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File: 566-02-768

Citation: 2009 PSLRB 101

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GINO TARASCO

Grievor

and

DEPUTY HEAD
(Department of Citizenship and Immigration)

Respondent

Indexed as
Tarasco v. Deputy Head (Department of Citizenship and Immigration)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: André Julien, Canada Employment and Immigration Union

For the Respondent: Martin Charron, law clerk

Heard at Montreal, Quebec,
July 28 and 29, 2009.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] On January 9, 2006, the Department of Citizenship and Immigration ("the employer") hired the grievor, Gino Tarasco, for a determinate period as an assistant at its Montreal call centre. On May 19, 2006, the employer informed Mr. Tarasco that it was terminating his employment as of June 2, 2006 because he had failed one of his training tests. On May 31, 2006, Mr. Tarasco filed a grievance against the termination of his employment. The grievance was referred to adjudication on January 31, 2007.

[2] On June 25, 2007, the employer informed the Public Service Labour Relations Board ("the Board") that, in accordance with the *Public Service Labour Relations Act*, an adjudicator did not have jurisdiction to hear the grievance because it was about termination while on probation and that such terminations fall under the *Public Service Employment Act* (*PSEA*).

[3] In his grievance, Mr. Tarasco alleges that his dismissal was a termination of contract without valid grounds and a disguised dismissal.

[4] I took the employer's objection under consideration at the hearing. The parties agreed that they would adduce their evidence and arguments on the objection and on the merits of the grievance.

II. Summary of the evidence

[5] The employer adduced eight documents in evidence. It called as witnesses Jean-Claude Miron, Sonia Rozon and Bobby Dagenais. At the time of the grievance, Mr. Miron was the director of the employer's Montreal call centre. Ms. Rozon and Mr. Dagenais were both supervisors at the call centre. They also trained new employees. Ms. Rozon was Mr. Tarasco's immediate supervisor. Mr. Tarasco testified and adduced five documents in evidence.

[6] Under an initial contract, Mr. Tarasco was hired for a three-month period beginning January 9, 2006 and ending March 31, 2006. That initial contract was renewed for the period from March 31, 2006 to March 31, 2007. The initial contract included a clause indicating that Mr. Tarasco would be subject to a 12-month probationary period. That clause also applied to the second contract, so Mr. Tarasco's probationary period should have ended on January 8, 2007.

[7] There are 275 employees at the Montreal call centre. It is the employer's

national call centre; thus, employees working there receive calls for requests for information from the public across Canada. The call centre must continually recruit new assistants as their annual turnover rate is between 30 and 40 percent.

[8] The call centre has a structured training program for assistants. The poster or the statement of merit criteria under which candidates can apply for assistant positions indicates under the "Other requirements/Comments" heading that candidates must be willing to take training and to pass exams. It also states that employment will be terminated if an exam is failed.

[9] The training program for new assistants is divided into 2 parts consisting of a total of 10 modules. A written test is administered at the end of each module. After passing the first six tests, Mr. Tarasco failed the test for the seventh module, entitled "Permanent Residency." He obtained a score of 62.5 percent, but the pass mark is 65 percent.

[10] On May 17, 2006, shortly before the one-hour test on the seventh module, Mr. Tarasco received a call from his brother informing him that their mother had just been hospitalized on an emergency basis because of heart problems. Mr. Tarasco claims that he informed Ms. Rozon and Mr. Dagenais before the test. Ms. Rozon and Mr. Dagenais claim that Mr. Tarasco simply told them that he was nervous. None of Mr. Tarasco, Ms. Rozon or Mr. Dagenais stated that Mr. Tarasco asked to leave and to postpone the test date. At the end of the test, Mr. Tarasco told Mr. Dagenais that he felt that he had not done well.

[11] Mr. Tarasco testified that Ms. Lauzon met with him late in the afternoon of May 18, 2006 to inform him that he had failed the test because his result was 63.1 percent. For that reason, his employment contract was terminated. Mr. Tarasco was immediately escorted out of the call centre. He was not entitled to any other explanation or to an end-of-employment interview.

