**Date:** 20160115

**File:** 566-02-7092
**XR:** 568-02-282

**Citation: 2016 PSLREB 2**

*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

**AMANDEEP MALHI**

Applicant and Grievor

and

**TREASURY BOARD**
**(Department of Employment and Social Development)**

Respondent and Employer

Indexed as
*Malhi v. Treasury Board (Department of Employment and Social Development)*

In the matter of an individual grievance referred to adjudication

**Before:** Catherine Ebbs, a panel of the Public Service Labour Relations and Employment Board

**For the Applicant:** Khadeeja Ahsan, counsel

**For the Respondent:** Zorica Guzina, counsel

Heard at Toronto, Ontario,
March 17 to 19, 2015.

## I. Introduction

[1] Effective July 3, 2009, Amandeep Malhi ("the grievor") started an indeterminate position with Human Resources and Skills Development Canada (now Employment and Social Development Canada; "the employer") as a human resources generalist (classified PE-01). He was unrepresented, meaning that his position was classified in a group that was not represented by a bargaining agent; therefore, he was not a member of any bargaining agent.

[2] In August 2009, the grievor began a leave without pay, granted by the employer, for the care of family.

[3] After the grievor's leave without pay exceeded one year, the employer filled his position indeterminately with another employee. The grievor was given written notice of it on March 2, 2011.

[4] Because his position had been filled, the grievor was entitled to be considered for public service positions in priority for up to one year after the end of his leave without pay. He registered in the "Priority Administration Program". He was not offered another position, and he ceased to be a federal public servant at the end of his priority period, in August 2012.

[5] On January 12, 2012, the grievor filed a grievance against what he alleged was " . . . the Employer's arbitrary and discriminatory decision of unilaterally backfilling [his] indeterminate PE-01 position while [he] was on Leave without Pay for the Care of Family."

[6] The employer denied the grievance at the first level on February 17, 2012. It found that the grievance was out of time and that, in any event, it had acted in compliance with Treasury Board policy. The grievor presented the grievance at the second and final levels of the grievance process, but the employer made no further decisions about it before it was referred to adjudication. (Note: In its second-level response, dated December 2014, as well as its final-level response, dated March 2015, the employer denied the grievance, finding it was both untimely and unfounded.)

[7] The former Public Service Labour Relations Board ("the former Board") received the grievor's notice of reference to adjudication on June 4, 2012. In it, he submitted that that Board had jurisdiction to hear his grievance by virtue of subparagraph

209(1)(*c*)(i) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) because it concerned a decision, in the words of that subparagraph, about the following:

> [A] *demotion or termination of an employee in the core public administration under paragraph 12(1)*(d) *of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)*(e) *of the Act for any reason that does not relate to a breach of discipline or misconduct* . . . .

[8] On June 26, 2012, the employer advised the former Board that it had two objections to the grievance. First, it was of the opinion that the grievance was out of time. Second, it argued that the subject of the grievance was not a matter that could be referred to the former Board. As a result of the employer's timeliness objection, the grievor submitted a request for the former Board to extend the time limit to file a grievance.

[9] Before the hearing, the grievor presented a list of information that he requested that the employer provide to him. A decision was made that his request would be addressed at the outset of the hearing.

[10] The hearing was held from March 17 to 19, 2015.

[11] For the reasons that follow, I order that file 566-02-07092 be closed. The Public Service Labour Relations and Employment Board ("the Board") lacks the jurisdiction to hear and decide the matter on the merits because of the following:

- the grievor's version of events, if assumed to be true, could not lead to a finding that the employer's action constituted a disguised termination under the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*);
- he could not file a grievance about an interpretation of a collective agreement because he is not a member of a bargaining agent; and
- the Board cannot address his discrimination allegation because it lacks jurisdiction to consider his grievance.

[12] I also order that file 568-02-00282 be closed because at the hearing, the employer withdrew its timeliness objection, and as a result, the grievor withdrew his request for an extension of time. I will not address these matters further.

[13] 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

Board to replace the former Board as well as the former Public Service Staffing Tribunal. On November 3, 2014, the *Public Service Labour Relations Board Regulations* (SOR/2005-79) were amended to become the *Public Service Labour Relations Regulations* ("the *Regulations*").

## II. Scope of the hearing

[14] The purpose of the hearing was to hear evidence and argument about four preliminary issues: the grievor's request for the production of information, the employer's timeliness and jurisdiction objections, and the grievor's request for an extension of time. The Board did not consider the merits of the grievance.

