Date: 20110601

File: 566-02-2356

Citation: 2011 PSLRB 74

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

THOMAS WILLIAM HORBAY

Grievor

and

DEPUTY HEAD
(Immigration and Refugee Board)

Respondent

Indexed as
Horbay v. Deputy Head (Immigration and Refugee Board)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Himself

For the Respondent: Pierre Marc Champagne, counsel

Heard at Toronto, Ontario,
April 26 and 27, 2011.

I. Individual grievance referred to adjudication

[1] Thomas William Horbay ("the grievor") received a one-day suspension without pay on January 5, 2007 for reporting to work late on several occasions without notifying his office. The grievor had earlier received a "letter of expectation" from the Immigration and Refugee Board (IRB or "the respondent") about reporting to work on time and then a letter of reprimand for failing to do so.

[2] The respondent's letter of suspension reads, in part, as follows:

. . .

> *In the Reprimand from May* [2006], *you were informed how disruptive to the unit unauthorized late arrivals are and were warned that further instances would lead to further discipline. You were asked to always notify when arriving late and to continue to send me an email each morning to notify me of your arrival.*
>
> *I note that there was improvement for a period of a few months but I have again noticed you are coming in late to the office and are not notifying anyone when you are late.*
>
> *Recently I have noted three occasions; December 5th, 6th and 7th, where you again failed to start your day at 8:30, and failed to notify the office that you would be delayed. You acknowledged this to be true and have submitted leave without pay for those days. There were also other days where you were late but I did not have a chance to document them, which you did not deny.*
>
> *I also asked in an email on December 13th to once again initiate the morning routine of sending me an email which you have failed to comply with.*
>
> *Also in May, when asked why you were late, you indicated that your child needs sleep and you are late because of this. It was suggested at the time that you need to make whatever arrangements necessary to make it into the office on your start time. There could be some flexibility in your schedule but that it needs to be worked out in advance to allow for planning purposes.*
>
> *You offered no further information in our January meeting as to why you once again are having trouble starting your day on time except that you* [*sic*] *situation is the same as it was.*

. . .

[3] The grievor challenged his one-day suspension without pay in a grievance that read as follows:

> . . .
>
> *Further to the "Notice of Discipline" I received on 4/1/07, dated 4/1/07, I grieve the sanction "[suspension] from duty without pay, Friday, January 5th, 2007", as I find a proper application of "the principals of progressive discipline", in view of all the circumstances, renders the sanction a dispensation of punititive justice.*
>
> [corrective action requested]
>
> *I seek: i) retraction and revocation of the "notice of Discipline", and*
>
> *ii) a refund forthwith of the sum of $234.00, which was deducted from my pay on 24/1/07 under the auspicies of the aove-noted "Notice of Discipline".*
>
> . . .
>
> [*Sic* throughout]

[4] Unsuccessful in the internal grievance process, the grievor referred the matter to adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*") on July 18, 2008.

II. <u>Hearing – preliminary matter</u>

[5] At the beginning of the hearing, the respondent indicated that it conceded the grievance without acknowledging any responsibility and agreed that I should grant the two corrective measures originally sought by the grievor.

[6] The grievor responded that he also sought a third corrective measure in written submissions at the first and second levels of the internal grievance process, as follows:

> *(iii) acceptance by the department (IRB/RPD) to accommodate my schedule to the flexible 7.5 hours per day in the timeframe of 9:00/9:30 A.M. to 5:00/5:30 P.M., at my discretion.*

The grievor contended that his grievance remained outstanding because the respondent had not accepted that measure. He argued that the respondent's failure to

accommodate him by granting the specified flexible hours amounted to discrimination on the basis of family status.

[7] The grievor did not provide notice to the Canadian Human Rights Commission (CHRC) that his grievance raised an issue involving the interpretation or application of the *Canadian Human Rights Act* (CHRA).

[8] The respondent stipulated that the grievor advanced the third corrective measure during the internal grievance process but objected that an adjudicator has no jurisdiction to consider it in the context of a reference to adjudication under paragraph 209(1)(*b*) of the *Act*. For his part, the grievor argued that I had the authority to consider evidence and arguments about the respondent's duty to accommodate his request for flexible hours as part of the original grievance.

[9] I decided to proceed by hearing arguments on the respondent's objection to my jurisdiction as a preliminary matter. On April 26, 2011, I adjourned the hearing for the day to allow the parties to prepare their oral submissions.

