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File: 566-02-2091

Citation: 2009 PSLRB 48



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

DEBORAH KASHUBA

Grievor

and

TREASURY BOARD

(Department of Human Resources and Skills Development)

Employer

Indexed as

Kashuba v. Department of Human Resources and Skills Development

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

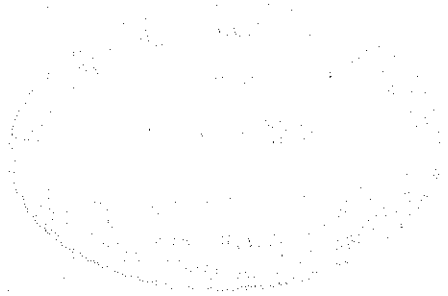
Before: Beth Bilson, adjudicator

For the Grievor: Jeffrey Palamar and Shereese Qually, counsel

For the Employer: Karl Chemsy, counsel

Heard at Winnipeg, Manitoba,
March 24, 2009.





REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Deborah Kashuba ("the grievor") was employed by the Labour Program, Human Resources and Skills Development Canada ("the employer") prior to the events that led to the submission of a letter of resignation in May 2007. The grievor submitted a grievance dated June 22, 2007, alleging that prior to her letter of resignation she was demoted and that she was forced to resign; she characterizes both the demotion and the resignation as instances of disguised discipline for which there is no legitimate basis.

[2] On January 29, 2009, counsel for the grievor forwarded to the employer a request for a number of documents to assist in their preparation of the case on behalf of the grievor. The substance of the request was as follows:

Additionally, as we continue to prepare for hearing, I request pre-hearing production of various documents. In particular, I ask you to provide the following:

- 1) *Performance reviews for the last 10 years of Ms. Kashuba's employment;*
- 2) *Ms. Kashuba's personnel file;*
- 3) *The job descriptions for all positions in the Manitoba and Saskatchewan region, including all managerial positions such as those responsible for racism, labour standards and workplace occupational health and safety, immediately after the implementation of the business line management system, as well as any amendments;*
- 4) *The job descriptions for all positions in the Manitoba and Saskatchewan region, including all managerial positions such as those responsible for racism, labour standards, and workplace occupational health and safety, immediately prior to the implementation of the business line management system;*
- 5) *An organizational chart for the Manitoba and Saskatchewan region, immediately after the implementation of the business line management system;*
- 6) *An organizational chart for the Manitoba and Saskatchewan region, immediately prior to the implementation of the business line management system;*
- 7) *Any memoranda, emails, correspondence, policies, directives or other documentation of any sort relevant to any of the following:*

a) the directions provided in implementing business line management structure;

b) the planning and organizing of the business line management structure in the Manitoba and Saskatchewan region;

c) the reason for implementing the business line management structure;

e) [Sic] the timeline for implementing the business line management structure;

f) the reasons why Ms. Kashuba and other staff were assigned the positions they were in the business line management structure (including explaining which managers were given business line responsibilities by assignment, or by choice);

8) Any memoranda, emails, correspondence, policies, directives or other documentation of any sort notifying or discussing with other managers their new assignments within the business line management structure; and

9) The same information as requested in numbers 3-8 for all regions currently on, or contemplated to be on the business line management structure within the next 2 years.

I also understand that an access to information request had been filed by Ms. Kashuba, which remains outstanding. A copy of this is enclosed for your reference. Please provide all documentation set out in this request as well.

[3] At the commencement of the hearing on March 24, 2009, counsel for the grievor indicated that they wished to make representations about the adequacy of the employer's response to this request, and to ask for an order under section 226(1)(e) of the *Public Service Labour Relations Act* requiring the production of further documents. This decision addresses only the arguments and my decision on this preliminary issue.

II Summary of the arguments

A. For the grievor

[4] Counsel for the grievor outlined the case which would be made for the grievor on the merits. The grievor was employed by the employer for a number of years, rising eventually to the position of Manager, Labour Operations, a post which she held from 1999; in this position, she had up to 28 employees reporting to her, and her duties focused on labour standards and fire prevention. Approximately two years before the

end of her employment, complaints of harassment were made against the grievor. While these complaints were being investigated, over a period of nearly two years, the grievor was removed from the workplace and performed her duties from her home. In the end, it was found that the complaints were unfounded, and the grievor returned to the workplace in February 2007. At that time, she was informed by her supervisor, Diane Kocela, that she would be placed in a new position which would involve a "racism-free" project, and would not entail supervisory responsibility for more than two employees. The grievor viewed this as a demotion, and when her request to have her old job back was refused, she ultimately submitted a letter of resignation.

