Date: 20080815

File: 566-02-731

Citation: 2008 PSLRB 68

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

TAMMY GIBSON

Grievor

and

TREASURY BOARD
(Department of Health)

Employer

Indexed as
Gibson v. Treasury Board (Department of Health)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievor: Neil Harden, Professional Institute of the Public Service of Canada

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Regina, Saskatchewan,
June 24 and 25, 2008.

I. Individual grievance referred to adjudication

[1] Tammy Gibson ("the grievor") began her employment with the Department of Health in December 2003 as a computer systems analyst (classified at the CS-01 group and level). She worked primarily at the Help Desk located in Regina, Saskatchewan, in what was known as the First Nations and Inuit Health Branch (FNIHB). On March 9, 2005, she accepted an offer of employment for the specified term of April 1, 2005, to March 31, 2006. When the term of employment was not renewed, she filed a grievance dated March 22, 2006. She alleged that she had been discriminated against by virtue of a medical disability, in contravention of article 43 of the collective agreement signed by the Treasury Board and the Professional Institute of the Public Service of Canada on June 3, 2002, for the Computer Systems Administration Group bargaining unit ("the collective agreement").

[2] On January 10, 2007, the grievor gave notice to the Canadian Human Rights Commission that she was raising at adjudication an issue involving the interpretation or application of the *Canadian Human Rights Act* ("the *CHRA*"), R.S.C., 1985, c. H-6. On February 6, 2007, the Commission notified the Public Service Labour Relations Board's registry that it did not intend to make submissions regarding the issue raised by the grievor.

II. Objection to jurisdiction

A. Submissions for the employer

[3] By letter dated January 26, 2007, the employer objected to an adjudicator's jurisdiction to hear the grievance. At the outset of the hearing, counsel for the employer indicated that he intended to pursue that objection.

[4] Counsel for the employer essentially submitted that the "non-extension of a specified term" was not a termination and thus fell outside the parameters of subsection 209(1) of the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. It was submitted that section 209 is in reality a limitation on the otherwise broad powers of an adjudicator under the new *Act*. To support his submission, counsel referred to the following four cases: *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100; *Monteiro v. Treasury Board (Canadian Space Agency)*, 2005 PSSRB 27; *Braconnier v. Treasury*

Board (Department of National Defence), 2006 PSLRB 109; and *Hanna v. Treasury Board (Citizenship and Immigration Canada),* PSSRB File No. 166-02-26983 (19960624).

[5] All of the cases referred to by counsel for the employer referred to section 92 of the *Public Service Staff Relations Act* ("the former *Act*"), R.S.C., 1985, c. P-35, which he submitted was the same as section 209 of the new *Act*. It was submitted that an adjudicator appointed under the new *Act* or the former *Act* is a creature of statute and has no inherent powers. An adjudicator's powers are defined or limited in either section 209 of the new *Act* or section 92 of the former *Act*.

[6] Counsel for the employer submitted that in this case, the subject matter was not an interpretation of a term of a collective agreement but rather a non-extension of a specified term of employment, which falls under section 58 of the *Public Service Employment Act*, enacted by sections 12 and 13 of the *Public Service Modernization Act*, S.C. 2003, c. 22. Section 58 essentially codifies the conclusions reached in the cases referred to by counsel for the employer that when a specified term of employment expires, the employment relationship concludes, unless the appropriate authority decides to renew the term. Specifically, counsel submitted that adjudicators appointed under the former *Act* had consistently held that in such a case, they had no jurisdiction since not renewing a term did not amount to terminating employment: *Monteiro*, *Pieters*, *Hanna* and *Braconnier*. Essentially, it was submitted that the question that I must ask myself is whether I have jurisdiction over the subject matter for which discrimination is being alleged.

B. <u>Submissions for the grievor</u>

[7] The grievor's representative conceded that the relevant provision of the new *Act* was paragraph 209(1)(*a*), which allows a grievance to be referred to adjudication if it is related to "the interpretation or application in respect of the employee of a provision of a collective agreement . . . ."

