Date: 20130919

File: 566-02-2985

Citation: 2013 PSLRB 114

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

LINH HO

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Ho v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, adjudicator

For the Grievor: Himself

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Victoria, British Columbia,
July 16, 2013.

I. Individual grievance referred to adjudication

[1] On March 17, 2008, Linh Ho ("the grievor") filed a grievance against his employer, the Department of National Defence (DND or "the respondent"). In his grievance, Mr. Ho challenged the respondent's decision to not allow him, after being on sick leave, to return to work before March 31, 2008, even though the grievor was ready to return to work on February 25, 2008. The grievor claimed that the respondent's decision was of a disciplinary nature. The grievance was filed under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*"). Mr. Ho's grievance reads as follows:

> *On February 25th 2008, the employer was advised by a Health Physician that I was able to return to work. Despite the assessment of their own physician, the employer has refused to allow me to return to work.*
>
> *On March 17, I was advised that my return to work will not be starting before March 31st for reasons not under my control [sic]*
>
> *In refusing to allow me to return to work in a timely manner, the employer has imposed a suspension without pay, without cause.*
>
> *I therefore grieve.*
>
> *That I be returned to work, effective the date that the Occupational Health Physician determined that I should return to work; that all pay and benefits lost since that date be restored to me; and that I be made whole in every way.*

[2] Mr. Ho's grievance was partly upheld by management in the internal grievance process. On June 16, 2009, at the final level, the director general of Labour Relations & Compensation wrote as follows:

> *Mr. Ho:*
>
> *This letter is the final level response to your grievance concerning your return to work. Mr. Harinder Mahil from the Professional Institute of Public Service of Canada represented you at this level.*
>
> *I have carefully reviewed the circumstances of your grievance, including the representations made on your behalf by Mr. Mahil. I find that even though you were found fit to return to work on the 25 February 2008, management did not yet have your limitations for your return to work. On the 14 March 2008, management met with Dr. Prendergast*

> *and they received all required information to facilitate your return to work.*
>
> *Therefore, there are two periods to consider. I find it reasonable to advance you sick leave with pay from 25 February to March 14 2008 as management did not have all information necessary for your return to work.*
>
> *As for the period of 17 March to 31 March 2008, management had then obtained all relevant information for your return to work. Therefore, I will grant you other leave with pay as you should not be penalized financially for any delays that occurred after this period of time. Accordingly, you grievance is partially upheld and the correctives [sic] measures are granted to the extent outlined above.*
>
> *By copy of this letter your representative is informed of this decision.*
>
> *For the Deputy Minister*
>
> *Monique Paquin*
> *Director General Labour Relations & Compensation*

[3] On August 25, 2011, the respondent wrote to the Public Service Labour Relations Board ("the Board"), objecting to the jurisdiction of an adjudicator to decide the grievance for the following reasons: the grievor had not suffered any financial penalty as contemplated under paragraph 209(1)(*b*) of the *Act,* and the respondent's action of advancing him paid sick leave was administrative and not disciplinary.

[4] The grievor's bargaining agent replied on his behalf on November 14, 2012, reiterating the position that the employer's action constituted discipline and citing case law in support of its contention that a hearing was needed to determine the matter. On November 14, 2012, the bargaining agent again wrote to the Board, this time to counter the employer's submission that the grievor had suffered no loss. It advised that due to the employer's advance of sick leave credits to him to cover the period of February to March 2008, the grievor had been forced to take vacation leave or other forms of leave when he fell ill.

[5] At a pre-hearing conference held on June 12, 2013, all parties agreed that, given the respondent's position at the final level of the grievance process, the only period at issue was from February 25, 2008 to March 14, 2008. It was also confirmed that the grievor's position was that the respondent's actions of not allowing him to return to work and of advancing him sick leave for that period was disciplinary. Both parties

then agreed that the grievor would bear the burden of demonstrating that the respondent's actions were disciplinary.

[6] I must point out that neither in the grievor's correspondence, at the pre-hearing conference nor at the hearing was it argued that the grievance was based on a violation of the relevant collective agreement.

[7] I decided to reserve my decision on the respondent's objection and to hear the evidence.

II. Summary of the evidence

[8] At the hearing, Mr. Ho was no longer represented by his bargaining agent. He testified and filed three exhibits. The respondent called one witness and filed seven exhibits.

A. For the grievor

[9] Mr. Ho testified that since 2003, he has been a computer systems analyst at the CS-03 level at DND's Esquimalt base ("Esquimalt"), in charge of the geographic information system there. At that time, he had 11 employees reporting to him.

