Date: 20131218

File: 566-02-4578

Citation: 2013 PSLRB 163

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JOY THEAKER

Grievor

and

DEPUTY HEAD
(Department of Justice)

Respondent

Indexed as
Theaker v. Deputy Head (Department of Justice)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Herself

For the Respondent: Karen Clifford, Counsel

Heard at Edmonton, Alberta,
May 7 and October 22, 2013.

Individual grievance referred to adjudication

[1] The grievor alleges that she was constructively dismissed or was the subject of disguised discipline by the employer when she was required to provide a fitness to work evaluation report from her physician prior to being allowed to resume her position with the Department of Justice ("the employer") after a lengthy period of sick leave.

Summary of the evidence

[2] Initially, there were a total of eight (8) grievances referred to adjudication by the Public Service Alliance of Canada ("the bargaining agent"). These grievances were subsequently held in abeyance pending the decision in a duty of fair representation (DFR) complaint filed by the grievor against the bargaining agent and one of its representatives. This complaint was heard and dismissed by another member of this Board. I was appointed as adjudicator to determine the outstanding matters contained in these grievances.

[3] Before the May 7, 2013 hearing, the bargaining agent retained independent counsel to represent the grievor on all of the grievances that had been referred to adjudication. This counsel was unavailable to attend on the dates in May scheduled for the hearing and submitted a request for postponement which was denied. Subsequently, the bargaining agent secured the services of other legal counsel who was available and attended pre-hearing conferences and made representations on behalf of the grievor.

[4] The grievor submitted a medical certificate and requested that the May 7, 2013 hearing be postponed. This medical certificate was too vague so the adjudicator requested a more detailed certificate which was submitted by legal counsel. It indicated that she was unable to attend the hearing scheduled for May 7 to 10, 2013 but would however be fit to attend within four to six months with continued treatment. As there were a number of preliminary matters outstanding, including objections to jurisdiction, the hearing proceeded in the absence of the grievor on May 7, 2013 to deal with these matters, with the grievor's counsel in attendance.

[5] The decision on the jurisdictional matters was reserved pending the completion of the evidence. Based on the doctor's certificate and the availability of counsel and

this adjudicator, the matter was scheduled to proceed on all outstanding matters on the week of October 22, 2013.

[6] Shortly after this, the Board's Registry Operations was advised that the bargaining agent had withdrawn its support for all of the grievor's grievances referred to the Board's Registry Operations. The grievor could pursue her grievance related to the allegations of constructive dismissal or disguised discipline without the approval or consent of the bargaining agent. At about this same time, the Board's Registry Operations was notified that the legal counsel appointed to represent the grievor had withdrawn from the files and that the grievor would now be self-represented.

[7] The grievor filed a second DFR complaint against the bargaining agent and asked that the hearing of the constructive dismissal or disguised discipline grievance be held in abeyance pending the determination of the second DFR complaint arguing that the Chairperson of the Board had done just this when she filed her first DFR so it should not pose a problem to do so again.

[8] The respondent disagreed with any further delays arguing that it was prejudicial to the presentation of its case to delay the matter again. As this matter was scheduled consistent with the time lines suggested by her physician in April 2013 and was independent of the facts on which her DFR complaint had been filed, the grievor was advised that the adjudicator ordered that the matter proceed as scheduled in October. She was also advised by the Board's Registry Operations that the other files, for which the bargaining agent had withdrawn its support, had been closed. I am not seized of the DFR complaint and given the closure of the grievances by Board's Registry Operations; I have now only to decide the grievance alleging constructive dismissal or disguised discipline.

[9] The grievor appealed the decision related to the postponement and the decision to close the other files to the Federal Court. At the time of the hearing the Federal Court had not issued an order which prevented the hearing proceeding. Neither had the Board received any further requests for postponement from the grievor. Counsel for the employer appeared at the appointed time and place prepared to proceed with the argument on the jurisdictional question deferred from the May, 2013 hearing and the merits. The grievor did not appear, nor did anyone on her behalf.

