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File: 566-02-02680

Citation: 2009 PSLRB 98



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

ROBERT BOIVIN

Grievor

and

**TREASURY BOARD
(Canada Border Services Agency)**

Respondent

Indexed as

Boivin v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Michel Paquette, adjudicator](#)

For the Grievor: [Himself](#)

For the Respondent: [Maryse Bernier, counsel](#)

Decided on the basis of written submissions,
filed on January 16 and February 9, 2009

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On December 24, 2008, Robert Boivin (“the grievor”) referred his grievance, dated August 27, 2008, to adjudication. The grievance reads as follows:

I hereby grieve the reprehensible action of the CBSA wherein the Employer violated s. 5 of the Privacy Act by unlawfully collecting personal information, and discriminated against me in my employment on the basis of disability, a prohibited act contrary to the Canadian Human Rights Act, thus imposing a disciplinary action resulting in a financial penalty for which the Employer is liable when the Employer directed me to attend a medical examination and secretly paid of [sic] an assessment for which I did not, nor would have consented to

I also grieve contravention of article 19.01 of the collective agreement for the above, and invoke article 19.02 so that this grievance cannot be heard at the first level, and should be transmitted immediately to the third level.

[2] The grievor seeks the following corrective action:

I seek relief by way of a rescinding of the financial penalty by way of a payment in the amount of fifty thousand dollars (\$50,000) for damages incurred as a result of the Employer's actions.

and

That the Employer take remedial action, and put measures in place to prevent further reprehensible acts of this nature

and

Any other corrective actions appropriate in the circumstances.

[3] It should be noted that, with respect to the allegation of discrimination, notice was given to the Canadian Human Rights Commission, which declined to participate in these proceedings.

[4] On January 16, 2009, the Canada Border Services Agency (“the respondent”) raised an objection to the jurisdiction of an adjudicator to hear the matter.

II. Summary of the evidence

[5] In July 2008, the grievor was asked to provide medical information on his disability. He was also given a letter asking for answers to specific questions, pending the outcome of a Health Canada assessment. He was provided with \$100 for his efforts.

[6] The grievor filed this grievance against that request on August 27, 2008. The grievance was denied at the final level of the grievance procedure.

[7] Furthermore, on March 20, 2009, the bargaining agent — the Public Service Alliance of Canada — confirmed that it declined to represent the grievor for this grievance.

III. Summary of the arguments

A. For the respondent

[8] The respondent's representative submitted that the grievance was inappropriately referred to adjudication under the *Public Service Labour Relations Act (PSLRA)* because 1) there is another administrative procedure, under the *Privacy Act*, to deal with such matters; 2) no financial penalty was imposed on the grievor with respect to the situation that he described; and 3) the grievor raised the issue of discrimination under the collective agreement but without the support of his bargaining agent.

[9] Clause 18.02(a) of the relevant collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group, expiry date June 20, 2007 ("the collective agreement"), stipulates that "[w]here there is another administrative procedure provided by or under any Act of Parliament to deal with the employee's specific complaint, such procedure must be followed."

[10] This is in conformity with subsection 208(2) of the *PSLRA* which states that:

208.(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

[11] The relevant provisions of subsection 209(1) of the *PSLRA* read as follows:

209.(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

...

[12] The respondent's representative submitted that the grievor's concerns would be best addressed through the recourse provided by the *Privacy Act* and that they therefore cannot be the subject of an individual grievance or referred to adjudication. Subsection 208(2) of the *PSLRA* sets out a specific bar to the rights of an employee to present a grievance on a matter for which there exists another administrative procedure for redress under an Act of Parliament.

[13] The respondent's representative objected to this referral to adjudication since it is based on a "financial penalty" imposed on the grievor. No disciplinary action resulted from the grievor's medical examination by an optometrist.

[14] The respondent's representative also objected to the grievor raising discrimination in his reference to adjudication. Since discrimination is a collective agreement matter, the grievor requires support from his bargaining agent to even present the grievance, which he does not seem to have. Subsection 208(4) of the *PSLRA* reads as follows:

208.(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

[15] In light of the above, the respondent respectfully submitted that an adjudicator appointed to hear a reference to adjudication under section 209 of the *PSLRA* does not have jurisdiction in this matter. Therefore, this reference to adjudication should immediately be dismissed without a hearing.

B. For the grievor

[16] The grievor's response to the respondent's objection is that no other process is available to provide redress. In *Murdoch v. Royal Canadian Mounted Police* (F.C.), 2005 FC 420, the Federal Court determined that the Privacy Commissioner was restricted in her role. Therefore, the *Privacy Act* did not provide a redress mechanism. The grievor submitted that a complaint to the Privacy Commissioner produces evidence by way of investigation and ruling rather than redress since only recommendations can be made. Therefore, the grievor concluded that the Board has jurisdiction to adjudicate this matter since there is no other process or body with jurisdiction.

