Date: 20130911

File: 566-02-5985

Citation: 2013 PSLRB 109

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CATHERINE PERRON

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Perron v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Grievor: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Zorica Guzina, counsel

Heard at Ottawa, Ontario,
April 22, 2013.
Written submissions filed June 7, 21 and 25, 2013.
(PSLRB Translation)

Individual grievance referred to adjudication

[1] Catherine Perron ("the grievor"), an employee of the Canada Border Services Agency, filed an individual grievance on November 25, 2010, which reads as follows:

> [Translation]
>
> *The purpose of this grievance is to challenge the decision rendered October 26, 2010 by Pierre Sabourin, Vice-President of Operations, about my harassment complaint against Mr. William Waters.*

In her grievance, the grievor sought the following corrective measures:

> [Translation]
>
> *That the employer acknowledge the harassment situation that exists and take the required corrective actions.*
>
> *That all sick leave credits used because of the harassment situation be reimbursed.*
>
> *That the employer agree to compensate all financial losses suffered because of the harassment situation and the schedule change imposed following the said complaint as well as any other measures that could be considered reasonable.*

[2] The grievor completed a grievance form prepared by the Treasury Board ("the employer"). Lynn Smith-Doiron, a representative of the grievor's bargaining agent, the Public Service Alliance of Canada (PSAC), signed the form to authorize "[translation] . . . the submission of a grievance about a collective agreement or an arbitral award . . . ."

[3] Since she did not receive a response that she considered acceptable, the grievor referred the grievance to adjudication on October 11, 2011. PSAC Representative Patricia Harewood signed the reference to adjudication form and specified on it that the grievance was based on article 19 of the collective agreement entered into between the employer and the PSAC for the Border Services Group bargaining unit, with an expiry date of June 20, 2011("the collective agreement"). The grievor did not mention article 19 ("No Discrimination") or any other provision of the collective agreement in her grievance statement. Clause 19.01 of the collective agreement reads as follows:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or*

> *ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

Objections to an adjudicator's jurisdiction

[4] The hearing dealt only with the issue of an adjudicator's jurisdiction to hear this case. The employer objected to the adjudicator's jurisdiction for several reasons, as it noted in an opinion submitted a few days earlier.

[5] First, the employer claimed that the grievance was about an issue that could not be referred to adjudication under the terms of section 209 of the *Public Service Labour Relations Act* ("the *Act*"). In her grievance, the grievor disputed the decision rendered by Pierre Sabourin on October 26, 2010 not to accept certain harassment allegations that she had made. Apparently, Mr. Sabourin made his decision in accordance with the employer's policy on the prevention and resolution of harassment in the workplace ("the policy"). The employer claimed that a grievance about the application of the policy could not be referred to adjudication; only grievances described in section 209 of the *Act* could be referred to adjudication. The employer referred me to *Boudreau v. Canada (Attorney General),* 2011 FC 868.

[6] Second, the employer pointed out that the collective agreement was not mentioned in the grievance statement and that it was not until the referral to adjudication that the grievor alleged a violation of article 19. According to the employer, the grievance referred to adjudication must be identical to the one reviewed during the grievance process, and if not, an adjudicator cannot hear it. In support of its arguments, the employer referred me to *Burchill v. Canada (Attorney General),* [1981] 1 F.C. 109 (C.A.), *Chase v. Deputy Head (Correctional Service of Canada),* 2010 PSLRB 9, *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8, *Canada (Attorney General) v. Assh,* 2005 FC 734, and *Schofield v. Canada (Attorney General),* 2004 FC 622.

[7] Third, the employer contended that the grievor failed to comply with sections 66 and 67 of the *Public Service Labour Relations Board Regulations* ("the *Regulations*"), which deal with the individual grievance form, since the grievor made no mention of the collective agreement in the grievance statement.

[8] Fourth, according to the employer, given that the grievance was based on an alleged harassment incident, the grievor should have given notice to the Canadian Human Rights Commission, in accordance with the terms of section 210 of the *Act* and section 92 of the *Regulations,* which she did not do.

[9] Fifth, again according to the employer, Mr. Sabourin still had not made a final decision when the grievance was filed about some of the allegations made by the grievor in her complaint under the policy. In his letter of October 26, 2010, Mr. Sabourin asked for additional information from the grievor about allegation "1" and dismissed allegations "2, 5 and 6"; he agreed to review allegations "3 and 4" after receiving further information. Obviously, he still had not reached a formal conclusion when the grievance was filed. Therefore, the grievance would have been premature, which would prevent an adjudicator from deciding it, as stated in *Fok and Granger v. Treasury Board (Department of Transport)*, 2006 PSLRB 93.

