

Date: 20101110

File: 566-02-2702

Citation: 2010 PSLRB 119



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

HANY HAMZA

Grievor

and

**DEPUTY HEAD
(Department of National Defence)**

Respondent

Indexed as
Hamza v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Renaud Paquet, adjudicator](#)

For the Grievor: [Himself](#)

For the Respondent: [Shelley Quinn, counsel](#)

Heard at Toronto, Ontario,
November 1, 2010.

REASONS FOR DECISION

Individual grievance referred to adjudication

[1] Hany Hamza (“the grievor”) was employed by the Department of National Defence (“the respondent”). On July 8, 2008, the respondent informed the grievor that it was rejecting him on probation. On August 1, 2008, the grievor grieved the respondent’s decision to reject him on probation. In his grievance, he stated that the respondent’s decision was disciplinary in nature, made in bad faith and discriminatory on the basis of race, religion, and national or ethnic origin.

[2] The Public Service Labour Relations Board (“the Board”) proposed to the parties that the hearing take place from March 15 to 19, 2010. The grievor asked that the hearing dates be delayed because he was expecting that, by those dates, he might not have received all the information that he requested from the respondent. The Board agreed to delay the hearing dates to May 10 to 14, 2010. Both parties confirmed that those dates were convenient. At 14:44 on Friday, May 7, 2010, the grievor advised the Board that he had “fallen sick in the last several days” and that he would not be able to attend the hearing, which was scheduled to begin Monday, May 10, 2010. I decided to postpone the hearing.

[3] On May 26, 2010, the Board wrote to the parties, advising them that the hearing had been tentatively scheduled for November 1 to 5, 2010, and asking them to advise it by no later than June 11, 2010 if they were not available on the proposed dates. The grievor did not give any indication to the Board that he was not available on those dates. On July 13, 2010, the Board wrote to the parties, informing them that the November 2010 hearing dates were considered final. Between July and October 2010, the Board and the grievor exchanged letters and emails. The grievor never raised any issue about the November 2010 hearing dates. On October 6, 2010, the Board issued the official “Notice of Hearing” which was sent to the grievor by Priority Post. The Board obtained confirmation from Canada Post that the “Notice of Hearing” was successfully delivered to the grievor. It included the following notice:

...

***AND FURTHER TAKE NOTICE** that if you fail to attend the hearing or any continuation thereof, the Board may dispose of the matter on the evidence and representations placed at the hearing without further notice to you.*

...

[4] The hearing started at 13:30 on November 1, 2010. The grievor was not there. I advised the respondent that I would try to reach the grievor. Shortly after that, the Board's staff called the grievor at his home phone number and let the phone ring 15 times. There was no answer and no voicemail on which to leave a message. At 14:09, the Board's staff sent an email to the grievor, stating that the adjudicator had advised the Board that the grievor was not in attendance at the hearing and asking him to advise it as to his intentions as soon as possible. I conducted the hearing in the grievor's absence. I asked the respondent to present its evidence, but I warned it that it would have to redo its presentation if the grievor showed up later during the hearing. I also advised the respondent that, if I were advised by the grievor after the hearing that circumstances beyond his control had prevented him from attending the hearing, I would reconvene, and the respondent would have to present its evidence again.

[5] There is no doubt that the grievor knew that the hearing was to start on November 1, 2010 at 13:30. He had the obligation either to attend or to ask for a postponement if there were legitimate reasons or last-minute emergencies that prevented him from attending. He did not mention any before the hearing.

[6] On November 2, 2010, the Board's staff called the grievor both in the morning and in the afternoon. There was no answer and no voicemail on which to leave a message. At 17:00, the Board's staff sent an email to the grievor asking him to advise the Board, by no later than November 5, 2010, as to why he did not attend the hearing. The grievor did not comply with that request.

[7] Between June and October 2010, the parties and the Board communicated about the issue of the disclosure of documents by the respondent to the grievor. On October 14, 2010, I issued a disclosure order to resolve the issue. The same day, the grievor wrote to the Board that the disclosure order was "completely unacceptable" because it included only a portion of the information that he had requested. On October 25, 2010, the Board wrote to the grievor stating that he had not provided any detailed information as to why the missing portion of the information was relevant to his hearing. On October 27, 2010, the grievor wrote to the Board stating that he was no longer officially recognizing the "current adjudicator" in his file and requesting that the adjudicator be replaced. On October 28, 2010, the Board wrote to the grievor and denied his request.

Summary of the evidence

[8] The respondent adduced eight documents in evidence. It called Ross Pigeau as a witness. Mr. Pigeau has now retired. In 2007 and 2008, he was the director general of the Toronto office of Defence and Research Development Canada (DRDC). The grievor reported directly to him. In February 2008, Mr. Pigeau completed the grievor's performance review report. Mr. Pigeau decided to terminate the grievor's employment, and he signed the termination letter.

[9] The grievor was hired from outside the public service on August 13, 2007, as the manager of knowledge and technology information at the Toronto office of the DRDC ("DRDC Toronto"). On hiring, the grievor was formally advised that he would be on probation for 12 months from the date of his appointment. On July 8, 2008, the respondent informed the grievor that it was rejecting him on probation because he did not possess the required abilities to fulfill the duties of his position. The reasons for rejecting the grievor are outlined in the following abstract from the July 8, 2008 rejection letter:

. . .

With all these efforts, the skills of strategic thinking and analysis as well as good judgment, influence and leadership still constitute areas of concern and it is concluded that you do not possess the required abilities for your position.

. . .

