Date: 20070501

File: 566-34-260

Citation: 2007 PSLRB 43

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

SHERRY STEVENSON

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Stevenson v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Herself

For the Employer: Victoria Yankou, counsel, and
Paula Warnholtz, Canada Revenue Agency

Heard at Toronto, Ontario,
January 29 to 31, 2007.

I. Individual grievance referred to adjudication

[1] Sherry Stevenson ("the grievor") is an excise tax auditor with the Canada Revenue Agency ("the employer"). She grieved a letter from the employer allegedly terminating an assignment to the Barrie, Ontario, Tax Services Office (TSO) and requiring her to report to the Toronto North TSO. She denies that she was on assignment to the Barrie TSO.

[2] The grievance details are as follows:

. . .

> *I grieve that the letter sent to me, dated February 24, 2005, regarding my status as an employee, has no basis in fact. I was never on assignment . . . As of October 4, 1999, I became a substantive AU-03 located in the Barrie office. There has never been any documentation to support a claim that I was on assignment to the Barrie office.*

. . .

[3] As corrective action, the grievor requested that the letter be rescinded and that she continue to work out of, and report to, the Barrie TSO.

[4] In her reference to adjudication she alleges that the actions of the employer are disciplinary.

II. Preliminary matters

[5] In a letter dated May 1, 2006, the employer objected to the jurisdiction of an adjudicator to hear this matter. The employer alleged that the grievance pertains to the location of the grievor's substantive position and does not relate to disciplinary action resulting in termination, demotion, suspension or financial penalty. The parties were informed that the issue of jurisdiction would be dealt with at the commencement of the hearing.

[6] At the commencement of the hearing, the employer submitted that I should determine the jurisdiction question without hearing evidence. The grievor alleged that the actions of the employer constituted disguised discipline. After hearing the submissions of both parties, I ruled that there were material facts in dispute and that evidence would be required in order to come to a conclusion on those material facts.

[7] At the hearing, the employer also argued that the grievance, as written, did not support the claim of disguised discipline. It was the employer's submission that I was therefore without jurisdiction to hear the grievance. The employer referred me to *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.).

[8] The grievor argued that I did have the jurisdiction to hear her grievance and referred me to *Gingras v. Treasury Board (Citizenship and Immigration Canada)*, 2002 PSSRB 46.

[9] I ruled that the grievance, as worded, was sufficient to allow the hearing to proceed on the jurisdictional question. In my view, an adjudicator should take a broad approach in interpreting grievance language. In the interests of good labour relations, an overly legalistic approach to grievance language runs the risk of not allowing the real issues in the workplace to be addressed. This view is supported by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42:

. . .

> *68 . . . it is important to acknowledge the general consensus among arbitrators that, to the greatest extent possible, a grievance should not be won or lost on the technicality of form, but on its merits. . . .*
>
> . . .
>
> *69 . . . These cases reflect the view that procedural requirements should not be stringently enforced in those instances in which the employer suffers no prejudice. It is more important to resolve the factual dispute that gives rise to the grievance.*

. . .

[10] Although I agree that the grievance language could have been clearer, what was being grieved and the connection to alleged disguised discipline are clear. The employer failed to demonstrate that it would suffer any prejudice as a result of proceeding. Accordingly, I dismissed the employer's objection.

III. Summary of the evidence

[11] An order excluding witnesses was granted. The grievor testified, and there were three witnesses for the employer.

[12] The grievor testified that she started working at the Barrie location of the Toronto North TSO in February 1990. At that time, the Barrie office was a sub-office of the Toronto North TSO. Barrie is approximately 94 kilometres from the other office of the Toronto North TSO, which is in North York. The grievor lives a short distance from the Barrie office.

