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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

LEONISSA BELMAR

Grievor

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Belmar v. Treasury Board (Department of Human Resources and Skills Development)

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: Karen Clifford, counsel

Heard at Toronto, Ontario,
December 19 and 20, 2011. Written submissions from the Canadian Human Rights Commission on February 13, 2012.

I. Individual grievances referred to adjudication

[1] Leonissa Belmar ("the grievor") worked as a term employee for the Department of Human Resources and Skills Development ("the employer") in Toronto. The applicable collective agreement was signed on March 14, 2005, by the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services (PA) bargaining unit ("the collective agreement"). The grievor filed two grievances on February 28, 2006. The details of these grievances read as follows:

> *I grieve management's decision to not renew my term contract, as per Marilyn* [sic] *Doyle's letter January 27, 2006.*
>
> …
>
> *I grieve management's failure to accomodate* [sic] *my disability. This is in violation of article 19 of the collective agreement.*

[2] The employer only replied to the grievances at the first level of the grievance procedure. The employer stated in its reply that it had the right to expect that, as a term employee, the grievor would be available for work and that, following her car accident in July 2005, she declared that she was unable to work. The employer also stated that it did not offer her a new employment contract after her contract expired in November 2005 due to the fact that she was unable to work.

[3] The employer objected to my jurisdiction to hear these grievances. First, it argued that the non-extension of the grievor's employment did not constitute a termination of employment within the meaning of section 209 of the *Public Service Labour Relations Act* ("the *Act*"); instead, it resulted from a decision not to renew her term contract, which had expired. An adjudicator does not have the authority to review an employer's decision not to renew a term contract.

[4] The employer also objected that the grievor failed to give notice to the Canadian Human Rights Commission (CHRC) as per subsection 210(1) of the *Act* that she was raising at adjudication an issue involving the interpretation of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. After the hearing, I suggested to the bargaining agent that it give notice to the (CHRC) as per subsection 210(1) of the *Act*. On February 13, 2012, the CHRC advised me that it did not intend to make any submissions in this case.

[5] The grievor responded that I have jurisdiction to hear the grievances because they involve the application of the no-discrimination clause (article 19) of the collective agreement. The grievor stated that the provision also applies to term employees and that the employer's reason for ending her employment violates those provisions.

II. Summary of the evidence

[6] The grievor testified. The employer called James Milloy and Marilyne Doyle as witnesses. At the time of the events giving rise to the grievances, Mr. Milloy was supervising a team of 20 employees, including the grievor. Starting in January 2006, Ms. Doyle was the manager supervising Mr. Milloy and assuming the administrative responsibilities of several work units, including that of Mr. Milloy and the grievor. The parties adduced 21 documents in evidence.

[7] The employer first hired the grievor as a term employee on October 31, 2003. Copies of the grievor's employment contracts were adduced in evidence, covering the entire period of October 31, 2003 to June 30, 2005. Ms. Doyle testified that she verified the grievor's employment file and that she could not find any employment contract for her after June 30, 2005. The grievor testified that she did not keep copies of her employment contracts. She does not remember the end date of her last written contract. However, she testified that she had a verbal contract that ended in March 2006.

[8] On July 4, 2005, the grievor left a phone message to Mr. Milloy to inform him that she had to leave for Trinidad because she had just learned that her father had died. She came back to Canada on July 15, 2005. The next day, she was injured in a car accident. On Monday, July 18, she left a phone message to Mr. Milloy to advise him that she had been injured and that she could not go to work. On Wednesday, July 20, she went to the office and met with Mr. Milloy. On July 25, 2005, the grievor faxed a medical note to Mr. Milloy, attesting that she was unfit for work due to injuries sustained in a car accident. The employer then granted the grievor sick leave without pay, effective July 22, 2005.

