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File: 566-02-416

Citation: **2008 PSLRB 16**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

RICHARD SIOUI

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Sioui v. Treasury Board (Correctional Service of Canada)

Interim decision concerning an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Rénald Labbé, counsel

For the Employer: Karl Chemsi, counsel

Heard at Quebec, Quebec,
March 10, 2008.
(P.S.L.R.B. Translation)

[1] This decision concerns a request for postponement that was filed late in the afternoon of Thursday, March 6 for a hearing scheduled for Quebec on Monday, March 10, 2008 and a request for postponement that was made at the start of the hearing on March 10, 2008.

[2] Richard Sioui ("the grievor" or "the employee") was a correctional officer at the Donnaconna Institution. On May 15, 2006, the grievor filed a grievance at the final level of the grievance process contesting his dismissal. On June 26, 2006, the bargaining agent referred the grievance to adjudication. The Correctional Service of Canada ("the employer") responded at the final level of the grievance process on July 7, 2007, denying the reinstatement request.

[3] The case was initially scheduled to be heard before the Public Service Labour Relations Board ("the Board") from January 9 to 12, 2007. The hearing was postponed following an agreement between the parties to attempt to settle the case through mediation. A mediation session was scheduled for January 10 to 12, 2007.

[4] On January 29, 2007, the Board was notified that the parties had reached an agreement during the mediation session. The bargaining agent was to deliver the final version of the agreement to the Board before the beginning of March 2007. Not having heard from the parties, the Board wrote to them on August 7, 2007 requesting an update. The parties requested more time to respond. On August 20, 2007, the bargaining agent indicated that it wished to extend the deadline for responding to the end of 2007. The employer objected to the bargaining agent's request on the grounds that the parties were not in a position to implement the agreement reached during mediation. The employer requested that the matter be scheduled for a hearing by the Board.

[5] On September 24, 2007, the Board informed the parties that it was denying the request for an extension and that the case would be scheduled. On October 11, 2007, the bargaining agent informed the Board that it was no longer representing the employee. On October 16, 2007, the Board wrote to the parties, advising them of the bargaining agent's withdrawal and asking the employee whether he still wished to proceed with the case and, if so, whether someone would represent him. In the meantime, the employee was directly consulted about choosing a date for the hearing. The Board later advised the parties that the March 10 to 14, 2008 hearing dates had

been provisionally scheduled and asked them to confirm their availability in writing no later than October 29, 2007.

[6] On October 17, 2007, the employee, by email, agreed to the hearing dates that the Board had proposed. On October 30, 2007, the employer, by email, advised the Board that it too was available on the proposed dates.

[7] In the meantime, the employee, the Board and the parties exchanged correspondence concerning the representation of the employee during the adjudication. On October 17, 2007, while confirming his availability for the hearing, the employee also confirmed that counsel would represent him "[translation] exclusively on the issue of suitable employment" but that he expected that his bargaining agent would represent him regarding his dismissal. On October 18, 2007, the Board confirmed to the parties that Marc Bellemare would now represent the employee.

[8] On October 31, 2007, the Board advised Mr. Bellemare and the employer's representative, Drew Heavens, that the March 10 to 14, 2008 hearing dates were "firm." On November 16, 2007, the Board once again confirmed the hearing dates, informing the parties that the hearing would be held in Quebec. On January 18, 2008, the Board formally advised the parties, including Mr. Bellemare, of the dates and location of the hearing.

[9] On January 21, 2008, Mr. Bellemare faxed a notice to the Board stating that he had never confirmed his mandate to represent the employee before the Board. On January 22, 2008, the Board informed the employee and the employer of Mr. Bellemare's correspondence and once again confirmed the hearing dates. To help in the preparation of a case in which one of the parties represents itself, on January 23, 2008, the Board sent the employee, by registered mail, a copy of the video entitled *Hearing Both Sides: Formal and Expedited Adjudication*. On January 23, 2008, the Board sent a notice of hearing directly to the employee and to the employer, reiterating the message in its January 18, 2008 letter. On January 25, 2008, Canada Post confirmed that the employee received the video.

