Date: 20080710

File: 566-02-1013

Citation: 2008 PSLRB 53

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ALAIN LAFERRIÈRE

Grievor

and

DEPUTY HEAD
(Canadian Space Agency)

Respondent

Indexed as
Laferrière v. Deputy Head (Canadian Space Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Himself

For the Respondent: Eric Daoust, Employer Representation Officer, Treasury Board

Decided on the basis of written submissions
filed May 26 and June 9 and 12, 2008.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] Alain Laferrière ("the grievor") referred a grievance to adjudication on March 20, 2007, alleging that the respondent, the Canadian Space Agency (CSA or "the employer"), unjustly terminated his employment. He claims that on November 27, 2006 he was coerced into resigning from his position because of conditions on his return to work communicated to him by the employer during a meeting on November 24, 2006.

[2] The Chairperson of the Public Service Labour Relations Board ("the Board") appointed me, pursuant to the authority conferred on him by paragraph 223(2)(*d*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"), to hear and rule on this case.

II. Summary of the evidence

[3] The CSA hired the grievor on October 2, 2000 as an engineer, classified EN-ENG-05. His substantive position was Manager, Hardware Safety and Mission Assurance. In July 2006, while acting in a position classified EN-ENG-06, the grievor found himself in a very serious situation of conflict with the employer. Because of that conflict, the grievor was on paid leave from July 19 to November 24, 2006.

[4] On November 22, 2006, Carole Lacombe, Acting President, CSA, called the grievor to a meeting for November 24, 2006, at 13:30. The purpose of the meeting was to discuss the grievor's return to work on November 27, 2006. Instead of reporting to work on November 27, 2006, the grievor sent a resignation letter to Ms. Lacombe on that day. On November 30, 2006, Ms. Lacombe wrote to the grievor, informing him that she accepted his resignation, effective at the close of business on November 28, 2006.

[5] On December 6, 2006, the grievor wrote to Ms. Lacombe, advising her that he was in a position to review his decision to resign and requesting her permission to be reinstated in his substantive position with the CSA. On January 12, 2007, Ms. Lacombe responded to the grievor, stating that the effective date of his resignation remained unchanged; in other words, she refused his request for reinstatement. The letter dated December 6, 2006, reads in part as follows:

> [Translation]
>
> . . .

> [Ms. Lacombe,] *since last November 27, I have received very encouraging news from Ms. Cynthia Fulton and Mr. Ian Foster to the effect that the measures taken by management to improve working conditions in the S&MA and Configuration Management section have demonstrated management's determination to take concrete action to regularize the situation.*
>
> *In light of that information, I am now in a position to review my decision to resign and to request your permission to be reinstated in my substantive position within the S&MA and Configuration Management team.*
>
> . . .

[6] On January 22, 2007, the grievor once again wrote to Ms. Lacombe, asking that his resignation be reconsidered so that he could be reinstated in his substantive position. On March 12, 2007, Dominique Brault, Chief/Human Resources Officer, CSA, responded, stating that at the request of Ms. Lacombe, she was writing to advise him that the CSA considered the file to be closed further to the acceptance of his resignation effective November 28, 2006.

III. Request for recusal

[7] On May 23, 2008, the grievor wrote to the Board to advise it of the following:

> [Translation]
>
> . . .
>
> *This is to inform the Board that I recuse Board Member Renaud Paquet from determining any question in this case or in any other case relating to me. I accuse Board Member Renaud Paquet of having unduly exhibited positions prejudicial to me in his reasons for decision in 2008 PSLRB 26. Accordingly, I cannot believe that Board Member Renaud Paquet will be capable of rendering an impartial decision relating to me in the immediate future or in the longer term.*
>
> . . .

[8] First of all, I wish to point out that the *Act* does not give the grievor the right to recuse the adjudicator. In my view, his letter constitutes instead a request for recusal.

[9] In his request, the grievor claims that I cannot render an impartial decision in this case because of the reasons I stated in *Laferrière v. Hogan and Baillairgé*, 2008 PSLRB 26, rendered on April 24, 2008. That case concerned a complaint that the

grievor filed against the union representatives of the Professional Institute of the Public Service of Canada ("the Institute"). In that complaint, the grievor alleged that the union representatives breached their duty of representation in his current dispute with the CSA. I dismissed the complaint.

[10] To dispose of the request for recusal, I must apply the directives of the courts designed to help a trier of fact determine whether a reasonable apprehension of bias exists. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, established the applicable principles:

. . .

> *. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."*

. . .

