Date: 20140412

File: 166-34-35729

Citation: 2006 PSLRB 40

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

TODD KEULEMAN

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Keuleman v. Canada Revenue Agency

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

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievor: Martin Ranger, Professional Institute of the Public Service of Canada

For the Employer: Neil McGraw, counsel

Heard at Ottawa, Ontario,
October 13, 2005.

Grievance referred to adjudication

[1] The grievor, Todd Keuleman, grieved the decision of what is now the Canada Revenue Agency (the "employer") to end prematurely his term employment. His May 19, 2004, grievance reads as follows:

> *I grieve the Employer's decision taken on May 17/04 to cancel my term. My term was cancelled after I inquired about the possibility of taking parental leave. The Employer's decision was taken in bad faith and in a form of disguised discipline.*

[2] The grievor is asking to be re-instated with full retroactive salary and benefits to the end of his term.

[3] The grievor referred his grievance to adjudication on February 25, 2005. The employer consented to extend the time-limit for doing so.

[4] 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*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act* (the "former *Act*"), R.S.C., 1985, c. P-35.

[5] The hearing of this matter was originally scheduled for August 2, 2005. It was postponed at the employer's request.

Summary of the evidence

[6] The employer offered term employment to the grievor as an analyst (group and level CS-02) in the Information Technology Branch of the Individual Returns and Benefits Directorate on November 19, 2002 (Exhibit G-4). This appointment was effective on December 2, 2002, and was to end on December 1, 2003. The letter of offer stated that the period of employment might be lengthened or shortened depending on operational requirements and the grievor's performance.

[7] The grievor was appointed to work on the implementation of the NetRAP Project, which was an electronic application to be used online by taxpayers.

[8] The grievor's initial term of employment was first extended from December 2, 2003, to March 31, 2004 (Exhibit G-5). That first extension could be lengthened or shortened in the same manner as the original term. The extension was made to correspond with the end of the fiscal year.

[9] The grievor's term was extended again for the period from April 1, 2004, to March 31, 2005 (Exhibit G-6). The letter of offer dated March 19, 2004, stated that the period could be lengthened or shortened, depending on operational requirements and the performance of the grievor. The request for approval of the second extension stated (Exhibit G-8):

. . .

> *D) Term employment is in the best interest of the Agency (Justification). Cet emploi pour une période déterminée est dans le meilleur intérêt de l'Agence (justification) :*
>
> *The NetRAP Project is a politically high profile system with very tight deadlines. Todd has all of the necessary credentials in order to design this system, as well as extensive knowledge in its stages of development. The learning curve would be very high if Todd was replaced and thus put the implementation of the system at risk.*

. . .

[10] Mr. John Carey (Acting Director, Assessment Processing Division, Information Technology Branch) testified that he took the decision to extend the grievor's term for a second time prior to the budget determination for 2004-2005 and without evaluating the needs of the Information Technology Branch. He stated that the one-year extension of that term was for budgeting purposes.

[11] At the beginning of April 2004, Kelly Rotar, project leader for the NetRAP Project and the My Account Project, was asked by Mr. Carey to evaluate the needs of her projects because the employer wanted to reduce the Information Technology Branch's budget. She performed the evaluation on the basis of the NetRAP Project schedule (Exhibit E-5), which had been prepared at the beginning of the project by previous project leaders. Her review led her to conclude that the tasks to be performed by Mr. Keuleman had been completed on April 16, 2004, (Exhibit E-5). The tasks to be performed by Imad Nasrallah (another CS-02 determinate employee working on the NetRAP Project) were also completed in April 2004. All the tasks

related to the development of the NetRAP Project had been completed and maintenance would be taken on by a full-time indeterminate employee. That employee was already performing maintenance on the My Account Project and maintenance for the NetRAP Project would be added to his duties. Ms. Rotar reported her findings to Mr. Carey, who decided to declare surplus the two CS-02 term positions of the NetRAP Project.

