Date: 20130731

File: 566-02-6636

Citation: 2013 PSLRB 89

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

MICHELE LAYE

Grievor

and

DEPUTY HEAD
(Department of Agriculture and Agri-Food)

Employer

Indexed as
Laye v. Deputy Head (Department of Agriculture and Agri-Food)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION ON THE ISSUE OF REMEDY

Before: David Olsen, adjudicator

For the Grievor: Ray Domeij, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard via teleconference on May 30, 2013 and
written submissions filed on June 14, 21 and July 5, 2013.

[1] This reference to adjudication concerns a grievance arising out of the employer's termination of employment of Michelle Laye ("the grievor"), a Senior Programs Officer at the PM-02 group and level at the Farm Incomes Program Directorate of the Department of Agriculture and Agri-Food ("the employer"), located in Winnipeg, Manitoba.

[2] The grievor's employment was terminated pursuant to the provisions of paragraph 12(1)(*e*) of the *Financial Administration Act* for reasons other than discipline by letter dated March 22, 2011 on the basis that the employer had concluded that the grievor had abandoned her position.

[3] Hearings were held on the merits of the reference to adjudication in Winnipeg, Manitoba, on October 16, 17, 18 and 19, 2012, and oral argument was heard in Ottawa on December 7, 2012.

[4] In my decision, dated March 21, 2013, I concluded at paragraph 177 that, after an objective review of the facts, the employer had not established that it had a reasonable basis upon which to conclude that the grievor had abandoned her position. I also concluded that the employer's actions in continuing to treat the grievor as an employee from November 2007 through March 2011 were inconsistent with the exercise of its right to deem an employee to have abandoned their position.

[5] I allowed the grievance and directed that the matter of remedy be remitted to the parties to be addressed within 60 days and that I would remain seized to deal with the remedy should the parties prove unable to resolve the matter to their satisfaction.

[6] The parties have been unable to resolve the matter to their satisfaction. Further to a teleconference between the parties on May 30, 2013, it was determined that the issue of remedy would be dealt with by way of written submissions.

Submissions of the employer

[7] Following preliminary discussions between the employer and the grievor's representative, the employer submitted a formal proposal on the issue of remedy, the salient features of which were the reinstatement of the grievor to a PM-02 position retroactive to the termination date; commensurate retroactive remuneration, less mitigation amounts; a valid fitness-to-work assessment; and a valid security clearance.

[8] The grievor has rejected the employer's proposal on two grounds: 1), the employer has no right to demand a valid fitness-to-work assessment, and 2), the grievor should be remunerated for the period prior to the termination date.

[9] Although the employer submits that it has a right to request a fitness-to-work assessment in this case, the employer is prepared to accept the doctor's note provided at the March 2011 fact-finding meeting that stated that the grievor was fit for work and that the grievor is presumed to be fully cleared to return to work without any restrictions or limitations.

[10] The employer submits that the retroactive period for loss of income commences from the termination date, March 22, 2011, since this is the date that the grievor's cause of action arose. The adjudicator's remedial jurisdiction can be exercised only in relation to the parameters of the grievance which has been referred to adjudication. No cause of action had arisen prior to March 22, 2011, and certainly, no grievance was filed in relation to the period from January to the termination date. The grievor is not entitled to remuneration for the period when she was on leave without pay.

Submissions of the union

[11] The employer makes two primary submissions. It asserts that it has a right to a fitness-to-work assessment at this date. No fitness-to-work request was made when the grievor returned to the workplace in January 2011 or at any time before the termination took effect. The grievor was absent from work on March 22, 2011 solely because of the employer's failure to maintain her security certificate rather than any illness or injury. No evidence that this document was required or requested was presented at the hearing. There was no evidence that the employer had any suspicions regarding her health. To request such at this time as a precondition to reinstatement is "discriminatory, arbitrary, capricious and veratious, bordering on harassment."

[12] Secondly, the employer maintains the date of the termination letter should be the date on which monetary damages begins to flow. The union claims damages as of either November 2007, the date the employer maintains the grievor abandoned her position, or January 2011, when the employer directed her to return to work.

[13] The letter has the effect of terminating the grievor's employment for an alleged abandonment in 2007 and that is what was overturned at adjudication. The employer

maintained throughout the process that it had a right to terminate retroactively yet suggests now that no consequence can flow from the decision to terminate retroactively. The employer suggests no work equals no pay, but the evidence shows the grievor was following the employer's instructions and in fact that some of these instructions were in fact mandatory. She was required to maintain availability and would suffer the consequences of failure to do so even though she was not physically in the workplace.

[14] The union seeks an order that Ms. Laye be returned to her position or an identical position on receipt of the decision; that the employer compensate for any lost pay and benefits to at least January 10, 2011, less mitigation; and that the employer's demand for fitness-to-work information is unreasonable and an invasion of the grievor's privacy without any sound business reasons for this demand, and further damages in the amount of $5000 as a result of the employer's arbitrary, discriminatory and veracious demands for a fitness certificate as a condition to return to work and the delay this demand has caused.