[13] The grievor was appointed to an excise tax auditor position at the AU-03 group and level in September 1999. The competition poster (Exhibit G-3) did not indicate that the North York office was being staffed - it simply referred to the Toronto North TSO. The appointment letter (Exhibit G-4) does not specify the work location. She was initially appointed to an acting position at the Barrie office as a result of this competition. The grievor testified that she did not request to be assigned there. She testified that there was no mention in the documents that she received that the position in Barrie was considered to be an assignment. She testified that she was still given all the rights and benefits as if her substantive position was in Barrie. She did not receive an assignment agreement. She continued to receive travel costs for any trips to the North York office. She continued to report to the same team leader. The cost centre code for her travel costs remained the Barrie office code.

[14] Michael Yee, Senior Manager, Verification and Enforcement at the Toronto North TSO in the fall of 1999, testified that he did have a conversation with the grievor about the letter of offer. He testified that he tried to accommodate her wish to stay at the Barrie office by agreeing to let her finish the work that she was doing. He drafted an email summarizing their conversation a week after it occurred. He copied that email to Diane C. Emmett, Assistant Director, Verification and Enforcement of the Toronto North TSO. He summarized the conversation that he had with the grievor as follows (Exhibit E-2):

. . .

> *I asked her what the problem was re the offer letter. She had wanted a relocation clause inserted in case she ever got stuck in North York and decided to move nearer to the Office. However, she was tired of the run around from HR and the ADVE and had signed/accepted and returned the letter yesterday. I explained, in my opinion, that the HR relocation rules would apply regardless of whether any clause was put in the original offer letter.*

> *We then discussed her AU3 WIP. Her estimated completion date of same was March 31/2000. I advised her that she would be offered the Excise Tax TA assignment in Barrie then, but reminded her that the position and assignment would disappear when the new Barrie building was completed. I reiterated that she continued to be on assignment in Barrie but her substantive position was in North York. When the new Barrie office was to be staffed, she had to compete with any other AU3 in North York wanting to work there. She had no guarantee of getting a position there. She agreed with this fact.*
>
> *I advised her that Peter Evans would continue to be her Team Leader, he would prepare her Performance Reviews, and that Barrie was her office base for travel claim purposes.*
>
> . . .

[15] The grievor testified that she had no recollection of this conversation, although she stated that she had no reason to doubt Mr. Yee's recollection. Ms. Emmett testified that her assistant advised her that the grievor had concerns about the appointment and that she would like to get assigned to Barrie (Exhibit E-3). The grievor did recall a conversation with David Rice (the manager who took over from Mr. Yee) about her substantive position being at the North York office.

[16] Mr. Yee testified that an assignment agreement was not prepared for the grievor. He stated that such agreements were not always prepared for employees. Ms. Emmett testified that it was not normal to provide assignment agreements when the auditor was at the same group and level and assigned to the same type of job. Assignment agreements are provided on request from an employee or if the assignment is to a different type of job at the same group and level.

[17] On April 5, 2004, the Barrie TSO was created (Exhibit G-1). At that time, the Barrie office had approximately 155 employees. The Barrie TSO continued to share a few services and programs with the Toronto North TSO.

[18] On May 4, 2004, the grievor made a request for a lateral move (Exhibit E-1, tab 4, and Exhibit G-17). In her application she stated:

> . . .
>
> *I have been employed by the CRA since February, 1990 and have reported to the Barrie Office since then. I became an AU-03 Excise Tax Auditor effective February, 1999 with my*

> *substantive position in North York; however, I continued to report to the Barrie office.*
>
> *I have never reported to the North York office. I am requesting a lateral move to the Barrie office since this has been my work location for the past 14 + years. I reside 3 km from the Barrie office.*
>
> . . .

[19] The grievor listed three preferred positions, all at the Barrie TSO: Excise Tax Auditor; Project Support to the Assistant Director, Verification and Enforcement; and Workload Development/Tech Advisor. In her testimony, the grievor stated that the request for a lateral move was in response to a call letter from the employer. She testified that she knew that management considered her to be on assignment at the Barrie TSO.