[12] On April 27, 2004, Mr. Carey advised the grievor and Mr. Nasrallah of his decision and told them that they would be put on the availability list. The grievor was informed by Mr. Carey in a meeting on May 17, 2004, that his term would end earlier than expected. Robert Gamey gave the grievor, by letter dated May 17, 2004, official notice that his term would end three weeks later, on June 7, 2004 (Exhibit G-11). On May 31 and June 2, 2004, Mr. Carey sent an e-mail to the grievor and Mr. Nasrallah to inform them of job opportunities at the Fitzgerald Campus.

[13] The grievor informed his co-workers of his departure by e-mail dated May 17, 2004. The grievor explained in his testimony that he wrote that e-mail in order to leave on a positive note. In that correspondence he wrote (Exhibit G-12):

. . .

> *It is with mixed feelings I write this.*
> *With the limited amount of work available, I am not surprised I have been laid off.*
> *I have been given 3 weeks notice and am not required to stay.*
> *I have handed in my badge and will be leaving today.*
>
> *I believe the documents I have been involved with are up to date.*
> *There is a little outstanding work related to statistics reporting but not a lot.*

. . .

[14] On March 31, 2004, the grievor notified the employer that his wife was pregnant (Exhibit G-7). He requested information on parental leave from Ms. Rotar on April 7, 2004. Ms. Rotar referred him to the Human Resources Branch because she was not familiar with the parental leave program. At that time, the grievor did not tell her that he wanted to go on parental leave. On April 27, 2004, Ms. Rotar was informed by e-mail that the grievor was interested in taking parental leave. He wrote as follows (Exhibit G-10):

> *Hi Kelly,*
> *I had hoped to talk to you in person about parental leave.*
> *I am willing to be somewhat flexible on when I started* [*sic*] *my parental leave. I wanted to make sure my leave was not going to have too negative an impact on the project. Unfortunately we have not had a chance to talk.*
>
> *I have talked to Phillip, Sandy, and Keith to get some input from them.*
> *Phillip and Sandy do not see any significant impact to the project schedule if I take my parental leave before testing has completed.*
> *With that in mind I was considering taking my parental leave fairly soon. I am going to contact HR and find out how much notice is required etc. I am looking at taking around 4 or 5 months. Thus if I left in June I would be back in October.*
> *Please let me know what your thoughts are about this.*
>
> . . .
>
> [*Sic* throughout]

[15] Ms. Rotar forwarded the grievor's e-mail to Mr. Carey the same day. Mr. Carey requested advice from the Human Resources Branch as follows (Exhibit G-15):

> *Hello Hélène. Please see the attached email from Todd Keuleman. I was speaking with you last week about letting go of terms before the end of their contract. Todd is one of the employees I had identified as surplus. Can you pls advise me concerning his request for parental leave versus my plan to end his term. Would I be contravening a right of his by laying him off?*
>
> . . .

[16] Martine Sigouin, Human Resources Advisor, replied on April 29, 2004, that Mr. Carey would not be contravening a right of the grievor by laying him off because the letter of offer stated that the grievor's term could be lengthened or shortened depending on operational requirements and the grievor's performance. She also quoted the following excerpt from the collective agreement signed by the employer and the Professional Institute of the Public Service of Canada on July 22, 2002, for the Audit, Financial and Scientific Group:

> . . .
>
> ***ARTICLE 17***
>
> ***OTHER LEAVE WITH OR WITHOUT PAY***
>
> . . .

17.07 Parental Allowance

(a) An employee who has been granted parental leave without pay, shall be paid a parental allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i), providing he:

(i) has completed six (6) months of continuous employment before the commencement of parental leave without pay,

(ii) provides the Employer with proof that he has applied for and is in receipt of parental benefits pursuant to Section 23 of the Employment Insurance Act *in respect of insurable employment with the Employer,*

and

(iii) has signed an agreement with the Employer stating that:

(A) the employee will return to work on the expiry date of his/her parental leave without pay, unless the return to work date is modified by the approval of another form of leave;

(B) Following his return to work, as described in section (A), the employee will work an amount of hours paid at straight-time calculated by multiplying the number of hours in the work week on which the parental allowance was calculated by the number of weeks for which the allowance was paid;

