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Citation: 2025 FPSLREB 160

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

PATRICE ROBERT

Applicant

and

CANADA REVENUE AGENCY

Employer

Indexed as
Robert v. Canada Revenue Agency

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: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Bernard Desgagné, representative

For the Employer: Nicholas Gualtieri

Decided on the basis of the documents on file and on written submissions, filed April 3, 2023, and January 12 and 26, 2024.
(FPSLREB Translation)

REASONS FOR DECISION **(FPSLREB TRANSLATION)**

I. Application before the Board

[1] This decision is about an application for an extension of time to refer a grievance to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board").

[2] On January 12, 2022, Patrice Robert ("the applicant") filed a grievance against his employer, the Canada Revenue Agency (CRA), in which he contested its mandatory COVID-19 vaccination policy.

[3] His grievance explained the reasons for his objection to vaccination and asked the employer to waive its mandatory vaccination policy and to not place him on leave without pay. He also asked that the leave be ended by retroactively paying him the salary that he had been deprived of. He concluded by stating this:

> [Translation]
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> …
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> *If this grievance is not resolved after proceeding through the level or levels set out in the collective agreement, it may be referred to adjudication, in accordance with the Federal Public Sector Labour Relations Act and its regulations, as it is about a disciplinary measure that resulted in a suspension and a financial penalty as well as a unilateral amendment to the terms and conditions of employment that was made in such a way that it forced me to resign and therefore was a constructive dismissal.*
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> …

[4] The grievance was filed at the final level of the grievance process on February 19, 2022, and the employer delivered its final-level decision on May 3, 2022, rejecting it.

[5] Only on March 1, 2023, was the grievance referred to adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). That section deals with individual grievances about disciplinary measures.

[6] The applicant asked the Board for an extension to the standard 40-day time limit to refer his grievance to adjudication.

[7] The employer objected and raised an objection to the Board's jurisdiction to hear the referral of this grievance to adjudication under s. 209 of the *Act*. It argued that no disciplinary action was taken.

[8] This decision concerns only the extension-of-time application.

[9] For the following reasons, the application is denied.

II. Summary of the arguments

A. For the applicant

[10] The applicant submits that the reason for the delay was entirely attributable to counsel who represented him between May 2022 and February 2023.

[11] The applicant states that he did not receive any assistance from his union since it asked its members to comply with the employer's mandatory vaccination policy. He has no legal training and has never been a steward. He had no representative until the moment that the employer rendered its decision at the final level of the grievance process.

[12] After he received that decision, the applicant consulted counsel, who advised him not to refer his grievance to adjudication and only to make a judicial review application with the Federal Court. Counsel filed that application on his behalf on May 24, 2022.

[13] On September 29, 2022, counsel filed an application with the Federal Court for the abeyance of the judicial review application, which was refused on January 26, 2023. On February 8, 2023, the Federal Court extended, until March 13, 2023, the deadline for the parties to submit their proposed timelines for the next steps to take in the judicial review.

[14] On February 20, 2023, counsel withdrew from the applicant's file and all other files challenging the employer's mandatory vaccination policy.

[15] The applicant then represented himself before the Federal Court. His latest representative, Bernard Desgagné, was unable to represent him because he is not a lawyer. Mr. Desgagné advised him to refer his grievance to adjudication, which he did, on March 1, 2023.

[16] On March 13, 2023, the applicant wrote to the Federal Court, indicating that he had referred his grievance to adjudication and that he was never informed of his counsel's request to put the proceedings in abeyance. He indicated in his letter that he believed that the leave without pay that was imposed on him constituted disciplinary action and that therefore, he considered that the Board had jurisdiction.

[17] The applicant's counsel did not advise him of the risk of losing his recourse to the Board if he did not refer his grievance to adjudication in parallel with the judicial review application.

[18] On April 13, 2023, the Federal Court made a new order in which it suspended the applicant's file until the Board reached a final decision on the referral-to-adjudication request.

[19] According to the applicant, were the Board to deny the extension-of-time application, the effect would be to end the file's abeyance at the Federal Court, and the Federal Court could decide, when it makes its judicial review, to refer the applicant's file to the administrative decision maker, and a new decision at the final level could be made and then referred to adjudication again.

[20] By not granting the applicant his requested extension of time, the Board would require him, the employer, and the court system to devote significant resources to different proceedings, which could prove unnecessary and return everyone to the starting point, resulting in a waste of time and money.

[21] Section 236(1) of the *Act* states this: "The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action …". Therefore, the *Act*'s purpose is to enable resolving employment disputes effectively, at the lowest possible cost, and not to lead applicants, bargaining agents, and the employer to unnecessarily multiply proceedings before courts.

