# IN THE MATTER OF AN ARBITRATION

**BETWEEN**

**PUBLIC SERVICE ALLIANCE OF CANADA**

**on behalf of the**

**UNION OF NORTHERN WORKERS**

(the "Union")

AND

**HAY RIVER HEALTH & SOCIAL SERVICES AUTHORITY**

(the "Employer")

**Re: Sue MacKay Grievances- Preliminary Objection**

**ARBITRATOR:** John M. Moreau QC

**Appearing for The Union:**

Michael Penner - Counsel
Sue MacKay - Grievor

**Appearing for The Employer:**

Marie-Pier Leduc - Counsel
Jennifer Croucher - Manager, Human Resources

A virtual hearing was held on May 30, 2022.

# PRELIMINARY AWARD

## INTRODUCTION

The Union filed four grievances on behalf of the grievor including: a one-day suspension; a three-day suspension; a five-day suspension and the grievor's termination from employment.[1]

The Employer raised a preliminary objection to proceeding to an arbitration hearing on the merits of the grievances.

The substance of the Employer's objection is that a significant delay (from three to five years) occurred between the time the grievances were referred to arbitration by the Union and the time the Union contacted the Employer and requested that the grievances be scheduled for an arbitration hearing.

The Employer relies on the equitable doctrine of *laches* as a result of the Union's delay and requests that the grievances be dismissed.

The Union for its part submits that the Employer's preliminary objection should be dismissed. The Union maintains that the doctrine of *laches* does not apply given that there is no evidence that any alleged delay was the fault of the Union, nor is there any evidence of prejudice to the Employer.

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[1] By agreement of the parties, a fifth grievance concerning a performance appraisal of the grievor during the course of her employment was not pursued in these proceedings and remains unresolved.

The parties did not call any witnesses during the hearing and relied on the evidence set out in the Agreed Statement of Facts set out below.

## AGREED STATEMENT OF FACTS

Further to the Employer's preliminary objection on the timeliness of Grievances #16-E-02049, #17-E-02085, #18-E-02269, #18-E-02306 and #18-E-02343 (collectively, the "Grievances") the parties offer the following agreed facts.

1. As between the parties, the grievance and arbitration process is set out in Article – of the Collective Agreement expiring March 31, 2016

2. The Union of Northern Workers (UNW) is a component of the Public Service Alliance of Canada (PSAC). When a grievance proceeds through the grievance process and is referred to arbitration, carriage of the grievance on the union side is transferred from the UNW to the PSAC.

3. On December 14, 2016 the UNW filed Grievance #16-E-02049 on behalf of Sue Mackay concerning a one-day suspension. On January 26, 2017, the UNW referred Grievance #16-E-02049 to arbitration.

4. Attached as Exhibit 1 is the UNW's referral of Grievance #16-E-02049 to arbitration.

5. On February 27, 2017 the UNW filed Grievance #17-E-02085 on behalf of Sue Mackay concerning her performance evaluation. On April 25, 2017, the UNW referred Grievance #17-E-02085 to arbitration.

6. Attached as Exhibit 2 is the UNW's referral of Grievance 17-E-02085 to arbitration.

7. On April 2, 2018 the UNW filed Grievance #18-02269 on behalf of Sue Mackay concerning her 3-day suspension. On May 31, 2018, the UNW referred Grievance #18-E-02269 to arbitration.
8. Attached as Exhibit 3 is the UNW's referral of Grievance #18-E-02269 to arbitration.

9. On May 28, 2018 the UNW filed Grievance #18-E-02306 on behalf of Sue Mackay concerning her 5-day suspension. On July 16, 2018, the UNW referred Grievance #18-E-02306 to arbitration.

10. Attached as Exhibit 4 is the UNW's referral of Grievance #18-E-02306 to arbitration.

11. On August 13, 2018 the UNW filed Grievance #18-E-02343 on behalf of Sue Mackay concerning the termination of her employment. On September 25, 2018, the UNW referred Grievance #18-E-02343 to arbitration.

12. Attached as Exhibit 5 is the UNW's referral of Grievance #18-E-02343 to arbitration.

13. On February 16, 2021, Kayla Minor, a representative of the PSAC wrote a letter to the Employer seeking hearing dates for the arbitration of the Grievances.

14. Attached as Exhibit 6 is a copy of the letter dated February 16, 2021.

15. On March 2, 2021, Michelle Theriault, legal counsel for the Employer, responded to the PSAC and indicated that the Employer was objecting to the Grievances going forward to arbitration "on the basis of delay-given that they are from between 5 and 3 years ago".