[12] Mr. Tarasco did not see his copy of the test in question until July 2009. He noted that his mark had changed from 63.1 percent to 62.5 percent. On that point, the employer's witnesses stated that the mark had always been 62.5 percent. Mr. Tarasco claims that the marks that he was awarded on questions 8 and 13 of the test are too low. If his answers had been properly assessed on those questions, he believes that he would have obtained a passing grade.

[13] Mr. Tarasco states that he is more comfortable in English than in French. At home, his parents spoke mainly French or Italian. However, all his education from elementary school on was in English. The training provided by the employer was bilingual. Participants were able to ask questions in the language of their choice, but a significant portion asked questions in French because they were Francophone. That made Mr. Tarasco's training more difficult because he constantly had to consult the French version and then the English version of the training material. Mr. Tarasco claims that it affected his learning.

[14] On the question of language, the employer adduced a hiring document that Mr. Tarasco had signed indicating that his first official language and his preferred language are French. The employer also submitted the results of Mr. Tarasco's second-language evaluation, which was, in this instance, in English.

[15] The terminology used in the termination-of-employment documents is not uniform. In the May 19, 2006 termination letter, the employer terminates the determinate employment because Mr. Tarasco did not fulfill one of the conditions of employment by failing one of the training tests. On the "Notice of Termination of Employment," the employer wrote the following as the reason for leaving: termination of employment. On the form completed for employment insurance, the employer indicated that the reason for leaving was rejection on probation. Given the wording on the record of employment, Mr. Tarasco was unable to receive employment insurance benefits.

III. Summary of the arguments

A. For the employer

[16] Mr. Tarasco's termination of employment is a rejection on probation. That type of dismissal is provided for in the *PSEA*, and a Board adjudicator does not have jurisdiction to intervene. The following provisions of the *PSEA* confer on the employer the right to impose a probationary period and to reject an employee during that period:

. . .

61. *(1) A person appointed from outside the public*

> *service is on probation for a period*
>
> > *(*a*) established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act*; or*
> >
> > . . .
>
> *Termination of employment*
>
> ***62.*** *(1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> > *(*a*) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act*, or*
> >
> > . . .
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> . . .

[17] In a rejection on probation, the employer does not have to provide evidence of just and sufficient cause for termination. Rather, it must show that the rejection is for an employment-related reason. If the employee believes that the reason is not employment related but rather a ruse or subterfuge, he or she must prove that it is a disguised dismissal.

[18] The employer has a training program in place for its assistants during their probationary periods. Each module of that training is subject to a test when the module is completed. If the employee fails a test, he or she is terminated. Mr. Tarasco failed one of the tests, and thus, he failed his probationary period. Therefore, he was terminated for an employment-related reason.

[19] Mr. Tarasco did not provide any evidence to show that his rejection on probation was a ruse or subterfuge or that there was some other real reason for the termination. Instead, the evidence shows that Mr. Tarasco failed a test. Mr. Tarasco claims that the failure was due to several reasons, including that he did not feel well because his mother had just been hospitalized, that the marking of two questions was

incorrect and that his training had been more difficult because of language comprehension problems. The adjudicator does not have jurisdiction to examine those elements, which have nothing to do with a ruse or subterfuge in an effort to cover up some other reason for the termination.

[20] In support of its arguments, the employer adduced the following decisions: *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429; *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (QL); *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139; *Dalen v. Deputy Head (Correctional Service of Canada)*, 2006 PSLRB 73; *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33; *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73; and *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91.

B. For Mr. Tarasco

[21] The employer's objection to the adjudicator's jurisdiction should be dismissed. The grievance was filed and dismissed at each stage of the grievance process. Furthermore, the employer acted arbitrarily and in bad faith.

[22] At the time of the termination, the employer did not comply with the Treasury Board guidelines applicable to a termination of employment for unsatisfactory performance. Under those guidelines, the employer must take a number of steps, which were completely omitted in Mr. Tarasco's case.

