Date: 20150930

Files: 566-34-6243 and 6244

Citation: 2015 PSLREB 80

Public Service Labour Relations Act Before an adjudicator

BETWEEN

DAVID GLENN BABB

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Babb v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, adjudicator

For the Grievor: Christopher Schulz, Public Service Alliance of Canada

For the Employer: Charlene Hall, Canada Revenue Agency

Decided on the basis of written submissions,
filed January 24, 2012, and October 25 and 31, 2013.

[1] 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" or PSLREB) 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; *PSLRA*) as that *Act* read immediately before that day.

Individual grievances referred to adjudication

[2] David Glenn Babb ("the grievor"), was a member of the Program and Administrative Services Group, classified at the CR-03 group and level, and was an employee of the Canada Revenue Agency ("the employer" or CRA). The applicable collective agreement is that concluded between the CRA and the grievor's bargaining agent, the Public Service Alliance of Canada (PSAC), for the Program and Administrative Services Group, with an expiry date of October 31, 2010 ("the collective agreement").

[3] On April 13, 2010, the grievor presented two grievances at the first level of the grievance procedure to contest his termination of employment. On October 24, 2011, the Board's Registry received a Form 21 via email from the grievor, without further documentation. On the first page of the form, on the line which asks for the name of the grievor's representative, the grievor handwrote the following: "This grievance is with the PSAC right now, you may receive another form. I want to ensure my timelines are protected." The Form 21 indicated that an individual grievance was being referred to adjudication under paragraphs 209(1)(*b*) (disciplinary action resulting in termination, demotion, suspension or financial penalty), 209(1)(*d*) (demotion or termination of an employee of a separate agency designated under subsection 209(3) of the *PSLRA* for any reason not related to a breach of discipline or misconduct) and under subparagraph 209(1)(*c*)(i) (demotion or termination of an employee in the core public administration under certain sections of the *Financial Administration Act* (R.S.C. 1985, c. F-11) for unsatisfactory performance or for any reason not relating to a

breach of discipline or misconduct). The Board's Registry responded to the email the following day, advising the grievor that the Board was unable to open a file until such time as he had provided it with the original and copies. It also advised him that as the CRA had not been designated a separate agency under subsection 209(3) of the *PSLRA*, he could not refer a grievance to adjudication pursuant to paragraph 209(1)(*d*).

[4] The reference to adjudication of this same grievance (PSLREB File No. 566-34-6243) on November 4, 2011 by the PSAC, was made pursuant only to paragraph 209(1)(*b*) of the *PSLRA*. The second grievance (PSLREB File No. 566-34-6244) was referred on a Form 20 and alleged a violation of article 19 ("No Discrimination") of the collective agreement.

[5] As his grievances alleged a breach of his human rights, the PSAC sent a copy of a completed Form 24 to the Canadian Human Rights Commission (CHRC). The CHRC advised the former Board by way of letters dated November 14, 2011 (for PSLREB File No. 566-34-6244) and December 12, 2011 (for PSLREB File No. 566-34-6243) that it did not intend on making submissions in the matters.

[6] In the letter of termination dated April 13, 2010, the employer stated that the grievor had been absent from the workplace on sick leave without pay since April 19, 2007, and that the CRA's *Leave Without Pay Policy* required that management resolve such leave without pay situations within two years of the leave's commencement. According to the letter, the CRA had presented the grievor, on May 11, 2009, with documentation outlining his several options, including returning to work or severing his employment, and had, in good faith, extended his leave without pay a number of times, with the final extension until March 31, 2010. The employer pointed out that on February 2, 2010, the grievor had indicated to it that he was not fit to return to work and that he could not communicate a potential return-to-work date. According to a medical report signed by a Dr. Ellie Stein and dated January 6, 2010, the grievor was "currently fully disabled."

[7] The termination letter indicated that, on several occasions, management had attempted to obtain a list of limitations and restrictions associated with the grievor's medical condition in order to establish a reasonable accommodation and a possible date on which he could return to work; it had also granted him six extensions to his leave-without-pay status. Despite its efforts, the grievor never provided the list and never consented to a requested referral to Health Canada.

