Date: 20160719

File: 566-02-8058

Citation: 2016 PSLREB 63

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

THADDEUS YARNEY

Grievor

and

DEPUTY HEAD
(Department of Health)

Respondent

Indexed as
Yarney v. Deputy Head (Department of Health)

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: Himself

For the Respondent: Karen Clifford, counsel

Heard at Ottawa, Ontario,
November 25, 2015.
(Written submissions filed November 27, 2015).

I. Individual grievance referred to adjudication

[1] The grievor, Dr. Thaddeus Yarney, grieved on November 26, 2012, that a change to his reporting relationship constituted a deployment without his consent. He alleged that this deployment constituted a suspension and a reprisal, continued defamation, and racial harassment and discrimination.

[2] The grievor referred his individual grievance to adjudication on February 1, 2013. He gave notice to the Canadian Human Rights Commission that his grievance raises an issue involving the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1995, c. H-6) with regard to racial discrimination. The Canadian Human Rights Commission notified its intention not to make submissions in this matter.

[3] On May 21, 2013, the Department of Health ("the respondent") objected to the jurisdiction of an adjudicator to hear the grievance. On July 4 and 5, 2013, the grievor's counsel replied to the respondent's objection. The parties were then informed that, usually, issues of jurisdiction have to be raised at the hearing.

[4] 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 Public Service Labour Relations 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; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] On June 30, 2015, the respondent requested that the grievance be dismissed without a hearing for reasons of mootness, *res judicata* (matter already adjudicated), and lack of jurisdiction. The respondent also requested that the grievor provide particulars in support of his grievance. I ordered the grievor to provide particulars.

[6] On August 17, 2015, the grievor, who was no longer represented by counsel, requested to address all remaining issues at the hearing. The same day, the respondent informed the Board that the grievor had not provided the particulars ordered and requested a disclosure order. I ordered the grievor to disclose to the respondent all documents on which he was relying in support of his grievance.

[7] Documents evidentiary in nature were provided to the Board's registry as an attachment to correspondence from the grievor's and the respondent's counsel. These documents do not form part of the record for the purposes of this decision as the respondent did not have an opportunity to challenge their relevance or veracity as the grievor did not appear on the day of the hearing. I have not considered those documents in making my decision and have given instructions to the Board's registry to return them to the grievor and the respondent respectively.

[8] In addition, the grievor regularly failed to communicate in general with the Board on a timely basis or to follow the Board's directions concerning communication with the respondent. On the morning of the hearing, the grievor informed the Board that he would not attend the hearing and requested that his grievance be decided based on the record. The Board informed the grievor that the hearing would proceed with or without him.

II. Summary of the evidence

[9] The grievor has been employed as a scientist at Health Canada since 2002 and has been classified BI-04 and has worked in the Health Products and Food Branch for the entire period. He worked in the Therapeutic Products Directorate (TPD) of that branch, and then, between 2010 and October 2012, he was assigned to the Marketed Health Products Directorate (MHPD). He grieved that the assignment was a deployment without his consent. An adjudicator dismissed his grievance on the basis that the assignment was not a deployment under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; *PSEA*) (*Yarney v. Treasury Board (Department of Health)*, 2013 PSLRB 45).

[10] In October 2012, Dr. Yarney's reporting relationship was changed to reflect that his position had been moved permanently within the MHPD structure due to the respondent's operational requirements. His position number and job description

remained the same. Assessment needs in the TPD had dwindled, and similar work existed in the MHPD.

[11] The respondent uses generic job descriptions to facilitate moving employees when operational requirements demand it. His TPD position was not backfilled while Dr. Yarney was assigned to the MHPD. The respondent considered using its workforce adjustment directive to reduce staff in the TPD but instead chose what it called "the classification option", which, according to the respondent, gives employees the right to file a classification grievance. Dr. Yarney chose not to exercise that right.

[12] Barbara Sabourin has been the director general at Health Canada responsible for the TPD since November 2011. She testified that the BI-04 assessment officers in that directorate, including the grievor, were involved in the assessment process conducted before drugs were authorized for marketing. The TPD's main role was authorizing new drugs, while the MHPD assessed drugs once they were on the market.

[13] In 2011, under the federal government's "Deficit Reduction Action Plan" (DRAP), a new cost-recovery process was put in place under the *User Fees Act* (S.C. 2004, c. 6). If the respondent did not meet its performance standards under that legislation, the income from fees would have been reduced, causing a revenue deficit. When the DRAP was rolled out, the decision was made to protect the review resources. Policy employees were laid off. The directorates were reorganized. Several positions were transferred through "classification action requests", to streamline operations.

