Date: 20100707

File: 566-02-2518

Citation: **2010 PSLRB 82**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

SHAWN LECLAIRE

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Marie-Claude Chartier, Professional Institute of the Public Service of Canada

For the Employer: Cécile La Bissonnière, Treasury Board Secretariat

Decided on the basis of written submissions
filed December 15, 2008 and April 20, May 20 and June 10, 2010.

Individual grievance referred to adjudication

[1] On September 7, 2007, Shawn Leclaire ("the grievor") filed a grievance against the Department of National Defence ("the employer"). The grievor is covered by the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada ("the bargaining agent") for the Computer Systems bargaining unit, expiry date December 21, 2007 ("the collective agreement"). The bargaining agent referred the grievance to adjudication on October 31, 2008, alleging a violation of article 43 of the collective agreement, which deals with discrimination.

[2] The grievance reads as follows:

> *Grievance details:*
>
> *I grieve the handling of my November 1, 2005 harassment complaint and May 28, 2006 complaint and the conduct of the investigation*
>
> *Corrective Action Requested:*
>
> *That a new investigation be conducted by a new investigator approved by me.*
>
> *That I be reimbursed for the loss of salary and benefits and all other costs generated by the harassment.*
>
> *That I be made whole.*

[3] The parties agreed to bypass the first level of the grievance process. At the second level, the employer rejected the grievance. It concluded that the harassment investigation report was complete and fair, that no re-investigation would take place into that matter and that the harassment complaint was unfounded. Given that conclusion, the employer denied the corrective action requested by the grievor. At the final level, the employer concluded that the grievor's harassment complaint had been handled properly and that the decision to reject it had been appropriate. The employer denied the corrective action requested by the grievor.

[4] On October 17, 2008, the grievor gave notice to the Canadian Human Rights Commission (CHRC) that he had referred a grievance to adjudication which involved human rights. In that notice, the grievor stated that he had suffered harassment and that he had been discriminated against by his employer after developing and subsequently suffering from chronic depression.

[5] On December 15, 2008, the employer objected to the adjudicator's jurisdiction to hear the grievance because it did not relate to the interpretation or the application of the collective agreement. Rather, the grievance related to the handling of a harassment complaint and the conduct of an investigation, matters not covered by the collective agreement.

[6] The bargaining agent requested that the adjudicator decide the objection before hearing the case on its merits. The employer agreed. In this decision, I will deal only with the objection to jurisdiction.

Submissions for the employer

[7] The employer submitted that an adjudicator appointed to hear a reference to adjudication under section 209 of the *Public Service Labour Relations Act* ("the *Act*") does not have jurisdiction in this matter because the grievance deals with alleged personal harassment and alleged abuse of authority. The grievance does not relate to the interpretation or application of the collective agreement but rather to the handling of harassment complaints and the results of the investigation into those complaints. Although the grievor alleged that he was discriminated against in his notice to the CHRC and although he mentioned the no-discrimination clause of the collective agreement in his referral to adjudication, the wording of the grievance makes no mention of discrimination or of the no-discrimination clause of the collective agreement.

[8] The grievor attempted during the grievance process and in his referral to adjudication to alter the nature of the grievance by adding discrimination. However, the Federal Court of Appeal's decision in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), prohibits altering a grievance to make it adjudicable. Discrimination was not raised as an issue either in the grievor's harassment complaints or in his grievance. There is no ambiguity in the grievance's wording as to the issue grieved. Therefore, the Federal Court of Appeal's decision in *Shneidman v. Canada (Attorney General)*, 2007 FCA 192 does not apply.

[9] During the grievance process, the grievor requested that discrimination be considered part of the grievance. Unfortunately, the employer's representative failed to reply specifically to that request. Nonetheless, the employer has always been of the opinion that the grievor was attempting to modify the nature of the grievance and, for

that reason, did not address the grievor's argument on the issue of discrimination in its reply at the second and the final levels of the grievance process.

[10] It is clear from the grievance's wording that its purpose is to contest the investigation report and its results. The wording of the grievance is not open to any interpretation; the grievor was not happy about the investigation report and its findings, and he grieved it. The adjudicator's jurisdiction is determined by the terms of the initial grievance, and the initial grievance cannot be read as including discrimination. Therefore, the grievance should be denied for lack of jurisdiction.

[11] The employer also referred me to *Chase v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 9; *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8; and *Schofield v. Canada (Attorney General)*, 2004 FC 622.

Submissions for the grievor

[12] The grievor argued that, although the grievance's wording does not refer specifically to article 43 of the collective agreement, it was written in a very broad way, so that it encompasses any allegations related to the harassment suffered by the grievor. The bargaining agent made it clear to the employer from the outset of the grievance process that the grievor had been harassed and discriminated against on the basis of his disability, in contravention of article 43 and of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). The employer did not address the issue in its response at the second and the final levels of the grievance process, although it was presented as the grievor's main allegation during the hearings at both levels.

