

Date: 20050628

File: 166-2-35471

Citation: 2005 PSLRB 64



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

WAYNE G. WESTBROOK

Grievor

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as

Westbrook v. Treasury Board (Correctional Service of Canada)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Yvon Tarte, adjudicator

For the Grievor: Michel Bouchard, UNION OF CANADIAN CORRECTIONAL
OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU
CANADA - CSN

For the Employer: Mark Sullivan, Employer Representation Advisor

(Decided without an oral hearing)

REASONS FOR DECISION

Grievance referred to adjudication

[1] The grievor, Wayne G. Westbrook, has referred a grievance to adjudication with respect to his termination of employment. This decision deals with the issue of whether the Board should exercise its powers pursuant to section 84 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993 (Regulations)* to dismiss, for want of jurisdiction, the grievance filed by Mr. Westbrook.

[2] Mr. Westbrook's grievance, filed on August 16, 2004, and received by the employer on August 18, 2004, states:

I grieve the employer's discriminatory practices, including the termination of my employment, following my 2002 workplace injury.

[3] As corrective action, the grievor states that he seeks the following:

I demand that the discriminatory practices cease, to be reinstated as an employee of the Public Service of Canada, to be accomodated (sic) taking into account my physical limitations, retroactive payment for all monies lost.

[4] The employer denied the grievance at the final level and the grievance was referred to adjudication.

[5] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, I continue to be seized with this reference to adjudication, which must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

[6] On June 10, 2005, the employer raised an objection with respect to an adjudicator's jurisdiction to hear the grievance. Accordingly, the employer requested that the matter before the Board be dismissed without a hearing, pursuant to section 84 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993*.

[7] A copy of the employer's objection to jurisdiction was sent to the bargaining agent and a response was received from them on June 15, 2005.

Summary of the argumentsFor the employer

[8] The employer requested that this grievance be dismissed for lack of jurisdiction. The employer informed the Board that the grievor had filed a complaint on January 26, 2004, with the Canadian Human Rights Commission (CHRC) regarding his termination. On March 25, 2005, the CHRC had written to the Commissioner of the Correctional Service of Canada and informed her that the CHRC had decided to dismiss the complaint and that the matter was now closed. A copy of the letter from the CHRC was attached to the employer's objection and is on file with the Board. The employer therefore submitted that a complaint under the *Canadian Human Rights Act (CHRA)* was clearly the appropriate administrative procedure to deal with this specific complaint and that the grievor had availed himself of that procedure, thereby depriving himself of the right to grieve the matter. The employer argued that the only way in which this matter could have proceeded as a grievance was through the issuance of an order pursuant to paragraph 44(2)(a) of the *CHRA*, ordering that the matters be referred back to the grievance process, but that no such order had been made.

[9] The employer further argued that even if the Board should decide to hear the matter, it disputed the grievor's claim that his employment was terminated. The employer stated that the authorities at Health Canada, in February of 2004, had confirmed that the grievor was permanently incapable of pursuing regularly any gainful employment, and recommended retirement on the grounds of permanent disability. The employer included in its submissions a copy of a letter dated April 4, 2005, written by the grievor and addressed to the Warden of Collins Bay Institution, indicating that the grievor was no longer capable of working and requesting that the medical retirement process be initiated as soon as possible. As a result, the employer concluded, the grievance was not with respect to a matter that could be referred to adjudication under section 92 of the *Public Service Staff Relations Act* and was not a grievance with respect to disciplinary action resulting in suspension or financial penalty, or termination of employment pursuant to paragraphs 11(2)(f) or (g) of the *Financial Administration Act*.

[10] Lastly, the employer argued that the grievance was untimely, having been filed by the grievor some two years after the alleged incidents that gave rise to the grievance.

For the grievor

[11] On behalf of the grievor, Mr. Bouchard submitted that the grievance was not untimely since the discriminatory practices being complained of were a series of ongoing issues and that the grievance was therefore a continuous grievance.

[12] On the issue of termination of employment, the bargaining agent argued that the grievor came to the realisation that he would no longer be permitted to work for the employer on or about the 16th day of August, 2004, and that he proceeded to initiate the grievance procedure on that day.

Reasons

[13] Applications to dismiss grievances without a hearing are heard pursuant to section 84 of the *Regulations*, which provides:

84. (1) Subject to subsection (2), but notwithstanding any other provision of these Regulations, the Board may dismiss a grievance on the ground that it is not a grievance that may be referred to adjudication pursuant to section 92 of the Act.

(2) The Board, in considering whether a grievance should be dismissed pursuant to subsection (1), shall

(a) request that the parties submit written arguments within the time and in the manner specified by the Board;
or

(b) hold a hearing.

[14] As set out in *Gascon et al. v. Treasury Board (Solicitor General - Correctional Service)*, 2000 PSSRB 68, and in *Lowther v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 89, if there is an “arguable case” that the grievance is one that may be referred to adjudication, it would be inappropriate to dismiss a grievance under section 84.

[15] Does the grievor have an arguable case that the grievance is one that may be referred to adjudication? When alleged discrimination is the fundamental issue at play, the Board’s decisions are clear: there is no jurisdiction as the matter is not one

that may be referred to adjudication - see *Kehoe v. Treasury Board (Human Resources Development Canada)*, 2001 PSSRB 9, *Sincère v. National Research Council of Canada*, 2004 PSSRB 2, and *Lowther (supra)*.

[16] As set out in paragraph 47 of the *Cherrier v. Treasury Board (Solicitor General-Correctional Services)*, 2003 PSSRB 37 decision, I have considered “the nature and the scope of the redress used by the grievor to determine whether a human rights element is at the heart of the grievance”. It is clear on the face of the record that an allegation of discrimination is at the heart of the grievance: the basis of the grievance is that the employer engages in discriminatory practices and terminated the grievor’s employment on account of his workplace injury and the ensuing physical limitations. This is also evident from the corrective action which requests that the employer accommodate him.

[17] These matters clearly fall within the ambit of the *CHRA* and can be pursued (and in fact were pursued) through the complaint process set out in that piece of legislation. In *Boutilier (supra)*, the Federal Court of Appeal determined that the *CHRA*’s complaint process constitutes an administrative procedure for redress for the purposes of subsection 91(1) of the *PSSRA*. Accordingly, as Mr. Westbrook’s grievance is not one which may be presented pursuant to subsection 91(1) of the *PSSRA*, there is no arguable case that it can be referred to adjudication pursuant to subsection 92(1).

[18] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[19] The employer's application under s.84 is allowed and the grievance is hereby dismissed for want of jurisdiction.

June 28, 2005.

**Yvon Tarte,
adjudicator**