[10] It is clear from the review of the file that the Registry Operations of the Board had advised the grievor of the time and place of the hearing both in hard copy and electronically. Subsequent to the hearing, the grievor advised Registry Operations that she was aware that the hearing had taken place and that she had medical certificates which excused her absence. She advised the Registry Operations that she would be submitting them. She eventually did so but not without further delay. It is worthy of note that at least one of these certificates was dated two weeks prior to the hearing of this matter and yet the grievor did not seek further postponement nor file it with the Board's Registry Operations prior to the completion of the hearing.

[11] The hearing proceeded in her absence, as she had been advised previously that it would.

[12] The employer argued that I have no jurisdiction to hear the matter as my jurisdiction requires disciplinary action resulting in dismissal or a financial penalty for the grievor to proceed without the concurrence of the bargaining agent. Not every financial repercussion is a financial penalty, nor is seeking a medical certificate from the employee punitive.

[13] Paul Shenher testified on behalf of the employer. At all times material to this matter he was the Acting Regional Director General for the Prairie Region of the Department of Justice (DOJ). He was responsible for the DOJ's operations across the Prairie Provinces. He held the senior delegated authorities for human resources and finance in the Prairie Region. The grievor at the time was employed in the Finance Department in the Regional DOJ office. She reported to the senior Financial Officer, Roberta Luk. The relationship between the grievor and her colleagues was stormy as was the case with the relationship between the grievor and Ms. Luk.

[14] Ms. Luk met with Mr. Shenher every other week to discuss the operation of the Finance Department. At these meetings, they had occasion to discuss the grievor's problems in the workplace and her absence due to illness in 2009. The grievor submitted a doctor's certificate dated May 22, 2009, stating that the grievor was unfit for work since May 15, 2009 and that her return to work date was uncertain at that time (Exhibit 12). On May 27, 2009, the grievor submitted a leave application in which she sought sick leave (on a paid and unpaid basis) until March 31, 2010 (Exhibit 11). On August 14, 2009, the grievor sent an email to Ms. Luk advising her that she had a

doctor's note indicating that she could return to work on the next Monday, August 17, 2009 (Exhibit 10 and 13).

[15] Ms. Luk consulted Mr. Shenher concerning how to approach the situation given the stormy relationship the grievor had with the workplace, the lack of notice and the conflicting reports from the grievor's physician. He agreed with her conclusion that additional medical information was required prior to allowing the grievor to return. This information was necessary to ensure that the grievor's return to work was successful for her and for the others in the office. Mr. Shenher and Ms. Luk consulted with the Human Resources Department concerning their preferred course of action and were advised that it was appropriate in the circumstances given the abrupt change in course and the lack of details in the doctor's note.

[16] The grievor ultimately did provide the requested detail and was returned to the payroll in September 2009. The grievor did not ever actually return to the workplace and was subsequently accepted for disability insurance. Her status was and continues to be that of an employee on leave without pay who is in receipt of disability benefits.

[17] In 2009, termination of the employment of an indeterminate employee required deputy minister approval. If the intent had been to dismiss the grievor, Mr. Shenher would have had to have been heavily involved in the discussions and the process. He would have had to request the deputy minister's approval before any employee was terminated. The protocol in place at the time was that he would have had to communicate the request to the deputy minister through one of the associate deputy ministers. He did no such thing. There was no plan to dismiss the grievor. Mr. Shenher had no recollection of any discussion or steps taken to discipline the grievor at the time and is not aware of any since.

[18] Mr. Shenher is unaware if the grievor's position still exists within the organization given that the workforce adjustment program announced in March 2013 has impacted the finance unit. She remains to the best of his knowledge on disability insurance.