16. Attached as Exhibit 7 is an email string between Ms. Theriault and Ms. Minor containing the March 2nd response from Ms. Theriault to the February 16th letter from the PSAC.

17. On May 11, 2021 Arbitrator Moreau confirmed to the parties that the Grievances would be heard at arbitration on May 30-31st, 2022 with subsequent hearing dates on September 26-29th, 2022.
All of which is jointly submitted.

*Michael H. Penner,* Union Counsel *Marie-Pier Leduc*, Employer Counsel

## Submissions of the Employer

The Employer noted at the outset that the grievor was employed as a Clinical Supervisor from March 23, 2013 to the date of her termination on July 31, 2018.

The Employer then focussed on the delay between the time the four grievances were referred to arbitration and the first communication from the Union on February 16, 2021:

- the one-day suspension grievance was 48 months

-the three-day suspension grievance was 33 months

-the five-day suspension grievance was 31 months

-the termination grievance was 29 months

The Employer underlined that there was no communication between the parties from the time the termination grievance was referred to arbitration on September 25, 2018 and February 16, 2021 when the Union sent its request for arbitration hearing dates. As noted in the Agreed Facts, carriage of the grievance on the Union side was transferred from the UNW to PSAC once the grievances were referred to arbitration.

Counsel for the Employer relied on the decision of *Sofina Food Inc. and UFCW, Local 401 (Preliminary Award on Delay)* 2019 CarswellAlta 614 where Arbitrator Ponak, in a case involving the termination of the grievor, set out the following with respect to the doctrine of *laches* at para 35:

> *Laches* is an equitable doctrine in which excessive delay by one party may enable the other party to seek relief because of harm caused by the excessive delay. As the numerous arbitral decisions cited by the parties make clear, *laches* has been imported into arbitration. The factors to be considered in applying the doctrine have been articulated by the Alberta Court of Appeal in *Pride of Alberta* and in many arbitration awards. For the purposes of the current case, several elements of the doctrine are relevant for the analysis: 1) whether the delay was excessive; 2) if there was excessive delay, was the delay clearly attributable to one of the parties; and 3) would the delay cause prejudice to the party seeking to rely on the doctrine of *laches* if the case proceeded to arbitration on its merits.

Bearing in mind that the Union has ultimate responsibility for advancing the grievances, the Employer submits that the delay by the Union in advancing the grievances from 2017/2018 to February 2021 is clearly excessive.

Relying on *Sofina*, the Employer notes that the grievance in that case was dismissed where there was a delay of 20 months between the time the grievance was

referred to arbitration (June 21, 2016) and the time the parties agreed to an arbitrator (February 26, 2018). Similarly, in *National Gallery of Canada v. PSAC* (2016) CarswellNat 8205, a case involving the layoff of five employees, the grievances were dismissed after a delay of 3 years (2013 to 2016) between the filing of the grievances and the appointment of an arbitrator. The delays in this case for the four grievances were clearly excessive given the passage of time in each grievance of anywhere between 29 to 48 months.

The Employer further submits that the Union bears the responsibility for advancing the grievances once they took the step of referring the grievances to arbitration. The Employer did not hear back from the Union until receiving the February 16, 2021 correspondence requesting the grievances be set down for hearing before this arbitrator. The Employer in fact had no idea that the grievances were proceeding to arbitration until receiving the Union's letter of February 16, 2021. The Employer therefore bears no responsibility for the delay after the Union advanced the grievances to arbitration.

The Employer submits that the doctrine of *laches* should apply given the lengthy and unexplained delay caused by the Union in advancing the grievances to arbitration.

## Submissions of the Union

The Union noted at the outset that article 37.10 of the collective agreement indicates that either party may refer a grievance to arbitration within 30 days of receipt of the Level 2 response: It reads:

> 37.10: Should the grievance not be resolved at Level 2, *either party* may by written notice to the other party within thirty (30) days of receipt of the Level 2 response, refer the matter to arbitration.

The Union exercised its rights to refer the grievances to arbitration pursuant to article 37.10. The same opportunity was also open to the Employer had it elected to do so.

The reference by the Union to arbitration in each of the grievances provided contact particulars to the Employer regarding the names, addresses and phone numbers of the Union representative at PSAC in Ottawa who had conduct of the file at arbitration. The Employer never indicated to the Union that the passage of time was causing a problem, or prejudice to the Employer, at any point between the time the grievances were referred to arbitration in 2017/2018 and March 2, 2021 when Employer counsel first raised the delay objection.

