Date: 20091123

File: 166-02-37358

Citation: 2009 PSLRB 156

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

CAROLYN BUCKWHEAT

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Buckwheat v. Treasury Board (Canada Border Services 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: Ian R. Mackenzie, adjudicator

For the Grievor: Patricia Harewood, Public Service Alliance of Canada

For the Employer: Christine Diguer, counsel

Heard at Windsor, Ontario,
October 7, 2009.

I. Grievance referred to adjudication

[1] Carolyn Buckwheat (“the grievor”) has grieved a one-day suspension that was imposed in October 2004. The grievor is a customs inspector and is represented by the Public Service Alliance of Canada. At the time of her suspension, the Canada Border Services Agency (“the employer”) was part of the Canada Customs and Revenue Agency. The collective agreement in place at that time was for the Program Delivery and Administrative Services Group, expiry date October 31, 2003 (“the collective agreement).

[2] The grievor received the final-level reply to her grievance on August 20, 2006. The grievance was referred to adjudication on August 28, 2006.

[3] 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*").

[4] An order excluding witnesses was issued. Two witnesses testified for the employer. The grievor testified, and one witness testified on her behalf.

[5] During the hearing, the grievor’s representative introduced a document entitled “Pre-Grievance Consultation” (Exhibit G-2, tab 4) into evidence. The employer did not object to its introduction. Communications during the grievance process are generally considered to be privileged. The privilege encourages full and frank discussions during the grievance process by all parties. In any event, I have concluded that I do not need to consider this evidence because similar evidence was tendered based on discussions with the supervisor that occurred outside the grievance process.

II. Summary of the evidence

[6] The grievor was a customs inspector at the Ambassador Bridge in Windsor, Ontario, at the time that the discipline was imposed. At that time, she had worked for the employer for approximately 22 years. After receiving French language training from her employer, she was appointed to a bilingual position in 1991 (Exhibit E-1, tab 2). Bilingual inspection officers are required to work one designated line at the port

of entry and are also required to be available on request at several other posts to deal with requests from travellers requesting a French-speaking customs inspector.

[7] In April 1993, the grievor and a number of other customs inspectors wrote to the manager of the Ambassador Bridge requesting a French language refresher course (Exhibit G-1). The request was denied by management at the Ambassador Bridge. The grievor testified that the reason given was operational requirements. She testified that she and others raised concerns with their supervisor about not getting any assistance in maintaining their language skills. The grievor's supervisor, Terry Rutherford, testified that he recalled that concerns had been expressed by some bilingual officers.

[8] The grievor entered into a job-sharing agreement in February 2000 (Exhibit E-1, tab 3). The agreement allowed her to work 18.75 hours per week. She worked two shifts per week and made every effort to work only on weekends to accommodate her child-custody arrangements. At the time of the relevant events, the grievor was job-sharing with Linda Tracey.

[9] In February 2004, the Office of the Commissioner of Official Languages conducted an investigation into French-language services at a number of ports of entry, including the Ambassador Bridge (Exhibit E-3). As a result of the recommendations contained in the investigation report, the agency developed an action plan that included a two-day refresher language training course (Exhibit E-1, tab 4).

[10] All bilingual inspectors received an email on July 23, 2004 advising them of the refresher training, which was called the "Bilingual Retention Course" (Exhibit E-1, tab 6). The inspectors were advised that the course would be offered from August 10 to September 3, 2004. The email concluded the following: "[p]lease contact your Admin. Superintendent to confirm your scheduled dates for training."

[11] The grievor received a change-of-shift notification, dated July 20, 2004 (Exhibit G-3), for her to attend the training scheduled for August 12 and 13, 2004. She testified that she did not receive the notification until sometime on the weekend before August 12. Mr. Rutherford testified that he had seen the grievor in passing and that she had confirmed that she had received the shift change notice. After receiving the notification, she wrote a letter to the district director of the Ambassador Bridge

Operations, David MacRae, on August 8, 2004 (Exhibit E-1, tab 7). In her letter, she wrote the following:

. . .