[22] The applicant submits that these criteria, described in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which the Board relies on when it determines whether to grant an extension of time, are met:

- Counsel's conduct was a clear, cogent, and compelling reason that justifies the fact that the applicant was late referring the grievance to adjudication.

- The delay lasted almost nine months because only after his counsel withdrew from the file did the applicant, by consulting his new representative, discover that he risked losing his only effective recourse.
- The applicant exercised due diligence when he referred the grievance to adjudication nine days after his counsel withdrew from the file.
- The applicant would suffer serious injustice were the extension not granted, as he would risk losing his only effective recourse. In addition, he would be forced to undertake costly legal proceedings that could ultimately prove unnecessary.
- The employer would not suffer prejudice since, for all practical purposes, the Board would still not have dealt with the file since all similar grievances before it were put on hold, with the employer's agreement, until the Board determines its jurisdiction to hear them.
- It is not possible to claim that the grievance has no chance of success since the Board has not yet ruled on its jurisdiction in similar cases before it.

[23] On that final point, the employer argued that the Board does not have jurisdiction because administrative leave without pay is an administrative measure. But the applicant argued that the Board has jurisdiction, as it was a disciplinary measure.

[24] It should be noted that after the applicant made his extension application, the Board issued a decision on this point, declaring itself without jurisdiction to hear grievances similar to his.

B. For the employer

[25] The employer objected to the extension-of-time application.

[26] It notes that the applicant filed the judicial review application for the decision at the final level of the grievance process. Through his counsel at the time, he asked the Federal Court for that file be put in abeyance. In its decision rejecting that request, the Court stated the following in its decision issued on January 26, 2023:

> [Translation]
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> …
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> *… the applicants chose to invoke this Court's jurisdiction in judicial review of the decision at the final level of the grievance process without referring the decision to adjudication and without raising before this Court that being placed on leave without pay constituted a disciplinary measure in their case. By doing so, the applicants knowingly took the position that being placed on leave without pay in their case was an administrative measure. In addition, nothing in the file suggests that the respondent disputes that position or that it would be erroneous in the circumstances of this case. Even if it turns out that the applicants were wrong and the Federal Court did not have jurisdiction because the recourse to*

> *adjudication had not been exhausted, it must be noted that by allowing the time to refer the grievance to adjudication to elapse, the applicants waived that right (page 2).*
>
> …

[27] The employer submits that in its decision, the Federal Court already addressed the issues raised in this extension application. In particular, the Federal Court found that the applicant had waived his right to refer the grievance to adjudication. Therefore, the employer respectfully requests that the extension application be dismissed on that ground. It submits that the extension application is an abuse of process.

[28] In addition, or alternatively, the employer submits that the extension application should be dismissed, in accordance with the criteria established by the Board's jurisprudence. It cites *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39, in which the adjudicator found that the authority to grant an extension of time should be used exceptionally and that an extension of time should be granted only in exceptional circumstances, in the interest of fairness (at paragraph 68).

[29] The employer provided the considerations that follow, in accordance with the five *Schenkman* criteria.

1. The reasons for the delay

[30] The employer argues that the applicant did not provide clear, cogent, and compelling reasons for the delay. It states that at no time was the applicant prevented from referring his grievance to adjudication within the prescribed time limits. Rather, as the Federal Court indicated in the decision noted earlier, the applicant deliberately chose to not refer his grievance to adjudication.

[31] It appears that the applicant is now attempting to justify the delay by challenging the strategy chosen by counsel who represented him at the time. As the Federal Court of Appeal stated in *Moutisheva v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 988 (C.A.)(QL) at para. 12, "… counsel for a party to a case is that party's agent. He acts on his behalf and as such assumes a number of obligations, including those of conduct of the proceedings and receipt and issue of documents required by the proceedings." Therefore, the applicant's explanation with

respect to the time limits is not valid or relevant. He is bound by the actions of his counsel acting on his behalf.

[32] In addition, the applicant chose that personal counsel. He cannot escape, after the fact, the positions that his counsel took. It would be fundamentally unfair if a party could evade the positions taken by counsel whose services they retained by stating that they are not satisfied with that counsel's actions.

[33] In all cases, in the context of an extension application, it is not appropriate to assess the conduct of the applicant's counsel in their relationship as agent, their competence, or the quality of the services that they would have rendered (see *Moutisheva*, at para. 16).

