Date: 20121004

Files: 566-02-6153 to 6156

Citation: 2012 PSLRB 104

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

BURT MEDEIROS

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs and International Trade)

Employer

and

Deputy Head
(Department of Foreign Affairs and International Trade)

Respondent

Indexed as
Medeiros v. Treasury Board (Department of Foreign Affairs and International Trade) and Deputy Head (Department of Foreign Affairs and International Trade)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Ray Domeij, Public Service Alliance of Canada

For the Employer and Respondent: Karen Clifford, counsel

Heard at Ottawa, Ontario,
August 20 to 22, 2012.
(Additional written submissions filed August 22 and 28, 2012).

I. Individual grievances referred to adjudication

[1] Burt Medeiros ("the grievor") was a telephone examiner working for Passport Canada, an agency of the Department of Foreign Affairs and International Trade ("the employer") at its office in Gatineau, Quebec. The grievor was first hired as a term employee on May 28, 2008. He worked for the employer for a period of two years. His last term contract covered May 10, 2009 to May 10, 2010. That contract was not renewed.

[2] On April 20, 2010, the grievor filed a first grievance against the non-renewal of his term contract. In that grievance, he asked that his contract be renewed. In his second grievance, filed on June 7, 2010, the grievor stated that, based on new evidence that he had received, he believed that the employer did not renew his term by reason of discrimination. He asked that the employer respect his collective agreement and cease discriminating against him and that his contract be renewed.

[3] Each grievance was referred twice to adjudication, first under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* ("the *Act*") and second under paragraph 209(1)(*b*) as violations of the no-discrimination clause of the collective agreement between the Public Service Alliance of Canada ("the union") and the Treasury Board for the Program and Administrative Services group (expiry date: June 20, 2011) ("the collective agreement"). The grievor gave proper notice to the Canadian Human Rights Commission that he was raising an issue involving the *Canadian Human Rights Act* R.S.C. 1985, c. H-6, ("the *CHRA*").

[4] On February 9, 2012, the employer objected to an adjudicator's jurisdiction to hear the grievances since they concern the non-renewal of a term contract. The employer argued that subsection 58(1) of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12, 13 ("the *PSEA*") stipulates that an employee ceases to be an employee at the end of his or her contract, unless the contract is renewed. For the employer, an adjudicator cannot question why it decided to not renew a term employee. It also argued that I was without jurisdiction on the second grievance as the grievor had not made out a *prima facie* case. The grievor did not agree with the employer's position. On February 27, 2012, he responded that an adjudicator has jurisdiction to examine issues of discrimination and that the employer has an obligation to act in good faith in its decision to not renew a term contract.

[5] The registry office of the Public Service Labour Relations Board advised the parties that a hearing would be convened and that they could argue their positions on the employer's objection at that hearing.

II. Summary of the evidence

[6] The grievor testified. He also called Rose Touhey and Karl Lafrenière as witnesses. Ms. Touhey and Mr. Lafrenière work for the employer. Both are also union officers. Ms. Touhey is the local president of the union, and Mr. Lafrenière is the vice-president. The grievor adduced 20 documents in evidence. The employer called Louise Sabourin as a witness. Between March and May 2010, Ms. Sabourin was the acting manager of the unit in which the grievor worked. She made the decision to not renew his contract. The employer adduced nine documents in evidence.

[7] The grievor worked in the receiving agent section of the employer in Gatineau. That section services governmental agencies such as Service Canada or Canada Post, which distribute or receive passport applications from citizens. In May 2010, six telephone interviewers worked in that section, four of whom were term employees. Other telephone interviewers worked in the mailing section, in the members of parliament section and in the international section. According to the grievor, in the past, employees from his section worked overtime in other sections.

[8] In February 2009, the grievor began taking Champix to help him quit smoking. It affected him badly. A few colleagues complained about him, and he apologized. After he stopped taking Champix, he began to feel depressed. With time, his health worsened. He saw his doctor and went on sick leave from November 16, 2009 to February 7, 2010. His absence was justified by two medical certificates that were provided to the employer. The employer did not know the nature of the grievor's illness. It approved his absence but refused to advance him sick leave with pay after he exhausted his paid sick leave.