[15] I will not address the production requests as I ordered file 568-02-00282 closed for lack of jurisdiction, and the documents requested relate to the merits of the matter and not to the jurisdiction issue. In addition, as stated earlier, the timeliness objection and the extension request were withdrawn.

[16] The final matter was the employer's jurisdiction objection. As stated earlier, the grievor referred the grievance to adjudication under subparagraph 209(1)(*c*)(i) of the *PSLRA*.

[17] The grievor did not allege that the employer actually terminated him under its *FAA* authority. Instead, he argued that its actions constituted a disguised *FAA* termination. The employer argued that it took the actions under the authority of Treasury Board policy and the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) and that there was no termination.

[18] To determine whether the Board had jurisdiction to hear the merits of the case, I considered the following question: If the Board assumed that the grievor's version of events were true, could it conclude that the employer's actions constituted a disguised *FAA* termination?

[19] If the answer were yes, then the Board had jurisdiction and would proceed to receive further evidence and argument to decide the case on the merits.

[20] If the answer were no, then the matter was one for which a referral to the Board under section 209 of the *PSLRA* was not possible, and the file would be closed.

[21] At the hearing, I heard evidence about the grievor's version of events. The parties made a number of objections about the relevance of the evidence being introduced. The employer argued that evidence from the grievor went to the merits of the case and that it needed to introduce evidence to disprove the grievor's allegations. I explained to the parties that when jurisdiction was being decided separately from any review of the merits, I did not need to hear evidence from the employer disproving the grievor's evidence, because at that stage, I was required to assume that all the grievor's evidence was true.

[22] The parties also raised the following three other jurisdictional issues:

- whether the grievor, being unrepresented by a bargaining agent, could present a grievance about an interpretation of a collective agreement;
- whether a grievance about a policy interpretation could be referred to the Board; and
- whether the Board could consider the grievor's discrimination allegation.

## III. The grievor's version of events

[23] The grievor worked for the employer first as a student, after which he was hired as a term employee. Subsequently, in July 2009, he started his indeterminate PE-01 position. He was not a member of any bargaining agent. His supervisor was Nicole Belanger.

[24] In June 2009, the grievor's indeterminate appointment was delayed, preventing him from applying for a promotion. As a result, he sent a letter to the director general, asking for her help, as he had met her previously. The director general was two levels above Ms. Belanger in the managerial hierarchy. He sent Ms. Belanger a copy of this letter.

[25] According to the grievor, Ms. Belanger was angry that he had communicated with her superior. He stated that she told him that this was a career-limiting move. He said that she continued to be dismissive and curt with him, even after he apologized to her.

[26] The grievor stated that, furthermore, before being hired indeterminately, he had

had a conversation with Ms. Belanger, in which she had said that her husband had worked with his kind of people. He was upset because he believed it was a discriminatory reference to his race, which he found offensive, but he did not complain because he was afraid that if he did, he would not be hired.

[27] In August 2009, the grievor applied to Ms. Belanger for leave without pay for the care of family. The employer granted his request. The leave without pay benefit described in article 41 of the agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (expiry date: June 20, 2014; "the collective agreement") was used as a guide.

[28] The grievor started his leave without pay on September 11, 2009, and it was to continue until August 25, 2010. He moved to England and became the sole caregiver of his ailing family member.

[29] At some time before the end of the grievor's first year of leave, Ms. Belanger asked to have his position temporarily filled, but her request was refused. The position was later moved to another area and then was temporarily filled. The grievor believed that at that point, the merit criteria were changed to some that he did not meet. The person who filled the position temporarily was the one who was finally chosen to fill it indeterminately.

[30] On July 21, 2010, Ms. Belanger asked the grievor by email whether he planned to return at the end of his leave, which was August 25, 2010. He replied that he wished to extend the leave as his family member still needed his care. Ms. Belanger helped him prepare the required forms, and the employer subsequently extended the leave until August 26, 2011.

[31] On August 6, 2010, Ms. Belanger requested information from the employer's human resources centre about filling the grievor's position indeterminately after he completed one year of leave. When she communicated with the grievor on August 9, 2010, about his application, she did not tell him that she was looking into replacing him in his position. She also did not tell him about the possible consequences of extending his leave past one year.

[32] The grievor received a standard letter from the employer dated October 8, 2010. It notified him that an employee on leave without pay could be replaced on an

indeterminate basis if the period of leave exceeded one year.

[33] The grievor was aware of this provision, but he believed that the employer would never proceed with this option without consulting with the employee on leave.

