Date: 20130124

File: 566-02-5447

Citation: 2013 PSLRB 8

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MACIEK KEPKA

Grievor

and

DEPUTY HEAD
(Department of Industry)

Respondent

Indexed as
Kepka v. Deputy Head (Department of Industry)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Himself

For the Respondent: Magdalena Persoiu, counsel

Heard at Ottawa, Ontario,
January 14, 2013.

I. Individual grievance referred to adjudication

[1] Maciek Kepka ("the grievor") worked as a patent examiner in the Canadian Intellectual Property Office (CIPO) of the Department of Industry ("the deputy head" or "the employer" or "the respondent") in Gatineau, Quebec. On August 9, 2010, he grieved that he had been unjustly terminated and that his request for leave without pay had not been duly considered. In his grievance, he asked to be reinstated in his former position and to be granted leave without pay.

[2] The employer denied the grievance at each level of the grievance process on the basis that the grievance was untimely. It also denied the grievance on its merits. The grievance was referred to adjudication on May 25, 2011. The employer raised the timeliness objection again on June 7 and August 12, 2011.

[3] The applicable collective agreement is between the Professional Institute of the Public Service of Canada ("the bargaining agent") and the Treasury Board for the Applied Science and Patent Examination Group, which expired on September 30, 2011 ("the collective agreement"). The bargaining agent withdrew its support for the grievance on September 28, 2011.

[4] According to clause 35.12 of the collective agreement, an employee may present a grievance no later than 25 days after being notified or first becoming aware of the action or circumstances that gave rise to the grievance. In its objection, the employer stated that the grievance was presented some six months after the grieved action or circumstances. According to the grievor, he grieved after it became apparent that, from their ongoing discussions, the employer would not extend his leave without pay or reconsider its position on his alleged resignation.

[5] In December 2012, the employer also objected to my jurisdiction on the basis that the grievor had resigned and that the grievance could not have been referred to adjudication under paragraph 209(1)(*b*) or (*c*) of the *Public Service Labour Relations Act* ("the *Act*") since it did not relate to disciplinary action or a termination.

[6] At the beginning of the hearing, I asked the parties to present their evidence and their arguments on the objections and on the merits of the grievance. For practical

reasons, I reserved my decision on the objections, and I heard the grievance on its merits.

II. Summary of the evidence

[7] The employer called Yvan Guay as a witness. Since 2002, Mr. Guay has been a section head in the Patent Branch of the CIPO. He was the grievor's supervisor. In that role, he had the responsibility and authority to approve leave requests from the grievor. The employer also adduced 18 documents in evidence. The grievor also testified. He reintroduced as evidence some of the documents adduced by the employer. He also introduced in evidence a letter that he sent to the Board's registry office on November 24, 2011 and a letter that he sent to the employer on October 28, 2010.

[8] The grievor has a master's degree in engineering. He was hired in January 2007 as a patent examiner. Between January 2007 and January 2009, he went on the employer's training program for new patent examiners. He first undertook the three-month classroom training on patent law and was then assigned to work with a senior examiner for 21 months. He successfully completed his training program. According to Mr. Guay, the grievor was a very good employee. He fully met the employer's expectations as a patent examiner.

[9] On December 2, 2008, the employer approved the grievor's request for a one-year leave without pay for personal needs. That leave was for January 19, 2009 to January 15, 2010. The grievor used that leave to work as a patent examiner for the European Patent Office in The Hague, Netherlands.

[10] In September 2009, the grievor asked for a meeting with the employer. That meeting took place in early October 2009. The parties discussed several demands made by the grievor about his return to work in January 2010. As a follow up to that meeting, Mr. Guay emailed the grievor on October 13, 2009, reminding him that he would soon have an important decision to make about his future and that it was crucial for him to choose the organization with which he would be most happy. Mr. Guay was referring to the CIPO and to the European Patent Office. For the entire period of his leave without pay, the grievor still had access to the employer's internal email network.

[11] On December 4, 2009, Mr. Guay emailed the grievor, asking him about his decision to return to work on January 18, 2010. On December 9, 2009, the grievor replied that he was getting married on January 16, 2010 and that he was waiting for a reply from the human resources section about the possibility of receiving one week of leave with pay for that purpose. He also mentioned that he would make his decision as to whether he would return to his position during the holiday season. On January 4, 2010, Mr. Guay followed up with the grievor on his intent to return to work. He asked him for his decision. On January 12, 2010, Mr. Guay wrote to the grievor, asking him again for his decision. He reminded the grievor to be at work on January 18, 2010. He also informed the grievor that he could have one week of marriage leave but that he first needed to request it.

