Date: 20110405

File: 566-02-4283

Citation: 2011 PSLRB 42

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

LAWRENCE McMATH

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: John Mancini and Andrea Tait, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Kenneth Graham, Treasury Board Secretariat

Decided on the basis of written submissions filed October 18, November 15 and December 22, 2010, and February 15 and March 9, 2011.

Individual grievance referred to adjudication

[1] On May 28, 2009, the Correctional Service of Canada ("the deputy head" or "the employer") hired Lawrence McMath ("the grievor") to work as a correctional officer at Edmonton Institution. On hiring, the employer informed the grievor that he would be subject to a 12-month probationary period. On May 26, 2010, the employer informed the grievor that his employment was terminated because he was not suited for his position. That same day, Mr. McMath grieved his rejection on probation and alleged that the termination was disguised discipline, a sham or a camouflage. He asked to be reinstated and to be paid all lost pay and benefits, with interest. He also requested damages.

[2] I have decided to deal with this case on the basis of written submissions. Even though the grievor does not agree with the employer's decision, there are no disputes with the facts of this case. The grievor does not deny that he was still on probation when he was terminated on May 26, 2010. He also admits that he received one month's pay in lieu of notice, as indicated in the termination letter. Rather, the grievor argues that the employer's decision to terminate him constituted discipline.

[3] The employer submitted that the grievor provided his personal password to another employee so that that employee could sign the grievor up as available to work overtime on January 21, 2010. This was contrary to the employer's procedure. For the employer, the grievor's action was fraudulent, and he committed a culpable misconduct. In his submission, the grievor admitted that he made an error in providing his password to another employee in January 2010.

[4] The employer made it clear in its May 26, 2010 termination letter that the grievor failed his probation because he gave his password to another employee, who then signed the grievor up in the system that managed employees' overtime availability. From that incident, the employer concluded that the grievor was not suited for the position of correctional officer.

[5] The employer argued that, because the grievor was terminated in accordance with subsection 62(1) of the *Public Service Employment Act* ("the *PSEA*"), S.C. 2003, c. 22, ss. 12, 13, the matter was outside the jurisdiction of an adjudicator. The employer submitted that the termination letter provided substantive suitability-related reasons for the termination of the grievor's employment. In support of its position, the

employer referred me to the following decisions, amongst others: *Canada (Attorney General) v. Penner,* [1989] 3 F.C. 429 (C.A.); *Maqsood v. Treasury Board (Department of Industry),* 2009 PSLRB 175; *Melanson v. Deputy Head (Correctional Service of Canada),* 2009 PSLRB 33; *Canada (Attorney General) v. Leonarduzzi,* 2001 FCT 529; *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; and *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134.

[6] The grievor alleged that the rejection on probation was disguised discipline, a sham or a camouflage and that it was done in bad faith. He submitted that I should allow him to adduce evidence on the employer's objection to my jurisdiction, that I should reserve my decision on the employer's objection and that I should hear his evidence on the merits of the case.

[7] The grievor argued that the employer's objection is groundless. This is a discipline grievance, and the adjudicator has jurisdiction to hear it, according to subsection 209(1) of the *Public Service Labour Relations Act* ("the *Act").* The employer took disciplinary action resulting in termination, as stated in its May 26, 2010 letter. The disciplinary action was based on an event that occurred in January 2010 but that was communicated to the grievor only two days before the end of his probation. The decision to terminate the grievor had nothing to do with his performance, and the termination letter makes no reference to performance. It is clear that the decision was disciplinary.

[8] The grievor submitted that only through a formal oral hearing would he be able to demonstrate that the employer's decision to terminate him was indeed discipline and was not, as the employer alleged, related to dissatisfaction with the grievor's suitability for the position of correctional officer. The grievor referred me to *Tello* and to *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91.

Reasons

[9] The grievor was appointed to a correctional officer position on May 28, 2009. The employer advised him on hiring that he would be on probation for a 12-month period. The employer terminated his employment on May 26, 2010, before the end of his probation period, and paid him one month's pay in lieu of notice.

[10] The following provisions of the *PSEA* provide the employer with the right to impose a probation period and to terminate employment during probation:

. . .

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

. . .

[11] According to section 211 of the *Act*, a grievance about a termination of employment under the *PSEA*, including a grievance challenging a rejection on probation, cannot be referred to adjudication. Section 211 of the *Act* reads in part 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 . . . .
>
> . . .

[12] Even though I do not have jurisdiction to hear a grievance about a termination while on probation, I must first, before reaching that conclusion, examine whether the termination was employment-related and whether the employer used rejection on

probation as a sham or camouflage to hide another motive for the termination. The following excerpts from *Tello* summarize well the actual case law on my jurisdiction:

. . .

> *[105] The plain reading of the* PSLRA *and the new* PSEA *is that a probationary employee can be terminated with notice for any reason (or no reason) and does not have access to adjudication. Under the new* PSEA*, the only restriction placed on the deputy head is that the employee must be within his or her probationary period and notice (or pay in lieu) must be provided. However, "[t]he interpretation of the law is always contextual . . ." (*Dunsmuir*, para. 74). Statutory restrictions on the deputy head's authority still apply and the deputy head must be acting within the new* PSEA *for the termination of a probationary employee to be a valid exercise of the deputy head's discretion.*
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> . . .
>
> *[111] . . . The deputy head is still required to tender the letter of termination as an exhibit (normally through a witness) to establish that the statutory requirements of notice and probationary status have been met. That letter will usually state the reason for the decision to terminate the employment of the probationary employee. The burden then shifts to the grievor. The grievor bears the burden of showing that the termination of employment was a contrived reliance on the new* PSEA*, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment-related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:* Penner *at page 438) then the grievor will have met his burden . . . .*
>
> . . .

[13] In this case, the employer met its basic obligations under the *PSEA*; the termination was done before the end of the probation period, and the employer provided pay in lieu of notice to the grievor. From there, the grievor bears the burden of proving that the termination was a contrived reliance on the *PSEA*, a sham or a camouflage. In that respect, the grievor argued in his submission that the termination was for disciplinary reasons. In other words, the grievor alleged that the employer used the probation period to hide or to camouflage discipline.

[14] The facts submitted to me are clear: 1) the employer terminated the grievor because he committed a culpable misconduct by providing his password to another

employee 2) the grievor admitted that he committed that misconduct 3) the employer concluded from it that the grievor was not suited for his position. In the case of an employee who has completed probation, the employer would normally impose discipline for a culpable misconduct. The employee could then grieve the discipline and refer his or her grievance to adjudication under paragraph 209(1)(*b*) of the *Act*. In the case of an employee still on probation, the employer could choose to impose discipline of some kind, but it could also choose to terminate the employee on the basis that the culpable misconduct is a source of dissatisfaction as to the employee's suitability for employment. The employer did so in this case. It concluded that the grievor was not suited for the position of correctional officer because he misconducted himself by providing his password to another employee.

[15] The grievor did not meet his burden of showing that the employer had no employment-related reasons to terminate him. He chose to argue that the decision to terminate him was discipline. Even if the employer normally disciplines employees who commit culpable misconduct, it may choose, for an employee on probation, to terminate that employee's probation if it believes that the culpable misconduct is a source of dissatisfaction with the employee's suitability. Considering that this is exactly what the employer did in this case, I have no jurisdiction to hear this grievance because it deals with a termination of employment under the *PSEA*.

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

(The Order appears on the next page)

Order

[17] I declare that I am without jurisdiction to hear this grievance.

[18] I order the file closed.

April 5, 2011.

Renaud Paquet,
adjudicator