[34] On February 16, 2011, Ms. Belanger emailed the grievor, advising him that his position was ready to be filled indeterminately by someone else. He was shocked by the news and responded by email immediately, asking why he had not been told earlier in the process. Ms. Belanger did not reply.

[35] In the grievor's opinion, Ms. Belanger tricked him out of the option of returning to his position, and she ". . . abused the powers and authority vested in her by taking advantage of [him] in [his] most vulnerable of times."

[36] The news about his position being filled threw the grievor into a state of deep anxiety and depression, as he was already in a vulnerable state with the burden of caring for a critically ill family member in a foreign country. He would not have asked for an extension of his leave without pay had he known that he would lose his job. He needed employment because he had loans and was helping his parents with their mortgage.

[37] In a letter dated March 2, 2011, Steve Bullock, a human resources advisor, advised the grievor that his position had indeed been filled indeterminately.

[38] On March 21, 2011, the grievor spoke to Mr. Bullock by phone, who told him there was nothing the grievor could do about the employer's action.

[39] The grievor was a new employee and did not have a bargaining agent representative. He attempted to obtain information from his employer about the next steps. Over the months that followed, he contacted several of the employer's officials, but they either did not respond or did not provide the information he needed.

[40] After receiving legal advice for the first time, the grievor presented a grievance to the first level on January 23, 2012.

[41] On August 12, 2012, the grievor ceased to be a public servant by operation of paragraph 42 of the *PSEA* because he had not received an offer of employment before the end of his priority period.

## IV. Analysis

[42] Only the jurisdiction issue remains to be addressed.

[43] I reiterate that I have considered the grievor's version of events not for the purpose of determining the facts and ruling on the merits but only to determine whether the Board has jurisdiction to hear and decide the grievance on the merits.

[44] The grievor referred his individual grievance to the Board under section 209 of the *PSLRA*. This section defines the scope of jurisdiction within which adjudicators must operate" (*Spencer v. Deputy Head (Department of the Environment),* 2007 PSLRB 123). If the subject of the grievance is not listed in section 209, the Board has no jurisdiction to consider any aspect of the grievance.

[45] Section 209 of the *PSLRA* reads 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.*
>
> *(2) Before referring an individual grievance related to*

> *matters referred to in paragraph (1)*(a)*, the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*
>
> *(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)*(d)*.*

**A. <u>Disguised termination allegation</u>**

[46] As stated at the outset, the question to be answered is the following: Could the grievor's version of events, if assumed to be true, lead to a conclusion that the employer's actions constituted a disguised termination under the *FAA*, thus giving the Board jurisdiction to hear and decide the matter on the merits?

[47] The grievor stated that the Board had jurisdiction because the employer's actions constituted disguised termination under paragraph 12(1)(*d*) or (*e*) of the *FAA* (see subparagraph 209(1)(*c*)(i) of the *PSLRA*).

[48] Paragraphs 12(1)(*d*) and (*e*) of the *FAA* read as follows:

> ***12.*** *(1) . . . every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> . . .
>
> *(*d*) 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 whose performance, in the opinion of the deputy head, is unsatisfactory;*
>
> *(*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 . . . .*

[49] Neither the *PSLRA* nor the *FAA* defines "termination of employment". Black's Law Dictionary, 7th Edition, defines "termination of employment" as "[t]he complete severance of an employer-employee relationship."

[50] In his version of events, the grievor alleged that the employer terminated his employment but that it disguised the termination by taking the following actions:

- replacing the grievor on an indeterminate basis after his leave without pay exceeded one year;

- deciding to replace him without giving him the chance to return to his position, which was against past practice;

- moving his position before his leave without pay extended past one year, changing the criteria of selection, and temporarily filling the position with the candidate who would eventually be placed into the position indeterminately;

- acting in bad faith and with a discriminatory intent; and

- making mistakes in the priority administration period.

[51] Even if I assume that the grievor's version of events is true, I cannot find that a termination is hidden in the employer's actions.

[52] The employer replaced the grievor after one year of his leave without pay. It acted under the authority given to it by section 1.4 of Appendix B of the Treasury Board *Directive on Leave and Special Working Arrangements*, which reads in part as follows: "… a person appointed to the core public administration on leave without pay can only be replaced on an indeterminate basis if the period of leave … exceeds one year." Although he no longer had his original position, he remained a public service employee. This action was not a termination of employment, disguised or otherwise.

