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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

FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (ESQUIMALT, B.C.)

Bargaining Agent and Applicant

and

TREASURY BOARD OF CANADA

Employer and Respondent

Indexed as
Federal Government Dockyard Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board of Canada

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent and Applicant: Ronald Pink, counsel

For the Employer and Respondent: Angela Charlton

Decided on the basis of written submissions, filed November 29 and December 20, 2024, and January 23 and February 20 and 26, 2025.

I. Overview

[1] The Treasury Board of Canada ("the employer") has objected to this group grievance on the basis that it is untimely. The Federal Government Dockyard Trades and Labour Council (Esquimalt, B.C.) ("the bargaining agent") states that the group grievance was filed on time, but if it is wrong, it applies for an extension of time. The employer states that an extension of time is unwarranted in this case.

[2] I have decided that the grievance was filed late. I have also decided to grant the bargaining agent an extension of time to file it. My reasons follow.

II. Background to the grievance

[3] The bargaining agent represents ship repair employees at the Department of National Defence's naval repair facilities in British Columbia. From April 19 to 30, 2023, the Public Service Alliance of Canada (PSAC) was on strike and had a picket line at the naval yard. Most employees represented by the bargaining agent did not cross the picket line. According to the bargaining agent, the employer told employees that they could take leave if they did not cross the picket line, either paid or unpaid.

[4] On June 2, 2023, the employer reversed that decision. It informed employees in the bargaining unit that it would cancel all approved leave requests during the strike and that they would be changed to unauthorized leave without pay, stating this:

> …
>
> … I have now been directed to cancel all approved voluntary leave requests submitted in arrears for the strike period and that all workplace absences that were not pre-approved must be considered as 'did not report too [*sic*] work' and actioned as such as LWOP code 985 (Unauthorized). These will therefore be actioned in the coming days, though it will take some time for them to be processed through the system.
>
> …

[5] On February 14, 2024, the employer processed its June 2, 2023, decision for those employees who used paid leave by deducting money from their pay. The paystubs were dated February 14; since pay is made two weeks in arrears, the pay period was January 18 to 31. Nothing turns on the actual pay period, and there is no dispute that employees were informed on or about February 14 that money had been deducted.

[6] The bargaining agent filed this group grievance on February 15, 2024. The group grievance states that the employer promised that employees could take paid or unpaid leave because of the PSAC strike and that the employer revoked that promise. The grievance goes on to state that the employer deducted money from their pay to recover the amounts they received as paid leave.

[7] The employer filed an application for a declaration against the bargaining agent of unlawful conduct under s. 198(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) because some employees did not cross the picket line. The Federal Public Sector Labour Relations and Employment Board ("the Board") dismissed that application in *Treasury Board v. Federal Government Dockyards, Trades and Labour Council (Esquimalt, B.C.)*, 2024 FPSLREB 84. The employer has applied for judicial review of that decision. That decision does not directly address this grievance, although it helped me understand the context of this dispute.

III. Parties' positions

[8] The employer objects to the group grievance because it is untimely. The employer says that it informed employees of its decision to change the paid or unpaid leave to unauthorized leave without pay on June 2, 2023. The time limit in the parties' collective agreement is 25 days, excluding weekends and holidays. The grievance dated February 15, 2024, was filed well outside that time limit.

[9] In response, the bargaining agent says that the time limit for the grievance began to run on February 14, 2024, when the employer deducted money from the employees' paycheques. The bargaining agent also argues that this is a continuing grievance because, having taken money, the employer has a continuing obligation to pay it back.

[10] In the alternative, the bargaining agent applies for an extension of time. The employer opposes that application.

IV. Timeliness

A. Trigger date for the grievance

[11] As I stated earlier, the bargaining agent argues that the time limit for the grievance began to run on February 14, 2024, when the employer deducted money from its employees' paycheques.

[12] Clause 20.15 of the parties' collective agreement sets out that a grievance must be filed within 25 working days of "… 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 main dispute between the parties in their submissions is about what constitutes the "… action or circumstances giving rise to the grievance." The bargaining agent argues that the action or circumstances giving rise to the grievance was the collection of the alleged overpayment for paid leave, which took place on or about February 14, 2024. The employer says that the action or circumstances was its email of June 3, 2023, telling employees that it would do that.

