Date: 20070919

File: 166-34-37510

Citation: **2007 PSLRB 99**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

HERMAN GIESBRECHT

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Giesbrecht 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: Dan Butler, adjudicator

For the Grievor: Himself

For the Employer: Krista Quinn, staff relation advisor

Decided on the basis of written submissions
filed May 17 and 23, 2007.

Grievance referred to adjudication

[1] On April 2, 2007, the Public Service Labour Relations Board ("the Board") received from Herman Giesbrecht ("the grievor") a reference to adjudication filed using Form 21 (Notice of Reference to Adjudication of an Individual Grievance), a form appropriate for some references to adjudication under the *Public Service Labour Relations Act* ("the *Act*"). The grievor conveyed this reference to adjudication under a covering letter in which he stated:

. . .

> *Please find attached a notice to adjudicate a grievance filed in 2005 on which the union and management both did nothing. A satisfactory resolution was never reached. Copies of the original grievance are attached. I was grieving a reference to Health Canada for a fitness to work assessment. In the end Health Canada refused to consider any outcome other than the one proposed by the manager, Jacqueline Kulbacki. I had a dozen or so doctors, saying that I was fine to go to work. Health Canada and their quacks were alone in refusing to give me clearance to return to work. Canada Revenue refused to allow me to return to work without the Health Canada quack, Dr. Tse's okay which she refused to give. Canada Revenue also created an environment too hostile for me. I was constructively dismissed so that it would ultimately appear that I resigned. Leave without pay had been approved till September 2007, but I could not work in any work that gave rise to conflict of interest. This meant starving or requesting termination. I want to sue Canada Revenue for wrongful dismissal.*
>
> *I was escorted out of the building on March 8, 2005, stripped of my security pass, and placed on indefinite leave for requesting some health accommodation due to observation that I mentioned to the manager. They seemed to view observations as threats or something. I have never been able to determine what set them off like that. As an employee I have a duty to report anything that would cause me difficulty working, which I did. I had a duty as an employee to report what I did, but it ultimately resulted in my termination.*
>
> . . .
>
> [*Sic* throughout]

[2] The following handwritten text, portions of which were difficult to decipher, comprised the "original grievance" to which the grievor referred in his covering letter:

GRIEVANCE VS Winnipeg Tax Centre March 16, 2005

By Herman Giesbrecht

ATTN: VICKY ZIZNISWSKI

I find the content and tone of the entire letter offensive. It suggests things that are simply not the case. It jumps to conclusions. I find the sentence regarding "the French racists" particular offensive and malicious in nature on the part of the writer. My complaint was that I found receiving an email promoting the "Francophonie" offensive as it suggests Canada's most privileged minority needs protection. This email was not job related and nowhere in my job description is there any mention of mandated French promotion, only that [indecipherable words] *French service be made available which was not endangered by my email. I support service in any language if it can be provided, something a multi-cultural society should be able to do. I have the right to complain about French also, both French and English employees should have the same rights. I am not stressed by "French racists", only by the constant unnecessary fear, intimidation and threat tactics to provide French service, which is never a problem if it ever arises. In the bilingual policy, there never seem to be any mention of English or other languages making me feel discriminated against since I know* [indecipherable phrase] *The paranoia about French also causes stress. I did not send any communique, only an explanation to Jackie as to why I complained about the email about "Francophonie" but she misunderstood it or chose to misunderstand it. Since my first language is not English, I sometimes can't find the right words about complex subjects. The email promoting "Francophonie" was intimidating. I was afraid of further intimidation which is why the email to Jackie. The attached letter confirms my concerns. According to the Official Languages Act, I have the right to work in the language of my choice. Because of this, I should not be harassed and intimidated through promotion of a language I do not understand. Also, I was not provided an opportunity to representation before I was drummed out of the office, nor contact with my doctor on whether or not to sign the "Consent to a Fitness to Work Evaluation". This form was signed under duress. Also since my complaint was a "whistle-blowing event" I should be protected by recent Whistle-blowing legislation.*

Thanks. Herman Giesbrecht.

[*Sic* throughout]

[3] The Director, Registry Operations and Policy, wrote to the grievor on April 2, 2007, noting that the date of the grievance attached to his covering letter accompanying Form 21 was March 20, 2005. Board staff advised the grievor to resubmit his reference to adjudication using Form 14 (Reference to Adjudication) as the correct form for grievances filed prior to April 1, 2005. On that date, the *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*, a reference to adjudication for a grievance that predates April 1, 2005, 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*''). A Registry Officer asked the grievor to specify the provision of subsection 92(1) of the former *Act* under which he was referring his grievance.

