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Citation: 2009 PSLRB 1

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

HÉLÈNE GALARNEAU ET AL.

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Galarneau et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication under section 209 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, adjudicator

For the Grievors: John Mancini, counsel

For the Employer: Nadia Hudon and Nadine Perron, counsel

Decided on the basis of written submissions filed November 4 and 24 and December 2, 2008.
(PSLRB Translation)

I. Nature of the grievances

[1] I am seized of 58 grievances filed between July 27, 2005 and April 6, 2006. The 58 grievors are all employed by the Correctional Service of Canada ("the employer"), and all filed similar grievances, which have been grouped for adjudication. The grievances read as follows:

> [Translation]
>
> *Since 1989* [the year varies from one grievance to another] *my employer has exposed me to second-hand smoke in my workplace, even though the toxicity of tobacco is well known. This situation has caused me health risks, health problems, stress, tension, worry, inconvenience and discomfort. My quality of life at work has deteriorated markedly, and my personal quality of life has been affected. The employer has not taken measures to eliminate second-hand smoke in the workplace. The employer is violating clause 18.01 of the collective agreement, the* Non-smokers' Health Act*, the* Canadian Charter of Rights and Freedoms *(sections 7 and 15), and the* [Quebec] Charter of human rights and freedoms*.*

[2] All the grievors have requested the following corrective action:

> [Translation]
>
> *Order the employer to take the necessary measures to eliminate second-hand smoke in my work environment. Order the payment of $10,000 in damages and interest for physical and psychological harm caused by the employer's negligence and failures. Order the payment of $20,000 in punitive or exemplary damages and interest for violating the* Canadian Charter of Rights and Freedoms.

[3] The employer raised an objection about the jurisdiction of an adjudicator, arguing that, since the grievances had not been filed at the first level within the time limit set out in the collective agreement, they could not be referred to adjudication under section 209 of the *Public Service Labour Relations Act*. Clause 20.10 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"), which specifies the time limit for filing a grievance, provides as follows:

> ***20.10*** *An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause*

> *20.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

[4] At a pre-hearing conference held on October 6, 2008, it was agreed that the employer's objection about the time limit for filing a grievance would be dealt with by written submissions.

[5] The employer filed its submission on November 4, 2008. The bargaining agent filed its response on November 20, 2008. The employer filed its rebuttal on December 2, 2008. This decision deals only with the objection raised by the employer.

II. Summary of the arguments

A. For the employer

[6] The employer argued that the grievances have to do with events and circumstances that occurred, and of which the grievors became aware, well before the 25-day time limit set out in the collective agreement for filing a grievance. Essentially, the employer argued as follows:

> [Translation]
>
> *. . . the employees have each noted circumstances of which they became aware, starting in 1975 in some cases (G. Renaud, 568-02-64) until 2003 in others (R. Jean-René, 568-02-51).*
>
> *Although the grievors decided to complain of this situation to their employer only in 2005, according to the admissions in their grievances they had been aware of this situation and had considered it grievable for much longer than the 25-day time limit.*
>
> *In addition, the grievors do not allege any particular circumstance occurring within the 25 days before their grievances were filed.*
>
> *The employer therefore argues that the grievors cannot now allege that their grievances are continuing grievances. Based on such an argument, grievors alleging a continuing grievance could allow a situation they considered harmful to them to go on as long as they wanted, thus circumventing the time limits set out in the collective agreement and doing something indirectly that they may not do directly.*

[7] The employer also argued that the grievors did not apply for an extension of the time limit and that, in any case, such an application should be dismissed on the grounds that the criteria set out in section 61 of the *Public Service Labour Relations Board Regulations* have not been satisfied. That section authorizes the Chairperson of the Public Service Labour Relations Board to extend a time limit provided in a grievance process contained in a collective agreement. Relying on *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, counsel for the employer argued that the criteria applicable to the extension of time limits are as follows:

- *clear, cogent and compelling reasons for the delay;*
- *the length of the delay;*
- *the due diligence of the grievor;*
- *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*
- *the chance of success of the grievance.*