> *Please accept this letter as confirmation that I will be relinquishing my Bilingual status as of September 1, 2004. Part of my decision comes with the implementation of the "bilingual retention course" commencing during the summer months during my days of rest, a time I have committed to my family. Partnered with the constant working of line 3 and being interrupted from whatever task I may be undertaking to attend to a French speaking individual because of a lack of bilingual officers has made my bilingual status a frustrating part of my job.*
>
> *I will respectfully continue to speak in both of Canada's official languages when approached by members of the travelling public, however I feel at this time in my career that the small sum of $6.00 each week* [bilingual bonus] *does not compensate the on the job aggravation nor time spent away from my children.*

. . .

[12] Mr. MacRae likely received the letter on the following Monday, August 9, 2004.

[13] The grievor testified that she wrote the letter out of "total frustration" after 13 years of not receiving any help. She was "extremely frustrated" about having to do two days of training. She wanted to spend that time with her children. She wanted to relinquish her bilingual status because the Ambassador Bridge was so short-staffed with bilingual officers that she was constantly being pulled from one place to another during her shifts. She also testified that she was frustrated that she had not received much notice of the training. She testified that, by writing the letter, she was refusing to accept the shift change notice. She testified that she was the primary caregiver and that child care was expensive. Her children went to their father's house for the weekends, so she tried to work only on weekends.

[14] The grievor did not attend the scheduled training on August 12 and 13, 2004. She did not advise anyone in management that she would not be attending the training course. She testified that she thought that it was implied in her note, given that she intended to relinquish her bilingual status. Her supervisor, Mr. Rutherford, learned that she had not attended when he returned from vacation on August 14, 2004. He spoke to Mr. MacRae about the grievor's failure to attend the course. He testified that it

was decided that she would be given the benefit of the doubt and that discipline would not be considered for failing to attend the training course. Mr. MacRae prepared a letter acknowledging her letter of August 8 and requiring her to attend the refresher training on September 1 and 2, 2004 (Exhibit E-1, tab 8). The letter reads in part as follows:

. . .

> *You were offered the position of Customs Inspector, Bilingual Imperative on August 12, 1997, which you accepted. In accepting this offer, you confirmed your willingness to comply with the terms and conditions of employment contained in the offer. You are therefore unable to relinquish your status as it forms part of your terms and conditions of employment. Should a vacancy exist for a Unilingual English, Customs Inspector, your request will be given consideration at that time.*
>
> *Recently you were scheduled to participate in a two-day, French Language Retention Course, which you did not attend. Please be advised that you have been rescheduled and are expected to attend this training on September 1st and 2nd, 2004 at the Ambassador Bridge Travelers Boardroom.*
>
> *Please feel free to contact the undersigned should you wish to discuss any aspect of this letter.*

. . .

[15] Mr. Rutherford testified that he was instructed by Mr. MacRae to deliver the letter to the grievor. Mr. Rutherford met with the grievor and gave her the letter on August 20, 2004. He asked her to read the letter and, after she had done so, he asked her if she understood it. She told him that she understood the letter. She told him that she did not agree that she could not give up her bilingual status and that she would be making further enquiries. She also asked if she was being ordered to attend the course on September 1 and 2, 2004. He told her that it was a direct order from Mr. MacRae. She told him that she would make every effort to attend the course.

[16] The grievor's representative, Marie-Claire Coupal, sent an email to Mr. MacRae on August 23, 2004 about the grievor's bilingual status (Exhibit E-1, tab 9). In the email, Ms. Coupal wrote that the grievor claimed that she could no longer speak French and that she should be allowed to relinquish her bilingual status and move into a unilingual position. In his reply to Ms. Coupal, Mr. MacRae stated that the grievor was expected to attend the training on September 1 and 2, 2004.

[17] Mr. Rutherford testified that he was in the shift superintendent's office on September 1, 2004 when acting superintendent Julie Michaelis received a phone call from the grievor. The grievor told Ms. Michaelis that she was sick that day. After the phone call, Mr. Rutherford told Ms. Michaelis that she should call back and request that the grievor submit a medical certificate for her sick day. The grievor testified that she received a voicemail from Ms. Michaelis on that day.