[4] The grievor filed Form 14 on April 9, 2007. He specified subparagraph 92(1)(*b*)(i) of the former *Act* as the provision applicable to his grievance:

> *Reference to Adjudication*
>
> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> . . .
>
> *(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> . . .
>
> *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.*
>
> . . .

[5] According to the information supplied in his reference to adjudication, the grievor worked as a Compliance Officer for the Canada Revenue Agency (''the CRA'' or "the employer"). His position was classified at the PM-01 group and level and was located in Winnipeg, Manitoba.

[6] Following the Board's standard procedure, a Registry Officer sent a copy of the reference to adjudication to the employer and asked it to provide the replies that it had issued to the grievance at each level of the grievance process, and to identify any issues that the employer might have with respect to timeliness. On May 4, 2007, a representative of the employer wrote to the Board and asked for an extension of time for the employer's response, given that its representatives were ". . . still looking into this grievance as [they had] no record of this grievance in our system . . . ." A Vice-Chairperson of the Board granted the request for an extension until May 17, 2007.

[7] In a letter to the Board dated May 17, 2007, the employer's representative took the position that the grievance was not properly before the Board for several reasons:

. . .

> *The grievance, as Mr. Giesbrecht refers to it, is relating to matters regarding fitness to work and a hostile work environment. It was addressed to Ms. Vicky Zyzniswski, who is understood to have been his union representative at the time and was never received by the Employer. The first the Employer became aware of the said grievance was when the PSLRB advised the Employer of the referral to adjudication.*
>
> *As the Employer did not have knowledge of this grievance, it did not go through the grievance process. Therefore, the employer's position is that this matter is not properly before the Board. In accordance with subsection 92(1) of the* Public Service Staff Relations Act (PSSRA)*, an employee may refer a grievance to adjudication* "Where an employee has presented a grievance, up to and including the final level in the grievance process…and the grievance has not been dealt with to the satisfaction of the employee"*. As such, the PSLRB's jurisdiction arises only once the employee has presented a grievance to the final level of the Canada Revenue Agency's (CRA) grievance process, as prescribed by Article 18 of the collective agreement between the CRA and the Public Service Alliance of Canada (PSAC).*
>
> *Furthermore, Mr. Giesbrecht resigned from the CRA effective September 20, 2006. In his letter of March 25, 2007, the issues that Mr. Giesbrecht raises are the same issues in his said grievance of March 16, 2005, except for the matter concerning his claim that he was constructively dismissed. Again, this issue was never raised through the grievance process, which is the proper forum. Therefore, in addition to not being properly before the Board, in light of Article 18 of the collective agreement between the CRA and the PSAC, the Employer respectively considers this matter to be untimely.*

> *As such, in view of the foregoing, the above-noted grievance is not one that can be referred to adjudication under the* PSLRA *and it is respectfully submitted that the PSLRB does not have jurisdiction in this matter. It is requested that this jurisdictional objection be allowed and that the grievance be dismissed without a hearing.*
>
> . . .

[8] A Registry Officer sent a copy of the employer's letter to the grievor on May 18, 2007, and asked that the grievor ". . . provide his position vis-à-vis the questions of jurisdiction raised by the employer *by no later than June 4, 2007* [emphasis in the original]. . . ."

[9] The grievor replied on May 23, 2007, as follows:

> . . .
>
> *I object to the employer's claims. Once I submitted my grievance to the union, they had a responsibility to forward my grievance to the employer. They were, in fact, in contact with the employer as they had me sign a consent form that the employer provided to them so they were aware of my complaint. In the words of the chief steward, Alfred Stewart, I can't help what the union chooses to support or not support . . . . The employer along with the union, and the Health Canada quacks engaged in obstruction, delaying and denying tactics which resulted in my having to resign in order to be able to eat as all work that I'm qualified to do would constitute a conflict of interest. The course of conduct by the employer, the union and Health Canada quacks are the architects of the untimeliness in their objection.*
>
> *With regard to jurisdiction, the employer claimed that the small claims court did not have jurisdiction to deal with my work related problem due to the concern about potential dual access to the courts since I was a member of a union. If this jurisdiction is denied, it would constitute no access of any kind. I submit that the employer cannot have it both ways. Either I am allowed to sue the employer for damages in a court of Queen's bench or I am allowed the procedure of adjudication before the PSLRB. The union has indicated to me that it is not going to support any grievance by me. Nobody is prepared to put anything in writing though and phone calls are never returned. There is very little in writing that I have been able to have access to.*
>
> . . .

