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Citation: 2019 FPSLREB 125

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

CHRISTIAN PARENT

Grievor

and

DEPUTY HEAD (Department of National Defence

Respondent

Indexed as
Parent v. Deputy Head (Department of National Defence)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Goretti Fukamusenge, Public Service Alliance of Canada

For the Respondent: Philippe Giguère, counsel

Heard at Québec, Quebec,
August 13 to 15, 2019.
(FPSLREB Translation)

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] On March 9, 2015, Christian Parent, the grievor, gave a poor welcome to a contractor who had come to perform electrical work on the Valcartier military base. The poor welcome earned him a two-day suspension for his "[translation] disrespectful language", according to the suspension letter. He filed a grievance against that disciplinary action.

[2] The grievor is part of a bargaining unit represented by the Public Service Alliance of Canada, which referred the grievance to adjudication on December 4, 2017, under two headings: pursuant to s. 209(1)(a) of the *Public Service Labour Relations Act* (which became the *Federal Public Sector Labour Relations Act* ("the *Act*") on June 19, 2017), and pursuant to s. 209(1)(b) of the *Act*. Section 209(1)(a) is about collective agreement interpretation grievances, and s. 209(1)(b) is about discipline grievances.

[3] For the reasons that follow, I allow the grievance in part. The Department of National Defence (DND or "the respondent") was right to rule against such uncivil behaviour. Nevertheless, when it assessed the misconduct, it should have considered the deficiencies that the grievor reported

II. Summary of the evidence

[4] The grievor and his brother, Bernard Parent ("Mr. Parent"), are the two electricians at the Valcartier military base. They are responsible for maintaining the electrical distribution network supplying the base. Both are qualified high-voltage electricians and line workers. The base's network is a 25 000 volt (25 kV) system; therefore, it is considered of medium size. The grievor and Mr. Parent testified at the hearing.

[5] At the hearing, the respondent called the following as witnesses: Martin Roy and Yohann Lacerte, representatives of Gémitech; Jean-Philippe Simard, a Defence Construction Canada (DCC) representative; and Jérémie Émond (retired lieutenant-colonel) who, as the commanding officer of the infrastructure unit, imposed the disciplinary action.

[6] Through DCC, a contracted entity, DND hires contractors to carry out construction and infrastructure work. DCC awards contracts to different contractors, including Gémitech, a company that specializes in electrical work. As of the events that led to the grievance, DCC had awarded two contracts to Gémitech for the Valcartier base, one for emergency services during off hours (outside the 40 hours per week that the Parent brothers worked), and the other for specialized calibration and inspection work.

[7] According to documents that the respondent filed at the hearing, both contracts were concluded with Gémitech. But a subsidiary of Gémitech, named Lignec, carried out the off-hours emergency services. To be able to respond to emergency calls, Lignec had a key that gave it access to the main substation, which houses the electrical network instrumentation for the base.

[8] On February 24, 2015, Mr. Roy, an engineer and general manager at Gémitech, received an email from DCC confirming that Gémitech could perform the maintenance work at the Valcartier main substation scheduled for March 9, 10, and 11, 2015.

[9] On March 9, 2015, as had been agreed and based on his understanding, Mr. Roy presented himself at the main substation with other Gémitech engineers and a co-op student. The established procedure was for Gémitech to wait and not to begin its work until the grievor and his brother conducted the safety operations required to shut down the part of the electrical network that the Gémitech engineers were to work on.

[10] Mr. Roy had in hand the key that Lignec used to enter the substation during off hours. When he arrived in the morning, he unlocked the door so that the Gémitech team could enter the substation to install the considerable amount of equipment required to perform the maintenance and calibration work that it had been tasked with. There was no question of beginning the work before the Parent brothers arrived as their participation was essential for the shutdown so that the work could be performed in complete safety.

[11] In the early afternoon, according to Mr. Roy, the grievor stormed into the substation. He was angry with the Gémitech engineers and berated them for having entered the substation like thieves, without permission. He then lectured them on safety and responsibility, insisting that they were not competent to carry out the work.

[12] Mr. Roy was taken aback. He knew the grievor since he had already worked with him on the base. He did not at all understand why the team, which was made up of electrical professionals, was being treated that way. I have reproduced the following passages from the team's complaint of March 12, 2015, to Mr. Simard of DCC after the incident:

> [Translation]
>
> …
>
> *On Monday, March 10 [at the hearing, the parties agreed that it was March 9], Gémitech Inc. was at Building VC-686 (the main electrical substation) of the Valcartier garrison to carry out preventive electrical maintenance. Over the course of the day, we asked that operations be conducted on the 25 kV network to isolate (to shut down) certain sections of the 25 kV switch cabinet. After a discussion, it was understood that the Department of National Defence employees would come early in the afternoon, around 13:00, to conduct those operations.*
>
> *As planned, [the grievor] and Bernard Parent appeared on site after lunch. However, they waited inside their vehicle for almost an hour until you arrived, as they had no right to interact directly with the contractors that DCC hired in accordance with previous directives. On Mr. Simard's arrival, [the grievor] entered the building where the work was taking place. That was when, without introducing himself and without hesitation, [the grievor] headed for Martin Roy, to let him know what he thought and to accuse him of being "illegal" and of having no right to enter the building without authorization. He stated that he had not been informed of our presence and that the Gémitech workers had to leave the site. They compared our workers to thieves breaking into a house that did not belong to them.*