[12] On January 15, 2010, the grievor called Mr. Guay to inform him that he was expecting a confirmation from the European Patent Office on January 29, 2010 that he was appointed as a permanent employee. He told Mr. Guay that Mr. Guay needed to extend his leave period to accommodate him. Mr. Guay approved an extra week of leave for the grievor to get married. However, he did not accept to extend the grievor's leave by two weeks. Mr. Guay wrote to the grievor on January 20, 2010, stating that it was impossible to extend his leave, and that no further leave extension would be granted. Mr. Guay also wrote that, considering the grievor's stated intention to remain with his new employer, he should send a letter of resignation.

[13] On January 22, 2010, Mr. Guay and the grievor had a telephone discussion. The grievor asked that his leave without pay be extended. Mr. Guay refused. He suggested to the grievor that it would be more professional for him to resign rather than to simply abandon his position. Later that day, the grievor wrote the following to Mr. Guay:

. . .

> [Translation]
>
> *Further to our phone conversation of today:*
>
> *I confirm my decision to not return to my patent examiner position at the CIPO as of January 25, 2010 inclusively. This follows a personal leave without pay of one year and a personal leave of one week, which ended on January 22, 2010. I understand that our working relationship will be managed in accordance with the*

> *collective agreement in force, in consultation with Ms. Suzanne Louis-Seize.*
>
> *I also confirm that, since February 2, 2009, I have been working as a patent examiner for the European Patent Office in Rijswijk (The Hague), Netherlands. Based on our conversation, it is not a conflict of interest.*
>
> *I hope that we will have the opportunity to work together in the future.*
>
> . . .

[14] The grievor testified that this letter was not a resignation letter. His intent was to maintain his employment relationship with the employer. He wanted to have his leave without pay extended as per the collective agreement in force. He clearly remembers verbally asking for a three-month leave without pay of Mr. Guay. Mr. Guay testified that he does not remember that the grievor presented that verbal request. The grievor always maintained the hope that the employer would change its mind and allow him to extend his leave without pay.

[15] On February 4, 2010, Mr. Guay wrote to the grievor to inform him that he accepted the grievor's resignation letter of January 22, 2010. He wrote that that letter ended the employment relationship between the grievor and the CIPO.

[16] On February 8, 2010, the grievor called Mr. Guay and asked him for a three-month leave without pay. Mr. Guay refused on the basis that the grievor was no longer an employee. The grievor argued that his January 22, 2010 letter was not a resignation letter. Mr. Guay added that, even had the grievor still been an employee, which he was not, his request would have been refused. Later that day, Mr. Guay emailed the grievor to reiterate that he had resigned on January 22, 2010 and that he was no longer considered an employee of the federal public service.

[17] On March 12, 2010, the grievor wrote to Mr. Guay and stated that, given Mr. Guay's lack of response to his January 22, 2010 letter, he understood that he was now on three-month leave without pay ending April 25, 2010 and that his date of return to work at the CIPO was April 26, 2010. He also wrote that, if he were to not return to the CIPO on April 26, 2010, he would send a letter of resignation by April 12, 2010. Mr. Guay testified that he never approved that three-month leave without pay for the grievor. On March 16, 2010, Mr. Guay replied to the grievor that he responded to his letter of January 22, 2010 on February 4, 2010 and that he accepted

the grievor's resignation at that time and informed him that that letter terminated his employment relationship with the CIPO. Mr. Guay also referred to his telephone conversation with the grievor, in which he refused the grievor extra leave without pay on the basis that he was no longer an employee.

[18] On April 23, 2010, the grievor wrote to Mr. Guay, asking for ". . . an additional three years of special unpaid leave . . . similar to leave given to Canadian civil servants appointed to a foreign mission." On April 30, 2010, Mr. Guay wrote to the grievor, informing him that he had accepted the grievor's resignation on February 4, 2010 and that he was no longer an employee of the federal public service. On June 4, 2010, the grievor responded to Mr. Guay that his January 22, 2010 letter indicated only that he would not return to his job on the originally planned date. He also stated that the letter was written to maintain the possibility of extending his unpaid leave from the CIPO. He also asked that his three-year leave request of April 19, 2010 be considered. On June 10, 2010, Mr. Guay wrote to the grievor that his resignation was accepted on February 4, 2010 and that he was no longer an employee of the public service of Canada. On June 27, 2010, the grievor provided a new mailing address to Mr. Guay. On the next day, Mr. Guay resent the grievor the letter of June 10, 2010.

[19] In answer to the grievor's question, Mr. Guay reiterated that he asked the grievor to resign because he thought that it was the best way to proceed in the circumstances. Mr. Guay needed something formal, and he asked for a signed letter from the grievor. Mr. Guay testified that he had full authority to approve an extension to the leave without pay but that he had not been prepared to approve it. Mr. Guay was convinced that the January 22, 2010 letter was a resignation letter; otherwise, he would have asked for another letter from the grievor.

