Date: 20150203

File: 566-02-7286

Citation: 2015 PSLREB 15

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before an adjudicator

BETWEEN

CHRISTINE HAYTER

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Hayter v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: George Filliter, adjudicator

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

For the Respondent: Ketia Calix, counsel

Heard at Ottawa, Ontario,
December 1 to 4, 2014.

I. Individual grievance referred to adjudication

[1] On July 21, 2011, the Treasury Board (Department of National Defence) ("the employer") sent a letter to Christine Hayter ("the grievor") stating her employment was terminated for non-disciplinary reasons. This letter was signed by Holly Robinson, Acting Director General of Financial Operations.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s.2) as that Act read immediately before that day.

[3] The employer alleged the grievor had abandoned her position.

[4] The grievor filed a grievance asking that the letter of termination be removed from her file and she be reinstated into her position.

[5] During the course of the proceedings, three witnesses gave evidence, and several documents were entered into evidence as exhibits.

[6] Much of the testimony and many of the exhibits related to allegations of misconduct the employer made against the grievor. As the employer decided to terminate the grievor for non-disciplinary reasons, I conclude this evidence is of little assistance to me. It would be imprudent of me if I did not remind the parties of my statement during the hearing, which was had the employer decided to terminate the grievor for disciplinary reasons, there is no doubt in my mind any grievance would not have succeeded. I say this as in my view, the grievor was certainly insubordinate and failed to follow the clear and concise directions of the employer.

II. Relevant facts

[7] The first witness called by the employer was Donald Verrette, who was employed as a management service officer since 2010 and to whom the grievor reported during this period. The second witness it called was Holly Robinson, who retired from the public service in 2014. On July 21, 2011, she was acting Director General of Financial Operations for the employer and signed the letter of termination.

[8] The Public Service Alliance of Canada ("the bargaining agent") called the grievor as its only witness.

[9] In addition, 32 documents were marked as exhibits.

[10] On June 25, 2009, Health Canada corresponded with the grievor's supervisor and indicated she was unfit to work (Exhibit 30). The prognosis was the grievor should be able to return to work on a gradual reintegration once she responded to treatment.

[11] On April 7, 2010, Health Canada issued another letter, indicating the grievor had been evaluated and was considered fit to work (Exhibit 2). This letter outlined a gradual return to work over a period of approximately one month.

[12] On April 30, 2010, the grievor acknowledged receipt of a letter entitled "Management Expectations" (Exhibit 1). This letter reflected the return-to-work schedule set forth in the correspondence from Health Canada dated April 7, 2010, and placed certain expectations on the grievor. She was required to report to work on time and to advise her supervisor, Mr. Verrette, if she were unable to come to work on any particular day.

[13] Mr. Verrette testified the main challenge respecting his supervision of the grievor prior to her leave revolved around her inability or unwillingness to report absences. In this regard, the employer issued a number of "Notice of Investigation" documents respecting the grievor's failure to comply with her obligations as an employee to report absences. The evidence was the employer did not complete its investigations as the grievor was not at work.

[14] As noted earlier, each one of these letters to the grievor refers to potential disciplinary actions and is therefore irrelevant to my inquiry into the grievance before me. However, what is relevant is the fact the employer sent these Notices of

Investigation by way of registered mail, and the grievor either refused to or at least failed to sign for them. As a result, the employer felt it necessary to retain the services of a process server to ensure the grievor received them and all future correspondence.

[15] The evidence of Mr. Verrette was between April 2010 and July 2011, the grievor was at work sporadically at best. In fact, his evidence was she was at work for only one full week during this period.

[16] On August 17, 2010 (Exhibit 10), Mr. Verrette requested the grievor to meet with him in order to discuss her absenteeism. In this letter, he advised her of administrative actions taken as a result of her no longer having sick leave benefits.

