Date: 20060830

File: 568-02-35

Citation: 2006 PSLRB 101

Public Service
Labour Relations Act

Before a Vice-Chairperson

BETWEEN

AHMED DUNGAS RABAH

Applicant

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
Rabah v. Treasury Board (Department of National Defence)

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson

For the Applicant: Osborne Barnwell, counsel

For the Respondent: Adrian Bieniasiewicz, counsel

Heard at Toronto, Ontario,
July 25, 2006.

Application before the Chairperson

[1] Mr. Dungas Rabah was rejected on probation from his position as a stores person with the Department of National Defence (DND) on August 2, 2004. He applied for an extension of time to file a grievance against his rejection on probation on January 31, 2006. He was subject to a collective agreement between the Public Service Alliance of Canada (PSAC) and Treasury Board for the Operational Services Group (expiry: August 4, 2003, Exhibit A-16).

[2] Counsel for Mr. Rabah, Osborne Barnwell, stated that the grievance would allege a breach of procedural fairness in the disciplinary process (relating to an alleged breach of his right to union representation), and would allege that the rejection on probation was not employment-related.

[3] Both parties made opening statements. Mr. Rabah testified and Major Michael Fitz-Gerald testified on behalf of the employer.

Summary of the evidence

[4] Mr. Rabah was born in Chad and, emigrated to Canada in December 1989. In Chad, he attended university, majoring in Human Sciences and Politics. Prior to coming to Canada, he was a teacher and worked for the International Red Cross.

[5] In Canada, he has worked in a number of positions, both paid and volunteer. He volunteers as a radio show host at a community radio station. He worked at a number of different jobs with the Ontario government. He testified that he had no dealings with unions in any of these positions. He also had a short-term position at the Canada Customs and Revenue Agency (as it was then known), and did not deal with the union in that position. He has also worked as a translator and interpreter with Citizenship and Immigration and the Immigration Canada and Refugee Board of Canada from 1999 to the present. He has performed this work as an independent contractor.

[6] In November 13, 2003, Mr. Rabah obtained a one-year determinate (term) position with the DND Area Support Unit - Supply, in Toronto, commencing on November 24, 2003 (Exhibit A-1). The position was as a stores person, classified at the GS/STS-03 group and level. The letter of offer also stated that he would be on probation for a period of 12 months (the entire period of his appointment). The letter

also stated that he was covered by a collective agreement and that membership dues would be deducted from his pay.

[7] Mr. Rabah received a number of briefings and an orientation session where it is alleged that he was advised that he was a member of a union (Exhibits E-1, E-2, E-5 and E-7). The briefing or "induction" forms are checklists that have been signed off by Mr. Rabah. Included in the forms is a check beside "name of shop steward". Mr. Rabah did not remember if he was advised of the name of his shop steward. His supervisor, Sergeant Margaret Low, who signed the form indicating that she had told him the name of the steward, did not testify. Mr. Rabah also signed a form called "PSAC Payroll Identification" (Exhibit E-3). He did not remember the briefing by his supervisor on the terms and conditions of employment. He also did not remember whether he had been provided with a copy of the collective agreement. He testified that he received lots of paper to read, and that he did not read it all but concentrated on material that was relevant to the performance of his duties. He testified that he did not know if union dues were deducted from his pay. He did not review his pay stub. He testified that he did not read the orientation guide (Exhibit E-5) or, in particular, the parts of the guide that refer to unions. He also testified that the subject of union, affiliation could have been addressed in the orientation session, but that, if so, he did not remember it.

[8] Mr. Rabah received a positive mid-term evaluation (Exhibit A-2) describing him as a "devoted member" of the clothing stores team.

[9] On June 21, 2004, Mr. Rabah was stopped by the police on his way home from work. He was arrested for allegedly trafficking in drugs. He was kept in police custody until the following day. He called his supervisor at around 3:00 p.m. and told her he had not been able to come to work. He told her that he did not want to discuss the reason over the phone but that he could come in and discuss it with her. She told him that they could discuss it at work the next day. Shortly afterwards, Captain David Coker, Technical Services Officer, called him to tell him that he should not come to work at his usual time in the morning, but that he should come to the gate at 10:00 a.m.. At that time, he was escorted by the military police to a meeting and given a letter suspending him without pay, pending an investigation (Exhibit A-3). The letter also stated:

. . .

