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Citation: 2013 PSLRB 45

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

THADDEUS YARNEY

Grievor

and

TREASURY BOARD
(Department of Health)

Employer

Indexed as
Yarney v. Treasury Board (Department of Health)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Grievor: Himself

For the Employer: Karen Clifford, counsel, Department of Justice

Heard at Ottawa, Ontario,
November 19, 2012.
Written submissions filed December 14, 2012 and January 15 and 22, 2013.

The grievances and the request for adjournment

[1] In his grievances, Dr. Thaddeus Yarney ("the grievor"), an employee classified at the BI-04 group and level, alleges that he has been deployed without his consent, contrary to section 51 of the *Public Service Employment Act* ("the *PSEA*"), S.C. 2003, c. 22, ss. 12, 13. His substantive position is in the Reproduction and Urology Division, Bureau of Metabolism, Oncology and Reproductive Sciences, Therapeutic Products Directorate. Against his wishes, he has been required to work in the Marketed Biologicals, Biotechnology and Natural Health Products Bureau, Marketed Health Products Directorate, since October 2010.

[2] The hearing was scheduled to take place in Ottawa on November 19, 20, 21 and 22, 2012. However, early on the morning of November 19, the grievor sent an email to the registry of the Public Service Labour Relations Board ("the Board"), stating that he was unable to attend the hearing "due to health reasons." In a subsequent telephone conversation with the Board's registry officer, he stated that he would try to be present at the hearing later that morning. The grievor did in fact appear at the hearing, shortly after its scheduled starting time. However, he maintained that he was unable to participate in the hearing, and he sought an adjournment. He presented a "sick note," obtained from a walk-in clinic the previous day, which stated that he ". . . was unable to work and/or attend school due to medical reasons … from Nov. 19, 2012, to Nov. 23, 2012 … recommended leave from work for health reasons."

[3] Counsel for the employer vigorously opposed the request for an adjournment and moved for the dismissal of the grievances. However, counsel argued in the alternative that, if I was inclined to grant the adjournment, it should be accompanied by strict conditions. In particular, counsel reminded me of the employer's jurisdictional objection in this case, which the employer had advanced before the hearing and which had been discussed at a pre-hearing conference. Counsel argued that, as a minimum, I should require the grievor to satisfy me that I had jurisdiction before the case was relisted for hearing.

[4] According to the employer's jurisdictional objection, the grievor had not been deployed at all, but had merely been assigned some new duties. Counsel for the employer maintained that an adjudicator could conclude that an employee had been the subject of a deployment without his or her consent only if there had been a

deployment within the meaning of the *PSEA*. This constituted a threshold issue, which should be resolved before any other evidence or argument was presented.

[5] I decided to grant the adjournment, but to attach several conditions. In a letter to the parties dated November 26, 2012, the Board's registry officer stated, in part, the following:

> *The adjudicator has decided to exercise his discretion to grant the adjournment sought by Dr. Yarney on November 19, 2102.*
>
> . . .
>
> *The adjudicator will decide [*the*] preliminary issue on the basis of written submissions. The written submissions process will proceed as follows:*
>
> . . .
>
> *The hearing will only be re-scheduled if the adjudicator, having received the parties' submissions, is satisfied either*
>
> *(a) that the grievor's documentary evidence proves that he was the subject of a deployment or*
>
> *(b) that, contrary to the employer's assertion, a grievor is not required to prove a formal, written deployment in a grievance described in section 209 (1) (c) (ii) of the Public Service Labour Relations Act.*

The parties' submissions

[6] Counsel for the employer asserted that, throughout the grievor's alleged deployment, he has remained in the same position to which he was hired (although the position number had been recoded). Counsel reviewed the provisions of the *PSEA* relating to deployments. In particular, she referred to section 52, under which an employee "[o]n deployment . . . ceases to be the incumbent of the position to which he or she had previously been appointed or deployed." It was thus impossible to conclude that the grievor had been deployed since he continued to be the incumbent of the position he previously held.

[7] According to counsel for the employer, section 52 reflected the Federal Court of Appeal's understanding of the deployment process in *Roberts v. Canada (Attorney General)*, [1999] F.C.J. No. 323 (C.A.) (QL), and in *Elmore v. Canada (Attorney General)*,

[2000] F.C.J. No. 2028 (C.A.) (QL), affirming [2000] F.C.J. No. 119 (T.D.) (QL). Moreover, in *Canada (Attorney General) v. Dawidowski*, [1994] F.C.J. No. 1791 (T.D.) (QL), the Federal Court had insisted that, to support a conclusion that a department had deployed an employee, a tribunal must find ". . . a subjective element (intent) and an objective element (compliance with the conditions set out in the Act including Treasury Board directives and Commission guidelines)" (at paragraph 11). The Federal Court specifically rejected the notion of a "*de facto* deployment," since that could result in employees being deprived of their statutory rights and safeguards, ". . . a result that was clearly not intended by Parliament and is contrary to the proper interpretation of the Act."

[8] Counsel for the employer observed that the Treasury Board no longer had any directives on deployments but had delegated the matter to departments. In the case of Health Canada, clause 3.4.3 of its "Staffing Related Policies and Guidelines, Effective March 30, 2007," stated that, among other things, a deployment "must be in writing."

[9] The grievor, in response, filed a lengthy submission, setting out the injustice he perceived in the treatment he had received from his department and insisting that he be allowed to present all his evidence. He urged me to hold that the changes made to his duties were so substantial that it could not reasonably be viewed as simply the assignment of some new duties to his position, even though he remained in the same position as before. It constituted, according to the grievor, a "disguised deployment" that had been made without his consent.