[17] As the grievor failed to respond to Mr. Verrette's request, he sent another letter on September 1, 2010 (Exhibit 14), asking the grievor to contact him no later than September 8, 2010, in order to discuss her continued absence.

[18] The grievor did not respond by September 8, 2010. However, on September 16, 2010, she left a voice mail indicating she would be at work that day; however, she was running late due to a missed bus.

[19] On September 23, 2010, the grievor signed a document (Exhibit 19) in which she consented to undergo a further fitness-to-work evaluation through Health Canada. She also told her supervisor she had seen her doctor and offered to provide a medical note to justify her absences.

[20] On October 27, 2010, the grievor faxed a medical note to Mr. Verrette (Exhibit 18). He testified he placed the grievor on sick leave without pay when he received this note. The medical note indicated the grievor had been unable to attend work since October 12, 2010, and the body of the note simply stated as follows: "Her ability to return will be reassessed by her Family MD."

[21] Mr. Verrette testified he never received further medical confirmation from the family physician, as noted in the medical certificate he received on October 27, 2010. On December 22, 2010, Mr. Verrette signed correspondence to Health Canada requesting a fitness-to-work evaluation (Exhibit 19).

[22] On January 24, 2011, Mr. Verrette sent a letter to the grievor, which was delivered by a process server (Exhibit 21). He told the grievor the fitness-to-work

evaluation was scheduled for March 7, 2011, at 09:45. He requested she contact him by the close of business hours on February 1, 2011, to confirm her attendance at the appointment, as it was his responsibility to confirm the appointment with Health Canada.

[23] As the grievor did not contact Mr. Verrette by February 1, 2011, he sent a further letter, which was again delivered by a process server (Exhibit 23). This letter again confirmed the March 7, 2011, appointment with Health Canada and required the grievor to respond to him by no later than the close of business on February 25, 2011, to confirm her attendance.

[24] The grievor did not respond as requested, and as a result, the appointment with Health Canada was cancelled. However, at 06:08 on March 2, 2011, the grievor left a voice message with Mr. Verrette in which she indicated she was able to attend the March 7, 2011, appointment. The evidence was this was too late, and the appointment remained cancelled.

[25] Mr. Verrette sent a new letter to the grievor dated March 7, 2011 (Exhibit 24). In it, he advised her that her new appointment with Health Canada would take place on May 2, 2011, and it was mandatory that she confirm her attendance by the close of business on March 21, 2011. This letter was also delivered by a process server.

[26] The grievor failed to comply with the March 21, 2011, date, and as a result, Mr. Verrette sent a letter dated March 29, 2011. It is useful to set forth the wording of this letter, as follows:

> *This is a follow-up to my letter dated Monday, 7 March 2011 regarding your presence at work and your appointment at Health Canada. This is to inform you that you failed to provide a medical certificate within the prescribed timeframe of Friday, 25 March 2011 as stated in my letter delivered by bailiff on March 8, 2011.*
>
> *You are presently on unauthorized leave without pay, and you have not given us a clear indication of your present status or your likely date of return to work. I have therefore decided that, should I not hear from you by Monday, April 4, 2011 with a satisfactory reason for your ongoing absence, we will begin the process for a non-disciplinary termination of your work. It is mandatory that you contact me during normal working hours by close of business day Monday, April 4, 2011 at (613) 971-6505. Should you supply*

> *me with a medical certificate, recommending that you are not fit to work, I am prepared to authorize sick leave without pay. As stipulated in my March 7, 2011 letter, please send your medical certificate by registered mail to my attention.*
>
> *Should you or your representative have any questions about this process, please do not hesitate to contact Samuel Roy, Labour Relations Advisor at 613-971-0269.*
>
> *If you have any further questions, or would like to discuss any details of this letter, please do not hesitate to contact me at 613-971-6505.*

[27] Mr. Verrette testified as of April 4, 2011, no medical certificate was provided to the employer by the grievor.