[20] On February 24, 2005, Deborah Dixon, Acting Assistant Director, Verification and Enforcement at the Barrie TSO, sent a letter to the grievor advising her that her assignment at the Barrie TSO would end on March 31, 2005, ". . . due to budgetary constraints . . ." (Exhibit E-1, tab 3). The letter noted that the grievor's appointment was to the Toronto North TSO.

[21] Both the grievor and the employer tendered exhibits outlining the budgetary situation. The grievor's position was that there was sufficient flexibility for the employer to staff an excise tax auditor position at the AU-03 group and level at the Barrie TSO. The employer's position was that there was no such flexibility. In light of my conclusions on the employer's rights to manage the workplace, the evidence on the employer's budget is not relevant for a determination on disguised discipline.

[22] Ms. Dixon testified that she offered the grievor, through Mr. Rice a temporary assignment to assist in the creation of a manual regarding gaming regulations. Ms. Dixon testified that Mr. Rice advised her that the grievor had declined the assignment. Ms. Dixon did not know how long the assignment would have lasted, but she estimated between three and six months.

[23] Both parties tendered as exhibits organizational charts for various periods - some showed the grievor as being on assignment to the Barrie TSO and some did not.

[24] The grievor also provided evidence that other employees were offered positions at the Barrie TSO. However, in both these cases the positions were not at the grievor's level.

[25] The grievor submitted the employer's staffing principles (Exhibit G-21). She also provided evidence of travel costs associated with her transfer to the North York office (Exhibits G-22 and G-23).

[26] Ms. Dixon testified that the grievor was an excellent auditor and that there were no concerns about the quality of her work.

IV. Summary of the arguments

A. For the grievor

[27] The grievor submitted that the employer's action constituted disguised discipline, was not done according to reason and was arbitrary. She submitted that it constituted an abuse of authority, was done in bad faith and that the employer did not consider relevant options. She referred me to *Tucci v. Canada (Attorney General)*, Federal Court File No. T-623-96 (19970211), for a definition of bad faith. In particular, she relied on the following categories of abuse of authority, summarized in that decision: acting on inadequate material, including where there is no evidence or without considering relevant matters, and the adoption of a policy that fetters the employer's ability to consider individual cases with an open mind.

[28] The grievor argued that the employer allowed the assignment to Barrie to continue and misled her into believing that she would eventually get an indeterminate appointment. She was the highest priority for an indeterminate appointment at the Barrie office and yet was not considered. The staffing principles of fairness were ignored. She was treated differently from other employees at the Barrie TSO.

[29] The grievor submitted that no document was provided by the employer to support the claim that she was on a temporary assignment.

[30] The grievor pointed out inconsistencies and inaccuracies in the grievance responses.

[31] The grievor also submitted that the employer's reliance on budgetary constraints as the reason for not appointing her to the Barrie TSO was a misleading attempt to rationalize its decision and demonstrates bad faith. She submitted that the funds were available and that there were opportunities to keep her at the Barrie TSO.

[32] The grievor submitted that, had she known that her assignment was to be terminated, she would have accepted, or at least considered, any opportunity to extend her assignment to the Barrie TSO.

[33] The grievor submitted that there was a financial penalty in the form of the loss of a reimbursable allowance for travel.

[34] The grievor asked that I order that the letter terminating her assignment be rescinded and that she continue to work out of the Barrie TSO.

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

[35] The employer submitted that I had no jurisdiction, as there was no disciplinary action in this case. The grievor knew that she had been appointed to the North York office when she accepted the appointment and was never given any guarantee that her assignment to the Barrie office was permanent. The grievor accepted the testimony of Mr. Yee and Ms. Emmett on the discussions at the time of her initial appointment to the AU-03 position. This demonstrates that she did know at the time that the assignment was only temporary.

[36] The employer submitted that the purpose of discipline is to correct bad behaviour. There was no evidence of wrongdoing, culpable behaviour or malfeasance on the part of the grievor. The employer referred me to Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (paragraph 7:4210), *Synowski v. Treasury Board (Department of Health)*, 2007 PSLRB 6, and *Smith v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-27445 (19970922). The evidence was that the grievor was an excellent auditor.