[9] When the grievor returned to work in February 2010, he had been assigned a different office or workspace. That office was between his supervisor and employee "A.B.". On his first day, the grievor asked A.B. if he was happy to see him back, and A.B. answered that he did not care. The grievor did not feel welcomed, which added to the stress of doing his work. Additionally, the fact that he had his supervisor right beside him was stressful. He started to suffer from anxiety. Furthermore, one day A.B. rudely

gave him a file and told him to take care of it because it was in Portuguese. A meeting was called with the employer, A.B. and the grievor, at which A.B. apologized.

[10] After returning to work in February 2010, the grievor was still seeing his doctor, since he still had some health problems. To reduce his level of anxiety, the grievor asked his supervisor if he could work four days a week and take annual leave every Monday. His request was approved.

[11] On March 3, 2010, the grievor wrote to Mr. Lafrenière about the stress he was experiencing by working in the office right beside his supervisor, who could hear everything he said on the phone. According to the grievor, at one point, his supervisor told him, "I am watching you." The grievor wrote to Mr. Lafrenière that he was feeling paranoid and suicidal since the supervisor made that comment and that he was suffering mental anguish daily. Mr. Lafrenière raised the issue with Maryse Allain, a labour relations officer with the employer, and he gave her a copy of the grievor's email. According to Mr. Lafrenière, the employer did nothing.

[12] Later, Mr. Lafrenière asked the employer to move the grievor to an office that was not beside the supervisor. The employer never agreed to move the grievor, even though at some point there was an empty office to which the grievor could have been moved. According to Mr. Lafrenière, the employer did nothing to help the grievor and did not accommodate his request. On April 1, 2010, a meeting was held with the employer to discuss the grievor's problems. Rather than discuss the issues previously raised by the grievor, the employer gave him the termination letter. That created a lot of stress on the grievor, who was devastated. Ms. Sabourin testified that she gave that letter to the grievor that day because she wanted to give him a month's notice, and she had booked annual leave for the days following April 1, 2010.

[13] In cross-examination, the grievor confirmed that he had not presented any request to the employer to be accommodated for health reasons. He did not provide a medical certificate supporting his wish to be moved away from the supervisor for health reasons. He never said that he could not do his work. On his return to work in February 2010, he did not provide any medical information about any restrictions attached to his return.

[14] The grievor testified that, before fall 2009, he did not take a lot of sick leave. His absences were never questioned by the employer, including when he was off for a

longer period in late 2009 through early 2010. The grievor feels that his contract was not renewed because, at some point, he was sick and took sick leave. To his knowledge, other employees hired at the same time as him are still employed by the employer.

[15] According to Ms. Touhey, in 2010, 200 term employees were working for the employer. That large number was explained by a large increase in passport demands from Canadians that began in 2007. In early April 2010, at a union-management consultation committee meeting, the employer advised the union that, because of a declining workload due to a reduction in passport applications, there would be a reduction in the number of employees, including the non-renewal of term employees. At the Operational Human Resources Labour-Management Consultation Committee meeting of April 30, 2010, the union raised concerns that the employer could use medical history as a criterion when terminating term employees. The employer replied that the normal criteria would be "last come, first out." The employer mentioned that, in some cases, performance would also be used as a criterion to terminate term employees. When questioned, Ms. Sabourin testified that she had never heard that attendance should be used as a criterion to not renew term employees.

[16] Ms. Touhey testified that she was told by an employer's representative that the employer would use performance and attendance criteria to lay off term employees. She also testified that, to her knowledge, the contracts of three term employees were not renewed and that those three had taken much more sick leave than average because they had medical conditions. According to Ms. Touhey, those three employees were clearly not the last three hired. According to Ms. Touhey, the employer never provided the union with any reasons for not renewing the grievor's contract. According to Ms. Sabourin, attendance was not the criteria used not to renew the grievor's term contract.

