Date: 20101216

File: 566-02-417

Citation: **2010 PSLRB 131**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

BALKAR SINGH BASRA

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Basra v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Corinne Blanchette, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN

For the Respondent: Richard Fader, counsel

Decided on the basis of a case management conference held on June 29, 2010.

Application before the adjudicator

[1] In *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70, I found that the original decision to suspend Balkar Singh Basra ("the grievor") pending an investigation became a disciplinary action because of the lengthy failure of the deputy head of the Correctional Service of Canada ("the deputy head") to adequately conduct an investigation. I ordered the grievor reinstated as of May 3, 2006. The deputy head sought judicial review of that decision. The Federal Court allowed the judicial review application in *Canada (Attorney General) v. Basra*, 2008 FC 606. In *Basra v. Canada (Attorney General)*, 2010 FCA 24, the Federal Court of Appeal remitted this matter to me for a new determination, with the following directions:

. . .

> *[31] The appeal will therefore be dismissed but the order of the Federal Court Judge will be varied so as to provide that the matter be remitted to the original adjudicator, or another adjudicator if he is unavailable to act, so that it may be decided again in conformity with these reasons, based on the existing record or such other evidence as the adjudicator may decide to allow. . . .*

. . .

[2] On April 12, 2010, I proposed to the parties to base the new determination directed by the Federal Court of Appeal on written submissions. On April 26, 2010, the parties provided their views. The grievor agreed with the proposed approach. The deputy head requested a full oral rehearing on the merits of the grievance. On my directions, the Operations Registry issued a letter on May 13, 2010, scheduling the matter for written submissions. On May 17, 2010, the deputy head wrote to the Operations Registry, indicating that proceeding by way of written submissions on the existing record would be a denial of procedural fairness, and it requested a case management conference.

Summary of the arguments

[3] A case management conference was convened on June 29, 2010, at which I heard submissions from the deputy head and the grievor.

[4] The deputy head argued that, at the original hearing, held from October 25 to 27, 2006, it did not approach this grievance through the prism of a disciplinary suspension, that it was required to now as a result of the Federal Court of Appeal's

decision and that, to address the suspension from a disciplinary point of view, it needs a different evidentiary foundation. According to the deputy head, two or three more hearing days are required to deal with these issues. In the deputy head's view, the facts now known about the case, along with the grievor having been criminally convicted of sexual assault and having lied to the police, are dispositive of the grievance.

[5] The grievor argued that the deputy head's representatives were present at the hearing and that they were clearly notified that the case was about a disciplinary suspension. The deputy head wishes to reargue its case and to tender new evidence. Submitting "post fact" evidence would be unfair to the grievor.

[6] In reply, the deputy head argued that it wishes to adduce new evidence to address issues set out in the Federal Court of Appeal decision that are fundamentally different from those addressed at the original hearing. When a deputy head presents a case of administrative action, it adduces just enough evidence to deal with that action. The deputy head wishes to lead evidence that it now knows to justify its decision to suspend the grievor in 2006. The deputy head argued that this matter was sent back to the adjudicator with the "door wide open" to hear new evidence. As a matter of procedural fairness, the deputy head must be permitted to lead a new evidentiary foundation supporting its 2006 decision, which did not occur at the original hearing. If evidence exists that sheds light on its original decision, then the deputy head should be at liberty to lead that evidence, subject to the approach developed by the Supreme Court of Canada in *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095. There is no unfairness for the grievor, as he will have the opportunity to address any new evidence presented.

Reasons

[7] The original hearing was about the following grievance, as quoted in 2007 PSLRB 70, at paragraph 1:

. . .

> On April 3, 2006, Randie Scott, acting warden of Matsqui Institution suspended me indefinitely without pay pending an investigation. I grieve that this disciplinary action is unwarranted, excessive and unfounded in facts and law.

. . .

The issue raised in the grievance is that the deputy head should not have suspended the grievor indefinitely pending an investigation, as that was a disciplinary action. The deputy head could not have misunderstood the grievor's position.