> *As part of this investigation, a meeting will be arranged with you to discuss your point of view in this matter. You will be contacted shortly to arrange a suitable date and time for this meeting. You have the right to have a representative present at that time.*

. . .

[10] Mr. Rabah testified that he thought the reference to his right to have a representative was a reference to having a lawyer. He already had a lawyer for his criminal charge and did not think he required a lawyer for the investigation meeting. Major Fitz-Gerald testified that the reference to a "representative" in the letter was designed not to prejudge whom Mr. Rabah could choose to bring with him to the meeting. Major Fitz-Gerald testified that Mr. Rabah could have brought anyone to represent him, not just a union representative.

[11] At the investigation meeting, Major Fitz-Gerald, the Commanding Officer, noted to Mr. Rabah that he did not have a representative with him. Major Fitz-Gerald testified that the Human Resources Officer at the meeting, Jackie Lean, told him that he had a right to a union representative, and asked if he wanted to have a union representative with him. Mr. Fitz-Gerald testified that he said: "No, I will be fine". Mr. Rabah did not remember Ms. Lean asking him that question. Ms. Lean did not testify. Major Fitz-Gerald asked Mr. Rabah if he had any questions, and he did not have any.

[12] Major Fitz-Gerald testified that the Vice-President of the union local, Michael Esteves, worked in the adjacent section, in close proximity to Mr. Rabah. Mr. Rabah testified that he did not know who Mr. Esteves was. Major Fitz-Gerald testified that the union was advised, on three separate occasions, of the suspension of the investigation meeting and of the rejection on probation.

[13] The employer issued a letter rejecting Mr. Rabah on probation, with an effective date of August 2, 2004 (Exhibit A-4). Mr. Rabah received a copy of the letter on August 2, 2004. Major Fitz-Gerald came to this decision based on the alleged off-duty misconduct of Mr. Rabah and concluded that the misconduct had impaired his ability to perform his duties because he had breached the bond of trust in the employer-employee relationship.

[14] Mr. Rabah noticed that a competition for his former position was advertised, and he wrote a letter to Major Fitz-Gerald on September 29, 2004, advising him that he had applied and would like to be considered for the position (Exhibit A-5). He testified that, at the time that he wrote this letter, he wanted his job back. In this letter he wrote that he "felt like a part of the family" when he worked at DND:

. . .

> *This was until I was charged with a crime I did not commit, not in connection with my work or anyone I worked with. There has been no conviction on the charge, and the overwhelming likelihood is that the case will be withdrawn, thrown out, or I will be found innocent.*

. . .

[15] Mr. Rabah testified that he did not receive a reply to his letter. In November 2004, he went to his member of Parliament. He also wrote letters to the Canadian Human Rights Commission (CHRC). He also testified that he went to various labour relations boards to get information, including the Ontario Labour Relations Board (but not the Public Service Staff Relations Board).

[16] On January 11, 2005, the charge against Mr. Rabah was withdrawn by the Crown (Exhibit A-8). Mr. Rabah wrote to Major Fitz-Gerald on January 14, 2005, advising him of the withdrawal of charges and enclosed the court-certified copy of the disposition (Exhibit A-8). In his letter he wrote:

. . .

> *The case has been withdrawn and I would appreciate very much the opportunity to get my job back. I have been trained and am interested, and capable and willing to work hard and surpass the role expectations and get along with everyone. I felt like part of a great team, and that is why I loved my work and I need to return to it as soon as possible.*

. . .

[17] Major Fitz-Gerald did not respond to this letter.

[18] Mr. Rabah also wrote to Master Warrant Officer, Cindy Rafuse, on January 14, 2005 (Exhibt A-7). He testified that she knew him and that he had hoped that she might be able to speak to Major Fitz-Gerald about getting his job back.

Mr. Rabah advised her in the letter that he was innocent, and asked her to inform his former co-workers of this fact.

[19] In January 2005, Mr. Rabah was advised by a friend that he should contact his union. He had some difficulty in locating the union office, but eventually did meet with some union officials. He was advised that he was outside of the time limits for filing a grievance. He testified that the union officers told him they would get back to him but never did.