[13] The complaint continues with the fact that the work had been agreed to in advance and that Gémitech had all the necessary qualifications, and it goes into great detail about the grievor's lamentations "[translation] about the past operations of Gémitech and other contractors on the military base". Nevertheless, the signatories emphasize the grievor's valid concerns, which unfortunately became somewhat lost in the torrent of criticism, in the following terms:

> [Translation]
>
> … [The grievor] *just wanted to make sure that the work would proceed safely and that the shutdown process would be acceptable to him and his brother, who work on the garrison's electrical network every day and are on the lookout for potential danger at each facility. The issue is that initially,* [the grievor's] *intentions were commendable, as he wanted to be sure about the contractor's*

> *work methods. However,* [the grievor] *became angry to the point of failing to respect people, not just the employees of a subcontractor who had done nothing to deserve such overused stereotypical language.…*
>
> *To sum up,* [the grievor's] *emotions and disregard for others took over such that the form of the message was inappropriate, while its substance made complete sense.*

[14] At the hearing, Mr. Parent essentially confirmed Mr. Roy's statements, although according to him, his brother did not become angry; he was abrupt because he thought that the Gémitech employees had entered the substation without permission. Mr. Parent did not deny that the grievor had perceived the Gémitech team as thieves who had broken in.

[15] As stated in the complaint letter, the Parent brothers did indeed wait for Mr. Simard to arrive before entering the substation. They had received a clear directive not to deal directly with the contractors, since DCC had established the contract.

[16] Mr. Simard, the DCC's representative, testified at the hearing. He met the Parent brothers at the substation entrance around 13:30. The grievor immediately went in to speak with the Gémitech employees, while Mr. Simard stayed outside with Mr. Parent. According to him, the exchanges between the grievor and Gémitech meant that ultimately, no work was performed that day. The next day, the Gémitech team returned, and Mr. Simard filled out the work authorization sheet ([translation] "CFB Valcartier Low- and High-voltage Work Authorization and Procedure"). He and Mr. Roy signed it. According to the testimony, Gémitech carried out the power shutdown work. The sheet is not signed in the space provided for the signature of an "[translation] HV [high-voltage] worker", which would be one of the two electricians at the Valcartier base.

[17] The grievor testified that two weeks earlier, his supervisor had informed him that work would be carried out on the main substation. He explained that the work that Gémitech carried out differed from the daily maintenance and repair operations that he and his brother are responsible for. Gémitech does many things, particularly preventive maintenance and instrument calibration, which was the work in question on March 9, 2015.

[18] The grievor expressed his concerns about the procedure that was followed, which he felt was not stringent enough. In his view, it was important above all that the

contractor meet with the base electricians to solidly establish the work parameters and the extent of the shutdown. It was particularly important that a work authorization sheet be filled out, detailing the work to be performed and the safety operations (shutdown) required beforehand. Once the sheet was signed, the responsibility for the work in the substation passed to the contractor.

[19] The grievor adduced two documents into evidence, one entitled "Workplace Electrical Safety", published by the Canadian Standards Association (CSA), and the other entitled "Electrical Facilities Safe Practices", published by DND.

[20] The grievor emphasized in the CSA document the importance for the main employer (in this case, DND, through DCC) to communicate to subcontractor employers (in this case, Gémitech) all the information necessary to avoid the dangers inherent in an electrical station, particularly dangers that are known but that are susceptible to not being identified by the subcontractor. In particular, the DND's document includes the following two provisions for high-voltage electrical facilities:

> [Translation]
>
> *1. No employee shall commence or be authorized to commence work on a high-voltage electrical facility without the authorization of the person in charge of the facility.*
>
> *2. No employee shall enter alone or be authorized to enter a part of a substation room containing a high-voltage electrical facility without the authorization of the person in charge of the facility.*

[21] According to the grievor, he was fussier than his supervisors about safety measures, and the lack of clear measures had already been discussed several times. According to him, the other concern was the ambiguity in the use of the substation key. It had been given to Lignec for use during off hours in case of emergency. No authorization had ever been given for another entity, Gémitech, to use it during working hours. According to the grievor, this presented too great a risk. He had witnessed incidents in which, according to him, a subcontractor did not take adequate precautions and exposed its employees to a genuine risk (hence his diatribe against a particular contractor in front of the Gémitech team).