[8] The grievor's representative, on the other hand, pointed out that on April 1, 2005, the new *Act* was proclaimed into force and that there were significant and critical changes made that now provide an adjudicator with jurisdiction in this case. To support his argument, the grievor's representative referred to the following five cases: *Kerr-Alich v. Treasury Board (Department of Social Development)*, 2007 PSLRB 33; *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Canada*

(Attorney General) v. Leonarduzzi, 2001 FCT 529; *Longpré v. Treasury Board (National Defence)*, 2004 PSSRB 81; and *Sincère v. National Research Council of Canada*, 2004 PSSRB 2. In essence, the position of the grievor's representative is that the employer acted in bad faith by discriminating against her and that therefore, the adjudicator has jurisdiction.

[9] In addition, the grievor's representative referred to paragraph 226(1)(*g*) of the new *Act*. It was submitted that this paragraph grants an adjudicator the power to interpret and apply the *CHRA*, which is an additional power to that granted under section 209 of the new *Act*.

C. Decision on the objection

[10] Counsel for the employer suggested that I rule on the issue of his objection to my jurisdiction before hearing evidence and arguments on the merits of the grievance. Therefore, at the close of argument I briefly adjourned to consider the issues raised. At the resumption of the hearing, I read the following:

> *Having considered the preliminary objection advanced by the employer in this matter, and having reviewed more fully the cases provided to me by both sides and the very competent arguments advanced by both representatives, I am of the view that I do have jurisdiction in this matter to hear evidence and argument on the merits.*
>
> *Although I will fully articulate my reasons for this conclusion when I render my decision, I think that it is appropriate to indicate that subsection 226(1)*(g) *of the* [new *Act*] *was important in my deliberations. In coming to this conclusion I want also to point out that the grievance itself refers to article 43 of the collective agreement and in the first level reply the employer indicates that the non-renewal of the term of employment was not only for budgetary reasons but also for issues relating to performance and attendance.*
>
> *Accordingly, I wish to hear evidence that ties in the allegations of discrimination to the reasons for non-renewal enunciated by the employer in the first-level reply. Failure to do so may be fatal to the grievance. However, I will hear arguments on this if need be.*
>
> *Also, on the issue of remedy, I would like to hear representations, at the end of the day, on what is my remedial power. In particular, given the conclusion of adjudicators under the* [former *Act*], *that being that non-renewal of a term of employment is not a termination, what*

> *is my power to order that the term employment be renewed or that payment be made for lost wages as a result of it not being renewed? In other words, is my remedial power limited to awarding damages?*

[11] Having had the benefit of further reflection, it is my continued view that an adjudicator has jurisdiction to inquire into the allegation in this grievance. Where an individual whose specified term of employment has not been renewed alleges that it was as a result of a discriminatory practice in contravention of the *CHRA*, an adjudicator has authority to inquire further into the matter. All of the cases submitted by counsel for the employer in support of this objection were decided under the auspices of the former *Act*. On April 1, 2005, the new *Act* was proclaimed as law and replaced the former *Act*.

[12] In addition to the jurisdiction of an adjudicator specified in section 209 of the new *Act*, which echoes section 92 of the former *Act*, Parliament, in its wisdom, included a new provision granting further "powers" to adjudicators. Paragraph 226(1)(*g*) of the new *Act* indicates that an adjudicator has the power to interpret and apply the *CHRA*. This newly enunciated power is linked to article 43 of the collective agreement prohibiting discrimination.

[13] Although paragraph 226(1)(*g*) of the new *Act* has not been specifically interpreted, I am persuaded by the obiter comments of the adjudicator in *Sincère*:

> . . .
>
> *[44] The adjudicator would have jurisdiction if the reasons why the* [term of employment] *was not renewed had disciplinary elements or elements independent of the* [term of employment]. *This is where the whole issue of the* [adjudicator]*'s jurisdiction over matters of human rights comes into play, since reasons related to human rights are the only ones alleged by the grievor.*
>
> . . .

