

Date: 20141029

File: 566-02-8792

Citation: 2014 PSLRB 93



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

MARC ST-AMOUR

Grievor

and

CANADA BORDER SERVICES AGENCY

Employer

Indexed as

St-Amour v. Canada Border Services Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: David Olsen, adjudicator

For the Grievor: Himself

For the Employer: Richard E. Fader, counsel

Heard at Ottawa, Ontario,
May 6, 2014.
Teleconference held on August 19, 2014.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

A. Background

[1] On February 27, 2013, Marc St-Amour (“the grievor”) grieved the Canada Border Services Agency’s (“the employer”) decision to terminate his employment as well as the contents of the termination letter dated February 4, 2013. He alleged that the decision to terminate his employment, as well as the contents of the termination letter, were contrary to the Computer Systems (CS) collective agreement and any applicable laws.

[2] By way of corrective action, he sought to be reinstated to his position, Senior Technical Analyst, classified CS-02, at the Canada Border Services Agency; that the termination letter dated February 4, 2013, and any other related documentation, be removed from his file and destroyed; that he be reimbursed for any and all compensation, benefits and pensions lost as a result of his termination of employment; any other measure deemed necessary to remedy the situation; and to be made whole. On February 28, 2013, the bargaining agent, the Profession Institute of the Public Service of Canada (“the PIPSC”) signed its approval and agreement to represent the grievor.

[3] The Canada Border Services Agency replied at the final level of the grievance process on August 14, 2013 in part as follows:

I understand that the Public Service Commission (PSC) concluded that you committed fraud pursuant to section 69 of the Public-Service Employment Act (PSEA) in appointment process 08-BSF-IA-HQ-IST-CS-8152 when you submitted your resume stating that you had completed a “Secondary V, General Diploma” when this was not the case.

I also understand the PSC ordered that your appointment made as a result of the above appointment process be revoked. In accordance with section 18.1 of the Federal Courts Act, your recourse with respect to the PSC’s decision is with the Federal Court of Canada.

There is no evidence providing that the revocation of your appointment was a termination contrary to the Computer Systems (CS) collective agreement.

Accordingly, your grievance is denied and the corrective action you seek will not be forthcoming.

[4] The grievance was referred to adjudication on July 18, 2013 by the Professional Institute of the Public Service of Canada under subparagraph 209(1)(c)(i) of the *Public Service Labour Relations Act (PSLRA)* for demotion or termination of an employee in the core public administration under paragraph 12(1)(d) of the *Financial Administration Act (FAA)* for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any reason that does not relate to a breach of discipline or misconduct.

[5] On March 26, 2014, the Canada Border Services Agency wrote to the Board to raise a preliminary objection, arguing that an adjudicator appointed to hear a grievance under section 209 of the *PSLRA* does not have jurisdiction in these matters for the reasons listed in the submission. The letter read in part as follows:

In 2011, the Public Service Commission (PSC) conducted an investigation under section 69 of the Public Service Employment Act (PSEA), and concluded that Mr. St-Amour committed fraud in an appointment process. Section 69 of the PSEA gives the PSC the authority to conduct an investigation if it has reason to believe that fraud may have occurred in an appointment process, and to take any corrective action that it considers appropriate. Subsection 15(1) of the PSEA provides that this authority to conduct investigations and impose corrective action may not be delegated to a Deputy Head of another department.

The PSC exercised its legislative authority in rendering a decision to revoke Mr. St-Amour's appointment. The Canada Border Services Agency was ordered to implement the decision. The Deputy Head applied the order to revoke Mr. St-Amour's nomination as per the PSC. This termination of employment was not a disciplinary action.

Since the revocation of Mr. St-Amour's appointment was ordered by the PSC, this was not as a result of the Deputy Head's discretion (see Krahn v. Treasury Board (Department of the Environment), 2012 PSLRB 7. Therefore, the Employer respectfully submits that the PSLRB has no jurisdiction to hear this grievance.

[6] The employer argued that under section 18.1 of the *Federal Courts Act*, Mr. St-Amour's recourse for this decision was before the Federal Court of Canada, which recourse he in fact exercised. The employer added that clause 33.08(a) of the CS collective agreement provided that a grievor is entitled to present a grievance except where another administrative procedure was provided for, which it alleged was the case here. Finally, it argued that the grievance did not meet any of the criteria enumerated in section 209 of the *PSLRA*.

[7] The employer stated that this matter was brought before the Federal Court by Mr. St-Amour on September 23, 2013 (file number T-188-13), and the matter was dismissed on January 30, 2014 (2014 FC 103).

[8] On March 28, 2014, the Professional Institute of the Public Service of Canada wrote to the Board, advising that it was withdrawing its representation from Mr. St-Amour's reference to adjudication. The PIPSC also advised that the file should remain open as Mr. St-Amour might decide to represent himself or obtain other representation. It advised the Board to direct all future correspondence directly to Mr. St-Amour.