[8] The deputy head argued that it was unable to lead evidence at the original hearing without contradicting its position that the suspension had been an administrative decision. The Federal Court of Appeal referred to that argument at paragraph 27 of 2010 FCA 24.

[9] In presenting a case at an adjudication hearing, parties make tactical decisions about how to present their evidence and arguments. Barring a ruling by the adjudicator to bifurcate issues in a proceeding, the parties are expected to address all the issues in the grievance at the adjudication hearing. Parties often raise arguments in the alternative during a hearing and lead evidence in support of those arguments. Both parties in this case made tactical decisions when they presented their evidence at the original hearing — for example, the deputy head chose to call one witness, and the grievor chose not to testify. The fact that, for tactical reasons, the deputy head chose to proceed in a certain way at the original hearing is not a reason, in my view, to grant a full evidentiary rehearing in redetermining the matter pursuant to the directions of the Federal Court of Appeal, as if the original hearing had never been held and the original tactical decisions had never been made. It cannot be said that the deputy head has been in any way misled by the grievance, which clearly challenges the disciplinary nature of the suspension.

[10] I further note that this is not a case in which I made rulings at the original hearing that precluded the deputy head from adducing evidence that it had anticipated adducing to establish its case. It is trite, but generally, litigants get only "one kick at the can" when litigating a grievance. Parties are expected to put their full cases and arguments forward during an adjudication hearing. In my view, the purpose of this new determination, ordered by the Federal Court of Appeal, is not to allow the deputy head to start again without considering that a hearing has already been held. The Federal Court of Appeal clearly envisioned that the evidence already before me might be sufficient when it directed that I make a new determination ". . . based on the existing record or such other evidence as the adjudicator may decide to allow."

[11] The purpose of this new determination is to correct errors that the Federal Court and the Federal Court of Appeal found in the decision-making process that led

to 2007 PSLRB 70. Both courts found that the hearsay evidence (in 2007 PSLRB 70, at paragraphs 120 and 129) was treated in error. The Federal Court of Appeal also found that the wrong test was applied in the original decision and that the case should not have been decided in accordance with the *Larson* factors (*Larson v. Treasury Board (Solicitor General Canada – Correctional Service*), 2002 PSSRB 9) but rather in accordance with the usual approach to disciplinary grievances, as set out in *Wm. Scott & Co Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1. Bearing in mind the purpose of this new determination, in my view there is an evidentiary foundation from the original hearing in this case to which I can apply the factors in *Wm. Scott & Co Ltd.* referred to in the Federal Court Appeal decision, with the assistance of submissions from the parties. Those factors are:

- Has the deputy head proven that the Correctional Service of Canada *Code of Discipline* or *Standards of Professional Conduct* was breached?

- If the deputy head has proven that the Correctional Service of Canada *Code of Discipline* or *Standards of Professional Conduct* was breached, was the disciplinary measure imposed excessive?

- If the disciplinary measure imposed was excessive, what measure would be appropriate in the circumstances?

[12] After hearing from the parties at the case management conference, I remain of the view that this case can be decided based on the parties' written submissions on the application of the factors in *Wm. Scott & Co. Ltd.* to the evidence on the existing record before me.

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

(The Order appears on the next page)

Order

[14] The deputy head's application for a full oral rehearing on the merits of the grievance is denied.

[15] I order the deputy head to file with the Operations Registry, with a copy to the grievor, by the close of business on January 31, 2011, its written submission on the application of the factors in *Wm. Scott & Co Ltd.* to the evidence in this case.

[16] Further, I order the grievor to file with the Operations Registry, with a copy to the deputy head, by the close of business on February 28, 2011, his written submission on the application of the factors in *Wm. Scott & Co Ltd.* to the evidence in this case.

[17] Finally, I order the deputy head to file its submission in rebuttal with the Operations Registry, with a copy to the grievor, by the close of business on March 18, 2011.

December 16, 2010.

Paul Love,
adjudicator