[8] Applying the criteria to these grievances, counsel for the employer argued as follows:

> [Translation]
>
> *On one hand, the grievors have indicated no clear, cogent or compelling reasons for the delay.*
>
> *On the other hand, the length of the delay —between 2 and 33 years — speaks for itself. The lengthy delay also demonstrates a lack of due diligence by the grievors.*
>
> *Extending the time limit would cause considerable prejudice to the employer, particularly given the time elapsed — up to 33 years in some cases. As well, given the nature of the grievances, for all practical purposes it would be nearly impossible for the employer to adduce evidence going back so far in time.*
>
> *In addition, the employer argues that in any case these grievances have no chance of success on their merits because, first, in accordance with subsection 208(2) of the* Public Service Labour Relations Act, *other administrative procedures for redress were provided to the grievors, under either the* Government Employees Compensation Act *or the*

> Canada Labour Code *and, second, because clause 18.01 of the collective agreement does not confer any special rights on the grievors.*
>
> *In fact, the grievors have alleged a violation of clause 18.01 of the collective agreement:*
>
> > *The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Union, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*
>
> *In that regard, the employer argues that clause 18.01 of the collective agreement is a general clause that, in light of the wording of the grievors' grievances, confers no substantive rights on the grievors. In fact, the clause referred to has no practical purpose other than to allow the grievors to refer their grievances to adjudication.*

[9] In support of their position, counsel for the employer also cited *Canada (Attorney General) v. Lâm*, 2008 FC 874.

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

[10] Counsel for the grievors argued, first, that the objection raised by the employer should be taken under advisement. They relied on *Collège d'enseignement général et professionnel de Valleyfield c. Syndicat des employés de soutien S.C.F.P.*, [1984] J.Q. no 576 (QL), and *Canada c. Vandal,* 2008 CF 1116.

[11] With respect to justification for the objection, counsel for the grievors submitted that the grievances were not filed in an untimely manner because they are continuing grievances, arguing as follows:

> [Translation]
>
> . . .
>
> *The employer pays scant attention to the concept of a continuing grievance, concluding that the employees are*

> *trying to do something indirectly that they may not do directly. We believe that the criterion — frequently found in adjudication law — of recurring breaches, not recurring damages, is amply established here and in itself allows the objection to be dismissed.*
>
> *Even without the benefit of evidence, it is clear to us that the employer committed separate violations for each day or period referred to in the wording of the grievances.*
>
> *It also appears to us that, with evidence, the employees could readily and precisely establish repeated violations over time in the various workplaces.*
>
> . . .

[12] In support of his position, counsel for the grievors cited Brown and Beatty, who detail the concept of a continuing grievance in *Canadian Labour Arbitration*, 4th edition.

[13] In addition, counsel for the grievors applied for an extension of the time limit and indicated his desire to adduce evidence in support of that application.

[14] In response to the employer's argument that the grievances may not be heard because another procedure for redress was provided, counsel for the grievors submitted that that argument refers to a previously existing procedure for redress, separate from the procedure involving time limits. Since the parties agreed at the pre-hearing conference to limit their submissions to the objection about the time limit, in a debate limited to that subject the employer should not be permitted to refer to another procedure for redress.

III. Rebuttal by the employer

[15] In rebuttal, counsel for the employer argued that a decision on the employer's objection should be rendered immediately and that taking the objection under advisement would run counter to Board case law. In that regard, he cited *Cloutier v. Treasury Board (Department of Citizenship and Immigration),* 2008 PSLRB 31; *Schenkman*; and *White v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 88. Counsel for the employer also argued that in this case it was not opportune to take the objection under advisement since the facts relevant to the time limit and the facts relevant to the merits of the grievances were dissociable.

[16] Counsel for the employer reiterated their position that the grievances were untimely, adding that "[translation] the employees had no intention of filing a grievance before 2005, that is, a number of years after the dates cited in the wording of the various grievances, and their grievances should be dismissed for that reason alone." In support of their position, counsel for the employer cited *Stubbe v. Canada (Treasury Board)*, [1994] F.C.J. No. 508 (C.A.)(QL).