[9] On March 31, 2014, the Board wrote to Mr. St-Amour, stating that it had been advised that the PIPSC would no longer be representing him in his reference to adjudication. He was asked to confirm with the Board by no later than April 14, 2014 whether or not he would be proceeding with his reference to adjudication.

[10] He was advised that if he wished to proceed, and would be represented by someone other than himself, he was to advise the Board of that individual's name, address, email, telephone and fax numbers so that any relevant documentation could be properly forwarded. He was also advised that the employer had raised an objection to the adjudicator's jurisdiction and that the PIPSC's response to that objection had been due by no later than April 11, 2014. He was asked to inform the Board if he did intend to proceed and to provide his position on the employer's objection no later than April 14, 2014.

[11] On April 8, 2014, a Notice of Hearing was delivered by Priority Post and by hand to Mr. St-Amour and the Canada Border Services Agency giving notice of the hearing scheduled for May 6 to 8, 2014, providing the address and the starting time. The notice also stated that if the parties failed to attend the hearing or any continuation thereof, the Board might dispose of the matter on the evidence and representations placed at the hearing without further notice. The Board received confirmation of personal delivery of the March 31, 2014 letter to Mr. St-Amour on April 2, 2014 from the Canada Post Corporation.

[12] On April 15, 2014, counsel for the employer wrote to the Board and to Mr. St-Amour advising that the Board had provided the grievor until April 14, 2014 to respond to the Board concerning the question of jurisdiction. The employer again took

the position that an adjudicator was without jurisdiction to hear this grievance. The employer submitted that as a result of the grievor's failure to contact the Board that the matter be dismissed forthwith without the need of further submissions or hearing on the matter.

[13] The Board wrote to Mr. St-Amour and counsel for the employer via email on April 17, 2014, noting that the grievor's reply to the Board's correspondence of March 31, 2014 was due no later than April 14, 2014 and that Canada Post records confirmed that Mr. St-Amour had signed for the March 31, 2014 letter as well as the notice of hearing dated April 8, 2014; however, the Board had not received any response from him.

[14] The Board also advised the parties that the hearing scheduled for May 6 to 8, 2014 would proceed as scheduled. The grievor was reminded that should he fail to attend the hearing, the Board could dispose of the matter based on the evidence and representations placed at the hearing without further notice to him.

[15] The Board did not receive any response or correspondence from the grievor by the deadline date.

[16] On May 6, 2014, the hearing into Mr. St-Amour's grievance commenced at 9:30. Representatives of the employer and counsel were in attendance, as was the adjudicator appointed to hear the case. Mr. St-Amour or a representative did not attend at the hearing. The Board opened its proceedings. Counsel for the employer submitted that by virtue of the grievor's non-attendance at the hearing, and as well based on the jurisdictional objection, that the Board should dismiss the grievance. The Board adjourned its proceedings after waiting approximately 1/2 hour.

[17] On May 6, 2014 at 21:00, the Board received an email from Natacha Morin on behalf of Mr. St-Amour stating, "I am responding to this email on behalf of my husband. Marc St-Amour is unable to attend this court as he is currently hospitalized."

[18] On May 9, 2014, the Board wrote to Mr. St-Amour via email, directing that he provide further information regarding his failure to attend the hearing of May 6, 2014, or to ask for an adjournment. The grievor was also requested to advise what his intentions were with respect to proceeding with the matter, and if he intended to proceed, he was requested to provide a medical certificate from the hospital

confirming the date on which he was admitted and attesting to the fact that he was unable to attend the hearing of May 6, 2014. He was advised that failure to produce the above-noted information by no later than May 16, 2014, would result in the closure of the file.

[19] On May 12, 2014, the grievor advised the Board that a request was made to the “Centre de readaption en dependence de loutaouais (*sic*) awaiting respond, as soon as I have the letter I will email it to you”. On May 15, 2014, the grievor wrote to the Board advising that he was still waiting for the letter and that he had made another request and asked for an extension.

[20] On May 20, 2014, again via email, the Board advised the grievor that the deadline by which he must respond to the directions issued by the Board was extended to no later than May 30, 2014. On May 23, 2014, the Board received a note from the grievor, attaching a note from the “Centre de Réadaption en dépendance de L’Outaouais” confirming that Mr. St-Amour was being treated in residence during the period May 5 to May 9, 2014.

[21] On May 23, 2014, the Board wrote to the grievor, requesting that he provide a response to the question of whether or not he intended to proceed with the hearing and if yes, to respond to the issues raised in the correspondence of May 9, 2014.