[5] In response to the grievor's allegation that her reassignment constituted a demotion, and that it was essentially disguised discipline, the employer responded that her reassignment was part of an overall reorganization of the workplace according to a "business line management system" which was being implemented by the employer across the country. However, counsel for the grievor said it was their intention to demonstrate that the grievor was treated differently than others in the implementation of the new system, and that this would support the allegation that her treatment was in fact disguised discipline. Since the onus of establishing that the reorganization constituted a disguise for a disciplinary act is a heavy one for the grievor, counsel argued that it is necessary to ensure that the grievor is given access to all of the documents requested.

[6] With respect to the first item requested, the performance reviews for the grievor, counsel indicated that they had received reviews for 2000, 2001 and 2004, three of the ten years requested. Counsel renewed their request for the additional seven reviews.

[7] Counsel indicated that they had received the items requested in numbers 2, 3, 4, 5 and 6 of the letter to the employer. With respect to items 7 and 8, counsel acknowledged that they had received a number of documents which bore on the events surrounding the implementation of the business line management system and the decision made to reassign the grievor, but were concerned that they had not received all of the documents requested. They pointed to several examples where e-mail messages seemed to allude to other messages that were missing. They conceded that their request was couched in quite broad terms, but argued that all of the documents

they requested are relevant to the grievor's case and that it is important to be able to develop a clear picture of the events involving the grievor's reassignment.

[8] Counsel said that it is clear that the key decision-makers with respect to the grievor were Ms. Kocela, Fulvio Fracassi, Marilyn Dingwall, Margaret Sebescen and Mr. McKennery, and asked that the employer be required to produce any documentation relating to decisions they made in relation to the grievor's reassignment or the implementation of the business line management system.

[9] Counsel also indicated that they had received no documentation pursuant to their request concerning how the decisions were made to place other people in Operations Manager positions which focused on labour standards and occupational health and safety.

[10] With respect to item 9 in the request, counsel said that it was important to know how the business line management system had been implemented in other regions so that it would be possible to evaluate whether the grievor had been dealt with differently in relation to the decision-making process nationally. In particular, counsel argued that it was important to know whether there were "racism-free" positions in other regions, and how employees had been assigned to these positions. One sign of disguised discipline recognized in the jurisprudence is that an employer has deviated from established policy in the case of the employee allegedly disciplined; counsel referred me to the decision of the Public Service Staff Relations Board in *Matthews and Canadian Security Intelligence Service*, PSSRB File No. 166-20-27336 (19970305) on this point.

[11] The access to information (ATI) request alluded to in counsel's letter to the employer related to the investigation of the harassment complaint, which had been conducted by a private contractor. The request asked for copies of the notes made by the contractor during the investigation as well as of whatever report was made to the employer. This request was denied through the initial ATI process, and has been appealed to the Office of the Information Commissioner of Canada. Counsel for the grievor referred me to the decision in *Synowski v. Treasury Board (Department of Health)*, 2007 PSLRB 6, where an adjudicator held that notwithstanding an outstanding access to information request, an adjudicator hearing a grievance under the *Public Service Labour Relations Act* can order production of a document - in that case also a harassment investigation report - which is part of the ATI request; in *Synowski*, the

adjudicator indicated that his ruling should not be regarded as preventing the employer from objecting to the admissibility of the document in other proceedings.

B. For the employer

[12] Counsel for the employer outlined the employer's response to the grievance. Starting in 2005, the employer was engaged in a major reorganization of its operations across the country, moving towards the business line management system. A pilot project was initially carried out in the Pacific region. It was against that backdrop that the harassment complaints against the grievor arose. She worked from home for approximately 22 months, which was the time it took for the investigation of the complaints and for the analysis of the contractor's findings by the employer to complete. When they concluded that the complaints were not well-founded, the general director, Mr. Fracassi, and the regional director, Ms. Kocela, decided immediately that the grievor should return to the workplace. By that time, however, the management structure had already somewhat changed, and it was not possible to reproduce for the grievor a situation identical to the one she had left. Instead of all managers being "generalists," it was expected that each would have special responsibility for a restricted portfolio. There were now three operations manager positions, one for labour standards, one for occupational health and safety, and one for workplace equity. It was decided that the best fit for the grievor was the workplace equity position, which included a "racism-free" project, although it also involved other initiatives. This position, as the organizational charts showed, involved supervising up to seven employees.

