Date: 20111117

File: 569-02-39

Citation: 2011 PSLRB 130

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Bargaining Agent: Andrew Raven, counsel

For the Employer: Sean Kelly, counsel

Heard at Ottawa, Ontario,
November 1, 2011.

I. Policy grievance referred to adjudication

[1] On August 31, 2007, the Public Service Alliance of Canada ("the bargaining agent") filed a policy grievance under subsection 220(1) of the *Public Service Labour Relations Act,* S.C. 2003, c. 22 ("the *Act*"). The grievance challenges an accommodation policy introduced by the Canada Border Services Agency (CBSA or "the employer") for its arming initiative of border services officers (BSOs). The grievance alleges that the policy breaches the non-discrimination clause of the collective agreement. The following abstract of the grievance is of particular interest to this decision:

. . .

> 1. *The bargaining agent grieves that the CBSA Accommodation Strategy for Arming and Control and Defence [sic] Tactics ("the Policy"), implemented effective July 27, 2007, is, on its face, unreasonable, arbitrary and discriminates against employees contrary to Article 19 of the PA (FB) collective agreement. This includes, but it is not limited to, the following aspect of the Policy:*
>
>   a) *the Policy states that Control and Defence [sic] Tactics (CDT) and successful completion of its arming program are mandatory and are essential in order to fulfill the functions of a Border Service Officer. However, the employer has not established these as a bona fide occupational requirement of the position. Accordingly, the PSAC states that the CBSA may not apply the Policy unless and until it has first established that its CDT and arming programs meet the legal standard of being reasonably necessary and in doing so, explicitly consider other less restrictive alternatives to the policy;*
>
>   b) *the Policy states that the duty to accommodate requires the employer to consider opportunities elsewhere within the CBSA. Where no such opportunities are identified, the employee will be terminated. The employer's characterization of its obligations to accommodate as limited to the CBSA is arbitrary and, on its face, will lead to discriminatory treatment of employees requiring accommodation;*

. . .

[2] To summarize, the bargaining agent requests that the adjudicator declare that the 2007 accommodation policy is discriminatory and that it should be rescinded. It also asks the adjudicator to declare that the employer has a duty to accommodate to

the point of undue hardship that extends beyond the authority of the CBSA and encompasses the public service as a whole.

[3] Effective June 16, 2011, the employer implemented a new policy on the duty to accommodate. Shortly thereafter, the employer submitted to the adjudicator in writing that the grievance was moot as the dispute over the 2007 accommodation policy no longer existed since the policy had been rescinded and replaced. In September 2011, there were discussions between the parties and the adjudicator on how to best manage the hearing, including potential site visits. At that point, there were also some discussions on the mootness argument put forward by the employer. Considering the potential impact of that argument on the rest of the proceedings, I decided to summon the parties for an oral hearing that would deal strictly with the issue of mootness.

[4] Consequently, in this decision, my initial task is to decide whether or not this policy grievance is moot. If I decide that it is moot, I will then have to decide if I will exercise my discretion to hear this policy grievance despite its mootness.

II. Summary of the evidence

[5] The parties adduced 14 documents in evidence, all by consent. The employer called one witness, Camille Therriault-Power who, since May 2009, has been the CBSA Vice-President for Human Resources. Ms. Therriault-Power is responsible for all core human resources programs at the CBSA, including implementation of the arming initiative and its related strategies, employment equity, training and the policy on the duty to accommodate. The bargaining agent did not call any witnesses. However, it cross-examined Ms. Therriault-Power.

[6] The 2006 Federal Budget allocated funds to the CBSA to begin the process of arming its BSOs. The entire complement of 4800 BSOs are to be trained and armed by March 31, 2016. As part of the arming initiative, the CBSA issued a policy in July 2007 entitled “Accommodation Strategy for Arming and Control and Defensive Tactics” (the 2007 accommodation policy). Based on past experience, the CBSA anticipated that some BSOs would be either physically or psychologically unable to undertake or succeed the firearms qualification training. The CBSA then felt that it needed to develop the 2007 accommodation policy.

[7] According to the 2007 accommodation policy, the CBSA had an obligation to consider alternative employment for BSOs who could not be armed. If no alternative employment was found within the CBSA, the BSO would be terminated for non-disciplinary reasons as they no longer met the conditions of employment and could not be accommodated to the point of undue hardship.