[22] The grievor responded on May 26, 2014 as follows: “This is to prof that cbsa new that I did not have a diplomat and give me the job on my expririce.” (*Sic*). Upon receipt of this email, the Board again wrote to the grievor on June 3, 2014 to ask him to fully respond to its correspondence of May 9, 2014 by June 5, 2014.

[23] The grievor wrote to the Board that same day answering: “To prof that cbsa hierd me base on my qualification and not my education” (*Sic*).

[24] On June 10, 2014, the Board requested the position of the employer.

[25] On June 16, 2014, the employer took the position that the grievor had been nonresponsive to the reasonable request for information and that there were no grounds to excuse the grievor’s failure to attend the hearing and submitted that the matter be dismissed forthwith.

[26] On July 7, 2014, the Board advised the parties that a teleconference would be convened, during which the adjudicator would address the issue of grievor's non-attendance at the hearing and confirm whether he intended to proceed with the matter.

[27] Based on the availability of both the grievor and counsel for the employer, a teleconference was scheduled for Tuesday, August 5, 2014, at 11:00, later changed to Tuesday, August 19, 2014 at 11:00 a.m.

[28] The Board proceeded by way of teleconference on August 19, 2014. The participants on the teleconference were Mr. St-Amour, the grievor, and counsel for the employer.

[29] The grievor explained that he was suffering from an illness and was receiving treatment in residence at the "Centre de Réadaptation en Dépendance de l'Outaouais" during the period of May 5 to 9, 2014, and was unable to attend the hearing.

[30] The Board asked the grievor to respond to the employer's objection that the Board was without jurisdiction to hear his grievance.

[31] The grievor stated that his employer knew all along that he did not have a high school diploma and had amended its letter of offer to reflect this. Because of his poor writing and reading skills, he did not prepare his own resume, but even if a high school or post-secondary diploma were referred to in the resume, he had advised the employer that he did not have a high school diploma. He explained that the employer knew he did not have a high school diploma, and that he told this to the investigator from the Public Service Commission.

[32] Further to the teleconference, on October 16, 2014 the Board advised the parties that I had decided to exercise my powers under the *Act* to hear the substantive issue of jurisdiction by way of written submissions. As the employer had already filed written submissions on the issue, a copy of which was provided to the grievor, the Board decided that the grievor was to provide his written reply submissions on the issue of jurisdiction no later than October 23, 2014 and the employer was to provide its written rebuttal submissions no later than October 30, 2014.

II. Written submissions

A. Submissions of the employer on jurisdiction

[33] The employer submitted that this is a clear-cut case of an adjudicator being without jurisdiction. The decision to terminate employment was not the employer's, and accordingly, there is no decision of the employer to grieve under section 208 of the *Act* or to refer to adjudication under section 209.

[34] The grievor's recourse to challenge the Public Service Commission's decision was in the Federal Court. An application for a review was brought to the Federal Court, which ultimately dismissed the application for review. If the grievor was not satisfied with the decision of the Federal Court Trial Division, his recourse would have been to the Federal Court of Appeal. The grievor was represented by experienced counsel for the PIPSC throughout the Federal Court proceedings. This case is similar to that of *Krahn v. Treasury Board (Department of the Environment and Public Service Commission)*, 2012 PSLRB 7, in which the employer, following orders of the Public Service Commission, placed the grievor on involuntary leave without pay because of his political activities. The Board found it had no jurisdiction to hear and decide his grievance in such circumstances.

B. Submissions of the grievor

[35] On October 20, 2014 the grievor wrote to the Board as follows:

In reference to your letter of October 16, 2014, I wish to provide the following statement by way of submission since I was not available for medical reasons on the previously scheduled hearing set of May 6-8, 2014.

Mr. Greg Cameron asked me by telephone before the offer of the CS-02 position was prepared and issued the following: I need a copy of your high school diploma, I then informed him I did not have one since I had not completed a high school educational program.

Greg Cameron related this information to Human Resources personnel and they verified if the alternative (a combination of education, training and/or experience) was stated on the CS-02 advertising poster (08-BSF-IA-HQ-IST-8152) and as this was confirmed by human resources personnel to Mr. Cameron, the offer of a CS-02 group and level position was subsequently prepared, offered and accepted by me.

This appointment was based on the advertised alternative therefore legal regardless of the error in claiming so on my CV.

Thank you for the opportunity to submit this text.

C. Reply submissions of the employer

[36] On October 21, counsel for the employer replied as follows:

I am writing further to the Board's direction of October 16, 2014 and in response to the grievor's submission of October 20, 2014. Please accept the following as the employer's reply in the above-noted matter.