[13] The grievor argued that this case differs from *Burchill*. In *Burchill*, the grievor changed the nature of his grievance after losing at the final level of the grievance process, making it impossible for the employer to understand the nature of his allegations and to adequately respond to them. In this case, the grievor submitted clear information to the employer at each level of the grievance process that the grievance related to article 43 of the collective agreement and to the *CHRA*.

[14] On May 7, 2008, the bargaining agent wrote to the employer, stressing that it had not responded to the grievor's main allegation in its second-level response and requesting that a position be taken by the employer as to whether it believed that the grievor was discriminated against based on his disability. The employer chose to ignore that request.

[15] The grievor disagreed with the employer that the grievance's wording is very specific. Nothing in the wording indicates why the grievor grieved the handling of his harassment complaints and of the investigation.

[16] The jurisprudence establishes a clear difference between cases where new issues are raised after the final level of the grievance process and those where an employee specifies the exact nature of the complaint during the grievance process. In this case, the exact nature of the grievance was raised at each level of the grievance process. The grievor did not try to surprise the employer with new arguments, but the employer willingly chose to ignore the issues that the grievor raised during the grievance process.

[17] The employer's objection should be rejected on the basis that the grievor did not alter or modify his grievance. The grievor should not be deprived of his right to adjudication because he did not specify in his grievance which type of harassment he was facing. He did so later, at each level of the grievance process.

[18] The grievor referred me to the following decisions: *Garcia Marin v. Canada (Treasury Board)*, 2007 FC 1250; *Gingras v. Treasury Board (Citizenship and Immigration Canada)*, 2002 PSSRB 46; and *Shneidman*.

Reasons

[19] The employer objected to my jurisdiction on the basis that the grievance could not be referred to adjudication pursuant to subsection 209(1) of the *Act* because it did not relate to the application or the interpretation of the collective agreement. Subsection 209(1) reads 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;*
>
> . . .

[20] When the bargaining agent referred the grievance to adjudication, it stated on the referral form that the grievance related to article 43 of the collective agreement. That article reads as follows:

> ***Article 43***
>
> ***NO DISCRIMINATION***
>
> ***43.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, membership or activity in the union or conviction for which a pardon has been granted.*

[21] The wording of the grievance does not directly refer to the no-discrimination clause of the collective agreement. However, it is clear that the grievance refers to harassment. The grievor felt harassed, and he made a harassment complaint. The employer conducted an investigation. The grievor was not happy with its results because the conclusion was not what he was looking for, which was for the employer to conclude that he had been harassed. He then filed the present grievance.

[22] A grievance alleging harassment on the basis of one of the reasons listed in article 43 of the collective agreement could be referred to adjudication. This grievance does not specify that the alleged harassment was for a reason stated in article 43. However, this does not mean that the grievance is not adjudicable.

[23] I agree with the grievor that the reasons for harassment did not need to be part of the grievance's wording for it to be adjudicable. The grievor argued that he made it clear to the employer at each level of the grievance process that he felt harassed on the basis of his disability. The employer did not refute this. The grievor produced a letter that was sent to the employer on May 7, 2008, after the hearing at the second level of the grievance process, alleging discrimination on the basis of disability and a violation of article 43 of the collective agreement. Indeed, the letter alleges that the employer failed to address issues related to disability in its response to the grievance despite the fact that such issues had been argued by the grievor. The employer admitted in its submission that the grievor raised those issues at the hearing of the grievance process, but it never addressed them. In other words, the employer has admitted that it knew

that the grievor was arguing a violation of article 43 with his grievance, although the grievor did not refer to such a violation in his grievance.

[24] I disagree with the employer that the grievor altered or amended his grievance and that in doing so he referred to adjudication a grievance different from the one that he originally filed. Obviously, the grievance could have been better worded. However, imprecise wording should not bar the grievance from being referred to adjudication. Instead, such a problem is corrected through a request for particulars by the employer, but it never made such a request. The employer had opportunities to address the alleged violation of article 43 of the collective agreement, but it chose not to. It cannot argue now that it has been caught by surprise and that it did not understand the nature of the allegations and that it was not able to adequately respond to them before the referral to adjudication, as was the case in *Burchill*.

[25] In *Shneidman*, the Court stated that when it is not clear on the face of the grievance the grounds of unlawfulness that the grievor will rely on, the grievor must provide more details during the grievance process if he or she intends to refer the grievance to adjudication. In this case, the grievance referred to harassment but not to the reasons on which the alleged harassment was based. The grievor introduced those details to the employer at the two hearings held during the grievance process.

[26] I believe that an adjudicator should avoid taking an overly technical and narrow approach on that type of issue. Most federal public service employees and their local bargaining agent representatives are not labour law specialists. When they file grievances, they do their best to use clear wording addressing clear questions, but they do not always succeed. Those technical difficulties are overcome when the specialists take over the grievances as they progress through the levels of the grievance process. Clarifications, as was the case with this grievance, must be brought up then.

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

(The Order appears on the next page)

Order

[28] The preliminary objection is dismissed.

[29] A hearing will be scheduled to hear the grievance on its merits.

July 7, 2010.

Renaud Paquet,
adjudicator