IV. Reasons

[17] In rendering a decision on the employer's objection, I must determine whether the grievances filed by the grievors may be considered continuing grievances. In *Canadian Labour Arbitration*, 4th edition, Brown and Beatty clearly define the concept of a continuing grievance at page 2-93:

> *Where the violation of the agreement is of a continuing nature, compliance with the time-limits for initiating a grievance may not be as significant unless, of course, the collective agreement specifically provides that in those circumstances the grievance must be launched within a fixed period of time. Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. . . In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages.*
>
> *Where it is established that the breach is a continuing one permitting the time period for launching the grievance to be measured from the latest occurrence, it has been held that the failure to initiate it within the stipulated time from the date of its first occurrence will not render it inarbitrable. However, the relief or damages awarded retroactively in such circumstances may be limited by the time-limit. Thus, for example, where a grievance claimed improper payment of wages and the grievance was allowed, the award limited the damages recoverable to five full working days prior to the filing of the grievance, which was the time-limit for initiating the grievance.*
>
> [*Sic* throughout]

[18] As well, in their reference work *Droit de l'arbitrage de grief*, 5th edition, Blouin and Morin cover the concept of a continuing grievance at page 311:

> [Translation]

> *V.55 - In certain cases, a limitation period may only be for the past, not for the future. This is the case in a continuing grievance. It is also the case when benefits under a collective agreement are claimed in a context where the services rendered that form the basis of the claim are performed successively and where the violation of the collective agreement is recurring or repetitive (III.50). In other words, the event that gives rise to the grievance is repeated episodically. When the grievance is filed, the event is not a past fact but rather a current practice of the employer. Thus, the complainant may not be criticized in the future for failing to make a claim in the past: in such a situation, the limitation period operates only on a day-to-day or periodic basis . . .*

[19] I am of the view that the concept of a continuing grievance applies to this case. In their grievances, the grievors allege that the employer has exposed them to second-hand smoke since the dates indicated, which vary from one grievance to another.

[20] The wording of the grievances itself suggests that the grievors allege that the circumstance giving rise to the grievance, that is, "[translation] exposure to second-hand smoke," began at a given point in time and continued at least until the date the grievances were filed. The grievors allege that exposure to second-hand smoke violates clause 18.01 of the collective agreement, which reads as follows:

> ***18.01*** *The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Union, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*

[21] Without determining at this stage whether clause 18.01 of the collective agreement confers substantive rights on the employees, I am of the opinion that the obligation cited by the grievors is of a continuing nature. If, in accordance with that provision, the employer has an obligation to take every reasonable measure for the occupational safety and health of employees, in my opinion, what is involved is a continuing obligation that is repeated each time the employees are called on to render services. If clause 18.01 confers on the grievors the substantive right to reasonable measures by the employer for their occupational safety and health, that right exists at all times, and its violation may occur each time the employer fails to take reasonable measures for employees' occupational safety and health.

[22] Therefore, given an obligation and a corollary right that continue and that are repeated over time, I am of the view that the grievances were not filed outside the 25-day time limit set out in clause 20.01 of the collective agreement. That said, the grievors must establish in evidence that the alleged violation of their rights under clause 18.01 occurred during the period preceding the date on which their grievances were filed and corresponding to the time limit for filing a grievance, that is, during the 25 days preceding the date on which the grievances were filed.

[23] I need not rule on the employer's allegation that the grievances may not be heard because another procedure for redress is provided, since it was agreed at the pre-hearing conference that this debate would be limited to the objection about the time limit.

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

(The Order appears on the next page)

V. Order

[25] The employer's objection about the time limit for filing the grievances is dismissed.

[26] The grievances are deemed to have been filed within the time limit set out in the collective agreement.

[27] The parties will be called to a hearing of the grievances on their merits.

January 12, 2009.

PSLRB Translation

Marie-Josée Bédard,
adjudicator