Date: 20100921

File: 566-02-2758

Citation: 2010 PSLRB 100

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROY LESLIE BOUDREAU

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Boudreau v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Ronald A. Pink, counsel

For the Employer: Virgine Emiel-Wildhaber, Treasury Board Secretariat

Decided on the basis of written submissions
filed June 18 and July 6, 2009 and August 13, 2010.

I. Individual grievance referred to adjudication

[1] Roy Leslie Boudreau ("the grievor") is an employee of the Department of National Defence (DND) who works at Fleet Management Facility Cape Scott, Canadian Forces Base Halifax. On March 30, 2007, he filed an individual grievance at the first level of the grievance procedure that reads as follows:

> *I wish to grieve managements* [*sic*] *failure to follow DAOD 5012-0 Harassment Prevention and Resolution and TBS Policy on the Prevention and Resolution of Harassment in the Workplace and subsequently sending me home.*
>
> *This action is unfair, unjust, and has caused me undue stress, illness, and financial loss.*
>
> [corrective action requested]
>
> *That management be directed to follow TBS and DND policies on harassment prevention and that I be compensated for all loss of money.*

[2] Unsatisfied with the DND's response to his grievance at the final level of the grievance procedure, the grievor referred it to the Public Service Labour Relations Board ("the Board") for adjudication with the support of his bargaining agent, the Federal Government Dockyard Chargehands Association (FGDCA). The subject of the grievance was initially identified as a disciplinary measure falling under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). Three weeks later, the FGDCA replaced the initial reference to adjudication with a corrected reference specifying paragraph 209(1)(*a*) as the applicable provision of the *Act*. The subject matter of a reference to adjudication under paragraph 209(1)(*a*) is the interpretation or application of a provision of a collective agreement — in this case, clause 16.01 ("Safety and Health") of the collective agreement between the Treasury Board ("the employer") and the FGDCA for the Ship Repair (SR)(C) Group, which expires March 31, 2011.

[3] This decision addresses the employer's preliminary objection, received by the Board on June 18, 2009, that an adjudicator has no jurisdiction to consider the grievance. The FGDCA opposed the objection on the grievor's behalf, filing written arguments on July 6, 2009. It also proposed that the Board rule on the objection based on the submissions on file. The employer supported that proposal, which the Board

subsequently endorsed. To complete the submissions process, the Board provided the employer an opportunity to rebut the written arguments filed on behalf of the grievor.

II. Summary of the evidence

[4] The FGDCA alleges the following facts:

. . .

> *Mr. Boudreau had four harassment complaints filed against him. The first complaint was made in 2002. The second complaint was made in 2003 but was not investigated until September 2005. The third and fourth complaints were made in 2004 and 2005 respectively. The first complaint was dismissed in 2003. The final three complaints were determined to be unfounded in 2007.*
>
> *On February 8th, 2005, Mr. Boudreau received a death threat. The Military Police investigated this threat but did not lay any charges. Mr. Boudreau remained at work from February 2, 2005 until September 2005. During this period, Mr. Boudreau experienced increasing levels of stress due to the threat on his life and the ongoing harassment investigations.*
>
> *On September 8th, 2005, the supervisor of Mr. Boudreau, Lieutenant Commander Tanya Koester, met with him to express her concerns for his health and to suggest that he seek medical help. Mr. Boudreau did so, and was advised by medical professionals that he should not return to work.*
>
> *Mr. Boudreau was approved for injury-on-duty leave in September 2005. He remained off work for 17 months.*
>
> *On March 30th, 2007, Mr. Boudreau filed a grievance. The grievance stated that the Employer had violated DAOD 5012-O Harassment Prevention and Resolution Policy (and its associated Guidelines) and the TBS Policy on the Prevention and Resolution of Harassment in the Workplace.*
>
> *Throughout the grievance process, the issue between the parties has been the Employer's delay in investigating the harassment complaints against Mr. Boudreau and the impact of this delay on Mr. Boudreau's health.*
>
> *On December 18th, 2007, Mr. Boudreau met with the employer at the second level of the grievance procedure.*
>
> *The Association then referred Mr. Boudreau's grievance to adjudication. In the referral to adjudication, the Association specifically referenced Article 16.01 of the collective agreement.*

. . .

