Date: 20151124

File: 566-02-6752

Citation: 2015 PSLREB 88

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

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

MONICA DHIMAN

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Employer

Indexed as
Dhiman v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: No one

For the Employer: Pierre-Marc Champagne, counsel

Heard at Kamloops, British Columbia,
October 6, 2015.

I. Individual grievance referred to adjudication

[1] Monica Dhiman, the grievor, alleged that she was rejected on probation due to a disability that the Canada Border Services Agency ("the employer") did not accommodate.

II. Summary of the evidence

[2] The grievor was employed as a border services officer (BSO) at the Port of Osoyoos, British Columbia. Before starting her duties at Osoyoos, she received 16 weeks of training at the employer's staff college in Rigaud, Quebec. She also received further training at the employer's learning centre in Chilliwack, British Columbia. Once she assumed her duties on April 6, 2010, she was provided on-the-job mentoring by senior BSOs at the port of entry. Her probationary period was for one year, commencing on that date.

[3] Christopher Babakaiff was a superintendent at the Port of Osoyoos while the grievor was employed there. He was her direct supervisor from his arrival in mid-2010 and testified that generally, she performed her duties in a satisfactory manner but that on several occasions, she demonstrated behaviours that caused the employer to question her suitability for a BSO position.

[4] Mr. Babakaiff testified that the grievor was disciplined in August 2010 for showing a picture of male genitalia on her cellphone to two of her co-workers during their shift. She received a one-day suspension without pay, which she did not grieve. She was suspended not only because she showed her co-workers inappropriate material in the workplace but also because she violated the employer's policy concerning cellphone use while on duty.

[5] On September 4, 2010, the grievor worked the nightshift, from 21:30 to 08:00 the next day. On that shift, she was provided with two "lookout" bulletins, which required her to report travellers for further scrutiny before allowing them access to Canada if they met the identity criteria the bulletins set out. When one of the two people identified in the lookouts attempted to cross into Canada, she properly identified and referred that person for further scrutiny. The second person was allowed to enter despite the fact that the person interviewed had a 96% probability of being the person identified in the lookout. When the likelihood is between 85% and 95% that the person seeking entry to Canada is the person identified in a lookout, a

BSO should refer the traveller for further scrutiny. When the likelihood is 96% or higher, referral for further scrutiny is mandatory. The grievor claimed at the time that she was not aware that at 96% she was required to refer the traveller for further scrutiny. She also claimed that she was not responsible for this person's entry and that someone else using her user ID was responsible.

[6] The employer investigated the incident. During the investigation, it was discovered that the grievor had not signed out of the Integrated Primary Inspection Line System as required by the employer's "Electronic Resources Policy." She also admitted sharing her electronic user ID with other BSOs with whom she worked. She was subsequently disciplined with a two-day suspension without pay for breaching the "Electronic Resources Policy." She was not disciplined for allowing the traveller to pass through the border without a referral as it could not be determined whether she had actually allowed it to happen or whether another BSO had done so, using her user ID.

[7] A term and condition of employment for a BSO is that he or she have a valid driver's licence, as he or she may be dispatched from one employer premises to another and may be required to operate employer vehicles while on duty. On January 19, 2011, the grievor, while off duty, was stopped by the Osoyoos Royal Canadian Mounted Police for a traffic infraction. It was determined that she had been drinking, and she was required to undergo a roadside alcohol screening, which she failed. As a result, her vehicle was impounded for 30 days, and her driver's licence was suspended for 90 days.

[8] The grievor did not report this suspension to the employer until 13 days later, on February 1, 2011, at a meeting she requested with Mr. Babakaiff and her union representative. A violation of the *Criminal Code of Canada* (R.S.C. 1985, c. C-46; "*Criminal Code*"), legislation that BSOs are charged with enforcing at border crossings, is a violation of the employer's "Code of Conduct" (Exhibit 2). Other co-workers were aware of her driving suspension as she had asked them for assistance getting to and from work.

[9] The grievor was asked at the meeting why she waited until February 1, 2011, to inform her employer, when the "Code of Conduct" requires her to report to it as soon as possible if she has been arrested, detained or charged with a violation in Canada of the *Criminal Code* related to her official duties. Her rationale for the delay in reporting

was that she wanted a specific union representative to attend the meeting with her and that that person was on assignment in Ottawa, Ontario, and was not available until February 1, 2011. When she was reminded at the time that the Employee Assistance Program's (EAP) services were available to help her if she felt she required assistance, she responded that she was already using its services. During the discussions at the meeting, she did not ask for any other support, did not claim she was an alcoholic and did not ask the employer for any accommodation.

