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File: 566-33-2785

Citation: 2010 PSLRB 89

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARK MONETTE

Grievor

and

PARKS CANADA AGENCY

Employer

Indexed as
Monette v. Parks Canada Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Himself

For the Employer: Karen Clifford, counsel

Heard at Ottawa, Ontario,
July 13 to 15, 2010.

I. Individual grievance referred to adjudication

[1] Mark Monette ("the grievor") was working for the Parks Canada Agency ("the employer") as a lock operator on the Rideau Canal. The employer rejected him on probation on October 1, 2007. On October 16, 2007, he grieved the rejection on probation, alleging that it was punitive in nature, had caused him enormous stress and had damaged his reputation. The employer denied the grievance, and the grievor referred it to adjudication.

[2] From 2002 to 2006, the grievor worked on the locks as a student or as a term employee for three to seven months, each year. In 2007, he was hired as an indeterminate employee. He started on May 16, 2007, and was subject to a 12-month probation period.

[3] As a lock operator, the grievor operated locks and bridges to facilitate the passage of vessels through the lock stations. He also maintained lock station grounds, structures, equipment and machinery. The grievor also interacted with lock users and the public and responded to inquiries and service requests. He reported to the lock master. He worked in the northern sector of the Rideau Canal, which runs from Ottawa (north) to Kingston (south). Approximately 3000 boats lock through the Rideau Canal each year, but not all of them pass through the locks in the northern sector. From May to October, 400 000 to 500 000 people visit the lock sites.

II. Summary of the evidence

A. For the employer

[4] The employer adduced 19 documents in evidence. It also called Irvin Mazurkiewicz, Marcel Bélanger and Gavin Liddy as witnesses. At the time of the grievor's termination on probation, Mr. Mazurkiewicz was the director of Canal Operations for the Rideau Canal. Mr. Bélanger was the manager of the northern sector of the Rideau Canal. Mr. Liddy was the superintendent of the Eastern Ontario Field Unit of the Parks Canada Agency.

[5] When the grievor was hired as an indeterminate employee, he was advised in writing that he would be subjected to a 12-month probation period. He was also advised that his employment would be subject to the *Parks Canada Agency Code of Ethics* and the Parks Canada Agency's human resources values and operating

principles. “People Qualities” is an element outlined in the Code. The first paragraph of page 10 of the Code, under “People Qualities,” reads as follows:

> *Demonstrating respect, fairness and courtesy in dealings with both citizens and colleagues, and recognizing that people who are treated with fairness and civility will be motivated to display these qualities in their own conduct.*

[6] Mr. Mazurkiewicz testified that lock operators are in constant contact with the public and other staff. Their responsibilities involve working as a team to ensure the efficient operation of the locks. When staff members work together, they must respect each other.

[7] In 2007, several issues occurred involving the grievor. According to the employer, he did not wear proper footwear and headwear on a few occasions. There was also a complaint from a boater who was told by the grievor, late in the day, that it was too late to lock through and that he would have to wait until the next day. The boater disputed the grievor’s determination that it was too late and was also unhappy about the grievor’s attitude toward him.

[8] On September 23, 2007, the grievor left a note on Mr. Bélanger’s desk complaining that he had been harassed by Adam Burpee, a lock master with whom the grievor worked. In the note, the grievor described the incidents prompting him to report that he had been harassed. Mr. Bélanger testified that he was surprised when he read that note on September 24, 2007, because he was unaware of any potential harassment issues involving Mr. Burpee and the grievor. Mr. Bélanger testified that he met with Mr. Burpee and the grievor to discuss the grievor’s note.

[9] While working as a term employee, the grievor’s performance was evaluated. His performance evaluation reports for 2004 and 2006 were adduced in evidence. Those reports indicate that the grievor exceeded the requirements of his position and was a superior employee. Mr. Bélanger testified that term employees do not perform all the duties of lock operators and that the employer’s expectations and demands are lower for term employees.