[14] For the reasons stated above, it is my view that the new *Act*, in particular under paragraph 226(1)(*g*), grants authority to an adjudicator to hear the merits of a grievance involving the decision not to renew a specified term of employment where it is alleged that the reasons for the decision are prohibited discriminatory practices of the employer.

III. Summary of the evidence

[15] The grievor was the only witness called by her representative. Counsel for the employer called Joy Smith, the grievor's immediate supervisor, Irene Davies, who at the relevant time was Assistant Director, Manitoba and Saskatchewan Region, FNIHB, and Patricia Merrithew-Mercredi, who at the relevant time was Director, Manitoba and Saskatchewan Region, FNIHB. In addition, a number of documents were marked as exhibits. Having reviewed the evidence, I conclude that there is no discrepancy insofar as the relevant facts are concerned.

[16] The grievor's résumé confirms that along with her specific training, she had qualifications as a programmer analyst and had competence in a number of programming languages, operating systems and applications. The grievor started working as a CS-01 at the Department of Health in December 2003 in its Informatics Branch. Her employment was for a specified term, and in September 2004 she was seconded to work in the FNIHB since its workload was very high. This assignment resulted in a deployment to the FNIHB in February 2005. In March 2005, the grievor accepted further specified-term employment for one year, expiring on March 31, 2006.

[17] The grievor's main role was to operate the Help Desk. The Help Desk assisted First Nations and Inuit communities in maintaining the operation of the computers used for the eHealth program. In addition to that function, she was given responsibility to create and manage the onehealth.ca portal and to assist with the deployment of hardware and networking within First Nations and Inuit communities.

[18] In July 2005 the grievor met with Ms. Smith as a result of missing a week of employment due to personal problems. At the meeting, the grievor indicated that she was disappointed with herself and that she was going to get to the bottom of the situation by seeking assistance. The grievor was given no feedback on her performance until February 6, 2006. In fact, her uncontested testimony was that in December 2005 she approached Ms. Smith and asked if she should be looking for new employment. She was led to believe that it was probably not necessary, but she confirmed that she knew that Ms. Smith could not guarantee anything.

[19] On February 6, 2006, Ms. Smith met with the grievor to discuss her performance and attendance issues. When faced with Ms. Smith's concerns, the grievor indicated that she had been suffering from "extreme anxiety and depression" and that she

intended to consult with her family doctor, counsellors, the Employee Assistance Program (EAP) and a naturopath and that she would attend various workshops and read books on assertiveness, personal development, stress management, living with depression and alleviating anxiety.

[20] The grievor testified that throughout her life, she has suffered from what she explained had been initially diagnosed as "anxiety and depression" and subsequently as "bipolar disorder." She described in great length how she has suffered throughout her life. According to her testimony, she was first medically diagnosed with depression in 1997 and was prescribed medication. At that point in her testimony, counsel for the employer objected that this was hearsay evidence and worse that it was a way to introduce medical opinions that could in no way be challenged. Although I allowed the testimony, I advised the grievor that I would decide the weight to be attached to this evidence.

[21] In addition to the grievor's evidence that was objected to by counsel for the employer, the grievor's representative introduced a document (Exhibit G-3) that purported to be a doctor's report. Counsel for the employer objected that the document should not be introduced into evidence without the purported doctor being called to testify. In addition, counsel indicated that the employer had never seen the document before the day of the hearing and that upon review, most of the references were to dates that were after the decision was made not to extend the grievor's term of employment. Again, I admitted the document with notice to the grievor's representative that although it appeared to be a doctor's report, I had no idea who authored it or whether the person purporting to be a doctor was in fact a doctor and if so, what his or her qualifications were and that therefore, I may place little or no weight on this evidence.

[22] The grievor sent an email to Ms. Smith on February 6, 2006, outlining the nature of their conversation and asked, among other things, for ". . . accommodating anxiety until managed." Ms. Smith did not ask for, nor did the grievor provide, any documentation outlining the nature of the accommodation being requested. However, she acknowledged that she should have been more proactive in that regard.

