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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

ATOUSA POURFARD

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Pourfard v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication and an application for an extension of time under 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 Grievor: Eve Berthelot, Public Service Alliance of Canada

For the Employer: Nathalie Arsenault and Vicky Champagne

Decided on the basis of written submissions, filed April 26, May 27, and September 4, 23, and 27, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **(FPSLREB TRANSLATION)**

I. Objection, and the application for an extension of time

[1] Atousa Pourfard ("the grievor") filed an individual grievance under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") to contest her rejection on probation of January 31, 2022. She claimed that her employer dismissed her unjustly. On October 3, 2019, she was hired as an intern in a TI-04 development position within the Department of National Defence's Officer Development Program, but she did not complete her internship.

[2] She also referred her grievance under s. 209(1)(a), with her bargaining agent's approval, and a signed Form 24, as she raised a question related to the interpretation of the collective agreement applicable to her bargaining unit. She alleged that her rejection on probation constituted discrimination on the basis of a disability, in violation of article 19 (no discrimination) of the collective agreement between the Public Service Alliance of Canada ("the Alliance") and the Treasury Board for the Technical Services (TC) group, which expired on June 21, 2021 ("the collective agreement"), and in violation of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[3] Among other corrective measures, she asked to be reassigned to her TI-04 position in the Officer Development Program and to continue her training. She also asked that the discrimination cease and that damages be awarded.

[4] The grievor was represented by her bargaining agent, the Alliance. The Union of National Defence Employees (UNDE) is one of its components. UNDE Local 10125 was responsible for filing the grievance before it was referred to adjudication. In this case, the local initially filed the grievance directly at the third level of the grievance process.

[5] The employer is the Department of National Defence. It objected to the Board's jurisdiction to hear the grievances, filed under s. 209 of the *Act*, because they were filed on May 13, 2022, which was outside the 25-day period set out in clause 18.15 of the collective agreement. The grievances should have been filed by March 7, 2022. It made its objection at the third level of the grievance process and after the grievances were referred to adjudication.

[6] The parties agreed that the initial grievances were filed late.

[7] However, on the grievor's behalf, the bargaining agent made an application for an extension of time to refer the grievances under s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[8] This decision deals only with the employer's preliminary objection and the bargaining agent's application for an extension of time.

[9] For the following reasons, in the interests of fairness, I grant the application for an extension of time. After reviewing all the parties' written submissions, I am not satisfied that the bargaining agent offered a clear, cogent, and compelling reason for the delay.

[10] However, given the facts, I place a great deal of weight on the following two criteria: the grievor's due diligence, and the balance between the injustice caused to her if the extension is not granted and the prejudice that the employer would suffer if it is. If it is not granted, the grievor will lose her only recourse to contest her rejection on probation, and if it is granted, the employer will not suffer any comparable prejudice.

[11] From the start, the grievor made efforts to contest her rejection on probation and the alleged harassment and abuse of management authority by making harassment complaints against several members of the management team, by trying to make a human rights complaint with the Quebec Commission des droits de la personne et des droits de la jeunesse, and by maintaining ongoing contact with her local's executive, to seek support to contest her rejection on probation.

[12] Therefore, although the original time limit to file a grievance was not met, which necessarily works against the grievor, the fact that she was diligent until the grievance was filed tilts the balance in her favour.

[13] If the extension of time is not granted, the grievor will lose her rights to contest her rejection on probation and to make her arguments about the violations of her human rights and article 19 (no discrimination) of her collective agreement. I find that it would be patently unfair to the grievor to suffer the consequences of her bargaining agent's inaction. It was clear that she wanted to contest her rejection on probation from the start and that she contacted the local within the time limit and throughout the process to have it take steps to support her.

A. Procedure followed in this decision

[14] The Board may decide any matter before it without a hearing (see s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365)).

