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File: 566-34-170

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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

WILLIAM CHEUK HANG WONG

Grievor

and

CANADA REVENUE AGENCY

Other party to the grievance

Indexed as
Wong v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: D.R. Quigley, adjudicator

For the Grievor: Rick Buchan and Fabia Wong

For the Other party to the grievance: Victoria Yankou, counsel, and Sonia Viric,
Canada Revenue Agency

Heard at Toronto, Ontario,
October 16 and 17, 2006.

REASONS FOR DECISION

Individual grievance referred to adjudication

[1] William Cheuk Hang Wong, the grievor, is the Manager, Specialty Audit, in the Verification and Enforcement Division of the Toronto East Tax Services Office (the “Toronto East TSO”) of the Canada Revenue Agency (“the employer”).

[2] On August 31, 2005, Mr. Wong filed the following grievance:

I grieve the decision to deny my request for full time French training. The decision is unjust, unreasonable and is consistent with a pattern of unfair treatment. Given that my request had already been approved by both Mike Yee, Assistant Director of Verification & Enforcement and the former Director Vince Pranjivan, I find that circumstances have not sufficiently altered and that the claims made cannot justify overturning the approval. Moreover, the business case I provided was not given full consideration All EXDP participants in my class were given the opportunity to take French language training to achieve the proficiency rating of CBC, but I was not. It is my view that I have been discriminated against based on my race and the decision is an act of retaliation as a result of my complaint to the Canadian Human Rights Commission.

Corrective action requested

That my request for full time French training be approved.

[3] Mr. Wong referred his grievance to adjudication on February 14, 2006, on the basis of paragraph 209(1)(b) of the *Public Service Labour Relations Act* (PSLRA), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22.

[4] On February 15, 2006, Mr. Wong gave notice to the Canadian Human Rights Commission (CHRC) of the following issue involving the interpretation or application of the *Canadian Human Rights Act* (CHRA), R.S.C. 1985, c. H-6:

. . .

3. Description of the issue involving the interpretation or application of the Canadian Human Rights Act and of the alleged discriminatory practice or policy:

The former Director approved my request for language training based on the profile of the Executive Development Program (EXDP) of which I am a participant. My immediate supervisor also approved my language training as stated in my Individual Learning Plan.

The new Director denied my language training request after I filed a Human Rights complaint regarding mistreatments I received over the years and the denial of my promotion in the last competition process. The denial of my request is a form of disciplinary action and is a retaliatory act prohibited by the Canadian Human Rights Act.

4. *Prohibited ground of discrimination involved:*

I believe I am being discriminated [sic] based on my ethnic origin.

5. *Corrective action sought:*

That I am allowed to take private French Language lessons with the aim of achieving a proficiency level of CBC.

That I am compensated for the loss of a graduation bonus in the amount of \$3,000. An amount that I would have been entitled to had I been given the opportunity to finish my language training and to graduate from the EXDP.

That I am compensated for the loss of opportunity of a promotion to the Executive level within the Public Service. This is due to the fact that I am pre-qualified in the EX-01 pool under the Career Assignment Program (CAP), subject only to the French language requirement. Upon attaining the French language proficiency level of CBC, my name would be forwarded to the Public Service Commission for approval of EX-01 pre-qualified status. The longer it takes for me to complete the language training the higher the probability that I will miss more appointment opportunities in the interim.

That I am compensated for pain and emotional suffering and humiliation over a long period of time.

...

[5] On September 18, 2006, the CHRC advised that it had reviewed Mr. Wong's file and did not intend to make submissions at the scheduled hearing.

Summary of the evidence and arguments

[6] Counsel for the employer objected to my jurisdiction to hear this matter. Counsel argued that Mr. Wong referred his grievance to adjudication pursuant to paragraph 209(1)(b) of the *PSLRA*, which refers to "... a disciplinary action resulting in

termination, demotion, suspension or financial penalty” Counsel alleged that the employer’s decision to deny Mr. Wong full-time French language training was a business decision and not a disciplinary action. Counsel submitted that there was no misconduct on Mr. Wong’s part, and, therefore, that no disciplinary action was ever imposed that resulted in a “. . . termination, demotion, suspension or financial penalty”

[7] Counsel for the employer stated that Mr. Wong’s allegation that he suffered a financial penalty was the result of his ineligibility to receive a graduation award of \$3000; Mr. Wong did not graduate from the employer’s Executive Development Program (EXDP), as he did not finish his language training and, therefore, was unable to meet the French language requirement. Counsel for the employer is asking me to find that this, in itself, does not meet the meaning of financial penalty as contemplated by paragraph 209(1)(b) of the *PSLRA*.