[10] On February 8, 2008, the employer wrote to the Board, requesting it to intervene and confirm the employee's presence at the hearing since the employer would be incurring expenses to call an expert witness. The Board replied to both parties that the

adjudicator had no intention of intervening at that stage since the consequences of failing to appear at a hearing had been outlined in the January 23, 2008 notice of hearing.

[11] On February 25, 2008, the employer sent the employee a copy of a medical opinion that it intended to file at the hearing with the assistance of an expert witness. The Board received a copy of the letter but not a copy of the report.

[12] On February 27, 2008, the employee wrote to the Board, requesting that it intervene and order the bargaining agent to represent him at the hearing at its own expense because of the complexity of the case. He requested that the hearing be recorded. On February 28, 2008, the Board confirmed receipt of the missive. On March 3, 2008, the Board refused to intervene and indicated that it did not have jurisdiction to order a bargaining agent to represent a grievor. It also pointed out that it might have been in the employee's best interests to seek private counsel as required. The request to record the hearing was denied because, among other reasons, the adjudicator's decision takes into consideration the evidence heard at the hearing and the parties' observations.

[13] On March 6, 2008, the Board received a request for postponement from the law firm that had apparently been retained to represent the grievor. The request provided no further justification to explain the client's delay in communicating with his solicitor.

[14] The letter stated as follows:

> [Translation]
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> . . .
>
> *Mr. Sioui contacted the undersigned yesterday, March 5, 2006* [*sic*]*. He wanted to retain his services for the hearing into his case scheduled for March 10 to 14, 2008 at Hôtel Dominion in Quebec.*
>
> *The undersigned has not had time to review the entire file. Thus, it is not in a position to know if it will accept the case, as requested by Mr. Sioui.*
>
> *We request a postponement of the case to mutually convenient dates should we agree to take the case.*

> *If we do not receive a reply before the date set for the hearing on March 10 at 13:30, we will appear and request a postponement at that time.*
>
> . . .

[15] On March 7, 2008, the Board acknowledged receipt of the request for postponement and asked the employer to respond no later than noon the same day. The employer responded that it was opposed to the request for postponement on the grounds that it was late in coming and that the employee had been aware of the hearing dates since October 2007, at which time he had been informed that the bargaining agent no longer represented him. The employer added that the employee had been informed on February 25, 2008 that an expert witness had been summoned and that the employee had been sent a copy of the medical opinion.

[16] On March 7, 2008, after considering the above factors, I denied the request for postponement; the reasons follow below. The parties were notified of my decision in the mid-afternoon.

[17] On March 10, 2008, at the start of the hearing, the grievor appeared with counsel. Through his counsel, the grievor once again repeated the request for postponement, adding the new fact that he had applied for legal aid. A first meeting with legal aid was scheduled for April 2, 2008. Counsel requested that the hearing be postponed until after that date.

[18] The employer objected to the request for postponement on the grounds that the request was not reasonable, pointing out the preparation that had been required for this complex case. However, the employer requested that if I agreed to the request for postponement that the proceedings be subject to strict conditions to avoid having the case drag on.

[19] In response to my questions, I learned that the grievor had talked to his counsel about the possibility of obtaining legal aid and had only consulted legal aid in the morning before the hearing scheduled to start that afternoon. I learned that his application for legal aid was based on the fact that he was currently a student and that he had been dismissed from his job and not on the facts of this case; there was no evidence that legal aid had been approved, only the grievor's word.

[20] The grievor confirmed to me that he had been aware since October 2007 that the union had refused to represent him. He admitted that he was not aware of a possible recourse against the union's failure to provide fair representation under section 187 of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 ("the *Act*"). He admitted not having consulted the Board's website to find out about the adjudication process and not having viewed the electronic documents that the Board provided to him when it found out that he would be representing himself.

