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File: 566-02-2967

Citation: 2010 PSLRB 136



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

LYSE DUCHARME

Grievor

and

**DEPUTY HEAD
(Department of Human Resources and Skills Development)**

Respondent

Indexed as
Ducharme v. Deputy Head (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Renaud Paquet, adjudicator](#)

For the Grievor: [Herself](#)

For the Respondent: [Sean Kelly, counsel](#)

Heard at Ottawa, Ontario,
November 29, 2010.
(PSLRB Translation)

Individual grievance referred to adjudication

[1] Lyse Ducharme, the grievor, was a researcher for the Department of Human Resources and Skills Development - Service Canada ("the employer"). Her position was classified at the ES-03 group and level. Ms. Ducharme was recruited to the position from outside the public service. When hired, she was formally notified that she would be on probation for 12 months, beginning September 25, 2006. On September 11, 2007, before the end of the probation period, the employer notified Ms. Ducharme that it was dismissing her effective October 15, 2007 but that she was relieved of her duties beginning September 14, 2007. The period between those two dates was to serve as paid notice.

[2] In its September 11, 2007 letter to Ms. Ducharme, the employer informed her that she did not meet the requirements of the ES-03 position that she occupied. In the second paragraph of its letter, the employer set out as follows the reasons that led to its conclusion:

[Translation]

. . .

Specifically, your high rate of absenteeism adversely affected the quality of your work. Despite frequent reminders, the situation did not improve. In addition, you demonstrated flagrant incompatibility in your conduct with your superiors and co-workers. Those performance shortcomings are clearly indicated in the performance reports attached to my September 5, 2007 letter.

. . .

[3] On January 15, 2008, Ms. Ducharme filed a grievance against her rejection on probation. In it, she alleged that the rejection was unjustified, was made in bad faith, constituted disguised disciplinary action and violated the *Canadian Human Rights Act* (CHRA). The grievance was denied at the final level of the grievance process on May 15, 2009 and was referred to adjudication on June 23, 2009. That same day, Ms. Ducharme notified the Canadian Human Rights Commission (CHRC) that, by referring her grievance to adjudication, she intended to raise an issue about the interpretation or application of the CHRA. On July 29, 2009, the CHRC notified the Operations Registry that it did not intend to make submissions in this matter.

[4] The hearing was to take place from March 15 to 18, 2010. On March 2, 2010, Ms. Ducharme notified the Operations Registry that she was not available on those dates but that she “[translation] would possibly be available starting in September 2010.” It was then agreed that the hearing date would be postponed. On June 21, 2010, the Operations Registry notified Ms. Ducharme that it had tentatively scheduled the hearing of her grievance from November 29 to December 3, 2010. The Operations Registry asked Ms. Ducharme to confirm her availability by July 8, 2010. Since Ms. Ducharme did not respond to that letter, I decided that the hearing would take place on those dates. Then, on my instructions, the Operations Registry tried twice to organize a pre-hearing conference to discuss the hearing procedure with the parties. Since I did not hear from Ms. Ducharme in time about her availability, I was unable to hold that conference. In addition, on October 22, 2010, on my instructions, the Operations Registry reminded Ms. Ducharme that the hearing of her grievance would take place as scheduled from November 29 to December 3, 2010.

[5] On October 27, 2010, the Operations Registry received a letter from Ms. Ducharme, which contained the following:

[Translation]

...

At this point, I need to focus on my survival, my health and my safety. Then, once the representation problem is solved, I intend to continue to debate my position that, while I was employed, I did not breach the regulations or the code of conduct of the public service during my recent job with Service Canada where I was a victim of harassment.

...

[6] On November 2, 2010, on my instructions, the Operations Registry responded to Ms. Ducharme’s October 27, 2010 letter and asked her to indicate her availability for a pre-hearing conference. The Operations Registry also informed Ms. Ducharme that the hearing would take place as scheduled from November 29 to December 3, 2010. Furthermore, on November 2, 2010, the Operations Registry sent a notice of hearing to the parties. The notice of hearing included the following note:

[Translation]

...