[8] The grievor’s representative, Fabia Wong, stated that the employer retaliated against Mr. Wong because he had filed a human rights complaint with the CHRC. The grievor’s representative submitted that the filing of that complaint resulted in a financial penalty, not only because Mr. Wong did not receive the \$3000 graduation award on completion of the EXDP, but also because he was not appointed to the EX-01 group and level. The grievor’s representative argued that this has limited Mr. Wong’s career aspirations and has deprived him of any extra income associated with the EX-01 group and level.

[9] Counsel for the employer reiterated that Mr. Wong was not subject to any disciplinary action, and that the decision to deny him full-time French language training was a result of budgetary considerations. Counsel noted that French language training is not an inherent right of an employee. Counsel submitted that the employer had no reason to retaliate against Mr. Wong, and that its decision to deny him French language training was not disciplinary, as there was no misconduct on Mr. Wong’s part and no intent to punish him. Counsel argued that the employer acted within its rights and in good faith.

[10] I took under reserve the parties’ arguments with regard to my jurisdiction to hear Mr. Wong’s grievance, and asked the parties to proceed on the merits.

[11] Before leading evidence in support of his grievance, Ms. Wong read the following opening statement:

This case is not simply about a denial of a request previously approved. It is not an isolated act of retaliation against the filing of a human rights complaint. It is much more than that. It is about a classic case of racial discrimination played out at its worst.

Imagine a well-qualified and experienced professional selected under a special government initiative program, the Diversity in Leadership Program: a joint effort between the Public Service Commission (PSC) and Centre for Career Management Development (CCMD) whose primary function was to bridge the previously unassailable EX gap for visible minorities. Imagine that same professional selected for the Agency's own elite program, the Executive Development Program (EXDP) because of his high potential and abilities. Now imagine that individual barred for arbitrary reasons from ever attaining EX status.

This case demonstrates the systemic discrimination thriving within the Agency and poses the following question: given the highly qualified nature of this candidate, his satisfaction of all objective placement criteria and his failure to achieve EX status, how can other visible minorities expect to succeed in breaking through the glass ceiling?

Mr. Wong is a chartered accountant by designation with 26 years of experience in Income Tax audits and is recognized by his peers as a tax specialist. He is hardworking and extremely competent, as evidenced by his exemplary performance records. He has consistently proven in an array of competitions since 1997 that he is well qualified to become an executive in the Public Service. But the system failed him consistently: not because he could not place first in appointment competitions, and not because he did not possess the relevant qualifications or the experience. In fact, Mr. Wong was found qualified in a number of the [sic] EX-01 competitions in the late 1990's and was successful in pre-qualifying in the Career Assignment Program (CAP) and the EX-01 pools in 2001 and 2002 respectively. In spite of all this, Mr. Wong was advised by his superior that he would never become an EX. In light of the consistent promotion of Mr. Wong's colleagues of Caucasian descent to EX status before him, some of whom possessed fewer qualifications than him, many of whom scored lower on given competitions, the logical inference is that Mr. Wong was a victim of discrimination based on his race. The processes involved in 2003 were arbitrary and abnormal per government standards: for instance, clearly diverging from normal protocol, no notes were taken during these processes,

in effect depriving the candidates of their ability to challenge the board's decision using the available recourse mechanism. In 2004, when all the qualified candidates with auditing experience in the existing pool were appointed except for Mr. Wong, the Hiring Manager even went as far as ignoring the established 3-year EX-01 pool after only 2 years had passed, and initiated a new process to establish a new pool.

Finally, Senior Management has now attempted to deprive Mr. Wong of his last chance of becoming an executive in the Public Service outside of CRA: specifically, Mr. Wong has pre-qualified in the EX-01 process under the CAP program subject only to the language requirement. Once he obtained the language proficiency of CBC, his name would be forwarded to the PSC for consideration of appointment. Without the language requirement fulfilled, Mr. Wong would remain as an EX minus one within CRA for the remaining [sic] of his career.