[10] The grievor explained that in 2005, part of his work related to a time management contract. Mr. Ho explained that, around that time, he noticed some inconsistencies related to the contract. Mr. Ho explained that he was concerned that a third party was doing the work that his group should have been doing and that his employees were bypassing him by taking their directions from that third party.

[11] The grievor indicated that he raised those issues with Colonel Moore, who asked him for more details about the allegations. Mr. Ho testified that he then prepared a package of information and gave it to Col. Moore.

[12] The grievor testified that upon receiving the information, Captain Williamson brought the matter to the military police for investigation. The grievor testified that he was then accused of breaching privacy and several electronics and security directives. The grievor testified that all he did was bring his concerns to management. The military police investigated the matter.

[13] Mr. Ho indicated that following its investigation, the military police issued an investigation report. The grievor indicated that while the report cleared him, it nevertheless indicated that management felt that he was not truthful and management did not trust him anymore. Mr. Ho indicated that he was not disciplined following the issuance of the report, which was not filed as an exhibit.

[14] Mr. Ho testified that, shortly after that, he became stressed, and he went on sick leave in October 2006.

[15] Mr. Ho testified about a meeting held in January 2008 at which he, Stéphane Chevalier, his union shop steward, Commander T.K. Robb and P. Rislahti, from the respondent's human resources department, all attended. Mr. Ho indicated that at that meeting, he told the respondent that he did not want to return to work for the DND, including to Esquimalt.

[16] However, the grievor testified that, after reflection, he was ready in early February 2008 to return to his substantive position. He indicated that on February 25, 2008, after being evaluated by Dr. Prendergast from the Department of Health, he was found fit to return to work.

[17] Mr. Ho indicated that, at that point, he informed Ms. Rislahti that he wanted to return to work.

[18] The grievor indicated that he underwent a medical assessment by Dr. Prendergast on February 22, 2008, following which he was found fit to return to his substantive position on February 25, 2008 (Exhibit E-4).

[19] The grievor indicated that Cmdr. Robb, his new supervisor, was not prepared to accept the February 25, 2008 medical report. He said that he wanted more details about the grievor's fitness to return to work.

[20] Mr. Ho testified that he was then informed that he could return to work only later in March 2008 because of an imminent reorganization and that it would be better if he returned only on March 31 (Exhibit E-7).

[21] The grievor testified that management was trying to punish him. He felt that it did not want him to return to work because of what happened in 2005, when he raised what he thought were inconsistencies in the time management contract. Mr. Ho also

felt disciplined by the respondent due to its refusal to allow him to return on February 25, 2008 because of another grievance he had filed (which is not the subject of this decision).

[22] The grievor indicated that the same person, Capt. Williamson, who ordered the military police investigation also opposed his return to work on February 25, 2008. Again, Mr. Ho testified that the reason for the refusal to allow him to return on February 25, 2008, as ordered by Dr. Prendergast, was to discipline him.

[23] The grievor indicated that, as of the date of the hearing, he is still employed in the same position in Esquimalt.

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

[24] Cmdr. Robb testified for the respondent. He stated that from April 2005 to 2008 he was the Commander, Base Information Services Officer at Esquimalt.

[25] Cmdr. Robb indicated that in early 2008, he attended a meeting with the grievor, his union steward (Mr. Chevalier), Dr. Prendergast and Ms. Rislahti. The purpose of the meeting was to discuss a letter Dr. Prendergast sent in 2007, stating that the grievor, who was then on extended sick leave, would not return to work (Exhibit E-2). Cmdr. Robb indicated that the purpose of the meeting was also to close the grievor's file. Cmdr. Robb testified that his understanding after the meeting was that the grievor had clearly indicated that he would not return to Esquimalt.

[26] Cmdr. Robb indicated that shortly after that meeting, on February 5, 2008, he received an email from Mr. Chevalier, indicating that, after reflection, the grievor was ready to return to his substantive position "bearing in mind that he expects to be fully accommodated as per" Dr. Prendergast's earlier instructions (Exhibit E-1). Cmdr. Robb indicated that that was a 180-degree change in the grievor's position from the early 2008 meeting.

[27] Cmdr. Robb's evidence was that Mr. Chevalier's email surprised him. He wanted to understand the accommodation recommended by Dr. Prendergast that Mr. Chevalier referred to in his February 5, 2008 email, since the issue of accommodation was never discussed at the earlier meeting. Again, Cmdr. Robb stated that, at that meeting, the grievor had expressed his decision not to return to Esquimalt. Nothing was said about accommodation.

