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Citation: 2006 PSLRB 87

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MICHAEL MCQUAID

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
McQuaid v. Canadian Food Inspection Agency

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

REASONS FOR DECISION

Before: Ken Norman, adjudicator

For the Grievor: Dave Riffel

For the Employer: Richard E. Fader, counsel

Heard at Calgary, Alberta,
April 24 to 26, 2006.

Grievances referred to adjudication

[1] On February 21, 2005, Mike McQuaid, Senior Human Resources Advisor (PE-04), Western Region, filed two related grievances against the Canadian Food Inspection Agency (CFIA). First, he grieved a three-day suspension imposed on January 21, 2005, and received on January 24, 2005. Second, he grieved a termination of employment letter written a day later, on January 25, 2005, and received on January 28, 2005. Both grievances assert that the disciplinary action in question was “unfair, unreasonable and in bad faith”.

[2] 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*, these references to adjudication 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*").

Summary of the evidence

[3] From the employer’s perspective, this is a straightforward case. Over the course of two weeks in January of 2005, four letters (Exhibits E-6, E-8, E-10 and E-13) from Wayne Outhwaite, Director, Human Resources Operation Division, CFIA, directed the grievor to report for work. After the first direction was disobeyed, subsequent letters warned of discipline, then imposed it by way of a three-day suspension with a clear statement that a further failure to report to work “will result in … termination.”

[4] The first letter of January 11, 2005 (Exhibit E-6), advises that the harassment investigation report of Simkins and Associates was enclosed. The letter notes that the grievor’s harassment allegations against his supervisor, Pat Henderson, Manager, Human Resources (PE-06), Western Region, were not substantiated by this report. The letter then requires the grievor to return to work on Monday, January 17, 2005, and report to Ms. Henderson. This letter was followed by a voicemail message left on the grievor’s home phone from Mr. Outhwaite on January 13, 2005, advising that a package was on the way from him. At the end of the voicemail, Mr. Outhwaite left his office, home and cell phone numbers.

[5] The second letter (Exhibit E-8) from Mr. Outhwaite was dated January 17, 2005. It begins by rejecting the grievor’s faxed request of that same day seeking 10 working days to review the harassment investigation report. The letter asserts that “Your

review of the report and the requirement for you to return to work are two separate issues." It then reminds the grievor that, in a letter of June 25, 2004, Mr. Outhwaite went "beyond the call of duty" and offered leave with pay from June 29, 2004, until the completion of the final harassment investigation report. The letter expressed satisfaction with this report and directed the grievor to report for work the next day, on January 18, 2005. The letter concluded with the warning that failure to so report would be considered as an unauthorized absence subject to disciplinary action, up to and including termination. This letter was not actually received by the grievor until January 28, 2005. It was in the same envelope as his termination letter of January 25, 2005 (Exhibit E-15).

[6] On January 19, 2005, Mr. Outhwaite left a voicemail message for the grievor, rejecting a renewed request, faxed the previous evening, for a year's Personal Needs Leave, instructed the grievor to report to work the next morning and advised that there was a letter coming by courier confirming these messages.

[7] In the third letter, of January 19, 2005 (Exhibit E-10), Mr. Outhwaite justifies his denial of the grievor's request for Personal Needs Leave on the operational requirements ground that "we are in need of Human Resource Officers in the Western Area due to the BSE emergency crisis". The letter then states:

. . .

> *I realize that the reintegration into the workplace could potentially be difficult for all involved. Therefore, I am offering the services of a third party intervention or a mediator to restore a positive working relationship with your manager. I am also asking you to provide me with any suggestions that would potentially facilitate the restoration of a positive working relationship with your manager.*

. . .

[8] The letter then directs the grievor to report for work the next day, January 20, 2005, and warns that failure to do so will be subject to disciplinary action, up to and including termination. In conclusion, Mr. Outhwaite reminds the grievor of the Employee Assistance Program (EAP) and provides their 1-800 telephone number.

[9] The fourth letter from Mr. Outhwaite is dated January 21, 2005. It rehearses the facts from the first letter of January 11, 2005. It then rejects a further request for Leave Without Pay from Mr. McQuaid, received by fax on January 20, 2005, for the

same reasons given two days earlier. The letter imposes a three-day suspension for continued failure to report to work and orders the grievor to report to work on January 25, 2005. Then the letter states "Please note that failure to report for work as directed will result in the termination of your employment with the Agency." Mr. Outhwaite concludes his letter by reiterating his commitment "to arrange for the services of a third party intervention or a mediator to assist in the restoring of a positive working relationship with your manager."

