IN THE MATTER OF ARBITRATION

BETWEEN:

Gate Gourmet

(the “Employer”)

AND:

UNITE HERE, Local 40

(the “Union”)

(J. Samonte Grievance)

ARBITRATOR:	Corinn Bell
COUNSEL:	D. McDonald *for the Employer* L. McGrady *for the Union*
HEARING:	By way of written submissions
PRELIMINARY AWARD:	December 23, 2015

This matter concerns a grievance by UNITE HERE, Local 40 (the "Union") on behalf of Joyce Samonte (the "Grievor"). The grievance was filed against Gate Gourmet (the "Employer"). The parties agree that I have the relevant jurisdiction to hear the matter.

The Employer submits that the Union filed the grievance outside the mandatory time limits prescribed in the Collective Agreement. The Employer argues that the grievance should be considered abandoned due to a failure on behalf of the Union to follow the relevant provisions of the Collective Agreement. The Union argues that I exercise my discretion under s. 89(e) of the *Labour Relations Code* to relieve against the alleged breach of the time limits prescribed.

THE FACTS

The Grievor was suspended without pay for February 24-26, 2015 after receiving a Letter of Discipline, dated February 23, 2015. The Union grieved the suspension on March 2, 2015 following STEP 1 of the Collective Agreement. The grievance was denied by the Employer the same day. On March 9, 2015 the Union notified the Employer that they would be advancing the grievance to STEP 2 of the Collective Agreement. An attempt to arrange a STEP 2 meeting was made by the Employer's Senior Human Resources Manager on March 11, 2015. The STEP 2 meeting was held on March 20, 2015. This meeting did not provide a resolution to the grievance.

The Union advised the Employer on March 25, 2015, that it would be proceeding to STEP 3 of the grievance procedure and informed the Employer that it would be advancing the grievance to an Officer of the Union and/or legal counsel to determine whether "...the grievance will advance further". The March 25th letter further advised the Employer that they would be informed as to the Union's position as to STEP 3 in due course. The Employer was next contacted by the Union regarding this grievance on July 16, 2015 when the Union requested an Expedited Arbitrator pursuant to s. 104 of the *Labour Relations Code*.

The timeliness dispute in question concerns the period between the STEP 2 meeting on March 20, 2015 and the Union's subsequent contact with the Employer to request an Expedited Arbitrator per STEP 3 of the Collective Agreement (on July 16, 2015).

The Collective Agreement provides as follows:

19.02 INFORMAL STEP

As an informal step, the employee is encouraged to make an earnest effort to resolve the grievance directly with the management person to whom the employee reports. At the employee's option, the employee may be accompanied by the Shop Steward for the department in which the employee works. Where no Department Steward exists, the employee may choose to be accompanied by any Shop Steward.

19.03 STEP ONE

(a) At this step, notice in writing of the grievances must be filed with a person designated by the Employer within ten (10) working days (excluding Saturday, Sundays, and Holidays) after the occurrence of the alleged grievance or of the date on which the employee first had knowledge of it, or should have had knowledge of it.
(b) The notice in writing shall briefly but clearly describe the nature of the incident or occurrence which gave rise to the grievance, and it shall clearly state the provision of the agreement which has been violated.
(c) The Employer's representative must answer the grievance in writing within ten (10) days.

19.04 STEP TWO

In the event that a resolution of the grievance, satisfactory to the Union and the Employer, does not result at Step One, an attempt to resolve the grievance shall be made between the employee, the shop chairsperson and/or a Union representative and a person or persons designated by the Employer.

This step must be taken by notice in writing within ten (10) working days (excluding Saturday, Sundays, and Holidays) of the date which the written answer was delivered in Step One.

19.05 STEP THREE

In the event that a resolution of the grievance, satisfactory to the Union and the Employer, does not result at Step Two, either Union or the Employer may advance the grievance to the next step within thirty (30) working days (excluding Saturday, Sundays and Holidays) of the Step Two decision. The next step in involves a selection from the following alternatives:

1. the optional grievance procedure provided for in [19].13;
2. a single Arbitrator;
3. use the Fast Track Med/Arb Process in Article [19].14.

The parties agree that within six (6) months of ratifying the new collective agreement that they will meet to review, discuss and possibly amend

contract language regarding the issue of minimizing the length of potential termination arbitrations.

19.07 TIME LIMITS

A grievance or dispute shall commence within the time limit provided, otherwise it shall be deemed abandoned. The limits may be exceeded or waived by mutual consent of the parties to this Collective Agreement.

The Union failed to take action under STEP 3 within the 30 days prescribed, and the Employer maintains that they had not consented to any extension of the time limits.

THE EMPLOYER'S SUBMISSIONS

Counsel for the Employer submits that I ought to not use my discretion to relieve against the above-discussed time limits. Referring to *Air Liquide Canada* (2001), 98 L.A.C. (4th) 230 (Moore), Counsel argues that such discretion must be exercised judicially. Counsel refers to the oft-cited factors taken into consideration when deciding whether an arbitrator ought to exercise his or her s. 89 discretion as discussed and canvassed in *Pacific Forest Products Ltd. and International Woodworkers of America, Local 1-118*, [1984] B.C.C.A.A.A. No. 235 (Munroe) at para. 13, and in *Behavioural Problem Productions Ltd. And International Alliance of Theatrical State Employees (Pilutik Grievance)*, [1998] B.C.C.A.A.A. No. 385. Especially relevant to this analysis are: (i) the degree of force of contractual expression of the time limits; (ii) the stages of the grievance procedure; (iii) the length of the delay; (iv) the reasonable explanation for the delay; and, (v) any prejudice that would be suffered by the Employer.