[13] The employer's position is that the grievance is based on a misapprehension of what constitutes a legitimate reassignment of duties, and counsel for the employer indicated that, at the appropriate time, it is his intention to argue that the adjudicator has no jurisdiction to hear the grievance.

[14] Counsel for the employer said that the employer had made a sincere effort to comply with the request for the production of documents, although it objected to certain elements of the request. With respect to the performance evaluations requested at item 1, counsel for the employer said that the three evaluations provided were the only ones the employer had been able to find. In any case, the rationale for ordering the employer to produce documents is that it has exclusive access to documents that

may be necessary to permit an employee to present a full case. That rationale does not apply here, since the grievor had copies of these documents in her possession.

[15] With respect to items 7 and 8, counsel for the employer argued that the request is far too broad and that it represents a fishing expedition on the grievor's part. The grievor's statement in the grievance was very detailed, suggesting that she must have specific ideas about the documentation being requested. The employer tried to provide relevant and specific documentation in response to items 7 and 8 and does not object to producing specific documents, but it cannot undertake to meet the request in its current broad terms.

[16] Counsel for the employer renewed the "fishing expedition" description in relation to item 9, which requests the same kind of information from all the other regions. Counsel for the employer argued that it is an unreasonable request. In any case, the implementation of the business line management system was conducted slightly differently in every region, and it would not be helpful to know implementation details from elsewhere in evaluating the grievor's situation. The employer had tried to provide the grievor with general documentation that was circulated widely describing the new system and explaining the reasons for moving in that direction. The assertion apparently being made by the grievor that employees in other regions were permitted to choose their new assignments is based on pure speculation. If the grievor is able to establish a *prima facie* case to show this, the employer will withdraw the objection, but otherwise, the employer should not be required to attempt to meet the request.

[17] The results of the harassment investigation were summarized in a set of PowerPoint slides that were circulated to a number of people, including the grievor. Counsel for the employer said that as far as the employer knew, this was the only form of report transmitted by the contractor. Counsel for the employer also said that it had made inquiries to the contractor about the availability of the notes, and produced an email indicating that it is "the policy" of the contracting firm to destroy such notes once a report has been sent to the client.

C. Rebuttal for the grievor

[18] Counsel for the grievor said that although some steps had been taken to implement the business line management system in the Manitoba and Saskatchewan

region as early as 2005, it was not completed until after the grievor left, and it is therefore relevant to be able to track the implementation of the new system against the events involving the grievor. The changes involving the grievor — her reassignment to the one position in an area in which she had little or no experience, for example — on the face of it suggest that she was being dealt with differently.

[19] Counsel for the grievor conceded that the requests in items 7, 8 and 9 were framed broadly in terms of the type of documents requested but argued that the subject matter had been narrowed down carefully to identify only those documents that related specifically to the grievor or that would allow an assessment of how she had been treated in relation to others and in the context of the reorganization that had been taking place.

[20] With respect to the material concerning the harassment investigation, counsel for the grievor pointed out that the response from the contractor indicated only that it was company "policy" to destroy notes but that it did not specifically say that the notes had been destroyed. Since counsel for the grievor had been advised that the grievor had specifically requested the contractor not to destroy the notes, it was requested that the production of the notes be pursued. Counsel for the grievor also expressed scepticism that the PowerPoint slides were the only format in which the contractor reported to the employer and renewed the request to be provided with a copy of the full report.

III Reasons

[21] As both counsel agreed before me, an adjudicator has the authority to assess a request of the kind made by the grievor and to decide whether to order that the employer produce further documents. The rationale for this, as counsel for the employer intimated, is to ensure that the common situation where documentation related to human resources issues is exclusively in the hands of the employer does not place an employee wishing to challenge employer decisions at a disadvantage. On the other hand, as counsel for the employer also stated, my jurisdiction in this regard should not be utilized to permit persons in the grievor's position to obtain documentation on a purely speculative basis or to see what it might turn up. The onus rests on the grievor to substantiate the allegation that the employer did not reassign the grievor as a legitimate step in a workplace reorganization but as a punitive measure in relation to charges of harassment that had proved groundless. This

requires that the grievor have some fairly focused basis for her allegation, and she cannot rely on what might be found if the employer is forced to disgorge the contents of its filing cabinets or computers wholesale.