[10] On September 26, 2007, the grievor sent an email to Jason Snyder, one of his work colleagues. The email reads as follows:

> ***Subject**: Please delete after reading. I'm not joking.*
>
> *Hello Mr Jay*
>
> *I hope all is well with your work life. It was so much fun being back at Long Island that I fell asleep with a smile every night. My wife had something to do with this, too, of course.*
>
> *Jay, I have a burning, seething rage cooking deep inside of me. One of . . . required 25G's worth of rehab after being subjected to work-place harassment. She is still trying to recover from this sordid episode in her life.*
>
> *At the time, I saw what was happening, but she was too tough to admit that she couldn't beat the problems she faced at work. Jay, I said to her one day ". . ., I will be glad to meet with your boss, in private, and sort him out." She asked me not so do because the end result would have been a prison sentence for me.*
>
> *Jay, sometimes when I am laughing and smiling, I am also harbouring and barely containing the urge to kill. I have been in violent, violent confrontations and fear no man. Either management cleans-up Northern Sector, or I will. That is my new vow in life.*
>
> *Next week I go to Hog's Back for six days. It should be more of an education. This is the only lock station at which I have not worked.*
>
> *Wes' email address?*
>
> *Please mention to . . . that we are so happy that the two of you have decided to bring a new baby into this world. . . . and I would very much like to have you to dinner before we leave for New Orleans. We will talk.*
>
> *Best regards bro*
>
> *Mark*
>
> *PS Next Wednesday evening . . . and I are attending the union meeting in SF. Maybe you shouldn't travel with us, but you might want to be there. Please: NO mention of this in the Northern Sector. Just yet I may need you to sow seeds of concern at some point.*
>
> [*Sic* throughout]

[11] Shortly after receiving that email from the grievor, Mr. Snyder brought it to Mr. Bélanger's attention. Soon after, Mr. Mazurkiewicz and Mr. Liddy were also provided with a copy of the email. They were very concerned about the fourth

paragraph which begins: "Jay, sometimes when I am laughing and smiling, I am also harbouring and barely containing the urge to kill." They were concerned about the safety of staff. According to Mr. Mazurkiewicz, Mr. Snyder and Mr. Burpee were also very concerned and they did not feel safe. The Ottawa Police were informed about the email. They arrested the grievor the same morning to question him.

[12] Mr. Bélanger submitted a detailed report about the grievor to the Ottawa Police at its request. In that report, Mr. Bélanger pointed out a few issues that had arisen with the grievor in 2007. Among other things, he referred to negative feedback from Mr. Burpee with respect to improper clothing, leaving work early and the incident involving the boater. Mr. Bélanger also wrote that some employees feared for their safety after learning about the email dated September 26, 2007.

[13] Mr. Liddy signed the letter offering the grievor an indeterminate position. He explained that probation periods are used to determine whether an employee is a right fit for his or her job and whether the employer has made the right choice. He testified that the *Staffing Policies of the Parks Canada Agency* contain a section on probation which applies to employees hired from outside.

[14] Mr. Liddy signed the letter rejecting the grievor on probation. Before making the decision to terminate the grievor, Mr. Liddy had discussions with human resources and labour relations staff at the employer. He also asked for feedback from Mr. Bélanger. Mr. Liddy's decision was based on the conclusion that the grievor did not meet the performance requirements of his position and that the email dated September 26, 2007 showed that he was unsuitable for a position with the employer. Mr. Liddy testified that, had the grievor's performance been otherwise perfect, he would still have rejected him on probation because of the email. He ended the grievor's termination letter by stating that the grievor had the right to grieve the termination decision under section 208 of the *Public Service Labour Relations Act* ("the *Act*").

[15] In October 2007, the employer completed the grievor's 2007 performance review. By that time, the grievor had already been terminated. According to Mr. Bélanger, the evaluation was completed by Mr. Burpee, Guy Rattey and Eric Dicaire. Mr. Rattey and Mr. Dicaire were also lock masters for whom the grievor had worked in 2007. Mr. Bélanger testified that the written evaluation report was the result of a consensus between the three lock masters, even though Mr. Dicaire did not sign the report. The report contained many negative comments on the grievor's performance in

2007. The grievor was rated "unsatisfactory" for the following evaluation criteria: work methods, interpersonal relationships, initiative, judgment and supervision.

[16] Mr. Liddy explained that there is an independent third party review (ITPR) policy at the employer. The policy was adduced in evidence. According to the policy, an employee wishing to challenge a non-disciplinary termination, including a rejection on probation, must file a grievance through the normal grievance process. The grievance is sent directly to the final level. If the employee is not satisfied with the reply, he or she can refer the grievance to the ITPR for review. There is no mention of the ITPR in the termination letter or in the employer's response to the grievance.

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

[17] The grievor adduced 10 documents in evidence. He called Evanne Casson and Jacques Ferland as witnesses. Ms. Casson is the grievor's spouse. She holds a PhD in psychology. Mr. Ferland works for the employer as a lock master at Kilmarnock Lockstation, in the central sector of the Rideau Canal. The grievor also testified.