[8] The letter of termination stated that on March 30, 2010, the day before the grievor's last extension expired, which was on March 31, 2010, his manager received a copy of a letter from a Dr. Jennifer Armstrong that was dated March 30, 2010, and that was addressed to the grievor's legal representative, Mary Mackinnon. The letter indicated that the grievor had undergone a neuropsychological assessment, which had concluded that he was not fit to return to work, and that no accommodation was appropriate or adequate, given his inability to work. The letter from Dr. Armstrong concluded by indicating that finances had been an issue for the grievor such that he had been unable to obtain treatment that had been recommended but for which he had been unable to obtain funding from either Ontario Health Insurance Plan or Sun Life.

[9] The termination letter concluded by stating that given the length of the grievor's absence and the fact that he had failed to provide the required medical information, the CRA was terminating his employment for reasons of incapacity.

[10] In its final-level response to the grievances, the CRA stated that in cases of extended leave without pay, management needs to determine whether an employee would be able to return to work in the foreseeable future, and that based on the medical evidence on file, the grievor was not in such a position. As such, the CRA was satisfied that the decision to terminate him had been made appropriately and in good faith.

Summary of the arguments

[11] On November 28, 2011, the CRA advised the former Board that it objected to the former Board's jurisdiction to hear and decide the matters, claiming that the grievor's employment had been terminated for non-disciplinary reasons. It argued that as it is a separate employer, only grievances contesting disciplinary action resulting in termination, demotion, suspension or financial penalty may be referred to adjudication. The CRA stated that it had a separate recourse mechanism ("Independent Third Party Review" or ITPR) in place to deal with non-disciplinary terminations.

[12] The PSAC filed a response on January 24, 2012, alleging that Mr. Babb's termination was discriminatory and a violation of article 19 of the collective agreement as well as sections 3, 7 and 10 of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*). With respect to the ITPR process, it alleged that adjudication was the only process through which the grievor could obtain proper recourse and that the ITPR

process had remedial limitations that were detrimental to him. The PSAC filed a copy of the ITPR directive with its submissions. The PSAC cited an excerpt from *Johal v. Canada (Revenue Agency)*, 2008 FC 1397, for the proposition that an employee will be disentitled from presenting a grievance because another redress exists only if that redress provides a "real remedy."

[13] The PSAC argued that the ITPR process was an attempt by the employer to remove itself from its obligations under the *CHRA*. It alleged that the grievor had been discriminated against on the basis of disability and that his grievance was therefore properly before me.

[14] The PSAC argued that human rights legislation has primacy over other legislation, citing *Zettel Manufacturing Ltd. v. CAW-Canada, Local 1524*, [2006] O.L.A.A. No. 333 (QL). It also cited the decision of an adjudicator of the former Board, *Lovell and Panula v. Canada Revenue Agency*, 2010 PSLRB 91, in which jurisdiction was taken over two grievances that contested terminations of employment for incapacity and in which the grievors alleged discrimination, just as in the present grievances. The adjudicator concluded that collective agreement no-discrimination clauses gave substantive rights to employees and that one could be used as the basis for a grievance. At paragraph 19 of the decision, the adjudicator ruled that it was clear that "… the ITPR process does not allow for any consideration of the *CHRA* … [and] cannot address alleged breaches of the collective agreement." The PSAC also cited paragraph 24 of the decision, in which the adjudicator ruled that the terminations of employment in the grievances related to lengthy leaves of absence for illness and that it was likely that the discrimination allegation would touch on the merits of the terminations and further that an adjudicator had the jurisdiction to examine whether the terminations were the result of alleged discriminatory conduct.

[15] The PSAC concluded its submission by stating that an adjudicator must take jurisdiction to hear the grievances as they might include elements of discrimination based on disability, which if founded, would be contrary to the *CHRA*. As a reviewer under the ITPR process could not interpret the *CHRA*, he or she could also not grant related corrective measures. Therefore, declining jurisdiction in this case would deprive the grievor of corrective measures that could be ordered by an adjudicator further to former paragraphs 226(1)(*g*) and (*h*), now paragraphs 226(2)(*a*) and (*b*) of the *PSLRA*.