[15] In this case, after reviewing the employer's objection and the bargaining agent's response, the Board determined that the objection and the extension-of-time application could be addressed by written submissions. In addition, it asked the parties to respond to additional questions and set fixed deadlines to do it.

[16] The bargaining agent did not respond by the specified deadline of July 12, 2024. It responded on August 15, 2024, a month later. It apologized for the delay and attributed it to a busy period and an oversight. In a later communication, it requested an extension of "[translation] a few days" to file its response, without requesting a new deadline. It must be stated that at all stages of this file's management, its representatives did not meet the minimum level of diligence required for labour relations files.

[17] The Board then established new deadlines for responses between September 9 and 27, 2024. The parties complied with them by filing replies to the Board's questions.

B. The application for an extension of time: the criteria established in *Schenkman* apply (*Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1)

[18] The parties agreed that the criteria set out in *Schenkman* apply in this case as a framework for determining whether an extension of time should be granted under s. 61 of the *Regulations*. The criteria are (1) the delay is justified by clear, cogent, and compelling reasons; (2) the length of the delay; (3) the grievor's due diligence; (4) the balance between the injustice to the employee and the prejudice that the employer would suffer were the extension granted; and (5) the grievance's chances of success.

[19] I wish to not dwell too much on explaining the criteria because several Board decisions have explained them (see *Schenkman*; *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42; *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33; *Fortier v. Department of National*

Defence, 2021 FPSLREB 41; and *Cherid v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 8).

[20] Suffice it to say that applying the criteria is not a mathematical equation or a "presumptive calculation", as the Board noted in *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144; instead, it is an assessment of the circumstances and context. The importance attached to each criterion is situational. Each one need not necessarily have equal weight (see *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39 at para. 70). In principle, fairness is the basis, because the *Regulations* provide the discretionary power to extend time limits set out in a collective agreement "in the interest of fairness" (see s. 61(b) of the *Regulations*, *Barbe*, at para. 25; and *International Brotherhood of Electrical Workers, Local 2228*, at para. 62).

[21] Although the Board has demonstrated a consensus in the majority as to the primary importance of the first criterion — a clear, cogent, and compelling reason for the delay — in some of its decisions, it has granted an extension to a deadline despite a less-convincing explanation or the lack of a clear, cogent, and compelling reason for the delay. In those cases, the Board placed more weight on other criteria, such as the short period and the disproportionate injustice that the grievor would suffer were an extension not granted (see *Slusarchuk v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 22 at paras. 32 to 35; and *Trenholm v. Staff of the Non-Public Funds*, 2005 PSLRB 65 at para. 86). With respect, the criteria are merely a guide to applying the Board's discretionary power.

[22] In Part II, which follows, I will address the parties' arguments and apply the *Schenkman* criteria in my analysis.

II. Arguments and analysis

A. An explanation of the time limit to file a grievance

[23] In its initial response to the employer's objection, the bargaining agent contended that the delay was entirely attributable to the bargaining agent's negligence and that the grievor should not suffer the consequences since she continually made efforts to contest her rejection on probation. The following is an excerpt from her initial response:

> [Translation]
>
> *Thus, the grievor diligently contacted her local's representatives, to ask for assistance on the dismissal and harassment issues. Unfortunately, the bargaining agent's representatives answered only the harassment issue and did not guide the grievor on how to file a grievance against the dismissal.*
>
> *18. We recognize that such behaviour by the bargaining agent is unacceptable and that we have an obligation to properly train our representatives. But the grievor should not suffer the consequences of her bargaining agent representatives' negligence. She has continually followed up with the bargaining agent and has made efforts to assert her rights.*

[24] The bargaining agent alleged that its representatives responsible for this file, notably UNDE Local 10525's president and vice-president, lacked training. They were inexperienced with respect to grievances.

[25] The employer focused on the lack of a clear, cogent, and compelling reason for the delay. It noted that the local's president was involved in the grievor's performance management process, so he was aware of the difficulties that she faced and the consequences that could result if they continued.