[17] The respondent has also objected that this grievance is not referable to adjudication under paragraph 209(1)(b) of the *PSLRA*. The grievor submitted that he is grieving a disguised disciplinary action, defined by the Board as an action or direction taken in response to some perceived or real malfeasance. The grievor also added that he will present evidence to show that the respondent's representative, his manager, decided without any legitimate basis to question the validity of his disability and accommodation needs, despite them having been consistent since at least 1996. Therefore, the instruction to attend an appointment with an optometrist was disciplinary in nature. The unlawful collection of personal information constitutes a financial penalty by way of damages for which he is entitled to financial compensation under the *Crown Liability and Proceedings Act* and the *Canadian Human Rights Act*.

[18] Additionally, the grievor submitted that his rights under section 8 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") to be free from unreasonable searches and seizures were infringed when the respondent paid \$150 for a medical report that he did not consent to, nor would have, thus effecting an unreasonable seizure. This action is also an infringement of subsection 15(1) of the *Charter*, which specifies the right to be treated equally and free from discrimination based on a disability.

[19] The grievor also argued that subsection 24(1) of the *Charter* allows him to apply to a court of competent jurisdiction for relief, giving as authorities *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and the Board's decision in *Van Duyvenbode v. Treasury Board (Department of Indian affairs and Northern Development)*, 2008 PSLRB 90.

[20] The grievor submitted finally that subsection 209(2) of the *PSLRA* is unconstitutional because it contravenes subsection 15(1) of the *Charter*, which specifies the right to be treated equally under the law and also paragraph 2(d) of the *Charter*, which specifies the right to freedom of association, by requiring the approval of the bargaining agent when that approval cannot be reasonably withheld under section 185 of the *PSLRA*. He added that the provisions in subsection 209(2) of the *PSLRA* are not upheld by section 1 of the *Charter*.

[21] For all the above reasons, the grievor submits that the Board has jurisdiction over his grievance and respectfully requests that it set a date for a hearing.

IV. Reasons

[22] Section 209 of the *PSLRA* is very clear as to what type of grievances can be referred to adjudication.

[23] Examining this grievance, I find that there are three separate allegations arising from the respondent's request for the grievor to provide medical information on his disability as follows:

- the respondent contravened section 5 of the *Privacy Act*;
- the respondent discriminated against him based on his disability; and
- the respondent imposed a disciplinary action resulting in a financial penalty.

[24] The grievor's argument on my jurisdiction for the contravention of section 5 of the *Privacy Act* is interesting, but it fails. He may have the right to file a grievance based on the interpretation that Justice Noël (see *Murdoch*) gives to redress as far as the *Privacy Act* is concerned, but even if I were to rule that he can file a grievance based on the contravention of section 5 of the *Privacy Act*, he cannot refer it to adjudication as it does not fit any of the parameters of section 209 of the *PSLRA*:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

(c) *in the case of an employee in the core public administration,*

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required;

...

[25] With respect to discrimination, the complainant invoked article 19 of the collective agreement. Without the support of the bargaining agent, the grievance is not adjudicable under subsection 209(2) of the *PSLRA* since it is based on the interpretation or application of the collective agreement. The PSAC declined to represent the grievor on this grievance.

[26] As for the disciplinary action, the grievor did not present any evidence of a suspension or/and financial penalty as per paragraph 209(1)(a) of the *PSLRA*.

[27] The grievor also challenges the constitutionality of section 209(2) of the *PSLRA* allegedly because it contravenes paragraph 2(d) and subsection 15(1) of the *Charter*.

[28] I fail to see how paragraph 2(d) of the *Charter* is contravened. The grievor is a member of the bargaining unit. He has not indicated how his right to freedom of association has been infringed.

[29] With respect to subsection 15(1) of the *Charter*, his rights have not been contravened. As stated in *Vaughan v. Canada*, 2005 SCC 11, at paragraph 25:

...

The party to the collective agreement is the union, and the union may or may not decide to carry an employee's

grievance forward based on many considerations which will include, but are certainly not limited to, its merits.

[30] If the grievor was not satisfied with the bargaining agent's decision, he could have challenged it through paragraph 190(1)(g) of the *PSLRA*.

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

(The Order appears on the next page)

V. Order

[32] The grievance is dismissed for lack of jurisdiction.

August 13, 2009.

**Michel Paquette,
adjudicator**