[10] Other incidents occurred before Mr. Babakaiff's arrival in Osoyoos, which caused the employer concern with the grievor's suitability to perform the BSO job. A co-worker had reported to Superintendent Alan Cole that he was receiving unsolicited and unwelcome text messages from the grievor seeking a sexual relationship in which he was not interested. This officer was transferred to another team so that he would not have to work with the grievor, who was advised to stop texting him. On another occasion, the grievor contacted Superintendent Cole and asked whether she could search the employer's database to determine if her ex-husband had entered Canada. She was advised that she could not use the employer's database for personal purposes. While it was good that she asked for permission to use the database, it demonstrated a lack of judgement in the employer's opinion to even ask permission. Superintendent Cole recorded those incidents in the grievor's file, and Mr. Babakaiff reviewed them.

[11] Based on all these incidents, and because the grievor's demonstrated performance issues were related to judgement, integrity, adherence to policies and relationships with co-workers, Mr. Babakaiff concluded that nothing could be done by way of further training that would improve her likelihood of successfully completing her probationary period. He drafted his recommendation that she be rejected on probation and forwarded it to the employer's Labour Relations branch for review (Exhibit 3). Labour Relations concurred, and the matter was submitted to Blake Delgaty, Regional Director General, Pacific Region, for approval.

[12] At a briefing from Glyn Lee, District Director, Okanagan Area, Mr. Delgaty posed three questions as part of his evaluation of whether the grievor demonstrated a pattern of behaviour inconsistent with her employment as a BSO. He asked whether the recommendation to reject the grievor on probation was unanimous for the management team, which it was. He then asked if the employer's Labour Relations branch concurred with the recommendation, which it did. Finally, he asked if every

option had been explored to maintain an employee in whom the employer had a significant investment. He questioned whether mentoring, counselling or further training would improve the likelihood that the grievor would successfully complete her probationary period.

[13] Given the amount of training she had received, her disciplinary record over a very brief time, and her demonstrated lack of judgement and wilful disregard for employer policy, it was clear to Mr. Delgaty that the grievor had not demonstrated the integrity and professionalism required of a BSO. Compliance with the employer's "Code of Conduct," including demonstrating these values, is a condition of employment for a BSO. Furthermore, he questioned how the employer and her colleagues could trust her given these demonstrated failures and lack of insight.

[14] Mr. Delgaty agreed that given the grievor's consistent display of unprofessional conduct, further training would have been unlikely to alter and improve it. She had already been paired with a senior BSO at the border and had received several weeks of training. The employer had done all it could to help her succeed. It had been provided with neither a request for accommodation from the grievor nor any information to support such a request. Consequently, Mr. Delgaty approved the proposal that the grievor be released from her employment for failing her probationary period.

[15] The grievor was called to a meeting with Chief Alan Profili and Mr. Babakaiff on March 4, 2011, at which she was advised that she had failed her probationary period and that her employment was being terminated, effective that day. She was accompanied by her union representative, Karen MacGillivary. According to Mr. Babakaiff when asked if she had any questions, the grievor asked if she could be accommodated for her "problem," but she did not provide any elaboration or further detail to support the request.

[16] Earlier that day, she had been sent home from work after a co-worker had reported that she smelled of alcohol and that she might be impaired while on duty. Mr. Babakaiff called her into his office, where she informed him that she had had wine the night before and that she had never consumed alcohol before work. This was the only time that the grievor had smelled of alcohol while on duty according to Mr. Babakaiff.

[17] The grievor did not appear at the hearing to call evidence in support of her claims that she had been wrongly discharged and that the employer had failed to accommodate her. The allegations are contained in the grievance document, which was filed on March 8, 2011. The bargaining agent withdrew its support of the grievance after it was referred to the former Public Service Labour Relations Board (the "former Board") under paragraph 209(1)(*b*) of the *Act* on March 12, 2012. The grievor submitted a response to the former Board's request for particulars on October 16, 2014, in which she claims to have been hospitalized for pancreatitis due to alcohol consumption. She also claimed to have hospital records in support and that she had sought the EAP's services to help her deal with the stress of her marriage breakup and relocation to British Columbia.