[5] In its rebuttal, the employer did not challenge the facts alleged by the grievor.

[6] The employer cited the text of clause 16.01 of the collective agreement as follows in its submission:

> *16.01 The Employer shall make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Association 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. The Association agrees to encourage its members to observe and promote all safety rules and to use all appropriate protective equipment and safeguards.*

[7] I have noted an apparent error in the Form 20 (*Notice of Reference to Adjudication of an Individual Grievance*) submitted by the FGDCA. It identifies the term of the applicable collective agreement as "01/04/08 to 31/03/2011." However, the grievor filed his grievance at the first level of the grievance process on March 30, 2007, one year before the cited effective date of that collective agreement. Because the FGDCA did not quote the text of clause 16.01 in its arguments but did not dispute the version of the text reported by the employer, I am confident that clause 16.01 of the collective agreement that was in effect on March 30, 2007 is identical and is as outlined by the employer. To be sure, the current collective agreement, which came into effect on April 1, 2008, and that is a matter of public record, indicates that there were no changes to clause 16.01 from its predecessor.

[8] For greater certainty, where I use the term "collective agreement" in these reasons, I refer to the previous collective agreement, which was in effect on March 30, 2007. "Clause 16.01" refers to clause 16.01 of that collective agreement.

III. Summary of the arguments

A. For the employer

[9] According to the employer, the evidence shows that the grievance concerns management's alleged failure to follow a DND policy — *DAOD 5012-0 Harassment Prevention and Resolution* — as well as the Treasury Board *Policy on Prevention and Resolution of Harassment in the Workplace*, neither of which form part of the collective

agreement. The grievance form itself does not refer to clause 16.01. The grievor never raised arguments concerning health and safety during the grievance procedure.

[10] The employer submits that the FGDCA is attempting to change the nature of the grievance by identifying clause 16.01 of the collective agreement as the subject of the reference to adjudication. That change is not permissible, as confirmed by *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[11] The grievance cannot be referred to adjudication as a matter involving the interpretation or application of clause 16.01 of the collective agreement because the grievance, on its face, does not relate to that provision. As a consequence, an adjudicator lacks jurisdiction to hear the grievance.

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

[12] Counsel for the FGDCA submits that the reference to adjudication did not change the nature of the grievance. The essence of the grievor's case is that he suffered undue stress and illness and that he remained off work for 17 months because the employer did not comply with its harassment polices. That failure to comply with its policies violated the collective agreement.

[13] The reference to adjudication cites clause 16.01 of the collective agreement. Doing so does not change the legal issues and facts to be determined. They remain the same as the issues and facts discussed throughout the grievance procedure. Highlighting clause 16.01 on the reference to adjudication form made explicit what had been implicit.

[14] In *Burchill*, the grievor sought to change the substance of his grievance on referring it to adjudication to make it adjudicable. That is not the situation in this case. The reference to adjudication does not raise a new issue — the problem that *Burchill* redresses. In the circumstances examined in *Burchill*, the employer was deprived of the opportunity to address the subject matter of the grievance, as identified in the reference to adjudication, during the grievance procedure. "The same cannot be said of the instant case," according to the FGDCA.

[15] The FGDCA referred me to the direction of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, to the following effect: ". . . a grievance must

be construed so that the "real complaint" is dealt with and an appropriate remedy is provided to bring resolution to the matters which have given rise to the grievance. . . ." See also *United Steelworkers, Local 3998 v. Dunham Bush (Canada) Ltd.* (1964), 15 L.A.C. 270, at 274.