Summary of the arguments

[19] The burden of proof in grievance adjudication normally rests with the grievor. In cases where discipline is alleged, the employer is called upon to justify the reason for imposing discipline and the appropriateness of the penalty imposed; it is not called

upon to prove a negative. The onus is on the grievor to persuade the adjudicator that he or she has been discharged or disciplined (See: Gorsky, Usprich, Brandt and Wilson, *Evidence and Procedure in Canadian Labour Arbitration* (1994), Volume 1, at page 9-19). In a case where there is dispute over whether discipline occurred, the threshold to be met by the grievor is that the discipline occurred. In the absence of any evidence from Ms. Theaker which established this, there is no discipline.

[20] Section 209 of the *Public Service Labour Relations Act* (the *Act*) requires that the grievor was the subject of disciplinary action by the employer in order for this adjudicator to be seized of the grievance. The employer has established that there has been no discipline and that the grievor has not been discharged. If she had been Mr. Shehner would have been involved. It is his uncontradicted evidence that he was not involved in any such circumstances.

[21] The employer had no disciplinary intent when it requested that the grievor submit further medical clarification prior to allowing her to resume her duties. Not every action taken by an employer constitutes discipline. One of the key factors in determining whether an employee has been disciplined is the employer's intent. Determining whether the employee has been the subject of disguised discipline can be addressed by examining the effects of the employer's actions of the employee. Where the impact is disproportional to the administrative purpose being served, the decision may be reviewed as disciplinary. However, where the employer's rationale is based on honestly held operational considerations, that threshold is not met (See: *Canada (Attorney General) v. Frazee,* 2007 FC 1176, at para 19 to 24).

[22] The Federal Court in *Frazee* identified at para 25 other considerations to be taken into account when determining whether or not there has been disciplinary action by the employer The employer's actions in this case stem from an honest desire to make the grievor's return to work experience effective. She had been off for some time and was now returning earlier than anticipated. The employer's request had no impact of her career prospects. There was no culpable or corrigible behaviour by the employee and the employer had no intent to correct her behaviour.

[23] The Federal Court in *Canada (Attorney General) v. Basra,* 2008 FC 606, considered what is disciplinary and what is not in the employment context. The Court found that the adjudicator erred when he failed to consider the employer's intention in

suspending the employee. This was upheld by the Federal Court of Appeal in *Basra v. Canada (Attorney General),* 2010 FCA 24.

[24] The employer's intention in requesting further medical information was to obtain sufficient information to ensure that the grievor's return to work was successful. Asking for additional medical information and refusing to allow the grievor to return to work without it is not disciplinary It is not unreasonable for non-medical professionals to require medical evidence about the employees fitness to work particularly when the employee has been off for an extended period of time and there is an abrupt change in the leave plan. Questions about an employee's health are not disciplinary (See: *Hood v. Canadian Food Inspection Agency,* 2013 PSLRB 49.)

[25] In the *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114, this adjudicator considered her jurisdiction when the employee argued that the employer's decision not to advance him sick leave credits in the absence of medical evidence. The grievor presented the employer with a medical note that contained no details. The employer requested additional details which the employee only provided weeks later. The employee was paid from the date the additional information was provided. In dismissing the grievance, the adjudicator held that the grievor had to demonstrate that on a balance of probabilities, the employer's actions were taken to discipline him (See para 48 and 56). Ms. Theaker has not met this burden.

[26] Employees within the public service are indeterminate employees appointed to a position, unlike in the private sector where there is a contract of employment (See: *Canada (Attorney General) v. Public Service Alliance of Canada,* [1991] 1 S.C.R. 614, at pages 633-634). Section 57 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13, defines the term of an indeterminate employee. The term continues unless the deputy head has specified a term of employment. In the present case, the grievor was hired on an indeterminate basis. The *Financial Administration Act*, R.S.C., 1985, c. F-11 provides at sections 11.1 and 12 how a deputy head can terminate a public servant. The relationship between the employer and the public servant is statutory in nature and not contractual.

[27] An action for constructive dismissal is contract based (See: Harris, *Wrongful Dismissal* (1989), Volume 1, at page 3-32.19 to 3.32-26). Such an action is not available to public servants (See: Caron, *Employment in the Federal Public Service,* at page 7-73.)