[17] Ms. Sabourin testified that a large reduction in passport applications occurred in 2010 and that the monthly and annual forecasts of applications were down. Consequently, the number of employees needed to be reduced. On March 22, 2010, Ms. Sabourin wrote to her director that the daily average number of calls by telephone examiners was down. Normally, an examiner would make 25 calls a day and receive 25 calls. It was down to approximately 100 calls a day for the whole section. She also testified that the amount of mail received monthly had drastically diminished. Ms. Sabourin also raised with her director that one of her six examiners was moving to

work in an acting position in another section. She indicated that the grievor's term was ending and that she suggested not renewing his contract. That would have left her with four telephone examiners, which would have been sufficient, considering the workload at that time.

[18] The employer adduced in evidence an email written by Ms. Sabourin on March 22, 2010. In that email, she wrote to her superiors that she did not intend to renew Mr. Medeiros' contract. She then explained that she had checked with labour relations and that they indicated that the file was well documented and that there should not be a problem in not renewing his term. She explained that the workload did not justify keeping the grievor on staff. She supported her statement with some figures.

[19] Ms. Sabourin testified that she made the decision to not renew the grievor's term contract and that nobody directed her to do so. She also testified that she was told to reduce the number of employees in her section. She was aware that the grievor took sick leave, but she testified that that did not play any role in her decision to not renew his contract. She chose him because he was the first of the four term employees in her section whose term contract was ending. Ms. Sabourin had no involvement in the non-renewal of other term employees' contracts.

[20] In May 2010, the employer published an employment poster for telephone examiners, which is the same position that the grievor occupied. The poster indicated that the employer wanted to create a pool of qualified candidates for the purpose of eventually staffing positions of different employment durations. Ms. Sabourin explained that, when that poster was published, no immediate need existed for examiners. Rather, the employer wanted to build a pool of qualified candidates for future use when the workload increased. Ms. Sabourin never told the grievor to not apply for those positions. Nor did she direct anybody to tell him to do so. Finally, Ms. Sabourin testified that the position that the grievor had occupied was staffed only on February 28, 2011.

III. Summary of the arguments

A. For the grievor

[21] The grievor argued that the only term employees not renewed in 2010 were those with some degree of disability. The employer informed the union local that

attendance and performance would be the criteria used to decide whose terms would not be renewed. The employer did not call any witness to deny that it gave that information to the union local. Furthermore, the employer had also informed the union that term employees would be laid off on the basis of "last come, first out." The grievor was not the last term to be hired, but he was laid off. In addition, at the same time that the grievor was laid off, a job poster was prepared to advertise his position. It all amounted to a pattern of discrimination to get rid of employees with medical conditions.

[22] The employer knew that the grievor was experiencing difficulties on his return from sick leave. He was stressed and was suffering from anxiety. The union contacted the employer about it, but nothing was done to help the grievor. A meeting was called on April 1, 2010, but instead of proposing solutions to the grievor's problems, the employer gave him his termination letter.

[23] There were no issues with the grievor's performance as a telephone examiner. The employer never had any problems with the quality of his work. Furthermore, at all times, the grievor kept the employer informed of his medical situation. On his return from sick leave, the grievor asked to be accommodated by moving his office away from his supervisor, who worked right beside him. That request was treated in a cavalier manner. An empty office was available, but the employer refused to move the grievor. The grievor feels that he was treated differently because he was sick. He suffered adverse treatment and discrimination from his supervisor and from the employer, which did not renew his contract. Given that there were no issues with the quality of his work, no other reason exists to explain his layoff.

[24] Ms. Sabourin testified that she made the decision to terminate the grievor. However, she admitted that someone above her told her to reduce the number of employees. She indicated that the workload was down, but she did not produce any document in support of her assertion. In addition, she adduced no written evidence at the hearing that the grievor's term was next up for renewal when the decision to not renew him was made. Furthermore, there was no evidence that Ms. Sabourin looked for another position for the grievor in the employer's other service lines.

[25] The decision to not renew the grievor's term, which used attendance as a criterion, is an obvious case of discrimination. The grievor asked for minimal

accommodation, namely, to be moved away from his supervisor. Instead, his employment was terminated.