[14] The DRAP had two drivers: ongoing operational efficiencies, and meeting performance targets. The respondent was aware that the TPD workload would not increase, as a result of the twice-yearly consultations with manufacturers and of what the scientific literature supported. As of the hearing date, the TPD's workload still had not increased. At the same time, the respondent wanted to improve the MHPD's surveillance of marketed drugs, mainly prescription drugs. It needed a better way to see signals and to take the right action when issues arose with drugs.

[15] The grievor was the only one transferred from one directorate to another in order to meet DRAP targets. The grievor might have been the only employee on assignment to another directorate during the DRAP, but several others were transferred, to meet DRAP targets. A senior science advisor from the policy section was transferred to the clinical review of diabetes drugs by way of a "classification

action request" to change his reporting relationship. Four others were transferred from the regulatory policy area into another unit by way of a "classification action request". Their manager was declared surplus.

[16] The MHPD was created out of the TPD in the early part of this century. Employees were transferred at that time from the TPD to the MHPD through "classification actions". The grievor's position number was transferred from the TPD to the MHPD in the same way in 2012. His MHPD position number is the same as the one he was assigned throughout, that is, "00081278" (before the respondent started using the human resources management system known as PeopleSoft, it had been "HFHD-0872 (HRAD)"). The organization chart submitted as Exhibit 3 confirms his position number. His position in the TPD was never backfilled while he was on assignment at the MHPD, and once the position was transferred to the MHPD, there was no need to backfill it; nor was there a position to backfill any longer.

[17] The grievor was sent a "classification action notice" on October 29, 2012. He never signed it as requested; nor did he file a classification grievance. The respondent did not deploy him to a different position pursuant to the *PSEA*; nor did it intend to. Since he was transferred to the MHPD, no notes have been made in the performance management system of poor or exceptional performance.

[18] According to Ms. Sabourin, the grievor suffered no career damage as he was and is able to apply to all BI-05 appointment processes. Opportunities exist for BI-05 positions in the MHPD and TPD that have generic job descriptions. Ms. Sabourin believes that nothing has precluded or is precluding the grievor from advancing his career even though he is assigned to the MHPD. The merit criteria for assessing candidates for BI-05 positions are identical for each branch. Alternatively, if he merely wanted to change branches, he could have applied for BI-04 positions. Had he done so, then the respondent could have deployed him to a BI-04 position at the same group and level. Nothing precluded or precludes him from participating in employment opportunities within Health Canada; however, he is expected to find opportunities to move himself.

[19] Line Morin-Smith is the manager of the Classification Policy and Oversight Directorate at the Classification Policy Branch of the Treasury Board Secretariat. She has over 20 years' experience in public service classification and is accredited in that

field. The "classification action request" the respondent used in this case (Exhibit 1) was a standard form used by all federal government departments, as was the "classification action notice" that was sent to the grievor (Exhibit 4).

[20] Ms. Morin-Smith testified that those forms were used because a reporting relationship change is a "classification action" and not a staffing action. A deployment is a staffing action. The fact that Dr. Yarney did not sign the "classification action notice" (Exhibit 4) did not preclude the respondent from acting on it. Classification actions can be taken without the position incumbent's consent; the incumbent's agreement is not required. They go ahead with or without the incumbent's signature as it is within management's authority to classify positions and organize the workplace. If Dr. Yarney disagreed with the "classification action", he had the option of filing a classification grievance. An incumbent's signature is required on a staffing action, such as a deployment. The signature on the classification document signifies only that the incumbent is aware of the change. The time limit for filing a classification grievance is 30 days from the date of the notice of the completion of the classification action.

[21] The grievor did not appear at the hearing, and no evidence was led in support of this grievance. He did not inform the Board until two hours before the hearing was due to commence and the panel of the Board, the respondent, and the respondent's witnesses had assembled that he would not appear that morning as he was then without legal counsel. On August 17, 2015, he had advised the Board and the respondent's representative that his former counsel was no longer representing him and that he would be representing himself, and yet on the morning of the hearing, without any notice, at the last minute, he emailed the registry officer assigned to the file and advised her that he would not appear, citing a lack of representation. Furthermore, when given the opportunity to address the employer's written arguments submitted following the hearing, he failed to do so, even after having been given an extension to do so.

III. Summary of the arguments

A. For the respondent

[22] By letter dated July 4, 2013, the grievor's then counsel admitted that an adjudicator had no jurisdiction to deal with the racial discrimination allegations made in the grievance without the support of the grievor's bargaining agent, the Professional

Institute of the Public Service of Canada, which did not support it. For that reason, the Board should not consider that part of the grievance.