[18] 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 Board") to replace 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[19] This matter was set down for hearing in June 2015 but was postponed at the grievor's request due to the death of her father. It was subsequently rescheduled for October 6 to 9, 2015, in Kamloops, British Columbia. The grievor was sent a notice of hearing, which was returned to the Board when it was not collected. The Board confirmed with her on September 25, 2015, at 10:32, via email that the mailing address on the notice was correct, following which it was resent to her, via courier.

[20] On October 6, 2015, a representative of the Board's registry contacted the grievor by telephone at the request of the panel of the Board. At 10:00, a voice mail message was left for her. At 10:49, she contacted the Board and advised it that she had suffered an ankle injury and that she had left a voice mail for the assigned registry officer, although she was unclear as to when that message was left. The registry

representative contacted her again at 10:54 and advised her that although the Board had not granted a postponement of the hearing, it would wait until 13:00 that day to proceed, to allow her time to appear. She advised the registry officer that she was in Vancouver and that she could not drive. When asked for further details, she stated that she had injured her ankle on September 9, 2015. She had been hospitalized from September 13 to October 5, 2015. She left a voice mail advising the assigned registry officer of that fact late in the evening of October 5, 2015, after the Board's Ottawa office had closed for the day.

[21] The panel of the Board took this information into consideration but decided to hear the employer's evidence and argument in the grievor's absence, based on the fact that she was aware of her health issues on September 25, 2015, when she last corresponded with the Board, and chose not to raise them at that time.

III. Summary of the arguments

A. For the employer

[22] As was held in *Tello v. Deputy Head (Correctional Service of Canada),* 2010 PSLRB 134, this Board has no jurisdiction under section 211 of the *PSLRA* in matters related to rejection on probation unless they fall within the parameters set out in section 209. Unless the grievor can establish that the rejection on probation was disguised discipline, a camouflage, a sham or perpetrated in bad faith, this Board has no jurisdiction to review the employer's decision to reject a probationary employee.

[23] The letter of termination (Exhibit 1) clearly indicates that the grievor's termination was administrative, following a review of her suitability to be a BSO. Mr. Delgaty testified that her demonstrated unacceptable behaviours were inconsistent with the employer's "Code of Conduct" and its values. Over time, she violated the employer's policy concerning cellphones in the workplace and its electronic resources policy, allowed others to use her user ID, and was disciplined twice. She shared inappropriate material with co-workers, made unwelcome and inappropriate advances toward a co-worker, resulting in his reassignment, asked if she could access the employer's database for personal use, and contravened an Act she was charged with enforcing at the border. She then compounded that inappropriateness by not reporting the contravention for several days, contrary to the employer's "Code of Conduct." By contravening the drinking-and-driving provisions of the *Criminal Code* and by being

suspended from driving for 90 days, she failed to comply with the terms and conditions of her employment requiring that she maintain a valid driver's licence.

[24] That disregard for employer policy and the lack of judgement and professionalism demonstrated by the grievor rendered her unsuitable for her position. Further training could not have resolved those issues. The probationary period is a time to assess an employee's suitability for a position, and the grievor had not demonstrated that she was suitable. Mr. Delgaty did not take the decision lightly. The employer put a lot of effort and investment into training the grievor, and if further training could have resolved the suitability issue, he would have considered it. However, judgement and professionalism cannot be gained through further training.

[25] It is true that the employer could have disciplined the grievor for her drinking and driving infraction but that it chose not to. This did not render her release from probation disguised discipline or establish that the employer acted in bad faith (*Ricard v. Deputy Head (Canada Border Services Agency)*, 2014 PSLRB 72).

[26] Unless there is evidence that the decision to reject the grievor on probation was disguised disciplinary action, a sham or camouflage, or perpetrated in bad faith, this Board has no jurisdiction. In this case, the only evidence is the employer's uncontradicted evidence, which should be accepted. Just because an employee could be disciplined for culpable behaviour does not mean that the employer cannot chose to reject that employee on probation rather than impose discipline.

