Date: 20070511

File: 166-02-36340

Citation: 2007 PSLRB 47

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

SIMON CLOUTIER

Grievor

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
Cloutier v. Treasury Board (Department of Citizenship and Immigration)

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

REASONS FOR DECISION

Before: Jean-Pierre Tessier, adjudicator

For the Grievor: Michel Morissette, counsel

For the Employer: Raymond Piché, counsel

Heard at Montréal, Quebec,
January 23 to 26, 30 and 31, May 3 to 5 and 8 to 12, October 31 to November 3,
and, specifically for this file, July 10 to 13, 2006.

Grievance referred to adjudication

[1] Simon Cloutier ("the grievor") works for the Department of Citizenship and Immigration ("the employer") and holds a position at the PM-03 group and level. In 1999, he was President of Local 10405 of the Canada Employment and Immigration Union, a component of the Public Service Alliance of Canada (PSAC).

[2] On June 5, 2003, the grievor was called to a disciplinary meeting and his employment was terminated on July 8, 2003.

[3] The grievor filed a grievance on July 11, 2003 alleging that the meeting on June 5, 2003 was part of the disciplinary process and that the employer had denied him the presence of a union representative at that meeting, in violation of article 17 of the collective agreement between the Treasury Board and the PSAC, Program and Administrative Services (all employees).

[4] The grievance was referred to adjudication on June 29, 2005, and the hearing took place in the summer of 2006. The reason for the lapse between the grievance's filing and its referral to adjudication is that complaints were filed by the grievor under section 23 of the *Public Service Staff Relations Act*, which the Board had to handle and close.

[5] 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*, R.S.C., 1985, c. P-35.

[6] At the hearing, the parties referred to other grievances concerning the same parties. The grievor filed a grievance similar to this one, contesting the lack of union representation at a meeting with the employer on July 3, 2003, in Public Service Staff Relations Board (PSSRB) File No. 166-02-36343. Another grievance denounced the fact that he had not received 24 hours' notice for the July 3, 2003 meeting, in PSSRB File No. 166-02-36342. In PSSRB file No. 166-02-36341, the grievor denounced the fact that he had not been informed of his disciplinary file's content prior to the termination of his employment on July 8, 2003.

[7] The evidence compiled in this case was included in the above-mentioned files, and vice versa, during the hearings into those grievances. The grievor maintained that all of these grievances were related to the disciplinary process connected to the termination of his employment and had to be considered at the hearing into it (PSSRB File No. 166-02-34652).

Summary of the evidence

[8] The grievor indicated that on June 2, 2003, he was called to a disciplinary meeting to be held on June 4 or 5, 2003 (Exhibit F-4). On June 4, 2003, he called Dianne Clément, Acting Director at the Montréal office of Inland Services, Department of Citizenship and Immigration, to request her questions in writing instead of having a disciplinary hearing.

[9] Ms. Clément refused to proceed with the written questions and asked the grievor to attend a disciplinary meeting on June 5, 2003 at 08:30 to discuss his late arrival on June 2, 2003. The letter indicated that the grievor could invite a union representative (Exhibit F-5).

[10] On June 5, 2003, the grievor informed Ms. Clément that he could not be represented and that it would be best to communicate in writing. The grievor then indicated that he wanted to be represented by Janina Lebon, National Vice-President. She worked in Ontario and he had not been able to reach her by the evening of June 4, 2003.

[11] The grievor said that after he indicated the name of his representative, Ms. Clément told him that, as far as she knew, representation would be provided by a union representative from Local 10405. There was a break, and then the meeting continued.

[12] The grievor declared that during the break he tried to reach a union representative, but he was not successful.

[13] Ms. Clément decided to proceed with the disciplinary meeting with the grievor. She questioned him about his late arrival on June 2, 2003, and he replied that he had woken up late. Resuming his testimony, he indicated that on July 8, 2003, his employment had been terminated and that the letter of termination had mentioned his late arrival on June 2, 2003 (Exhibit F-13). In cross-examination, the grievor indicated

that no disciplinary measures had been taken against him at the meeting, but that Ms. Clément had told him that she would be getting back to him.

[14] The grievor declared that he did not know who the local union representatives were before the June 5, 2003 meeting, but that the employer had indicated that the union had sent a memo in November 2002 containing the names of the local executive (Exhibit E-3).

[15] The employer called Ms. Clément to testify. The grievor had returned to work in May 2003, and Julie Thibodeau was his supervisor.

[16] On June 2, 2003, when her assistant told her that the grievor had notified management of his late arrival, Ms. Clément asked to meet with him to discuss it and to remind him of the objectives of compliance with the work schedule.

[17] Afterwards, Ms. Clément went over the chronology of events after June 2, 2003, in particular the grievor's request to communicate in writing, the meeting's postponement, the invitation to a meeting set for June 5, 2003 at 08:30 and the grievor's statement that he had been unable to reach Ms. Lebon to represent him.

[18] Ms. Clément indicated that she had informed the grievor that Ms. Lebon was not a union representative designated by the PSAC to represent CIC employees in the Quebec Region. She asked him to return to his office. A few minutes later, she asked the grievor to attend the meeting.