[18] The grievor testified that she called in sick because she was not feeling well. She thought that she had either food poisoning or the stomach flu. On the second day, she was still sick but failed to call in to the office. She testified that it "slipped her mind." She also stated that since she missed the first day she did not think that she could just jump in to the second day of training. She assumed that the employer would know that she was still sick. She testified that no one called her to ask where she was. At the hearing, she stated that she made a mistake by not calling in on the second day.

[19] Mr. Rutherford met with the grievor on September 4, 2004, to ask her why she had missed the training session. He testified that she told him that she had called in sick on those days. He told her that she had not called on the second day. She told him that she knew that he wanted a medical certificate. He told her that an investigation would be conducted and that she could submit "any information or document that she wishes to help with the investigation" (from notes made by Mr. Rutherford, Exhibit E-1, tab 10). When she asked if that was a doctor's note, he replied "yes," but also "anything else that [you] think might help." The grievor testified that she had no idea what other information he was looking for.

[20] After the meeting, Mr. Rutherford remembered that he had forgotten to ask her when he could expect the doctor's note. He phoned Suzanne Schulthies, an acting supervisor, and asked her to speak with the grievor to get the answer. The answer was emailed to him on September 4, 2004 (Exhibit E-1, tab 10). The grievor was reported to have stated that she would submit the note at "her earliest convenience" and that she would have someone drop it off or she would bring it in on her next shift, the following Saturday. The grievor testified that she told Ms. Schulthies that she was still feeling a bit weak. Ms. Schulthies told her not to go to the doctor right away, that she should not worry about it and that she should get it "when you can." The grievor testified that she did not get the certificate earlier because she was not feeling well and

was not able to go anywhere, especially since she would have had to take her children with her.

[21] Labour Day was Monday, September 6, 2004. The grievor obtained a note from a doctor at a walk-in clinic on Tuesday, September 7, 2004 (Exhibit E-1, tab 11). The note stated the following: ". . . [the grievor] was seen today stating that she missed work . . . due to vomiting and diarrhea."

[22] Mr. Rutherford wrote an email to the grievor on September 15, 2004, acknowledging the receipt of the medical note and noting that he had not received any other "documentation or reports" from her about her absence (Exhibit E-1, tab 11).

[23] Mr. Rutherford testified that he consulted with Mr. MacRae and human resources advisors before imposing discipline. He said that they were concerned that the doctor was not aware of the sickness and that he was only commenting on what she had told him. In addition, it was a concern that the certificate was obtained quite a few days after she called in sick.

[24] The "Disciplinary Action Report" issued by Mr. Rutherford summarized the history of events of the training and concluded that, based on the contents of the doctor's note and her "known reluctance" to attend the training, her absence on September 1, 2004 was not authorized (Exhibit E-1, tab 12). Mr. Rutherford also noted in the document that she failed to advise the employer that she would be absent on September 2, 2004. The discipline imposed was for one shift of 9.1 hours, which was served on October 16, 2004.

[25] Mr. MacRae testified that he did not consider lesser discipline. He stated that, because she had already missed the training once and because she had then been directed to attend, in writing, she was not responding to oral or written communication. Mr. MacRae testified that he felt that a one-shift suspension was the minimum required to correct her behaviour. In cross-examination, both he and Mr. Rutherford agreed that the suspension was "severe." Mr. MacRae also agreed that she had been suspended without direct evidence that she had lied about being sick.

[26] Mr. MacRae was asked, in cross-examination, what would have satisfied him that the grievor was sick. He stated that it was a subjective question and that it was a "confluence of all information" that supported his conclusion that she was not sick. He

stated that the medical information would have been more compelling had the doctor made observations of her physical condition rather than on what she reported to him. In re-examination he testified that more contemporaneous evidence would have borne more weight in his assessment of whether to impose discipline.