[10] Finally, as promised in the fourth letter of January 25, 2005, Mr. Outhwaite terminated the grievor for failure to report to work as instructed.

[11] The grievor's testimony paints quite a different picture of what was going on in the dark days preceding his termination. His story reaches back to a fateful day in April 2003. The day was April 8, 2003. To say the least, for the grievor, that day contained a career-altering moment. At the conclusion of a regular staff meeting, Ms. Henderson asked him to remain in the room. She then told him to go and get the "B" file (Dr. "B" was a probationary veterinarian at a meat plant. The grievor had travelled to Manitoba and had made some recommendations with regard to Dr. "B"'s allegedly inappropriate behaviour with subordinates and female veterinarians.) On the grievor's return to the meeting room with the file, Ms. Henderson started in on him. She was upset because she had received a call from the Regional Director, in Winnipeg, saying that Dr. "B" was to be terminated. Her emotional rant at the grievor included throwing some of his "B" file into a waste basket. The grievor was absolutely flabbergasted. He had never before in his career been so abused. I gathered that he was shaken to the core by Ms. Henderson's tantrum.

[12] The grievor's grievance against Ms. Henderson's language and behaviour on April 8, 2003, was allowed by letter of June 18, 2003 (Exhibit G-2), from Fiona Spencer, Vice-President, Human Resources, CFIA. The letter asserts that "Ms. Henderson's tone and the action of throwing part of your file in the waste basket were inappropriate. She has expressed regret for this and has offered to apologize." Subsequently, she did apologize. However, the grievor's testimony was that, thereafter, things were never the same between him and Ms. Henderson. She would not communicate with him unless she had to.

[13] The next significant event was an e-mail from the grievor to Ms. Henderson, copied to Mr. Outhwaite, of February 2, 2004 (Exhibit G-3), accusing Ms. Henderson of revoking his cellular telephone in a demeaning manner. The e-mail concludes with the assertion that "this is one of a number of times that I have been harassed since the spring of last year and I must respectfully ask that it stop." Mr. Outhwaite stepped in at this point seeking specifics. The grievor objected on the ground that Ms. Henderson is a long-time personal friend of Mr. Outhwaite. By an e-mail of February 23, 2004 (Exhibit G-4), Mr. Outhwaite refuses to step away, explaining that he has nothing beyond a long-time professional relationship with Ms. Henderson, and reiterates his request for details as to the alleged campaign of harassment. The e-mail states that Mr. Outhwaite will be in Calgary the following week and seeks a meeting with the grievor. By a letter of that same day (Exhibit G-5), the grievor provided Mr. Outhwaite with a list of 10 items that he asks be considered as formal complaints under the CFIA's harassment policy. After much delay, and by the grievor's account, as a result of letters from his lawyer, the CFIA contracted with Simkins & Associates to conduct an investigation. And finally, on December 23, 2004, their final report was released to the CFIA.

[14] Simkins & Associates' final report was received by the grievor in the package covered by Mr. Outhwaite's first letter of January 11, 2005. On the evening of Thursday, January 13, 2005, the grievor picked the package up from his local postal outlet. His testimony was that he was very upset by his first glance at the final report. He just could not believe that none of his harassment complaints had been substantiated by the final report. He went to bed only to put in a sleepless night. From that point forward, for the ensuing 12 days that culminated in his termination, the grievor continued to be in an emotional state. He just could not come to terms with the looming prospect of returning to work for Ms. Henderson.

[15] In a letter faxed to Mr. Outhwaite on the evening of January 18, 2005 (Exhibit E-9), renewing his request for Personal Needs Leave, the grievor conveyed his feelings as follows:

> *Notwithstanding the findings of the Simkins report, I continue to believe that I was harassed by Ms. Henderson and I feel great reluctance in returning to work for her. I am concerned about retribution for the filing of my complaint. It would prove very stressful for both of us should I return in the near future. I know that because I well recall the stress*

> *that was present in the days before I commenced the current leave, this is especially true because of the nature of the work performed such as handling harassment complaints and advising on performance issues.*

[16] Finally, the grievor testified that he was very surprised by the three-day suspension letter, received on the morning of January 24, 2005. He thought that he had been negotiating with the employer. Not once, had any of Wayne Outhwaite's cordial telephone messages mentioned the word "discipline". The very notion of being disciplined came as a shock to the grievor's pride. He had only been disciplined once in his entire career. And, that was half a lifetime ago in his RCMP Training Depot days. The offence was failing to iron his running shoe laces.