[28] The grievor testified she sent three medical certificates, dated October 29, 2010, February 7, 2011, and March 7, 2011 (Exhibit 32), by fax sometime in March 2011. She testified she was unable to locate the proof of delivery of this fax. I am prepared to accept her evidence that she did fax these documents; however, I also accept Mr. Verrette's evidence he did not receive them. As will be seen, this conclusion is of little or no impact on the ultimate result I reached.

[29] Despite Mr. Verrette's statement in his correspondence (Exhibit 26), he did not commence action on April 4, 2011, to terminate the services of the grievor for non-disciplinary reasons. In fact, on June 28, 2011, Mr. Verrette sent another letter to the grievor, which was again delivered by process server. The contents of this letter are also of importance. It reads as follows:

> *This is a follow-up to my letter dated Tuesday, 29 March 2011 regarding your presence at work. Please note this letter was already a follow-up to my letter dated Monday, 7 March 2011, delivered by bailiff on Tuesday, 8 March 2011. This letter is to inform you that you failed to provide a medical certificate within the prescribed timeframe of Friday, 25 March 2011 as stated in my letter delivered by bailiff on Wednesday, 30 March 2011.*
>
> *This is also a follow-up to my letter dated Monday, 7 March 2011, delivered by bailiff on Tuesday, 8 March 2011 regarding your appointment at Health Canada on Monday, 2 May 2011. This is to inform you that you failed to call me within the prescribed timeframe of Monday, 21 March 2011, to confirm your attendance at this appointment. Please note that you also failed to attend this appointment despite the fact that you were aware of this appointment.*

> *You are presently on unauthorized leave without pay since the [sic] 27 September 2010, and you have still not given us an indication of your present status or your likely date of return to work. Considering the above and the fact that I have not heard from you since the 2nd March 2011, I have [sic] therefore I will be recommending to the delegate authority, Ms. Patricia Laviolette, Director General, Financial Operations, to begin the process for a non-disciplinary termination of your work.*
>
> *I would like to remind you that the Employee Assistance Program (EAP) is available to all employees. The EAP is a confidential referral service for DND employees who want help coping with a difficult period or situation in their lives. The program provides support to employees, to help find specialized services, agencies and professionals who are equipped and qualified to help. The EAP office can be reached at (613) 944-7159.*
>
> *Should you or your representative have any questions about this process, please do not hesitate to contact Samuel Roy, Labour Relations Officer at 613-971-0269.*
>
> *If you have further questions, or would like to discuss any details of this letter, please do not hesitate to contact me at 613-971-6505.*

[30] The termination letter, dated July 21, 2011 (Exhibit 29), was forwarded to the grievor.

[31] It is important to note at no time between March 2, 2011, and July 21, 2011, did the grievor ever attempt to telephone or otherwise contact Mr. Verrette to advise him that she had in fact forwarded medical documents to the employer. Furthermore, this information was not provided to the employer even during the grievance hearing conducted before the referral of this matter to adjudication.

III. Summary of the arguments

[32] The employer argued the grievor was terminated for non-disciplinary reasons, those being that she had abandoned her position.

[33] The employer argued the grievor's termination was done pursuant to paragraph 12(1)(*e*) of the *Financial Administration Act* ("*FAA*"), which reads as follows:

> ***12.*** *(1) Subject to paragraphs 11.1(1)*(f) *and* (g)*, every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*

. . .

> (e) *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct . . . .*

[34] The employer referred me to a case of the former Board, which counsel for the employer stated was distinguishable from the within case (*Laye v. Deputy Head (Department of Agriculture and Agri-Food*), 2013 PSLRB 27). Counsel for the employer argued in the case before me, the grievor's failure to respond to communication from her employer and her failure to provide medical information, or at the very least ensure its delivery, was evidence of abandonment. In accordance with the employer's argument, the *Laye* case does not stand for the proposition an employer can no longer terminate for abandonment.