[21] I also learned that when the employee consulted Mr. Labbé last week about representing him in this case, he had told Mr. Labbé that he had the means to pay his fees, which Mr. Labbé confirmed. However, by the end of the week, the grievor changed his mind. Apparently, he had received an inheritance but did not intend to waste it on defending his rights in this case. He expected to be represented by legal aid. Mr. Labbé does not take legal aid cases.

REASONS

[22] The following reasons concern the decisions of March 7 and 10, 2008. Even though the request for postponement was denied and the denial was communicated to the parties on March 7, I took the time to listen to the employee's arguments at the start of the hearing on March 10 and considered them in my decision.

[23] The right to representation by counsel stems from the principle of natural justice, which is the right to be heard. The object of the right to representation by counsel is to assist the litigant by giving him or her the opportunity to show cause or defend himself or herself. Although the right to representation acquired constitutional status under section 7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), it is not an absolute right, as indicated by J. Thurlow in *Howard v. Stony Mountain Institution*, [1984] 2 F.C. 642 (C.A.):

. . .

> *I am of the opinion that the enactment of section 7 has not created any absolute right to counsel in all such proceedings. It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have the opportunity to present his case, as fully and adequately as possible. The advantages of having the assistance of counsel for that purpose are not in doubt. <u>But what is required is an</u>*

> *opportunity to present the case adequately and I do not think it can be affirmed that in no case can such an opportunity be afforded without also as part of it affording the right to representation by counsel at the hearing.*
>
> . . .
>
> [Emphasis added]

[24] Justice Thurlow added that the right to representation by counsel depends on the circumstances of the particular case and its nature, its gravity and its complexity and the capacity of the litigant himself or herself to understand the case and to present his or her defence.

[25] The right to representation rests on principles that were initially established by the courts and later "entrenched" by section 7 of the *Charter*. Under section 34 of the Quebec *Charter of Human Rights and Freedoms*, the right to representation by counsel is an absolute right before tribunals when they are serving in a quasi-judicial capacity. However, that legislation does not apply to federal administrative tribunals. Therefore, in this case, common-law principles apply.

[26] Professor Yves Ouellette, in his work entitled *Les tribunaux administratifs au Canada* (1997 - Thémis), appropriately states the following on page 143:

> [Translation]
>
> ***The right to representation by counsel***
>
> *Common law in Canada has never recognized a general and absolute right to representation by counsel before an administrative tribunal that is required to apply the principles of natural justice, undoubtedly in the interest of procedural effectiveness. Instead, we have deemed that the administrative tribunal has a certain discretion in this matter but that the right must be granted when the lack of representation by counsel amounts to a denial of justice or prevents an individual from showing cause. At such times, the court must consider the impact of a decision on the person's reputation or ability to earn a living, the complexity of the case, the cost and the time implied by representation by counsel.*
>
> [Emphasis added]

[27] The principles that apply to the right to counsel also apply to a request for a postponement to retain counsel. That right is not absolute. As with the right to representation, courts have a great deal of discretion (see *Meunier c. Luc Jean, Extermination 7/24,* [2000] D.T.T.Q. no. 118).

[28] The courts have often been faced with requests for postponement related to the right to representation by counsel. In his work entitled *Droit public et administratif*, Collection de droit 2004-2005, École du Barreau du Québec, vol. 7, 2004 (cited in *Mario Boily c. Armoires Orléans*, 2005 QCCRT 609), Denis Lemieux states the following:

> [Translation]
>
> . . .
>
> *A person may request a postponement or suspension from the body to obtain a reasonable period within which to fully exercise his or her right to a full and complete defence. That request may be based on the need to review certain new facts, to seek assistance from counsel, or to summon witnesses or retrieve documents. An administrative organization will have the discretionary authority to grant or deny such a postponement. However, the denial of a postponement may be unlawful if it leads to irreparable harm for the person concerned, where such harm does not stem from negligence on the part of that person or that person's counsel.*
>
> . . .
>
> [Emphasis in the original]