[17] I conclude that the letter of January 19, 2005, warning of disciplinary action should he fail to report to work the next day had not been taken in by the grievor when he received it the afternoon of January 21, 2005. The grievor's faxed reply of January 22, 2005 (Exhibit E-14), shows that he had read it only as a rejection of his request of January 18, 2005, for Personal Needs Leave. The content of this fax confirms the grievor's point in testimony that he thought that he was in a negotiating mode with Wayne Outhwaite. It reads, in its entirety, as follows:

. . .

> *Dear Wayne:*
>
> *Yesterday afternoon I received your letter of January 19, 2005, wherein you deny my request for Personal Needs Leave. I am disappointed in your decision and find it unreasonable.*
>
> *I have returned all of your telephone calls, your letter however indicated that you have made other calls to me but have not left messages. I cannot respond to your messages if I am not aware of them. Please conduct further correspondence with me in writing rather than by telephone.*
>
> *Your proposed return to work date of January 24, 2004, is premature and unacceptable. I have not yet had the opportunity to review the report, or to obtain elaboration about the report from Simkins, or to obtain advice from medical and legal advisors or to thoroughly review what options I might have in this matter. I remain concerned about retaliation from Ms. Henderson for the filing of my harassment complaint against her and I feel that such retaliation would be even more likely because of my recent grievance.*

. . .

[18] There were two grievances filed with Mr. Outhwaite on January 20, 2005; one pertained to the final report and one to Mr. Outhwaite's denial of the grievor's Personal Needs Leave request.

Summary of the arguments

[19] The CFIA's position was first articulated by Ms. Spencer, Vice-President, Human Resources, in her October 27, 2005 (Exhibit G-32), reply to the two grievances at hand. This letter notes that the grievor was "directed in writing on four separate occasions to report for work or face disciplinary action, up to and including the termination of your employment for cause." The letter then points out that the grievor's case did not fall within any of the exceptions to the "obey now, grieve later" principle.

[20] Richard Fader's argument before me stood by the latter position. The grievor's excuses for failing to report to work were not based on the three exceptions to the "obey now, grieve later" principle. There was no foundation for them in terms of illegality, immorality or safety. With regard to the former stance, as I will explain in my reasons, the facts did not bear this out. Four written orders to report to work or face disciplinary action up to and including discharge simply were not delivered to the grievor. Nevertheless, Mr. Fader contended that, by the morning of January 24, 2005, the grievor had in hand a letter that left no room for doubt. That letter imposed a three-day suspension and explicitly stated that failure to report for work the next morning "will result in the termination of your employment".

[21] In support of this argument, Mr. Fader cited the following cases: *Budgel v. Treasury Board (Indian and Northern Affairs Canada),* PSSRB File No. 166-02-25555, (1994) (QL); *Kwan v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-27120, (1996) (QL); *Petrovic v. Treasury Board (Natural Resources Canada)*, PSSRB File No. 166-02-28216, (1998) (QL); *Pachowski v. Treasury Board (Revenue Canada – Customs and Excise),* PSSRB File No. 166-02-28543, (1999) (QL); *Pachowski v. Canada (Treasury Board),* [2000] F.C.J. No. 1679 and *Sainte-Marie v. Canada Customs and Revenue Agency,* 2006 PSLRB 30. The essence of these cases is captured in the most recent one, *Sainte-Marie*, where in paragraphs 135 and 136 one finds these statements:

. . .

> *[135] The employee was told in writing on several occasions to report to work or he would have to suffer the consequences.*
>
> *[136] The grievor preferred not to return to work in his position as long as the labour relations issues had not been settled. This was his choice and he must bear its consequences.*

. . .

[22] Dave Riffel, on behalf of the grievor, first submitted that the disciplinary process leading up to the discharge was simply unfair. The entire disciplinary process took place over the course of a very, very short period of time, in a context where Mr. Outhwaite should have realized that the grievor was unrepresented, emotional and not thinking clearly. Second, Mr. Riffel contended that Mr. Outhwaite acted in bad faith as he was too close to Ms. Henderson and was interviewed as part of the Simkins & Associates harassment investigation.

