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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MICHAEL WYBORN

Applicant

and

THE PARKS CANADA AGENCY

Employer

Before: [Guy Giguère, Deputy Chairperson](#)

For the Applicant: [Paul Taylor, Public Service Alliance of Canada](#)

For the Employer: [Richard Fader and Mala Khanna, Counsel](#)

Heard at Kingston, Ontario,
August 1, 2001.

DECISION

[1] Mr. Wyborn, who was an Island Attendant classified at the ELE-02 subgroup and level (GL group) at the St. Lawrence Islands National Park, was dismissed for theft on October 6, 1999. On March 27, 2000, Mr. Wyborn grieved his discharge, requesting to be reinstated into his position.

[2] On July 13, 2001, Mr. Taylor wrote to the Board to apply under section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* (Board's Regulations) for an extension of the time limits in Mr. Wyborn's grievance on his discharge. Mr. Taylor explained that the employer had indicated during the grievance procedure that it might consider Mr. Wyborn's grievance to be untimely. Mr. Fader wrote back to the Board on July 23, 2001 that it was the position of the employer that Mr. Wyborn's grievance was untimely and that the employer opposed the grievor's application to extend the time limits.

[3] At the outset of the hearing I informed the parties that the hearing would deal solely with the grievor's request for an extension of time. Following a decision on the request for an extension of time, Mr. Wyborn's grievance would be either heard on its merits at adjudication or, if the application was denied, the grievance would be dismissed as being untimely.

Evidence

[4] On September 10, 1999, Mr. Wyborn was suspended without pay by the employer pending the outcome of an investigation into allegations that he was involved in thefts of cash belonging to the Parks Canada Agency (Parks Canada) from self-registration vaults at islands under his responsibility. On September 23, 1999, Mr. Wyborn attended with a union representative, Kathleen Burtch, a meeting with Larry Harbidge, Acting Superintendent, St. Lawrence Islands National Park, and Marian Stranak, Human Resources, Eastern Ontario Field Unit, Parks Canada (Exhibit E-3). Mr. Harbidge informed Mr. Wyborn that the investigation had been completed and had concluded that Mr. Wyborn "stole money from the Park". Mr. Wyborn was given an opportunity to explain his version of the events. Ms. Burtch asked Mr. Harbidge about the Ontario Provincial Police (OPP) criminal charges against Mr. Wyborn. Mr. Harbidge answered: "We have no control over any OPP charges. Our disciplinary action is separate. Can be up to and including release from duty." Mr. Harbidge concluded by saying that if Mr. Wyborn considered resigning, he should consult with his union first and that Parks Canada would accept his resignation.

[5] On September 27, 1999, Mr. Wyborn grieved his suspension of September 10, 1999 (Exhibit E-2). On October 6, 1999, Mr. Wyborn attended with Bud Andress, a union representative, a meeting with Mr. Harbidge and Ms. Stranak. Mr. Wyborn was informed by the employer that his employment was terminated and a letter of termination was given to him (Exhibit E-4). The letter of termination ended with this notice:

In accordance with Section 91(1) of the Public Service Staff Relations Act and your Collective Agreement, you may present a grievance against my decision within twenty-five (25) days of receipt of this letter.

[6] At the end of the meeting, Mr. Harbidge also concluded by telling Mr. Wyborn “You have 25 days to grieve this action and I imagine you will be talking with Bud sometime after this meeting” (Exhibit 5).

[7] Mr. Wyborn testified that even if the employer had told him that he could file a grievance within 25 days, he did not do so because he was waiting for the OPP to contact him. He stated that within a week and a half he was contacted, as he received a summons to appear in court for the criminal proceedings at the beginning of November 1999. The proceedings were delayed until February 11, 2000, where he learned that the criminal charges against him were dropped. Mr. Wyborn declared that he then went to see Mr. Andress to file a grievance. Mr. Wyborn testified that Mr. Andress told him that it was too late to file a grievance but that he would do it anyway to see how it would go. However, Mr. Wyborn explained that Mr. Andress waited until March 27, 2000 to file the grievance which Mr. Wyborn signed on that day.

[8] Mr. Wyborn testified that he assumed that the criminal court proceedings and his dismissal were all part of the same process. He stated that he waited until he was exonerated and then he thought that he could grieve, not thinking of the 25 days mentioned to him in October 1999. Mr. Wyborn explained that he had suffered a loss of memory for a period of time in 1992 as a result of a head injury suffered in a car accident and that it still affected his judgement and attention span. As a result of this accident, Mr. Wyborn lost his driver's licence and the employer wanted to put him on leave without pay. However, Mr. Wyborn grieved that decision and, after going to adjudication, he was back at work at Parks Canada in 1994.

