Date: 20081119

File: 166-34-37434

Citation: 2008 PSLRB 94

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

LANCE ROGERS

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Rogers 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: Renaud Paquet, adjudicator

For the Grievor: Evan Heidenger, Professional Institute of the Public Service of Canada

For the Employer: Harvey Newman, counsel

Heard at Vancouver, British Columbia,
October 28, 2008.

I. Grievance referred to adjudication

[1] On May 20, 2004, Lance Rogers ("the grievor") grieved a five-day suspension imposed by the Canada Revenue Agency ("the employer"). At the time, the grievor was covered by the collective agreement between the employer and the Professional Institute of the Public Service of Canada for the Audit, Financial and Scientific group ("the collective agreement") for the period from December 22, 2000 to December 21, 2003. The reply at the final level of the grievance process is dated December 18, 2006, and the grievance was referred to adjudication on January 22, 2007.

[2] On April 1, 2005, the *Public Service Labour Relations 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*, this reference to adjudication 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*").

[3] In his grievance, the grievor alleged that the investigation, the disciplinary procedure and the disciplinary action imposed by the employer violated both his right to a fair process and the provisions of articles 24 and 37 of the collective agreement. As corrective action, the grievor asked that the suspension be rescinded, that lost pay and benefits be restored, that leave credits be restored, that all references to discipline be destroyed, and that he be made whole in every way.

[4] On July 5, 2004, at the second level of the grievance process, the employer reduced the five-day suspension to a written reprimand. Based on that decision, on February 13, 2007, the employer wrote to the Public Service Labour Relations Board ("the Board") and objected to the jurisdiction of an adjudicator because there was no longer a disciplinary action that resulted in a suspension or a financial penalty. The Board asked the parties to submit their arguments on the objection in writing. The written submissions were received in June and July 2008. The adjudicator decided that a decision could not be made based only on those submissions, and so a hearing was scheduled.

[5] At the beginning of the hearing, it was agreed by the parties that the hearing would be limited to evidence and arguments about my jurisdiction. It was also agreed

that the grievor's testimony would be limited to elements related to jurisdiction and, more specifically, to his claim that a financial penalty had been imposed on him.

II. Summary of the grievor's evidence

[6] The grievor works as an Auditor at the Burnaby-Fraser Tax Service Office. The employer suspended him because he had acted improperly by intervening on behalf of a taxpayer.

[7] The grievor is of the opinion that he did nothing wrong, that he acted in an open manner and that he did not hide anything from the employer. The only thing he did was send an email on behalf of a woman he had met through some church functions. That woman had talked to him about problems that she was encountering with the Canada Revenue Agency ("the Agency"), which was claiming the repayment of three years of child tax benefits that had already been granted to her. The grievor was not involved with the woman's file as an employee of the Agency. However, he thought that the situation was unfair, and he wanted to do something to correct it.

[8] The grievor spoke with his superiors and was told not to get personally involved in that file. A few months later, the grievor attended a presentation given by a specialist from the Legislative Policy Directorate of the Agency who, among other things, spoke about "remission orders," which can be issued under some special circumstances to resolve issues between taxpayers and the Agency.

[9] Shortly after that presentation, the grievor emailed the specialist explaining the woman's issues, and suggested that the specialist contact the Problem Resolution Agent at the grievor's office, who was aware of the issues confronting the woman. Eighteen months passed, and the grievor was finally informed that a remission order had been issued. The woman's problems had been resolved.

[10] The grievor was very proud of his actions; he felt that he had contributed and had helped someone in need. When it was time for his annual performance review, he notified his superior of his accomplishment, and he asked that it be mentioned in his appraisal review. However, his superior reminded the grievor that he had been asked not to get involved with the woman's file.

[11] The employer then decided to launch a full-fledged investigation into the grievor's behaviour regarding the woman's file, which profoundly hurt the grievor. He

had trouble sleeping, and it created a lot of stress for him. He visited his doctor and went on sick leave for about one month because he was experiencing extreme stress from the situation. When he returned from sick leave, the employer's fact-finding investigators met with the grievor and explained the accusation against him. This created more stress for the grievor, who once again saw his doctor. The doctor provided him with another medical certificate, and the grievor went on sick leave for approximately one more month.

[12] Those stress leaves were supported by medical certificates. The stress was a direct consequence of the investigation and the employer's accusation of misconduct. Eventually, the grievor used all of his paid sick leave. Later, when his wife became ill and his presence was required, the grievor had to take sick leave without pay.