The Employer submits that language in the Collective Agreement should be found to be declaratory, as opposed to permissive. If it is accepted that the language is declaratory, Counsel argues that this Board should adopt the reasoning in *Compass Group Canada*, [2010] B.C.C.A.A.A. No. 118 (McEwan) that relief against a mandatory provision of a Collective Agreement is an extraordinary event. In conducting a balance of factors in this case, the Employer argues that there is no compelling justification for the lengthy delay on the part of the Union in this case. Counsel for the Employer reminds me, as a final note, that, in the words of Arbitrator Greyell in *Nelson & District Credit Union and I.W.A. – Canada, Loc. 1-405 (Simpson) (Re)* (1998), 71 L.A.C. (4th) 333, at p. 342 approving the reasoning from Arbitrator

McColl in *Re Bristol-Myers Manufacturing and Teamsters Union, Loc. 213 (1988), 3 L.A.C. (4th) 256* that "balancing of equities" requires me to "reach a conclusion which does not do an injustice to the conflicting interests". As to prejudice, Counsel for the Employer contends that the Employer was prejudiced by the Union's delay because of a risk of fading memories and imprecise recollections, but in the alternative that I find no prejudice, following *Pacific Forest Products Ltd*., *supra*, I ought still not relieve given the delay.

The Employer therefore submits that the mandatory language of the Collective Agreement coupled with the long, unexplained delay of over four and a half months without a reasonable explanation for such a delay justifies a finding that the grievance should be considered abandoned.

THE UNION'S SUBMISSIONS

Counsel for the Union contends that notwithstanding the mandatory language found within the Collective Agreement, relief ought to still be granted based on considerations of all relevant factors and circumstances surrounding the timeliness issue, citing Arbitrator Ready in *Canada Post Corporation* [2013] CLAD No. 111.

An essential relevant factor, contends the Union, is the failure of the Employer to expediently provide the Personnel File of the Grievor to the Union. I am satisfied, based on e-mails included in the Union's appendices submissions, that the Union Organizer, Mrs. Christina Bencze, requested the Grievor's personnel file on March 20, 2015. This file was not received in full until June 18, 2015, nearly three months later. The Union argues that this created a reasonable belief on the part of the Union that "time limits were not of any significance to the Employer".

As to the late delay in the grievance procedure, Counsel for the Union submits that the fact that the Union "pursued the early stages of the grievance… vigorously". In that process, the Employer could gather facts and information relevant to the grievance, and such factors tend towards the exercise of discretion.

As to the length of the delay, Counsel for the Union seeks to distinguish this delay from the *Air Liquide Canada*, supra, and *Aramark Canada Ltd*., *supra* delays of seven months, given that the three-and-a-half month delay at instant was "far from

extraordinary" and caused in part by the lack of willingness on the part of the Employer to share requested documents.

Counsel for the Union submits that the lack of a cogent explanation for the delay on behalf of the Union should be viewed in light of the fact that they had not been able to inspect relevant documents until June18, 2015. As to the nature of the grievance, Counsel for the Union submits that it is likely to have a negative effect on the Grievor given her 26 years of service without prior discipline and her loss of seniority & wages.

Counsel for the Union refutes the Employer's contention that they have been prejudiced by the process, given their opportunity for a full investigation pre-suspension and their lack of provision of evidence as to witnesses whose recollections would be disadvantaged by the operative passage of time. As well, the Employer cannot reasonably contend that the grievance has been abandoned given the requests from Mrs. Bencze for the Grievor's personnel file.

DECISION AS TO THE TIMELINESS/DELAY

I am prepared to exercise my discretion under s. 89(e) of the *Labour Relations Code* to relieve against the timeliness prescribed under the Collective Agreement and proceed to hearing on the merits for several reasons. Principally, I am satisfied that the balancing of equities as described in the authorities and the factors described in *Pacific Forest Productions, Ltd., supra* tend away from a strict interpretation of the Collective Agreement on the particulars of this case.

Although the force of language used in the Collective Agreement, as acknowledged by both Counsel for the Employer and for the Union, is mandatory in nature, I am reminded that I am not precluded from granting relief in such situations. That said, I am cognizant that I must be all the more judicial in my approach.

The facts before me in this case can be distinguished from the cases of *Air Liquide Canada, supra* and *Aramark Canada Ltd., supra* primarily because the Employer knew that the Union was seeking the personnel file and information relevant to the grievance and that information was not provided by the Employer for a period of months. I find that this information, which was accessible to the Employer, was directly relevant to the grievance process.

I am equally satisfied that the delay in question was caused at least in part by omissions of the Employer by not providing the documents that would have assisted the Union in better understanding the factors taken into account regarding the Grievor's suspension.

Finally, in absence of evidence to the contrary, I find the risk of potential prejudice towards the Employer to be negligible, given the fact that they took the opportunity to undertake a comprehensive examination of the circumstances surrounding the suspension in February of 2015. This must be viewed in context of the risk of potential damage to the Grievor. Counsel for the Union rightfully submits that, until twelve months after her discipline, the Grievor's future as an employee would be jeopardized should her workplace conduct be the subject of further scrutiny.

It is for these reasons that I am exercising my discretion under s. 89(e) of the *Labour Relations Code* and relieve against the timelines prescribed within the Collective Agreement. As such, I order a hearing on the merits of the case.

Dated at the City of _Kamloops_, in the Province of British Columbia, this __23rd__ day of December, 2015.

Corinn Bell, Arbitrator