[27] Mr. Rutherford was asked in cross-examination what additional documentation would have satisfied him that she was sick. He said that possibly a receipt from a pharmacist or something else that would have proven that she was sick. He also testified that he was not sure what would have satisfied him that she was sick.

[28] In cross-examination, the grievor was asked what arrangements she had made for childcare for the September 1 and 2 training session. She testified that the children were to stay with their grandparents. She was asked by counsel for the employer if she had thought of getting a note from them. She testified that she had never thought of that, as Mr. Rutherford had asked for something to justify her illness, not her childcare arrangements.

[29] The grievor completed the refresher training course in November 2004.

[30] In the grievance replies at the third and final levels, reference was made to an earlier incident of an unauthorized absence in February 2003. A document summarizing that incident, written by Mr. Rutherford, was introduced (Exhibit E-5). The grievor did not show up for work one day, after she had been denied a leave request for that same day. Mr. Rutherford called her at home and told her to report to work. The grievor told him that she could not come to work because her children were at home and she could not leave them. The grievor testified that she had assumed that the leave was approved since it was extremely rare that an inspector with her years of seniority would be denied a vacation leave request. She had never seen the form denying her leave request. She testified that she was spoken to about it but that it "did not appear to be a big deal."

[31] The grievor had no prior discipline and no record of abusing sick leave.

[32] The grievor testified that, before this hearing, Mr. Rutherford told her that he thought that the discipline imposed was too harsh. Mr. Rutherford testified that he had said this to her but that it was before he had reviewed his notes. Once he had reviewed

his notes, he remembered that she had failed to show up for the first training session. He testified that the discipline imposed was appropriate.

[33] The grievor testified about the impact of the discipline on her, both financially and emotionally. She testified that, because she was a single parent with three children less than five years old at the time, money was "tight" and that the financial loss represented groceries for her children. She also testified that she was quite emotional at the time because of the suspension and that she contacted the Employee Assistance Program (EAP).

[34] Ms. Tracey testified that she knew the grievor well as a co-worker. She testified that the grievor was devastated by the suspension and stated that the grievor was emotionally upset and was crying.

III. Summary of the arguments

A. For the employer

[35] Counsel for the employer submitted that it is not necessary for discipline to be progressive where more severe discipline is warranted. In this case, the grievor knew that she was expected to attend the training course, but she did not attend. She "wiggled her way out of" attending. The order to attend was communicated clearly. The medical certificate provided by the grievor did not provide substantive evidence of sickness. It was up to the grievor to provide this evidence, and she did not.

[36] The grievor was not suspended because of her performance at work.

[37] In the end, the employer did not believe that the grievor was sick, which was a reasonable conclusion based on all the evidence. The misconduct deserved discipline. She received a direct order to attend a training session, and she disobeyed. This is not an exception to the "obey now, grieve later" rule. She did not grieve the order to attend the training session.

[38] The amount of the discipline was appropriate in the circumstances. An adjudicator should not interfere with a disciplinary penalty when the discipline imposed is reasonable. I was referred to *Noel v. Treasury Board (Human Resources Development Canada),* 2002 PSSRB 26; *Alford v. Treasury Board (Employment and Immigration Canada),* PSSRB File No. 166-02-15438 (19890214); and *Clayton and Frost*

v. Treasury Board (Transport Canada), PSSRB File Nos. 166-02-19079 and 19080 (19900130).

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

[39] The grievor's representative submitted that the issue before me was whether the employer had just cause to discipline the grievor. Being sick does not constitute just cause to suspend an employee. Although she did not call in sick on the second day, she did provide a medical certificate that shows that she was sick.

[40] In the alternative, the employer failed to adhere to the principles of progressive discipline. The discipline imposed was too severe, and it should be reduced to an oral reprimand for the grievor's failure to report her absence on the second day.

[41] The grievor thought that she could relinquish her bilingual status and informed the employer of her intention not to attend the first training session. She was not disciplined for her failure to attend the first training session in August 2004. Her failure to attend should not be considered in this grievance. She intended to attend the training course on September 1 and 2, 2004, but did not attend in the end because of illness. She testified that she did not go to the doctor on those days of illness because she was too sick and she had her children with her.