[9] On August 3, 2005, the employer informed the grievor of her options and responsibilities concerning her benefits and deductions during her period of leave without pay. As part of those options, it informed her of the procedure to apply for disability insurance. Part of the claim for disability insurance was completed in

August 2005. However, the claim was not processed because some information was missing. The grievor completed that information on February 14, 2006. She then indicated that her doctor recommended that she stay home until she was physically able to return to work and that she was uncertain as to when that would happen.

[10] The grievor testified that she left several phone messages with Mr. Milloy in fall 2005 to discuss her situation. Mr. Milloy testified that he never received those messages. In December 2005, the grievor called Harry Bezruchko, who was then Mr. Milloy's supervisor. She testified that Mr. Bezruchko told her not to worry about her job and that the employer would look into how it could accommodate her when she was ready to come back to work.

[11] The grievor later learned that Ms. Doyle replaced Mr. Bezruchko as the manager in charge of the unit in which she worked. On February 10, 2006, Ms. Doyle emailed the grievor, asking her to confirm her correct mailing address. She also wrote the following in that email: "*… As you are aware, your term contract with Service Canada expired November 30, 2005. This email is to confirm that you are no longer employed with this department.*"

[12] On February 13, 2006, the grievor asked to meet with Ms. Doyle. Ms. Doyle replied on February 20, 2006 that she would appreciate it if the grievor would advise her of the purpose of the meeting. The grievor did not reply, and a meeting never took place.

[13] In August 2005, the grievor applied for compensation for her lost wages from her car insurance company. Her claim was accepted, and she received 100% of her lost wages from July 2005 to June 2006. According to the grievor's testimony, she was not capable of working full-time between the date of her car accident and June 2006.

[14] The grievor testified that she never asked the employer to accommodate her to facilitate her return to work after her car accident. Mr. Milloy and Ms. Doyle testified that they were never asked to accommodate the grievor. The grievor testified that, during that period, she was not capable of working. She also testified that the employer never contacted her about her health, when she could return to work and what could be done to accommodate her or to facilitate her return to work.

[15] The employer part of the grievor's disability insurance claim indicates that no positions were available for the grievor on a reduced-hour basis. That part of the form was signed by Mr. Milloy. However, Mr. Milloy testified that it would have been possible to employ the grievor part-time to accommodate her return to work or to make other arrangements to accommodate her, had she asked.

[16] Mr. Milloy testified that he was not involved in the renewal of term employees' contracts. The decision to renew term employees' contracts was made by the manager, in this case Mr. Bezruchko, in 2005, and by Ms. Doyle in 2006. Ms. Doyle testified that she was verbally informed that the grievor's contract ended on November 30, 2005. However, as reported earlier, she never found an employment contract for the grievor for the period between June 30 and November 30, 2005.

III. Summary of the arguments

A. For the grievor

[17] The employer discriminated against the grievor by refusing to accommodate her disability and by terminating her employment because she was disabled. The employer was well aware that she was not capable of working because of a car accident in July 2005. For that reason, it decided to terminate her employment.

[18] The evidence showed that it would have been possible to accommodate the grievor with part-time employment or with special work arrangements, which would not have imposed undue hardship on the employer. In addition, there was minimal cost to the employer to keep the grievor on sick leave without pay while she was not capable of working. For those reasons, the employer failed in its duty to accommodate the grievor. She asked to be reinstated with the status that she had when she was wrongly terminated.

[19] The grievor referred me to the following decisions: *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8; *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 33; *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 373A* (1998), 77 L.A.C. (4th) 152; and *Calgary District Hospital Group v. United Nurses of Alberta, Local 121-R* (1994), 41 L.A.C. (4th) 319. The grievor also referred me to subsections 14.3.3 and 14.3.6 of *Mitchnick* and *Etherington*, *Leading Cases on Labour Arbitration*.

B. For the employer

[20] The employer objected to my jurisdiction to hear the "termination" grievance because it deals with the non-renewal of a term contract. The employer has the sole authority to make the decision to renew or not to renew term contracts, and the *Act* does not give adjudicators the power to examine that decision. The grievor's employment contract expired on June 30, 2005 and was not renewed. Even if the employer operated on the belief that the grievor's employment ended in November 2005, there was no employment contract between the employer and grievor beyond June 30, 2005. That error of the employer cannot create an employment relationship.