[9] On May 17, 2000, Mr. Wyborn attended with Mr. Andress a meeting with Doug Stewart, a Field Unit Superintendent, and Michael Largy, at the time a National Labour Relations Advisor at Parks Canada. The purpose of the meeting was to determine if any new information was available for the employer to consider in relation to Mr. Wyborn's grievance of March 27, 2000.

[10] Mr. Largy testified that he asked Mr. Wyborn why he had not grieved his termination of employment within the timeframe indicated in the letter of termination. Mr. Wyborn's response was: "The collective agreement is shit. What was important was the OPP prosecution; the 25 days are not important. What's important is the prosecution."

[11] Mr. Largy explained that his notes of the meeting (Exhibit E-6) contained a sanitized version of what Mr. Wyborn said at the meeting. This is why he wrote: "Mr. Wyborn stated that the grievance procedures were irrelevant and that all that was important was the criminal charge laid by the province." Mr. Largy testified that he also asked Mr. Andress about the timeliness of the grievance. Mr. Andress replied that he was not qualified to speak on this issue but he was there to present a document. This document provided a brief summary of the major events, including a statement that Mr. Wyborn did not grieve his termination of employment because he was waiting to see if he would be hearing from the OPP and that, after charges were laid, Mr. Wyborn decided to await the outcome of the court case before grieving his termination of employment.

[12] Mr. Largy testified that it appeared clearly to him that Mr. Wyborn considered the 25-day period to be without value and that he did not give any indication that he was surprised when he was referred to the 25-day limit for the filing of a grievance. Mr. Largy also testified that Mr. Wyborn at no time mentioned memory loss as a reason for the long delay in filing the grievance.

[13] In cross-examination, Mr. Largy testified that he believed that information which led to the dismissal of Mr. Wyborn is probably still available.

[14] Mr. Wyborn testified that he was an Island Attendant for 12 years and this is a seasonal job for periods of up to eight months. He stated that he has not found a new job since his dismissal.

ArgumentsFor the Grievor

[15] Mr. Taylor submitted that an important factor in considering extensions of time limits is the prejudice to the parties. In the instant case, there is no prejudice to the employer as the information which led to Mr. Wyborn's dismissal is available. However, there is a severe prejudice to Mr. Wyborn if he is not granted an extension of the time limits. Mr. Wyborn has been exonerated of charges laid against him by the OPP but the employer still considers him guilty. It is therefore very important for him to have a chance to be heard at adjudication to clear his reputation. It is also important for him to regain his job, as it is his main source of income.

[16] Mr. Taylor also submitted that when the employer offered to let Mr. Wyborn resign he did not, which is evidence that he did not relinquish his intention to get his job back. Also, Mr. Andress did not explicitly warn Mr. Wyborn of the consequences of not grieving within the 25-day time limits.

[17] Finally, Mr. Taylor argued Mr. Wyborn has limited ability to understand legal technicalities and that the words "you may present a grievance" in the discharge letter of October 6, 1999 meant to Mr. Wyborn that it was not a necessity for him to put in his grievance within the 25 days after he was notified of the termination of his employment.

[18] Mr. Taylor relied on *Canadian Labour Arbitration*, Third Edition, Brown and Beatty, 2:3126 and the following decisions: *Rattew* (Board file 149-1-107); *Dunham* (Board file 149-2-39) and *Coleman* (Board file 149-2-26).

For the Employer

[19] Ms. Khanna submitted that the evidence is that Mr. Wyborn made a conscious decision not to grieve because he was more concerned with the criminal charges and that he did not bother with the grievance procedure. Mr. Wyborn is experienced in the grievance process and has gone through two grievance processes notwithstanding the alleged memory loss. He was represented by a union official throughout every meeting and the employer gave him notice, both orally and in writing, on the issue of timeliness. The evidence points to the fact that Mr. Wyborn understood the time limits

requirement. Ms. Khanna submitted that Mr. Wyborn's actions indicate that he made a conscious decision not to grieve within the time limits.

[20] Ms. Khanna submitted that the Federal Court of Appeal in *Stubbe v. Canada (Treasury Board)*, [1994] F.C.J. No. 508 (Q.L.), established that there is no need for the Board to weight the relative prejudice between the parties in considering an application for an extension of time limits. But in the alternative, the greatest impact would be on labour relations. The time limits were agreed to by the parties and by granting an extension of the time limits in such circumstances as Mr. Wyborn's would render them meaningless.