[8] The employer's witness admitted that the security issues, physical layout, volume of traffic and number of employees vary greatly among the CBSA 120 land ports of entry. This implies that the security risk for employees and the public varies accordingly.

[9] Ms. Therriault-Power testified that the 2007 accommodation policy was never "really implemented". Although it was adopted in July 2007, it was not enforced by the CBSA. The CBSA then formally suspended the 2007 accommodation policy in October 2008. However, even though the policy was suspended, some minor amendments were made to it in February 2009.

[10] In the fall of 2010 or the winter of 2011, Ms. Therriault-Power made a recommendation to a CBSA senior management committee to rescind the policy. Her recommendation was approved and the 2007 accommodation policy was replaced by a new accommodation policy effective June 16, 2011. That new policy applies to all CBSA employees, including those who are unable to succeed the arms training. However, there was nothing in the new accommodation policy, or in the communication that was issued to all employees when it was put in place, to formally confirm that the 2007 accommodation policy had been rescinded. In fact, it was not removed from the CBSA intranet site until October 2011. Furthermore, there was no formal communication to the bargaining agent that the 2007 accommodation policy had been rescinded.

[11] The employer was guided in the development of its new policy by Treasury Board's policy on accommodation. It was also influenced by the August 2010 decision of the Canadian Human Rights Tribunal (CHRT) in *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20. In *Johnstone*, the CHRT ordered the CBSA to cease its discriminatory practices against employees seeking accommodation based on family status, and to develop, in consultation with the Canadian Human Rights Commission (CHRC), a plan to prevent reoccurrence of that type of discrimination. Although the *Johnstone* decision had an impact on the development of a new accommodation policy, that new policy applies to all accommodation situations within

the CBSA. The CHRT examined the new accommodation policy and concluded, on June 14, 2011, that it was satisfied with it.

[12] Ms. Therriault-Power testified that the 2011 accommodation policy, which has an effective date of June 16, 2011, is the only accommodation policy in force at the CBSA. Among other applications, the 2011 accommodation policy applies to BSOs who may need to be accommodated as a result of BSOs being armed. No other policy applies to BSOs who need to be accommodated. Ms. Therriault-Power also stated that the CBSA agrees, in accordance with its 2011 accommodation policy, that if a BSO cannot complete the arming training, and if the duty to accommodate arises, the CBSA will in good faith, in consultation with the employee, and after an individual assessment of his or her needs, undertake to accommodate the employee to the point of undue hardship. Ms. Therriault-Power also testified that the CBSA will contact other public service departments in order to accommodate an employee who cannot be accommodated within the CBSA.

[13] The 2011 CBSA accommodation policy was not grieved by the bargaining agent or its members.

III. Summary of the arguments

A. For the employer

[14] The employer argued that the policy grievance is moot, as the dispute is related to an accommodation policy that was never enforced, and was rescinded and replaced by a new policy on the duty to accommodate. Moreover, there is no basis for an adjudicator to exercise his discretion to hear this policy grievance, despite its mootness.

[15] The leading decision in regard to mootness is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Since then, courts and administrative tribunals have adhered to that doctrine. On that note, the employer referred me to *Leboeuf v. Treasury Board (Department of Transport) and the Public Service Alliance of Canada*, 2007 PSLRB 27, and to *Federal Government Dockyards, Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board*, PSLRB File No. 585-02-16 (20090130). It also referred me to several decisions from Ontario and Alberta labour arbitration tribunals reinforcing the application of the mootness doctrine in cases of policy grievances

where the policies in dispute had been rescinded, had disappeared, or had been resolved by a settlement.

[16] In assessing whether a matter is moot, an adjudicator must first determine if there is still a tangible and concrete dispute or live controversy. In this case, there is no longer a live issue between the parties. The employer never really implemented its 2007 accommodation policy, then it suspended it in 2008, and replaced it with a new policy in 2011. It is now pointless for the adjudicator to determine if the 2007 accommodation policy violates the collective agreement or the *Canadian Human Rights Act* (*CHRA).*

[17] The 2011 accommodation policy has resolved any possible outstanding issues between the parties on accommodating BSOs who fail the arms training since the new policy states that each accommodation request must be assessed on a case-by-case basis, which means that each case must be considered individually.