[10] Finally, the employer pointed out that the grievor could have used as recourse a judicial review to dispute Mr. Sabourin's decision, as the Federal Court decided in *Assh* and *Thomas v. Canada (Attorney General),* 2013 FC 292. Therefore, the adjudicator is without jurisdiction.

[11] The grievor responded that an adjudicator has full jurisdiction to decide this grievance. In the grievance, she alleged that she was subjected to harassment because she is a Quebecker. Based on Mr. Sabourin's letter dated October 26, 2010, which gave rise to the grievance, it was obvious that the employer clearly understood the meaning of the grievor's allegations. The grievor referred to an internal PSAC document entitled, "[translation] Report on Related Grievances," as well as the response at the final level of the internal grievance process, which suggests that the PSAC labour relations officer, in representing the grievor, relied on a violation of article 19 of the collective agreement. The grievor referred to the following: *Public Service Alliance of Canada v. Treasury Board (Department of Human Resources and Skills Development),* 2012 PSLRB 84, *Lannigan v. Treasury Board (Correctional Service of Canada),* 2006 PSLRB 34, and *Leclaire v. Treasury Board (Department of National Defence),* 2010 PSLRB 82. She added that the failure to give notice to the Canadian Human Rights Commission under section 210 of the *Act* was a mere technical irregularity that had no bearing on an adjudicator's jurisdiction.

[12] In response, the employer referred me to *Juba v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 71, with respect to the requirement to give notice to the Canadian Human Rights Commission.

[13] Following the hearing, I wrote to the parties to ask for additional submissions, as follows:

> [Translation]
>
> *On another read of the file, the adjudicator noted that a PSAC representative signed the grievance form that Ms. Perron completed. The signature appears in section 2 of the form. According to the wording of that section, the person who signs "authorizes the grievance submission relative to a collective agreement or an arbitral award." The adjudicator questioned whether he could conclude that, based on that signature, on its face, the grievance was about the interpretation or the application with respect to Ms. Perron of a provision of the collective agreement for the purposes of his jurisdiction, in light of the* Burchill *case.*

[14] The grievor responded that Ms. Smith-Doiron's signature confirmed that the grievance was based on article 19 of the collective agreement, which, for that matter, the employer already knew.

[15] According to the employer, Ms. Smith-Doiron's signature was merely an assertion that the grievance was based on the collective agreement; it did not determine the adjudicator's jurisdiction. The employer referred me to *Fok and Granger, Canada (Attorney General) v. Boutilier,* [1999] 1 F.C. 459 (T.D.), and *Baranyi v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 55.

Analysis

[16] Subsection 208(2) and sections 209, 210 and 241 of the *Act* read as follows:

> ***208.*** *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act*.*
>
> . . .
>
> ***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;*

(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.*

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a)*, the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d)*.*

210. *(1) When an individual grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the* Canadian Human Rights Act*, that party must, in accordance with the regulations, give notice of the issue to the Canadian Human Rights Commission.*

(2) The Canadian Human Rights Commission has standing in adjudication proceedings for the purpose of making submissions regarding an issue referred to in subsection (1).

. . .

241. *(1) No proceeding under this Act is invalid by reason only of a defect in form or a technical irregularity.*

. . .

Sections 66, 67 and 92 of the *Regulations* provide as follows:

> ***66.*** *(1) An employer shall prepare a form for an individual grievance that sets out the information to be provided by the grievor, including*
>
> *(*a*) the name, address, telephone number, place of work, position title, division and section or unit and classification of the grievor as well as the name of the grievor's employer;*
>
> *(*b*) either*
>
> *(i) a statement of the nature of each act, omission or other matter that establishes the alleged violation or misinterpretation giving rise to the grievance including, as the case may be, a reference to any relevant provision of a statute or regulation or of a direction or other instrument made or issued by the employer, that deals with the terms and conditions of employment or any relevant provision of a collective agreement or an arbitral award, or*
>
> *(ii) a statement of the alleged occurrence or matter affecting the grievor's terms and conditions of employment;*
>
> *(*c*) the date on which the alleged violation or misinterpretation or the alleged occurrence or matter affecting the grievor's terms and conditions of employment occurred; and*
>
> *(d) the corrective action requested.*
>
> *(2) The form shall be submitted to the Board for approval, and the Board shall approve it if the form requests the information that is required under paragraphs (1)(*a*) to (*d*) and if any other information requested on the form is relevant to resolving the individual grievance.*
>
> *(3) The employer shall make copies of the approved form available to all of its employees.*
>
> ***67.*** *An employee who wishes to present an individual grievance shall do so on the form provided by the employer and approved by the Board and shall submit it to the employee's immediate supervisor or the employee's local officer-in-charge identified under subsection 65(1).*
>
> . . .
>
> ***92.*** *(1) A notice of a human rights issue under subsection 210(1), 217(1) or 222(1) of the Act shall be given to the Canadian Human Rights Commission in Form 24 of the*

> *schedule together with a copy of the grievance and the notice of the reference to adjudication.*
>
> *(2) The person who gives the notice shall send a copy of it to the Executive Director, the other party, any intervenors and every person in receipt of a copy of the notice of the reference to adjudication by virtue of section 4, unless that person has notified the Executive Director in writing that the person does not wish to receive a copy of subsequent documents.*

[17] I can summarily dismiss some of the objections raised by the employer about an adjudicator's jurisdiction.

[18] First, in my view, sections 66 and 67 of the Regulations are not about an adjudicator's jurisdiction. In effect, section 66 requires that the employer prepare a grievance form but does not oblige employees to use it. With respect to section 67, which provides that employees complete the grievance form, I have no reason to believe that the procedure so described is mandatory such that any failure would nullify the grievance. Given the many warnings issued by the higher courts that adjudicators must endeavour to render their decisions on the merits, rather than technical irregularities, it is impossible to conclude that an adjudicator would not have jurisdiction to determine a grievance for the sole reason that the grievor failed to complete the form as required. Put another way, section 67 is simply a guideline. In that respect, I refer in particular to the warnings in the following cases: *Galloway Lumber Co. Ltd. v. Labour Relations Board of British Columbia,* [1965] S.C.R. 222; *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199 (Ont. C.A.); and *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42. Furthermore, in section 241 of the *Act*, the legislator specifically provided that a technical irregularity does not invalidate a grievance (see *Martel and Carroll v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 35, *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency,* 2008 PSLRB 78, *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20, and *Public Service Alliance of Canada v. Staff of the Non-Public Funds, Canadian Forces,* 2009 PSLRB 123).

[19] Next, the employer pointed out that the grievor filed the grievance prematurely, considering that Mr. Sabourin asked her for additional information in his letter dated October 26, 2010, with respect to some of the allegations she made in her complaint under the policy. Having received only a few arguments on that point, I reserve my

decision on the possibly premature nature of the grievance. The representatives could discuss many possibilities, as the case may be, when the hearing resumes, including the following:

a) the employer abandoned that objection, since it did not raise it in the reply at the final level of the grievance process;

b) the fact that the grievance might be premature is not a mere irregularity that can be relinquished but instead is a fundamental issue of jurisdiction; or

c) since the essential question that I must decide is whether the employer breached its duty to provide the grievor with a harassment-free workplace, I should give no weight to the fact that the grievor failed to respond to Mr. Sabourin's request for information before filing her grievance.

[20] Contrary to what the employer argued, the eventual recourse of a Federal Court judicial review has no connection to an adjudicator's jurisdiction. It suffices to state that subsection 208(2) of the *Act* provides that an employee may not present a grievance ". . . in respect of which an administrative procedure for redress is provided under any Act of Parliament . . . ." Given that judicial review is not "administrative" but judicial, that subsection does not apply. There is no valid reason in statutory law, in the jurisprudence or in the legal literature to conclude that there is such a limitation to adjudicating grievances under the *Act,* just as the Federal Court decided in *Thomas*, at paragraphs 26 to 29.

[21] Similarly, section 210 of the *Act* has no bearing on an adjudicator's jurisdiction. In my view, it is sufficient to indicate that the grievor in her grievance raised no ". . . issue involving the interpretation or application of the *Canadian Human Rights Act . . . .*" Certainly, the grievor raised some questions to which the *Canadian Human Rights Act* and the collective agreement apply, but she claimed only that the employer violated the collective agreement. Under those conditions, she was not obligated to give notice to the Canadian Human Rights Commission of the referral of her grievance to adjudication.