[10] Mr. Pigeau had a formal meeting with the grievor for his six-month mid-probation performance review, which was assessed using the core competencies of the grievor's position. The grievor's performance report was then discussed. In section 7 of that report, Mr. Pigeau expressed his preoccupations about the grievor's performance as follows:

. . .

. . . Dr Hamza seems to have adapted less well, however, to the horizontal/leadership (versus hierarchical/managerial) organizational structure of the Agency and of DRDC Toronto, which requires a well developed ability to communicate, influence, negotiate, lead and compromise . . . Also, Dr Hamza needs to develop and display a substantial ability to think strategically . . . I also encourage Dr Hamza to be more receptive to constructive criticism concerning his

individual performance and his professional progress . . . It is critical that Dr Hamza demonstrate these skills and competencies: they are key for achieving success in his position as Knowledge and Technology Exploitation Manager.

. . .

[11] The grievor was given the opportunity to submit written comments if he did not agree with his performance review report. He did not. Nor did he grieve.

[12] In early April 2008, Mr. Pigeau asked the grievor to focus on two specific tasks or projects, and he relieved him from his other duties. The grievor was given three months to complete those two tasks which were intended to help develop his competencies in strategic analysis and thinking. One of the tasks was to develop a strategic framework for collaboration between DRDC Toronto and academia. The other task was to develop a strategic framework for collaboration between DRDC Toronto and the DRDC Centre for Security Science. Mr. Pigeau testified that those tasks were directly linked to the grievor's work description.

[13] Mr. Pigeau testified that the grievor did not adequately perform those two tasks. The grievor's final products were two reports which were sent for assessments to the following three directors at the DRDC: Eric Fresque, Keith Hendy and Andrew Vallerand. The three directors raised serious concerns with one or both reports, which showed Mr. Pigeau that the grievor did not possess the competencies for that type of task and that he did not meet the requirements of his position.

Summary of the arguments

[14] The respondent argued that the grievor was terminated while on probation because he did not meet the requirements of his position. The letter of termination and the evidence adduced demonstrated that the grievor was terminated because he did not succeed in his probation. That type of termination is provided for in the *Public Service Employment Act (PSEA)* s.c. 2003, c.22, and an adjudicator does not have jurisdiction to intervene. Section 62 of the *PSEA* gives an employer the right to impose a probationary period and to reject an employee during that period. Section 211 of the *Public Service Labour Relations Act (PSLRA)* prevents the referral to adjudication of a grievance dealing with any termination of employment under the *PSEA*.

[15] In support of its arguments, the respondent referred me to the following decisions: *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33; *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39; *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175; *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52; *Raveendran v. Office of the Superintendent of Financial Institutions*, 2009 PSLRB 116; and *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139.

Reasons

[16] The grievor was hired from outside the public service, and he was advised on hiring that he would be on probation for a 12-month period. The respondent terminated his employment before the end of the probation period, and the evidence adduced at the hearing shows that it had concerns with his performance. The following provisions of the *PSEA* provide an employer the right to impose a probation period and to terminate employment during an employee's probation:

...

61. (1) *A person appointed from outside the public service is on probation for a period*

(a) *established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act; . . .*

...

Termination of employment

62. (1) *While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*

(a) *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, . . .*

...

and the employee ceases to be an employee at the end of that notice period.

...

[17] According to section 211 of the *PSLRA*, a grievance about a termination of employment under the *PSEA* cannot be referred to adjudication. Considering that this grievance challenges the grievor's termination while on probation and that I have concluded that the termination was properly effected under the *PSEA*, I do not have jurisdiction to hear it. Section 211 of the *PSLRA* reads as follows:

211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(a) any termination of employment under the Public Service Employment Act ...

...

[18] Even though an adjudicator does not have jurisdiction to hear a grievance about a termination on probation, he or she must, before reaching that conclusion, examine whether the termination was employment related and whether the respondent used the rejection on probation as a sham or camouflage to hide another motive for the termination. As stated in *Leonarduzzi*, the respondent simply has to provide the adjudicator with some evidence that the rejection was related to employment issues. In this case, the respondent met that burden.

[19] Mr. Pigeau assessed the grievor's performance six months after he was hired. In the performance review report, Mr. Pigeau expressed concerns about the grievor's performance. Those concerns were communicated to the grievor. In April 2008, Mr. Pigeau asked the grievor to complete, within three months, two specific tasks. According to Mr. Pigeau, the grievor did not adequately perform those two tasks. Mr. Pigeau concluded that the grievor did not possess the required abilities to occupy his position, and he rejected him on probation. Specifically, Mr. Pigeau believed that the grievor was lacking in strategic thinking and analysis skills as well as in good judgment, influence and leadership.

[20] The respondent adduced evidence that the decision to terminate the grievor was based on employment-related reasons. The grievor did not show up at the hearing, and

consequently, he did not prove to me that the termination on probation was a sham or a camouflage or that it was done in bad faith.

[21] The grievor knew that the hearing was to start at 13:30 on November 1, 2010. He was advised by the Board that, if he failed to attend the hearing, the adjudicator might dispose of the grievance on the evidence and representations adduced at the hearing, without further notice to him. After the hearing, the Board's staff enquired with the grievor as to why he did not show up. The grievor did not provide any valid reason that could have prevented him from attending. Consequently, I decided to proceed with the hearing and to write this decision without hearing from the grievor.

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

(The Order appears on the next page)

Order

[23] The grievance is dismissed.

November 10, 2010.

**Renaud Paquet,
adjudicator**