[23] The testimony of the respondent's witnesses was uncontradicted. The grievor remained assigned to the same position number throughout since he was appointed to position HFHD-0872. In the public service, an employee is appointed to a position with an associated number. That does not preclude the respondent from moving that assigned number within its organizational structure. There was no intent to deploy the grievor to another position pursuant to the *PSEA*. A deployment under the *PSEA* involves a subjective element, the intent to deploy, and an objective element, compliance with the conditions set out in the legislation and Treasury Board and Public Service Commission guidelines (see *Canada (Attorney General) v. Dawidowski*, [1994] F.C.J. No. 1791 at para. 11 (QL)). In 2012, a change occurred in the grievor's reporting relationship, which was a "classification action." Even if it is considered a reassignment of duties, that would still be within management's prerogative and outside the Board's jurisdiction, pursuant to s. 7 of the *PSLRA*.

[24] There is no evidence that this reporting relationship change negatively impacted the grievor's career. His upward mobility did not depend on whether he was a BI-04 in the TPD or the MHPD. He could have applied to any BI-05 appointment process had he chosen to, in either scenario. If he wanted to change areas of concentration, he could have applied to a BI-04 position and been deployed to it, which would have been a staffing action, and the vacancy created could have been backfilled. In this situation, no vacancy was created in position 00081278, and no backfill was created that could have been staffed.

[25] In a workforce adjustment situation, some employee has to be declared surplus. Often, employees are required to compete for their own job, which creates morale problems in the workplace. For operational reasons, the respondent chose not to do that in this case. It reorganized its operations, and positions were reassigned to different directorates.

[26] The grievor was not left without recourse. According to the respondent, he could have filed a classification grievance, but rather than do that, he filed an individual grievance, which was referred to adjudication under s. 209(1)(c) of the *PSLRA*. In it, he alleged that he had been deployed without his consent.

[27] The grievor has filed numerous grievances over the years concerning his relationship with Dr. Barbara Rotter. He was offered a deployment as part of a without-prejudice settlement to resolve the issues, which he refused. Those issues have no bearing on the situation that existed in October 2012.

[28] The grievor was assigned to a different manager for valid operational requirements. The respondent contends that it was not a deployment. Section 52 of the *PSEA* states that when an employee is deployed, he or she ceases to be the incumbent of one position and becomes the incumbent of another position. This matter has already been grieved, and an adjudicator dealt with it in *Yarney*, 2013 PSLRB 45. For the Board to have jurisdiction over this matter, it would have to have been a deployment that met the definition of "deployment" in the *PSEA*. Section 7 of the *PSLRA* clearly excludes the adjudication of grievances challenging the assignment of duties (see *Dawidowski* and *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12 at paras. 91, 92, and 117).

[29] The entirety of the evidence before the Board supports the fact that the grievor was not deployed under the *PSEA*. The jurisprudence supports the respondent's position. Despite a disclosure order directing the grievor to supply the respondent with any documents he intended to rely on to support his allegation that he had been deployed, none was supplied.

[30] Therefore, according to the respondent, the Board is without jurisdiction to deal with this grievance, and it should be dismissed.

[31] This grievance is not an application under section 43 of the *PSLRA* for a reconsideration of a Board decision based on new evidence. The respondent submits that the grievor is attempting to relitigate two points and that this is vexatious as it cannot lead to any practical result. Furthermore, such attempts are abuses of process and are contrary to the fundamental principle of *res judicata*, which is a doctrine that states that further litigation on the same issue between the same parties is barred. The two points are the following:

(a) though not the focus of this hearing, the grievor attributed the employer's actions to a letter from Dr. Rotter, to whom at one point the grievor reported, which was allegedly defamatory, which was dealt with

by adjudicators on two previous occasions and again appears in the grievor's pleadings and written submissions in this case; and

(b) the alleged deployment, disguised intent to deploy, or disguised deployment of the grievor from his TPD position to the MHPD position.

[32] With respect to point (a), the grievor referred to the letter in his "Grievance Details" as follows:

> *The continued reassignment is imposed as a consequence of my filing of a lawsuit against Dr. Barbara Rotter's defamation by letter dated January 25, 2008, which was the culmination of a long history of maltreatment, including incremental suspensions for up to eight months without cause. This lawsuit was filed only after numerous request/grievances to management for cancellation of Dr. Rotter's letter and all issues pertaining had been ignored.*

[33] Under "corrective action requested" in this grievance, the grievor sought the "… withdrawal and destruction of Dr. Barbara Rotter's letter of January 25, 2008, which continues to remain on my file and [is] an instrument of continued harassment and defamation."