[37] The employer submitted that there was no lack of transparency in the way that the grievor was treated. I should accept the evidence of the employer's witnesses as being more reasonable and probable.

[38] The employer noted that management has the right to determine staffing (paragraph 51(1)(*a*) of the *Canada Revenue Agency Act* and section 7 of the *Public Service Labour Relations Act*. An employee has no right to the job of his or her choice and preferred work location.

[39] The employer submitted that the grievor has not suffered any financial penalty. The loss of reimbursement for travel was not a financial penalty as envisaged by the *Public Service Labour Relations Act*. The grievor accepted the appointment to the position knowing the location and therefore accepted the cost of travelling to and from North York. The employer referred me to *Schofield v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2002 PSSRB 47 (upheld in *Schofield v. Canada (Attorney General)*, 2004 FC 622).

[40] The employer submitted that abuse of authority is different from discipline. To address such abuse of authority concerns, the grievor had access to internal policies of the employer, such as filing a harassment complaint. An adjudication hearing is not the forum for dealing with allegations of abuse of authority.

[41] The employer argued that there was no evidence of bad faith on its part and referred me to the definition of bad faith in *Black's Law Dictionary*, 6th ed., which states that there is an intentional element to bad faith. There were legitimate reasons for ending the assignment, based on budgetary constraints. Allegations of bad faith should not be made lightly. Bad faith also requires a conscious wrongdoing, which was not the case here.

[42] The employer submitted that the grievance should be dismissed on the basis of a lack of jurisdiction.

C. Grievor's rebuttal

[43] The grievor agreed that the employer is allowed to manage its budget; however, it cannot have unlimited discretion, especially when its result is improper.

V. Reasons

[44] The grievor is an excellent employee facing a difficult situation that has had an obvious impact on her daily life. However, she has not demonstrated disguised discipline, for the reasons set out below. I am therefore without jurisdiction.

[45] As recently confirmed by the Federal Court in *Canada (Attorney General) v. Grover*, 2007 FC 28, adjudicators are required to look at the substance of an employer's alleged disciplinary action, not its form, in order to determine whether they have jurisdiction. In this case, the form of the employer's action was administrative in nature. The grievor alleges that this administrative action was a disguised disciplinary action. When examining an action of the employer that is, on its face, administrative in nature, an adjudicator must look at all the surrounding facts and circumstances to determine whether that action was in reality disguised discipline.

[46] The grievor did not recall a conversation that she had had with Mr. Yee shortly after her appointment to the AU-03 position, but she did not dispute it. Mr. Yee's testimony and his email clearly indicate that she was advised of the location of her substantive position. Her request for a lateral move in May 2004 clearly shows that she recognized that her substantive position was located at the North York office (Exhibit E-1, tab 4, and Exhibit G-17).

[47] Disciplinary action is action taken by the employer in response to alleged misconduct or, 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]" (*Robertson v. Treasury Board (Department of National Revenue*), PSSRB File No. 166-02-454 (19710628)). The grievor has not provided any evidence to demonstrate that the actions of the employer were a response to alleged or perceived misconduct. On the contrary, the evidence demonstrates that the employer was pleased with her work and the performance of her duties.

[48] In the absence of alleged misconduct, the alleged bad faith of the employer is not relevant. There are other avenues for addressing allegations of bad faith in the staffing and assignment process. I agree that allegations of bad faith should not be made lightly. In addition, allegations of bad faith should not be left hanging over anyone's head. For that reason only, I have assessed the evidence presented in order to come to a determination on this allegation. Based on the evidence, I cannot conclude that there was bad faith on the part of the employer.

[49] I do not need to determine whether the travel costs associated with the change of the grievor's work location constitute a financial penalty, as the grievor has not

demonstrated any disciplinary action pursuant to paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*. Accordingly, I come to no conclusion on this point.

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

(The Order appears on the next page)

VI. Order

[51] The grievance is dismissed.

May 1, 2007.

Ian R. Mackenzie,
adjudicator