[23] On the unfairness issue, Mr. Riffel argued that the CFIA's published Discipline Policy, effective May 3, 2004, was violated by Mr. Outhwaite in a number of ways. Disciplinary Termination, at page 4, "should only be taken when other disciplinary actions have failed or are considered inadequate and when it is determined that the employee is no longer suitable for continued employment by reason of misconduct." In *Haydon v. Treasury Board (Health Canada),* 2002 PSSRB 10, it is stated that a principle of disciplinary action is that "the employer must apply progressive discipline". *Laboucane v. Treasury Board (Indian and Northern Affairs Canada),* PSSRB File Nos. 166-02-16086 to 16088 (1987) (QL), notes, in reporting the grievor's arguments, Mr. Riffel's contention that the *Taback* decision (Board File 166-2-13187 to 13191) supports the proposition that "The grievor should have had time to experience discipline prior to being discharged". This time for reflection was not afforded to the grievor. Nor was there a considered determination that he was no longer suitable for continued employment. In other words, in the language of arbitral doctrine, his rehabilitative potential was not considered (see *Mann v. Treasury Board (Transport Canada),* 2003 PSSRB 100 at para. 261). Further, under "Policy Requirements" the CFIA's Discipline Policy states that, at page 4, disciplinary action "includes a disciplinary interview where the employee is given the opportunity to explain his/her actions." In *Haydon*, it is noted that there was such a face-to-face meeting held with the grievor. At page 8 of the CFIA's Discipline Policy, under "Disciplinary Notification", he

drew my attention to the comments that a face-to-face meeting is preferable, and that mitigating circumstances and contributing factors should be taken into account.

[24] Finally, on the overarching principle of the duty of fairness owed to any employee facing termination of his employment, Mr. Riffel cited para. 45 of the recent judgment in *Pelletier v. Attorney General of Canada,* 2005 FC 1545, that "there is no doubt that there must be a duty to act fairly when a person's employment is at stake (*Knight v. Indian Head Sch. Div. No. 19…* at page 677) and that in those cases '[a] high standard of justice is required' (*Kane v. University of British Columbia,* [1980] 1 S.C.R. 1105 (1980) 110 D.L.R. (3d) 311, at paragraph 13)". According to para. 48, at a minimum the duty of fairness in such a case entails the right to be heard, Noel J. notes at para. 85 that "this means 'participatory rights' as explained by the Supreme Court of Canada in *Baker* so that the views and evidence of the affected person may be put forward fully and be considered by the decision-maker."

[25] As to how I might take into account the part that Mr. Outhwaite played in all of this, Mr. Riffel cited *Maan,* where, at para. 260, the conduct of a superior who picked on a grievor was taken into account as a mitigating factor.

[26] In rebuttal, Mr. Fader cited *Glowinski,* 2006 FC 78 (Kelen J.), at para. 40, adopting *Endicott,* 2005 FC 253 (Strayer D.J.) for the proposition that, generally speaking, Treasury Board or departmental policies are not legally binding unless the enabling statute requires that such a policy be issued. Therefore, I am not entitled to look to the CFIA's Discipline Policy in order to fault Mr. Outhwaite's process.

[27] In response to Mr. Riffel's entire procedural unfairness argument, Mr. Fader drew my attention to *Tipple,* [1985] F.C.J. No. 818 (Fed. Court of Appeal) for the contention that any such procedural unfairness was wholly cured by the hearing *de novo* before me in which the grievor had full notice of the allegations against him and full opportunity to respond to them.

Reasons

[28] The bedrock principle upon which this decision stands is the duty of fairness owed to an excluded senior Human Resources Advisor, such as the grievor. I accept Mr. Riffel's general argument from *Pelletier* in this regard.

[29] An element of the principle of the duty of fairness is set forth by the Supreme Court of Canada in *Knight v. Indian Head Sch. Div. No. 19,* and endorsed by Noel J. in *Pelletier* at para. 81:

. . .

> *In both the situation of an office held at pleasure and an office from which one can be dismissed only for cause, one of the purposes of the imposition on the administrative body of a duty to act fairly is the same, i.e., enabling the employee to try to change the employer's mind about the dismissal.*

. . .