III. Summary of the arguments

A. For the employer

[13] The employer's position is that an employee leaving the workplace on sick leave rather than leaving because the employer asked him or her to leave is not disciplinary action and cannot be considered a financial penalty resulting from disciplinary action under paragraph 92(1)(*c*) of the former *Act*.

[14] It is possible that the grievor felt stressed during the course of the investigation, but the employer granted him the requested sick leaves. The sick leaves were not the result of the employer's intention to punish the employee but rather the result of the employee being sick. The employer did not impose the sick leaves.

[15] The employer argued that this case differs from *Massip v. Canada (Treasury Board)*, [1985] F.C.J. No. 12 C.A. (QL). In *Massip*, the employee, a foreign service officer, had her foreign service premium cancelled for disciplinary reasons. The Federal Court of Appeal ruled that the loss of the foreign service premium did constitute a financial penalty and, in that case, resulted immediately and inevitably from disciplinary action. In the grievor's case, the employer did not impose sick leave on the grievor. Rather, the grievor asked for sick leave, and the employer granted it.

[16] In *Attorney General of Canada v. Demers*, 2008 FC 873, the Federal Court quashed the decision of the adjudicator, who had concluded that the grievor went on sick leave as a direct result of stress caused by the employer. The adjudicator had

ordered the employer to compensate the grievor for the loss resulting from the sick leave. The Court did not agree with the adjudicator and stated that an adjudicator of the Board does not have the expertise to determine that certain actions of the employer could cause psychological distress leading to sick leave. By making such a determination, the adjudicator exceeded her power.

[17] The employer does not dispute that a disciplinary investigation and disciplinary action can cause stress on employees. However, the grievor presented no medical evidence that the sick leaves were taken as an immediate consequence of the employer's action. In the absence of such medical evidence, and considering *Demers*, an adjudicator cannot conclude that the sick leaves were a financial penalty resulting from disciplinary action.

[18] The employer recognized that the grievor is a valuable employee. However, the employer had concerns with the grievor's conduct when he intervened in a taxpayer's file. It was legitimate for the employer to conduct an investigation and the investigation was conducted in good faith. After reviewing the circumstances of the case, the employer decided to reduce the penalty to a written reprimand. Since then, the written reprimand has been removed from the grievor's file.

[19] The employer also referred me to *Parkolub and Hu v. Canada Revenue Agency*, 2007 PSLRB 64, and to *Price v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 47.

B. <u>For the grievor</u>

[20] At the outset of his argument, the grievor withdrew the alleged violations of articles 24 and 37 of the collective agreement. Considering that the employer has reduced the disciplinary action to a written reprimand, the grievor is asking that his sick leave credits be restored or reimbursed.

[21] There is no doubt that the sick leaves taken by the grievor resulted from the disciplinary investigation and the disciplinary action imposed by the employer. The grievor became stressed, went to see his doctor and left on sick leave. As a result, he spent all of his sick leave credits, and he incurred a financial loss when he had to take sick leave without pay. That loss resulted from the disciplinary action imposed by the employer.

[22] There is jurisprudence in favour of the grievor's argument that loss of sick leave could be considered as a financial penalty. As established in *Massip*, a financial penalty does not need to result only from a suspension. In *Massip*, it involved the loss of the foreign service premium. In this case, it involves the loss of sick leave credits. The interpretation provided by the Federal Court of Appeal in *Massip* has subsequently been followed by the Board's adjudicators in *Lavigne v. Treasury Board (Public Works)*, PSSRB File Nos. 166-02-16452 to 16454, 166-02-16623 and 16624, and 166-02-16650 (19881014), in *Guay v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-24899 (19950217), and in *Gingras v. Treasury Board (Citizenship and Immigration Canada)*, 2002 PSSRB 46.

[23] In *Lavigne*, the adjudicator concluded that the grievor's use of sick leave could be regarded as a financial loss equivalent to a financial penalty imposed by the employer. In his decision, the adjudicator directed the employer to reinstate the grievor's sick leave credits. In *Guay*, the adjudicator also regarded the use of sick leave credits as a financial penalty, and he ordered the employer to reinstate the sick leave credits. In *Gingras*, the adjudicator had to decide on an objection from the employer that the loss of the foreign service premium could not be argued at adjudication because it was not mentioned in the grievance. The adjudicator rejected the objection and took jurisdiction.

[24] The employer does not dispute that the grievor used sick leave immediately after he was advised of the disciplinary investigation and immediately after he was advised that he would be suspended. The grievor provided the employer with medical certificates to support his requests for sick leave, and the employer approved those requests.

