Date: 20090325

File: 525-02-18

Citation: 2009 PSLRB 39

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

MOHAMMAD ASLAM CHAUDHRY

Applicant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Chaudhry v. Treasury Board (Correctional Service of Canada)

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, Board Member

For the Applicant: Himself

For the Respondent: Karl Chemsi, Counsel

Decided on the basis of written submissions filed January 9 and February 5 and 25, 2009.

I. Request before the Board

[1] Mohammad Aslam Chaudhry ("the applicant") has requested that the Public Service Labour Relations Board (PSLRB or "the Board") reconsider a decision on an unfair labour practice complaint that it issued on July 13, 2005 (*Chaudhry v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 72). The application is made under section 43 of the *Public Service Labour Relations Act* (*PSLRA*). The Treasury Board ("the respondent") submits that the application should be dismissed because of delay and because the applicant has not shown that there is any merit in the application.

[2] This application for reconsideration was determined on the basis of written submissions. Those submissions are on file with the Board. In addition to the application for reconsideration received on January 9, 2009, and the reply to the respondent's submissions received on February 25, 2009, the applicant had sent other correspondence to the PSLRB that he wished to have considered as part of his submissions. He made particular reference to correspondence that he sent to the PSLRB on March 18, 2008. I have considered those submissions, also on file with the PSLRB.

II. Background to the request for reconsideration

[3] The applicant was rejected on probation by the employer in 2004, and he referred a grievance against that action to the PSLRB (PSSRB File No. 166-02-33836). He also filed a complaint under section 23 of the *Public Service Staff Relations Act* (*PSSRA*) alleging that he had been threatened with the loss of his job if he filed a grievance (PSLRB File No. 561-02-25). This reconsideration application refers only to the complaint under the *PSSRA*.

[4] The grievance and complaint were heard together by me, sitting as both an adjudicator and a Board member under the *PSLRA*. The applicant was represented by his bargaining agent (the Public Service Alliance of Canada). The decision, issued on July 13, 2005, dismissed both the complaint and the grievance.

[5] In his complaint, the applicant alleged that his supervisor had threatened the loss of his job if he proceeded to file a grievance. His supervisor denied making such a threat. Based on an assessment of the credibility of the evidence of the applicant and the supervisor, I concluded that the "preponderance of probabilities" supported the evidence of the supervisor and that the applicant had not met his burden of proof.

[6] The applicant filed a judicial review application against the decision on the grievance with the Federal Court. He did not file a judicial review application against the decision on the complaint, which would have been filed with the Federal Court of Appeal.

[7] The Federal Court dismissed the judicial review application on April 13, 2007 (*Chaudhry v. Canada (Attorney General),* 2007 FC 389). The applicant appealed that decision to the Federal Court of Appeal, which dismissed the appeal on February 15, 2008 (2008 FCA 61). The applicant filed an application for leave to appeal to the Supreme Court of Canada, which dismissed the application on November 13, 2008 (2008 CanLII 59057).

[8] In his judicial review application, the applicant submitted that he was entitled to a hearing before being rejected on probation. The Federal Court of Appeal concluded that he was not entitled to a hearing. The Court also stated the following:

. . .

> *[7] In a similar vein, the appellant argues that the fact that he did not receive a hearing prior to his rejection* [on] *probation violated his right to a fair hearing pursuant to section 2(e) of the* Canadian Bill of Rights*. . . . Section 2(e) of the Bill of Rights only provides for a right to a fair hearing for the determination of one's rights and obligations. Those rights and obligations were part of the conditions for his probationary hiring. I do not see that he became entitled to a hearing prior to his rejection* [on] *probation. In any event, the appellant had a hearing before the adjudicator, and that hearing, in my opinion, was conducted fairly in accordance with the principles of fundamental justice.*
>
> *[8] The appellant makes two additional arguments, namely that his manager had no authority to deploy him to a new position in October 2003, and that the Warden did not have the authority to reject him on probation. These arguments appeared in neither the Notice of Application nor in the appellant's memorandum of fact and law before the Motions Judge. We therefore feel it would be inappropriate to address either submission. Unless there is a compelling reason otherwise, a party cannot succeed on appeal by advancing arguments which the parties and the Motions Judge had no opportunity to address. Counsel for the respondent stated that he would have lead evidence in respect of these matters had he been made aware that they would be raised.*

. . .