[16] In a letter from the former Board's Registry dated October 17, 2013, the parties were invited to file final submissions.

[17] The CRA filed a submission on October 25, 2013. In its submission, it repeated its earlier allegation that I lacked jurisdiction to hear the grievances and that the ITPR process was the appropriate mechanism for redress. The CRA reiterated the facts supporting its decision to terminate the grievor and reviewed the statutory framework that applied to this case. As in his Form 21 the grievor had indicated that he was referring his grievance to adjudication under paragraphs 209(1)(*a*), (*b*) and (*d*) of the *PSLRA*, it then reviewed each ground of the referral.

[18] The CRA stated that paragraph 209(1)(*a*) of the *PSLRA* did not apply since the grievances do not relate to the interpretation or application of a provision of a collective agreement and that paragraph 209(1)(*b*) did not apply either, as it specifically deals with disciplinary terminations, which the grievor's was not. The CRA acknowledged that the PSAC's submissions alleged a violation of the *CHRA* but argued that "… the underlying action that led to his grievance" was the fact that he was discharged for non-disciplinary reasons. It alleged that the referral under paragraph 209(1)(*a*) was an attempt to circumvent the ITPR process. The CRA noted that if I did not take jurisdiction over his grievances, the grievor could choose to reopen his complaint to the CHRC. Finally, it asserted that paragraph 209(1)(*d*) did not apply, as it has not been designated a separate agency by the Governor in Council under subsection 209(3) of the *PSLRA*. The CRA did not present an argument concerning subparagraph 209(1)(*c*)(i).

[19] On October 31, 2013, the former Board received supplementary submissions from the PSAC. In them, it pointed out that the employer's submissions revealed that the employer had not disputed that the grievor was temporarily disabled at the time of his termination and that it had not denied that he had been terminated because of that disability and of its conclusion that he had not been in a position to return to work in the foreseeable future. It submitted that therefore a *prima facie* case of discrimination had been established, since the decision to terminate was related to the grievor's disability.

[20] The PSAC argued that I have the jurisdiction, under paragraphs 209(1)(*a*) and 226(1)(*g*), now paragraph 226(2)(*a*) of the *PSLRA*, to consider whether there had been a violation of article 19 (No Discrimination) of the collective agreement and of the *CHRA*.

It alleged that adjudicators have had the power to hear grievances that address human rights matters under the *CHRA* since April 1, 2005.

[21] In response to the employer's allegation that the grievor was attempting to circumvent the grievance process, the PSAC alleged that in fact the employer was guilty of doing so. It alleged that the employer, by characterizing the termination as being due to incapacity rather than its discriminatory practice or its failure to accommodate, circumvented the grievance process. It pointed out that the wording of the grievance was clear, and it alleged a violation of human rights and a failure to accommodate.

[22] The PSAC stated that the employer's proposal that the grievor reopen his complaint before the CHRC was neither practical nor consistent with the intent of the *PSLRA*, which seeks to resolve disputes in an expeditious and efficient manner.

[23] The PSAC found support in a decision of an adjudicator of the former Board in *Haynes v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 85, who found that filing a grievance and referring it to adjudication, rather than filing a complaint before the CHRC, was the appropriate administrative process for redress. The PSAC argued that the same rationale applied in the present case.

Reasons

[24] I have considered the submissions of both parties, and for the reasons that follow, I have concluded that I must dismiss the employer's objection to my jurisdiction to hear and determine these grievances.

[25] With respect to grievance 566-34-6243, the PSAC, on behalf of the grievor, clearly referred it to adjudication under paragraph 209(1)(*b*) of the *PSLRA* as an individual grievance contesting a disciplinary action. The grievance itself makes an allegation of wrongful dismissal, refers to the grievor having been retaliated against for having availed himself of his rights, and refers to the grievor having been disciplined. In its argument, the CRA recognized that grievances contesting disciplinary action resulting in termination, demotion or financial penalty could be referred to adjudication. I find that grievance 566-34-6243 is clearly such a grievance and that I have jurisdiction to hear and determine the matter.

