

Date: 20080703

File: 566-02-1349

Citation: 2008 PSLRB 46



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

CONNIE KATHELENE BROWN

Grievor

and

DEPUTY HEAD
(Department of Social Development)

Respondent

Indexed as

Brown v. Deputy Head (Department of Social Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [John A. Mooney, adjudicator](#)

For the Grievor: [Pradeep Chand, counsel](#)

For the Respondent: [Jennifer Champagne, counsel](#)

Heard at Ottawa, Ontario,
May 12, 2008.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] This decision deals with preliminary issues raised by the Department of Social Development (“the respondent” or “the department”) in this grievance.

[2] Connie Kathelene Brown (“the grievor”) was a human resources advisor acting at the PE-03 group and level at what was then Human Resources and Skills Development Canada and is now the Department of Social Development when she resigned from her position on July 7, 2006. In an email on October 2, 2006, the grievor filed the following grievance with the department.

Subject: Grievance – Severance Pay – Connie Brown

Hello Anne/Nancy,

This email is to advise you that I wish to file a grievance regarding the non-receipt, to-date (October 2nd), of my severance pay or ROE for final termination.

I resigned from the Department on July 7th, 2006. I met with my Compensation Advisor on June 28th, 2006, at which time I received my Termination Letter, dated June 20th, indicating the amounts I am entitled too as well as the amounts I am required to pay back.

There was one area of arrears with Sick Leave that was indicated in the Gross amount on my letter and needed to be re-calculated to remove Employee Deductions that were to be taken for the period of time to be paid back. This amount was then confirmed in an email dated July 13th and all required documents were sent back to the Department the same day.

A follow-up email was sent on August 24th and I was asked to call the Compensation Advisor. I attempted to do and left at least 3 messages. One of which I did receive a message to call back.

When I attempted to call on September 21st, the message said the Inbox was full and I could not leave a message. I then sent an email.

Follow-up was done on September 1st, 21st, and 28th. None of which have been responded to as of today.

I feel that this delay in paying out my severance is retribution for my actions while employed in the department (i.e. filing an appeal) and I feel I am being harassed, as a result.

I also feel that the refusal to pay my severance is considered to be discipline for these actions.

Yours sincerely,

Connie Brown

[Sic throughout]

[3] The grievor is not covered by a collective agreement.

[4] On May 10, 2007, the grievor's counsel wrote to Maureen Grant, Director General, Human Resources Services Delivery, People and Culture Branch, to inform her that he would be representing the grievor (the letter was attached to the grievor's referral to adjudication). The grievor's counsel indicated in his letter that it was his position that the grievor had been constructively dismissed. The grievor's counsel asked for several corrective measures, including damages, for the constructive dismissal and pay in lieu of notice of termination.

[5] The department responded to the grievance at the second level of the grievance process on May 30, 2007 (the response was attached to the grievor's referral to adjudication). The department granted the grievance with respect to the grievor's severance pay and record of employment but did not address the issue of constructive dismissal.

[6] On June 15, 2007 (Exhibit G-1), the grievor's counsel wrote to Ms. Grant to inform her that he did not agree with the department's response. He indicated that the response did not address all the issues raised by the grievor, including the amounts she was owed and the matters of discipline and harassment. The grievor's counsel asked the department to respond to his letter by June 30, 2007.

[7] The grievor's counsel referred the grievance to the third level of the grievance process on June 20, 2007 (Exhibit G-2).

[8] The grievor's counsel referred the grievance to adjudication on the next day, June 21, 2007, pursuant to paragraph 209(1)(b) of the *Public Service Labour Relations Act (PSLRA)*.

[9] The grievor's counsel filed a notice with the Canadian Human Rights Commission (CHRC) on June 21, 2007. The notice indicates that the grievor will raise in her grievance before the Public Service Labour Relations Board ("the PSLRB") issues

involving the application or interpretation of the *Canadian Human Rights Act*. In that notice, the grievor provided background information on her grievance and stated that she was discriminated against with respect to a promotion and that her decision to resign was in part due to the stress of her working environment. The grievor also stated that her grievance was granted in part but that there were still outstanding issues, including the amounts owed to her regarding her severance pay and the discipline and harassment matters. The CHRC wrote to the PSLRB on June 26, 2007, and stated that it did not intend to make submissions in this grievance.

II. Preliminary objections

A. Respondent's preliminary objections

[10] At the hearing, the respondent's counsel raised three preliminary objections regarding my jurisdiction to hear this grievance. She submitted that I cannot hear this grievance since it does not deal with a disciplinary matter. The grievor did not mention in her grievance that her resignation was coerced or that it was involuntary. The grievor resigned from her position, and resignations are governed by the *Public Service Employment Act*. The grievance dealt with the issue of severance pay and the grievor's record of employment. Those matters have been resolved.