[23] Ms. Smith did allow the grievor to attend doctor's appointments and EAP meetings during working hours. Ms. Smith testified that she was waiting for feedback from the grievor so as to better assess the request for accommodation. On

February 20, 2006, Ms. Smith emailed the grievor and provided her with a summary of performance expectations. In the email, Ms. Smith advises the grievor that she will be recommending a three-month extension to her specified term of employment (to June 30, 2006) to evaluate her performance. There was no dispute that Ms. Smith did not have the final say in granting an employment extension; a committee of directors known as the Senior Regional Directors' Management Committee (SRDC) made those determinations.

[24] On February 22, 2006, Ms. Davies authored a memorandum in which she recommended a three-month extension for the grievor on Ms. Smith's recommendation. In the memorandum, Ms. Davies states that Ms. Smith is working with Raeanne Kurtz, Human Resource Manager, to develop a "performance plan" for the grievor. The SRDC met on February 27, 2006. Ms. Merrithew-Mercredi and Ms. Davies testified that the three-month extension was not approved.

[25] Ms. Merrithew-Mercredi testified that the reasons for not approving the extension were strictly budgetary, but Ms. Smith indicated that in a conversation with Ms. Davies she was told that the SRDC was not prepared to "risk manage" another employee. I find that in reality there was a bit of both reasons. The real budgetary issues came in fiscal year 2007-2008 when the budget was cut by some 70 percent, but in 2006-2007 the budget remained the same as the previous fiscal year. However, in anticipation of the budget cuts, the FNIHB was required to have a transition plan to cope with them. So, when the grievor's name came before the SRDC for a three-month extension, they considered both the need for a transition plan and the performance and attendance issues touched upon in Ms. Davies' memorandum. As Ms. Davies said, those issues "did not help Ms. Gibson."

IV. Summary of the arguments and reasons

[26] The issues to be considered in this matter are as follows:

a) Has the grievor established that she has a "disability" as defined in the *CHRA*?

b) If the answer to the first question is in the affirmative, has the grievor established that she has been discriminated against? In particular, has she established that the reason why her specified-term employment was not extended was directly linked to discrimination on the part of the employer?

c) If the answer to the second question is in the affirmative, what is the remedial power of an adjudicator under the new *Act*?

d) Given the remedial power of the adjudicator, what is the appropriate remedy to be granted under the circumstances of this case?

A. Has the grievor established that she has a "disability" as defined in the *CHRA*?

[27] The Supreme Court of Canada has considered the test to be applied in matters concerning allegations of discrimination in an employment setting. Particularly, it has determined a three-part test that eliminates the distinction between direct and adverse-effect discrimination: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (*Meiorin*), [1999] 3 S.C.R. 3, para 54. However, although often overlooked, but clearly pointed out by the Federal Court of Appeal, one of the overarching principals of the *Meiorin* case is that the onus lies on the complainant (here the grievor) to prove a *prima facie* case: *Sketchley v. Canada (Attorney General),* 2005 FCA 404, para 86.

[28] In *Pepper v. Treasury Board (Department of National Defence),* 2008 PSLRB 8, an adjudicator has considered the application of *Ont. Human Rights Comm. v. Simpsons-Sears,* [1985] 2 S.C.R. 536, para 28, with respect to what a grievor is required to establish when an allegation of discrimination on the basis of disability is alleged. At paragraph 141, the adjudicator has determined that a grievor must establish that ". . . he has a disability captured by the *Canadian Human Rights Act*, that he suffered adverse treatment in the workplace and that this disability was a factor in the adverse treatment he received. . . ."

[29] The Supreme Court of Canada has further confirmed that the standard of proof in a matter involving an allegation of discrimination is the ordinary civil standard of a balance of probabilities: *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202. In applying that standard, tribunals have recognized that the evidence is often circumstantial.

[30] The grievor's representative submitted that the grievor's testimony was sufficient to establish that she has a disability. The grievor's representative was unable to refer to any case that would support his position that the evidence of the grievor herself was sufficient to draw a conclusion that she suffered from a disability.