[10] The Chairperson of the Board has referred this matter to me for determination in my capacity as an adjudicator.

Reasons

[11] This decision addresses the objection raised by the employer to my jurisdiction, as an adjudicator, to consider the grievance referred to adjudication by the grievor.

[12] I have examined the record of correspondence between the Board and the parties in this matter, and the other documents on file. I am satisfied that the parties have had sufficient opportunity to make their views known on the jurisdictional issue before me, and that I have sufficient information with which to make a decision based on the written record.

[13] The employer raised several issues in its objection to my jurisdiction. I find it unnecessary in this decision to address the question of timeliness raised in the employer's submission or to make any determination as to whether the subject of the grievor's reference to adjudication fell under subparagraph 92(1)(*b*)(i) of the former *Act* as he claimed in Form 14. This matter can be decided, in my view, by answering the question "Did the grievor submit a grievance to the employer?"

[14] A prerequisite for accepting jurisdiction to consider a reference to adjudication under section 92 of the former *Act* was proof that a grievance was filed in accordance with the former *Act* and any applicable provisions of a governing collective agreement. Subsection 2(1) of the former *Act* defined a grievance in the following manner:

. . .

> *"grievance" means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees . . .*

. . .

I interpret the phrase "presented in accordance with this *Act*" as meaning that an employee who wished to submit a complaint was required to do so using the grievance process established for this purpose under the framework of the former *Act*. Primary responsibility to set up and maintain the grievance procedure lay with the employer, who was required to comply with the parameters outlined in the *Public Service Staff*

Relations Board Regulations and Rules of Procedure, 1993. For represented employees, rules for accessing and using the grievance process were conventionally governed by the provisions of a collective agreement.

[15] The document attached to the grievor's reference to adjudication was labelled a "GRIEVANCE" [emphasis in the original] by the grievor. Was it, in fact, a grievance within the meaning of the former *Act*? By any reasonable measure, this document can certainly be construed as a complaint in writing. It clearly contained allegations that, on their face, involve labour relations issues. However, in order to qualify as a grievance within the meaning given that term under subsection 2(1) of the former *Act*, the document must have been ". . . presented in accordance with [the former] *Act* . . ." using the grievance procedure established for that purpose.

[16] The employer's representative stated on May 4, 2007, that the employer had no record of the grievance in its system. In the employer's subsequent written submission of May 17, 2007, the employer's representative stated that the grievance was never received by the employer.

[17] In his response to the employer's objection, the grievor did not say that he had presented his grievance to the employer. Instead, he wrote that he had submitted his grievance to the union (i.e. "the bargaining agent"). He then argued that the bargaining agent ". . . had a responsibility to forward my grievance to the employer . . . ."

[18] Subsection 91(1) of the former *Act* outlined the entitlement to present a grievance on specific, enumerated subject matter:

> *Right to Present Grievances*
>
> ***91.*** *(1) Where any employee feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award, or*

> *(*b*) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (*a*)(i) or (ii),*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*
>
> . . .

Subsection 91(1) explicitly conferred the entitlement to file a grievance on the employee: ". . . the employee is entitled . . . to present the grievance . . . ." While the subsection was silent on the possibility that a bargaining agent might file a grievance on an employee's behalf, its wording cannot, in my view, be interpreted as placing formal responsibility for doing so on the bargaining agent.

[19] The collective agreement applicable to the parties as of the date of the grievor's purported grievance is on file at the Board (Program Delivery and Administrative Services Group collective agreement between the CRA and the Public Service Alliance of Canada (PSAC) signed December 10, 2004, and expiring October 31, 2007). Throughout article 18 (Grievance Procedure) of this collective agreement, it is clear that responsibility for initiating and advancing a grievance lays with the employee. None of the agreement's provisions identify the bargaining agent as having or sharing the primary legal responsibility for presenting or filing a grievance. Clause 18.05, for example, specifically states that an employee ". . . who wishes to present a grievance . . . shall transmit this grievance to his or her immediate surpervisor or local officer-in-charge . . . ." The plain wording of this clause makes it clear that it is the employee who is responsible for "transmitting" a grievance.