[20] Mr. Rabah testified that he wrote a number of letters to the CHRC. He prepared a statement for the CHRC, dated March 21, 2005 (Exhibit A-15), in which he stated that he believed that he was being discriminated against by being denied a position at DND because of a criminal charge. He wrote to the CHRC on May 11, 2005 (Exhibit A-9), requesting a "review and objecting to your decision" to not accept his complaint. In the letter he wrote that he had been blacklisted for present and future jobs with DND.

[21] In May 2005, Mr. Dungas Rabah retained counsel with regard to his former employment with DND. His counsel, Mr. Barnwell, wrote a letter to DND on May 12, 2005 (Exhibit A-10). In the letter, Mr. Barnwell expressed Mr. Rabah's desire to return to his position at the Department. A further letter requesting a return to work was sent on June 21, 2005 (Exhibit A-11). A lawsuit against the employer was launched in the Ontario Superior Court in summer 2005. On November 16, 2005, Mr. Barnwell requested that the employer agree to an extension of time to file a grievance, as provided for in the applicable collective agreement (letter to Lois Lehmann, Exhibit A-13).

[22] On January 23, 2006, the court action against the employer was stayed, pending an application to the Public Service Labour Relations Board ("the Board") for an extension of time (Exhibit A-14). This application for an extension of time was filed with the Board on January 31, 2006.

Summary of the arguments

[23] In addition to oral arguments, counsel for Mr. Rabah relied on written arguments filed with the Board in support of his application. Those submissions are on file with the Board and are summarized below.

[24] Counsel for both parties agreed that the criteria to be assessed in a determination of whether to grant an extension of time are as follows (see *Schenkman v. Treasury Board (Public Works and Government Services)*, 2004 PSSRB 1 and *Peacock v. Union of Canadian Correctional Officers*, 2005 PSSRB 9:

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;
- balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance.

[25] Counsel for Mr. Rabah submitted that in assessing this case it was necessary to view it from the perspective of Mr. Rabah. He was excited to be working at DND, and his mid-term performance appraisal clearly reflected that. His excitement about his job was demonstrated by his admission that he never checked his pay stub and, therefore, did not know if union dues were being deducted. Mr. Barnwell submitted that the jurisprudence did not require the Board to assess whether or not Mr. Rabah ought to have known of his right to file a grievance. When he was advised of his right to have a representative (in the letter of June 23, 2004, Exhibit A-3) he interpreted this as a right to have a lawyer. He testified that he felt he did not need to have a lawyer, because he had done nothing wrong.

[26] Mr. Barnwell noted that the length of the delay was approximately 17 months. During this period Mr. Rabah kept the issue of his rejection on probation alive. Mr. Rabah had written a letter in September 2003, in an effort to get his job back, demonstrating a continued interest in returning to employment. He had been preoccupied with the criminal charge until January 2005, when he was acquitted. In January he wrote to both Major Fitz-Gerald and Ms. Rafuse asking for his job back. He testified that he approached his member of Parliament and went to the CHRC. In May 2005, he engaged legal counsel, and his lawyer wrote a number of letters seeking an extension of time. It was clear that Mr. Rabah was preoccupied with seeking a remedy every step of the way. If he had known he had a right to grieve, he would have grieved. He exercised due diligence in pursuing a remedy.

[27] Mr. Barnwell submitted that there was no evidence of any prejudice to the employer if an extension was granted. There was a serious taint on Mr. Rabah's reputation, and he lost a job that he loved. In terms of the balance between the prejudice to the employer and the injustice to Mr. Rabah, the balance was in favour of Mr. Rabah.

[28] Mr. Barnwell submitted that, with regards to the chance of success of a grievance, one cannot say that the grievance would be devoid of merit.

[29] Mr. Barnwell referred me to *Chambers v. Treasury Board (Public Works Canada)*, PSSRB File No. 149-2-63 (1985) where there was a three-year delay. He also referred me to *Brennan and Treasury Board (National Defence)*, PSSRB File No. 149-2-70 (1986), where the adjudicator referred to the injustice to the employee as being the "continuing blot" on the employee's record that was "bound to be a serious impediment to his future employment prospects".