[26] The employer noted that the local's president was also present when the decision to reject the grievor on probation was communicated to her on January 31, 2022. He knew that a grievance was the way to contest it. Later on, and still within the time limit, the grievor notified several other bargaining agent representatives of her termination. But despite that, no representative filed a grievance.

[27] Considering the parties' arguments on the reasons for the delay, I am not sufficiently convinced that the bargaining agent had a clear, cogent, and compelling reason for it. It was not enough to state that it was due to the bargaining agent's serious negligence (including the executive members' lack of training). The reason must be explained, and the explanation must cover the entire delay.

[28] First, I am not persuaded that local's executive members, who had been in their positions for at least a year and had direct access to members of the Alliance for support, did not know how to file a grievance within the time limit to contest an employee's rejection on probation. In the union world, employment loss is the worst workplace situation. Bargaining agent representatives, especially a local's president and vice-president, should know that.

[29] In my opinion, it is unimaginable that bargaining agent stewards lacked the basic reflex to help a member contest a rejection on probation or did not know how to find the necessary information from the Alliance in the time required to at least protect the grievor's right of recourse. Her argument on the lack of training is even more difficult to accept since the president was copied on the January 31, 2022, rejection-on-probation letter that specified the 25-day time limit to file a grievance to contest the sanction. In addition, according to the grievor, the local's president had been aware of her file since June 2021. A local's president must do at least the minimum of diligence to ensure that strict deadlines, negotiated in a collective agreement for filing grievances, are met.

[30] The grievor sent an email to the local on February 2, 2022 (Appendix A), and the executive's initial response (Appendix B) to her request for support to make a complaint for what she characterized as "[translation] harassment and abuse of authority" at the Verdun office. The secretary-treasurer of the local's February 3, 2022, response consisted of not only acknowledgements of receipt and that the local had received a communication from the Alliance about her potential complaint but also an explicit warning to her. This is an excerpt from the email: "[translation] Thank you for your concern to 'not affect Mr. Lima's work situation' or other bargaining agent executive co-workers working under the stated people."

[31] Although the analysis does not stop at the first *Schenkman* criteria, the absence of a clear, cogent, and compelling reason from the bargaining agent for the delay could be fatal, especially when it comes to the initial time to file a grievance.

[32] The bargaining agent contended that the delay is short and that the Board has granted extensions of time for much longer delays.

[33] However, all the decisions that the bargaining agent cited can be distinguished from this case because in those cases, the delays did not occur at the initial stage of the grievance process.

[34] In addition, in all the decisions that the bargaining agent cited, except *Trenholm*, the Board concluded that there was a clear, cogent, and compelling reason for the delay.

[35] In *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8, the grievance was referred to at least the first level in a timely manner, so the employer was aware that the grievor wanted to contest the refusal to grant him his retroactive payment for the specified period at issue.

[36] In *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81, the grievor forwarded the grievance to the bargaining agent to contest his suspension within the time limit. The bargaining agent did not forward it to the employer because its responsible representative was absent and had encountered difficulty finding a manager to whom she could refer it.

[37] In *Trenholm*, the Board concluded that the bargaining agent did not provide any clear, cogent, and compelling reasons for the five-month delay to refer the grievance to adjudication. There was no evidence of the grievor's diligence. However, since it was a dismissal, the Board gave much more weight to the impact on the grievor of an unfavourable decision.

[38] The employer invoked *Parker v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 57, to support its position that there is no clear, cogent, and compelling reason for the delay. *Parker* is not determinative because the Board tends to balance all the criteria, according to the circumstances. In addition, the facts differ from this case because in *Parker*, when it reviewed all the criteria, the Board concluded that the grievor did not exercise due diligence during the period of the referral to adjudication.

[39] It is clear that the lack of a clear, cogent, and compelling reason for the delay, particularly at the grievance's initial filing, works against the application for an extension of time (see *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 60 at para. 80; and *Cherid*, at para. 28). However, when I assessed the other criteria in the next section, I granted the extension of time, in the interests of fairness.

