

Date: 20170830

File: 566-02-11430

Citation: 2017 FPSLREB 24

*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

LORETTA THOMAS-KOTEVICH

Grievor

and

**TREASURY BOARD
(DEPARTMENT OF EMPLOYMENT AND SOCIAL DEVELOPMENT)**

Respondent

Indexed as

*Thomas-Kotevich v. Treasury Board (Department of Employment and Social
Development)*

In the matter of an individual grievance referred to adjudication and an application to add a referral under section 209(1)(b) of the *Federal Public Sector Labour Relations Act*

Before: Catherine Ebbs, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Tony Jones, employment relations officer

For the Respondent: Sebastien Chouinard, analyst

Decided on the basis of written submissions
filed November 9, 2015, and January 7 and 15, 2016.

REASONS FOR DECISION

I. Introduction

[1] The grievor, Loretta Thomas-Kotevich, was hired as a medical adjudicator in the Processing Payment Services Branch - Disability Processing, Service Canada, in Chatham, Ontario, on January 6, 2014. She was subject to a 12-month probationary period. The respondent, Service Canada, ended her employment on February 14, 2014.

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act* and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* (“the Act”) and the *Federal Public Sector Labour Relations Regulations* (“the Regulations”).

[3] On August 7, 2015, the Professional Institute of the Public Service of Canada (PIPSC) provided the Board with a “Form 20 - Notice of Reference to Adjudication of an Individual Grievance” pursuant to s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*). The Form 20 stated that the provision of the collective agreement that is the subject of the grievance is article 43 of the Health Services Group collective agreement, which is the “no discrimination” clause.

[4] At the same time, the PIPSC filed a “Form 24 - Notice to the Canadian Human Rights Commission” alleging that the grievor’s termination constituted discrimination on the basis of age under s. 7 of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6).

[5] On November 2, 2015, Tony Jones, a PIPSC employment relations officer, sent the Board correspondence that included the following:

Please be advised that the Professional Institute of the Public Service of Canada (“PIPSC”) is withdrawing its’ [sic] support from the above-noted grievance. As this matter involves a termination of employment and was referred to adjudication in part under s. 209(1)(b) of the Public Service Labour Relations Act, it is our understanding that Ms. Thomas-Kotevich may proceed to adjudication without the support of PIPSC. As such, all future correspondence should be directed

to her attention with respect of [sic] this matter.

[6] Later the same day, Mr. Jones advised the Board that “[t]here appears to be some confusion regarding the referral of this matter to adjudication.” He requested that the Board “... keep this file open for the time being...”.

[7] On November 9, 2015, the Board received written submissions from Mr. Jones requesting that it allow the reference to adjudication to also be brought under s. 209(1)(b) of the *FPSLRA*.

[8] On January 7, 2016, the Board received correspondence from Sebastien Chouinard, analyst, on behalf of the respondent, which opposes the request.

[9] In the event that the Board grants the PIPSC’s request, the respondent requests that the grievance be dismissed without a hearing on the basis that the Board has no jurisdiction to hear the matter under s. 209 of the *FPSLRA*. In the alternative, the respondent requests that the Board deal with the jurisdiction issue as a preliminary matter.

[10] For the following reasons, I grant PIPSC’s request to amend the reference to adjudication to include a notice of reference to adjudication of a grievance under s. 209(1)(b) of the *FPSLRA*, namely, disciplinary action resulting in termination. And I deny the respondent’s request to dispose of this grievance without a hearing. The matter will be scheduled for hearing. Once the Board has heard all the evidence, it will determine whether it has jurisdiction.

II. Issues and analysis

A. Should the PIPSC’s request to amend the reference to adjudication be granted?

[11] In its November 9, 2015, submissions, the PIPSC stated, in part, as follows:

Throughout the grievance process, the Institute represented Ms. Thomas-Kovetich. On her behalf the Institute advanced arguments that the rejection on probation was a form of disguised discipline and discriminatory on the basis of the Canadian Human Rights Act. It was always our intent, and the intent of Ms. Thomas-Kovetich, to refer this matter under both s. 209(1)(a) and s. 209(1)(b). However, through an error/omission on my part, I forgot to include a Form 21 as part of the materials to refer this matter to the Board....