[20] The grievor reiterated that he never resigned from his position at the CIPO. He admitted that he wrote the January 22, 2010 letter, but he maintained that it was not a resignation letter. After that letter, he testified that he maintained a dialogue with the employer to leave open the possibility of coming back to work for the CIPO. The grievor believed that the employer could have approved other options to maintain the employment relationship.

[21] Most of the documents adduced in evidence by the employer were emails sent to or received from the grievor. The grievor testified that he was not sure that he had received or sent those emails. In addition, he might have received some of them, but he

could not verify whether their contents had been altered before being adduced in evidence.

[22] The grievor wrote "July 17, 2010" in section 1(C) of the grievance form as the "Date on which each act, omission or other matter giving rise to the grievance occurred." In his testimony, he could not remember anything special happening that day.

III. Summary of the arguments

A. For the employer

[23] The employer argued that the grievance is untimely. It was filed several months after the grievor became aware of the employer's decision that gave rise to it. The employer's decision to accept the grievor's resignation was communicated to him on February 4, 2010. That decision was reiterated to the grievor several times in March, April and June 2010. It was too late in August 2010 for him to grieve the employer's decision. He waited too long. The employer denied the grievance at each level of the grievance process on the basis of timeliness.

[24] The employer argued that the grievor did not meet the criteria outlined in the jurisprudence for granting an extension of time. I will not reproduce that argument since it is not at issue because the grievor never asked for an extension of time.

[25] The employer also objected to my jurisdiction to hear the grievance on the basis that the grievor resigned. The onus was on the grievor to prove that his resignation was not valid. He did not. The grievor did not resign under duress. On its face, his letter of resignation objectively reflected his intention to resign. That letter was accepted by the employer.

[26] During the grievance process, the grievor never argued that the employer's actions or decisions constituted disciplinary action or a termination as per paragraph 209(1)(*b*) or (*c*) of the *Act*. The grievor could not refer his grievance to adjudication on those bases as he did. In doing it, he altered his grievance, which is contrary to the principle outlined in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[27] The employer referred me to the following decisions: *Payne and Ohl v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 33; *Mangat v. Canada Revenue Agency*, 2010 PSLRB 86; *Dubord & Rainville Inc. v. Métallurgistes Unis d'Amérique, Local 7625* (1996), 53 L.A.C. (4th) 378; *Bodner v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-21332 (19910607); *Arsenault v. Treasury Board (Solicitor General – Correctional Service Canada)*, PSSRB File No. 166-02-23957 (19930722); *Hanna v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2009 PSLRB 94; *Attorney General of Canada v. Frazee*, 2007 FC 1176; *Brown v. Deputy Head (Department of Social Development)*, 2008 PSLRB 46; and *Lindsay v. Canada Border Services Agency*, 2009 PSLRB 62.

B. For the grievor

[28] The grievor argued that he never resigned from his position at the CIPO. The letter of January 22, 2010 was not a resignation letter but rather a notice to the employer that he would not return to work on January 25, 2010.

[29] The grievor argued that his grievance was not late because he pursued discussions with the employer after January 2010. He was trying to find a reasonable and constructive solution to his employment status situation. At all times, he wanted to maintain the employment relationship with the CIPO. He repeatedly asked for leave without pay, and at all times, he kept the employer aware of his situation. The employer ignored his requests and incorrectly chose to state that he resigned.

[30] The grievor is still not sure whether he wants to stay in Europe and would like to maintain the possibility of returning to work for the CIPO if he so chooses. He stated that he has borne the cost of his dispute with the employer. First, he needed to be present at this hearing. He also had to live with the uncertainty of this case. The employer incurred no costs and would not be damaged by granting him leave without pay. To the contrary, his experience in Europe could be a valuable contribution to the CIPO if he returns to work there.

IV. Reasons

[31] The grievor grieved that he was unjustly terminated and that his request for leave without pay had not been duly considered. He referred his grievance to adjudication under paragraph 209(1)(*b*) and subparagraph 209(1)(*c*)(i) of the *Act*. Section 209 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*
>
> *(*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.*
>
> *(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*).*

[32] Considering that the bargaining agent did not represent the grievor at adjudication and that the grievance was not referred to adjudication under paragraph 209(1)(*a*) of the *Act*, the grievance cannot be dealt with as a grievance related to the application or interpretation of the collective agreement. That means that the part of the grievance related to the grievor's request for leave without pay will not be considered since it involves the collective agreement. I am left with the allegation that the grievor was unjustly terminated. However, before I examine the merits of that part of grievance, I must first deal with the employer's objections.