[11] *Adams v. British Columbia* (*Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.), provided explanations concerning the type of evidence required to demonstrate an appearance of bias:

> *. . . sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it* [the allegation] *is made will not bring an impartial mind to bear . . . suspicion is not enough. . . .*

[12] It is therefore for the grievor to demonstrate, beyond mere suspicions or statements, that in all probability a reasonable and well-informed person would believe that I would not decide fairly in this case.

[13] The grievor argues that in 2008 PSLRB 26, I exhibited positions prejudicial to him. In that decision, I note that the union representatives acted honestly based on the information submitted. Following the employer's final refusal to reinstate him, the grievor asked the union representatives what recourse he had. They told him that he had no recourse in light of the facts and the jurisprudence. The grievor did not inform the union that he felt threatened at his reinstatement meeting; the representatives were therefore convinced that his resignation was voluntary and free of coercion. I

therefore concluded that the union representatives did not act in a manner that was arbitrary, discriminatory or in bad faith.

[14] The reasons for the decision explain why I concluded that the union representatives' actions did not warrant my allowing the grievor's complaint against them. However, it cannot be reasonably concluded from reading those reasons that I assume a position on the issue that is the subject of this grievance, that is, that the grievor's resignation was a constructive dismissal. I merely state in the reasons that the union representatives were unable to act or make decisions on a situation of which they were unaware. The grievor never told them that he felt threatened at the meeting that was held a few days before his resignation. In no way does that mean that I believed, or now believe, that he did not feel threatened. I simply concluded, based on the evidence adduced at the time, that the union could not have known it.

[15] In the reasons for the decision, the issue of the grievor's mental health in the fall of 2006 was also raised. The medical certificates issued at that time were used for the purpose of determining whether the grievor was able to return to work. He never claimed during his discussions with the union that his mental condition was such that his judgment would have been seriously impaired at the time of his resignation. Nevertheless, the union representative examined the medical certificates and rejected that option. In no way does this mean that I then determined, at the time of his resignation and in light of the circumstances, whether the grievor's mental condition was such as to enable him to judge his own actions. That is a completely different issue for which it would be necessary to hear the parties' evidence if an argument were advanced on that subject.

[16] In short, I dismissed the grievor's complaint on April 24, 2008, since he did not show that his union representatives had contravened the provisions of the *Act*. That in no way affects my capacity to demonstrate a completely impartial mind in ruling on this referral to adjudication, which challenges a decision by the employer. In my opinion, a reasonable and well-informed person familiar with the context of this case and the reasons for my decision dated April 24, 2008, would conclude that the grievor has not established that recusal is appropriate.

[17] In view of the foregoing, the request for recusal is therefore denied.

IV. Preliminary objection by the employer

[18] On April 17, 2007, Mark Sullivan, Employer Representation Officer, sent the Board a letter submitting an objection that the Board did not have jurisdiction to rule on the grievor's referral to adjudication. The objection reads as follows:

> [Translation]
>
> . . .
>
> *The employer submits that, contrary to what Mr. Laferrière alleges, his email of December 6, 2006 is not a grievance within the meaning of article 35 of the Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada governing the Architecture, Engineering and Land Survey group (expiry date September 30, 2007). We also wish to reiterate that the documents cited above do not in any way represent a grievance and were not treated as such by management representatives of the Canadian Space Agency. Should the Board determine that the referral constitutes a grievance, the employer's position is that there has been a failure to comply with subsection 209(1) of the Act and that the Board does not have jurisdiction to consider Mr. Laferrière's referral.*
>
> . . .

[19] The employer reiterates the importance of article 35 of the collective agreement between the Treasury Board and the Institute governing the Architecture, Engineering and Land Survey group (expiry date September 30, 2007) ("the collective agreement"). The employer submits that that article dealing with grievances applies to the grievor even though he is of the opinion that he was not afforded fair representation by his union. The grievor's right to grieve is in fact based on that article of the collective agreement.

[20] On May 26, 2008 and subsequently in a reply dated June 12, 2008, the grievor made his written submissions. On May 26, 2008, he reiterated his request for recusal and proceeded to make his submissions, which read as follows:

> [Translation]
>
> . . .
>
> *In my opinion, the Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada is not applicable in this case (including article 35), since I was*

> *not afforded fair representation by the Institute at various times throughout my very serious conflict with the employer, which resulted in the referral to adjudication that is the subject of this case. In my opinion, based on paragraph 39 of the reasons for decision published on April 24, 2008, it is important to point out that the decision to dismiss my complaint against the Institute (2008 PSLRB 26) is not representative of the representation afforded to me by the Institute throughout the conflict. Paragraph 39 reads in part as follows: "In ruling on this complaint, I will take into account only evidence related to . . . the respondents' actions following the complainant's March 19, 2007 request for assistance."*
>
> *In my opinion, I was subjected to an unjust termination of employment by the employer. I would describe this as a constructive dismissal.*
>
> *In my opinion, subsection 209(1) of the PSLRA is applicable in this case.*
>
> *I have raised issues relating to the interpretation of the Human Rights Act [sic] with respect to the actions and policy of certain management representatives of the employer.*
>
> *The Human Rights Commission [sic] indicated that it did not intend to allocate any resources to this case and requested a copy of the final decision for its files.*
>
> *In my opinion, the Public Service Labour Relations Board has the mandate and the jurisdiction to hear this case.*
>
> . . .