[20] Although the grievor's Form 14 reported that he filed his grievance at the first level of the grievance procedure on March 16, 2005, the only document on file that bears this date is the document that, according to the grievor's own submission, he presented to the bargaining agent and not to his immediate supervisor or local officer in charge as required by clause 18.05 of the collective agreement.

[21] The grievor's reply of May 23, 2007, inferred that the bargaining agent failed in its alleged responsibility to forward his grievance to the employer. It stated explicitly that the bargaining agent was a party to ". . . obstruction, delaying and denying

tactics . . . .” It also claimed that the bargaining agent “. . . indicated to [him] that it is not going to support any grievance by me . . . .”

[22] It is not my role in this decision to determine the merits of any of these allegations about the bargaining agent. If the grievor believed that the bargaining agent failed in a legal duty that it owed him with respect to his grievance, and wished to pursue action based on this belief, he could have filed a complaint under another provision of the former *Act* on this subject. I note that the file does contain an email to the Board from the grievor, dated March 20, 2007, in which the grievor stated that he “. . . would also like to file a complaint against the union PSAC for refusing to accept a grievance . . . .” The Director, Registry Operations and Policy, appropriately replied on March 22, 2007, that the Board could not provide advice or guidance on what course the grievor should follow. Instead, the reply was limited to providing him with factual information about the process for referring a grievance to adjudication and the legislative provisions relating to labour relations complaints. As of the date that I am writing this decision, Board records establish that the only action the grievor decided to undertake was to refer the grievance that is before me to adjudication. There is no other complaint from the grievor on record.

[23] As I am not seized here with a complaint against the bargaining agent, my role is limited to determining, as a matter of fact and law, whether the grievor filed a grievance in accordance with the former *Act* and the applicable collective agreement that falls within my jurisdiction as an adjudicator.

[24] The evidence on file is straightforward. The document labelled “GRIEVANCE” attached to the grievor’s reference to adjudication was addressed to Vicky Zyzniswski, a person identified in the employer’s submission as a bargaining agent representative, without dispute by the grievor. For his part, the grievor confirmed that he submitted his grievance to the bargaining agent, not the employer. The employer stated that it never received a grievance, again without dispute by the grievor. There is no copy of a grievance presentation form before me. I find, accordingly, that the document dated March 16, 2005, was not presented to the grievance process in accordance with the former *Act*. As such, it was not a grievance within the meaning of the former *Act.*

[25] I find further that the grievor did not transmit his grievance to his immediate supervisor or officer in charge. As such, the grievor failed to observe the requirement established under clause 18.05 of the collective agreement for presenting a proper

grievance. This failure constituted a bar to his advancing his complaint through the grievance procedure and to adjudication.

[26] The grievor additionally ran afoul of the legislation by not pursuing his grievance ". . . up to and including the final level in the grievance process . . ." as required by subsection 92(1) of the former *Act*:

Reference to Adjudication

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

[27] The grievor stated on Form 14 that he presented his grievance at the final level of the grievance process on March 16, 2005, the same date that he claimed on Form 14 to have presented his grievance at the first level, and the same date indicated on the grievance document that, by the grievor's own admission, he gave to the bargaining agent rather than the employer. In the absence of any proof that there was ever a grievance transmitted to the final level of the grievance process, I find that the information contained on Form 14 concerning the final-level filing lacked any basis in fact. Given that the grievor did not meet the pre-condition established under subsection 92(1) of the former *Act* of having presented his grievance ". . . up to and including the final level in the grievance process . . .", he was not entitled to refer his grievance to adjudication for this reason as well.

[28] Cumulatively, the grievor failed to observe multiple requirements for presenting a grievance. Each of these failures was procedurally fatal. Taken individually and together, there is no question that they result in a situation where I am prohibited from hearing this case, as is underscored by subsection 96(1) of the former *Act*:

> ***96.*** *(1) Subject to any regulation made by the Board under paragraph 100(1)(d), no grievance shall be referred to adjudication and no adjudicator shall hear or render a decision on a grievance until all procedures established for*

> *the presenting of the grievance up to and including the final level in the grievance process have been complied with*
>
> . . .

[29] For all of the above reasons, I accept the employer's objection to my jurisdiction to consider the matter raised by the grievor. I make the following order:

(The Order appears on the next page)

Order

[30] The objection of the employer is allowed.

[31] I order that the file be closed.

September 19, 2007.

Dan Butler,
adjudicator