[13] The parties' dispute is one of long-standing at the Board and elsewhere about the trigger date for a grievance when the employer tells an employee that it is going to do something and then does it later. There are cases stating that a limitation period for a grievance begins to run as soon as the employer tells the employee that it is going to do something, and others stating that the limitation period begins to run when the employer actually does that thing. In *Prévost v. Office of the Superintendent of Financial Institutions*, 2011 PSLRB 119, the former Board described those two lines of authority before stating its preference for the former; however, the Board has applied the latter as recently as in *Squires v. Parks Canada Agency*, 2023 FPSLREB 42.

[14] I do not consider it necessary to resolve that dispute in this case because the bargaining agent's argument is belied by the wording of the grievance. The text of the grievance reads as follows:

> …
>
> *We were promised by the Employer that we could take paid* ***or unpaid leave*** *because of the PSAC strike. The Employer then revoked this promise and denied the leave of our choosing.*
>
> *In some instances, the Employer made unilateral deductions from our pay to recover the amounts we received as paid leave as well as deducted additional amounts.*
>
> *The Employer violated the Collective Agreement by:*
>
> - *Failing to grant and pay our legitimate paid leave requests,* ***failing to honour our legitimate leave without pay requests****, and, in some cases, making additional deductions from our wages improperly ….*
>
> …
>
> [Emphasis added]

[15] The relief sought in the grievance is this:

> … [that] *our leave with pay requests be paid in full and in compliance with Articles 5, 9, 10, 12, 13, 14, 16, 25, 26, 35, and any other relevant Articles of the Collective Agreement. We request that such payments are with interest.* ***We request that our requests for leave without pay be honoured*** *in compliance with the above-mentioned Articles of the Collective Agreement.*
>
> [Emphasis added]

[16] The bargaining agent argues that the group grievance is timely "… because it was filed when the members who initially opted to take paid leave began to have their pay deducted in February 2024." However, both the basis of the grievance and the relief sought say that they are about paid and **unpaid** leave. The bargaining agent does not allege that anything happened about unpaid leave in February 2024. Since the grievance is about both paid and unpaid leave, the action or circumstance that gave rise to it must be the June 2, 2023, email advising employees that both paid and unpaid leave during the strike would be converted into leave without pay (unauthorized). This means that the grievance is untimely.

B. This is not a continuing grievance

[17] A continuing grievance is one in which the event being grieved is being performed successively, or the violation of the collective agreement is recurring or repetitive. Each time the violation occurs, the limitation period begins to run again. By contrast, the recurrence of damage does not make a grievance a continuing grievance; see *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at paras. 34 to 36.

[18] The bargaining agent argues that this is a continuing grievance because a continuing failure to pay money owed is a continuing grievance. The bargaining agent further argues that the employer owes a duty to return the money collected from employees in February 2024, and this means that this is a continuing grievance. To be blunt, it is not. The cases cited by the bargaining agent (namely, *Watson v. Treasury Board (Department of National Defence)*, 2012 PSLRB 105, *Garault v. Treasury Board (Royal Canadian Mounted Police)*, 2023 FPSLREB 116, and *Cargo Link Transport Ltd. v. CAW-Canada, Local 2006*, 2011 CanLII 6846 (BC LA) were all about ongoing disputes over an employee's rate of pay. Those cases were continuing grievances because the employee was owed the proper rate of pay each day they worked, so the violation recurred every day.

[19] In this case, the alleged violation was the failure to provide leave between April 19 and 30, 2023. The employer advised the employees of its position about that leave on June 2, 2023. This is not an allegation about a continuing violation of the collective agreement up to the present day.

[20] I also note that the bargaining agent's position would result in almost all grievances being continuing grievances. The bargaining agent submits that this is a continuing grievance simply because "[m]oney owing to members remains owing". That is true in almost any grievance involving pay or other financial benefits, and it cannot be the case that all such grievances are continuing grievances without a limitation period.