[10] During the grievor's arguments the following day, he revealed that he had also sought "other corrective measures" within the internal grievance process. At my request, he identified one further corrective measure as follows:

> *(iv) according Refugee Protection Officers the same terms and conditions of employment as Members of the Immigration and Refugee Board in the Refugee Protection Division*

[11] Both parties referred during their submissions to a letter sent to the grievor on July 2, 2008 by a representative of the Public Service Alliance of Canada, the grievor's bargaining agent, which I admitted, on consent, as Exhibit G-1.

A. <u>Arguments for the respondent</u>

[12] The third corrective measure sought by the grievor is a request for accommodation in his hours of work. Normally, the respondent would be tempted to analyze whether that measure had the effect of changing the nature of the grievance, contrary to *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.). However, that analysis is unnecessary because the grievor referred the matter to adjudication as a disciplinary action under paragraph 209(1)(*b*) of the *Act*.

[13] A request for accommodation can be advanced only in relation to a provision of a collective agreement, usually the "No Discrimination" article, or, in this case, under the "Hours of Work" article. The subject matter of an accommodation grievance is the respondent's alleged failure to properly interpret or apply the specified provision of the collective agreement. Such a grievance can be referred to adjudication only under paragraph 209(1)(*a*) of the *Act* and, then, only with the support and representation of the bargaining agent as required by subsection 209(2). None of those conditions are met in this case.

[14] The grievor could have used the respondent's alleged failure to accommodate him as an explanation for his purported misconduct. That approach would not have been a problem. However, arguing instead that the respondent refused to accommodate him clearly makes his allegation a matter of collective agreement interpretation under paragraph 209(1)(*a*) of the *Act* that cannot be considered as part of the disciplinary action before the adjudicator. As a result, the adjudicator may not hear evidence related to the third corrective measure sought by the grievor or otherwise consider it in any way. The third measure should be struck from the grievance.

[15] What remains are the two original corrective measures specified in the grievance. There is no need to hear evidence about those measures because the respondent, which bears the burden of proof, has conceded them. The adjudicator should follow the approach outlined in *Bah v. Deputy Head (Canada Border Services Agency)*, 2011 PSLRB 25, and grant the two corrective measures without the respondent acknowledging any responsibility.

B. Arguments for the grievor

[16] The grievor recounted a discussion with an unnamed bargaining agent representative that convinced him that the responsible bargaining agent officials had not considered the issue of the respondent's discrimination against him on the basis of family status when the bargaining agent decided not to support his grievance. He cited the absence of any reference to discrimination in the bargaining agent's letter of July 2, 2008 (Exhibit G-1) as a glaring omission that indicated professional negligence on the bargaining agent's part. According to the grievor, had the letter's author read the grievor's written submissions at the first and second levels of the internal grievance process that confirmed that he was seeking flexible hours under the

collective agreement, that issue would have been addressed, and the parties would not have found themselves at this hearing. In summary, the bargaining agent failed in its duty of fair representation to the grievor. The adjudicator should consider that failure as a factor that allows him to accept jurisdiction over the third corrective measure.

[17] The respondent's allegation that accommodation has nothing to do with the matter of discipline before the adjudicator is a complete misrepresentation, as borne out by the grievor's written submissions during the internal grievance process. There is nothing in the corrective measures sought by the grievor that takes the respondent by surprise.

[18] The grievor stated that part of his argument is that the respondent's breach is related to the "No Discrimination" article of the relevant collective agreement. He did not advance that breach as an excuse for his misbehaviour or misconduct. He noted that he argued the Supreme Court of Canada's decision in the "*Meiorin*" case (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3) at the second level of the internal grievance process.

[19] As mentioned earlier, the grievor explained that he also sought other corrective measures in his submissions within the internal grievance process. Consistent with those submissions, he confirmed that he wanted the adjudicator to accord refugee protection officers the same terms of employment as members of the IRB in the Refugee Protection Division.

C. <u>Respondent's rebuttal</u>

[20] The only evidence of any position taken by the bargaining agent is the letter of July 2, 2008 (Exhibit G-1), in which it refused to support the grievor's case. Contrary to what the grievor argued, the letter addressed the issue of flexible hours and his allegations of discrimination.

[21] The grievor clearly confirmed in his argument that he sought access to flexible hours, which is a matter covered by the relevant collective agreement.

[22] The "other measure" sought by the grievor is an attempt to negotiate terms and conditions of employment. Those terms and conditions of employment are not within the scope of the hearing, and it is not the grievor's role to negotiate them.

[23] Nothing brought forward by the grievor in his argument supports the proposition that the adjudicator has jurisdiction over the additional corrective measures.

III. Reasons

[24] The circumstances of this case are unusual. The respondent has conceded the grievance and has asked that I issue an order granting the two corrective measures sought by the grievor in his grievance as originally filed. In my view, those corrective measures fully respond to the grievance and render the grievor whole with respect to the one-day disciplinary suspension imposed by the respondent.