B. the other criteria

[40] With respect to the other *Schenkman* criteria, I put significant weight on two in particular: the grievor's due diligence, and the fact that in the balance, the grievor would suffer disproportionate injustice were the extension of time not granted.

Although I read the case law that both parties cited, I did not find the decisions very useful for the purposes of my analysis, as the facts clearly differed from this case.

[41] The deadline for filing the grievance was March 7, 2022. It was not filed until May 13, 2022. Thus, it was filed more than two months late. In this context, I agree with the parties that a two-month delay to file a grievance is not excessive. But it is also not insignificant, especially since it is the delay in the grievance's initial filing.

[42] I find that the grievor demonstrated due diligence throughout that period. From the start, and within the 25-day time limit to file the grievance, she was in contact with the local, including on February 2 and 17 and again on March 3, 2022, about her rejection on probation. Each time, she asked the bargaining agent for support and claimed that she had been rejected unjustly. In addition, within the deadline, she made a harassment complaint with the Office of the Ombudsman. She also tried to make a complaint with the Commission des droits de la personne et des droits de la jeunesse about her rejection on probation. All those efforts demonstrate her due diligence to protect her rights of recourse.

[43] After the deadline to file the grievance expired, the grievor did not stop contacting her bargaining agent. In particular, I note that she contacted it at least 20 times, including by contacting the Alliance's then national president, Chris Aylward, on April 29, 2022.

[44] With respect to the balance between the injustice that the grievor would suffer were the extension not granted and the prejudice that the employer would suffer if it were granted, it is clear that she would suffer much more serious injustice. She would lose her right to contest her rejection on probation and to be heard on her allegations that article 19 of her collective agreement (no discrimination) and her human rights under the *CHRA* both were violated.

[45] On the other hand, the employer did not mention any equivalent prejudice that it would suffer, other than citing the principle reiterated in *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, which states that in labour relations, parties should have the right to assume that a dispute ends when a limitation period expires. The employer did not cite any actual or substantial prejudice, such as the loss of the integrity of potential witnesses' testimonies or the imminent destruction of relevant, defensible documentary evidence.

[46] I see no need to assess the grievance's chances of success in the absence of evidence. In its case law, the Board tends to not assess that criterion in the absence of full evidence.

[47] In closing, I acknowledge that only rarely does the Board grant extensions of time when the delay was in the grievance's initial filing. The grievor did not cite any case law in which the Board granted an extension of time at that initial stage. In *Slusarchuk*, the extension was granted at the stage when the grievance was transmitted to the third level, and the delay was only six days. In *Trenholm*, the extension was granted at the stage when the grievance was referred to adjudication, and the delay was five months.

[48] Deadlines negotiated in collective agreements are not suggestions; they are strict and must be respected for the federal public sector labour relations system to function properly and for grievances to be resolved expeditiously.

[49] It is possible that my decision would have been different had the grievor not diligently pursued her grievances throughout the two months or had the time for the grievance's initial filing been longer than two months. It is also possible that the decision would have been different were the injustice of not granting an extension been much less serious for the grievor. Each decision on an extension-of-time application depends on each case's situation.

[50] However, nothing in the legislation or *Regulations* prevents the Board from granting an extension of time in such circumstances, especially when there is sufficient evidence that the grievor acted diligently to contest the employer's decision within the time limit and up to the moment of the grievance's initial filing and that she would suffer undue injustice if the extension were not granted.

[51] In this case, I exercise my discretionary power under s. 61(b) of the *Regulations* in the interest of fairness and grant the application for an extension of time.

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

(The Order appears on the next page)

III. Order

[53] The employer's objection is dismissed.

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

[55] The hearing will be placed on the hearing schedule in due course.

December 23, 2024.

FPSLREB Translation

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