[42] The employer believed that the grievor was lying about being sick. This case turns on the credibility of the grievor. Her testimony was that she was sick. The employer did not tender any evidence to show that she was not sick. In his testimony, Mr. MacRae admitted that there was no direct evidence that she was lying. To establish grounds for discipline, there must be "clear, cogent and compelling" evidence of misconduct; see *Sabourin v. House of Commons,* 2006 PSLRB 84. In this case, the employer has failed to demonstrate that there was misconduct. The grievor's direct testimony that she was sick, along with the note from the doctor, shows that she was sick. The doctor was not called to testify. There was no history of unauthorized absences by the grievor. She had no history of abusing sick leave. There was no direct evidence that she was trying to avoid taking the course. She took the course in November 2004. Her failure to notify the employer of being sick on September 2, 2004, was an honest mistake that warranted an oral reprimand at most.

[43] The one-shift suspension was too severe, and the employer did not consider any of the relevant mitigating factors, such as her past record, the future prospects for

likely good behaviour and the economic impact of the suspension; see *Canadian Broadcasting Corporation v. Canadian Union of Public Employees* (1979), 23 L.A.C. (2d) 227 (*CBC*). There was no harm done, and the grievor had and continues to have a good performance record.

[44] The grievance should be allowed. As corrective action, the grievor's representative submitted that any letter or documents relating to the suspension should be removed from her file and destroyed. She should be reimbursed for her lost income for one shift. She should also be awarded $1000 for pain and suffering, which would compensate her for the humiliation suffered from having been accused of lying.

C. Reply of the employer

[45] Counsel for the employer submitted that the grievor was not disciplined for failing to call in sick on the second day of training. She was disciplined for failing to follow a direct order to attend a required training session. She was given the opportunity to provide sufficient evidence of illness, but she did not provide it. There was clear, cogent and compelling evidence that she was not sick.

[46] The corrective action specified in the original grievance did not refer to damages. Furthermore, the grievance falls under the former *Act,* under which an adjudicator has no jurisdiction to award damages. The decision of the employer was not taken lightly and was made in good faith; accordingly, no damages should be considered.

[47] The *CBC* case cited by the grievor's representative involved a mistake made by the grievor, which is not the case here. The discipline was the appropriate quantum. Mr. MacRae testified that one of the important reasons for not imposing a lesser amount of discipline was that lesser discipline would not have been a clear enough indication that she could not ignore a direct order.

IV. Reasons

[48] The grievor received a one-day suspension (9.1 hours) for insubordination. The employer simply does not believe that the grievor was sick on the day that her refresher training was scheduled. However, after hearing all the evidence, it still remains that the employer had only suspicions and no evidence of insubordination. In light of the fact that the burden of proof rests on the employer to prove misconduct, I

have concluded that the grievance must be allowed, at least in part, for the following reasons.

[49] To prove insubordination, the employer must show that a clear order was given by a person in authority, that the order was received and understood by the employee, and that the order was disobeyed; see *Doucette v. Treasury Board (Department of National Defence),* 2003 PSSRB 66. The evidence shows that there was a clear order by her supervisor to attend the training course and that the grievor understood that it was an order. The question that remains is whether the order was disobeyed. An illness is a legitimate excuse for not obeying the order to attend the training course.

[50] It was reasonable for the employer to be suspicious of the grievor's claim of illness. The claim for illness came after she missed the training session in August 2004 and also after she had clearly expressed her lack of interest in attending. The onus was on the employer to be clear about the evidence that it required from her to prove her illness. Given the temporary nature of the claimed illness, either a stomach flu or food poisoning, the employer should have been clear on the day that she called in sick that it required that she obtain a medical certificate immediately. The acting supervisor did not testify, so the only evidence before me is that of the grievor. There was evidence that a voicemail was left at the grievor's home requesting a medical certificate but no evidence that the urgency of obtaining a certificate was communicated in that message. The grievor testified that the acting supervisor told her that she should get the medical certificate when she could, which does not convey urgency. This is especially important because the grievor told the acting supervisor that she was still feeling a bit weak. If the importance of obtaining a certificate had been conveyed, the grievor may have been able to obtain a certificate that would have provided the contemporaneous evidence that Mr. MacRae testified he was looking for.