PLEASE ALSO NOTE that, if you fail to appear at the hearing or any possible continuance of the hearing, the adjudicator may determine the matter based on the evidence and the submissions before him at that time, without giving you further notice.

...

[7] On November 16, 2010, on my instructions, the Operations Registry wrote to Ms. Ducharme and again asked whether she would be available for a pre-hearing conference on November 22 or 23, 2010 and reminded her that her grievance would be heard from November 29 to December 3, 2010. A telephone message was also left at her home on November 17, 2010. On November 22, 2010, the Operations Registry received a letter from Ms. Ducharme that indicated that she would not be available for the pre-hearing conference and that she wanted the hearing postponed. The following excerpts from her letter summarize her position:

[Translation]

...

No, I am not available for a hearing called by the employer on November 22 or 23, 2010 for the following reasons, of which you are already aware:

...

Because, since I have been placed in a position to find my own representation, which is the fault of the fact that the CAPE union decided not to represent me as a member, I will follow up on this file only once I've found new representation, to which I am entitled; when health and time permit and I have emphasized the fact that I do not anticipate doing so before the new year, 2011

Because, once I am equipped to proceed in accordance with my rights, I will inform you

...

[8] On November 23, 2010, on my instructions, the Operations Registry responded to Ms. Ducharme's letter, received on November 22, 2010, and informed her that the hearing of her grievance would take place as scheduled from November 29 to December 3, 2010 and that she would have to adduce medical evidence if the state of her health prevented her from appearing at the hearing. The Operations Registry received confirmation from Canada Post that its November 23, 2010 letter was

delivered to Ms. Ducharme on November 24, 2010. Additionally, at 12:15 on November 23, 2010, the Operations Registry called Ms. Ducharme and left her a telephone message informing her verbally of the content of the November 23, 2010 letter, which reads in part as follows:

[Translation]

...

The purpose of our most recent communication with you was to set a date for a conference in preparation for the hearing of your grievance. Since you are not available for such a conference, it will not take place.

However, please note that, as we reminded you in our November 16, 2010 letter, the hearing for your grievance will be held as scheduled from November 29 to December 3, 2010.

In your November 17, 2010 letter, you indicated that you do not anticipate being prepared to proceed with the hearing of your grievance until 2011. I remind you that the hearing of this grievance was first scheduled from March 15 to 18, 2010. That hearing was postponed. You were not available because of your schedule, according to your March 2, 2010 letter. In that same letter, you indicated that you would be available starting in September 2010.

On June 21, 2010, we wrote to you, informing you that your grievance would be heard from November 29 to December 3, 2010. Since then, on more than one occasion, we have reminded you that the hearing would take place on those dates and that, if you did not appear at the hearing, the adjudicator could conclude that you had abandoned your grievance and could deny it on that basis.

Unless we receive in our office, before 12:00 on November 26, 2010, satisfactory medical evidence that the state of your health prevents you from appearing at the hearing scheduled from November 29 to December 3, 2010, the hearing will take place. If you do not appear at the hearing, the adjudicator could conclude that you have abandoned your grievance or determine the grievance based on the evidence adduced by the employer at the hearing.

...

[Emphasis in the original]

[9] Ms. Ducharme did not contact the Operations Registry after receiving the November 23, 2010 letter. The hearing began on November 29, 2010 at 09:30 as

scheduled, but Ms. Ducharme was absent. I indicated to the employer that an officer from the Operations Registry would attempt to reach Ms. Ducharme and that the hearing would resume at 09:50. At 09:40, an officer from the Operations Registry telephoned Ms. Ducharme. She did not answer. The officer left her a telephone message informing her that the hearing had begun at 09:30 and that the adjudicator had noted that she was absent. The officer asked Ms. Ducharme to contact her as soon as possible to inform her whether a significant impediment prevented her from attending the hearing. Ms. Ducharme did not return the call.