[26] The grievor argued that I have jurisdiction to hear his grievances because the employer acted in bad faith by discriminating against him. The grievor drew a parallel between his situation and the facts related in the cases that he referred to. Those cases are the following: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 *(Meiorin)*; *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Otis Canada Inc. v. International Union of Elevator Constructors, Local 50* (2004), 135 L.A.C. (4th) 193; and *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71.

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

[27] The employer argued that I have no jurisdiction to hear the grievances since they deal with the non-renewal of a term contract. According to the *PSEA*, term employees cease to be employees at the expirations of their term contracts. The grievor's term expired on May 10, 2010, and the employer made the decision to not renew it. The adjudicator has no jurisdiction over a term contract renewal.

[28] The facts do not support the grievor's allegation of discrimination. First, the evidence does not support that he was disabled. Rather, it shows that he took sick leave and that he returned to work full-time after that leave. No medical evidence was adduced at the hearing or presented to the employer that the grievor had any work restrictions.

[29] In early 2010, the volume of work to be done by telephone examiners dropped significantly. The decision to reduce the number of employees in the grievor's work unit came from above, but Ms. Sabourin decided that the grievor's contract would not be renewed. She based her decision on the fact that, of the four term employees in the work unit, the grievor's term was the next up for renewal. That fact was not contradicted by the evidence adduced by the grievor.

[30] The employer opened a competition in June 2010 for telephone examiners because it knew that, at some future point, it might need new examiners. However, there was no immediate need for examiners when the competition was published.

Staffing is a long process, and security clearances can take time to be issued. The employer required a pool of qualified candidates for its future needs. Further, the evidence shows that the grievor's position was left vacant for many months.

[31] The grievor argued that the employer refused to accommodate his needs for a different office. No medical evidence was presented to support that he needed to be accommodated. Rather, his request was a preference for a different office that the employer decided not to satisfy.

[32] The employer referred me to the following decisions: *Belmar v. Treasury Board (Department for Human Resources and Skills Development)*, 2012 PSLRB 20; *Chouinard v. Deputy Head (Department of National Defence)*, 2010 PSLRB 133; *Dansereau v. National Film Board and Lachapelle*, [1979] 1 F.C. 100 (C.A.); *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68; *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43; *Ikram v. Canadian Food Inspection Agency*, 2012 PSLRB 4; *Juba v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 71; and *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100.

IV. Reasons

[33] On April 20, 2010, the grievor challenged the employer's decision to not renew his term contract. In that grievance, he asked that his contract be renewed. On June 7, 2010, the grievor filed a second grievance on the basis of new evidence that he had received. In that second grievance, he alleged that the employer did not renew his term by reason of discrimination. He asked again that his contract be renewed.

[34] I agree with the employer that I do not have jurisdiction to hear grievances that simply contest the non-renewal of a term contract. In such cases, the grievor's employment contract expired, and the employer did not renew it. I do not have jurisdiction to question or rescind that decision by virtue of the terms of the *Act* and of the *PSEA* under normal circumstances. The relevant provisions of the *Act* and of the *PSEA* are the following:

. . .

> ***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;*
> >
> > (b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
> >
> > *(*c*) in the case of an employee in the core public administration,*
> >
> > > *(i) demotion or termination under paragraph 12(1)(*d*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
> > >
> > > *(ii) deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
> >
> > *(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*
>
> *. . .*
>
> *[from the PSEA]*
>
> *. . .*
>
> ***58.** (1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extension made under subsection (2).*
>
> *. . .*

[35] The evidence clearly shows that the grievor was a term employee. His term expired on May 10, 2010. Those two facts are not in dispute. There was no argument from the grievor that the employer's decision was disciplinary or that he was terminated under paragraph 12(1)(*d*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11. On that basis, I would normally have no jurisdiction to hear the first grievance, which challenged the employer's decision to not renew the grievor's term contract. That is consistent with *Dansereau* and *Belmar.* However, I have jurisdiction to consider

the grievances on the basis of the argument that the decision not to renew the grievor's term was made in bad faith and was discriminatory.

