Date: 20070119

File: 166-34-36595

Citation: 2007 PSLRB 12

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MARY BALL

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Ball 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: Ken Norman, adjudicator

For the Grievor: Krista Devine, Public Service Alliance of Canada

For the Employer: Simon Kamel, counsel

Heard at Saskatoon, Saskatchewan,
September 6, 2006.
(Written submissions filed October 3 and 31 and November 10, 2006.)

I. Grievance referred to adjudication

[1] By a grievance dated January 6, 2005, Mary Ball challenged the utilization of statistics in assessing performance in her "Employee Performance Management Report" for the period of September 1, 2003, to August 31, 2004. The material corrective action sought was to delete from the supervising manager's comments a number of statistical observations.

[2] The collective agreement applicable to this grievance is the one signed by what is now the Canada Revenue Agency and the Public Service Alliance of Canada on December 12, 2004, for the Program Delivery and Administrative Services Group bargaining unit ("the collective agreement").

[3] 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.

[4] On September 21, 2005, the grievor referred her grievance to adjudication, on the basis of article 58 of the collective agreement.

[5] 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*, R.S.C., 1985, c. P-35 ("the former *Act*").

II. Summary of the arguments

[6] At the outset of the hearing, the employer rose to make a jurisdictional objection. At the conclusion of argument on the question of whether this objection might be heard in the absence of any evidence, the parties came to an accord. It was agreed that argument could proceed, by way of written submissions, without evidence, on the following question:

> *Whether subclause 58.01(a) of the Program Delivery and Administrative Services Group collective agreement (expiry date: October 31, 2007) provides jurisdiction to the Board* [*sic*] *to review a performance evaluation based on the three criteria described therein; that statistical information or standards do not reflect how well the employee has performed the employee's assigned tasks.*

Clause 58.01(a) of the collective agreement reads as follows:

> ***ARTICLE 58***
>
> ***EMPLOYEE PERFORMANCE REVIEW AND EMPLOYEE FILES***
>
> ***58.01*** *For the purpose of this Article,*
>
> *(a) a formal assessment and/or appraisal of an employee's performance means any written assessment and/or appraisal by any supervisor of how well the employee has performed the employee's assigned tasks during a specified period in the past;*

A. <u>For the employer</u>

[7] The submission of the employer is that there is nothing in clause 58.01(a) of the collective agreement, a mere definition section, which alters the line of decisions in which adjudicators operating under the former *Act* have established that performance appraisals fall within the purview of management; performance appraisals are not subject to review. A generation ago, *Veilleux v. Treasury Board (Public Service Commission)*, PSSRB File No. 166-02-11370 (19820729), at 14, ruled that an adjudicator "... cannot take it upon himself to decide in the employer's stead on a performance rating for an employee, since this is the right of the employer under section 7 of the Financial Administration Act." Most recently, *Bahniuk v. Canada Revenue Agency*, 2005 PSLRB 177, asserted, at paragraph ¶ 13, that the case law under the former *Act* is clear that an adjudicator does not have jurisdiction to review a performance appraisal as such. At ¶ 63, this point is reiterated with the proviso that an extremely limited jurisdiction might arise out of the collective agreement. In *Bahniuk*, the adjudicator took jurisdiction only on the narrowly restricted issue of bad faith.

[8] Reference was also made to *Largess v. Treasury Board (Transport Canada),* PSSRB File Nos. 166-02-17666 and 17667 (19881207), which ruled, at 19-21, that an adjudicator had no jurisdiction to review a performance evaluation, as such a review did not entail a question of interpretation or application of a collective agreement or arbitral award.

[9] The employer submitted that, on this footing, the grievance before me is fatally flawed because it does not raise a question of interpretation or application with regard to clause 58.01(a) of the collective agreement, for that clause does no more than define

what a formal assessment or appraisal of an employee's performance means. So decided *Ahad et al. v. Treasury Board (Department of National Defence),* PSSRB File Nos. 166-02-15840, 16038 and 16233 (19870126), with regard to an identical clause. Of particular relevance to this matter, at 23, *Ahad* stated that this definitional clause could not base a reference under the provisions of paragraph 91(1)(*a*) of the former *Act* for ". . . an employee who was dissatisfied with the contents of a performance evaluation report. . . ."

[10] Subsequently, *Raymond et al. v. Staff of the Non-Public Funds, Canadian Forces,* PSSRB File Nos. 166-18-20105 to 20107 (19910211), at 15-16, adopted the comment in *Canada Post Corporation v. Public Service Alliance of Canada* (19950815), unreported, that an article in a collective agreement that is merely a definition ". . . should not (absent bad faith) form the basis of substantive, and significant, rights. . . ."

[11] With regard to the purpose and use of a definition provision, *Denike v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14264 (19831107), para 15, made the point that a definition article ". . . can only serve as an aid in the interpretation of a substantive provision(s) of the collective agreement. . . ."