[26] With respect to grievance 566-34-6244, I find that this case is on all fours with the facts and arguments raised in *Lovell and Panula*. In that case, the grievors contended that their terminations of employment for incapacity from the CRA were discriminatory and contrary to both their collective agreement and the *CHRA*. As in the case before me, in *Lovell and Panula*, the employer objected to the jurisdiction of an adjudicator to hear the grievances on the basis that they were non-disciplinary and that the appropriate recourse mechanism for the grievors was the ITPR process. As in this case, the employer's ITPR directive stated that an employee could not request ITPR if he or she had "… sought remedy through administrative recourse under a federal Act, with the exception of the Canadian Human Rights Act" and that a reviewer was prohibited from ruling on "… issues relating to the interpretation or application of the Canadian Human Rights Act" (at para 10 of *Lovell and Panula*).

[27] As the adjudicator in *Lovell and Panula* stated, normally an adjudicator does not have jurisdiction over non-disciplinary terminations of employment by the CRA. However, in the case before me, the question is whether I have jurisdiction over a grievance that relates to an alleged breach of the collective agreement and alleged discrimination that was contrary to the *CHRA*.

[28] In examining my jurisdiction, I find that paragraph 209(1)(*a*) of the *PSLRA* clearly states that a grievance related to the application of a provision of a collective agreement can be referred to adjudication, with the only limitation being that in the case of such a referral, the grievor has obtained the consent of his or her bargaining agent. Mr. Babb's grievance, while lengthy and a bit rambling, clearly claims in its second paragraph that the employer breached his human rights. In the following paragraph, he claims that the termination of his employment was retaliation in response to his workplace injuries, while in the next paragraph, he makes a reference to disability insurance and accommodation. In a later paragraph, he states that the employer exploited his illness/disability. There are several other references to his health and need for accommodation contained in the remaining portions of the grievance.

[29] From a reading of the grievance as a whole, it is clear that the grievor contests his termination on a number of fronts, one of which is an alleged breach of his human rights. While the grievance does not mention article 19 of the collective agreement, it is clear that the pith and substance of his grievance concerns an alleged breach of his

human rights. Indeed, the employer, in its submissions, did not allege that this aspect of his grievance caught it by surprise or that the grievor, by referring his grievance to adjudication, had changed the grounds on which he grieved, in violation of the principle in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[30] As did the adjudicators in *Lovell and Panula* and in *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, I agree that article 19 of the collective agreement grants substantive rights to employees and that it can be used as the basis for a grievance. As stated at paragraph 126 of *Souaker*, the legislator cannot have intended for a violation of the collective agreement to escape review by an adjudicator. Therefore, I conclude that I have jurisdiction over grievances alleging a breach of the no-discrimination clause of the collective agreement, and I find that this grievance, in pith and substance, is such a grievance.

[31] While an adjudicator appointed under the *PSLRA* is not bound by previous decisions, it is important to foster a positive labour relations climate, notably by not reversing previous decisions on the same matters unless they are clearly wrong. This also contributes to uniformity, stability and predictability in a dispute resolution process. While such an approach maintains the effect of earlier awards, nonetheless, the legitimate interests of each party must be considered.

[32] I should also note that the employer accepted the receipt of the grievances and that it replied at the final level of the grievance process without disputing the grievor's right to present his grievances.

[33] Parliament's intention to give an adjudicator jurisdiction over grievances that allege violations of human rights is made clear in subsection 208(2) of the *PSLRA*, which states that an individual cannot present a grievance "… in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*." The *PSLRA* also gives an adjudicator the jurisdiction to interpret and apply the *CHRA* and to give relief under that *Act*.

[34] Therefore, I have concluded that I have the jurisdiction to examine whether the grievor's termination of employment was the result of alleged discriminatory conduct. The employer's objection to jurisdiction is dismissed.

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

(The Order appears on the next page)

Order

[36] The employer's objection to jurisdiction is dismissed.

[37] I direct the new Board's Registry to contact the parties to schedule these grievances for hearing.

September 30, 2015.

Steven B. Katkin,
adjudicator