Mr. Wong has been discriminated against on a consistent basis, and this has negatively impacted his psychological well-being, his personal integrity, and ultimately undermined the security he is entitled to as a citizen and civil servant of Canada.

The reason we are here today is that Senior management has unequivocally failed in satisfying its duty of fairness with respect to Mr. Wong and the procedures for appointment to EX status. Mr. Wong has been unfairly deprived of his right not to be treated arbitrarily, and his treatment over the years has affected his life and his life choices - including his employment and place of residence: matters of a fundamentally [sic] and personal nature.

[12] The grievor's representatives filed four exhibits and Mr. Wong testified on his own behalf. Counsel for the employer filed one exhibit, but called no witnesses.

[13] Mr. Wong was a participant in the employer's EXDP and, after prequalifying (subject to the language requirement) in the EX-01 pool under the Career Assignment Program (CAP), was sent for language training. The EXDP and the CAP share the same objective: to develop high-potential employees for entry into the executive community. As part of his learning plan, and as a condition for graduation, Mr. Wong had to achieve French language proficiency at the CBC level.

[14] Mr. Wong began full-time French language training in approximately September 2001. Between May and August 2002, he achieved a "B" level in reading, a "C" level in writing and an "A" level in oral interaction (BCA). His language training

ended on August 15, 2002. Thus, Mr. Wong did not achieve French language proficiency at the CBC level required to graduate.

[15] Mr. Wong contends that he was not offered training to attain the CBC level, but, rather, the lower BBB level, which was discriminatory, since his colleagues in the EXDP were given training to attain the CBC level.

[16] In October 2002 Mr. Wong accepted a three-month acting assignment at the EX-01 group and level that was extended several times before ending in February 2004. Mr. Wong stated that the reason why he accepted the acting EX-01 assignment was because it was the first time he had been offered an assignment at that group and level and he did not want to miss such an opportunity. While on this acting assignment, Mr. Wong stopped attending language training.

[17] In September 2004, Mr. Wong approached the employer's senior management to inquire as to when he could resume his French language training. He stated that, initially, he was given approval to resume his training by Vince Pranjivan, then Director, Toronto East TSO, and by his own manager, Mike Yee, Assistant Director, Certification and Enforcement, at the Toronto East TSO. However, Mr. Wong was advised later that no decision would be made until the arrival of Deborah Danis, the new Director, Toronto East TSO.

[18] Mr. Wong testified that he met with Ms. Danis in January 2005. He alleged that Ms. Danis advised him that she would be willing to mentor him to help him get a promotion, if he would contact the CHRC and request that his complaint be held in abeyance. Mr. Wong stated that he advised Ms. Danis that he would need to consult with the CHRC.

[19] Several weeks later, Mr. Wong met again with Ms. Danis. He informed her that after discussing the matter with the CHRC he was advised that if his complaint was put in abeyance his file would, for all intents and purposes, be considered closed.

[20] Mr. Wong stated that he participated in a mediation session with Ms. Danis in May 2005. As a result of the mediation, Ms. Danis requested that Mr. Wong prepare a business case for French language training. Mr. Wong prepared and submitted his business case to Ms. Danis in early August 2005.

[21] Mr. Wong stated that on August 16, 2005, Ms. Danis advised him that after having considered his business case she was denying his request, as he was close to retirement and the investment in language training was not a sound one. As well, since there were limited resources, other employees could be offered those resources. Mr. Wong noted that Ms. Danis did offer him part-time language training (several hours two or three times per week) with a follow-up assessment of his ability to learn, and that she would then consider the possibility of full-time French language training. Mr. Wong, however, declined, as he believed that he could only achieve the required CBC level through full-time tutoring.

[22] Mr. Wong testified that he has no intention of retiring in the near future and that, as far as he is aware, there is no mandatory age requirement to retire from the federal public service. He also stated that managers always have discretionary funds available to them for training purposes.

[23] In cross-examination, Mr. Wong stated that the business case that he prepared and submitted to Ms. Danis for full-time French language training had an estimated cost of \$35 000 and consisted of approximately 800 hours of training.