[10] Since Ms. Ducharme was repeatedly informed of the hearing date and since she provided no evidence of a legitimate reason that prevented her from attending the hearing, I decided to continue the hearing and to determine the grievance based on the evidence adduced by the employer.

Summary of the evidence

[11] The employer adduced 12 documents in evidence. It also called as witnesses Pierre-Étienne Gérin, Chi Nguyen, Yvonne Dionne, Annie Blondeau and William Harris. Mr. Gérin supervised Ms. Ducharme from the time she was hired in September 2006 until mid-November 2006. Ms. Nguyen supervised Ms. Ducharme from mid-November 2006 until the end of March 2007. Ms. Dionne supervised Ms. Ducharme for a two-week period in late August and early September 2007. Ms. Blondeau is a labour relations advisor for the employer. From November 2006 until December 2007, Mr. Harris was Director of Strategic and Business Planning at Service Canada. The managers who supervised Ms. Ducharme reported to Mr. Harris. Mr. Harris made the decision to reject Ms. Ducharme on probation.

[12] According to Mr. Gérin, Ms. Ducharme's performance was below expectations. She had been hired to carry out research, conduct analyses and make recommendations. She had difficulty synthesizing the information that she gathered. She had difficulty adapting quickly to priorities that changed as a result of emergencies. In Ms. Ducharme's verbal communications with Mr. Gérin, her attitude was disrespectful and scornful. On one occasion, at a meeting with external partners of Service Canada, she took a position contrary to his. Ms. Ducharme also had difficulties in her relations with her co-workers because she was not much able to help them when needed. Mr. Gérin stated that he received comments from some employees who no longer wished to work with Ms. Ducharme. Additionally, Mr. Gérin stated that,

although he discussed the problems with Ms. Ducharme, her attitude remained unchanged.

[13] For the five weeks in which he supervised Ms. Ducharme, Mr. Gérin informed Mr. Harris of the difficulties that he experienced with her. In August 2007, at Mr. Harris' request, Mr. Gérin wrote a report evaluating Ms. Ducharme's performance. The report was adduced at the hearing. It confirmed Mr. Gérin's testimony about Ms. Ducharme's shortcomings.

[14] Ms. Nguyen testified that in her role as Ms. Ducharme's supervisor she experienced many of the same difficulties as Mr. Gérin. Ms. Nguyen quickly realized that Ms. Ducharme was impolite with her, that her performance was not always satisfactory and that she had difficulties in her relations with her co-workers. Ms. Nguyen discussed those issues with Ms. Ducharme and informed her of her expectations but saw no improvement in the months during which she supervised Ms. Ducharme. Ms. Ducharme was repeatedly disrespectful and even aggressive in her verbal communications with Ms. Nguyen.

[15] During her supervision of Ms. Ducharme, Ms. Nguyen informed Mr. Harris of the difficulties that she experienced with Ms. Ducharme. In August 2007, at Mr. Harris' request, Ms. Nguyen wrote a report evaluating Ms. Ducharme's performance. The report was adduced at the hearing. It confirmed Ms. Nguyen's testimony about Ms. Ducharme's shortcomings.

[16] From April 2 to July 31, 2007, Ms. Ducharme was temporarily seconded from Service Canada to a position at the Patented Medicine Prices Review Board. The employer adduced in evidence the performance evaluation that was prepared at the conclusion of the secondment agreement. The author of the evaluation concluded that Ms. Ducharme did not meet the requirements of the position. No witness was called to corroborate or explain the evaluation.

[17] Ms. Dionne supervised Ms. Ducharme for a brief two-week period near the end of her probation period, after her return to Service Canada. Ms. Dionne noted a meeting with Ms. Ducharme at which Ms. Ducharme was particularly disrespectful and impolite with her. Ms. Dionne attempted to explain certain things to Ms. Ducharme but was unable to because Ms. Ducharme constantly interrupted her and did not allow her to speak. Ms. Dionne informed Mr. Harris of the incident.