[Emphasis in the original]

[9] The applicant sent correspondence to the PSLRB on March 18, 2008, raising concerns about his case, but did not formally request reconsideration of the decision under section 43 of the *PSLRA*. His formal request for reconsideration was made on January 9, 2009.

III. Summary of the arguments

A. For the applicant

[10] The applicant submitted that he delayed requesting a reconsideration of the PSLRB's decision because he was pursuing remedies through the Federal Court and the Supreme Court of Canada. He stated in his application for reconsideration that he had not previously requested reconsideration for the following reasons:

> 1. *I believed that the Federal Courts will (ultimately) be able to deliver JUSTICE.*
>
> 2. *I was waiting for the final outcome of my struggle through the Federal Courts, the Supreme Court and the Standing Committee on Justice and Human Rights.*
>
> 3. *I intended to file a case of TORT against your office (PSLRB).*
>
> 4. *I believed that your office (PSLRB) CAN NOT review its own decision without BIAS.*
>
> [Emphasis in the original]

[11] In his correspondence of January 9, 2009, the applicant stated that he now wanted to avail himself of the reconsideration process.

[12] The applicant submitted that the Warden who authorized his rejection on probation did not have the delegated authority to do so. The applicant also submitted that his constitutional rights had been violated because he was not given the opportunity to know of his alleged offences before being rejected on probation. He asserted his right to a hearing before being rejected on probation and his right to be presumed innocent. The applicant submitted that the Warden did not know any of the details of his rejection on probation and the applicant questioned the Warden's

credibility. He also submitted that I erred in my conclusions on the credibility of his supervisor.

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

[13] Counsel for the respondent noted that the applicant's grievance cannot be reconsidered under section 43 of the *PSLRA*, as the authority to reconsider applies only to the complaint.

[14] Counsel for the respondent submitted that the applicant had established no valid reason for the unreasonable delay in filing this application and no compelling reason for reconsidering the decision. He submitted that the applicant was trying to reargue the merits of his case after the courts had dismissed it.

[15] Counsel for the respondent stated that the reconsideration application was clearly inconsistent with the spirit and intent of section 43 of the *PSLRA*. He submitted that the PSLRB has interpreted this provision with caution. A reconsideration is not an alternative method of appeal, and it does not permit the PSLRB to draw a different conclusion from the evidence (see *Quigley v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 125-02-77 (19880604)). The purpose of reconsideration is to allow the requesting party to present new evidence or arguments that could not ". . . reasonably have been presented at the original hearing, or where some other compelling reason for review exists . . ." (see *Czmola v. Treasury Board (Solicitor General – Correctional Service Canada*), 2003 PSSRB 93). It is also clear from *Czmola* that the reconsideration process should be used ". . . judiciously, infrequently and carefully."

[16] Counsel for the respondent also referred me to *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 125-02-41 (19851218), where it was noted that the party making the application must show that the new evidence could not have been obtained with "reasonable diligence" and adduced at the original hearing. In addition, the new evidence must have a ". . . material and determining effect . . ." on the decision. Counsel submitted that all of the arguments advanced by the applicant could have been raised at the original hearing. There was no change in circumstances or newly discovered evidence that could have a determining effect on the decision. The issue of delegated authority was never disputed at the original hearing and could have been easily challenged at the hearing. The applicant had full opportunity to adequately

state his case. In any event, the Warden clearly had the delegated authority. The applicant was attempting to reargue the merits of the case, which is clearly inconsistent with the reconsideration process.

[17] Counsel for the respondent also submitted that every argument raised by the applicant related to his grievance and not to his complaint. The applicant had only applied for a judicial review of the grievance decision, not the complaint. He should bear the consequences of failing to file an application for judicial review of the decision on the complaint.

C. Reply of the applicant

[18] The applicant submitted that the respondent had provided no new evidence or document to prove that the Warden had the delegated authority to reject an employee on probation. The "[f]undamental and vital issue of authority was misjudged and/or misunderstood" by the adjudicator/Board member.

[19] The applicant submitted that there was no time limit prescribed for a reconsideration application under the *PSLRA*. He noted that he had already submitted legitimate reasons for the delay.

[20] The applicant submitted that there was ". . . nothing complicated or ambiguous about section 43" of the *PSLRA* and that ". . . the Board has jurisdiction to review ANY of its decisions" [emphasis in the original].

[21] The applicant submitted that it was only in January 2007 that he became suspicious of the authority of the Warden to reject him on probation. He was not aware of this at the time of the original hearing. It was "blatantly unreasonable" to expect him to have expert knowledge of the rules and regulations being discussed at the hearing. The applicant submitted that he could not have disputed this issue at the original hearing.