[18] The grievor lives on Nicholls Island, close to some of the Rideau Canal locks. He had been on the labour market for 30 years when he started to work on the locks. He went back to university to be eligible to work on the locks as a student. He was first hired as a summer student in 2002. He was rehired in 2003 and 2004 as a student, and then obtained term contracts in 2005 and 2006. In 2007, he was offered indeterminate employment.

[19] The grievor explained the context and meaning of his September 26, 2007 email to Mr. Snyder. That email was simply a friendly exchange with a work colleague. The grievor never intended to harm anybody. He testified that he is against any type of physical violence. He simply used a colourful style to express his frustration with what was happening at work. He acknowledged that he should not have written those comments. The purpose of his email was to express his concerns to a co-worker. The grievor testified that he was the only employee in the northern sector that would stand up to management.

[20] After being arrested by the Ottawa Police on September 26, 2007, the police officer told the grievor that he did not believe that the grievor had committed a crime.

However, the police officer had to take workplace threats seriously after the deaths in the Ottawa Community Transportation (OC Transpo) incidents few years before.

[21] On September 23, 2007, three days before the September 26 email, the grievor filed a written complaint to Mr. Bélanger. The complaint referred to issues involving Mr. Burpee and to a discussion between the grievor and Mr. Bélanger. The grievor wrote in his complaint that Mr. Bélanger had shouted at him and had questioned his ethics, integrity and commitment to the employer. The grievor also wrote that he had been the victim of harassment by Mr. Burpee and that he would not tolerate it any longer. On September 25, 2007, Mr. Bélanger met with the grievor and informed him that he would be transferred, effective immediately, to a different lockstation. The grievor decided to complain to the employer's ombudsman. The ombudsman did not call him back even though he left a detailed message.

[22] The grievor testified on the issue of improper clothing. He explained that he wore a straw hat to avoid excessive exposure to the sun. He had been told by his doctor to protect himself from excessive sun exposure following radiation treatment for cancer. The grievor also explained that one day he had different footwear because of a skin problem on his ankle. When Mr. Burpee objected to that footwear, the grievor obeyed and went back to more traditional footwear.

[23] The grievor testified on the incident involving a boater and about leaving work early. He explained that the boater arrived too late at the locks to let him through. The boater was unhappy and made a complaint against the grievor. The grievor testified that he never left work early.

[24] The grievor testified that he had a good relationship with his work colleagues and superiors, including Mr. Bélanger. He adduced in evidence some cordial email exchanges with Mr. Bélanger. The grievor also adduced in evidence a letter from Mr. Ferland, a letter from Kipper Trevorrow, a retired master scow operator, and a farewell card signed by the students working at the Ottawa locks. Those documents all praise the grievor's qualities, work and attitude.

[25] Mr. Ferland testified about his positive relationship with the grievor which dated to 2002 when the grievor was working as a student at the Long Island lock station. Mr. Ferland also testified on the problems that he personally experienced with

Mr. Bélanger, who had been very abusive with him, had shouted at him and could not accept that somebody would challenge him or file a grievance against him.

[26] The grievor pointed out that he received very positive performance appraisals from the employer in 2004 and 2006. He disagreed with the 2007 performance appraisal, and he pointed out in his testimony the specific parts with which he disagreed. The grievor also testified that one of the lock masters who signed the 2007 performance appraisal had been coerced by the employer to sign it. That lockmaster had been worried about his job if he did not sign the appraisal. Furthermore, the grievor was not given the opportunity to discuss the appraisal and sign it.

[27] The grievor adduced in evidence the employer's reply at the final level of the grievance process. That reply contains the following:

. . .

> *Although there was evidence of performance issues during your employment with the Rideau Canal, the critical factor that led to your immediate termination during the probationary period was the written threats against the workplace in an email dated September 26, 2007.*
>
> . . .
>
> *Threats against the workplace must be taken seriously by management for the safety and the emotional health of the workplace. Your statements were not only troubling and frightening, they were also contrary to the organization's values and operating principles, thereby rendering you unsuitable for continued employment with the Parks Canada Agency.*
>
> *Based on the above, your grievance is denied at the final level.*

. . .

[28] Ms. Casson testified that she has known the grievor for 15 years and has lived with him for the past 10 years. She testified that the grievor is courageous, caring and intelligent and that he has very high moral standards and a tremendous work ethic. His writing style is dramatic and flamboyant. He has a strong distaste and low tolerance for violence. He would not be capable of violence in the workplace. Ms. Casson testified that the grievor enjoyed working on the Rideau Canal but that, in September 2007, he felt harassed. In his September 26, 2007 email, the grievor used

extreme words because he has an extravagant way of expressing himself. He did not mean what he wrote.