[25] Normally, the matter should end there. However, the grievor maintains that two further corrective measures remain outstanding. Because the respondent did not formally challenge the grievor's right to pursue those further measures on the grounds stated in *Burchill*, the issue before me is whether I have jurisdiction to consider them in the context of a grievance about a disciplinary action referred to adjudication under paragraph 209(1)(*b*) of the *Act*.

[26] The grievor's third corrective measure, on its face, has nothing to do with discipline. He asks that I order the respondent to provide him access to a particular flexible-hours schedule, at the grievor's discretion. It is clear from the record (and from Exhibit G-1) that the grievor is an employee whose terms and conditions of employment are governed by a collective agreement negotiated by his bargaining agent and the respondent. While that collective agreement is not in evidence, I believe that it is non-contentious to state that the administration of hours of work is a matter that forms part of the terms and conditions of employment negotiated by the respondent and the grievor's bargaining agent. To be sure, the grievor confirmed in his submissions that he was seeking flexible hours under the collective agreement. As such, access to flexible hours, or the denial of such access, is a subject for a grievance involving the interpretation or application of the collective agreement that may be referred to adjudication under paragraph 209(1)(*a*) of the *Act*. The grievance in this case is not of that type. Moreover, even if it were, subsection 209(2) of the *Act* requires that the grievor be supported and represented by his bargaining agent at adjudication. He is not.

[27] As argued by the grievor, the third corrective measure also relates to the allegation that, under the collective agreement, the respondent has a duty to accommodate him in his hours of work, failing which it has discriminated against him on the basis of family status. I note that the grievor did not submit a notice to the CHRC that he was raising an issue involving the interpretation or application of the *CHRA*. He is advancing, in effect, a different and separate claim — that the respondent has discriminated against him with respect to his hours of work contrary to the "No Discrimination" provision of the collective agreement or, alternately, the "Hours of Work" article. Once more, the grievance in this case is not expressed as a matter involving the interpretation or application of a provision of a collective agreement within the meaning of paragraph 209(1)(*a*) of the *Act*. If it were, representation by the bargaining agent would be required at adjudication.

[28] At the most basic level, the grievor is trying to attack a perceived problem in his workplace about hours of work using the vehicle of his existing discipline grievance. I make no judgments about the merits of his concerns about hours of work. I can only determine whether I have the jurisdiction in deciding the grievance before me to address those concerns. I agree, without reservation, with the respondent that I do not.

[29] The fourth or "other corrective measure" can and must be summarily dismissed. What the grievor proposes as a remedy is an alteration of the terms and conditions of employment that apply to his and to other equivalent positions. As confirmed by section 229 of the *Act*, which reads as follows, an adjudicator may not make an order that alters negotiated terms and conditions of employment:

> ***229.*** *An adjudicator's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*

Apart from the legal prohibition, I find that there is no credible argument to be made that the relationship between the terms and conditions of employment for refugee protection officers and for members of the IRB forms part of the essential subject matter of the grievance in this case — discipline for reporting late to work.

[30] The grievor's allegation that the bargaining agent failed in its duty of fair representation in this matter has no relevance. I ruled at the hearing that the *Act* provides a complaint mechanism under section 190 to pursue any such allegation. An adjudicator under Part 2 of the *Act* is not entitled to switch hats and be seized of a

matter that properly belongs to the Board in an entirely different proceeding. An adjudicator can only look at a dispute between an employee and an employer in relation to terms and conditions of employment. For a host of legal reasons, it would be entirely improper for me, in this case, to review the bargaining agent's conduct. Simply put, how and why it decided not to represent the grievor in these proceedings has no bearing on the question of jurisdiction.

[31] In the circumstances, I accept the respondent's objection to my jurisdiction over the third and "other" corrective measures. In view of the respondent's decision not to lead evidence and to concede the two corrective measures stated in the original grievance, I allow the grievance in part. I do not believe that it is strictly necessary that I adopt the formulation in *Bah* as urged by the respondent other than to confirm that a discipline grievance must be allowed when the respondent decides not to meet its evidentiary burden.

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

(The Order appears on the next page)

IV. Order

[33] The grievance is allowed, in part.

[34] I order the deputy head to revoke the letter of suspension of January 4, 2007 and remove all references to the grievor's related one-day suspension without pay from his personnel file.

[35] I order the deputy head to reimburse the grievor $234.00.

[36] The deputy head's objection to my jurisdiction to consider other corrective measures is allowed.

June 1, 2011.

Dan Butler,
adjudicator