[16] The FGDCA maintains that the courts have given grievors much latitude in the drafting of their grievances. For its part, the Board held, in *Lannigan v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 34, that *Burchill* does not ". . . impose, in an absolute sense, an obligation on a grievor to reference every provision of the collective agreement implicated in a grievance, the substance of which is clear on its face." Moreover, courts, arbitrators and adjudicators have consistently held that cases should not be won or lost on a technicality of form: *Blouin Drywall Contractors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (Ont. C.A.).

[17] The FGDCA maintains that the grievor's health issues were canvassed throughout the grievance procedure. The employer explicitly acknowledged those problems in the grievance process and also expressed regret for his suffering. The employer wrote as follows in its second-level response to the grievance on January 28, 2008:

. . .

> *. . . you have stated that the entire harassment investigation process had a major impact on you and your health and well-being and resulted in you being off work and receiving your WCB compensation for a period of seventeen months.*
>
> . . .
>
> *. . . while I sincerely regret the impact this entire matter has had on you and your health, I unfortunately do not have the authority to provide you with the compensation you have requested.*

. . .

The FGDCA thus maintains that it is clear that the employer was aware of the issues being raised and the true subject matter of the grievance. The health and safety issue was not new and was acknowledged by the employer throughout the grievance procedure.

[18] The FGDCA further argues that the employer has not provided any evidence that it suffered a prejudice arising out of the reference to clause 16.01 of the collective agreement in the reference to adjudication (see *Parry Sound (District) Social Services Administration Board*, at paragraph 69).

[19] The FGDCA concludes as follows:

. . .

> *. . . it would be unduly technical to dismiss the grievance where the issue of health and safety has been canvassed between the parties since the grievance was file* [*sic*]*. The Employer has not been placed at a disadvantage by the mention of Article 16.01, and this is no way alters the issue for determination.*

. . .

[20] The FGDCA asks the adjudicator to hear the grievance on its merits.

C. Employer's rebuttal

[21] The employer maintains that the case law is clear that clause 16.01 of the collective agreement must be read as a whole. It must be interpreted as creating an obligation owed to the bargaining agent, not to an individual employee: *Parsons et al. v. Treasury Board (National Defence)*, 2004 PSSRB 160, *Albus and Deminchuk v. Treasury Board (Solicitor General)*, PSSRB File Nos. 166-02-16887 and 16888 (19871125), and *Preeper et al. v. Treasury Board (National Defence)*, PSSRB File No. 166-02-21892 (19920212).

[22] Since the grievor referred the grievance to adjudication under clause 16.01 of the collective agreement, the employer reasserts that the grievor changed its nature in an attempt to use a clause that creates an obligation owed to the bargaining agent to claim one owed to him.

IV. Reasons

[23] The issue that I must determine is whether the grievance in this case has been properly referred to adjudication as a matter involving the interpretation or application of clause 16.01 of the collective agreement, as claimed by the FGDCA, or that it has been improperly referred because the reference to adjudication changed the nature of the grievance, contrary to the doctrine expressed in *Burchill*.

[24] Both the wording of the grievance and the grievor's requested corrective action identify compliance with the ". . . DAOD 5012-0 Harassment Prevention and Resolution and TBS Policy on the Prevention and Resolution in the Workplace [*sic*] . . ." as the root concern. The FGDCA's statement of the facts of the case confirms that non-compliance with policy — the failure to launch a harassment investigation in a timely manner — comprises the principal subject of the grievance. It stipulates that, ". . . [t]hroughout the grievance process, the issue between the parties has been the Employer's delay in investigating the harassment complaints against Mr. Boudreau and the impact of this delay on Mr. Boudreau's health."

[25] Essentially, the employer does not dispute that depiction. What the employer does dispute is that the grievance, and how it was discussed during the grievance procedure, ever revealed that the question to be resolved concerned the interpretation or application of clause 16.01 of the collective agreement, as later claimed in the FGDCA's corrected reference to adjudication.