[53] After the grievor was replaced, he registered in the Priority Administration Program, which was governed by the *PSEA* and administered by the Public Service Commission, not the employer. Subsection 41(1) of the *PSEA* provides that the grievor had until the end of his leave plus one year to be offered a position in the public service. According to section 42, "A person who is entitled under subsection 41(1) to be appointed to a position and who is not so appointed in the applicable period provided for in that subsection ceases to be an employee at the end of that period." Consequently, since the grievor was unsuccessful in obtaining employment within the public service, he automatically ceased to be an employee of the public service at the end of that period, which was August 12, 2012. The fact that he ceased to be a public service employee at that time was not the employer's decision. It occurred by operation of section 42 of the *PSEA*.

[54] The employer's action started a process that eventually led to the grievor losing his public service employment. However, that is different from finding that the

employer terminated his employment, whether in a disguised way or not. The result of the employer's action was that the grievor remained an employee of the public service but became a priority candidate for a new position. From that point on, the process was not directed by the employer, but rather by the Public Service Commission and the *PSEA*. Finally, when the grievor ceased to be a public servant in August 2012, it was by operation of the *PSEA*.

[55] The actions complained of are related to the employer's authority under Treasury Board policy and to the operation of the *PSEA*. Neither matter can be the subject of a referral to adjudication because neither is found in section 209 of the *PSLRA*.

[56] I further note that section 211 of the *PSLRA* clearly states 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 *. . . .*

[57] The grievor also argued that the employer constructively terminated his employment before the end of the first year of his leave without pay by moving his position and changing the selection criteria so that he could no longer meet them.

[58] Again, even if the employer made changes to the grievor's positon and temporarily filled it, it did not terminate his employment. As the employer stated, even as late as when the grievor referred the matter to adjudication, he was still employed in the public service. In addition, if an allegation of bad faith is made, the Board can examine it only if the subject of the grievance is referable under section 209 of the *PSLRA*.

**B. <u>Other issues related to jurisdiction</u>**

**1. <u>The collective agreement</u>**

[59] The grievor argued that even though he was an unrepresented employee, he was entitled to file a grievance about the terms and conditions in the collective agreement because the employer had applied certain of its articles to his situation. In particular, he alleged that the employer discriminated against him, contrary to article 19 of the

collective agreement.

[60] The employer stated that the grievor was not a member of a bargaining agent and did not have bargaining agent support, which meant that he could not file a grievance about an interpretation of the collective agreement. I agree. While the employer might have referred to certain of its provisions when setting the grievor's terms and conditions of employment, it did not mean that he became a member of the relevant bargaining agent and that he was brought under the protection of the collective agreement (see *Kwong v. Treasury Board (Immigration and Refugee Board)*, 2006 PSLRB 116 at para. 7).

**2. Interpretation of policy**

[61] The employer noted that the Treasury Board *Directive on Leave and Special Working Arrangements* gives it the authority to replace an employee on leave without pay after one year. It submitted that to the extent that this grievance could be characterized as dealing with how it applied the Treasury Board directive, it is not within the jurisdiction of the Board. I agree. The Board's jurisdiction in this case is limited to questions identified in section 209 of the *PSLRA*, which does not include policy interpretation (for example, see *Spencer*).

**3. Discrimination allegation**

[62] The grievor asked the Board to rule on his allegation that the employer discriminated against him, in violation of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[63] Paragraph 226(2)(*a*) of the *PSLRA* provides that the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA*.

[64] However, as was explained in *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 at para. 83, ". . . subsection 226(1) of the *PSLRA* applies only to an adjudicator appointed to hear and determine grievances that have first been found adjudicable under subsection 209(1) of the *PSLRA*." In other words, if the grievance does not meet the threshold determination of falling within a category in subsection 209(1), the discrimination allegation cannot be addressed. There is no stand-alone human rights grievance.

[65] I have determined that there is no matter under section 209 of the *PSLRA* in the

grievance before me. Therefore, I do not have the jurisdiction to address the grievor's discrimination allegation.

## V. Conclusion

[66] As stated earlier, the employer's timeliness objection and the grievor's request for an extension of time were withdrawn.

[67] I find that the Board lacks jurisdiction to hear and decide the grievance because it is about matters for which a reference to adjudication to the Board cannot be made.

[68] I wish to recognize the diligence of counsel for the parties and to thank them for the collegial manner in which they dealt with the challenges of the hearing.

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

*(The Order appears on the next page)*

## VI. Order

[70] I order files 568-02-00282 and 566-02-07092 closed.

January 15, 2016.

**Catherine Ebbs,**
**a panel of the Public Service Labour Relations and Employment Board**