2. The length of the delay

[34] The length of the delay to refer the grievance to adjudication is important. It was referred more than eight months after the time limit expired, which was June 29, 2022. The employer refers to *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, in which the adjudicator stated as follows at paragraph 46:

> *46 Before applying those criteria to the facts of this case, I wish to make the following general comments. In principle, time limits set by the* Act *and the* Regulations *are mandatory and should be respected by all parties. Having relatively short time limits is consistent with the principles that labour relations disputes should be resolved in a timely manner and that parties should be entitled to expect that an issue has come to an end when a prescribed time limit has elapsed. Time limits are not elastic, and extending them should remain the exception and should occur only after the decision maker has made a cautious and rigorous assessment of the circumstances.*

[35] In *Popov v. Canadian Space Agency*, 2018 FPSLREB 49, the adjudicator stated this at paragraph 52:

> ***52*** *To explain the delay, the grievor would have had to show that during all the time at issue, he was unable to refer the grievance to adjudication, which he did not do. He managed to file the grievance on time.…*

[36] The applicant did not demonstrate anything that during those eight months would have prevented him from referring his grievance to adjudication within the prescribed time limits or even from then applying for an extension of time.

[37] Furthermore, the employer submits that it should not be held attributable for counsel's failure to inform the grievor of the impact of not referring his grievance to adjudication.

3. The applicant's due diligence

[38] The employer's view is that the applicant did not exercise due diligence in pursuing his grievance.

[39] The reference to adjudication was made under s. 209(1)(b) of the *Act*. No bargaining agent approval was required in this situation.

[40] The applicant knowingly decided not to refer his grievance to adjudication and instead chose to make the judicial review application of the final-level decision.

4. Balancing the prejudice between the parties

[41] The employer's view is that this factor should not carry much weight since the applicant did not establish clear, cogent, and compelling reasons justifying the delay or demonstrate that he acted with due diligence. That said, *Grouchy* states that the employer should be entitled to some certainty that labour disputes will be resolved in a timely manner.

5. The grievance's chances of success

[42] The grievance's chances of success are low. The applicant was placed on administrative leave without pay, as the policy prescribed. Therefore, it was not in any way a disciplinary measure.

[43] Thus, the employer's view is that the extension application should be denied.

C. The applicant's response

[44] The applicant indicates that he did not find that the *Moutisheva* decision, which the employer cited, states that applicants cannot dissociate themselves from their counsel. However, he found the passage that the employer cited from *Julien v. Canada (Citizenship and Immigration)*, 2010 FC 351 at para. 36.

[45] The applicant submits that that decision appears to be about an application to set aside an administrative tribunal's decision. He argues that it does not apply to this case since his extension application is not intended to cancel a decision but simply to allow him to exercise his only effective recourse.

[46] And even were *Moutisheva* to apply to this case, the applicant should not be bound by his counsel's decision (see *Julien*, at para. 36). Depriving a person of his or her only effective recourse is a breach of natural justice.

[47] The applicant argues that instead, decisions on extension-of-time applications should be considered. On that point, he refers to a recent decision, *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42 at para. 25, in which the Board wrote the following about a grievance that was referred to adjudication 20 months late:

> *[25] I point this out because it seems essential to me to first be concerned with fairness. Sometimes, a party may display so little diligence or provide such a confusing or illogical explanation that the Board cannot in good conscience grant an extension of time. Deadlines exist for a good reason, which is to ensure the most efficient process possible. Therefore, a good reason is necessary to waive them. However, in some cases, while there may be some doubt as to the clarity of the explanations or the parties' diligence, the concern for fairness prevails.*

[48] In this case, it cannot be said that the applicant did not exercise due diligence. He challenged his former counsel's actions who, in addition, requested that the file be put in abeyance without the applicant's knowledge and then dropped him shortly after the Federal Court rejected that request. In the interest of fairness, the Board must not deprive an applicant of their recourse to adjudication because of their counsel's actions.

III. Analysis and reasons

[49] Under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"), the Board may grant an extension of time for any level of the grievance process, including the reference to adjudication.

[50] Section 61 reads 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,*	***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) *by agreement between the parties; or*	***a)*** *soit par une entente entre les parties;*
(b) *in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.*	***b)*** *soit par la Commission ou l'arbitre de grief, selon le cas, à la demande d'une partie, par souci d'équité.*

[51] The fundamental principle that emerges from that text is that the Board has a discretionary power to extend a time limit if it determines that doing so is fair.

[52] The Board has long used the *Schenkman* criteria to determine whether it is fair to extend a time limit. Therefore, I will undertake that analysis.

A. The reasons for the delay

[53] The decision to extend a time limit must first and foremost be based on a solid reason for the delay. That is the anchor against which all the other criteria are assessed. Without a valid reason to explain a delay, it is difficult to see how it could be fair to grant an extension of time. In this case, my view is that the applicant did not provide a valid reason for his delay. He explained how he came to change his mind and why he wants to pursue adjudication. In my view, a change of mind is not a valid reason.