[10] In her rebuttal, counsel for the employer argued that nothing in the grievor's submissions demonstrated that he had been deployed.

Relevant legislative provisions

[11] The following provisions of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*), are pertinent to these grievances:

. . .

> ***7.*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to*

and to classify positions and persons employed in those portions of the federal public administration.

. . .

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*

. . .

(c) *in the case of an employee in the core public administration,*

. . .

(ii) deployment under the Public Service Employment Act *without the employee's consent where consent is required. . . .*

. . .

[12] Also pertinent are the following provisions of the *PSEA*:

. . .

2. *(1) The following definitions apply in this Act.*

. . .

"deployment"

« mutation *»*

"deployment" means the transfer of a person from one position to another in accordance with Part 3.

. . .

Authority of deputy heads to deploy

51. *(1) Except as provided in this or any other Act, a deputy head may deploy employees to or within the deputy head's organization.*

Deployment from separate agencies

(2) Except as provided in this or any other Act, a deputy head may deploy to the deputy head's organization persons who are employed in a separate agency to which the Commission does not have the exclusive authority to make

appointments if the Commission has, after reviewing the staffing program of the separate agency at the agency's request, approved deployments from it.

Deployment within or between groups

(3) A deployment may be made within an occupational group or, unless excluded by regulations under paragraph 26(1)(a)*, between occupational groups.*

Treasury Board directives and regulations

(4) A deployment to or within an organization named in Schedule I or IV to the Financial Administration Act *shall be made in the manner directed by the Treasury Board and in accordance with any regulations of the Treasury Board.*

Employment status preserved

(5) The deployment of a person may not

*(*a*) constitute a promotion, within the meaning of regulations of the Treasury Board, in the case of an organization named in Schedule I or IV to the* Financial Administration Act*, or as determined by the separate agency, in the case of a separate agency to which the Commission has the exclusive authority to make appointments; or*

*(*b*) change a person's period of employment from a specified term to indeterminate.*

Consent to deployment

(6) No person may be deployed without his or her consent unless

*(*a*) agreement to being deployed is a condition of employment of the person's current position; or*

*(*b*) the deputy head of the organization in which the person is employed finds, after investigation, that the person has harassed another person in the course of his or her employment and the deployment is made within the same organization.*

Previous position

52. *On deployment, a person ceases to be the incumbent of the position to which he or she had previously been appointed or deployed.*

Deployment not an appointment

> ***53.*** *(1) A deployment is not an appointment within the meaning of this Act.*
>
> *Exceptions to priority rights*
>
> *(2) A deputy head may deploy a person without regard to any other person's right to be appointed under subsection 41(1) or (4) or any regulations made pursuant to paragraph 22(2)*(a)*.*

Reasons

[13] It is common ground that, at all material times, the grievor has continued to occupy his substantive position. However, he maintains that the change in his duties was so substantial that it could not realistically be characterized as a simple assignment of new duties but that it rose to the level of a deployment in substance, although not in form. It was a "disguised deployment," he argues, and I should treat it as a deployment and take jurisdiction over his grievances.

[14] I have to decide at this stage whether, on the assumption that the grievor can prove everything he has alleged, I would have jurisdiction to provide a remedy.

[15] It is not seriously disputed that, if an employee has remained the incumbent of his or her original position rather than becoming the incumbent of some different position, the employee has not been deployed within the meaning of the *PSEA*. I note that, in *Dawidowski*, the Federal Court rejected the argument that an employee could be the subject of a "*de facto* deployment." Admittedly, in that case it was the department that made that argument with a view to denying another employee a right of appeal under the *PSEA*. However, as the Court stated, a tribunal can conclude that a deployment has been made only if it finds ". . . a subjective element (intent) and an objective element (compliance with the conditions set out in the Act including Treasury Board directives and Commission guidelines)" (at paragraph 11). I view the decision in *Dawidowski* as standing squarely for the proposition that the only deployments that will be recognized under the *PSEA* are those where the department intended to make a deployment and complied with any pertinent conditions in statutes, regulations or guidelines.

[16] Therefore, the real question I have to decide in relation to the employer's jurisdictional objection is whether, as an adjudicator dealing with a grievance referred

to adjudication under subparagraph 209(1)(*c*)(ii) of the *PSLRA*, I am bound to follow the meaning attributed to the word "deployment" under the *PSEA*.

[17] In my view, given the language of subparagraph 209(1)(*c*)(ii) of the *PSLRA*, it is impossible to conclude that the word "deployment" has a meaning under the *PSLRA* that is different from its meaning under the *PSEA*. Subparagraph 209(1)(*c*)(ii) could not be clearer on this score: the adjudicator has jurisdiction in the case of a ". . . deployment under the *Public Service Employment Act. . . .*"

[18] A further reason for rejecting the "disguised deployment" or the "*de facto* deployment" argument is that section 7 of the *PSLRA* precludes an adjudicator from examining employee complaints about the assignment of duties. That topic is an entrenched management prerogative. If the grievor were right in his argument that an adjudicator could take jurisdiction pursuant to subparagraph 209(1)(*c*)(ii) over a "disguised deployment," such as the one about which he complains, the adjudicator would inevitably be called upon to trespass into that forbidden territory.

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

(The Order appears on the next page)

Order

[20] I order the files closed.

April 22, 2013

Michael Bendel,
adjudicator

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