Further, there is no evidence that the Employer was more compromised in presenting its case than the Union under the circumstances. In that regard, the Employer was well aware that it bears the onus of proof in reference to the four disciplinary grievances and was in a position to follow-up with the scheduling of the hearing had it elected to do so pursuant to article 37.10.

The Union tabled *The Government of the Northwest Territories and Public Service Alliance of Canada (on behalf of the Union of Northern Workers) (June 28, 2021),* a decision of Arbitrator Coleman. That case involved a similar preliminary motion on behalf of the Employer who submitted that the grievance should be rejected based on the

doctrine of *laches* given that there was prejudicial delay by the Union for failing to identify sufficient particulars of the grievance in a timely manner. In denying the preliminary objection, Arbitrator Coleman found on the facts that the Employer had also contributed to the delay, citing the Supreme Court of Canada's decision in *Blencoe v. British Columbia Human Rights Commission,* 2000 SCC 44. Arbitrator Coleman noted at p. 15 *"…that a finding of laches requires both delay and proof of 'significant prejudice*', *an analysis quite different from what is called for in a timeliness case brought forward as a violation of the express terms of the collective agreement".*

The Union further notes that there is no evidence of actual prejudice as a result of the passage of time between the filing of the grievances and the reference to arbitration. Both sides, for example, are equally challenged on the issue of witnesses having to recall events dating back over several years. Further, there is no provision in the collective agreement which renders a grievance void due to the delay in these circumstances.

In the end, the Union agrees with the Employer that there has been an extensive passage of time leading up to the reference of the grievance to arbitration. But this delay is not attributable solely to the Union nor is there any evidence of prejudice to the Employer. There is no indication in that regard that the Employer expressed any concern over the delay at any point leading up to the arbitrator's appointment. The doctrine of *laches* is based on fairness and it would be unfair in the Union's view to the grievor, who has been terminated from her employment, to have her grievance(s) dismissed.

## Reply of the Employer

The Employer noted that the circumstances were similar to those in *Sofina*, a case which also involved the grievor's termination from employment. Arbitrator Ponak found the case to be an appropriate circumstance for the application of the doctrine of *laches* given the inexcusable 20-month delay. It was incumbent on the Union here to similarly move their case forward in a timely manner. By doing so only on February 21, 2021, after an extensive delay of more than three years, prejudiced the Employer's ability to advance its case at arbitration.

## Decision

There is no dispute that the issue in this case is whether the equitable doctrine of *laches* applies to the delay from the time the Union referred the grievances to arbitration in 2017/ 2018 to February 16, 2021 when the Union requested that the grievances be set down for hearing.

As noted in the *Hodgson* decision, the doctrine of *laches* is an equitable doctrine which bars the assertion of a claim where an extensive lapse of time prejudices the party adverse in interest. Arbitrator Coleman in *Hodgson* cited the leading Supreme Court of Canada decision of *Blencoe* which noted that a delay in the proceedings will not in itself automatically invoke the doctrine of *laches*. The Court noted that there must be evidence of "significant prejudice" resulting from the prolonged delay for *laches* to apply:

> [101] In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings.

> *However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law.* Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: R. v. L. (W.K.), [1991] 1 S.C.R. 1091, at p. 1100; Akthar v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 32 (C.A.). *In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.*

The Employer relied on Arbitrator Ponak's comprehensive decision in *Sofina Foods. Inc*. which involved a delay of 26 months from the date the Union referred the grievance to arbitration in June 2016 and the written notice of appointment from the Union to the arbitrator in August 2018. In that case, Arbitrator Ponak referred to the tests set out by the Alberta Court of Appeal decision of *Pride of Alberta Meat Processors Co. v. U.F.C.W., Local 280P*, 1998 ABCA 132 in applying the doctrine of *laches*:

> [35]…The factors to be considered in applying the doctrine have been articulated by the Alberta Court of Appeal in *Pride of Alberta* and in many arbitration awards. For the purposes of the current case, several elements of the doctrine are relevant for the analysis: 1) whether the delay was excessive; 2) if there was excessive delay, was the delay clearly attributable to one of the parties; and 3) would the delay cause prejudice to the party seeking to rely on the doctrine of *laches* if the case proceeded to arbitration on its merits.