(C) should he fail to return to work in accordance with section (A) or should he return to work but fail to work the total period specified in section (B), for reasons other that death, lay-off, early termination due to lack of work or discontinuance of a function of a specified period of employment that would have been sufficient to meet the obligations specified in section (B), or having become disabled as defined in the Public Service Superannuation Act, he will be indebted to the Employer for an amount determined as follows:

(allowance received) x

(remaining period to be worked following her return to work)
[total period to be worked as specified in (B)]

however, an employee whose specified period of employment expired and who is rehired by the [CRA] *within a period of five (5) days or less is not indebted for the amount if his new period of employment is sufficient to meet the obligations specified in section (B).*

. . .

[17] Ms. Sigouin wrote to Mr. Carey that subparagraph 17.07(a)(iii)(A) meant that:

. . .

If the employee knows prior to taking parental leave that his term will not be renewed , the employee will not be able to sign an agreement with the Employer confirming that he would return to work.

. . .

[18] Concerning subparagraph 17.07(a)(iii)(c), Ms. Sigouin wrote (Exhibit G-15):

. . .

This means that if the employee signs an agreement to return and that once he returns or during is [*sic*] *leave he is laid off, the employee will not need to reimburse the parental allowance that was given.*

The parental allowance given is added to the amount that is given by Employment Insurance (55%) to bring the employee's amount to 93% of his salary.

If the employee does not get the parental allowance from [the employer] *(due to the circumstances noted above), he will still be eligible to receive the 55% from EI.*

You had already mentioned to Helene that this employee's term might be shortened. If you have confirmation, before his departure on Parental leave, that is term will be shortened, it would be important to advise the employee prior to him signing for the parental allowance.

. . .

[19] Mr. Carey testified that it would be morally wrong to allow the grievor to sign a parental leave agreement if the employer did not have enough work for him. Mr. Carey's concern was that it was important that the employee knew, before taking his parental leave that he would be laid off. In cross-examination, Mr. Carey explained that, when he wrote to a Rose Fitzpatrick, on May 18, 2004, (Exhibit G-13), that "[w]ith regard to parental leave, Todd had requested to go on parental leave earlier in the fiscal. . . .", this meant that Mr. Keuleman had requested information on parental leave and not that he had completed a formal request. Mr. Carey specified that the decision to lay off the grievor was taken before Mr. Keuleman showed interest in making a parental leave request. Acceptance of a parental leave request would have had no impact on the Assessment Processing Division's budget. The employer had no reason to initiate a disciplinary action against the grievor or to retaliate.

[20] Mr. Carey testified that 13 employees, including Messrs. Keuleman and Nasrallah were let go between January and July 2004. Only four of them were replaced because the reduced workload meant that new employees did not have to be hired.

[21] The following part of clause 17.06 of the collective agreement relates to parental leave and is relevant to this grievance:

. . .

ARTICLE 17

OTHER LEAVE WITH OR WITHOUT PAY

. . .

17.06 Parental Leave Without Pay

(a) Where an employee has or will have the actual care and custody of a new-born child (including the new-born child of a common-law spouse), the employee shall, upon request, be granted parental leave without pay for a single period of up to thirty-seven (37) consecutive weeks in the fifty-two (52) week period beginning on the day on which the child is born or the day on which the child comes into the employee's care.

. . .

(d) An employee who intends to request parental leave without pay shall notify the Employer at least four (4) weeks in advance of the expected date of the birth of the employee's child (including the child of

> *a common-law spouse), or the date* [*sic*] *the child is expected to come into the employee's care pursuant to paragraphs (a) and (b).*
>
> *(e) The Employer may:*
>
> *(i) defer the commencement of parental leave without pay at the request of the employee;*
>
> *(ii) grant the employee parental leave without pay with less than four (4) weeks' notice;*
>
> *(iii) require an employee to submit a birth certificate or proof of adoption of the child.*
>
> . . .