[21] In his reply dated June 12, 2008, the grievor reiterates his position that article 35 of the collective agreement on the grievance procedure is not applicable in his case since he was not afforded fair representation by the union during his conflict with the employer.

[22] The grievor argues that he is not relying on the collective agreement for the purpose of filing his grievance and that the *Act* provides him with a right to refer any individual grievance to adjudication without limiting such right to grievances governed by a collective agreement.

[23] The grievor argues that the process he followed is in accordance with the spirit of section 209 of the *Act*. In his view, he did not receive satisfaction following the letter dated March 12, 2007 from the employer advising him that his file was closed. In his

opinion, he suffered unjust termination of employment, which he can now describe as a constructive dismissal. Accordingly, the Board has the mandate and the jurisdiction to hear the case.

V. Reasons

[24] The sections of the *Act* applicable in this case to determine the adjudicator's jurisdiction are 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.*
>
> . . .
>
> ***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).*

. . .

[25] The issue that arises in ruling on the employer's objection is whether the grievor did or did not file a grievance. The grievor argued, when making the referral to adjudication, that he did so by means of the email he sent to Ms. Lacombe on December 6, 2006. Since the grievor found the response he received to be unsatisfactory, he once again addressed himself to Ms. Lacombe on January 22, 2007. From his point of view, that constituted transmittal of his December 6, 2006 "grievance" to the next level. Also, in the grievor's view, Ms. Brault's reply dated March 12, 2007 to the letter to Ms. Lacombe dated January 22, 2007 constituted the response at the final level of the grievance procedure.

[26] The term "grievance" is not defined anywhere in the *Act* or the collective agreement. It is common knowledge in the field of labour relations that a grievance is basically a written complaint against a decision of the employer that an employee wishes to grieve.

[27] Nowhere in his alleged grievance of December 6, 2006 does the grievor mention the employer's decision that he referred to adjudication, namely, the employer's alleged unjust termination of his employment and his being coerced into resigning as a result of conditions placed on his return to work that the employer communicated to him at a meeting held on November 24, 2006. Instead, the grievor is requesting that the employer ignore his resignation and reinstate him in his position.

[28] The internal grievance resolution procedure exists to provide the parties with the possibility of finding solutions to their disputes themselves. The various levels of the procedure provide an equivalent number of opportunities for dialogue and discussion, with the goal of reaching a solution. If no agreement is achieved, the parties may then turn to a third party who has the authority to impose a solution. This constitutes the foundation of the grievance systems of Canadian labour relations regimes, and the *Act* is no different in that regard.

[29] The grievor's December 6, 2006 letter to Ms. Lacombe is not a grievance within the meaning of article 35 of the collective agreement. There is no doubt that in the letter the grievor makes a request to the employer. However, nothing in the letter's contents could reasonably suggest to the employer that it is a grievance. Furthermore, I do not consider that the letter to Ms. Lacombe dated January 22, 2007 constitutes transmittal of the grievance to the next level.

[30] There was a failure to comply with the obligation to first use the internal grievance procedure, as required by section 225 of the *Act*. Subsection 241(2) of the *Act* confirms that this is not a defect in form or a technical irregularity within the meaning of subsection 241(1) of the *Act*. Accordingly, section 225 applies to its full effect and leads me to allow the employer's objection.

[31] Finally, even if I were to conclude that the internal grievance settlement procedure had been followed, I would not have jurisdiction, given that the grievor never filed a grievance against the termination of his employment.

[32] The grievor argues that the collective agreement does not apply to his case since the union did not afford him fair representation throughout his conflict with the employer. That argument must be dismissed on its face. The collective agreement is the only labour contract for all public servants who belong to a bargaining unit. If an employee is dissatisfied with the union representation afforded to him or her, he or

she can file a complaint against the union, but the collective agreement continues to apply, regardless of the nature and outcome of the complaint.

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

(The Order appears on the next page)

VI. Order

[34] The request for recusal is dismissed.

[35] The preliminary objection is allowed.

[36] The grievance is dismissed since the adjudicator has no jurisdiction to consider it.

July 10, 2008.

PSLRB Translation

Renaud Paquet,
adjudicator