[35] Counsel for the employer then referred me to another case before the Federal Court, which she stated stood for the proposition the employer does not need to prove the grievor intended to abandon her position for the adjudicator to conclude abandonment had occurred (*Lindsay v. Attorney General of Canada,* 2010 FC 389).

[36] Counsel for the employer argued several cases decided by the former Board and its predecessor continue to confirm an employer can allege an employee has abandoned his or her position and can take non-disciplinary action by terminating him or her (*Jensen v. Deputy Head (Department of the Environment),* 2009 PSLRB 153; *Kwan v. Treasury Board (Revenue Canada - Taxation), PSSRB File No.* 166-02-27120 (19960830); *Pachowski v. Canada (Treasury Board),* 2000 CanLII 16436; and *Latchford v. Treasury Board (Solicitor General Canada - Correctional Service),* PSSRB File No. 166-02-26212 (19961227)).

[37] The employer argued even if it had disciplined the grievor for misconduct, it was not prohibited from terminating her for non-disciplinary reasons (*Forner v. Deputy Head (Department of Environment),* 2014 PSLRB 95). However, it argued in the case before me, there was no evidence of any disciplinary action being meted out against the grievor.

[38] Furthermore, with respect to the medical information provided by the grievor, counsel for the employer noted the courts and adjudicators have determined the need for some degree of specificity and substance to these notes in order to put much

reliance on them (*Halfacree v. Attorney General of Canada,* 2014 FC 360, and *Gibson v. Treasury Board (Department of Health),* 2008 PSLRB 68).

[39] On the other hand, the grievor referred me to the oft-cited decision in *Edith Cavell Private Hospital v. Hospital Employees' Union, Local 180* (1982), 6 L.A.C. (3d) 229. Turning to page 4 of that decision, the grievor suggested the learned arbitrator had defined the criteria that must be proven by an employer to justify "non-culpable deficiency in job performance."

[40] In addition, the grievor referred me to *Laye* and suggested this case was similar. In this regard, the learned adjudicator determined the employer did not have justification to terminate the grievor in that case for non-disciplinary reasons, who was off work for a much longer time than was the grievor in this matter. The grievor submitted I should adopt adopt the reasons in *Laye*.

IV. Analysis

[41] As I see my role, the issues before me are as follows:

1. Does the employer have the right to terminate an employee based on an allegation of abandonment of position?
2. If so, what criteria must the employer meet to justify such an action?
3. In the case at hand, did the employer meet the criteria?
4. In reviewing all of the actions of the employer, do I conclude that they were reasonable?
5. Finally, what if any remedy would be appropriate under the circumstances?

A. Does the employer have the right to terminate an employee based on an allegation of abandonment of position?

[42] In my view, an employer can terminate an employee for alleged abandonment of position (*Jenson*, *Kwan*, *Pachowski* and *Latchford*).

[43] The most recent case of the predecessor to this Board confirms an employer is able to terminate for abandonment of position (*Laye*). The learned adjudicator confirmed the employer can terminate pursuant to section 12(1)(e) of the *FAA* by alleging the employee in question had abandoned his or her position. That said, in the

circumstances of that case, the learned adjudicator concluded the employer failed to make out a case of abandonment of position.

[44] The aforementioned decision (*Laye*) considered the fact that the express authority of a deputy head to terminate employment by reason of abandonment was repealed by the *Public Service Reform Act* of 1992. The learned adjudicator stated as follows:

. . .

> *…. in the absence of express definition of abandonment in the legislation, the employer's guidelines or the collective agreement, an employee may still be deemed to have abandoned his or her position in circumstances where the employee has been absent from work for a significant period of time without authorization and without valid reasons, under circumstances within the employee's control, and without notice to the employer, unless the employee shows that he/she was unable to notify the employer because of exceptional circumstances.*

. . .