[12] The respondent argues that the PIPSC clearly withdrew representation and therefore that it should not be allowed to correct “an administrative error”.

[13] While it appears that the PIPSC sought to withdraw its representation in its November 2, 2015, correspondence, I am satisfied that the purported withdrawal was contingent on the grievor being able to continue to have her matter adjudicated by the Board pursuant to s. 209(1)(b) of the *FPSLRA*. Once it was brought to Mr. Jones’ attention that the PIPSC had not included a Form 21 (“Notice of Reference to Adjudication of an Individual Grievance” pursuant to subsection 209(1)(b) of the *FPSLRA*) in its initial correspondence to the Board, he immediately advised the Board that he needed to look into the matter further. His later correspondence on this matter makes it unequivocally clear to me that the PIPSC has not withdrawn its representation.

[14] Given Mr. Jones’ admission outlined in his November 9, 2015, submissions, his position that during the grievance process the PIPSC argued on the grievor’s behalf that her termination constituted disguised discipline, and having reviewed the grievor’s written submissions during the grievance process alleging bad faith and discrimination related to the termination, I find as a fact that the referral to adjudication was to have been brought under ss. 209(1)(a) and (b) of the *FPSLRA*.

[15] Section 241 of the *PSLRA* provides that no proceeding under it is invalid by reason only of a defect in form or a technical irregularity (see, for example, *Dumont v. Public Service Alliance of Canada*, 2008 PSLRB 70 at para. 38). Given the evidence in this case, I find that the absence of a referral under s. 209(1)(b) of the *FPSLRA* was clearly an administrative error.

[16] Accordingly, I grant the PIPSC’s request to amend the referral to adjudication of this grievance to include a reference to adjudication under s. 209(1)(b) of the *FPSLRA*.

B. Should the respondent’s requests be granted?

[17] The respondent submits that the Board has no jurisdiction to hear this grievance. Since the grievor’s probationary employment was terminated under s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), a reference to adjudication under s. 209 of the *FPSLRA* is precluded. Section 211 of the *FPSLRA* provides that a termination under the *PSEA* cannot be referred to adjudication.

The respondent relies on *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, in support of its position.

[18] I note at the outset that the decision in *Tello* that the Public Service Labour Relations Board did not have jurisdiction to hear the grievance was made after a full hearing and a review of all the evidence.

[19] The jurisprudence is well settled that the Board does have jurisdiction to determine whether the employer acted in a contrived reliance on the *PSEA* and whether the basis for a termination was not employment related. While the onus will be on the grievor to establish that such a contrived reliance on the *PSEA* took place or that the rejection on probation was disguised discipline, a sham, or a camouflage or was done in bad faith, she has alleged that the respondent acted in bad faith and that it discriminated against her on the basis of age.

[20] The Board will require a full oral hearing to determine whether it has jurisdiction with respect to this grievance.

[21] Accordingly, the respondent's requests to dismiss the grievance without a hearing or, in the alternative, to determine the jurisdictional issue as a preliminary matter are denied.

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

(The Order appears on the next page)

III. Order

[23] I grant the PIPSC's request. The reference to adjudication shall be amended to include a notice of reference to adjudication of a grievance under s. 209(1)(b) of the *FPSLRA*, namely, disciplinary action resulting in termination.

[24] I deny the respondent's requests to dispose of this file without a hearing or, in the alternative, to deal with the issue of jurisdiction as a preliminary matter.

[25] File 566-02-11430 shall be scheduled for hearing. The Board will determine the issue of its jurisdiction following a full oral hearing of the grievance.

August 30, 2017.

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