II. Summary of the arguments

A. For the employer

[29] When the grievor was hired as an indeterminate employee, the employer made it clear to him that he was subject to a 12-month probationary period. The grievor was terminated before the end of that period because he did not meet the requirements of his position. Even if the *Public Service Employment Act* ("the *PSEA*") does not apply to the employer, the criteria used to decide a rejection on probation grievance when the *PSEA* applies should be used to decide this grievance.

[30] The employer argued that it had valid employment-related reasons to reject the grievor on probation. For that reason, the grievance should be rejected. In 2007, there were several incidents in which the grievor's performance or behaviour was not satisfactory. The employer had to advise the grievor to wear proper footwear and headwear. The employer received a complaint against the grievor from a boater. The grievor's performance appraisal dated October 2007 shows that he did not meet the requirements for work methods, interpersonal relationships, initiative, judgment or supervision. Also, the grievor's email dated September 26, 2007 rendered him unsuitable for the position he occupied. The email was contrary to the *Parks Canada Agency Code of Ethics*. It had a dramatic effect on the workplace, and employees no longer felt safe anymore working there.

[31] The employer referred me to the following decisions: *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; *Raveendran v. Office of the Superintendent of Financial Institutions*, 2009 PSLRB 116; *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33; *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52; *Wright v. Deputy Head (Correctional Service of Canada)*, 2005 PSLRB 139; *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 67; *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39; *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167; *Archambault v. Canada Customs and Revenue Agency*, 2003 PSSRB 28; *Jacmain v. Attorney General et al.*, [1978] 2 S.C.R. 15; *Canada*

(Attorney General) v. Penner, [1989] 3 F.C. 429 (C.A.); and *Canada (Attorney General) v. Public Service Staff Relations Board*, [1977] 1 F.C. 91 (C.A.).

B. For the grievor

[32] The grievor argued that he was not an ordinary probationary employee. When he was hired as an indeterminate employee, he already had 148 weeks of service with the employer. In making the decision to terminate the grievor's employment, Mr. Liddy did not refer to the grievor's file but instead relied solely on information provided by Mr. Bélanger.

[33] On September 23, 2007, the grievor made a harassment complaint with Mr. Bélanger who responded by transferring him to another lockstation. The grievor called the empoyer's ombudsman but was unable to reach him. The grievor felt frustrated and wrote the September 26, 2007 email. That email was not entirely a joke even though it contained some humour. Rather, it was an expression of his frustration. By 11:00 that day, he was arrested by the Ottawa Police, who told him that it had no choice but to act because of the OC Transpo incidents.

[34] The grievor argued that he received excellent performance appraisals in 2004 and 2006. He also adduced in evidence positive recommendations from Mr. Ferland, Mr. Trevorrow and the students who worked with him. The 2007 appraisal was completed in large part by the person against whom he had made a harassment complaint. The other person who signed it was coerced to do so.

[35] The grievor did not refer me to any jurisprudence. He did not refer to the decisions presented by the employer. Instead, he chose to return the copies of the decisions which had been provided to him back to the employer's counsel.

IV. Reasons

[36] After working as a term seasonal employee or student for five seasons, the grievor was offered an indeterminate position in May 2007. In the job offer letter that he signed, it was clearly specified that he would be subject to a 12-month probation period. In accepting the offer, the grievor agreed to be on probation for a 12-month period. On October 1, 2007, when the grievor was terminated, he had been employed in an indeterminate position for five months, and was therefore rejected while still on probation. Although the grievor argued that he was not an "ordinary" probationary

employee given the length of his prior service in various term or seasonal capacities, he was nonetheless a probationary employee and this grievance must be considered with that in mind.

[37] Most of the jurisprudence submitted by the employer is based on cases from the core public administration in which the *PSEA* applies. Subsection 62(1) of the *PSEA* provides the employer in the core public administration the right to terminate employment during an employee's probation:

> . . .
> *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*, or*
>
> . . .
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> . . .

[38] Section 211 of the *Act* does not permit the referral to adjudication of a grievance with respect to any termination of employment under the *PSEA*. Consequently, a grievance related to a rejection on probation cannot be referred to adjudication in the case of employees covered by the *PSEA*. In such cases, as stated in *Jacmain* and *Leonarduzzi*, the employer's burden is to present minimal evidence that the termination was employment related. The grievor's burden is to demonstrate that the employer's decision to reject on probation was not employment related and that it was instead a sham or camouflage or was made in bad faith.

[39] The *PSEA* does not apply to this employer or its employees. However, the employer suggested that the same criteria should apply to decide the grievance. According to the employer, an adjudicator should reject the grievance if the rejection on probation was based on employment-related reasons. Subsections 13(1) and 13(2)

of the *Parks Canada Agency Act*, S.C., 1998, c.31 ("the *PCAA*") establish, as follows, the authority of the employer with respect to that issue.