[34] The respondent submits that the grievor's continued reference to the January 25, 2008, letter and in particular his characterization of it as defamatory is an abuse of process and that it cannot lead to any practical result. The January 25, 2008, letter has formed part of other grievances before adjudicators, as follows:

(i) For his grievance bearing file number 566-02-2862, he based part of it on Dr. Rotter's "… insincere and disturbing assertions in her letter of January 25, 2008" and sought as corrective action "[t]o be reimbursed in full leave entitlements used as a consequence of the imposition of Dr. Rotter's letter of January 25, 2008". In *Yarney v. Deputy Head (Department of Health)*, 2011 PSLRB 112, Adjudicator Potter addressed the letter and noted that the grievor did not have the support of his bargaining agent, that the grievance could not fall under s. 209(1)(a) of the *PSLRA*, and that there was no foundation for referring that issue under s. 209(1)(b). The grievance was dismissed.

(ii) In his grievance bearing file number 566-02-5334, the grievor made an identical allegation about the letter as in this grievance and sought the same corrective action with respect to the letter as in this grievance.

(iii) In his grievance bearing file number 566-02-6318, the grievor raised the same allegations about the letter as in this grievance and sought the same corrective action with respect to the letter as in this grievance.

[35] The last two grievances were dismissed in *Yarney*, 2013 PSLRB 45, which was not subject to judicial review.

[36] Further, the alleged defamatory nature of the letter formed the basis for a lawsuit in the Ontario Superior Court of Justice, File 10-47465, by which the grievor claimed damages for defamation in the amount of $500 000 against Dr. Rotter as well as additional damages. An order from that Court, dated April 19, 2011, dismissed that lawsuit (see *Yarney v. Rotter*, Ontario Superior Court of Justice File No. 10-47465).

[37] The respondent submits that it is appropriate to also consider the basic principle of *res judicata*. In the labour relations context, in which precisely the same grievance has been brought a second time by the same party or grievor, adjudicators have applied that doctrine and have held that the second grievance on the same issue is not adjudicable (see Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at para. 1:3100).

[38] The grievor already litigated the defamatory nature of the January 25, 2008, letter; that matter was dismissed. He also already grieved the letter's contents in three grievances and sought to have it removed from his file. They also were dismissed. In addition, in *Yarney*, 2011 PSLRB 112, the adjudicator clearly indicated that the letter was not "disciplinary" and thus could not have been referred to adjudication under s. 209(1)(b) of the *PSLRA*. He also ruled that without the bargaining agent's support, there was no basis for considering the letter under s. 209(1)(a). In *Yarney*, 2013 PSLRB 45, the grievances, which were referred under s. 209(1)(c), were also dismissed.

[39] The grievor should be precluded from any further attempt to refer to adjudication issues related to the January 25, 2008, letter, and the Board should issue a declaration that referring to the letter was vexatious. The respondent respectfully

submits that strong language from the panel is required to prevent an abuse of process in that respect and to deter the grievor from raising this issue again.

[40] With respect to point (b), the grievor's alleged deployment, disguised intent to deploy, or disguised deployment from his TPD position to the MHPD position, this point was raised in the grievances in files 566-02-5004, 5334, and 6318, which were dealt with in *Yarney*, 2013 PSLRB 45. When the adjudicator rendered that decision, the grievor was on assignment in the MHPD. After that assignment ended, in 2012, his position had its reporting relationship changed to the MHPD. This grievance refers to that same action and states that the reassignment "… constitutes disguised intent to deploy and disguised deployment without consent".

[41] The respondent submits that the adjudicator's specific finding in *Yarney*, 2013 PSLRB 45, was that absent a change to the position number, it was clear that no deployment took place. Since no material change in circumstance has occurred between that ruling and this grievance, and significantly, since the grievor has maintained the same position number, he is simply attempting to relitigate the same issue, which the respondent submits is an abuse of process.

[42] Significantly, the grievor provided no evidence of a deployment and no evidence of a position change. In addition, the adjudicator in *Yarney*, 2013 PSLRB 45 ruled that the concepts of "disguised deployment" or "*de facto* deployment" ought to be rejected because s. 7 of the *PSLRA* precludes an adjudicator from examining employee complaints about the assignment of duties. He commented as follows at paragraph 18:

> *[18] … If the grievor were right in his argument that an adjudicator could take jurisdiction pursuant to subparagraph 209(1)*(c)*(ii) over a "disguised deployment," such as the one about which he complains, the adjudicator would inevitably be called upon to trespass into that forbidden territory.*

[43] Again, the respondent submits that the grievor is attempting to relitigate that issue, which is vexatious and an abuse of process.