Summary of the arguments

By the grievor

[22] In its reply to the grievance at the third level of the grievance process, the employer stated that Mr. Keuleman submitted his formal parental leave request by e-mail on April 27, 2004 (Exhibit G-3). That statement contradicts the testimony of Ms. Rotar and Mr. Carey. The employer's own chronology of events (Exhibit G-14) indicates that the grievor mentioned his interest in parental leave to Ms. Rotar on April 7, 2004, and this is confirmed by Mr. Carey's e-mail dated May 18, 2004, (Exhibit G-13). The evidence did not support the employer's submission that it had decided to end the grievor's term before he submitted his parental leave request.

[23] The grievor requested parental leave from Ms. Rotar on April 7, 2004. On that date no operational requirement or decision to declare him surplus had been identified. The grievor was entitled to parental leave, the employer being without discretion to deny such leave.

[24] In *Chiasson v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-23625 (1994) (QL), an adjudicator concluded that the grievor met all the requirements of the collective agreement for maternity leave and was entitled to it. In that case, prior to departing on maternity leave, the grievor had told the employer that she might not return to work after her leave. The grievor was later advised that she would be laid off. A similar decision should be rendered in the present case as the grievor met all the requirements under the collective agreement for parental leave.

[25] The request to approve the second extension of Mr. Keuleman's term indicates that the implementation of the NetRAP Project would be put at risk if his term were not extended (Exhibit G-8). The term was ended seven weeks after that extension and six weeks after the grievor had requested parental leave. Those facts do not support the employer's position. The employer's decision to end the grievor's term is nothing less than disguised discipline in order to save money.

[26] In these circumstances, the grievance should be allowed and the employer should be ordered to pay the grievor the equivalent of the balance of his term for the period between June 7, 2004, and March 31, 2005.

By the employer

[27] The evidence showed that the grievor's lay-off coincided with family circumstances. In the present case, the grievance can be allowed only if the evidence demonstrates that the term employment was not shortened for work-related matters such as lack of work or budgetary requirements but because the employer wanted to avoid granting a parental leave.

[28] The discussion on April 7, 2004, and the April 27, 2004, e-mail were not official requests for parental leave but were just an expression of interest. The grievor did not sign a formal request for parental leave and did not sign an agreement with the employer stating that he would return to work at the end of his parental leave, as provided for in the collective agreement.

[29] In the present case, the interest shown by the grievor in searching out information on parental leave did not preclude the employer from taking a decision on a lay-off. The decision for term terminations was supported by a needs' assessment made by the project leader, who showed that the tasks to be performed by the grievor on the NetRAP Project had been completed.

[30] No evidence was submitted by the grievor to support his allegation that the lay-off was a sham to avoid granting him parental leave. On the contrary, the evidence demonstrated that maintenance of the NetRAP Program, after the lay-off, was to be done by an indeterminate employee performing those duties on the My Account Project. The lay-off was justified in the circumstances of the NetRAP Project.

[31] An adjudicator has jurisdiction over a grievance referred to adjudication that relates to a disciplinary action resulting in termination of employment, pursuant to paragraph 92(1)(*c*) of the former *Act*. To succeed in his grievance, the grievor had to demonstrate that the reason given by the employer for the lay-off was a disguised disciplinary measure or a camouflage. That principle was followed in *Frève v. Treasury Board (Agriculture and Agri-Food Canada)*, PSSRB File No. 166-02-27631 (1999) (QL), and should be applied in the present case. The evidence showed that the lay-off was decided after a review of the workload. The employer came to the conclusion that the tasks had been completed, and the evidence demonstrates that this was true; nobody replaced the laid off employees.

[32] In the present case, the employer did not deny a parental leave request and no grievance was filed concerning the application of clause 17.07 of the collective agreement. The grievor has the burden of proving that his term employment was ended in bad faith in a form of disguised discipline and he failed to do so. Consequently, the grievance should be denied.

Rebuttal by the grievor

[33] The employer took advantage of the operational requirements' excuse when it changed its mind about its conclusion that to replace Mr. Keuleman would put the implementation of the NetRAP Project at risk (Exhibit G-8). The employer did this to avoid a parental leave request, and the end of term was really disguised discipline.