> ***13.*** *(1) The Chief Executive Officer has exclusive authority to*
>
> *(*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and*
>
> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.*
>
> *(2) Nothing in the* Public Service Staff Relations Act *shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).*

[40] For the purposes of this case, subsection 13(1) of the *PCCA* gives the employer exclusive authority over the appointment process, including the probationary period of new employees, and over termination other than for cause. Subsection 13(2) prevents me from dealing with grievances referring to those issues. That legal framework is comparable to that of the core public administration, which involves section 211 of the *Act* and subsection 62(1) of the *PSEA*. Section 211 of the *Act* 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*; or*
>
> *. . .*

[41] Based on the above, I agree with the employer's argument that I must dismiss the grievance for want of jurisdiction if I find that this rejection on probation was based on employment-related reasons. However, should I find that the grievor was in fact rejected on probation; the matter does not end there. The grievance would still be adjudicable if I find that it concerns disciplinary action. The wording of the grievance indicates that the grievor was of the opinion that he was filing a grievance against a disciplinary matter. The grievance wording contests what the grievor refers as his "dismissal" and uses the term "punitive in nature". Also, he referred his grievance to

adjudication under paragraph 209(1)(*b*) of the *Act*, which covers grievances against disciplinary action.

[42] After analyzing the evidence, I find that the employer's reason for rejecting the grievor on probation was the email dated September 26, 2007. Mr. Liddy testified that, had the grievor's performance been otherwise perfect, he would still have rejected the grievor on probation because of that email. Mr. Liddy also put emphasis on that email in the October 1, 2007 termination letter. No evidence has been adduced that the employer had ever discussed with the grievor that he was not meeting the requirements of his position before that email was sent. There could have been some issues between the grievor and his superiors, but they were minor, and I do not believe that they would have led to his rejection on probation. Furthermore, the rejection occurred a few days after the September 26, 2007 email was sent.

[43] There is not doubt in my mind that the September 26, 2007 email was threatening in and of itself. Also, evidence was adduced that some employees and managers found it threatening and were frightened by it. That evidence has not been contradicted. Furthermore, the Ottawa Police found it threatening enough to arrest the grievor. Even if I were to believe the grievor and his spouse that the grievor hates violence and would never resort to using it, it would not change the impact of his email on the workplace. In workplace communications, as in harassment situations, the most important element to consider is the reaction and impact that behaviours, actions or words may have on the people who are targeted. In this case, the impact was fear and workplace insecurity.

[44] I find that this incident was, in and of itself, serous enough to support a termination for cause on the part of the employer. The grievor was a probationary employee and as such cannot count on a long an unblemished employment record in order to mitigate the consequences of his actions.

[45] I also find that threats against the workplace are work-related and constitute an employment-related reason to reject an employee on probation. An employer is fully entitled to conclude that a probationary employee does not meet the job requirements of his position if he or she expresses the types of feelings towards management or supervisors as has the grievor. Interpersonal relationships are integral to a productive work environment, as are positive relationships between supervisors and subordinates. The employer has recognized this by placing 'People Qualities" as an element which it

has included in its *Code of Ethics*. The employer is well within its rights to conclude that an employee who frightens co-workers and supervisors alike by using threatening language is not the type of employee that it wishes to hire on an indeterminate basis.

[46] When dealing with a rejection on probation, the role of an adjudicator is not to determine for himself or herself whether the employer should have rejected an employee for his or her actions, behaviour or performance. Rather, the adjudicator should determine if there was an employment-related reason behind the employer's decision to reject on probation. In this case, there was an employment-related reason to reject the grievor on probation. Consequently, I do not have jurisdiction to decide the grievance.

[47] The employer adduced its ITPR policy in evidence at the hearing. That policy states that the proper forum for an employee to challenge an employer's decision of rejection on probation is to file a grievance and refer the grievance to the ITPR if the final-level reply is unsatisfactory. In its pre-hearing correspondence, the employer challenged the adjudicator's jurisdiction because the grievor did not refer his grievance to the ITPR. The grievor did not make any submissions on that point at the hearing, even though his bargaining agent had indicated before the hearing that he did not agree with the employer's position. At the hearing, the employer changed its position and chose not to raise an objection on this basis. There is no remaining reason for me to address that issue.

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

(The Order appears on the next page)

V. Order

[49] The grievance is dismissed.

August 20, 2010.

Renaud Paquet,
adjudicator