[44] The grievor should be precluded from any further attempt to refer to adjudication any deployment issues unless and until his position number changes. He is abusing the adjudicative process. The respondent respectfully submits that the grievor should be precluded from raising any further reference to disguised

deployment as the authorities cited indicate that it did not occur. Accordingly, the respondent requests that the Board issue a declaration that all references to disguised intent to deploy and to disguised deployment were vexatious. The respondent respectfully submits that strong language from the Board is required to prevent an abuse of process and to deter the grievor from raising this issue again.

B. For the grievor

[45] As stated earlier in this decision, the grievor chose not to appear or to provide an argument to support his case and requested that the matter be decided on the basis of written submissions he had previously filed. He also failed to respond to the respondent's request that he be deemed a vexatious litigant within the time frames specified by the Board despite having been provided with a copy of the respondent's written submission on the matter. Despite being given an extension to January 15, 2016, to file written submissions in response to the respondent's request that his grievance be declared vexatious, he did not file any.

IV. Reasons

[46] This grievance must be dismissed as I am without jurisdiction pursuant to s. 7 of the *PSLRA* to deal with any matter falling within management's rights to organize its workplace and assign duties:

> ***7*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.*

[47] If I am wrong in my assessment of my jurisdiction in this matter, this grievance ought to be dismissed for the reason that the grievor failed to meet his burden of persuasion and that he abandoned his grievance by failing to attend the hearing and to reply to the respondent's written submissions as requested by the Board.

[48] This matter is without a doubt one that adjudicators have already dealt with, and they have found the same result. The respondent's actions did not meet the definition of a deployment under the *PSEA*, as set out in *Dawidowski* or *Taticek*. It had no intent to deploy the grievor; nor did its actions meet the definition of "deployment"

in the *PSEA*. Therefore, contrary to the assertions of the grievor, his consent to the transfer of his position was not required.

[49] Furthermore, based on a reading of the grievor's pleadings, this grievance attempts to resurrect the events dealt with in previous grievances filed by the grievor that the adjudicators dealt with in *Yarney*, 2011 PSLRB 112 (files 566-02-1991 to 1995 and 2862), and *Yarney*, 2013 PSLRB 45 (files 566-02-5004, 5334, and 6318), in the guise of new allegations. In total, including the file before me, he has sought to pursue these same matters in no less than nine grievances. Clearly, the principle of *res judicata* applies in the absence of anything new that would have given rise to the most recent grievance, and the grievance before me is not adjudicable (see Brown & Beatty, at para. 1:3100).

[50] I take seriously the respondent's request that the reference to adjudication be deemed vexatious. In addition, the grievor's continued attempts to litigate Dr. Rotter's letter as defamatory, and he has continued his attempt to relitigate his allegation that he was deployed without his consent despite the decision of an adjudicator to the contrary, place an onerous burden not only on the respondent but on the Board. Add to that his failure to appear at the hearing and to respond to the Board's requests to address the concerns he raised and his refusal to communicate in general with the Board on a timely basis or to follow the Board's directions concerning communication with the respondent. All that has resulted in an onerous burden being placed not only on the respondent but also on the Board.

[51] Based on the relitigation of the same issues and on how the grievor has conducted himself throughout this file, I conclude that he has acted frivolously and that his reference to adjudication is vexatious. If he truly intended to pursue this matter before the Board, he would have respected the deadlines the Board set for replying to correspondence, he would have appeared as the Board required at the hearing, he would have filed submissions about the respondent's request that this reference to adjudication be declared vexatious, and he would have complied with the Board's disclosure order.

[52] Furthermore, an attempt to relitigate matters that have already been adjudicated by adjudicators and the Ontario courts, and dismissed, and that are *res judicata* cannot be permitted to proceed in the interests of the respondent, the public,

and the proper and efficient administration of justice. Such an attempt is vexatious and a waste of valuable respondent and Board resources.

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

(The Order appears on the next page)

V. Order

[54] The grievance is dismissed.

[55] The reference to adjudication is declared vexatious, and the grievor is barred henceforward from referring any further grievances related to Dr. Rotter's January 25, 2008, letter to him or to his alleged deployment to the MHPD before and including October 12, 2012, to adjudication without first seeking the approval of the Board.

July 19, 2016.

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