Crown Employees
Grievance Settlement Board

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GSB# 2016-2529; 2016-2853
UNION# 2016-0727-0010; 2017-0727-0001

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Fletcher) **Union**

- and -

The Crown in Right of Ontario
(The Ministry of Natural Resources and Forestry) **Employer**

BEFORE	Ken Petryshen	**Arbitrator**
FOR THE UNION	Alex Zamfir Ontario Public Service Employees Union Grievance Officer	
FOR THE EMPLOYER	Andrew Lynes Treasury Board Secretariat Legal Services Branch Counsel	
TELECONFERENCE	September 25, 2018	

Decision

[1] I have two grievances before me filed on behalf of Mr. R. Fletcher. Mr. Fletcher is employed with the Ministry as a Helicopter Pilot in the classification of Pilot 4. For the purposes of this decision the grievance of relevance is dated July 26, 2016, and reads as follows:

> I grieve that the employer has created a poisoned and toxic work environment for me due to the vexatious comments and conduct of Eric Tremblay, Chief Pilot contrary to Article 3.3 specifically but not exclusively of the collective agreement and the OHSA and any other articles, principles of law, policies or other Acts, statutes or legislation deemed applicable.
>
> Further, the failure to consider the adverse impact to my dignity, psychological and physical health demonstrates the incompetence of Chief Pilot, Eric Tremblay on health and safety issues in violation of the Act.

[2] The Union has filed 36 pages of particulars that cover a period of time starting from February 18, 2009, and ending on November 1, 2017. The Employer takes the position that there is no justification in this case for the scope of the evidence to exceed the three year rule that the GSB has applied in similar circumstances. The Union maintains that it should be permitted to call evidence about the relevant events that go back to February 18, 2009. In the alternative, the Union claims that it should be permitted in the circumstances to at least call evidence for the relevant events starting in June of 2012. Union and Employer counsel made submissions on the proper scope of the evidence in this case during a conference call held on September 25, 2018. The hearing on the merits of the grievances is scheduled to begin on October 1, 2018.

[3] During his submissions, Union counsel referred me to the following decisions: *George Brown College of Applied Arts and Technology and OPSEU*, 2015 CanLII 9122 (ON LA) (Bendel); *Re Hotel-Dieu Grace Hospital and Ontario Nurses' Association* (1997), 62 L.A.C. (4th) 164 (Picher); *OPSEU (Lunan) and Ministry of Labour*, 2015 CanLII 36166 (ON GSB) (Leighton); *OPSEU (O'Brien) and Ministry of Community Safety and Correctional Services* (2011), GSB No. #2003-1881 (Leighton); and, *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2nd) 103 (ONT CA).

[4] In addition to the *OPSEU (Lunan)* and *OPSEU (O'Brien)* decisions relied on by the Union, Employer counsel referred me to the following decisions: *OPSEU (Akintunde) and Ministry of Community Safety and Correctional Services*, 2018 CanLII 558850 (ON GSB) (Watters); OPSEU (Dubuc) and *Ministry of Community Safety and Correctional Services* (2016), GSB No. #2015-1330 (Herlich); *OPSEU (Patterson) and Ministry of Public Safety and Security* (2003), GSB No. #2001-0925 et al. (Leighton); and, *OPSEU (Lavoie et al.) and Ministry of Community Safety and Correctional Services* (2015), GSB No. 2012-2206 et al. (Sheehan).