[19] Ms. Clément confirmed that she had indicated to the grievor that representation would be provided by representatives from Local 10405, and had shown him a document that the employer had received in 2002 (Exhibit E-3).

[20] Ms. Clément explained that she proceeded with the meeting because she wanted to speak directly to the grievor and hear what he had to say about his late arrival on June 2, 2003.

[21] In cross-examination, Ms. Clément was asked whether on June 5, 2003, she had taken into consideration the rules on conducting an administrative review (disciplinary). This is a 22-page document prepared by Human Resources Development Canada (Exhibit F-15).

[22] Ms. Clément replied that she had no idea whether or not she had referred to that document.

Summary of the arguments

[23] The grievor's union representative pointed out that on June 5, 2003 the employer had talked to him about his late arrival. According to him, this was a disciplinary hearing, and the grievor was entitled to have a representative. Clause 17.02 of the collective agreement would have applied to this meeting. This provision reads as follows:

> ***17.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one (1) day's notice of such a meeting.*

[24] Even though there was no disciplinary sanction on June 5, 2003, the June 2, 2003 late arrival is mentioned in the reasons listed in the letter of termination that was given to the grievor on July 8, 2003 (Exhibit F-13).

[25] According to the grievor's representative, the right to representation is a fundamental right, and any evidence collected at a meeting where there is no representation must be dismissed by the adjudicator. A disciplinary measure based on such evidence should also be dismissed.

[26] The grievor's representative referred to a document that dealt with the right to union representation. This document compiles different extracts from the doctrine and judgments dealing with this issue. I will refer to it later in the reasons.

[27] For its part, the employer pointed out that it was up to the grievor to contact a union representative. However, regarding representation at meetings, the collective agreement provides that the PSAC has the right to name employees as representatives, and that it is the one that provides the names to the employer. The applicable provisions of the collective agreement read as follows:

> ***13.01*** *The Employer acknowledges the right of the Alliance to appoint or otherwise select employees as representatives.*

> ***13.02*** *The Alliance and the Employer shall endeavour in consultation to determine the jurisdiction of each representative, having regard to the plan of organization, the number and distribution of employees at the work place and the administrative structure implied by the grievance procedure. Where the parties are unable to agree in consultation, then any dispute shall be resolved by the grievance/adjudication procedure.*
>
> ***13.03*** *The Alliance shall notify the Employer in writing of the name and jurisdiction of its representatives identified pursuant to clause 13.02.*

[28] Before the meeting on June 5, 2003, the grievor should have made the necessary efforts to find a local representative. At the meeting, he did not make any confessions that could have been used for subsequent measures. Even if the adjudicator found that the meeting had been unlawful, the sanction would at most have involved striking a confession or an item collected at the meeting, and not overturning the employer's decision about the termination of employment.

Reasons

[29] The question to be settled is whether the grievor was entitled to representation at the June 5, 2003 meeting, and to assess the consequences.

[30] The grievor was officially notified on June 2, 2003 that he was being invited to a disciplinary meeting to be held on June 4 or 5, 2003. He wanted the communication to occur in writing rather than holding a meeting. Ms. Clément turned down this request and set the meeting for June 5, 2003.

[31] The grievor only attempted to reach Ms. Lebon in the evening of June 4, 2003. Ms. Clément indicated that he had to contact the representatives chosen by the PSAC.

[32] On this point I believe that the employer's decision was right. Clause 13 of the collective agreement confirms that the PSAC is entitled to designate employees as representatives.

[33] Clauses 13.02 and 13.03 of the collective agreement provide for consultation on jurisdictions based on the plan of organization, the distribution of employees and the work places. It is only when the parties are unable to agree that grievances are to be resolved by the grievance/adjudication procedure.

[34] The evidence does not support the fact that there was disagreement between the employer and the union. It appears that the employer based itself on the union document (Exhibit E-3), which states as follows:

> [Translation]
>
> . . .
>
> *. . . from now on, you may contact your union leaders on any union matter, such as . . . the application of the agreement, representation, accompaniment . . .*
>
> . . .

[35] In *Dodier v. Treasury Board (Employment and Immigration),* PSSRB File No. 166-02-14640 (19851016), the adjudicator states as follows:

> . . .
>
> *Clause 8.01, the first clause in the general article entitled Appointment of Representatives, states the following:*
>
> > The Employer acknowledges the right of the Alliance to appoint employees as Representatives.
>
> *In article 2 of the agreement, an "employee" is defined as "a person who is a member of the bargaining unit".*
>
> *In light of the above definition, clause 8.01 could therefore be interpreted as meaning that the employer acknowledges the right of the Alliance to appoint as a representative any person who is a member of the bargaining unit. This interpretation is reinforced by clause 8.04, which reads as follows:*
>
> > A representative shall obtain the permission of his immediate supervisor before leaving his work to investigate with fellow employees complaints of an urgent nature, to meet with local management for the purpose of dealing with grievances and to attend meetings called by management. Such permission shall not be unreasonably withheld. Where practicable the Representative shall report back to his supervisor before resuming his normal duties.
>
> . . .