[11] The respondent's counsel also argued that I did not have jurisdiction to hear this matter because the referral to adjudication did not meet the conditions set out in subsection 209(1) of the *PSLRA*. The department was never given the opportunity to respond to the grievance at the third level of the grievance process, as required by that subsection, since the grievor referred the grievance to adjudication the day after she referred it to the department at the third level.

[12] The respondent's counsel was also of the view that the grievor cannot raise the matter of constructive dismissal or involuntary resignation before me. By doing so, the grievor would be changing the nature of the grievance. The Federal Court has held that a grievor cannot change the nature of a grievance when referring it to adjudication. On that point, she referred me to *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109.

B. Grievor's response

[13] The grievor's counsel submitted that I could hear this grievance since it alludes to disciplinary matters. The last two paragraphs of the grievance raise the issue of discipline.

[14] The grievor's counsel declared that there were still unresolved issues with respect to severance pay.

[15] The grievor's counsel noted that he wrote to the department on several occasions but never received a response. He wrote to the department on June 15, 2007, indicating that he did not agree with its response to the grievance (Exhibit G-1). He wrote again several times after the grievance was referred to the third level of the grievance process, but his requests were again ignored. The grievor wrote to Ms. Grant on June 21, 2007, and asked her to respond by June 29, 2007 (Exhibit G-2). On July 27, 2007, he wrote to Helene Gosselin, Deputy Head of Service Canada, asking for a reply to his previous correspondence regarding the grievance (Exhibit G-3).

[16] The grievor's counsel submitted that the grievance included the matters of constructive dismissal and involuntary resignation. The grievor did not have the benefit of a lawyer's advice when she drafted her grievance, so its wording may not be as precise as it could have been, but that should not affect its validity. On that point, the grievor's counsel referred me to *Gingras v. Treasury Board (Citizenship and Immigration Canada)*, 2002 PSSRB 46, where the adjudicator took jurisdiction over the grievance although it did not specifically state that the respondent's actions resulted in a financial penalty. The adjudicator noted that an employee should be given a certain degree of latitude in drafting his or her grievance.

[17] The grievor's counsel argued that the grievor's resignation was involuntary. It was the result of stress that she was subjected to following her appeal of an appointment process that the department had carried out. The grievor won the appeal, but the department failed to promote her even though she was trained and qualified for a promotion. The department subjected the grievor to further stress by requiring her to undergo a second language evaluation to keep her position. The grievor's counsel filed in evidence the grievor's resignation letter (Exhibit G-4). The letter shows that the grievor was stressed and that she resigned because of her work environment. The grievor's resignation was not the product of sound judgment.

[18] The grievor's counsel referred me to *Roy v. Treasury Board (Health and Welfare Canada)*, 2000 PSSRB 8, where the adjudicator sets out the test for determining whether an employee has resigned from his or her position. With respect to the matter of the onus of proof in cases of disguised discipline, the grievor's counsel referred me to the following decisions: *Bratrud v. Office of the Superintendent of Financial Institutions Canada*, 2004 PSSRB 10, and *Grottoli v. Canada Customs and Revenue Agency*, 2001 PSSRB 87. The grievor's counsel argued that *Burchill* did not apply to this grievance. The grievor did not change the nature of the grievance.

C. Respondent's reply

[19] The respondent's counsel argued that the disciplinary action to which the grievor refers in her grievance relates to the payment of her severance pay. The severance pay in question was granted in the grievance process. In her grievance, the grievor did not refer to her resignation as resulting from a disciplinary action.

[20] The respondent's counsel submitted that the department had replied to the grievor's counsel's letter of June 15. The respondent's counsel wanted to file in evidence a letter from Ms. Grant to the grievor's counsel dated June 19, 2007 (Exhibit E-1). In that letter, Ms. Grant informed the grievor's counsel that the department responded to the grievance at the second level of the grievance process. The grievor's counsel objected on the grounds that Ms. Grant was not at the hearing to testify to the letter's contents. I decided to admit the letter in evidence because the exchanges between the parties during the grievance process were relevant to the preliminary issues raised by the department.

[21] The respondent's counsel asked that I render a decision on the preliminary issues before I render a decision on the merits of this grievance. The grievor's counsel asked that I hear the merits of the grievance before I render a decision on the preliminary objections. I indicated to the parties that I would render a decision on the preliminary objections raised by the respondent before receiving further evidence and hearing further arguments.

III. Reasons for decision

[22] The grievor has referred her grievance to adjudication pursuant to paragraph 209(1)(b) of the *PSLRA*, which reads as follows:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

...

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

[23] The respondent argues that I should not hear this grievance since it does not relate to a disciplinary matter. I do not entirely agree with that submission. The grievance clearly alleges that she was subjected to a disciplinary action resulting in a financial penalty. More specifically, the grievor alleges that the department's refusal to pay her severance pay constitutes disciplinary action. That is clear from the last two paragraphs of her grievance:

...