B. <u>For the bargaining agent</u>

[18] The fact that the 2007 accommodation policy was not implemented is not relevant since what is grieved here is the policy itself. On its face, that policy violates the collective agreement and is inconsistent with the *CHRA*.

[19] The bargaining agent argued that if the adjudicator concludes that the grievance is moot, he should explain why it is moot. The employer knew that its 2007 accommodation policy was human rights offensive. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin),* [1999] 3 S.C.R. 3, the Court stated that a rule — in the present case, the requirement to be armed — must accommodate individual differences to the point of undue hardship if it is found to be reasonably necessary. The 2007 accommodation policy did not meet that standard, and did not include an individual assessment of the employee to be accommodated.

[20] Contrary to the 2007 policy, the 2011 accommodation policy meets the *Meiorin* standard. It emphasizes the need for individual assessments and an analysis of the needs of the workplace. It also recognizes the employer's obligation to look outside of the CBSA, if necessary, to accommodate an employee.

[21] The bargaining agent referred me to the following decisions: *Meiorin*; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de*

l'Hôpital général de Montréal), 2007 SCC 4; *Babb v. Canada Revenue Agency*, 2008 PSLRB 38; *Public Service Alliance of Canada v. Treasury Board (Border Services, Program and Administrative Services and Operational Groups)*, 2009 PSLRB 37; *Dervin v. Treasury Board (Department of National Defence)*, 2009 PSLRB 50; *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 66; *Prince Rupert Airport Authority v. Public Service Alliance of Canada, Local 20215*, 2009 C.L.A.D. No. 281; and *Gardner Costa v. Treasury Board (Canada Border Services Agency)*, 2010 PSLRB 59.

IV. Reasons

[22] This decision is to determine if this policy grievance is moot, and if so, whether I will exercise my discretion to hear it despite its mootness.

[23] After hearing the evidence and reviewing the case law, there is no doubt in my mind that this policy grievance is moot because there is no live issue to be resolved given that the policy has been replaced by a new policy that the bargaining agent acknowledged met the test set out by the Supreme Court on accommodation and was not the subject of a grievance. There is therefore no point in my hearing the grievance since the concrete dispute between the parties has disappeared and there is no live issue to be decided in favour of one party or the other.

[24] In *Borowski,* the Supreme Court of Canada wrote the following on the doctrine of mootness:

. . .

> *15. The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from*

> *its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.*
>
> *16. The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.*
>
> . . .

[25] In the present case, the employer adopted an accommodation policy in 2007 for employees who would not succeed the arms training. The bargaining agent believed that that policy violated the collective agreement and the *CHRA*, and it filed this policy grievance. The evidence showed that the 2007 accommodation policy was suspended in 2008. This fact alone would not be sufficient to declare that the grievance is moot. I reject the employer's argument that the grievance is moot because the policy was never enforced. However, on June 16, 2011, the 2007 accommodation policy was rescinded and replaced by a new accommodation policy that satisfies the bargaining agent. As commented on previously, the grieved policy no longer exists, and it was replaced in 2011 by a new policy which addresses the issues raised in the 2007 grievance. Furthermore, the new policy was not grieved by the bargaining agent. Consequently, the grievance is moot.

[26] Since there is no longer a concrete dispute between the parties, and there remains no concrete controversy between them, there is no reason for me to intervene and hear the parties on the merits of the grievance. The 2011 accommodation policy applies to BSOs who may require accommodation due to failing the arms training. According to that policy, the CBSA will, in good faith, in consultation with the employee and after an individual assessment, undertake to accommodate the employee to the point of undue hardship. CBSA will also contact other public service departments in order to accommodate an employee who cannot be accommodated within the CBSA. Nothing, in what was presented by the bargaining agent, could lead me to believe that the 2011 accommodation policy does not fully resolve the issues

raised in the 2007 policy grievance. With respect to the issue of my ability to exercise my discretion and to hear the grievance, regardless of the fact that it is moot, the bargaining agent bears the burden of convincing me that I should do so. The bargaining agent has provided, however, no factual, legal or policy consideration that provides a basis for such a decision and I therefore decline to so exercise my discretion.

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

(The Order appears on the next page)

V. Order

[28] I order the file closed.

November 17, 2011.

Renaud Paquet,
adjudicator