[24] When asked by counsel for the employer what disciplinary action was alleged to have been imposed on him, Mr. Wong replied that Ms. Danis had advised him at the August 2005 meeting that “What you are doing [pursuing a human rights complaint] is damaging your career. If you put the complaint in abeyance, your reputation in the office and in the region might give you an opportunity to be promoted to an EX-01.” Mr. Wong stated that his refusal to put his CHRC complaint in abeyance was viewed by the employer as insubordination, and that denying him full-time French language training was retaliation against him. He also stated that he wrote letters to the Minister and the chief executive officer of the employer to complain of discrimination by senior management.

[25] Mr. Wong reiterated that Ms. Danis’ decision to deny him full-time French language training to achieve the required CBC level was a retaliatory measure because of his refusal to hold his human rights complaint in abeyance. He stated that by being denied language training he was being punished: he was unable to achieve the French language proficiency at the CBC level, which was a condition for graduation and the \$3000 graduation award. He was also deprived of promotional opportunities, the loss of which added to his financial losses.

[26] Counsel for the employer submitted that Mr. Wong did not discharge the burden of proof required to demonstrate that his grievance is properly before an adjudicator. Counsel asked that I issue a ruling on jurisdiction based on Mr. Wong's testimony alone, and that the employer's witnesses, who were present, not be required to testify. After hearing counsel for the employer's submissions, I granted her request for the following reasons.

Reasons

[27] Mr. Wong has referred his grievance to adjudication on the basis of paragraph 209(1)(b) of the *PSLRA*, which reads as follows:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

...

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

...

[28] The first question that I have to decide is whether Mr. Wong was subject to "... a disciplinary action resulting in termination, demotion, suspension or financial penalty" It is only if the answer to this question is in the affirmative that I can proceed to hear the other issues raised in Mr. Wong's grievance. The facts before me do not suggest, and Mr. Wong did not allege, that his employment had been terminated, or that he had been demoted or suspended. The only remaining element of paragraph 209(1)(b) of the *PSLRA* on which Mr. Wong could, therefore, refer his grievance to adjudication is a disciplinary action resulting in a financial penalty.

[29] In this case, the employer alleged that its decision not to send Mr. Wong on full-time language training was based on business considerations, and Mr. Wong's testimony gives some support to that claim. In these circumstances, Mr. Wong bears the onus of establishing on a balance of probabilities that the employer's decision was disciplinary in nature and resulted in a financial penalty.

[30] Mr. Wong alleged that the employer's decision not to send him on full-time language training was a disciplinary action. In support of his allegation, he suggested that the employer's decision was motivated by improper considerations, i.e. racism and retaliation because he had filed a human rights complaint with the CHRC.

[31] In his testimony, Mr. Wong recognized that, although Ms. Danis denied his request for full-time language training, she offered him part-time training, several hours two or three times per week, following which she would assess his progress and review the possibility of full-time training. However, Mr. Wong declined that offer, as was his right.

[32] I would like to note here that language training is not an absolute right; it is not protected by statute or a collective agreement, and no employee should expect to be entitled to it.

[33] If Ms. Danis had decided to offer Mr. Wong no language training at all, either on a full-time or part-time basis, his allegation of disciplinary action would have carried more weight. However, the fact that Ms. Danis did offer him part-time training and was amenable to considering full-time training at a later date renders Mr. Wong's allegation less credible.

[34] In the circumstances of this case, and on the evidence before me, I am not satisfied that, on a balance of probabilities, the decision not to authorize Mr. Wong to go on full-time language training was a disciplinary action. I therefore conclude that Mr. Wong's grievance is not a matter properly referred to adjudication under the *PSLRA*, and I dismiss it for lack of jurisdiction. As a result, it is not open to me to address any of the other issues raised in his grievance.

[35] In reaching my decision, I was mindful that the legislator has turned its mind to giving adjudicators jurisdiction to interpret and apply the *CHRA*, where human rights issues are raised in an individual grievance. Subsections 208(2) and (3) of the *PSLRA* specifically give an employee the right to present an individual grievance raising such issues, as long as they do not relate to pay equity. For their part, paragraphs 226(1)(g) to (i) of the *PSLRA* enable an adjudicator to interpret and apply the *CHRA* in relation to matters properly referred to adjudication, with the exception of pay equity issues. In Mr. Wong's case, however, I have determined that his individual grievance was not properly referred to adjudication.

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

(The Order appears on the next page)

Order

[37] This grievance is dismissed.

December 6, 2006

**D.R. Quigley,
adjudicator**