[26] It strikes me that the bargaining agent faced a problem in this case. The essence of the grievance is the allegation that the employer failed to abide by specific policy requirements about the timely conduct of harassment investigations. However, those specific policy requirements do not form part of the collective agreement and, as such, it is unlikely that their application could be adjudicated under the *Act*. To bring the subject matter within the ambit of subsection 209(1), the bargaining agent needed to frame the issue in a different way. The record suggests that it did so in the first instance by characterizing the employer's actions as disciplinary, filing the reference to adjudication under paragraph 209(1)(*b*). In the corrected reference to adjudication, it reframed the issue as a matter under paragraph 209(1)(*a*) — a matter involving the interpretation or application of a provision of the collective agreement. It is at that stage that the bargaining agent specifically identified clause 16.01 as the subject of the grievance for the first time. The employer states, without refutation, that neither the grievor nor his bargaining agent referred to clause 16.01 during the grievance procedure. The FGDCA counterargues that it should always have been clear to the employer that its interpretation or application was the real issue. Because the employer's alleged failure to comply with harassment policy requirements caused harm to the grievor's health, the FGDCA maintains that the employer breached its collective agreement obligation to ". . . make all reasonable provisions for the

occupational safety and health of employees," and that that breach was always the implicit subject of the grievance.

[27] I have concluded that I cannot accept the bargaining agent's argument in the circumstances of this case.

[28] Despite what the employer contends based on the case law of the former Public Service Staff Relations Board, I believe that adjudicators should be open to the possibility that an individual employee's health concerns may be addressed as a matter involving a collective agreement provision such as clause 16.01. To be sure, the adjudicator in the recent decision *Galarneau et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 70, accepted that proposition, finding as follows at paragraphs 66 and 67:

> ***66*** *In my opinion, the first sentence of clause 18.01 of the collective agreement clearly creates for the employer a substantive duty to each of its employees: the employer shall make reasonable provisions for the occupational safety and health of employees. Although the duty is expressed in general terms, it is in my view a no less substantive commitment, the scope of which extends to each of the employer's employees. In the second sentence of the clause, the parties set out the means by which they agree to ensure that the duty in the first sentence is met. To enable the employer to meet its duty to make reasonable provisions to protect the health and safety of its employees, the parties commit to consult and to work together to carry out the necessary procedures. I do not see on what basis this second element of the clause should eclipse the employer's duty, and the corollary right of employees, provided in the clause's first sentence.*
>
> ***67*** *Indeed, I believe that the main purpose of clause 18.01 of the collective agreement is found in the employer's duty, which is stated in the clause's first sentence, while the second sentence provides for the mechanisms to ensure that the duty is met. The mechanisms, created in the form of respective undertakings by the employer and the bargaining agent, are not exclusive and do not have the effect of reducing the substantive nature of the duty clearly established in the clause's first sentence. Furthermore, I see nothing that would prevent the parties from setting out in a single clause both a duty for the employer to its employees and mutual obligations for the employer and the bargaining agent. With all due respect, it is my position that concluding that clause 18.01 does not confer individual rights on*

> *employees constitutes an overly restrictive interpretation that voids the meaning of the clause's first sentence.*

However, the adjudicator's finding in *Galarneau et al.* does not mean, in my opinion, that every grievance that involves alleged harm to a grievor's health will necessarily open an issue involving the interpretation of the occupational health and safety provisions of a collective agreement, creating grounds for a reference to adjudication on that basis under paragraph 209(1)(*a*) of the *Act*. The determination that must be made about the nature of the grievance is case-specific and dependent on the facts.

[29] In *Galarneau et al.*, the grievances when initially filed with the employer referred to a collective agreement provision concerning occupational safety and health (closely comparable to clause 16.01 in this case). The specific nature of the health concern that gave rise to the grievances — the exposure of 58 employees to second-hand smoke while at work — left no doubt from the beginning that the subject matter was safety and health in the workplace. The jurisdictional objection (among others) decided by the adjudicator did not challenge that characterization (and the *Burchill* doctrine was not invoked). Instead, the employer contended, unsuccessfully, that the occupational safety and health provision of the collective agreement did ". . . not create substantive individual rights that could be used as the basis for individual grievances."