B. <u>If so, what criteria must the employer meet to justify such an action?</u>

[45] Section 12(1)(e) of the *FAA*, in my view, provides authority to the Deputy Head to exercise his or her discretion to terminate for non-disciplinary reasons including abandonment. The decision of the Deputy Head is to be reviewed by an adjudicator on the standard of reasonableness (*Laye* and *Lindsay*). In other words, the employer must satisfy me that it acted fairly and in good faith.

[46] I accept the conclusion that in presenting their evidence, the employer did not have to establish that the grievor intended to abandon her position (*Lindsay*).

[47] However, the employer is required to establish that (1) grievor was absent from work for a significant period of time; (2) the leave was without authorization; (3) there were no valid reasons under circumstances within the employee's control; and (4) there was no notice to the employer (*Laye*).

C. <u>In the case at hand, did the employer meet the criteria?</u>

[48] Although in my view, the employer is not required to prove intent, the evidence before me is that the grievor knew or ought to have known her responsibility to file

medical information. Furthermore she should have ensured that her employer was in receipt of this documentation.

[49] The grievor clearly did not.

[50] In coming to this conclusion, I have determined the grievor did send a medical certificate in March 2011 by fax to a number that may or may not have been that of the employer. However, she was advised on several occasions subsequent to this by letters delivered to her by a process server that the employer was not in receipt of any such documentation.

[51] A reasonable person would have called her supervisor and ensured the delivery of the documentation. Indeed, in submissions the representative for the grievor indicated the union would have ensured delivery of this documentation had they been approached.

[52] Does this show intent on the part of the grievor? Probably not, however it does establish a lack of responsibility which does not speak well of the grievor.

[53] That said, the most troubling aspect of the case from the point of view of the employer is whether or not the grievor was on unauthorized leave for a significant period of time (*Laye*).

[54] In my opinion, the answer must be yes.

[55] It is undisputed the grievor sent medical documentation to the employer on October 27, 2010. This documentation indicated she was unable to attend at work and she would submit further documentation at a future date. The employer took this medical certificate as justification for her absence and placed her on authorized sick leave without pay.

[56] The employer set up an appointment with Health Canada for a Fitness to Work evaluation. Communications were sent to the grievor on two occasions advising her the appointment was March 7, 2011. The evidence supports a conclusion the grievor was still on authorized sick leave albeit without pay at least until this date.

[57] When the grievor failed to communicate with Mr. Verrette on February 25, 2011, the employer took steps to establish yet another appointment with Health Canada for

the same Fitness to Work evaluation. A communication was sent to the grievor by Mr. Verrette on March 7, 2011, asking for confirmation of her attendance by March 21, 2011. In my view, at this stage, the grievor was still on authorized sick leave without pay.

[58] It was only as of March 21, 2011, that the employer raised the possibility of commencing a "non-disciplinary termination". The referral to this type of action required the grievor to respond to Mr. Verrette by close of business day on April 4, 2011.

[59] So the best case scenario for the employer was the grievor was only on unauthorized sick leave when she received the letter dated March 29, 2011.

[60] The employer, however, did not commence action to terminate the services of the grievor for "non-disciplinary reasons. In fact on June 28, 2011, Mr. Verrette sent yet another letter in which he once again, noted the grievor was on unauthorized leave. Furthermore, he again indicated he would be commencing action for "non-disciplinary termination". In this letter he stated he was recommending to the appropriate authority the process commence.

[61] The evidence is undisputed, the termination letter was dated July 1, 2011.

[62] Therefore, in my view the grievor was on unauthorized leave probably from March 29, 2011 but at least from June 28, 2011 to July 21, 2011.

[63] In my view in either case this is a significant period of time.