[22] Still to be considered are the employer's two main objections, which require further study.

[23] First, the employer noted that the grievor declared in the grievance statement that her conflict with the employer arose from her harassment complaint. That complaint was filed under the policy. According to the employer, a dispute about the application of the policy would not fall within an adjudicator's jurisdiction under section 209 of the *Act*.

[24] I carefully read the jurisprudence adduced by both parties about the question of determining in which circumstances an adjudicator can conclude that a grievance about alleged harassment, reviewed under the policy, is within the scope of paragraph 209(1)(*a*) of the *Act*. I reread *Boudreau, Chase* and *Leclaire* in particular. I conclude from that jurisprudence that, if the essential subject matter of a grievance is the employer's failure to comply with the procedure set out in the policy, an adjudicator has no jurisdiction to deal with it (see *Boudreau*). On the other hand, if the substance of the grievance is alleged harassment and the collective agreement prohibits harassment, an adjudicator can hear the grievance, even if the application of the policy is noted in it (see *Leclaire*).

[25] Obviously, the grievor claimed in her grievance essentially that, after she filed a harassment complaint in accordance with the policy, the employer refused to acknowledge that she had been subjected to harassment. In her grievance, she expressed her dissatisfaction with the employer's refusal. Harassment is prohibited under article 19 of the collective agreement. As in *Leclaire*, I must conclude in the circumstances that the grievance essentially constitutes an allegation that the employer breached its duty to provide the grievor with a harassment-free workplace under article 19 of the collective agreement, which meets the requirements of paragraph 209(1)(*a*) of the *Act*.

[26] The employer asserted that the grievor changed the nature of her grievance by referring to article 19 of the collective agreement during the referral to adjudication. As decided in *Burchill*, the *Act* only allows issues raised in the grievance process to be referred to adjudication. I already concluded that the essential subject matter of the grievance was an allegation that the collective agreement had been violated.

[27] Despite the foregoing, I scrupulously reread the jurisprudence referred to by both parties concerning *Burchill.* It is clear that the Federal Court of Appeal still interprets subsection 209(1) of the *Act* in the same way as in *Burchill*; on that point, I refer to *Shneidman v. Canada (Attorney General),* 2007 FCA 192, and to *Boudreau*, in

which the Federal Court reviewed all the jurisprudence. As a general rule, an adjudicator does not have jurisdiction, under paragraph 209(1)(*a*) of the *Act*, if the grievor did not allege in the grievance a dispute about a collective agreement. There is only one exception to that rule: if the grievor (or the grievor's representative) informs the employer, during the grievance process, of the contractual nature of the conflict, the grievance is admissible by the adjudicator under paragraph 209(1)(*a*).

[28] The issue in this grievance is something that has not yet been examined in the *Burchill* context, namely, that the grievance form that the grievor completed bears the signature of a PSAC representative, who declared by signing it that she authorized "[translation] . . . the submission of the grievance about a collective agreement or an arbitral award." After the hearing, I asked the representatives if I could conclude from that signature that the PSAC had identified the grievance, on its face, as a collective agreement grievance for the purposes of my jurisdiction, in light of *Burchill.*

[29] In my view, the grievance that the grievor referred to adjudication is the same as the one she filed with the employer, namely, one that falls within the ambit of paragraph 209(1)(*a*) of the *Act*. Furthermore, in light of the parties' written arguments, I cannot ignore the PSAC representative's signature on the grievance form. That signature cannot be interpreted as anything but an affirmation that the grievance alleged a violation of the collective agreement. Furthermore, the arguments that the employer filed at my request after the hearing did not challenge the validity of that conclusion. The signature would have served no purpose had the grievor and the PSAC not believed that it was a grievance as described in paragraph 209(1)(*a*) of the *Act.* Therefore, I conclude that, in the circumstances of this case, the PSAC acknowledged to the employer, through that signature, the contractual status of the grievance.

[30] Finally, I set aside all the employer's jurisdiction objections, except with respect to the possibly premature nature of the grievance with respect to some of the harassment allegations (as explained at paragraph 19).

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

(The Order appears on the next page)

Order

[32] A hearing will be scheduled to address the possibly premature nature of the grievance and to hear the grievance on its merits, as the case may be.

PSLRB Translation

September 11, 2013.

Michael Bendel,
adjudicator