[30] In this case, the facts as asserted by the FGDCA suggest to me that the essential nature of the grievance was not about occupational health and safety in a comparable sense. From the outset, the grievance was explicit in challenging alleged delays on the employer's part in investigating harassment complaints filed against the grievor. The objective of the grievance, unmistakable in the primary corrective action requested by the grievor, was to direct the employer to follow its own harassment policy requirements. The compensation sought by the grievor was for the effects of the employer's alleged failure to have done so.

[31] The complicating dimension in this case is that it is unchallenged that the grievor's health was adversely affected as a result of what happened to him in his workplace — and that those health effects were discussed during the grievance procedure. The following two statements of fact by the FGDCA, uncontested by the employer, are quite clear:

. . .

> *Mr. Boudreau was approved for injury-on-duty leave in September 2005. He remained off work for 17 months.*
>
> . . .
>
> *Throughout the grievance process, the issue between the parties has been the Employer's delay in investigating the harassment complaints against Mr. Boudreau and the impact of this delay on Mr. Boudreau's health.*
>
> . . .

[32] The key question is whether the facts reveal that the grievance as submitted and as argued during the grievance process focussed in its essential character on the employer's failure to ". . . make all reasonable provisions for the occupational safety and health . . ." of the grievor, in a sense comparable to the situation in *Galarneau et al.*, or instead on the employer's alleged non-compliance with harassment policy procedural requirements. Was the employer's collective agreement obligation for the grievor's health as expressed in clause 16.01 the essential subject matter of the grievance as discussed by the parties, or were the health effects on the grievor discussed by the parties as one of the results of the employer's alleged failure to meet obligations of a different nature — obligations that are founded in the procedural requirements established by its harassment policies?

[33] On balance, I am persuaded that the latter depiction of the essential character of the grievance is more appropriate. Had the submissions revealed that the issue confronted by the parties during the grievance procedure was more clearly framed as a matter concerning the employer's obligation to take "all reasonable measures" to protect the grievor's health, I might have reached a different decision. In my view, the precedent established by *Galarneau et al.* opens the door to that possibility if the facts provide the necessary support. In the circumstances of this case, the facts lead to a different finding. The grievor's health was on the table but, in my view, it was broached by the parties more as an element to be considered for the purpose of remedy than as the primary problem revealed by the grievance. I am not able to conclude based on the facts that the employer's occupational safety and health obligations under clause 16.01 of the collective agreement were understood, or should have been understood, by the employer to be at issue, and were certainly not explicitly addressed by the grievor or the bargaining agent.

[34] Therefore, I rule that the interpretation or application of clause 16.01 of the collective agreement was not the essential subject of the grievance as originally filed or the essential substance of what was discussed during the grievance procedure. By referring to clause 16.01 in the reference to adjudication, the FGDCA introduced a different element into the dispute. In my view, the *Burchill* prohibition applies.

[35] The FGDCA correctly draws attention to case law that cautions against an overly technical or demanding approach to the drafting and prosecution of grievances. That said, I do not believe that it is overly exacting in the circumstances of this case to require during the grievance procedure a more forthright identification of the substantive issue as a matter involving the employer's occupational safety and health obligations under clause 16.01 of the collective agreement. As a general rule of natural justice, the employer should not at adjudication be required to defend against a substantially different characterization of the issues than it encountered during the grievance procedure. I am satisfied in the circumstances of this case that agreeing to hear the grievance on its merits as a matter involving clause 16.01 would condone the type of reformulation of the grievance that the Federal Court of Appeal in *Burchill* said should not occur. The employer's objection to my jurisdiction to consider the grievance is founded.

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

(The Order appears on the next page)

V. Order

[37] The grievance is dismissed.

September 21, 2010.

Dan Butler,
adjudicator