Reply submissions of the employer

[15] The employer replied that it accepts the medical note dated March 8, 2011 that Ms. Laye is fit for work and that based on this note it is presumed that she has been fully cleared by her physician to return to work without restriction.

[16] The employer observes that the union has provided the mitigation information for 2012; however, mitigation information for 2013 remains outstanding.

[17] The employer asserts that Ms. Laye suffered a motor vehicle accident while she was on sick leave. The employer had not neglected to maintain her security clearance. Security clearances expire after a period of time and have to be renewed. There is no obligation on the employer to maintain an employee's security clearance while that employee is absent from the workplace for an extended period.

[18] The employer states that to place the grievor in the same position she would have been in does not require the employer to provide her with windfall remuneration for the period of January to March 2011 when she was not performing any duties for the employer.

[19] The grievor is not entitled to any damages as claimed. Alternatively, if the adjudicator intends to entertain the submission, then the employer respectfully submits that the union must be required to establish its claim of alleged discrimination and harassment in the normal manner and satisfy all the applicable legal tests. The employer categorically denies the allegations of discrimination and harassment.

Reasons

[20] Having reviewed the submissions of the parties, it is apparent that there is no dispute that the grievor is to be reinstated to a PM-02 position retroactive to the termination date of March 22, 2011. Although the employer initially took the position that the grievor's reinstatement was conditional on the receipt of a valid fitness-to-work assessment indicating that the grievor is fit to return to work, the employer has made it clear that it is prepared to accept the doctor's note provided at the March 2011 fact-finding meeting that stated that the grievor was fit to work and that she is presumed to be fully cleared to return to work without any restrictions and limitations. In my view, it is not necessary for me to address the employer's request for a fitness-to-work assessment at this time as that issue is now academic.

[21] The employer submits that the retroactive period for loss of income commences from the termination date, March 22, 2011. The union argues that the employer should compensate the grievor for any lost pay and benefits to at least January 10, 2011, less mitigation, on the basis that she reported to work in January 2011, that she followed the employer's instructions and that she was required to maintain availability.

[22] The employer replies that it had not neglected to maintain her security clearance and asserts that there is no obligation on the employer to maintain an employee's security clearance while that employee has been absent from the workplace for an extended period.

[23] The evidence as recited in paragraphs 54 to 63 of the decision on the merits is that in response to a letter sent by Mr. Friesen on December 23, 2010 to the grievor stating that it was critical that she contact him no later than close of business Friday December 31, 2010 regarding her continued employment status, the grievor left a voicemail for Mr. Friesen on January 5, 2011. On January 6, 2011, Mr. Friesen and the grievor spoke on the telephone. The grievor indicated that she was ready to return to

work. Mr. Friesen asked her to report to the workplace the following Monday. He stated that the purpose of her reporting to work was to get more details of her absence and to determine whether she was ready to work. He subsequently learned that her security clearance had expired. He then instructed her to come into work on the Monday for the purpose of completing her security clearance forms. He testified that it took several months to complete a security clearance and that it was his intention to wait until the security clearance had been completed before pursuing the question of the grievor's leave status during her absence. As the process for completing the security clearance was taking an inordinately long time, Mr. Friesen decided to proceed with his fact-finding meeting. At the fact finding meeting, the grievor produced a doctor's note that stated that the grievor was fit for work.

[24] The grievor had been absent from the workplace for an extended period of time when in response to the letter from Mr. Friesen in December 2010 she contacted the employer and advised it that she was ready to return to work. The evidence was uncontradicted that the grievor's security clearance had lapsed and that it took several months to complete a security clearance. It was only at the fact finding meeting, on March 22, 2011, that the grievor produced the doctor's note indicating that she was fit for work. In all of the circumstances of this case, I am not prepared to conclude that the employer is responsible to compensate the grievor for the period from January through until the date of the termination.

[25] With respect to the claim for further damages in the amount of $5000 for harassment on the basis that the employer initially took the position that reinstatement was to be conditional on a current fitness-to-work assessment, I am not prepared in the circumstances of this case to find that the condition was arbitrary, and I am not prepared to grant that relief.

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

(The Order appears on the next page)

Order

[27] The grievor will be reinstated forthwith unconditionally on the release of this decision to her PM-02 or equivalent position, effective March 22, 2011.

[28] The grievor shall receive her full pay and benefits from March 22, 2011 to the date of her reinstatement, less any employment income she earned during this period.

[29] The grievor is to provide mitigation information for the year 2013 to the employer forthwith.

[30] I remain seized for a period of 60 days with any questions and issues relating to the implementation of this remedy.

July 31, 2013.

David Olsen,
adjudicator