[21] For these reasons, I have concluded that the grievance was filed late.

V. Application for an extension of time

[22] The Board has the power to extend any period set out in a collective agreement or the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") "in the interest of fairness" (see s. 61(b) of the *Regulations*).

[23] Both parties oriented their submissions around the so-called *Schenkman* factors (from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1) commonly applied by the Board in assessing whether to grant an extension of time, which are:

- whether there are clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the respondent in granting an extension; and
- the chance of success of the grievance (often expressed as whether there is an arguable case in favour of the grievance).

A. Broader labour relations interest in deciding this grievance warrants granting the extension of time

[24] However, these factors are not exhaustive; see *Fortier v. Department of National Defence*, 2021 FPSLREB 41 at para. 30; and *Bastien v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 34 at para. 11. The superordinate principle in the

Regulations is the interests of fairness, as recently described in *Peloquin v. Treasury Board (Correctional Service of Canada)*, 2024 FPSLREB 35 at para. 52. These factors are helpful guides to fairness, but they are not a checklist that the Board must follow in every case, nor do they prevent the Board from considering other factors in a given case.

[25] In this case, I have given significant weight to the broader labour relations impact of this group grievance. This group grievance is about two large issues: what happens when employees do not cross a picket line, and what happens if an employer changes its mind about that after the fact. These are the types of issues that if left unresolved, will fester and continue to harm the labour relations of this bargaining unit. Therefore, there is a broader labour relations interest in having this grievance decided instead of dismissed for untimeliness. I acknowledge that I could shoehorn this aspect of the case into the balance-of-prejudice factor in the *Schenkman* factors by characterizing it as about the prejudice to both the bargaining agent and employer from not having a substantive decision rendered about this grievance; however, it is not necessary for me to do so since the *Schenkman* factors are non-exhaustive.

[26] I will turn now to the *Schenkman* factors.

B. Not a very clear or convincing reason for the delay

[27] The bargaining agent gives two main reasons for the delay: it relied on legal advice to the effect that it could wait until the employer recovered paid leave before commencing a grievance, and it was distracted by the employer's illegal strike application. Neither explanation is terribly strong.

[28] The bargaining agent's submissions and reply submissions state that it believed that the group grievance was timely when it was filed on February 15, 2024. Its belief on February 15 is not important; its belief when the grievance would actually have been timely (i.e., in June and early July 2023) is what is important. The bargaining agent does not suggest or hint that it received advice in the early summer of 2023 to the effect that it could wait to file a grievance. This is unlike the circumstances in *Prévost* (which the bargaining agent relies on), in which the advice was given at the time that the grievance would have been timely. At most, the advice in this case explains the delay asking for an extension of time — something I will return to when discussing the "due diligence" factor.

[29] As for the illegal strike application, the bargaining agent suggests that it was busy responding to that case. I am sure that is true. However, the case was heard on January 9 to 11, April 2 and 3, and May 10, 2024. The bargaining agent filed this grievance on February 15, in the middle of that hearing. The Board released its decision on June 24. The bargaining agent is unclear about why the illegal strike application impacted when it filed the group grievance.

[30] In its main submissions, it states this:

> …
>
> *… If the Bargaining Agent was unsuccessful in those proceedings, then it is the case that there could be no claim for leave as one cannot claim leave when participating in an unlawful strike. This was the primary issue affecting the members. Only after that occurred did the Bargaining Agent then focus on whether the promises made by the Employer were to be fulfilled.…*
>
> …

[31] I have difficulty understanding this submission. The illegal strike application was decided 3 months after the bargaining agent filed the group grievance. The bargaining agent did not shift its focus after the application had been decided — it filed this group grievance in the middle of the hearing of that application.