[12] In the alternative, the employer submitted that, even if I accept the grievor's contention that clause 58.01(a) of the collective agreement was contravened, I am still without jurisdiction. The logic here is that, if what the grievor is saying is accepted, then it follows that there was no formal assessment. If there was no formal assessment, then clause 58.01(a) of the collective agreement does not apply at all, as that clause is the entry door identified by the grievor to the application of the collective agreement.

B. <u>For the grievor</u>

[13] The response of the grievor to the employer's argument that a challenge to the content of a performance appraisal is not adjudicable is that the grievance here is not about that. It is lodged against the manner in which the performance evaluation was conducted. Specifically, the argument here is that the evaluation was not based on Ms. Ball's assigned tasks as called for in clause 58.01(a) of the collective agreement but rather on arbitrary external statistical measures and quotas. Support for the proposition that an adjudicator may consider challenges to a performance evaluation process on a broader basis than bad faith or discrimination is found in a comment in

Ahad, at 22, that were the written assessment done by someone other than a supervisor or were it to fail to assess how well the employee has performed his assigned tasks during a specified period, an adjudicator would have jurisdiction. In addition, *Bahniuk* notes, at ¶ 14, that an adjudicator does have the limited jurisdiction to examine whether ". . . the conditions established in the . . . Guidelines . . . ." for eligibility were met.

[14] Further, what is in issue here is a dispute about interpretation of the collective agreement. *Resi-Care Cape Breton Association v. Canadian Union of Public Employees, Local 3008* (1996), 58 L.A.C. (4th) 46, at 53, supports the proposition that ruling on such competing views as to the meaning of the collective agreement is a commonplace arbitrable issue. Accordingly, the employer's contention that clause 58.01(a) of the collective agreement is a definition section that does not establish a substantive right is no barrier to my jurisdiction under paragraph 92(1)(*a*) of the former *Act* to interpret a provision of a collective agreement or an arbitral award.

C. <u>Employer's rebuttal</u>

[15] In rebuttal, the employer submitted that the grievor's argument is an attempt to achieve indirectly what cannot be achieved directly by trying to characterize clause 58.01(a) of the collective agreement as a process provision when it plainly is nothing more than a definition section. The cases relied upon by the employer demonstrate that a definition section provides no substantive rights.

[16] The *Bahniuk* decision proceeded only on the limited jurisdictional context of bad faith or discrimination.

[17] The distinction between content and process simply does not hold up on the facts of this case. Ms. Ball's grievance specifically requests that an adjudicator remove all numerical information from her performance appraisal. In short, what is being sought from an adjudicator is a manipulation of the content of the performance appraisal.

[18] *Resi-Care Cape Breton Association* has no application to this matter, as it was situated in a very different context where the arbitrator faced no definition of grievance in the collective agreement and, at 50, the arbitrator indicated that ". . . [i]n this case, however, because of the way in which the agreement is drafted, I think it is

advisable as well to consider certain provisions of the *Trade Union Act* [of Nova Scotia]."

III. Reasons

[19] It is common ground between the parties that performance appraisals fall within the purview of management and are not *per se* subject to review in adjudication (see *Veilleux*). Thus, any issue with regard to the content of a performance appraisal is not adjudicable (see *Ahad*). However, if a performance review is challenged on the footing of bad faith or discrimination, then there is an extremely limited jurisdiction on the part of an adjudicator (see *Bahniuk*).

[20] The jurisdictional question that I am invited to answer is whether clause 58.01(a) of the collective agreement might be a similar source of extremely limited adjudicatory jurisdiction based on the criteria set out in that clause. I grant that *Ahad*, at 22, comments that were the written assessment done by someone other than a supervisor or were it to fail to assess how well the employee has performed his assigned tasks during a specified period, an adjudicator would have jurisdiction. And, I further note that *Bahniuk,* at ¶ 14, states that an adjudicator does have the limited jurisdiction to examine whether certain conditions of eligibility set out in the Guidelines were met. However, I read these comments as speaking to the core jurisdictional ground of bad faith. I am not persuaded by the grievor's contention that they support the proposition that a definition clause of the collective agreement can, in and of itself, found adjudicatory review of a performance evaluation in the name of flawed process (see *Denike* for a ruling that a definition article can only serve as an aid in the interpretation of a substantive provision of a collective agreement; *Raymond* subsequently makes plain a similar view by endorsing the doctrine set out in *Canada Post Corporation* that a definition clause in a collective agreement should not (absent bad faith) form the basis of substantive rights).

[21] I have been charged with determining whether the definitional language of clause 58.01(a) of the collective agreement, in and of itself, provides me with jurisdiction within the statutory mandate of paragraph 91(1)(*a*) of the former *Act* to adjudicate the propriety of the use of statistical information or standards in a performance review. Given the above-referenced case law under the former *Act*, the quite different statutory and collective agreement language informing the private sector award in *Resi-Care Cape Breton Association* is of no assistance.

[22] Finally, as I am not persuaded to assume jurisdiction in this case, I see no need to consider the employer's alternative submissions.

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

(The Order appears on the next page)

IV. Order

[24] I sustain the employer's jurisdictional objection and this grievance is dismissed.

January 19, 2007.

Ken Norman,
adjudicator