whether acquired immunity would be sufficient to not have to be placed on LWOP.
- She experienced a significant amount of stress when her family members became sick and her cashflow was reduced. Her spouse was hit by a drunk driver in March 2021, continues to suffer from a post-concussive syndrome, and can no longer work.
- She is the sole income earner for the family and the primary caregiver for three teenage children.
- She continues to work fully remotely from her home office in British Columbia with a team based in Ottawa, Ontario.

b. Length of the delay

[23] The applicant submits that the length of the delay, which was 30 days after the time limit prescribed in the PA collective agreement expired, is not significant.

c. Due diligence of the applicant

[24] The applicant submits that she was engaged throughout the grievance process and that she submitted addendums in the escalation of her grievance on the following dates:

- June 13, 2022;
- July 12, 2022;
- October 8, 2022; and
- November 1, 2022.

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

[25] The applicant argues that the application for an extension of time should be granted, in the interest of fairness. According to her, given the discrimination and discipline allegations, the impact of not having her case heard would be significant. She submits that her situation is similar to the one in *Noor*.

e. Chance of success

[26] The applicant argues that this is not a case in which granting the application would serve no useful purpose because there is no chance of success or because the grievance is frivolous or vexatious.

[27] To support her position that the application should be granted, the applicant cites *Guittard v. Staff of the Non-public Funds, Canadian Forces*, 2002 PSSRB 18; *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59; and *Duncan v. National Research Council of Canada*, 2016 PSLREB 75.

2. For the respondent

[28] The respondent submits that the application for an extension of time should be dismissed in accordance with the criteria established under the Board's case law. It argues that the Board has the authority to grant an extension of time in the interest of fairness under s. 61(b) of the *Regulations* and that granting them should be the exception. To support its position, the respondent cites *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39; and *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92.

[29] The respondent also submits that several times, the Board has held that the *Schenkman* criteria are not always equally important and that each criterion's importance must be examined in relation to the facts of each case. To support its argument, it cites *Gill v. Treasury Board (Department of Human Resources and Skill Development)*, 2007 PSLRB 81.

a. Clear, cogent, and compelling reasons for the delay

[30] According to the respondent, the applicant did not provide clear, cogent, and compelling reasons for the delay filing the grievance. It does not dispute that she faced a difficult decision deciding whether she should comply with the Policy, but, according to it, no insight was provided into the reasons for the delay filing the grievance within

the time limit. It submits that no explanation was provided as to what transpired during the delay and that she was not prevented from filing a grievance; she simply did not file it within the prescribed time limit. The respondent submits that granting an extension of time that is not based on a strong justification for the delay would amount to not respecting s. 90(1) of the *Regulations* and cites *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68, to support its position.

b. Length of the delay

[31] The respondent submits that the grievance was filed over one calendar month beyond the time limit set out in the PA collective agreement. While the delay is not considered lengthy, it does not lessen the standard against which the reason for the delay is held.

c. Due diligence of the applicant

[32] The respondent submits that the applicant did not demonstrate that she exercised due diligence pursuing the grievance.

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

[33] The respondent submits that this factor should not carry much weight because the applicant did not establish clear, cogent, and compelling reasons for the delay or that she acted with due diligence. According to the respondent, per *Grouchy*, it is entitled to some certainty to know that labour disputes will be resolved in a timely manner.

[34] The respondent further submits that the onus to establish injustice is on the applicant. Were the matter of utmost importance to her, she would have made a more diligent effort to ensure a timely filing of the grievance.

e. Chance of success

[35] The respondent submits that it is difficult at this stage to analyze the chance of success of the grievance because evidence has not been presented.

IV. Reasons

A. The issues

[36] This application for an extension of time raises these two issues:

- 1) Is this grievance continuing in nature?
- 2) If the grievance is not continuing, should the Board exercise its authority under s. 61(b) of the *Regulations* and grant the application?

1. Is the grievance continuing in nature?

[37] The applicant argued that the grievance is continuing because the respondent's decision to deny her request for religious exemption on February 14, 2022, repeatedly breached the no-discrimination article of the PA collective agreement, and she felt the impact of the breach over time.

[38] The respondent argued that the decision to deny the applicant's request was distinct and unrepeatable and that the fact that the consequences of its decision might have been ongoing do not make the grievance continuing in nature. I agree.

[39] In *Bowden*, the issue of whether a grievance was continuing in nature was examined. It states as follows:

...

[35] *The arbitrator in British Columbia v. B.C.N.U. (1982), 5 L.A.C. (3d) 404, relied on the definition of a continuing grievance in Professor Gorsky's Evidence and Procedure in Canadian Labour Arbitration, at page 35, as follows:*

... The recurrence of damage will not make a grievance a continuing grievance. It is necessary that the party in breach violate a recurring duty. When a duty arises at intervals and is breached each time, a "continuing" violation occurs, and the agreement's limitation period does not run until the final breach. When no regular duty exists and the harm merely continues or increases without any further breach, the grievance is isolated, and the period runs from the breach, irrespective of damage.

[36] *In Ontario Public Service Employees Union v. Ontario (Ministry of the Attorney General), 2003 CanLII 52888 (ON GSB), the arbitrator posed the question to be answered as follows: "Does it [the grievance] involve a continuing course of conduct rather than one action which happens to have continuing consequences?"*

...

[40] *Baker v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 34, outlines the test for a continuing grievance as follows:

...

15 It is generally recognized in the arbitral jurisprudence that continuing grievances are ones that allege repetitive breaches of a collective agreement rather than simply a single or isolated breach. The test applied by arbitrators is whether there has been a recurring breach of duty and not merely recurring damages....

...