[23] The employer was overly strict in correcting Mr. Tarasco's test. An analysis of the test and the expected answers shows that Mr. Tarasco should have received more marks for questions 8 and 13. Had that happened, he would have passed the test and would not have been rejected on probation.

[24] Mr. Tarasco had informed the employer that he was nervous and preoccupied because of his mother's hospitalization. The employer did not take it into account. Mr. Tarasco had experienced some difficulty with the bilingual format of the training provided by the employer. The employer did not take that into account either.

[25] Mr. Tarasco was doubly penalized by the employer. He lost his job, and the employer indicated on his record of employment that he was rejected on probation. In addition to losing his job, he was also not entitled to employment insurance benefits.

[26] In support of his arguments, Mr. Tarasco referred to *Leonarduzzi*. He also adduced the following decisions: *Dubé and Piton v. Treasury Board (Department of National Defence)*, 2007 PSLRB 77; *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71; *Babineau v. Treasury Board (Correctional Service of Canada)*, 2004 PSLRB 145; and *Keays v. Honda Canada Inc.*, 2007 ONCA 564. The Treasury Board document *Guidelines for Demotion/Termination of Employment for Unsatisfactory Performance* was also adduced in support of one of Mr. Tarasco's arguments.

IV. Reasons

[27] Subsection 62(1) of the *PSEA* is clear: the employer may terminate the employment of an employee while the employee is on probation. A Board adjudicator does not have jurisdiction to rule on that type of rejection, except to verify that it is in fact a rejection on probation and not some sort of ruse to hide another reason for termination.

[28] *Penner* serves as a reminder that the probationary period allows the employer to assess an employee's ability to perform a job. During that period, the employer may reject the employee if it believes that the employee does not have the qualities required to hold the position. An employee terminated in that manner does not have the right of recourse to adjudication.

[29] If the employee refers a grievance to adjudication following a rejection on probation, then the employer's burden of proof is only to show that the reason for the rejection is employment related. That principle is clearly set out in *Leonarduzzi*. If it is shown that the reason for the rejection is employment related, that is, related to the qualities required to hold the position, the adjudicator does not have jurisdiction to hear the grievance unless the grievor proves that the rejection on probation is a ruse or subterfuge hiding another reason for termination. If he or she were to succeed in providing that evidence, then the adjudicator would have jurisdiction to hear the grievance.

[30] Mr. Tarasco was terminated because he failed a test that measured his skills regarding one of the functions of his position. Such a reason for rejection is directly related to employment. The evidence adduced by the employer is not contested; the test covered one aspect of an assistant's work. Therefore, I do not have jurisdiction to

hear Mr. Tarasco's grievance because the employer has shown me that it had an employment-related reason for rejecting him. Furthermore, Mr. Tarasco did not prove that the rejection was a disguised dismissal and that the reason given, an unsuccessful probationary period, was merely a ruse.

[31] I am satisfied from the evidence adduced that Mr. Tarasco was not feeling well on May 17, 2006 when he arrived for the test. That may have negatively affected his test results. Mr. Tarasco missed the pass mark by only a small margin. It is possible that the marking criteria were too strict. It is also possible that Mr. Tarasco did not fully understand certain concepts of the training because of its bilingual format. Under such circumstances, the employer might have offered Mr. Tarasco an opportunity to retake the test, but it did not. Regardless of whether that may seem overly rigid, the employer was fully within its rights not to offer Mr. Tarasco an alternative and, instead, to decide to reject him.

[32] Contrary to what Mr. Tarasco alleges, a double penalty does not apply here. What the employer wrote on the record of employment is not a penalty but rather reflects the reason for the termination of employment. In addition, the Treasury Board policy to which Mr. Tarasco refers does not apply because it does not address termination of employment while on probation. Lastly, there is nothing in the evidence adduced by Mr. Tarasco to support the claim of bad faith or arbitrariness in the employer's actions or decisions.

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

(The Order appears on the next page)

V. Order

[34] The employer's objection to an adjudicator's jurisdiction is allowed.

[35] The grievance is dismissed.

August 19, 2009.

PSLRB Translation

Renaud Paquet,
adjudicator