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File: 566-02-7652

Citation: 2014 PSLRB 70

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ALFRED LEGERE

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
(Legere v. Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievor: Himself

For the Respondent: Pierre Marc Champagne, counsel

Heard at Moncton, New Brunswick,
June 3 and 4, 2014.

I. Introduction

[1] Alfred Legere ("the grievor") has a lengthy history of employment with the Correctional Service of Canada ("the employer").

[2] He filed grievances on November 20, 2011, which were referred to adjudication. The grievances claimed the employer had acted improperly with respect to what he referred to as a forced demotion.

[3] The employer raised a number of issues regarding the jurisdiction of the Public Service Labour Relations Board ("the Board") to hear any of the grievances. The Board determined it lacked jurisdiction to hear a number of the grievances, but granted an extension of time to the grievor to refer this grievance to adjudication. The Board further ordered that a hearing be conducted into the merits of the matters as they pertain to the alleged disciplinary demotion (*Legere v. Treasury Board* (*Correctional Service of Canada)*, 2013 PSLRB 125).

[4] At the outset of the hearing, counsel for the employer informed me the employer took issue with the position of the grievor, namely, that he had been disciplined.

[5] I explained to the grievor he had the burden of establishing to my satisfaction that the action of the employer was disciplinary. I further indicated if he met his burden, the employer would then bear the onus of establishing just cause for its action.

[6] The focus of this decision is on the nature of the action of the employer.

II. Procedural issue – Relevance of evidence from the psychologist for the grievor

[7] At the start of the hearing, the grievor stated he had summoned his treating psychologist as a witness and asked for confirmation that the morning of the second day was being set aside to allow for the psychologist's testimony.

[8] After consideration of the expected testimony of this witness, the grievor stated he did not need to call the psychologist as a witness, as his testimony would not help determine whether or not the actions of the employer were disciplinary.

III. Summary of the evidence

[9] The grievor testified on his own behalf. He also called Terry Hatcher, a retired Assistant Deputy Commissioner of Institutional Operations (ADCIO) as his only other witness.

[10] The employer called David Niles, the present ADCIO in the Atlantic Region as its only witness.

[11] It is my view that there is little if any dispute with respect to the relevant facts.

[12] The grievor started with the employer in 1983 as a recreation coordinator at the Springhill Institution, in Springhill, Nova Scotia.

[13] In 2002 the grievor became the deputy warden at the Springhill Institution. At the time, this institution housed 15 maximum-security female inmates, including the only female prisoner deemed a dangerous offender.

[14] In 2006 the grievor was appointed Warden at the Nova Institution for Women in Truro, Nova Scotia. This facility was categorized as a minimum to medium security institution, and the grievor described the environment as "open with a fair amount of freedom." The classification of this position was EX-01.

[15] Nova Institution for Women is the institution in which Ashley Smith began her federal incarceration, and the grievor admitted to underestimating her threat to herself. The grievor testified he and his staff became focused on her care to the detriment of other inmates.

[16] On July 10, 2006, a plot by the inmates to take the grievor hostage was uncovered. The grievor testified this created more stress in his life than he had expected.

[17] In addition, the grievor testified in general terms about the efforts he took to try to keep Ms. Smith alive.

[18] On August 2, 2007, the grievor was told by Mr. Hatcher he was going to be promoted to the position of Warden at the Springhill Institution. This position was classified EX-02.

[19] On August 17, 2007, the grievor was informed by the Regional Deputy Commissioner he was not going to be promoted to Warden at the Springhill Institute.

[20] In January 2008 the grievor received what is called a Section 13 Notice. Mr. Niles testified this type of notice had been sent to the grievor because a board of investigation struck to investigate the death of Ms. Smith had drafted some statements that might be harmful to the reputation of the grievor and that might be included in the final report. The section 13 process allowed the grievor to reply to the draft in full.

[21] Although no evidence was adduced as to what the grievor was alleged to have done, I find the allegedly harmful statements were not included in the final report of the board of investigation. Although the final report was not entered as an exhibit, the grievor described the many attempts he took to obtain the report, all of which failed. The only letter he received was dated May 15, 2014, in which the author stated that there was no internal investigation report naming him.

[22] The grievor described the cumulative effect of all that had transpired over the last few years and the impact on his health. He was placed on sick leave in January 2008.

[23] On September 16, 2008 the employer offered the grievor a special two-year deployment to a position called Special Advisor to the ADCIO. The position was classified EX-01, and the grievor accepted the offer on October 15, 2008. One of the paragraphs reads as follows

> *This special deployment is for a duration which cannot exceed two years from the date of appointment. During this period, you have the responsibility along with your direct report to monitor EX-01 openings across Canada for which you meet the competency and linguistic profile. It is important to note that you need to be mobile as a minimum for CSC positions across Canada. At the end of the two years, if no indeterminate appointment to an equivalent position has yet been made, the Department reserves the right to deploy you to the first available position to which you meet the profile. Should you decline the offer without reasonable grounds as determined by your Regional Deputy Commissioner, it could lead to a layoff situation. It is understood that reasonable efforts will be made to accommodate your needs along with the organizational operational needs.*

[24] The grievor claimed his experience during his special deployment was "extremely negative" and this affected his performance. However, he testified that, in his view, his performance assessment up to April 2010 was unfair.