[41] In *Baker* there were alleged breaches of the collective agreement on five occasions, there were no recurring damages. The respondent's decision on February 14, 2022, was distinct and unrepeatable. The fact that the applicant felt its consequences for an extended period did not make the grievance continuing.

[42] Given that I have found that the grievance is not continuing, there is no need to address the respondent's argument with respect to the remedy being limited to the 25 days before the date on which the grievance was filed.

2. Should the Board exercise its authority under s. 61(b) of the *Regulations* and grant the application?

[43] Having found that the grievance is not continuing, should the application for an extension of time be granted? In the interest of fairness, I believe that it should be granted, for the reasons outlined as follows.

[44] Article 18 of the PA collective agreement outlines the grievance process and the associated time limits. Clause 18.15 states as follows:

18.15 A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance. The Employer may present a policy grievance in the manner prescribed in clause 18.04 not later than the twenty-fifth (25th) day after the date on which the Employer is notified orally or in writing or on which the Employer first becomes aware of the action or circumstances giving rise to the policy grievance.

18.15 Un employé-e s'estimant lésé peut présenter un grief au premier palier de la procédure de la manière prescrite par la clause 18.08 au plus tard le vingt-cinquième (25e) jour qui suit la date à laquelle il est informé ou prend connaissance de l'action ou des circonstances donnant lieu au grief. L'employeur peut présenter un grief de principe de la manière prescrite par la clause 18.04 au plus tard le vingt-cinquième (25e) jour qui suit la date à laquelle il est informé de vive voix ou par écrit ou à laquelle il prend connaissance de l'action ou des circonstances donnant lieu au grief de principe.

[45] Section 61(b) of the *Regulations* gives the Board the authority to extend the time limits to file a grievance and states as follows:

61 Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,

(a) by agreement between the parties; or

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

61 Malgré les autres dispositions de la présente partie, tout délai, prévu par celle-ci ou par une procédure de grief énoncée dans une convention collective, pour l'accomplissement d'un acte, la présentation d'un grief à un palier de la procédure applicable aux griefs, le renvoi d'un grief à l'arbitrage ou la remise ou le dépôt d'un avis, d'une réponse ou d'un document peut être prorogé avant ou après son expiration :

a) soit par une entente entre les parties;

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

[Emphasis added]

[46] As both parties pointed out, when determining whether such an application should be granted, the Board will consider the following five criteria, set out in *Schenkman*:

- clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the applicant's due diligence;
- balancing the injustice to the applicant against the prejudice to the respondent if an extension is granted; and
- the grievance's chance of success.

[47] There are two tendencies in the Board's case law with respect to applications for extensions of time. They are described in *Van de Ven* and in *Noor* as follows:

- 1) a clear and cogent reason for the delay takes precedence over the other criteria; or
- 2) a more balanced approach is preferred to assess the *Schenkman* criteria.

[48] I prefer to use a more balanced approach to assess the criteria outlined in *Schenkman* with respect to this application. Adopting this approach to the criteria is

more in line with the requirement that “the interest of fairness” guides the exercise of my discretion.

1. Clear, cogent, and compelling reasons for the delay

[49] The respondent indicated that the applicant did not provide clear, cogent, and compelling reasons for the delay. She indicated that the grievance deadlines were not “top of mind” for several reasons, including the fact that she contracted COVID-19 in March 2022 and sought guidance as to acquired immunity and that she experienced stress as a result of illnesses contracted by family members, her spouse being hit by a drunk driver, being the primary caregiver, and financial pressures. I note that she did not explain how any of those reasons prevented her from filing her grievance within the time limit. As such, I give this factor some weight in favour of the respondent.

2. Length of the delay

[50] On the grievance form, the applicant identified February 14, 2022, as the date that she first became aware of the act that gave rise to the grievance. She filed her grievance on May 4, 2022, which was 30 working days outside the time limit prescribed in the PA collective agreement. Thirty working days is not a significant delay. After reviewing the Board’s jurisprudence with respect to the length of the delay, I note that the Board has granted applications for extensions of time for delays that were much longer. As such, I give this factor weight in favour of the applicant.

3. The applicant’s due diligence

[51] Based on the parties’ submissions, I find that the applicant was diligent. She submitted document addendums in the escalation of her grievance four separate times. This factor weighs in her favour.

4. Balancing the injustice to the applicant against the prejudice to the respondent from granting the application

[52] This case is similar to *Noor*. I find that the injustice to the applicant would be greater were the application not granted than would be the prejudice to the respondent were it granted.

[53] This grievance alleges a breach of article 19, entitled “No Discrimination”, and article 6, entitled “Managerial Responsibilities”, of the PA collective agreement and discipline that gave rise to a termination, suspension, demotion, or financial penalty.

The alleged breach of the duty to accommodate on the basis of religion and the loss of salary has had a significant impact on the applicant. If the case were not heard, she would have no other recourse.

[54] The respondent cited *Grouchy* to substantiate its position that it is entitled to some certainty to know that labour disputes will be resolved in a timely manner. While I agree with the respondent that it is entitled to that certainty, it did not provide any evidence of the prejudice that it would experience were the application granted.

[55] I find that this factor carries significant weight in favour of the applicant.

5. The grievance's chance of success

[56] As the parties have indicated, it is difficult to assess this factor because evidence as to the substance of the grievance has not been presented. As such, I give this factor very little weight.

[57] I conclude that it is in the interest of fairness to grant the request for an extension of time. The potential injustice to the applicant outweighs any prejudice to the respondent. The applicant was diligent once the grievance was filed, and the length of the delay was not excessive.

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

(The Order appears on the next page)

V. Order

[59] The respondent's objection is denied. The application for an extension of time is granted. The grievance will be set down for a hearing according to the Board's scheduling process.

October 28, 2024.

Brian Russell,
a panel of the Federal Public Sector
Labour Relations and Employment Board