[18] Each witness stated that Ms. Ducharme had an absenteeism problem or that she was often late or left work early without notifying her superiors. Mr. Gérin and Ms. Nguyen also emphasized that often Ms. Ducharme did not follow the established procedures for providing notification of her absences. Ms. Blondeau explained the summary of Ms. Ducharme's absences that she compiled using the employer's computerized records. The summary indicates that Ms. Ducharme was absent for 45 days of the 12 months of her probationary period. Those 45 days include 18.8 days of annual leave, 20.2 days of sick leave and 4 additional days for other reasons. The employer authorized all the absences.

[19] Based on the written reports on Ms. Ducharme's performance written by Mr. Gérin, Ms. Nguyen and the Patented Medicine Prices Review Board, as well as the comments made by Mr. Gérin and Ms. Nguyen, Mr. Harris decided to terminate Ms. Ducharme's probation period. On August 21, 2007, Mr. Harris met with Ms. Ducharme and informed her of his dissatisfaction, particularly with her conduct. On September 5, 2007, he sent her a letter ordering her to comply with the requirements concerning her hours of work, her absences and her conduct. In the same letter, Mr. Harris informed Ms. Ducharme that he was considering rejecting her before the end of her probation period and that he would inform her of his decision the following week.

[20] On September 11, 2007, Mr. Harris notified Ms. Ducharme in writing that she was rejected on probation. Mr. Harris testified that he had repeatedly met with Ms. Ducharme to inform her of management's expectations of her. He saw no improvement in her conduct or attitude as a result of those meetings. Nor did Mr. Gérin and Ms. Nguyen note any improvement in Ms. Ducharme's conduct or attitude.

Summary of the arguments

[21] The purpose of the probation period is to evaluate an employee's ability to occupy a position. If, during that period, the employer concludes that the employee does not have that ability, it may dismiss the employee without the employee being entitled to grievance adjudication under the *Public Service Labour Relations Act* (PSLRA). Specifically, under section 211 of the PSLRA, a grievance against a rejection on probation under the *Public Service Employment Act* (PSEA) may not be referred to adjudication.

[22] The evidence adduced by the employer established that the decision to reject Ms. Ducharme on probation was based on employment-related reasons. Ms. Ducharme was disrespectful to her superiors and co-workers. She did not meet the requirements of her position in terms of interpersonal relations. As well, she did not always follow the established procedures for absences, was not always punctual and was often absent. Therefore, she failed her probation period.

[23] The employer referred me to the following decisions: *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175; *Marycrest v. Canadian Union of Public Employees, Local 2280*, [2009] O.L.A.A. No. 94 (QL); *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33; *Monette v. Parks Canada Agency*, 2010 PSLRB 89; *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33; *North York (City) Hydro Electric Commission v. Canadian Union of Public Employees, Local 11*, [1992] O.L.A.A. No. 836 (QL); *Ross v. Treasury Board (Correctional Services Canada)*, 2003 PSSRB 97; *Spurrell v. Office of the Superintendent of Financial Institutions*, 2003 PSSRB 15; *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2010] O.L.A.A. No. 281 (QL); and *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139.

Reasons

[24] The employer recruited Ms. Ducharme to a researcher position on September 25, 2006. She was hired from outside the public service. On hiring, she was informed that she would be on probation for 12 months. On September 11, 2007, the employer notified her that she was rejected on probation effective October 15, 2007 and relieved of her duties starting on September 14, 2007. In its September 11, 2007 letter, the employer informed Ms. Ducharme that her rate of absenteeism adversely affected the quality of her work and that her conduct demonstrated flagrant incompatibility with her superiors and co-workers.

[25] The following provisions of the *PSEA*, on which the employer relied in Ms. Ducharme's case, authorize the employer to establish a probation period for an employee and to dismiss the employee:

...

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 . . .

. . .

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.

. . .

[26] Section 211 of the *PSLRA* prevents the referral to adjudication of a grievance against a rejection on probation under the *PSEA*. The part of section 211 of the *PSLRA* that is relevant to this case 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 . . .