I feel that this delay in paying out my severance is retribution for my actions while employed in the department (i.e. filing an appeal) and I feel I am being harassed, as a result.

I also feel that the refusal to pay my severance is considered to be discipline for these actions.

...

[24] Whether or not that refusal constitutes a disciplinary action is, of course, another matter that I would have decided upon receiving the evidence and hearing the arguments on that matter had I decided to hear this grievance. However, for the reasons set out below, I have decided that I do not have jurisdiction over this grievance.

[25] A second issue is whether I have jurisdiction to hear this grievance even though it was referred to adjudication the day after the grievor presented her grievance at the third level of the grievance process. The respondent argues that I do not have jurisdiction to hear this grievance because the department was never given the opportunity to respond to it. The grievor argues that the department could have responded to the grievance after it was referred to adjudication.

[26] I agree with the respondent's submission that the grievor did not meet the conditions set out in the *PSLRA* for referring a grievance to adjudication. The scheme of the dispute resolution process set out for grievances in the *PSLRA* is that the parties to a grievance should try to resolve it between themselves before referring it to adjudication. To ensure this, the *PSLRA* sets out conditions that the grievor must meet before referring the grievance to adjudication. Subsection 209(1) of the *PSLRA* provides that a grievor can refer a matter to adjudication after having presented his or her grievance at the final level of the grievance process if the grievor is not satisfied with the respondent's response. Section 225 of the *PSLRA* is also relevant to this issue. It reads as follows:

225. No grievance may be referred to adjudication, and no adjudicator may hear or render a decision on a grievance, until the grievance has been presented at all required levels in accordance with the applicable grievance process.

[27] Parliament has pointed out that failing to follow those steps is not a technical matter. Section 241 of the *PSLRA* provides that:

241. (1) No proceeding under this Act is invalid by reason only of a defect in form or a technical irregularity.

(2) The failure to present a grievance at all required levels in accordance with the applicable grievance process is not a defect in form or a technical irregularity for the purposes of subsection (1).

[28] The *Public Service Labour Relations Board Regulations* are also relevant to this grievance. They provide that a department must provide a response to a grievance within 20 days of its presentation. The relevant provisions read as follows:

...

Deadline for decision

72. (1) Unless the individual grievance relates to classification, the person whose decision constitutes the appropriate level of the individual grievance process shall provide the decision to the grievor or the grievor's representative, if any, no later than 20 days after the day on which the individual grievance was received by the grievor's immediate supervisor or the grievor's local officer-in-charge identified under subsection 65(1).

...

Deadline for reference to adjudication

90. (1) *Subject to subsection (2), a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process.*

Exception

(2) *If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.*

...

[29] When a grievance is referred to the third level of the grievance process, the employer has 20 days to respond. In this grievance, the respondent was deprived of that opportunity since the grievor's counsel referred the grievance to adjudication the day after he referred it to the third level of the grievance process. I have therefore decided that I do not have jurisdiction over this grievance because the grievor has not met the conditions set out in the *PSLRA* for a referral to adjudication.

[30] Had I ruled that I had jurisdiction over this matter, I would not have allowed the grievor to allege that her resignation was the result of a constructive dismissal or that it was involuntary. The Federal Court pointed out in *Schofield v. Canada (Attorney General)*, 2004 FC 622 (at paragraph 13), that "... the Adjudicator's jurisdiction is determined by the terms of the initial grievance" In my view, the initial grievance cannot be read to include constructive dismissal and involuntary resignation. The last two paragraphs of the grievance make it clear that the disciplinary action that is being grieved is the department's alleged refusal to pay the grievor's severance pay. The heading of the email is also telling; it reads: "Subject: Grievance - Severance Pay - Connie Brown." The grievor herself, in describing her grievance in the notice to the CHRC, wrote, ". . . I filed the initial grievance as a result of my struggles to obtain my severance pay, after being ignored by the department" So the initial grievance was about discipline related to severance pay, not constructive dismissal or involuntary resignation. It is only on May 10, 2007, more than seven months after the grievor presented her initial grievance (but before the department provided a response), that

the grievor's counsel introduced the issue of constructive dismissal in his letter to Ms. Grant. The issue of involuntary resignation was introduced at the grievance hearing on May 12, 2008. Therefore, I would not have had jurisdiction to address the matters of constructive dismissal and involuntary resignation since the terms of the initial grievance cannot be read to include them. Those matters were, in my view, different and distinct. I offer these comments in *obiter* since I have ruled that I do not have jurisdiction over this grievance.

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

(The Order appears on the next page)

IV. Order

[32] The referral to adjudication is dismissed for lack of jurisdiction.

July 03, 2008.

**John A. Mooney,
adjudicator**