[64] The case law of the predecessor Boards reveals that the issue of abandonment of position has been considered in a variety of cases in which the periods of absence have varied greatly. For example, in *Latchford*, the period of absence was a period of one month, in *Okrent* it was six months and in *Laye* the period of absence was three years. Even older decisions from the former Public Service Staff Relations Board, such as *Dorion v. Treasury Board (Solicitor General)*, PSSRB File Nos. 166-2-14806 to 14808 (19950219) refer to much shorter periods of time (2 weeks approximately in the case of Mr. Dorion) and refer to an earlier version of the *Public Service Employment Act* which contained an abandonment provision that referred to an absence of one week as sufficient to found a declaration of abandonment.

[65] It is my view that there is no definite line that can be drawn between periods that will support a declaration of abandonment and those that are not long enough to do so. Each case must be evaluated on its merits and within its own context. In this case, the grievor had been absent from work without authorization under circumstances where the employer had contacted her, clearly expressed what it considered to be her position regarding leave as of a specific date and clearly advised her of the consequences of not responding to its requests for information. The period of time during which she failed to communicate with the employer is not insubstantial at all and, for an employer and any reasonable individual, constitutes a significant period of time in which to be out of contact and leave their employer in the dark as to when, or if, they might return to work.

[66] The evidence provided by the grievor fails to disclose any valid reason not under her control for her absence. Indeed, no explanation at all for her absence was offered either during the grievance process or before me. Further, the evidence clearly confirmed that the grievor had been absent for what I have concluded is a significant period of time without notice to her employer.

D. In reviewing all of the actions of the employer, do I conclude that they were reasonable?

[67] It is important to review the reasonableness of the actions of the employer.

[68] The evidence before me shows that during 2010, Mr. Verrette reached out to the grievor on several occasions. He did this both in writing but also by telephone calls and messages. Although he was frustrated by the fact the grievor's phone either was eaten by the dog in the case of her cell phone or disconnected in the case of her land line, he did continue to attempt to contact her and left several voicemail messages, even engaging the services of a bailiff in order to ensure that his communications were received.

[69] I note that this appears to have changed somewhat in March 2011. Until then, Mr. Verrette had communicated with the grievor on a regular basis and had followed up on deadlines for the provision of information. However, on March 7, 2011 he contacted the grievor and advised her that she needed to contact him by March 21, 2011 in order to confirm her attendance at an appointment with Health Canada. When the grievor failed to do so, he sent another letter dated March 29, 2011,

advising her that she was now on unauthorized leave and requesting that she contact him by April 4, 2011, failing which the process for a non-disciplinary termination would be undertaken. Despite his warning, Mr. Verrette did not commence action on that date and appears to have contacted the grievor again only on June 28, 2011, nearly three months after the deadline he had imposed and nearly two months after she had missed her appointment with Health Canada. While it would have been a better practice to contact the grievor earlier, I cannot say that his failure to do so had any impact on her actions and definitely could not be taken as condonation of her actions. I also find that his actions meet the test of reasonableness under the circumstances. He contacted the grievor, through a bailiff, on several occasions prior to taking action, clearly set out for her the employer's view and consequences should she fail to contact him. His actions, while perhaps not letter-perfect, were entirely reasonable.

[70] I acknowledge the frustration Mr. Verrette must have felt, however, given the fact the termination of an employee has been referred to by adjudicators as the "capital punishment" of employment, it would have been better for the employer to have followed up in a timely way on its letters to the grievor with the view to trying, to ensure the necessary documentation.

[71] All of that said, in my view, the actions of Mr. Verrette, meet the test of reasonableness under the circumstances.

E. Finally, what if any remedy would be appropriate under the circumstances?

[72] In view of the fact I conclude there is no merit to the grievance there is no need to discuss the remedies requested by the grievor other than to say that had I concluded otherwise any remedy granted would not have included retroactive pay. I say this as there was no evidence provided to me that would have justified such a claim. Indeed, the evidence was clear that the grievor was not able to attend at work from 2010 onwards.

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

(The Order appears on the next page)

V. Order

[74] I find that the grievance must be dismissed.

February 3, 2015.

George Filliter,
adjudicator