[51] The employer was not clear on what additional evidence would satisfy its concerns. It simply said that additional evidence was required, without specifying exactly what evidence it was looking for. At the hearing, apparently for the first time, it was suggested that she could have obtained a note from her parents attesting that they were scheduled to take care of her children while she was on training. Statements could have been obtained from others about her illness. It rests with the employer to provide specific examples of what evidence it is looking for to allay its suspicions.

[52] The evidence of an earlier unauthorized absence in 2003 is not relevant as no discipline was imposed. Although that unauthorized absence was referred to in the third and final levels of the grievance process, there was no evidence that the employer relied on it in imposing discipline.

[53] The *Clayton and Frost* decision cited by the employer is not relevant because, in that case, the grievors gave no reason for leaving the workplace.

[54] In *Gendron v. Treasury Board (Solicitor General),* PSSRB File No. 166-02-14163 (19850107), the adjudicator was faced with a similar question: Did the grievor suffer from the symptoms that she described? The adjudicator noted that it came down to a question of medical evidence and the credibility of the grievor. In *Gendron,* there was medical evidence of the symptoms, whereas in this case, the medical evidence is not conclusive. The adjudicator in *Gendron* also found that a decisive factor in assessing the grievor's credibility was the admission of the employer that the grievor was a good employee and that she did not abuse the sick leave provisions of the collective agreement. Similar considerations apply here.

[55] In cases involving a denial of sick leave (such as *Gendron*), the burden of proof rests with the grievor. The collective agreement provision for granting sick leave states that the employee must satisfy the employer that he or she is sick ". . . in such manner and at such time as may be determined . . ." by the employer (clause 35.03). In those cases, the grievor must prove that he or she was sick to be entitled to sick leave. However, this is a discipline case. The burden rests on the employer to prove misconduct. In essence, the employer is required to prove that the grievor was not sick on the days in question. Discipline cannot be imposed on the basis of suspicions. The employer is required to have some evidence that the employee was not sick to justify imposing discipline. I find that the employer has not met its burden of proof. Therefore, the employer did not have just cause to impose discipline.

[56] In final submissions, the grievor's representative raised a claim for damages for hurt feelings for the first time. Leaving aside the issue of whether or not an adjudicator has jurisdiction under the former *Act* to award damages, it is inappropriate to raise such a damages claim after the evidence portion of a hearing is closed. The employer was prevented from cross-examining the grievor on the grounds for her claim for damages. Therefore, I have not considered it.

[57] The grievor requested that her disciplinary record be expunged, with all references to events in question removed from her file. Since there has been no further discipline against the grievor since 2004, the following provision in her collective agreement has already ensured that any references to this discipline were removed from her record:

. . .

> ***17.05*** *Any document or written statement related to disciplinary action, which may have been placed on the personnel file of an employee, shall be destroyed after two (2) years have elapsed since the disciplinary action was taken, provided that no further disciplinary action has been recorded during this period.*

. . .

[58] Accordingly, I decline to make an order that would be redundant in the circumstances of this case.

[59] The only other corrective action raised at the hearing was for 9.1 hours of pay. Accordingly, I am ordering payment of 9.1 hours of pay, at her rate of pay on October 16, 2004.

[60] The grievor did not grieve the denial of sick leave for September 1 and 2, 2004. To ensure that my order is clear, by allowing the grievance I am not granting pay for the two days of unauthorized sick leave.

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

(The Order appears on the next page)

V. Order

[62] The grievance is allowed, in part.

[63] The one-day discipline of 9.1 hours is rescinded.

[64] The grievor is to be paid for 9.1 hours at her rate of pay on October 16, 2004.

November 23, 2009.

Ian R. Mackenzie,
adjudicator