[25] This case differs from *Demers*, where the adjudicator went too far in concluding that the action of the employer provoked the use of sick leave. In this case, the adjudicator should apply the principles established in *Massip* or *Lavigne* and in *Guay*. The grievor's illness occurred at the time the discipline was imposed. There is a direct causal link between the discipline and the sick leave. In *Demers*, the direct causal link could not be made.

IV. Reasons

[26] The employer raised an objection on jurisdiction, given that the original suspension without pay was reduced during the grievance process to a letter of reprimand. The grievor counters that he did suffer a financial penalty because he had to use his sick leave. Therefore, the only question to be decided is whether the sick leaves taken by the grievor should be considered as a financial penalty resulting from disciplinary action. Subsection 92(1) of the former *Act* reads as follows:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> (a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> (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*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)*(f) *or* (g) *of the* Financial Administration Act, *or*
>
> (c) *in the case of an employee not described in paragraph* (b), *disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *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] Based on *Massip*, it is clear that a financial penalty does not necessarily need to be a suspension without pay. In *Massip*, it was the loss of the foreign service premium that constituted a financial penalty. The following abstract summarizes well the logic applied by the Federal Court of Appeal:

> . . .
>
> *Reimbursement of costs incidental to service outside Canada is only one consideration for provision of the Foreign Service Incentive. It is primarily incentive payment. I do not see how its loss can be regarded as any less a financial penalty then*

> [*sic*] *the loss of any other component of an employee's remuneration entitlement. I infer, in the absence of evidence or a finding to the contrary, that a term posting entails an element of tenure.*
>
> *The remoteness of the financial penalty from the disciplinary action is a proper consideration. However, it does not arise here. The loss arose immediately and inevitably from the disciplinary action by operation of an express provision incorporated in the collective agreement governing the Applicant's employment. It was not at all remote.*
>
> . . .

[28] In *Massip*, the employer recalled the employee to Canada and stopped paying her the foreign service premium. The loss was immediate and inevitable. In this case, the sick leaves immediately followed the disciplinary investigation and the disciplinary action. However, no evidence was presented to support the argument that the sick leave was inevitable, as was the loss of the foreign service premium in *Massip*.

[29] The employer did not force the grievor to take sick leave. The employer simply approved the sick leave when the grievor presented his requests. The evidence cannot lead me to conclude that sick leave was inevitable.

[30] In *Demers*, the Court quashed the adjudicator's decision because she had concluded that there was a link between the employer's action and psychological distress suffered by the employee without being presented with any scientific evidence to that effect. The following extract is of particular interest:

> . . .
>
> *[34] In her decision, the adjudicator referred to Mr. Demers' psychological distress. Bear in mind that the adjudicator's field of expertise is in labour relations and, unless she refers to the opinion of either a physician or a psychologist in determining that a certain event caused psychological distress to Mr. Demers, she is clearly exceeding her powers.*
>
> . . .

[31] The grievor did not present any evidence to establish that the sick leave was inevitable as a consequence of the employer's investigation and disciplinary action. He referred to *Lavigne* and *Guay* in support of his argument. In both cases, the adjudicator did not rely on expert evidence to establish a connection between the use of sick leave and the employer's action. However, the facts in those two decisions were

substantially different from the facts in *Demers*. Also, both decisions were issued before the Federal Court examined the question in *Demers* in 2008.

[32] In *Lavigne*, the employer had ordered Mr. Lavigne to take leave. He chose to use his sick leave, whereas other managers who were also investigated took annual leave, which eventually was reimbursed to them. Mr. Lavigne's sick leave had not been reimbursed. In *Guay*, the adjudicator found that the actions of the employer were such that stress was inevitable and that at least some of the sick leave used by Mr. Guay was directly attributable to the actions of the employer.

[33] In this case, the employer did nothing wrong in deciding to launch an investigation on the grievor's behaviour. The grievor testified that he was stressed by the fact that the employer conducted an investigation. Later, he was stressed by the disciplinary action imposed on him. The burden was on the grievor to prove that his sick leaves were inevitable as a consequence of the employer's disciplinary action. He did not meet this burden, and, for that reason, I accept the objection raised by the employer.

[34] I do not have jurisdiction to hear this grievance because there is no financial penalty resulting from the disciplinary action taken by the employer, as per paragraph 92(1)*(c)* of the former *Act*.

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

(The Order appears on the next page)

V. Order

[36] I accept the objection raised by the employer.

[37] The grievance is dismissed.

November 19, 2008.

Renaud Paquet,
adjudicator