[5] In *OPSEU (Akintunde)*, Arbitrator Watters commented about the three year rule with reference to some relevant decisions as follows:

> 6. A concise statement of the three (3) year rule is found in the following passage from the *Lunan* Decision:
>
> > 8. The Board has held that a grievor alleging harassment and discrimination can be permitted to adduce evidence over a period of three years before the date of the grievance. See *Patterson (Leighton)* and *Patterson (Abramsky)*… Evidence of events up to three years before the grievance should allow the union sufficient opportunity to prove a pattern of harassment and not be so long ago as to be difficult to defend. However, the Board has also held that it is not a rigid rule. It is a guideline: the Board must consider each case on its facts. See *O'Brien (Leighton)* … Thus it could be fair to the parties to extend the three years or shorten the period.
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> 7. It is clear from a reading of the authorities that the three (3) year rule is intended to strike a fair balance between the interests of both parties. More specifically, the ability of the Union to establish an alleged pattern of improper conduct must be weighed against the Employer's right to effectively defend itself against dated accusations. In deciding whether, and how, to apply the rule, the Board has considered the following matters:
>
> > i) whether the grievor was aware of the right to challenge or grieve the earlier events which the Union seeks to rely on;
> >
> > ii) whether the hearing would be unduly protracted by the application of the rule, as a result of the need to present and consider voluminous evidence relating to past events; and
> >
> > iii) whether extending the period of arbitral review would raise concerns from both an equitable and procedural standpoint.

8. The authorities also confirm that the three (3) year rule is simply a point of departure, and is not an inflexible rule to be mechanically applied in all cases. It has been described as a "rule of thumb". By way of example, the three (3) year period was extended in both *O'Brien* and *Lunan*, as described below.

9. In *O'Brien*, the grievances were filed in 2003 and 2009. With respect to the latter grievance, the Board permitted the Union to present evidence back to 2000 based on the "unique circumstances" of the case. In that instance, the grievor had been out of the workplace and in receipt of LTIP since 2001. The Vice-Chair concluded that, as a result, there would not be a need for the presentation of voluminous evidence with respect to events which occurred within the extended period. I note that the extension granted was expressly stated to be "subject to a finding of actual prejudice if the employer can prove it during the hearing" (page 8).

10. In *Lunan*, the grievor filed seven (7) grievances between December, 2012 and October, 2013 alleging harassment and discrimination on the part of the Employer. The Vice-Chair, in substance, applied the three (3) year rule subject to a limited exception due to "special circumstances". In this regard, she permitted the Union to lead evidence with respect to a single and specific incident in 2004 involving an exchange between the grievor and a co-worker. The Vice-Chair observed that the Employer did not argue that such an extension would create "actual prejudice". I note that she made the following comment on the evidence that might be adduced as a consequence of the extension: "Whether this evidence is relevant or necessary is a decision better made during the hearing" (page 5). The final substantive paragraph of the decision reads:

> 10. I am also of the view that evidence of approximately three years before the first grievance dated December 7, 2012 should suffice to give the union a fair opportunity to prove harassment and discrimination. By approximate I mean that the three years should not be "to the day", especially if there is an important event that has occurred just beyond the three years. The precise line is better determined during the hearing.

11. Finally, I note that this Board has previously determined that the exclusion of otherwise relevant evidence, through a proper application of the three (3) year rule, does not constitute a violation of the rules of natural justice.

[6] In *OPSEU (Akintunde)*, Arbitrator Watters concluded on the facts before him that the application of the three year rule would "provide a fair and reasonable balance between the competing interests of the Union and the Employer" and that there were no special or unique circumstances that warranted a departure from the three year rule.

[7] In determining the appropriate scope of the evidence in this case I have reviewed the particulars provided by the Union and considered the submissions of

counsel. Using the three year rule as a guideline to determine a fair and reasonable balance in weighing the competing interests of the parties, I have concluded that the proper scope of the evidence in this case will be as follows. The Union will be permitted to call evidence starting from February 2013, which is about three years and six months prior to the filing of the relevant grievance. In addition, the Union will be permitted to call evidence with respect to the events set out in numbers 12 h, i, j, k, l, m and n of its particulars. The events described in these particulars occurred on or about December 16, 2010, but relate to subsequent particulars within the three year period. This determination on the scope of the evidence will provide the Union with a sufficient period of time to establish its case while at the same time providing the Employer with a manageable period of time to defend the allegations made by the Union.

Dated at Toronto, Ontario this 26th day of September, 2018.

"Ken Petryshen"

Ken Petryshen, Arbitrator