[21] Ms. Khanna submitted that the test is not whether Mr. Wyborn wanted his job back but whether he intended to grieve within 25 days of being notified of his termination of employment. The evidence here is that Mr. Wyborn did not intend to grieve within 25 days.

[22] As for the explanation of Mr. Wyborn's car accident and its impact on his memory and his judgement, this is the first time that this is being raised. This causes concern with respect to the grievor's credibility as he has a crystal clear memory of other aspects of the events surrounding his grievance. The burden of proof was on the grievor and he did not meet it.

Reasons for Decision

[23] Clause 18.10 of the collective agreement between the employer and the Public Service Alliance of Canada for the GL group (Exhibit E-9) reads as follows:

18.10 An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause 18.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.

[24] The 25-day time limit found in clause 18.10 of the collective agreement is the standard time limit for filing a grievance in the federal Public Service. It is the same time limit found in the Board's Regulations at subsection 71.(3). This 25-day time limit is considered to be a sufficient time period for an employee to reflect, seek advice and decide whether or not to grieve. However, the Board has discretion under section 63 of

the Board's Regulations to relieve a party who failed to meet the time limit if to do otherwise would cause an injustice (see *Rattew (supra)*). To make a determination on this, the Board in the past has considered the length and reasons of the delay as well as weighed the balance of prejudice if the extension was granted or not.

[25] In the instant case, the length of the delay is significant as Mr. Wyborn filed his grievance on March 22, 2000, which is about six months after he was notified of his discharge on October 6, 1999. The evidence is that Mr. Wyborn is familiar with the grievance process as he went through it twice after his car accident and had filed these two grievances within the time limits. At the September 23, 1999 meeting, Mr. Harbidge had clearly explained that the criminal charges and the employer's disciplinary action were separate. Mr. Wyborn testified that he did not put in a grievance within 25 days because he was waiting for the police to contact him. He was contacted within a week and a half, where he was given a summons to be in court at the beginning of November 1999. I believe that at this point he made a conscious decision not to grieve as he felt it was more important to resolve the criminal charges pending against him. Mr. Wyborn testified that he waited until the charges were dropped and then he felt that, as he had been exonerated, he could grieve. It is therefore only after the charges were dropped in February 2000 that he made the decision to grieve his termination of employment. This is supported by Mr. Largy's testimony and his notes to file (Exhibit E-6) of the meeting held with Mr. Wyborn after his grievance was filed on March 27, 2000. At this meeting on May 17, 2000, Mr. Wyborn clearly expressed his disregard of the requirements of the collective agreement.

[26] I do not accept Mr. Taylor's argument that the word "may" in the phrase "you may grieve" confused Mr. Wyborn as he was familiar with the grievance process and had union representation. I therefore find, for those reasons, that Mr. Wyborn formed the intention to grieve his termination of employment on or after February 11, 2000.

[27] Mr. Wyborn testified that on February 11, as the criminal charges were dropped against him, he went to see Mr. Andress and asked to file a grievance and it was not until March 27, 2000 that the grievance was filed. Mr. Wyborn blames Mr. Andress for this late filing as he blames Mr. Andress for not explaining to him clearly, back on October 6, 1999, the importance of filing his grievance within 25 days. Mr. Andress

was not there to testify and give his version of the events and I have doubts regarding the veracity of Mr. Wyborn's testimony in this regard.

[28] Nevertheless, these omissions should not be reasons by themselves for extending the time limits as Deputy Chairperson M.M. Galipeau wrote in *Boulay* (Board file 149-2-160), at page 11:

...I do not believe these omissions and actions, which, according to the evidence, seem to be at the source of the delay, can by themselves constitute reasons for extending the deadline in which to file a grievance with the employer. It seems to me that errors committed by lawyers and other employee representatives cannot be the sole ground of extending time limits without running the risk of opening the door to a series of applications citing a variety of oversights as justification for seeking the extension of time limit....

[29] As Ms. Khanna submitted, the Federal Court of Appeal found that the Board is not required to weight the prejudices that might follow upon the granting or refusal of an extension of time limits when it has found that the grievor had not formed the intention to grieve until after the time to do so had expired. However, if there were such a requirement in the instant case, concerning the prejudice to Mr. Wyborn I would find that the greatest prejudice would be to the employer. Time limits contribute to the stability in labour relations and should not be set aside lightly.

[30] I have considered all the reasons for the delay in the filing of Mr. Wyborn's grievance. I do not consider that they justify the Board to grant Mr. Wyborn's request for an extension of the time limits to allow him to file his grievance and consequently his grievance is dismissed as being untimely.

**Guy Giguère,
Deputy Chairperson**

OTTAWA, October 30, 2001.