[31] Although I am most sympathetic with the description of the grievor's symptoms, I have little if any probative evidence before me to indicate if any "disability" existed. Upon reflection, I am not convinced that the evidence of the grievor where she suggested that she was diagnosed with "anxiety and depression" and subsequently with "bipolar disorder" is sufficient, and it certainly does not meet the balance of probabilities test. Furthermore, I have concluded that I will attach no weight to the document entered as an exhibit purporting to be from a doctor (Exhibit G-3). It has no probative value and cannot be challenged in cross-examination or by another physician. In drawing this conclusion, I am particularly persuaded by the fact that no evidence was put forward as to who authored the document or what his or her qualifications were. In fact, as I write this decision, I have no idea whether this person is male or female or even a doctor, let alone what his or her qualifications may or may not be.

[32] This conclusion is crucial to the outcome of this case as I have concluded that the evidence before me is of no assistance in determining that the grievor suffered from a "disability" as defined in the *CHRA*. When pressed as to the evidence being relied upon to prove the grievor's disability, her representative stated on more than one occasion that he was relying only on the testimony of the grievor and on Exhibit G-3. This is indeed unfortunate as all that had to be done was to call the purported author of Exhibit G-3 as a witness. An adjournment would have been granted for that purpose if requested, but no such request was made.

[33] It is therefore my conclusion that since the grievor's representative has failed to prove a crucial element of the allegation of prohibited discrimination, which is that she suffered from a "disability" as defined in the *CHRA*, the grievance must fail. Given this conclusion, I need not address the other issues before me. However, in case I am in error in this conclusion, I will comment briefly on the other issues.

B. Has the grievor established that the reason why her specified-term employment was not extended was directly linked to discrimination on the part of the employer?

[34] If I had to decide on whether the grievor's representative has established that her specified-term employment not being extended was directly linked to discrimination by the employer, I would have to conclude that the grievance would not succeed. This determination is linked to the conclusion above, because it is my finding that although the grievor did "on the face of the record" request accommodation and

advise the employer that she suffered from an ailment, she at no time provided any information confirming her disability and, more importantly, the nature of her requested accommodation.

[35] The Supreme Court of Canada indicated that the ". . . search for accommodation is a multi-party inquiry. . . ." In writing that, the Court concluded that there is a duty on the ". . . complainant to assist in securing an appropriate accommodation. . .": *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970, para 43 and 44. Although the Court is quick to point out that the employer is in the best position ". . . to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. . ." it is clear from that case that the complainant must do his or her part.

[36] It is my view that it would be an unreasonable responsibility to place the onus on the employer to unilaterally determine the nature of the disability of the employee and similarly unilaterally determine the nature of the accommodation without some input from the employee: *Price v. Fredericton (City),* [2004] N.B.H.R.B.I.D. No. 1 (QL); upheld by *Price v. Fredericton (City)*, 2004 NBQB 319, and *New Brunswick (Human Rights Commission) v. Fredericton (City)*, 2005 NBCA 45. In this case, the grievor testified, and her representative also submitted, the untenable position that once the employer was advised of the existence of a possible disability, the onus fell entirely upon the employer to accommodate the needs of the grievor. I simply cannot accept this rationale, and the grievor's representative was unable to provide any case law to suggest that this was the status of the law.

[37] I do wish to suggest that under the circumstances of the case, Ms. Smith should have been more proactive. In that regard, I note that in her testimony she acknowledges that fact, but in the final analysis, the employer's failure to be more proactive did not amount to a failure to accommodate since the grievor's actions were lacking.

[38] Having found that the grievor has not established that the reasons why her specified-term employment was not extended was directly linked to discrimination on the part of the employer, I do not need to pronounce on the extent of an adjudicator's jurisdiction under the new *Act* with regards to an appropriate remedy.

C. Conclusion

[39] For all of the reasons stated above, I conclude that the grievor's representative has failed to prove her case, and therefore the grievance is dismissed.

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

(The Order appears on the next page)

V. Order

[41] The grievance is dismissed.

August 15, 2008.

George Filliter,
adjudicator