[22] With respect to the first item requested, the performance evaluations, the employer claims that a good-faith effort to find them turned up only 3 of the 10 requested. On that point, I am prepared to accept the assurances of the employer that diligent efforts have been made to find the other reviews, and I will make no order on this item.

[23] The next items in contention are items 7 and 8, which are the requests from the grievor for a wide variety of documentation related to the implementation of the business line management system in the Winnipeg office and the reassignment of employees in accordance with that reorganization. Counsel for the grievor stated that they had received documentation in response to this part of the request but that they had concluded that the documentation did not adequately meet the request.

[24] In some respects, the employer has a legitimate concern about the breadth of the requests with respect to items 7 and 8, which ask for a wide variety of types of documentation related to five stated categories of subject matter. For example, I agree that asking for all documentation related to "the planning and organizing of the business line management structure in the Manitoba and Saskatchewan region" is unduly vague. Nor, I think, do the challenges of putting together a coherent narrative based on the documents that the grievor has received justify making an order of the comprehensive nature that they ask.

[25] On the other hand, counsel for the grievor were able to pinpoint several key decision makers: Mr. McKennery, Ms. Kocela, Mr. Fracassi, Ms. Dingwall and Ms. Sebescen. Counsel for the grievor also alluded to a particular gap in the information that they had received relating to the decisions that were made to place other employees in the operations manager positions related to labour standards and occupational health and safety. I agree with counsel for the grievor that it is difficult to tell whether the grievor was dealt with in a different way without knowing how the reassignment of those employees was effected.

[26] Therefore, I will order that the employer make diligent efforts to identify and produce any documentation that was generated by the named individuals or that was

addressed to any of them that would bear on the decisions about the reorganization that would directly affect the grievor's situation. I will also order the employer to make diligent efforts to identify and produce any documents concerning the decision to reassign the two employees who occupied the other two operations manager positions. It should be noted that I do not intend these orders to prevent the grievor from requesting the production of specific documents whose existence becomes apparent in the course of the hearing.

[27] With respect to item 9, I agree with the employer that this aspect of the request constitutes an example of a fishing expedition. To require the employer to provide all documentation, no matter how mundane or trivial, having anything to do with the unrolling of the new management system in all regions of the country would place an enormous burden on the employer, one that would be out of all proportion to what the grievor could currently state as a clear expectation of the result. The employer has provided a number of documents outlining general features of the business line management system across the country, and this approach seems reasonable. I will order that the employer make diligent efforts to ensure that the full range of documents of this kind have been produced, and insofar as there are any policies or advisories that were circulated to management in all regions, they will be covered by that order.

[28] Of the material requested through the ATI process, counsel for the employer stated that the report from the contractor was provided only in the PowerPoint format to which the grievor already has access. Although it is open to the grievor to probe this further in the course of the hearing, at this point there is no reason not to take the word of the employer that this is the case, and I will make no order concerning the report.

[29] With respect to the notes of the investigation, counsel for the grievor expressed a lingering concern that the notes may still be in existence, despite the email from the contractor indicating that his firm has a general policy of destroying such notes once they have rendered a report to the client. I will make an order directing Nabil Oudeh, the contractor, either to provide assurances that the notes have been destroyed or to produce them.

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

(The Order appears on the next page)

IV. Order

[31] I order that the employer make diligent efforts to identify and produce any memoranda, emails, correspondence, policies, directives or other documentation of any sort that was generated by Mr. Fracassi, Ms. Kocela, Mr. McKennery, Ms. Sebescen or Ms. Dingwall or that was addressed to any of them bearing on those aspects of the reorganization that did have or that could be expected to have had a direct effect on the circumstances. In particular, the employer should identify and produce any documentation related to the reassignment of employees to the two operations manager positions to which the grievor was not reassigned.

[32] I order that the employer make diligent efforts to ensure that the grievor has been provided with all general documentation concerning the planning and implementation of the business line management system in all regions and any policies or advisories that were circulated to management in all regions concerning issues relevant to the grievance.

[33] I order that the employer produce any documents described in paragraphs 31 and 32 within 60 days of these orders.

[34] I order that, within 60 days of this order, Mr. Oudeh of CCR International provide the notes of the investigation into the complaints against the grievor or, if they no longer exist, that he provide a statement to this effect. A copy of this decision should be sent to Mr. Oudeh at ccrinternational.com.

April 20, 2009.

**Beth Bilson,
adjudicator**