[30] Counsel for the employer, Mr. Bieniasiewicz, submitted that Mr. Rabah either knew he could grieve or ought to have known. He had been briefed on his terms and conditions of employment, and had received a copy of the collective agreement. If he had read his collective agreement, he would have known of his right to grieve. The employer made every effort to inform him of his rights under his collective agreement. As stated in *Schenkman*, an employee has an obligation to inform him - or herself of his or her rights. Furthermore, Mr. Rabah worked in close proximity to Mr. Esteves (the local vice-president), and it is hard to imagine that he could not obtain information about his rights from him. It cannot be said that he was diligent in pursuing his rights. In fact, he was reckless in not reading all the information provided to him by his employer.

[31] Mr. Bieniasiewicz submitted that Mr. Rabah had formed no intention to grieve until the charges were dropped against him in January 2005. There were no compelling reasons for the delay. The only reason given was that Mr. Rabah was not aware of his right to file a grievance. The delay from the time he contacted his bargaining agent in January 2005 until his stated intention to file a grievance was six months, which was an excessive delay. Mr. Bieniasiewicz referred me to *Wilson v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File Nos. 166-2-27330 and 149-2-165 (1997) and *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113, where a delay of six months was found to be excessive. He submitted that, once the time limits in the

grievance have expired, the employer has a reasonable expectation that the file can be closed. The time limits contribute to stability in labour relations (*Wyborn*).

[32] Mr. Bieniasiewicz noted that the chances of success of the grievance are very low. If the application for an extension of time were allowed, the employer would argue that an adjudicator was without jurisdiction to hear it, since this was a case of rejection on probation.

[33] Mr. Bieniasiewicz noted that, in *Chambers*, the grievor was misled by his bargaining agent when it advised him that he should wait to file a grievance until after the criminal charges were resolved. Also, in the *Brennan* decision, the grievor was misled by the employer, which was not the case here.

[34] Mr. Barnwell noted that, in *Wilson*, the grievor was a psychologist who knew that he had a right to grieve. In Mr. Rabah's case, the grievor did not know of his right to grieve, and was not as sophisticated as a psychologist. Similarly, in *Wyborn*, the facts were completely different from the facts in this case. To apply these cases without looking at the particular circumstances of Mr. Rabah would lead to an injustice. Mr. Rabah has not had his "day in court" so that his character can be rehabilitated. The cloud of criminality over him as a result of his termination for alleged trafficking should not have to stay on his record.

Summary of the reasons

[35] Mr. Rabah has applied for an extension of time to file a grievance against his rejection on probation from a term position with DND. He was notified of his rejection on probation on August 2, 2004. He applied to the Board for an extension of time on January 31, 2006.

[36] Assessing whether to exercise discretion and grant an extension of time to file a grievance involves an assessment of five criteria:

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;
- balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance.

[37] On balance, my assessment of the five criteria leads to the determination that the application for an extension of time should be granted, for the reasons set out below.

Clear, cogent and compelling reasons

[38] The employer, in its argument, stated that Mr. Rabah either knew or ought to have known of his right to grieve under his collective agreement. With regards to Mr. Rabah's direct knowledge, I have the testimony of Mr. Rabah that he did not remember being advised during the various orientation sessions of the fact that he was unionized. There was no direct testimony from the employer on this point. I accept that this information was contained in some of the orientation material provided to Mr. Rabah, but, in the absence of direct evidence, I cannot conclude that it was drawn to his attention.

[39] Whether Mr. Rabah was advised of his right to union representation at the fact-finding meeting was contested at the hearing. Mr. Rabah said he was not advised, and Major Fitz-Gerald said that Ms. Lean did advise him. Ms. Lean was not called to testify. Given that this disputed matter is the likely subject, in part, of the grievance, it is not appropriate for me to come to a conclusion on this point in the absence of a full evidentiary record. I do not find that a determination on this point is of particular relevance to the application. The right to union representation is a different right than the right to file a grievance. There are a number of cases involving an application for extension of time where union representation was provided. We can conjecture that a competent union representative would likely have advised Mr. Rabah that he had a right to grieve. However, this is hypothetical.