Reasons

[34] Mr. Keuleman grieved the employer's decision to end his term prematurely; he did not grieve a violation of clause 17.06 or 17.07 of the collective agreement. As his grievance was referred to adjudication pursuant to paragraph 92(1)(*c*) of the former *Act*, my jurisdiction to hear this case is limited to the parameters set out in that paragraph. Paragraph 92(1)(*c*) reads as follows:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *. . .*

> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty.*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

[35] The concept of disciplinary action referred to in section 92 of the former *Act* has been discussed in *Robertson v. Treasury Board (Department of National Revenue)*, PSSRB File No. 166-02-454 (1971). In that case, after taking into consideration the provisions relating to discipline in the *Financial Administration Act*, the *Terms and Conditions of Employment Regulations* and the *Public Service Staff Relations Act*, the adjudicator concluded as follows:

> . . .
>
> *. . . both the* [*Financial Administration Act*] *and Section 106* [of the *Terms and Conditions of Employment Regulations*] *expressly refer to penalties for breaches of discipline or misconduct. Those words embody the concept of fault, that is to say: either willful wrong-doing or culpable negligence, either of which can have penal consequences. I think the words do not include such failings or deficiencies as involuntary incompetence or incapacity (or infancy or old age) which clearly lack the element of voluntary malfeasance.*
>
> *My view is that the "disciplinary action" referred to in Section 91(1)(b) of the Public Service Staff Relations Act is such action as is taken in response to alleged "breaches of discipline or misconduct" - - - in other words, in response to what the Employer considers to be some kind of voluntary malfeasance, by whatever name it may be called in an office file.*
>
> . . .
>
> [Emphasis in the original]

[36] Consequently, the grievor should demonstrate that the employer's decision constitutes a form of disguised discipline that was taken in response to alleged breaches of discipline or misconduct. The parties agreed to the principle that an adjudicator has jurisdiction to hear this grievance if the grievor establishes that the termination of employment was not a genuine lay-off but rather a disciplinary dismissal in disguise.

[37] In the present case, the grievor submitted that the decision to shorten his term had been taken by the employer to avoid granting his verbal parental leave request on April 7, 2004, which was also made in writing on April 27, 2004 (Exhibit G-10). In the grievor's opinion, the employer changed its mind about its decision to extend his term just to avoid granting him parental leave. The grievor's submission is that the bad faith of the employer is demonstrated by the fact that it ended his term prematurely shortly after it had determined that a second extension was required in order to avoid putting the NetRAP Project at risk.

[38] To succeed on that basis, the grievor must prove that the conclusion reached by Ms. Rotar is disguised discipline. The evidence submitted by Ms. Rotar in her testimony in relation to the NetRAP Project schedule (Exhibits E-4 and E-5), from which she had concluded that all the tasks assigned to the grievor and another CS-02 determinate employee had been completed on April 10, 2004, was not contradicted. No evidence was submitted by the grievor that undermined the credibility of Ms. Rotar. It is on the basis of Ms. Rotar's findings that Mr. Carey decided to shorten the grievor's term.

[39] Mr. Carey had decided to extend the grievor's term for a second time from April 1, 2004, to March 31, 2005, without a needs' assessment for the NetRAP Project. He testified that he did so on a request from the Human Resources Branch prior to the determination of the 2004-2005 budget. The second extension of the grievor's term was confirmed to the grievor by Mr. Gamey on March 19, 2004 (Exhibit G-6). Mr. Carey was asked to reduce the Information Technology Branch's budget at the beginning of April, 2004, and he asked the project leader to evaluate the workload of the NetRAP Project.

[40] Mr. Carey advised the grievor and Mr. Nasrallah on April 27, 2004, that their terms would be shortened. In accepting Ms. Rotar's findings, Mr. Carey assumed his managerial responsibility to keep costs for the NetRAP Project to a minimum. The tasks to be performed for the maintenance of the NetRAP Project did not justify keeping the grievor. This was not contradicted by the grievor's evidence. On the contrary, the grievor's departing e-mail stated that, with the limited amount of work available, he was not surprised to have been laid off. Furthermore, the grievor specified that the documents with which he had been involved were up to date and

that a small amount of work remained to be done for reporting statistics (Exhibit G-12).