[22] The applicant submitted that the complaint was related to the grievance. His arguments about the credibility of his supervisor and the Warden are directly related to the complaint. The question of delegated authority was "vital" for the complaint. This was a fundamental issue for the entire hearing.

IV. Reasons

[23] The *PSLRA* provides that the Board may "review, rescind or amend any of its orders or decisions" (subsection 43(1)). This provision applies only to decisions of the Board. It does not apply to decisions of an adjudicator appointed under the *PSLRA*. The only mechanism for a review of an adjudication decision is a judicial review application to the court. The applicant has judicially reviewed the adjudication decision relating to his grievance against his termination. This application relates solely to the unfair labour practice complaint decision that was issued at the same time as the decision on his grievance.

[24] There are two issues to be determined: 1) whether the application should be dismissed for reasons of delay, and 2) whether there are sufficient grounds to reconsider the decision.

[25] There are no deadlines for filing an application for reconsideration under section 43 of the *PSLRA*. However, in the interests of finality in labour relations disputes, reconsiderations should be raised at the earliest possible opportunity. The earliest opportunity is within a reasonable time of an applicant receiving the information or evidence that it intends to rely on in supporting its application. In this case the applicant relies on his alleged discovery that the Warden did not have the proper delegated authority to reject him on probation as the new evidence to support his application (I will address the merits of this allegation below). The applicant submits that he became aware of the delegated-authority issue in January 2007. The Federal Court decision referring to this issue was released in February 2007. There was a delay of approximately 24 months in filing the application for reconsideration. That is a significant delay.

[26] The applicant also explains the delay by referring to his judicial review applications before the courts. The applications related to the grievance, not the complaint. Furthermore, on judicial review, the courts do not look at "new" evidence or arguments. In fact, the Federal Court of Appeal noted that it was not addressing new arguments raised by the applicant at the judicial review hearing, including the issue of delegated authority. Therefore there is no reason why the applicant could not have pursued a reconsideration application on his complaint at the same time as his judicial review application and appeals related to his grievance. He also submitted that he was contemplating filing a lawsuit against the PSLRB. He did not, however, so that factor

cannot be a relevant explanation for the delay. He has also stated that he believed that the PSLRB could not review its own decisions without exhibiting bias. The applicant did not explain why he reached that conclusion. Any concerns about bias or independence of a tribunal should be raised directly with the tribunal, at the earliest opportunity. The applicant did not do so. Accordingly, it is not a valid reason for the delay in making this application.

[27] Therefore, I have concluded that this application is untimely and that it should be dismissed on that basis. However, I understand that the applicant has had a lengthy period of litigation with regard to his grievance and complaint. In the interests of providing some closure for both the applicant and the respondent, I will address the merits of the reconsideration application.

[28] Applications for reconsideration of decisions of the PSLRB are not common. However, the Board has developed jurisprudence in this area that is helpful in setting out the appropriate use of the reconsideration power. The jurisprudence under the *PSSRA* is relevant for a determination under section 43 of the *PSLRA* (see *Danyluk et al. v. United Food and Commercial Workers Union, Local. 832*, 2005 PSLRB 179).

[29] A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB (see *Quigley*, *Danyluk, Czmola* and *Public Service Alliance of Canada*). The reconsideration must:

- not be a relitigation of the merits of the case;
- be based on a material change in circumstances;
- consider only new evidence or arguments that could not reasonably have been presented at the original hearing;
- ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;
- ensure that there is a compelling reason for reconsideration; and
- be used ". . . judiciously, infrequently and carefully . . ." (*Czmola*).

[30] The issue of the delegation of authority to reject on probation did not relate to the complaint. The basis of the complaint was the allegation that the applicant had been threatened with the loss of his job. Even if the issue of delegation of authority did relate to the complaint, it would not constitute new evidence that could not reasonably have been expected to have been raised at the original hearing.

[31] The issue of the credibility of witnesses was a matter that could have been raised at the original hearing. The allegation of the failure to have a hearing before being rejected on probation relates to the grievance, not the complaint. It was also a matter that could have been raised at the original hearing. In addition, this allegation was addressed by the Federal Court of Appeal in its decision on the judicial review application.

[32] There is no compelling reason to reconsider the Board's decision. Accordingly, the application for reconsideration is dismissed.

[33] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[34] The application for reconsideration is dismissed.

March 25, 2009.

Ian R. Mackenzie,
Board Member