[25] The grievor testified that, during this period, he "felt like an endangered species" and was quite worried that he might be demoted.

[26] In February 2010 the grievor learned he had been named as a defendant in the lawsuit filed by the family of Ashley Smith. The employer granted legal assistance and approved indemnification for the grievor, *albeit* eight months after he applied for it.

[27] Mr. Niles testified about a series of meetings he had with the grievor starting in September 2009. Mr. Niles was clear that no disciplinary process was ever contemplated by the employer.

[28] During the series of meetings there were discussions about the future of the grievor. At one point the grievor proposed an "honorary demotion" to Deputy Warden in one of the facilities where he would maintain a salary level at the EX-01 level. This was not accepted by the employer.

[29] Mr. Niles testified the meetings with the grievor took place almost every two weeks. The grievor wavered between being willing to transfer out of the Atlantic Region and not being willing to do so. Mr. Niles stated that the grievor's options were reduced because the grievor was ultimately unwilling to transfer.

[30] In February or March 2010 Mr. Niles and the grievor spoke about a position at the Springhill Institution. Mr. Niles confirmed the position was going to be vacant and the grievor expressed his willingness to accept the position.

[31] The grievor testified that on April 21, 2010, he signed a document entitled Deployment – Lower Level Position. The position offered to the grievor was Assistant Warden, Management Services. This position was classified AS-07 and the start date was May 1, 2010. The parties acknowledged this classification was two levels below the EX-01 classification held by the grievor in his special deployment.

[32] The grievor testified he was under duress when he signed the agreement. However, the grievor acknowledged he never informed the employer that he was under duress and in fact did not file a grievance until November 2011.

[33] Finally, the grievor was named in two publications (*Frank Magazine* (2011) and *The Huffington Post* (2013)). Neither article was complimentary about the grievor, but the employer took no specific action to address this. Mr. Niles testified the employer had decided it was ill-advised to start a communications battle with the media.

[34] There was no dispute the grievor was not consulted before the employer decided not to take any action to rebut the erroneous statements by the press.

IV. Issue to be decided

[35] The issue before me is whether the deployment of the grievor to the Assistant Warden, Management Services, position was disciplinary in nature.

V. Positions of the parties

A. The grievor

[36] The grievor argued the demotion to the position of Assistant Warden, Management Services, was disguised discipline even though it was voluntary.

[37] The grievor acknowledged Mr. Niles was a good supervisor who "somewhat assisted me in returning to work." He submitted the demotion was because he had received a notice under section 13 and was named as an individual defendant in the lawsuit filed by the family of Ashley Smith.

[38] He also argued the employer had done nothing about the damage to his reputation and he was never consulted regarding a communication strategy to counter the articles published in *the Huffington Post* and *Frank Magazine*.

[39] The grievor noted he could not find any case law supporting his argument that the voluntary demotion was disguised discipline. That said, the grievor referred me to a number of cases and argued there were some parallels (*Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70, reviewed by the Federal Court in *Canada (Attorney General) v. Robitaille*, 2011 FC 1218).

[40] The grievor argued the demotion in his case was excessive; the employer should have sent him for a fitness-to-work assessment and the permanent nature of the staffing action meant it was similar to a termination (*Spawn v. Parks Canada Agency*, 2004 PSSRB 25; *Deering and Treasury Board (National Defence)*; 166-2-26518; and *MacArthur v. Deputy Head (Canada Border Services Agency),* 2010 PSLRB 90).

[41] Finally, the grievor argued the employer should have involved him in the decision not to respond to the publications (*Tipple v. Canada (Attorney General)*, 2012 FCA 158).

[42] In closing, the grievor submitted he had been demoted as a result of gross mismanagement and had been treated badly. He argued the damage to his career and reputation were irreparable and that he should receive compensation.

B. The employer

[43] The employer submitted that, while it recognized the unfortunate situation of the grievor during this period, there was no evidence of discipline, disguised or otherwise.

[44] Counsel for the employer submitted the cases referred to by the grievor were distinguishable. For instance, *Robitaille* did not apply, since the Board determined there was a disciplinary demotion.

[45] Likewise, counsel for the employer argued *Spawn* and *MacArthur* dealt with whether the demotion was excessive discipline, and this did not help determine the issue at hand. Finally, the employer argued that, at this stage, the issue was not remedy, so *Tipple* was irrelevant.

[46] The employer argued the issue was whether or not the grievor had established he had been disciplined. The employer contended the evidence established the demotion of the grievor was voluntary, the employer at no time commenced disciplinary action or formed an intention to do so, the employer was not upset about the grievor being served with a section 13 notice or being named as a defendant in a lawsuit, and these actions would not have justified disciplinary action in any event.