[21] The employer argued that it did not fail to accommodate the grievor's disability. In fact, the grievor never made a request to the employer for accommodation. Instead, she indicated that she was not available for work and asked the employer to help her with her application for disability insurance. In parallel, the grievor was fully compensated for her lost wages by her car insurance company because she was unable to work.

[22] The employer referred me to the following cases: *Stringer*; *Dansereau v. National Film Board and Lachapelle*, [1979] 1 F.C. 100; *Sincère v. National Research Council of Canada*, 2004 PSSRB 2; *Monteiro v. Treasury Board (Canadian Space Agency)*, 2005 PSSRB 27; and *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68.

IV. Reasons

[23] In her first grievance, the grievor disputes the employer's decision not to renew her term contract. In her second grievance, she sates that the employer violated article 19 of the collective agreement by failing to accommodate her disability.

[24] I agree with the employer that I do not have jurisdiction to hear the first grievance, as it relates to the non-renewal of a term contract. The first grievance does not involve the interpretation or application of the collective agreement, a disciplinary action resulting in termination, demotion, suspension or financial penalty, or a demotion or another form of termination as per paragraph 209(1)(*c*) of the *Act*. 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*. The relevant provisions of the *Act* and of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 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.*

Public Service Employment Act

…

> ***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).*

…

[25] The grievor did not challenge that she was a term employee. However, it is not clear when her contract expired. The employer could not track down any employment contract for her after June 30, 2005. She did not adduce any employment contract in

evidence. In parallel, there is some evidence that the employer treated the grievor as if she were an employee after June 30, 2005. The employer even wrote in its first-level reply to the grievance that the grievor's term contract expired at the end of November 2005. The fact that the employer could not find her employment contract for the July-November 2005 period does not prove that there was no contract. On the other hand, there was no convincing evidence submitted by the grievor that her term contract was extended beyond November 2005. Considering everything, it is reasonable to infer from the evidence adduced at the hearing that the grievor's last term contract expired on November 30, 2005.

[26] There was no argument from the grievor that the employer imposed disciplinary action on her or demoted or terminated her under paragraph 12(1)(*d*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, so as to bring her grievance within the ambit of paragraph 209(1) *b*) or *c*) of the *Act*. Therefore, I conclude that I do not have jurisdiction to hear the first grievance. This is consistent with the decisions in *Stringer*, *Dansereau*, *Sincère* and *Monteiro*.

[27] The second grievance refers to the no-discrimination clause of the collective agreement and to the employer's obligation to accommodate the grievor. The grievance implies that, if the employer did not meet that obligation, it discriminated against the grievor and therefore violated article 19 of the collective agreement.

[28] The evidence adduced at the hearing is clear and was not contradicted. The grievor never asked the employer to accommodate her. In fact, the evidence shows that the grievor was incapable of working when her contract expired in November 2005 and that she became capable of working only in June 2006, several months after she filed her grievance. The employer knew that the grievor suffered injuries in a car accident, but it was never made aware of any measures that it could take to facilitate or to make possible her return to work. In fact, such measures did not even exist, considering that she was incapable of working at the time at issue.

[29] Therefore, I conclude that the grievor did not meet her burden of proving that the employer violated article 19 of the collective agreement and that it failed to satisfy its obligation to accommodate her. The grievor had a minimal obligation to present a clear request for accommodation to the employer, but she did not. In fact, given the information supplied to the employer by the grievor at that time, it was entirely

reasonable for the employer to conclude that the grievor was unable to work at all. The employer cannot then be accused of failing to accommodate the grievor.

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

(The Order appears on the next page)

V. Order

[31] The grievances are denied.

February 17, 2012.

Renaud Paquet,
adjudicator