[33] The employer objected first to the referral to adjudication on the basis of timeliness. The grievance was rejected on that basis at each level of the grievance process. Furthermore, the employer raised its timeliness objection within 30 days of the grievance being referred to adjudication. The following provisions of the collective agreement specify the timeline in which to file a grievance:

> ***35.12*** *A grievor may present a grievance to the first step of the procedure in the manner prescribed in clause 35.06, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance. . .*
>
> *. . .*
>
> ***35.17*** *In determining the time within which any action is to be taken as prescribed in this procedure, Saturdays, Sundays and designated paid holidays shall be excluded.*
>
> ***. . .***

[34] The grievance was filed on August 9, 2010. Considering clauses 35.12 and 35.17 of the collective agreement, it had to refer to actions or circumstances for which the grievor was notified or of which he became aware on or after July 5, 2010 in order to be timely.

[35] Absolutely no evidence was adduced at the hearing that the actions or circumstances that gave rise to the grievance occurred on or after July 5, 2010 or that the grievor learned or was notified of any of those actions or circumstances on or after July 5, 2010. Indeed, although the grievor gave the date of July 17, 2010 in his grievance as the date on which the time limits began to run, he was unable, when questioned, to give any reason for having identified that date. Further, the evidence adduced before me all indicates that the grievor was or should have been aware of the employer's acceptance of his resignation on or around February 4, 2010, which acceptance was repeated to him several times prior to July 2010. Whether the employer's characterization of the letter of January 22, 2010 was correct or not is irrelevant to the issue of time limits. It is clear to me that the grievance is untimely.

[36] The grievor did not deny the employer's evidence. However, he testified that he was not sure whether he received or sent the emails adduced in evidence. In addition, he testified that he might have received some of them, but he could not verify whether

their contents had been altered before being adduced in evidence. Despite those comments, the grievor did not produce any verbal or written evidence that the emails were not accurate. I find the evidence adduced by the employer to be credible. There was no contradiction between Mr. Guay's testimony and the emails that were adduced in evidence. Mr. Guay never hesitated in his testimony. He gave me the clear impression of being very upfront and honest. The grievor did not question Mr. Guay's credibility or testimony except that the grievor testified that he verbally requested a three-month leave in January 2010, which Mr. Guay does not remember.

[37] The evidence shows that the grievor was on leave without pay and that he had to return to work on January 25, 2010, in the absence of obtaining an extension of his leave without pay or new leave. On February 4, 2010, the employer wrote to the grievor, stating that their employment relationship had ended. The grievor claimed that his letter of January 22, 2010 was not a resignation letter. Even so, the fact remains that the employer considered that the employment relationship had ended, and it clearly so informed the grievor. The grievor did not deny receiving that information. He knew that the employer believed that the employment relationship was terminated. He then had 25 days to grieve, but he did not.

[38] The employer confirmed in writing to the grievor on February 8, March 16, April 30 and June 10 that it considered that their employment relationship had ended. The employer wrote to the grievor on those dates as responses to the grievor's repeated requests to the employer for leave or letters "informing" the employer that he was on leave. The grievor ignored the employer's emails and letters stating that it considered that the grievor was no longer an employee. The grievor claimed that he pursued discussions with the employer about his status or his potential return to work. The facts do not support that claim. The employer made a decision on February 4, 2010, and it never let the grievor believe that there was any room to negotiate that decision.

[39] Considering all of that, the grievance is clearly untimely and I am therefore without jurisdiction to consider it. The employer raised the timeliness issue when it needed to, as per subsections 95(1) and (2) of the *Public Service Labour Relations Board Regulations*. Those subsections read as follows:

> ***95.*** *(1) A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication,*
>
> *(*a*) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the presentation of a grievance at a level of the grievance process has not been met; or*
>
> *(*b*) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.*
>
> *(2) The objection referred to in paragraph (1)(*a*) may be raised only if the grievance was rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason.*

[40] I need not rule on the other objection or on the merits of the grievance because I have already concluded that it is untimely. However, I should add that, as the employer stated, this grievance could not have been referred to adjudication as a discipline grievance since no discipline was imposed or even alleged.

[41] I should also add that, if he did not resign, as he claims, the grievor had an obligation to show up for work on January 25, 2010, but he did not, either that day or later. Consequently, he was on unapproved leave since he did not have the right or the authority to approve his own leave, as he implied on March 12, 2010. An employer is fully entitled to expect an employee to show up for work in the absence of approved leave. That is an intrinsic part of the employment relationship and contract, and the grievor clearly broke that rule.

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

(The Order appears on the next page)

V. Order

[43] I order the file closed.

January 24, 2013.

Renaud Paquet,
adjudicator