Arbitrator Ponak determined in *Sofina Foods Ltd.* that there was supporting evidence that the responsibility for the delay fell with the Union. His findings in that regard are set out below:

> [44] I am satisfied that the Union is almost entirely responsible for this excessive delay in the appointment of an arbitrator. While the Employer could have been more proactive, especially during the long silence from the Union between July 18, 2016, and May 29, 2017, ultimately it was the Union that consistently failed to follow through with timely responses. Ironically, the Union ultimately confirmed the appointment of the same arbitrator (Allen Ponak) to whom both parties had originally agreed more than two years previously. During the two-year period, Arbitrator Ponak's name continued to be discussed and agreed to by the Employer, followed by long periods of silence from the Union. In other words, the Employer was willing to agree to the arbitrator initially suggested by the Union but for reasons that were never made clear the Union could not or would not finalize the appointment. The evidence does not disclose any reason for the excessive delay or the repeated failure of the Union to meet promised timelines. Union Counsel admitted responsibility in a telephone conversation with Employer Counsel.

> [45] I conclude that responsibility for the excessive delay lies with the Union and that there is no reasonable explanation for the delay.

Arbitrator Ponak went on to dismiss the grievance finding actual prejudice to the Employer resulting from the excessive delay:

> [87] The delay in the current case has been excessive by any standard. Should the merits of the grievance be heard in arbitration, it will be more than three years since the termination. More than two years of the delay is attributable to unexplainable Union procrastination in the appointment of an arbitrator. While I am not a strong believer in the concept of presumptive prejudice based on the passage of time, there comes a point where the amount of time that has passed becomes so excessive that one must accept that the impact of faded memories of key witnesses is real rather than notional. I am satisfied that the degree of delay in the current case has reached that point. This is particularly so in a case that involves a specific incident or incidents of conduct (as opposed to a contract interpretation case with limited testimony) where multiple versions of the material incidents may be presented. As well, there is often a backstory in these kinds of cases, requiring recollection of events that preceded the termination. The prejudice is particularly acute for the party that bears the onus, in this case the Employer.

Turning to the first criteria set out in in *Pride of Alberta*, the delay of between 29 and 48 months for the four grievances in this case was clearly excessive. It is worth noting, as Arbitrator Coleman did in *Hodgson*, however, that there is a difference between timeliness delays resulting from a violation of the express time limits set out in the collective agreement and a significant delay which occurs after a reference to arbitration. In the latter case, there is: *"[T]he necessity of findings of both delay and prejudice".* He also notes the assertion that *"many witnesses may be impaired by the passage of time"* has not been upheld as a proper basis in itself to support a finding of prejudice.

Turning to the second criteria of whether the delay is attributable to one party, the facts in this case indicate that the Union did set out in each of the referral letters the contact persons at the PSAC's office in Ottawa who had conduct of the particular

grievance. This factor is important. As noted in the Agreed Facts at para 2: *"…When a grievance proceeds through the grievance process and is referred to arbitration, carriage of the grievance on the union side is transferred from the UNW to the PSAC".*

I agree with the Union that the reference to arbitration in each grievance letter (at Step 3) serves as an invitation to the Employer to contact the named Union person with responsibility for the arbitration of the grievance(s) at the PSAC office in Ottawa. There is no evidence of a response from the Employer to those invitation request(s) for each of the four grievances. Indeed, there was no further communication at all between the parties until February 16, 2021 when the Union suggested a three-day hearing with this arbitrator as Chair.

Who is to blame for that delay in setting the matter down for arbitration?

It could be argued that it behooved the Union to request a further response from the Employer after the reference of the individual grievances to arbitration rather than wait years before proposing the scheduling of a three-day arbitration. It could also be said by the same token that the Employer should have followed up with the Union contacts at the PSAC office in Ottawa, as was requested in the Union's arbitration referral letters.

In the end, there is no clear evidence of responsibility for the delay falling on one side or the other. The subject matter of the grievances came to a standstill from the time the grievances were referred to arbitration in 2017/2018 until February 16, 2021. There

is no evidence of any actual prejudice to the Employer on the facts before me resulting from the delay in setting the grievances down for an arbitration hearing. Accordingly, I find in terms of the third test in *Pride of Alberta,* that the delay did not cause prejudice to the Employer, the party seeking the application of the doctrine of *laches*.

In conclusion, I reject the Employer's submission that this is a proper case for the application of the doctrine of *laches.*

The preliminary objection of the Employer is dismissed for all the above reasons. I direct the parties reconvene on September 26, 27, 28, 29, 2022 for a continuation of the hearing into the merits of the grievances.

**JOHN M. MOREAU QC**
**June 13, 2022**