[28] Cmdr. Robb testified that he wrote to Dr. Prendergast on February 18, 2008. He sought another fitness evaluation of the grievor. In that letter, Cmdr. Robb also specifically requested particulars as to the specific accommodation measures that would be required to affect the grievor's return to Esquimalt (Exhibit E-3).

[29] Cmdr. Robb testified that, on February 25, 2008, he received a letter from Dr. Prendergast following another fitness-to-work evaluation of the grievor (Exhibit E-4).

[30] Cmdr. Robb stated that while the February 25, 2008 letter stated that the grievor was fit to work and that he could return to his substantive position at Esquimalt, it did not address the precise issue of the required accommodation despite the fact that he had specifically asked for it.

[31] Cmdr. Robb testified that a meeting was then arranged with Dr. Prendergast. The meeting took place upon Dr. Prendergast's return from holiday on March 14, 2008.

[32] Cmdr. Robb indicated that Dr. Prendergast specified at that meeting that "accommodating the grievor" meant providing him with a structured environment and a fresh start and that he needed an experienced supervisor who could communicate well and was supportive (Exhibit E-6). Cmdr. Robb indicated that since he was about to be away for two weeks, that, upon his return, Mr. Ho was to report to him, and that it was important that the grievor be provided with the environment referred to in Dr. Prendergast's letter, Cmdr. Robb thought it would be better if the grievor returned to work on March 31, 2008, upon Cmdr. Robb's return (Exhibit E-7).

[33] Cmdr. Robb indicated that, in the past, he had never worked with the grievor, that he did not know him and that he never inquired as to why Mr. Ho had been on sick leave since October 2006. Cmdr. Robb indicated that he wanted to build a new organization and that he wanted to start fresh. He was not interested in what might have happened in the past.

[34] In cross-examination Cmdr. Robb stated that he did not recall meeting with the grievor at a grievance hearing on another matter. In addition, in response to a question on why it took him two weeks to greet the grievor on his return to work on March 31, 2008, Cmdr. Robb explained that he was busy and had 228 other employees.

III. Summary of the arguments

A. For the grievor

[35] The grievor argued that the respondent's decision to advance him sick leave for February 25 to March 14 2008, should be construed as disguised discipline.

[36] The grievor claimed that while he was paid for those days, nevertheless, he had to earn those sick leave days. Therefore, he was penalized.

[37] The grievor maintained that on February 25, 2008, Dr. Prendergast concluded that he was fit to return to work and that the respondent was made aware of that fact.

[38] For the grievor, the claim that the respondent needed more particulars to accommodate him was just an excuse to stop him from returning to work.

[39] The grievor indicated that, in his view, management is still upset with him for what he did in 2005, when he raised concerns about inconsistencies in the time management contract. The grievor insisted that he was then asked for information, which he provided, and that management should not have punished him.

[40] Mr. Ho also indicated that the fact that it took two weeks for Cmdr. Robb to greet him in the new unit was also a sign that management did not want him back. The grievor also argued that Cmdr. Robb's indication that he did not know the grievor before 2008 is not credible, since Cmdr. Robb had once attended another grievance hearing involving the grievor.

B. For the respondent

[41] At the hearing, counsel for the respondent reiterated his objection that I did not have jurisdiction since the respondent's action of advancing sick leave to the grievor was purely administrative.

[42] Counsel for the respondent argued that there is no evidence to support the grievor's theory that management's decision to not allow him to return for the period between February 25 to March 14, 2008, was disciplinary, or was meant to punish him for what had happened three years before.

[43] Counsel for the respondent maintained that the grievor's view is that everybody knew what happened in 2005 and that he was being punished for it. According to

counsel for the respondent, the evidence is that Cmdr. Robb was to be Mr. Ho's new supervisor. They met in January with several others. Mr. Ho clearly expressed that he did not want to return to work at the DND. Counsel for the respondent maintained that it was perfectly justifiable for Cmdr. Robb, after being told that the grievor had changed his mind and needed to be accommodated, to take the time needed to obtain information from the doctor about the required accommodation measures. The fact that the doctor was not immediately available and that Cmdr. Robb wanted to be present when the grievor returned to work to provide the grievor with a structured environment made plenty of sense.

[44] Counsel for the respondent insisted that there is no evidence of discipline in this case and that the grievor bears the burden of proving that he was in fact disciplined. In support of his argument, counsel for the respondent referred me to *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food),* 2013 PSLRB 57, and *Synowski v. Deputy Head (Department of Health)*, 2007 PSLRB 6.