[36] This interpretation appears completely logical to me. Clause 13.02 speaks of employees' work places. It would not be very practical for an employee from Montréal to choose to be represented by someone from Vancouver, for instance.

[37] The grievor did not demonstrate that he made the necessary efforts to contact someone who was available to be his representative.

[38] While the absence of representation at the June 5, 2003 meeting is largely the grievor's responsibility, the employer did decide to proceed with the meeting. The employer had indicated that the meeting was disciplinary. It did not demonstrate that it was urgent that the meeting be held on June 5, 2003 and, in view of the exchanges with the grievor in the days leading up to it, the employer could have given him more time to find a local union representative. I have to say that the employer held such a meeting without any union representation and that this was in violation of article 17 of the collective agreement.

[39] The grievor's representative maintained that the breach of the right to representation rendered the disciplinary process null and void. On this point, he referred to the following paragraph in *Evans v. Treasury Board (Employment and Immigration Canada),* PSSRB File No. 166-02-25641 (19941021):

. . .

> *The right to representation in such circumstances is a substantive one whose breach cannot be cured at some later date by hearing de novo. Unlike* Tipple *(Federal Court of Appeal A-66-85), this case is involved with more than simple procedural fairness. Given the nature and purpose of such rights, they ought to be interpreted liberally for the benefit and protection of the employee.*

. . .

[40] To decide on the consequences of the absence of representation at a disciplinary meeting, I think it is important to take into consideration the content of the meeting and the circumstances surrounding it.

[41] The evidence proves that no disciplinary measure was imposed at this meeting. The meeting was about an established fact: the grievor's late arrival on June 2, 2003. There was no question of getting confessions or other admissions from him, only an explanation for his absence.

[42] The grievor first attempted to have the meeting cancelled and proposed communicating in writing. He indicated that on the very morning of the meeting he had not been able to reach the person he wanted as his representative.

[43] At the meeting, the grievor indicated that he had arrived late because he had woken up late that morning.

[44] It is true that the June 2, 2003 late arrival is a question of fact. The employer deems that the grievor failed to provide a valid reason for his late arrival. This is its version of the situation. The presence of a union representative might have enabled the grievor to expand further on the reason for his late arrival.

[45] All things considered, I do not believe that this constituted irreparable harm because there were other occasions, including the grievance hearing before the adjudicator, when the grievor had the opportunity to provide all the explanations surrounding his late arrival. On this point, I refer to *Tipple v. Canada (Treasury Board),* [1985] F.C.J. No. 818 (FCA)(QL):

. . .

> *Assuming that there was procedural unfairness in obtaining the statements taken from the Applicant by his superiors (an assumption upon which we have considerable doubt) that unfairness was wholly cured by the hearing de novo before the Adjudicator at which the Applicant had full notice of the allegations against him and full opportunity to respond to them. In particular, it was no error of law for the Adjudicator to give such weight as he thought right to those statements which were, in our view, properly admitted in evidence by him. The section 28 application will be dismissed.*

. . .

[46] However, in the remainder of paragraph 4 of the letter of dismissal, the employer referred to other statements that the grievor made at the June 5, 2003 meeting, to the effect that he was not given any disciplinary measures and that he did not remember his supervisor reminding him to comply with the work schedule.

[47] With respect to these items, the grievor did not provide any witness to contradict, give a nuance to or expand on the employer's statement. In this sense, I believe that these statements cannot be admitted as evidence in later proceedings, such as the termination of employment on July 8, 2003.

[48] The July 8, 2003 letter of termination refers to several other elements, including:

- communication with the immediate supervisor;
- taking an excessively long break on May 13, 2003;
- the communication of June 4, 2003;
- attire on June 25, 2003;
- taking an excessively long break on July 2, 2003; and
- the incidents of July 3, 2003.

[49] The grievance filed by the grievor is worded as follows:

> [Translation]
>
> *I contest the employer's decision on June 5, 2003 to deny me the presence of a union representative during the disciplinary hearing held on that day, in contravention of article 17 of the Collective Agreement.*
>
> *That the entire disciplinary process be ruled invalid. Compensation and invalidation.*

[50] This grievance was filed on July 11, 2006 after the termination of employment on July 8, 2003. I understand that the grievor is asking that the entire disciplinary process be deemed invalid and void, which logically refers to the process related to the termination of his employment.

[51] The termination of his employment relates to several reasons, only one of which pertains to the June 5, 2003 meeting. Thus, I see no reason to invalidate the entire disciplinary process and all of the reasons for the termination given the contents of the termination letter of July 8, 2003, which go well beyond the facts related to the June 5, 2003 meeting.

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

(The Order appears on the next page)

Order

[53] The grievance is allowed in part.

[54] The grievor was entitled to be accompanied by a union representative at the June 5, 2003 disciplinary meeting.

[55] In light of the evidence presented, the employer's failure to observe this obligation did not invalidate the entire disciplinary process. However, the statements that the grievor made at this meeting regarding his recollection about having been given disciplinary measures or about his supervisor having reminded him to comply with the work schedule cannot be used against him in later proceedings.

May 11, 2007.

P.S.L.R.B. Translation

Jean-Pierre Tessier,
adjudicator