[40] It is clear that the employer never advised Mr. Rabah of his right to grieve his rejection on probation. In the letter of rejection, there is no mention of his right to grieve, and he was not advised of this right at the fact-finding meeting. It is important to remember that the right to grieve is distinct from the right to refer a matter to adjudication. The employer did advise the bargaining agent on three separate occasions of the action being taken against Mr. Rabah. With this direct knowledge, it is disappointing that the bargaining agent did not directly approach Mr. Rabah to at least advise him of his rights under the collective agreement.

[41] Mr. Rabah had also been criminally charged with drug trafficking, and I accept his testimony that he was preoccupied with this serious criminal charge. This is a compelling reason for not having filed a grievance.

[42] Based on these considerations, I find that there was a clear, cogent and compelling reason for the delay in filing a grievance.

The length of the delay

[43] The length of the delay should be measured from the 25th day after the rejection on probation (on August 2, 2004). The first time that a request for an extension of time was made was on November 16, 2005, in correspondence to the employer (Exhibit A-13). This is a delay of approximately 14 months. This is a lengthy delay, partly explained by the grievor's preoccupation with the criminal charge, and partly explained by his misguided efforts to resolve the matter with the employer and with other commissions and boards.

Due diligence of the applicant

[44] The due diligence of the applicant refers to the efforts of the applicant in addressing his dispute. Mr. Rabah was misguided in his efforts to address the subject matter of his dispute. He did approach the Department directly in September 2004, seeking to get his job back (Exhibit A-5). He then corresponded with the employer in January 2005, advising the Department that the charges were withdrawn and again contesting the decision to reject him on probation. He made a number of misguided efforts to seek redress, in particular through a complaint to the CHRC. He also sought legal redress through the courts. In other words, throughout the entire period of the delay he demonstrated the intent to dispute the rejection on probation.

Balancing the injustice to the applicant against the prejudice to the employer

[45] The injustice to Mr. Rabah if he is not allowed to file a grievance is significant. The loss of employment is always a serious matter. However, in this case, that seriousness is compounded by the reasons provided by the employer for his rejection on probation. An allegation of drug trafficking that has subsequently not been proven in court is a serious mark against his reputation. Recent jurisprudence (*Vaughan v. Canada* 2005, SCC 11) has confirmed that Mr. Rabah's only recourse is a grievance under the *Public Service Labour Relations Act*. In my view, this is a significant factor favouring an extension of time.

[46] The prejudice to the employer is not significant. The employer knew conclusively by May 2005, when his lawyer first wrote to the Department, that Mr. Rabah was challenging his rejection on probation. There was no evidence from the employer about any significant prejudice it would suffer as a result of an extension of time being granted, other than the mere passage of time.

Chance of success of a grievance

[47] The chance of success of a grievance is always a problematic criterion. Without extensive evidence on the merits of the grievance - which is clearly not appropriate in an application for an extension of time - one cannot say conclusively what the chances of success are. Grievances against rejection on probation are difficult to win. However, grievances against rejection on probation have been successful, and, without a full evidentiary record, it is difficult to predict the chances of success. Based on the evidence presented, I can conclude that Mr. Rabah has an arguable case. In my view, it is also important to define "success" in the context of Mr. Rabah's situation. Even if he is ultimately unsuccessful, a full hearing will give him an opportunity to address the reasons given by the employer for his rejection on probation, and to perhaps rehabilitate his reputation.

[48] It is important to note that the application for an extension of time is for filing a grievance that will first be heard within the Department's grievance procedure. This is distinct from an application to extend time limits for referral to adjudication. In my view, given the opportunities for resolution of grievances in the grievance process, a lower standard for assessing the chances of success is appropriate. The extension-of-time application does not preclude the employer from arguing that an adjudicator is without jurisdiction if the grievance is subsequently referred to adjudication.

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

(The Order appears on the next page)

Order

[50] The application for an extension of time is granted.

[51] Mr. Rabah has 25 days, from the date of this decision, to file a grievance in accordance with the grievance process set out in his collective agreement.

August 30, 2006.

Ian R. Mackenzie,
Vice-Chairperson