In the letter... dated October 16, 2014 the grievor was directed to provide his response to the jurisdiction objection raised in the employer's letter of March 26, 2014. The grievor has, however, simply reiterated why he believes the decision of the Public Service Commission ("PSC") was wrong. As noted in the teleconference on August 19, 2014 this matter was referred to the Federal Court on judicial review and the application was dismissed. The grievor has not appealed that decision to the Federal Court of Appeal. As a result, it is respectfully submitted that the decision of the PSC is beyond the jurisdiction of an adjudicator pursuant to section 209 of the Public Service Labor Relations Act to challenge. The employer was ordered by the PSC to implement its decision and to revoke the grievor's nomination. There is nothing on these facts that would provide jurisdiction under section 209.

III. Reasons

[37] The decision of the Federal Court Trial Division sets out the relevant factual background that is not in dispute.

[38] The grievor joined the federal public service in 1997 in a position classified in the Computer Systems group, as CS-01. On June 25, 2008, he participated in an internal appointment process to establish a pool of qualified candidates to staff positions within the Canada Border Services Agency of senior technical analysts at the CS-02 group and level. He was a successful candidate and was appointed to the position on October 1, 2008.

[39] In a letter dated January 17, 2012, the Public Service Commission informed the grievor that an investigation would be conducted to address the possibility that the

grievor had committed fraud in the internal appointment process which led to his appointment to the 2008 position.

[40] In an investigation report dated May 16, 2012, the Public Service Commission found that the grievor had, pursuant to s. 69 of the *PSEA*, committed fraud by providing false information about his level of education in order to meet the educational criteria of the 2008 position.

[41] On August 1, 2012, the Public Service Commission informed the grievor of the results of the investigation and the proposed corrective action, which included the revocation of his appointment as a senior technical analyst. The grievor was given an opportunity to make submissions in response to the report and the proposed corrective actions.

[42] On August 23, 2012, the grievor's labor relations officer responded to the investigation report and to the proposed corrective action, asserting that the revocation of his appointment was disproportionate and unnecessary.

[43] Ultimately, on December 21, 2012, the Public Service Commission advised the grievor of its proposed corrective action and provided him with an opportunity to respond in writing. The grievor declined to comment.

[44] Finally, on January 22, 2013, the Public Service Commission, pursuant to section 69 of the *PSEA*, advised the grievor that his appointment was revoked and directed the Canada Border Services Agency to complete the documentation required to implement the revocation and to confirm to the Public Service Commission that it had done so within 60 days of the signing of the record of decision. The Public Service Commission also stated that following the revocation of his appointment, Mr. St-Amour would cease to be an employee of the federal public service.

[45] Mr. St-Amour brought an application for judicial review of the decision of the Public Service Commission pursuant to section 18.1 of the *Federal Courts Act*. As stated above, the Court dismissed the application for judicial review on January 30, 2014.

[46] Section 209 of the *PSLRA* confers on the Board jurisdiction to hear specific references to adjudication. This section provides 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.*

[47] Section 211 of the *PSLRA* provides an exception to the jurisdiction of the Board to hear and determine references to adjudication. It provides as follows:

211. *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*

(a) *any termination of employment under the Public Service Employment Act; or*

...

[48] Section 69 of the *Public Service Employment Act* provides as follows:

69. *If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, the Commission may*

(a) revoke the appointment or not make the appointment, as the case may be; and

(b) take any corrective action that it considers appropriate.

[49] It is clear on the facts that the Public Service Commission exercised its statutory authority under section 69 of the *Public Service Employment Act (PSEA)* in rendering its decision to revoke Mr. St-Amour's appointment, resulting in his termination from the public service. The Canada Border Services Agency was directed to implement the decision. The deputy head applied the order to revoke Mr. St-Amour's appointment. It is clear that in this case, the termination of employment was not as a result of action taken by the grievor's employer.

[50] The case before me is, I find, identical on a substantive level to the Board's decision in *Krahn*. As in *Krahn*, this grievance does not fall within section 209 of the *Act* as the act complained of was neither disciplinary nor a violation of the collective agreement. To be disciplinary, the act would need to originate from the grievor's employer, the CBSA, and not the PSC. The grievance, as written and argued, raises no issue of collective agreement interpretation that would act to put the termination in question. Finally, this termination was effected under the *PSEA* and not the *FAA*.

[51] Given that the grievor's termination was effected under the *PSEA*, section 211 of the *PSLRA* applies to this grievance to bar my jurisdiction to consider it.

[52] As the employer argued, the grievor's recourse was to the Federal Court and Federal Court of Appeal, a conclusion which is highlighted by the grievor's submissions on jurisdiction. Those submissions were factual in nature and alleged that the grievor had not committed fraud as the employer had always been aware of the fact that he did not have a high school diploma. In accordance with section 69 of the *PSEA*, the PSC had jurisdiction over the determination of this issue, and, once it had rendered its decision, the grievor's only recourse was to the Federal Courts, not this Board.

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

(The Order appears on the next page)

IV. Order

[54] The objection to jurisdiction is upheld. I order the file closed.

October 29, 2014.

**David Olsen,
adjudicator**