[30] By all accounts, the grievor was afforded no such opportunity. And, on this question, the hearing before me has no capacity to wholly cure, as it was put in *Tipple,* that breach of the duty to act fairly.

[31] Backing up a step, I want to pay close attention to the alleged progressive disciplinary process that led to the discharge. It is not, even by half, what Ms. Spencer made it out to be at para. 17.

[32] First, the letter of January 11, 2005, covering the Simkins & Associates final report, serves no disciplinary warning. Second, the letter of January 17, 2005, goes astray and is only received by the grievor after his termination. At best, that leaves the letter of January 19, 2005, received on the afternoon of January 21, 2005, as the very first time that the grievor was notified that he faced disciplinary action if he failed to report to work.

[33] However, as I have noted in para. 16 of this decision, it is clear to me that the grievor missed this signal. In his emotional state of shock, he was focussed on what he thought was a negotiation about his request to be allowed to stay away from the workplace, without pay, on a Personal Needs Leave rather than again face the wrath of Ms. Henderson. This distinguishes this case from *Pachowski* where, at para. 71, Joseph Potter expresses satisfaction that Ms. Pachowski knew the dire consequences of failing to report to work. In *Pelletier,* Noel J. comments, at para. 66, that the employee must grasp the seriousness of the situation "Otherwise, the employee's right to be made aware of the reasons for the employer's dissatisfaction and to answer those reasons will be seriously affected."

[34] In my opinion, the grievor's faxed letter of January 22, 2005, quoted in full at para. 16, was surely a signal to Mr. Outhwaite that the grievor simply did not grasp the seriousness of the situation. This is bolstered by previous faxes from the grievor of January 18 and 20, 2005, that had sounded alarms first about just how "*very* stressful" [emphasis added] it would be for the grievor to return to work under Ms. Henderson in the near future and, second, that it would be "especially stressful for me to work for her during the course of the grievance process."

[35] Finally, in the grievor's faxed letter of January 22, 2005, there is a plea for more time, in part to obtain medical advice. Surely these three faxes signal that the grievor's focus is on his health and nothing else. In all fairness, Mr. Outhwaite should then have picked up the telephone so that the grievor would be left in no doubt about the jeopardy that he was in. Mr. Outhwaite's failure to so act removes the letter of January 19, 2005, as a legitimate first step in the disciplinary process upon which the CFIA may rely before me.

[36] This brings me to the morning of Monday, January 24, 2005, when, finally Mr. Outhwaite's three-day suspension letter of January 21, 2005, brought home to the grievor that he was caught up in the disciplinary process. He now had precious little time to digest, reflect upon or seek counsel about his dire straits. He had no more than the rest of that day and that night to experience the progressive disciplinary process, reflect on his alleged misdeeds, and contemplate his certain fate the next morning if he failed to report for work under Ms. Henderson. This was even more intense than the "sudden flurry" of events that preceeded the unjust dismissal in *Pelletier,* at para. 57, where "Between the telephone call from the representatives of the Privy Council and the dismissal, there elapsed only one weekend (two days)".

[37] In terms of the elements of the arbitral doctrine of progressive discipline, I consider that all of Mr. Riffel's points, summarized at para. 21, are well taken. This does not mean that I am blind to the instruction of the Federal Court in *Glowinski* and *Endicott,* and nevertheless, stand on the proposition that the CFIA's Discipline Policy is legally binding. However, it does mean that I look to it as a fair reflection of the requirements of progressive discipline. For a similar approach, see *Mungham* 2005 PSLRB 106, at para. 31, where adjudicator Ian R. Mackenzie looked to an overtime policy document, published by the employer, as reflecting the common understanding of the parties as to what the equitable allocation of overtime means.

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

(The Order appears on the next page.)

Order

[39] For all of the above reasons, the grievance against the three-day suspension is sustained in part (PSSRB File No. 166-32-36738). In its stead, I substitute a written reprimand. The grievance against the termination is sustained, in full (PSSRB File No. 166-32-36739).

[40] The grievor is to be reinstated forthwith, with all due reinstatement of or compensation for his lost salary and benefits to date. Such reinstatement is to proceed under a return-to-work protocol to be facilitated by a neutral third party, to be agreed between the parties, and to be hired at the expense of the CFIA. I will remain seized of these remedies for 90 days in order to resolve any differences that may arise between the parties as to their implementation.

July 13, 2006.

Ken Norman,
adjudicator