[36] The grievor had the burden of proving that the employer's decision to not renew his term was tainted with discrimination. He did not meet that burden. He proved only that he was absent on sick leave between November 2009 and February 2010. Even if I believed that an employer's representative told the union that the employer would consider attendance when deciding who would be laid off, the evidence shows that that employer's representative did not make the decision to not renew the grievor's term. Ms. Sabourin testified that she made that decision, and I believe her. No evidence was adduced at the hearing that could lead me to believe that she should not be believed and that somebody else made that decision. She testified with no hesitation and her testimony was forthright. Ms. Sabourin also testified that the workload was down in her section. Her testimony was supported by specific statistics, and I also believe her on that point. She was asked to reduce the number of employees, and she testified that she opted to not renew the grievor's term because his contract was to be the first to expire. I believe that she was also truthful on that point. The employer might have said at a union-management meeting that it would use the principle of "last come, first out" to lay off employees. However, when it decided to reduce the number of telephone examiners in the receiving agent unit, the evidence shows that Ms. Sabourin did not apply that principle.

[37] There is nothing violative of the collective agreement in the employer informally telling the union what it would do (that the criteria would be attendance and performance), then changing its position at a meeting ("last come, first out") and finally doing something else (using the date of term renewal) when it came time to act. However, I find that that was poor labour relations and human resource management. The employer would benefit from clarifying its position on the criteria it will use for workforce reduction and by sharing it with the union local. In addition, the employer should reflect on the potential discriminatory impact of using attendance as a criterion to lay off employees or to not renew term contracts.

[38] On March 22, 2010 Ms. Sabourin wrote to her superiors that she did not intend to renew Mr. Medeiros' contract. She mentioned in that email that she had checked with labour relations and that there should not be a problem in not renewing his term. I have no evidence that that email reflects any wrong intent by the employer. It simply

says that for the labour relations section, there was nothing preventing the employer from not renewing the grievor's term.

[39] Ms. Touhey testified that, to her knowledge, the three term employees who were not renewed all had taken more sick leave than average because they had medical conditions. She also said that an employer representative had said that attendance would be used as a criterion to lay off terms. Those two statements alone are not enough to conclude that the employer discriminated against the grievor on the basis of a disability. First, the evidence directly contradicts the allegation that the grievor's disability played a role in his termination. Ms. Sabourin was never told not to renew the grievor's contract and she had never heard that attendance should be used as a criterion to lay off terms. Second, I would need a lot more facts regarding the other two terms and their usage of sick leaves and its relationship to their non-renewal before being able to conclude that a pattern of discrimination is revealed. In the grievor's case, there is some logic behind the employer's decision not to renew his term and this explanation was supported by the evidence and is sufficient to respond to the grievor's assertion that his disability was the reason for his termination.

[40] The evidence showed that, in May 2010, the employer published an employment poster for telephone examiners. The evidence also showed that the employer wanted to create a pool of qualified candidates for its future needs, even if at the time there were no needs for examiners. There is nothing wrong with an employer planning ahead of time to fill its staffing needs. Contrary to what was argued by the grievor, that does not prove a pattern of discrimination against the grievor.

[41] No evidence was presented to me that the employer discriminated against the grievor by refusing to accommodate him. No accommodation request per se was presented to the employer. On the issue of office space, the evidence shows that the grievor asked to be moved to a new desk but that his request was not acted upon. For that to amount to discrimination, the grievor should have first produced evidence that his requests were directly linked to a disability and that that information was relayed to the employer in a request to accommodate him. Then, the burden would have switched to the employer to prove that those requests could not have been accommodated to the point of undue hardship. However, no evidence was produced by the grievor linking his requests to a disability.

[42] I conclude that the employer did not discriminate against the grievor and that it did not violate the *CHRA*, R.S.C. 1985, c. H-6, or the no-discrimination clause of the collective agreement.

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

(The Order appears on the next page)

V. Order

[44] The grievances in files 566-02-6153 and 6155 are dismissed.

[45] I order that the files for grievances 566-02-6154 and 6156 be closed since I have no jurisdiction to hear these grievances.

October 04, 2012.

Renaud Paquet,
adjudicator