IV. Reasons

[45] The issue I must first decide in this case is whether I have jurisdiction to dispose of Mr. Ho's grievance. As stated, the parties agreed that, in this case, the burden of demonstrating that the respondent's decision to advance sick leave to the grievor, who was then evaluated fit to return to work, was indeed of a disciplinary nature. The period at issue is from February 25, 2008 to March 14, 2008.

[46] In this case, my jurisdiction starts and ends with paragraph 209(1)(*b*) of the *Act.* It reads as follows*:*

> ***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*
>
> . . .
>
> (b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty . . . .*

[47] In my opinion, the fact that the grievor was advanced sick leave does have a financial bearing on him in the sense that he has to earn back those sick leave credits or presumably he will have to reimburse them one way or another. Whether or not that

financial impact amounts to a financial penalty according to subsection 209(1)(*b*) is questionable. However, even if it is a financial penalty, the grievor still had to demonstrate to me, on a balance of probabilities, that the respondent's action was taken to discipline him.

[48] In this matter, the grievor argued that the respondent used the means of advancing sick leave to prevent him from returning to work sooner and to punish him for raising concerns over a contract issue dating back to 2005. Mr. Ho insisted that he was declared fit to return to work as of February 25, 2008 and that the only valid explanation of the respondent's decision is that it simply did not want him back and still held a grudge over what he did in very good faith almost three years before.

[49] After a careful consideration of all the facts, and while I understand that the relationship between the grievor is still difficult roughly five years after this grievance was filed, I cannot conclude that the respondent's decisions not to allow the grievor to return to work on February 25, 2008 and to advance him sick leave for the days at issue were disciplinary.

[50] I should point out that, in this case, the employer's characterization that its action was merely administrative has no bearing on me. In a case like this, one has to go beyond how an action is labelled; it is important to understand all the facts surrounding the events before reaching a conclusion.

[51] In this case, the relevant facts are essentially the following. After raising with his respondent what he considered were inconsistencies related to a contract, the grievor found himself investigated for alleged breaches involving privacy matters and security directives. While he was never found guilty or disciplined for those matters, nevertheless, he went on long-term sick leave. In January 2008, at a meeting involving his shop steward and Cmdr. Robb, the grievor made it clear that he did not want to return either to Esquimalt or to the DND. I must point out that the grievor did not contest that part of the evidence. A few days later, on February 5, 2008, the grievor, through his shop steward, indicated that he had changed his mind and indicated that he was willing to return but only if he were accommodated as per Dr. Prendergast's letter.

[52] Unfortunately, neither of Dr. Prendergast's earlier letters referred to accommodation measures. In the circumstances, and in light of the fact that the

grievor had a few days before he expressed his decision not to return to work and that Dr. Prendergast had stated previously that the grievor was permanently disabled (Exhibit E-2), I find it perfectly understandable that Cmdr. Robb wanted more information and evaluation, and that he specifically asked for the kind of accommodation measures that needed to be put in place (Exhibit E-3).

[53] In my view, it is also understandable that after receiving the second fitness-to-work evaluation (Exhibit E-4), Cmdr. Robb still felt that the issue of accommodation had not been addressed and that he wanted to discuss the matter with the doctor.

[54] In my view, Cmdr. Robb's explanation that he had to wait for the doctor's return before meeting with him to determine what kind of accommodation measures were envisaged, is reasonable. I also believe Cmdr. Robb's explanation when he testified that he wanted to be present to facilitate the grievor upon his return to work, which explained why March 31, 2008 was chosen for the grievor's return.

[55] The grievor asked me to conclude that since the same individual who asked the military police to investigate him in 2005 decided that he would return only on March 31, 2008, it showed some kind of a pattern and that management was still upset with him. In my view, there is not a shred of evidence that that is the case. Moreover, I cannot draw any conclusion that disciplinary intent was present from the fact that it took two weeks after Mr. Ho's return to work for his superior, Cmdr. Robb, to greet him. While such a situation could understandably have led Mr. Ho, given his position, to conclude that disciplinary motives were present, no proof of such was offered. Indeed, the grievor never even questioned Cmdr. Robb on this issue and the allegation remains just that, an allegation.

[56] Again, while I appreciate that this whole matter was not a happy experience for the grievor, one needs to offer more, when it comes to meeting a burden of proof, than his or her perceptions. In this case, there is no corroborating evidence that supports the grievor's allegations that the reason that the respondent did not want him back on February 25, 2008 was to punish him. I therefore conclude that I am without jurisdiction to hear the grievance.

[57] The employer's objection is upheld.

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

(The Order appears on the next page)

V. Order

[59] I order the file closed.

September 19, 2013.

Linda Gobeil,
adjudicator