This Board, has stated that it is debatable whether constructive dismissal can apply in the public service (See: *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96, at para 69).

[28] The proper manner in which to pursue an action for constructive dismissal or disguised discipline at Common Law is to sue the employer and seek damages (See: *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para 33 and 34). A public servant is precluded from suing the crown under section 236 of the *Act* (See: *Rinaldi v. Treasury Board (Canadian Space Agency)*, (PSSRB File Nos. 166-02-26927, 26928 and 27383 (19981005), at page 23). An employee must seek internal remedies if they are dissatisfied with the employer's decision.

[29] There is no evidence before this adjudicator of dismissal, constructive or otherwise. Likewise there is no evidence that disciplinary action was taken against the grievor. She received salary payments following the receipt of the detailed medical information in September 2009. Subsequently she received and continues to receive disability benefits from the public service long-term disability insurance carrier. She remains on the employer's books as an employee on a leave without pay.

Reasons

[30] Section 209 of the *Act* identifies what matters may be referred to adjudication by an employee:

> *Reference to adjudication*
>
> *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.*

[31] The employer's representative is correct that it is the source of my jurisdiction and unless the grievor can establish that the employer's action was disciplinary or falls within the other circumstances outlined in the section, I have no jurisdiction to make a determination in the matter. The employer has satisfied me that the actions taken which delayed the return of the grievor to the payroll were not motivated by any desire to discipline the grievor. The delay while the parties waited for the fitness to work evaluation to be conducted and to receive its results may have had a financial implication for the grievor; however, it was in my opinion a reasonable response to the sudden notification of the grievor's intention to return to the workplace from a sick leave that was anticipated to last for at least another seven months based on the application for leave filed by the grievor (Exhibit 12).

[32] There are no indicia of disciplinary action which are required for me to assume jurisdiction over this matter. The grievor was not suspended while the employer waited to receive the medical information that had been requested. She remained on sick leave without pay as she had been immediately prior to the notification of her impending return. Once the information certifying her fitness to return to work was provided she was immediately returned to the payroll. There is no evidence that the employer intended to punish conduct that was unacceptable and culpable. Similar to the situation in the *Hood* decision, the employer had good reason to request the additional medical information in order to ensure the safe and successful reintegration of the grievor to the workplace.

[33] Consistent with the reasoning in *Frazee, Hood,* and *Ho,* I have concluded that there has been no disciplinary action, disguised or camouflaged, taken by the employer over which I may assume jurisdiction. Based on this conclusion alone, I am without jurisdiction; however, I will also address the issue of whether or not there has been a termination of employment over which I may have jurisdiction.

[34] The documentary evidence and the testimony of Mr. Shenher clearly established that the grievor was not and has not been terminated by the employer. Mr. Shenher described a work situation which created a great deal of stress for the grievor and for those who worked with her. Following a lengthy period of sick leave which was related to this stress, the employer, as did the employer in *Hood*, had legitimate business interests in seeking clarification from the grievor's physician to ensure that she was fit to return to work and as to what she needed in the form of accommodations to ensure that her return to work was successful.

[35] There is no evidence that the action taken by the employer was in any way peculiar or extraordinary, nor is there any evidence that it significantly altered the terms and conditions of the grievor's employment. There is an expectation on all employees that they cooperate with the employer to ensure the success of their reintegration into the workplace after a lengthy illness. Furthermore, there is no evidence of any intent to alter unacceptable behaviour demonstrated by the grievor. In fact, the evidence of Mr. Shenher was that the grievor was not the subject of any disciplinary action whatsoever.

[36] There is nothing which establishes that the grievor was terminated over which I may seize jurisdiction. An analysis of the file, the documents provided by the grievor or on her behalf, and the evidence submitted by the employer, both oral and written, have convinced me that this is not that case.

[37] The employer has introduced sufficient evidence for me to convince me that I am without jurisdiction to deal with this matter.

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

(The Order appears on the next page)

Order

[39] The grievance is dismissed.

December 18, 2013.

Margaret T.A. Shannon,
adjudicator