[27] In Ms. Ducharme's case, an adjudicator has jurisdiction over her rejection on probation if the employer's decision to terminate her employment was arbitrary, discriminatory or in bad faith. An adjudicator has jurisdiction if the employer improperly relies on the *PSEA* or if the reason the employer provides constitutes subterfuge or camouflage. However, unlike the situation in disciplinary grievances, an adjudicator does not have the authority to determine whether the employer had sufficient grounds for dismissing an employee. In other words, an adjudicator may not substitute his or her assessment for that of the employer.

[28] In the September 11, 2007 dismissal letter, the employer based its decision in

part on Ms. Ducharme's absenteeism. The evidence established that Ms. Ducharme had a high rate of absenteeism. In fact, she was absent for 45 days of the approximately 240 days of her probation period, a 19% rate of absenteeism. The evidence also established that Ms. Ducharme was occasionally late for work or left work early and that she did not always follow the established leave management procedures. The employer is entitled to expect that its employees will work the hours that they are scheduled to work and that they will follow the leave management procedures. Additionally, that issue is a point of dissatisfaction with Ms. Ducharme's ability to occupy her position.

[29] That said, based on the evidence adduced, I am not satisfied that Ms. Ducharme's absenteeism is a ground for valid dissatisfaction with her ability to occupy her position. Granted, her rate of absenteeism was very high, but the evidence established that, for each of Ms. Ducharme's absences, the employer approved the leave, which was provided in the collective agreement. Ms. Ducharme took vacation leave; she was entitled to. She stated that she was ill for 20 days during the year; the employer accepted her statements. The employer cannot subsequently allege that Ms. Ducharme did not fulfill the requirements of the position because she took advantage of leave provided in the collective agreement that it approved. As in *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, and *Melanson*, I am of the opinion that, although the numerous days of leave taken by Ms. Ducharme undoubtedly affected the quality of her work, it is not a valid reason for dissatisfaction with Ms. Ducharme's ability to occupy her position.

[30] The evidence adduced at the hearing also established that Ms. Ducharme had difficulties with interpersonal relations and that she lacked respect for her supervisors, as established by the testimonies of Mr. Gérin, Ms. Nguyen and Ms. Dionne. Furthermore, although Mr. Gérin and Ms. Nguyen discussed the problem with Ms. Ducharme, her attitude remained unchanged. That issue is a valid dissatisfaction with Ms. Ducharme's ability to occupy her position.

[31] The employer need not prove to me that, to dismiss Ms. Ducharme, it had a number of grounds for its dissatisfaction with her ability to occupy her position. The employer adduced evidence establishing that the decision to dismiss her was based on dissatisfaction with her ability to occupy her position. Since no evidence was adduced before me that her rejection on probation was arbitrary, discriminatory or in bad

faith — that is, that it improperly relied on the *PSEA* — or that subterfuge or camouflage was involved, I do not have jurisdiction to hear and decide this grievance.

[32] On December 3, 2010 at 10:21, Ms. Ducharme sent a facsimile to the Operations Registry stating that she had already indicated that she was not available for a hearing until 2011 and that she could not provide medical evidence about what prevented her from attending the hearing because her attending physician had closed his practice on October 29, 2010. Ms. Ducharme knew about her hearing date several months in advance and was obliged to attend unless prevented by circumstances beyond her control. If the state of her health prevented her from attending the hearing, I could have agreed to postpone the hearing on the condition that she would provide me with a medical certificate certifying that fact, as the Operations Registry had expressly informed her. She displayed a lack of diligence by waiting until four days after the scheduled start of the hearing to inform the Operations Registry that her physician had closed his practice five weeks earlier.

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

(The Order appears on the next page)

Order

[34] I declare that I do not have jurisdiction to hear this grievance.

[35] I order this file closed.

December 23, 2010.

PSLRB Translation

**Renaud Paquet,
adjudicator**