[41] The evidence showed that no one was hired to replace the grievor and the other CS-02 determinate employee who had been laid off, or to perform tasks related to the NetRAP Project's implementation. It was proved and uncontradicted that the maintenance of the NetRAP Project was performed by an indeterminate employee working on the My Account Project. This information convinces me that the grievor's termination was not disguised discipline and was justified by valid economic reasons.

[42] In relation to the parental leave issue, the evidence is to the effect that the grievor requested information from Ms. Rotar in a conversation on April 7, 2004. No evidence showed that Ms. Rotar informed Mr. Carey of that conversation. On April 27, 2004, the grievor advised Ms. Rotar in writing of his intention to take parental leave and to contact the Human Resources Branch for information (Exhibit G-10). That written intention was forwarded to Mr. Carey on the same day. There is no evidence before me to show that Mr. Carey's decision to shorten the grievor's term resulted from the grievor's intention to request parental leave. Also, the grievor did not prove that he ever formally requested parental leave pursuant to clause 17.06 of the collective agreement.

[43] I conclude that the grievor's e-mail dated April 27, 2004 (Exhibit G-10) did not meet the criteria stated in clause 17.06 of the collective agreement. Paragraph 17.06 (d) puts the obligation on the employee to notify the employer at least four weeks in advance of the date of the birth of the employee's child, or the date on which the child is expected to come into the employee's care (Exhibit G-1). The April 27, 2004, e-mail did not specify a date when the grievor expected to take care of his child, but made a general statement that he was looking at a period of four or five months, which might possibly start in June (Exhibit G-10). Furthermore, the grievor stated:

. . .

> *I am willing to be somewhat flexible on when I started* [*sic*] *my parental leave. I want to make sure my leave was not going to have too negative an impact on the project. . . .*

. . .

In the circumstances, I conclude that the grievor did not formally request parental leave before the decision to lay him off was taken by the employer.

[44] The employer's interpretation of clause 17.07 is related to the rights of an employee to receive a parental allowance if he meets the three criteria listed. Clause 17.07 does not set the criteria on which to grant parental leave, but the condition to qualify for a parental allowance under the Supplemental Unemployment Benefit Plan. The grievor had to notify the employer of his intention to request a parental leave at least four weeks in advance of the date on which the child would come into his care, pursuant to paragraph 17.06(d) of the collective agreement.

[45] The grievor did not submit evidence showing a casual link between his intention to take parental leave and the employer's decision to shorten his term. On that issue, the evidence showed that the employer assessed whether its decision to end the grievor's term early was respecting the grievor's rights. That evidence did not demonstrate that the grievor's request about parental leave had any impact on the decision of the employer to shorten his term. In other words, the grievor did not establish that the employer's decision to shorten his term was made to deprive him of any rights to parental leave. Furthermore, the grievor did not discharge his burden of proof: the evidence does not support his allegation that his termination was a disguised disciplinary measure. On that issue, no evidence showed that the employer's decision was taken in response to the grievor's actions or behaviour.

[46] The decision in *Chiasson (supra)* is of very little help to the grievor. The facts and the issues in that case are different from those in this matter. Ms. Chiasson's grievance concerned the application of the maternity leave allowance provided for in her collective agreement and for which she completed all the required forms. Her employer misinterpreted her intention to come back to work and denied her entitlement to the maternity leave allowance. Mr. Keuleman's situation is very different. He alleges that the employer ended his term because he intended to request parental leave.

[47] The decision in *Frève (supra*) cannot receive application in the present file either because the issue in that case dealt with the adjudicator's jurisdiction to hear a grievance challenging a termination pursuant to subsection 29(1) of the *Public Service Employment Act*. In the case at hand, the employer, as a separate employer under the former *Act*, is governed by a different statutory regime.

[48] For the reasons stated above, I find that the grievor did not establish that the premature ending of his term employment constituted disguised discipline. Consequently, I am without jurisdiction to hear the grievance.

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

(The Order appears on the next page)

Order

[50] The grievance is dismissed.

April 12, 2006.

Léo-Paul Guindon,
adjudicator