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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

MORRIS KLOS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Klos v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Pierre-Marc Champagne, counsel

Decided on the basis of written submissions,
filed October 20 and November 7, 2017.

Procedural history

[1] On December 2, 2016, Morris Klos ("the grievor") referred a grievance to the Public Service Labour Relations and Employment Board, now the Federal Public Sector Labour Relations and Employment Board ("the Board"), under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), now the *Federal Public Sector Labour Relations Act* ("the *Act*"). The grievance, dated July 18, 2016, was against the Correctional Service of Canada (CSC), one of the departments for which the Treasury Board is the employer ("the respondent"). The Manager, Case Management Services, closed the referral file on December 6, 2016, because the grievance was not a disciplinary matter (as a referral under s. 209(1)(b) would indicate), but rather an interpretation grievance, for which the support of the bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN; "the bargaining agent"), is required under the *Act*. The grievor did not have the support of his bargaining agent for the referral to adjudication.

[2] The grievor applied for judicial review of this decision before the Federal Court of Appeal (FCA). The Court granted the application on September 12, 2017 (*Klos v. Attorney General of Canada*, unreported, docket no. A-1-17, 20170912). The grievor's referral to adjudication was remitted to the Board for redetermination. The Board is to rule on whether it possesses jurisdiction to hear the grievance of July 18, 2016, after affording the parties the opportunity to make representations on the issue. The Board must issue its decision within 30 days of receiving the parties' representations.

[3] Following that decision, the Board invited representations from the parties on the jurisdictional issue according to the following schedule:

- The grievor was to provide his submissions to the Board and provide a copy to the respondent by no later than October 5, 2017.
- The respondent was to provide its submissions to the Board and provide a copy to the grievor by no later than October 20, 2017.
- The grievor was to submit any rebuttal to the Board and provide a copy to the respondent by no later than October 30, 2017.

[4] The grievor did not submit any representations by October 5. The respondent's submissions were received on October 20, 2017. Although the grievor's rebuttal

was dated October 30, 2017, the Board only received it on November 7, 2017. Along with his written submissions, the grievor submitted several attachments. The employer did not object to the submission of these documents, which I have reviewed and considered in rendering this decision.

Grievance at issue

[5] The grievance that was referred to adjudication was sent to the Warden of Mission Institution on July 18, 2016, where the grievor worked as a correctional officer, classified CX-2 (at the time the grievance was filed, he was on long-term leave without pay). Its introductory paragraph reads as follows:

> *As a loyal Correctional Service Canada employee I write to initiate a grievance arising from occurrences or matters which have affected my terms and conditions of employment in accordance with section 208(1)(b) of the* Public Service Labour Relations Act*, S.C. 2003, c.22. s. 2 regarding unfair labour practises* [sic] *resulting in failure to accommodate a physical disability (cardiac) under the* Canadian Human Rights Act*, procedural unfairness, and miscarriage of natural justice including the right to be heard.*

[6] Following this paragraph, the grievor detailed the following alleged facts:

- He had been hospitalized a number of times due to "work related cardiac stress responses" either from the workplace or following workplace meetings. After reporting workplace bullying and abuse, he was subjected in August 2013 to discipline and a financial penalty.

- In December 2013, the grievor was assaulted by a fellow employee. He was subject to discipline a few days after that, which was later rescinded. However, in October 2014, he was again subject to discipline and received another financial penalty.

- In December 2014, his physician ordered that he stop working because of his cardiac condition. In April 2015, the grievor and the CSC agreed to a gradual return to work. Investigation interviews concerning the disciplinary matters resumed, which led to more cardiac incidents.

- The CSC then refused to hold further interviews and asked the grievor to prepare his responses in writing. He considers that unpaid work

> and grieves being denied the opportunity to make oral representations. He also grieves the fact that the employer has not implemented the gradual return to work.

[7] As remedy, the grievor asked for the following in his grievance:

> *On principles of natural justice and procedural fairness I am seeking to exercise my right to be heard in the investigation process and to be accommodated according to the limitations of my cardiac condition, and request immediate cessation of Employer reprisal for submitting a grievance(s).* [sic]

[8] On October 12, 2016, the CSC responded at the second level of the grievance process, stating that the grievor was entitled to be paid for attending the investigation meetings (he was still on leave without pay) (Exhibit E to the grievor's affidavit dated September 6, 2017, tab 14 in the grievor's written submissions). The CSC also stated the following on the gradual return to work:

> …
>
> *In your grievance presentation you have focused on the refusal of the employer to let you come back to work under Gradated Return to Work. Over the course of two years, management has tried to facilitate a safe and gradual return to work. As late as April 28 of this year we directly contacted your physician, Dr. … to facilitate a gradual return to work, only to learn that you did not give him authorization to communicate with us. This has been a significant road block [sic] in attempting to acquire adequate accommodations for your condition. The employer has always intended to implement a gradual return to work with you, but has been unable to do so due to your inability to provide the employer with the necessary information.*
>
> …

[9] In its response, the CSC added that on November 24, 2014, the grievor had withdrawn grievances he had filed against disciplinary measures that were imposed in 2013 and 2014. It is unclear which disciplinary measures were grieved and whether all grievances against disciplinary measures were withdrawn.

[10] On referring the grievance to adjudication, the grievor added the following sentence to his application: "With this application, I, Morris Klos, the undersigned, retract any prior statement that may be interpreted as giving rise to an issue under the *Canadian Human Rights Act*."

Respondent's submissions

[11] The respondent contends that the true nature of the grievance clearly relates to the interpretation of the collective agreement, which requires the bargaining agent to represent the grievor, as stated in s. 209(2) of the *Act*.