[54] The applicant explained that the reason for the delay was entirely attributable to the counsel he had hired to represent him. Counsel advised him not to refer his grievance to adjudication and only to make a judicial review application to the Federal Court, which was done on May 24, 2022.

[55] However, as the employer submitted, the applicant cannot dissociate himself from his counsel. The actions taken were his, and counsel was only an agent acting on his behalf (see *Moutisheva*). That principle of law is well established and is not a fact-based determination.

[56] Although the applicant now disagrees with his counsel's opinion, it is not the Board's role to determine the quality of the representation that his counsel provided (see *Moutisheva*).

[57] The employer submitted that it would be unfair that a party could evade the positions taken by counsel whose services it retained, by stating that it is no longer satisfied with that counsel's actions. I agree. Through his counsel, the applicant chose to pursue a judicial review application rather than pursue a grievance at adjudication. That was his choice. By doing so, he did not meet the applicable time limit to refer his grievance to the Board.

[58] The applicant now wishes to continue the adjudication process after he received advice from someone else who, incidentally, is not a lawyer. The reason for the change of mind is that the applicant now considers that recourse less costly and more effective. That explains why he changed his mind, but in my view, it is not a valid reason to justify extending the time limit.

B. The length of the delay

[59] The length of the delay is significant — more than eight months. Although the delay's duration is rarely decisive in itself, it goes without saying that the longer the delay, the more important it is to provide a solid justification for it. The fact that such a reason was not provided merely tilts the balance further against granting the requested extension.

C. The applicant's due diligence

[60] Due diligence requires action. The applicant must demonstrate that they actively took steps to advance their grievance. In this case, other than the actions that the applicant took within the nine days after his counsel withdrew from the file, there is no proof of due diligence. On the contrary, the applicant was aware of the referral process to adjudication but deliberately chose not to pursue it. Therefore, no effort was made during most of the delay.

[61] Therefore, there is very little evidence of the applicant's due diligence to pursue his case to adjudication.

D. Balancing the prejudice between the parties

[62] The applicant's case before the Federal Court is still active. It is in abeyance only until the Board's final decision is rendered on the grievance's referral to adjudication.

[63] According to the applicant's words, he did not withdraw his file before the Federal Court but instead wishes to first take advantage of the process before the Board. He feels that the adjudication process is less expensive and that it is the most effective recourse. He explained that a Federal Court decision would simply return the whole thing to the employer for a new decision, after which he could make another reference to adjudication.

[64] The applicant submitted that he would suffer serious injustice were the extension not granted since he would risk losing his only effective recourse. And he would be forced to undertake costly legal proceedings that could ultimately prove unnecessary.

[65] I disagree with the applicant's suggestion that recourse to adjudication is his only effective recourse. He still has a viable recourse before the Federal Court.

[66] I note that since he made his extension application, in *Rehibi v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 47, the Board determined that the measures that the Treasury Board imposed with respect to mandatory vaccination were administrative and not disciplinary. Therefore, the Board has dismissed grievances similar to the applicant's that alleged disciplinary action. The grievors in *Rehibi* made a judicial review application before the Federal Court of Appeal. To date, their request's fate is unknown.

[67] According to the employer, it should be entitled to some certainty that labour disputes will be resolved in a timely manner. In these circumstances, I agree. As stated in *Grouchy*, the time limits set out in the *Act* are enforceable and must be respected. These relatively short time limits reflect an intention to promote the early resolutions of workplace disputes and to provide certainty to parties when time limits have expired. Only in exceptional circumstances should they be extended.

E. Chances of success

[68] As noted earlier, in *Rehibi*, the Board considered the same issue that is the basis of the applicant's grievance and determined that it did not have jurisdiction since the employer's actions were administrative. However, since that decision is currently being subjected to the judicial review process, its fate remains unknown. For that reason, I cannot conclude that the grievance would have no chance of success. Therefore, this criterion does not play a decisive role against the applicant.

IV. Conclusion

[69] The applicant made a choice when he decided to pursue the judicial review application before the Federal Court and not to refer his grievance to adjudication. By doing so, he chose to consider the employer's actions as administrative and not disciplinary. His appeal to that Court is always available to him. It would not be fair in the circumstances to grant an extension of time so that he could begin a new process before the Board and assert the opposing facts.

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

(The Order appears on the next page)

V. Order

[71] The employer's objection is allowed.

[72] The extension-of-time application for the referral to adjudication is dismissed.

[73] The grievance in Board file no. 566-34-46844 is denied.

November 28, 2025.

FPSLREB Translation

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board