[32] The bargaining agent urges me to consider the entire context of this application, and that it was "navigating a tumultuous and uncertain time". The bargaining agent cites two cases (*Prévost*, and *Nicholl v. Treasury Board (Department of Transport)*, 2024 FPSLREB 126) in which the Board granted an extension of time to an individual grievor who was dealing with complex personal circumstances while trying to navigate the grievance process, which explained their delay. I do not find that argument compelling. There is a difference between an individual grievor dealing with personal circumstances and a bargaining agent dealing with litigation against the employer. If anything, I would have expected the ongoing litigation to make the bargaining agent more attentive to this issue, not less.

C. The length of the delay is moderately high

[33] The length of the delay in this case is roughly seven months. In *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59 at para. 14, the Board referred to a delay of four or five months as neither short nor long. In *Guittard v. Staff of the Non-public Funds, Canadian Forces*, 2002 PSSRB 18 at para. 28, the Board found

a delay of four months "not unduly excessive." In *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8 at para. 67, the Board characterized a five-month delay as "not an inordinate amount of time". In *Duncan v. National Research Council of Canada*, 2016 PSLREB 75 at para. 147, the Board called a four- to five-month delay "not excessive".

[34] A delay of roughly seven months is at the longer end of what the Board has been willing to forgive in the past, but it is not so lengthy a delay as to overwhelm the other factors in this case.

D. No lack of due diligence

[35] As for due diligence, the employer argues that the bargaining agent did not act diligently during the period of delay. However, this delay is consistent with the bargaining agent's mistaken belief that it could wait until the paid leave was actually recovered to file this grievance. The bargaining agent acted diligently in filing the grievance immediately after that pay recovery and in asking for an extension of time relatively quickly after the employer objected to the Board about the timeliness of this grievance.

E. The balance of prejudice favours granting the application for an extension of time

[36] In considering the balance of prejudice, I am not in a position to assess the degree of prejudice suffered by any individual grievor. The grievance is about a change from authorized paid or unpaid leave to unauthorized unpaid leave. I do not know whether changing unpaid leave from authorized to unauthorized leave has any impact on an employee. As for those whose paid leave was turned into unpaid leave, the question of whether they suffered any prejudice depends on the type of paid leave they used. If it was vacation leave, then the leave returns to the employees' vacation leave bank to be used later or cashed out — so there may be no prejudice. If it was other forms of paid leave, it may or may not be returned to a leave back with a cash value.

[37] However, the employer has not alleged that it has suffered any prejudice by this delay. Therefore, the balance of prejudice favours granting the extension, as there is a possibility of prejudice to the employees in this group grievance to be weighed against the complete lack of prejudice to the employer.

[38] Both the bargaining agent and employer discussed the fact that a large number of employees filed individual grievances about their leaves shortly after the strike ended. These individual grievances were all dealt with at the final level of the grievance process, and none were referred to adjudication. I was concerned about whether this group grievance duplicated the individual grievances — in which case, the employer may be prejudiced if I were to give the bargaining agent a second chance to pursue the same case. I asked the bargaining agent to provide a copy of one of these grievances that was representative of them. The grievance it provided was against the employer's decision to deny an employee so-called "699 leave" (leave with pay because of something not directly attributable to the employee) during the PSAC strike. The individual grievance was about a different issue and different decision than that raised by this group grievance. Therefore, I was satisfied that the bargaining agent is not trying to litigate the same grievance twice. The employer did not make that argument, and the text of the grievance provided to me does not indicate an overlap between the individual and group grievances.

F. No weight given to the chances of success of the grievance

[39] Finally, both parties submitted that it is too early to tell whether the grievance will be successful and that this final factor should be given very little weight. I agree.

[40] In conclusion, the bargaining agent has not presented a very good explanation for a somewhat lengthy delay filing this group grievance. Nevertheless, I will grant the application for an extension of time. I rely particularly on the broader labour relations benefits of having this grievance heard — which, I hope, will "lance the boil" of any lingering labour relations problems arising from the PSAC strike. I also rely on the balance of prejudice, in particular that the employer has not alleged that the delay has prejudiced it in any way. The interests of fairness warrant an extension of time in this case, despite the relatively weak explanation for the delay.

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

(The Order appears on the next page)

VI. Order

[42] The Board grants the application for an extension of time.

June 3, 2025.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board