[12] The grievance dated July 18, 2016, deals with the employer's failure to accommodate a physical disability (a cardiac condition), procedural fairness in the investigation of disciplinary matters, and a miscarriage of justice.

[13] The respondent argues that grieving a failure to accommodate is in fact related to the interpretation of the collective agreement, which includes a no-discrimination clause.

[14] The grievor does refer to disciplinary matters in his grievance, but they occurred in 2013 and 2014, and they would have had to be grieved in a timely fashion.

[15] The grievor was terminated on September 20, 2016. He did not grieve his termination. The July 18, 2016, grievance is unrelated to the termination.

Grievor's rebuttal

[16] The grievor submits that the grievance was referred to adjudication under s. 209(1)(b) of the *Act*, and therefore, the Board does have jurisdiction. He states the following at paragraph 12 of his submissions:

> *… the true nature of the grievance pertains to procedural unfairness, specifically failure to uphold a written promise to the Grievor by engagement in disciplinary action contrary to physician orders not only jeopardizing the safety of the Grievor, but in fact, causing harm as noted in medical documents.*

[17] In fact, according to the grievor in his submissions, the termination on September 20, 2016, confirmed "the grieved disciplinary action". In his referral to adjudication, he specifically retracts "… any prior statement that may be interpreted as giving rise to an issue under the *Canadian Human Rights Act*." Therefore, he argues, the grievance cannot be seen as relating to the collective agreement under the no-discrimination clause. Rather, he grieves the fact that he was ordered to perform duties, without pay, under the threat of discipline.

[18] When the grievor attempted to obtain a restraining order against the employer in the Supreme Court of British Columbia "… subsequent to a third work related cardiac medical event which caused ambulance hospitalization from the workplace …", as noted in his submissions, counsel for the Attorney General of Canada advised him that the appropriate forum for the matter was the grievance process.

[19] The grievor adds that since he has ceased being a member of the bargaining agent, he does not need their support to come before the Board. He invokes in this regard s. 212 of the *Act*.

[20] The grievor concludes his submissions as follows: "I respectfully emphasize that in spite of the Employer's position that this Board lacks jurisdiction, it has offered no plausible alternative."

Reasons

[21] The FCA remitted to the Board the grievance of July 18, 2016, for it to determine whether it has jurisdiction to hear that grievance.

[22] The scope of the Board's jurisdiction to hear a grievance is defined in s. 209 of the *Act*. The provisions relevant to this grievance read as follows:

> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *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 ….*
> >
> > …
>
> ***(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.*

[23] The grievance was properly presented to the CSC under s. 208(1)(b) of the *Act*, which states as follows:

> ***208 (1)*** *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> …
>
> ***(b)*** *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[24] When counsel for the Attorney General of Canada opposed the petition before the Supreme Court of British Columbia and argued that the proper forum was the grievance process, this was simply a restatement of s. 236 of the *Act*, which reads as follows:

> ***236 (1)*** *The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.*
>
> ***(2)*** *Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.*
>
> …

[25] The grievance process is the only avenue to dispute terms and conditions of employment for federal public service employees. However, the right to grieve those terms and conditions does not automatically give rise to a right to be heard by this Board. As stated earlier, the Board's jurisdiction is limited by s. 209 of the *Act*. Despite the grievor's submissions, I have not been convinced that his grievance concerns disguised discipline. Rather, it concerns the way the employer managed the investigation process into disciplinary issues as well as the grievor's gradual return to work. The disciplinary issues gave rise to disciplinary measures. It is unclear from the exhibits filed which disciplinary measures were grieved, and which discipline grievances were later withdrawn. What is clear, however, is that the July 18, 2016, grievance concerns accommodation and process, not discipline. While the grievance provides some information regarding previous discipline imposed, it does not state that a disciplinary measure is being grieved, nor does it ask for any disciplinary measure to be reversed. Rather, the grievance details the alleged mishandling of the investigation process and the failure to facilitate the grievor's return to work.

[26] The procedural handling of the investigation process, and the alleged lack of accommodation for the investigation and the return to work, are not disciplinary

matters. They were grieved on the basis of discrimination and procedural unfairness in the initial grievance and were never presented as disguised discipline. Both the introductory paragraph and the remedies sought confirm the fact that the grievor is seeking redress for what he considers procedural defects and discriminatory actions by the employer; but no disciplinary action has been alleged.

[27] Without any disciplinary action, as the respondent states, the alleged discrimination and the handling of the investigation process could come before the Board only by being linked to the collective agreement, with the bargaining agent's support. The fact that the grievor has ceased to be a member of the bargaining agent is of no importance. The bargaining agent's responsibility for representing the members of the bargaining unit in the context of a grievance relating to the collective agreement is independent of union membership; the obligation exists towards all members of the bargaining unit. Section 212 of the *Act*, which allows for representation by any employee organization in a case where an employee is not represented by a bargaining agent, does not apply in this case.

[28] Only when he referred the grievance to adjudication did the grievor allege that there had been disguised discipline. In so doing, the grievor has changed the fundamental nature of the grievance, contrary to the ruling in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.). He cannot add to the grievance of July 18 or change its nature. In his submissions, he adds the termination of September 20, 2016, to the grounds of the grievance as further illustrating disciplinary intent, and he asks for reinstatement as a remedy. No evidence was presented to suggest that the termination was ever part of the July 18, 2016, grievance. The grievance as originally presented was not against disciplinary measures nor disguised discipline. It was against a failure to accommodate a physical ailment in the context of an investigation and return to work, as shown by both its introductory paragraph and the remedies sought.

[29] Therefore, I conclude that the Board is without jurisdiction to hear the July 18, 2016, grievance.

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

(The Order appears on the next page)

Order

[31] The grievance is dismissed for lack of jurisdiction.

November 29, 2017.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board