[47] As to whether or not there was disciplinary action, the employer argued that case law supported the contention the evidence in this case did not establish that the employer had disciplined the grievor (*Theaker v. Deputy Head (Department of Justice),* 2013 PSLRB 163; *Canada* (A*ttorney General) v. Frazee*, 2007 FC 1176; *Hood v. Canadian Food Inspection Agency*, 2013 PSLRB 49; and *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114).

[48] Specifically, counsel for the employer contended there was no evidence of any intent on the part of the employer to discipline the grievor; on the contrary, he noted the testimony of Mr. Niles was there was no such intent, uncontradicted despite the cross examination of the grievor.

[49] Furthermore, the employer argued there was no evidence of a sham or camouflage (*Agbodoh-Falschau v. Canadian Nuclear Safety Commission*, 2014 PSLRB 4 and *Financial Transactions and Reports Analysis Centre of Canada v. Boutziouvis*, 2011 FC 1300, [reversed in *Financial Transactions and Reports Analysis Centre of Canada v. Boutziouvis*, 2013 FCA 118, (*Boutziouvis, 2013*)])

[50] Finally, counsel for the employer submitted the evidence did not support a finding of bad faith or disguised discipline (*Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57 [upheld in *Tudor Price v. Treasury Board (Canada) (Agriculture and Agri-Food Canada)*, File No. T-1074-13]).

VI. Analysis

[51] I have a great deal of sympathy for the grievor. He strikes me as a valuable and valued employee who takes great pride in the performance of his duties. To be served with a section 13 notice and then to be named as a defendant in a lawsuit would be terrible for a person such as the grievor. The stress he has described is palpable.

[52] However, I am not convinced the grievor was disciplined by the employer in this case and, therefore, I find that I do not have jurisdiction to hear this grievance.

[53] My jurisdiction stems from section 209 of the *Public Service Labour Relations Act* which reads as follows:

> *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.*

[54] As I explained to the grievor at the start of the hearing, he bore the burden of proof to convince me that he had been disciplined. It would only be after this burden had been met that it would shift to the employer to provide proof of the justification of its actions.

[55] It is widely accepted that an adjudicator can look behind the reasons given by the employer in determining whether or not discipline has occurred (See *Frazee* at para 23, *Hood* at para 107 and also *Boutziouvis*, *2013* at paras 4 and 7). Having reviewed the evidence however, I find nothing to establish the employer intended to discipline the grievor. This is necessary to make a determination of a disciplinary action, disguised or otherwise (*Frazee* and *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 130 at para 94).

[56] Indeed, the undisputed testimony of Mr. Niles is the employer at no time considered any form of discipline towards the grievor.

[57] Furthermore, the evidence does not support the contention of the grievor that the employer had engaged in a sham or camouflage to make the agreement look like a demotion. The onus is on the grievor to establish this (*Agbodoh-Falschau*).

[58] Considered in its entirety, the evidence before me is that the grievor voluntarily signed an agreement on April 21, 2010, with his employer. The agreement was that he accepted a deployment to the position of Assistant Warden, Management Services,

effective May 1, 2010. The classification of this position was AS-07, which was below the EX-01 level that the grievor held in the special deployment.

[59] The decision of the grievor to sign this agreement came after lengthy discussions with Mr. Niles and after the grievor decided that he was not prepared to relocate to another region. No evidence was adduced that this agreement was anything but voluntary in nature, and I conclude that the grievor signed it freely. The grievor argued that he should have been sent for a Fitness to Work Assessment, but there was no evidence adduced that any such discussion ever took place. It must be noted that the grievor had in fact worked for almost 2 years in the special assignment and showed no signs of needing such an assessment, nor was there any evidence that he asked for same.

[60] I do not accept the argument of the grievor that he signed the agreement under duress. The undisputed evidence was the grievance was signed approximately 18 months after the deployment agreement signed in April 2010. I simply do not accept that the grievor would not raise his concerns surrounding the purported duress for this length of time.

[61] Additionally, the grievor argues the employer disciplined him by not consulting with him respecting a communications plan to address the unfavourable articles published in two publications. The grievor referred me to *Tipple* in support of this argument. I do not accept the analysis of *Tipple* argued by the grievor, as in my view the conclusion of the learned adjudicator respecting the failure of the employer to consult with the grievor about a communications strategy was not a disciplinary action, but rather went to the issue of damages. Furthermore, this argument fails on a more fundamental ground. There is no evidence whatsoever that the media coverage establishes part of a pretext for what was, on all the facts before me, a voluntary agreement between the grievor and the employer.

[62] The articles published in *The Huffington Post* (2013) and *Frank Magazine* (2011) both post-dated the execution of the voluntary demotion and the 2013 article post-dated the grievance. So, even if I were to accept the position of the grievor that the failure to consult with him concerning a communication strategy could be considered disciplinary in nature, because the voluntary demotion pre-dates the articles in question the grievor cannot claim this to be the discipline he referred to in his grievance.

[63] In my view, the arrangement was made between the grievor and the employer and was accepted by both. Furthermore, there was no suggestion that the grievor was precluded from advancing his career.

VII. Reasons

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

(The Order appears on the next page)

VIII. Order

[65] The grievance is dismissed.

July 8, 2014.

George Filliter,
adjudicator