[29] I agree with J. Handman in *Autobus scolaire Fortier Inc. c. Syndicat des chauffeurs d'autobus scolaires, région de Québec* (CSD), [2000] D.T.T.Q. no. 118, concerning the reasonable limits of the right to postpone for the purpose of retaining counsel:

> [Translation]
>
> *[18] The right to representation by counsel, on the other hand, is not absolute. It is up to the court to assess, based on the circumstances and nature of the case, whether a postponement is necessary to a full and complete defence, or whether it amounts to nothing more than a delaying tactic. A lower court, which is master of its own house, has discretion in that regard. Only the arbitrary denial of postponement*

> *can result in a denial of justice and justify legal intervention. . . .*

[30] Consequently, given that the right to representation by counsel is not an absolute right, I must consider how serious are the reasons justifying the request for postponement, including whether it is a tactic designed to delay the process, time constraints, the parties' entitlement to a swift and effective process, and the general framework of the *Act*.

[31] I have weighed the facts of this case, including that this is not the first request for a postponement, that the case was referred to adjudication more than 18 months ago and that the Board has sent the employee numerous communications asking him if he was going to proceed with his case in the absence of counsel. There were several notices of confirmation of the hearing specifying that the dates were final. I believe that the grievor did not intend to be represented by counsel until February 25, 2008, when the employer sent him a copy of an expert report and indicated its intention to call an expert. That was when the grievor reacted, requesting that the Board order the union to represent him, which the Board refused to do for the above-mentioned reasons.

[32] However, it was not until March 5, 2008 that the grievor contacted a lawyer to represent him. Moreover, once the Board denied the request for postponement on March 7, 2008, the grievor then sought legal aid on March 10, 2008, the morning of the hearing, and tried to use it as a way to get a postponement. The admission that he had retained the services of a lawyer in private practice at his own expense the week before and then changed his mind and sought to be represented by counsel from legal aid four days later did not help his case.

[33] Under the circumstances, any harm to the grievor stems only from his negligence in having waited until the very last minute to seek representation. The grievor needed to act as soon as he received the notice of hearing if he intended to be represented. The grievor provided no justification that it was difficult or that he was unable to consult a lawyer in time to properly prepare for the hearing. No suggestion was made that he was caught off guard by new facts or even that he was unable to produce witnesses or the documents needed for the case because of the evidence already provided by the employer.

[34] Moreover, I believe that the grievor did not take the process seriously by failing to inquire about his rights and by not looking into the tools that were at his disposal to make an informed decision as to whether to represent himself or have counsel represent him if he felt that the case was too much for him to handle.

[35] I am aware that this is a dismissal grievance, but that reason in and of itself does not justify granting the postponement in view of the other factors involved in the case. The grievor provided no argument regarding his inability to defend himself because of the complexity of the case or his inability to understand it.

[36] I am also taking into consideration the consequences of a last-minute request for postponement, which could have been avoided had the grievor had exercised due diligence. In this case, the employer should not have to suffer the consequences of the grievor's negligence, since it had taken the precaution of warning him ahead of time of the evidence that it would be presenting at the hearing and of inquiring about his attendance. Time constraints, the parties' entitlement to a swift and effective process, and the efficient application of the *Act* mean that I have no reason to exercise my discretion.

[37] Under such circumstances, this is not a denial of the right to counsel but rather a refusal to postpone the hearing on that pretext. In that regard, I refer to the findings of the Commission des relations de travail du Québec in *Mario Boily* and to those in *Chow v. Treasury Board (Statistics Canada)*, 2006 PSLRB 71. I find that under the circumstances, the request for postponement is nothing more than a delaying tactic aimed at further deferring the hearings that had been scheduled for quite some time.

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

(The Order appears on the next page)

Order

[39] The request for postponement is dismissed.

March 18, 2008.

P.S.L.R.B. Translation

Michele A. Pineau,
adjudicator