[27] In her grievance, the grievor also alleged that the employer failed to accommodate her disability. Both Mr. Babakaiff and Mr. Delgaty testified that she neither sought nor disclosed a need for accommodation. She never raised any issue that would have required accommodation before being advised that she had been rejected on probation. It was a desperate attempt to save her job. Earlier on, she had denied needing any help for alcohol-related issues. She claimed she had no alcohol issues. During the course of her employment, her use of alcohol was discussed twice: once when she reported her driving suspension, and second, on March 4, 2011, the morning of the meeting at which she was notified that her employment was terminated.

[28] Both times, she claimed that she had had wine the night before and that she did not use alcohol before coming to work. Her explanation was simple. There was no

disclosure of any disability. A distinction must be made between an ailment or a problem, and a disability (*Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35). The difference is a matter of control. When the grievor cannot control her use of alcohol, the duty to accommodate is triggered. Just because she uses alcohol and might have overindulged on occasion does not create a disability requiring accommodation.

[29] How is the employer to accommodate an employee in the absence of information supporting the need? It is not sufficient for an employee to say that he or she requires accommodation to establish the legitimate need. There is no *prima facie* case of discrimination before this Board, and there is no basis upon which to take jurisdiction over the allegations related to the employer's alleged failure to accommodate the grievor.

[30] The burden of proof is on the grievor to establish that her rejection on probation was disguised discipline, a camouflage or sham, or perpetrated in bad faith. Furthermore, she also has the burden of proof to establish that on the balance of probabilities the employer was aware of her disability and her need for accommodation. In the absence of any evidence from her, the burden of proof has not been met, and this Board has no jurisdiction, pursuant to section 211 of the *Act*.

IV. Reasons

[31] The employer has established that the grievor was released from her employment while on probation following an assessment of her suitability for continued employment as a BSO. It established reasonable grounds, based on uncontradicted evidence, which supported its assessment that despite a lengthy period of training and being paired with a senior BSO, the grievor demonstrated a lack of professionalism and judgement and a disregard for the employer's policies such as to render her unsuitable for continued employment as a BSO. The fact that she contravened some of the very legislation she was charged with enforcing and then failed to report that contravention demonstrated the type of behaviour that clearly established a lack of judgement that, among other things, made her unsuitable for her position. It also speaks to the honesty she brought to the job, again making her unsuitable for such a position of trust, which Canadians place in BSOs who protect the border.

[32] The employer has discharged its burden of proof, and unless the grievor establishes on the balance of probabilities that her release on probation was improper, I am without jurisdiction. It is clear that, as follows from the *Tello* decision at paragraph 127, the employer's argument is correct that the grievor bears the burden of establishing that the employer rejecting her on probation was disguised discipline, a sham or camouflage, or perpetrated in bad faith:

> *[127] As the grievor was unable to establish that the decision to reject him on probation was arbitrary, he bears the burden of demonstrating that the termination of employment is a "sham" or a "camouflage." As noted by the Federal Court of Appeal in another context (*Dansereau v. Canada (1990)*, [1991] 1 F.C. 444 (CA), at page 462) bad faith cannot be presumed and an employee seeking to provide evidence of bad faith "… has an especially difficult task to perform… "In* McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), an adjudicator noted, at page 14, that, in his view:*
>
> . . .
>
> … if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity…
>
> … It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith … keeping in mind of course that good faith should always be presumed…
>
> . . .

[33] The grievor has not done so.

[34] As to whether the employer failed in its obligation to accommodate the grievor's disability, there is no evidence that she had one. The evidence is that the employer was unaware of a need to accommodate her. She denied having a drinking problem when the matter of her alcohol consumption arose.

[35] The grievor did not rely on the collective agreement's discrimination provision, so I assume that she relied on the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6) to support her claim that the employer is obligated to accommodate her. As stated as follows in *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12:

. . .

> *[102] Section 7 of the* CHRA *provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (subsection 3(1) of the* CHRA*). Section 25 of the* CHRA *defines disability as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.*
>
> *[103] In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a prima* facie case *of discrimination. A* prima facie *case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*O'Malley *at para. 28)). . . .*

. . .

[36] The grievor has not discharged her burden of proof in this respect either. I cannot rely on her response to the demand for particulars as evidence as it forms part of the pleadings in this case and is not evidence. Thus, aside from the fact that I have no jurisdiction to hear the grievance, the grievor has not led any evidence to establish that she has a disability that was not accommodated.

[37] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[38] The grievance is dismissed.

November 24, 2015.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations and Employment Board