[22] Therefore, the grievor's concerns on March 9, 2015, were twofold: 1) he had no authorization sheet that had been properly filled out and that detailed Gémitech's work and the safety measures he was to take, and 2) according to him, the key had

been used without permission. At the hearing, he emphasized the seriousness of the situation, given the real danger of electrocution in a 25 kV station.

[23] The grievor agreed that the Gémitech employees were completely qualified to work in the substation (except for the co-op student, who had to be properly supervised). He denied saying that they were not "qualified". That day, he had wanted to say that they did not have the required authorization to enter the substation (no express authorization to use Lignec's key) and to begin their work (no authorization sheet detailing the work). He acknowledged that he had severely criticized one contractor in particular because he was not applying the safety standards strictly enough. He acknowledged that he had been abrupt but maintained that his criticism was aimed at the lack of authorization and not the Gémitech employees as such.

[24] DND's subsequent investigation essentially confirmed that the grievor had become angry and that he had criticized some contractors for what he had perceived were safety deficiencies. The suspension letter, dated October 19, 2015, presents the accusations against the grievor as follows:

> [Translation]
>
> *… The investigation revealed that on March 9, 2015, you demonstrated the following misconduct:*
>
> *1. You used disrespectful and derogatory language when addressing the Gémitech employees.*
>
> *2. During a discussion with the Gémitech employees, you used disrespectful and derogatory language against the employees of different contractors who had worked at the Valcartier base in the past.*
>
> *…*
>
> *For this misconduct, I impose on you a two-day suspension without pay. I made this decision taking into account the fact that you already have a reprimand letter in your file. I also took note of a significant aggravating factor. In effect, not only do you not acknowledge the facts you are accused of, but also, you have stated that you acted properly… Rather than focusing on justifying your behaviour on the pretext of safety deficiencies in engineering services, I invite you to reflect on the behaviour expected of DND employees.*

[25] The letter mentions an aggravating circumstance but no mitigating factors.

[26] At the hearing, Mr. Émond, who signed the suspension letter and was also the decision maker at the first level of the grievance process, testified that he deemed that

a two-day suspension was an appropriate penalty for the grievor's misconduct. Clearly, the grievor had breached the standards of respect that are the rule at DND. Mr. Émond claimed to have "[translation] praised" the grievor at the disciplinary hearing for his safety concerns. Nevertheless, at the Board's hearing, Mr. Émond emphasized the grievor's lack of remorse and his sense of "[translation] regency" as if he and his brother were the only ones who could look after the electrical network.

[27] At the hearing, the respondent adduced into evidence the grievor's performance evaluations. His skills as an electrician are not in doubt; however, comments state that his communication style should be more respectful. It is also stated that he should be "[translation] more attentive to directives from [his] supervisors". In his comments, he stated, "[translation] I would like to have clearer directives, on paper."

[28] The grievor and his brother testified to significant changes since the event that led to the grievance both with respect to the key protocol, in that now, contractors must obtain the key from an agreed location on the base before going to the substation, and to the authorization sheet, which is now filled out in advance and details the work to be done, the shutdown operations, and the transfer of responsibility between the base electricians and the contractors that perform electrical work. At the hearing, the grievor and his brother testified that they are satisfied with the new procedures, which they consider safer.

[29] Finally, at the hearing, Mr. Roy stated that he has since worked often at the Valcartier base, that he has dealt with the Parent brothers many times, and that no other issues have arisen.

[30] I note that the respondent adduced into evidence a written reprimand that appears in the grievor's disciplinary file. It is about actions he took while carrying out his electrician job that according to the respondent, were contrary to his supervisors' specific directives. The actions were taken in October and December 2013. The reprimand letter is dated June 1, 2015, but it took effect on June 19, 2014, for the purposes of the disciplinary file.

[31] The respondent also adduced into evidence the Government of Canada's *Values and Ethics Code for the Public Sector* ("the *Code*"), which applies to all federal public servants. One of its listed core values is respect for people.

III. Summary of the arguments

A. For the respondent

[32] According to the respondent, it is clear that the grievor breached the *Code* through his lack of respect for the Gémitech employees. The evidence established that he had raged at the professional engineers. He had questioned their competence and their right to be at the site where they were to perform their work and for which they had received authorization. The grievor's role was to shut off the power; managing the contractor was DCC's responsibility.

[33] According to the respondent, misconduct was proven, and there are no mitigating factors. However, there are aggravating factors: warnings, the earlier discipline, and the lack of remorse or an apology.

[34] According to the respondent, once misconduct has been identified, the Board's role does not include altering the penalty. The case law in this respect is clear: once misconduct is established, the adjudicator should not review the amount of the disciplinary action if it is within the parameters of what is reasonable.

[35] The respondent cited several decisions to support its position. In *Bousquet v. Treasury Board (Public Works)*, PSSRB File No. 166-02-16316 (19870421), the grievor had been suspended for three days for waging a defamation campaign against his employer. The following excerpt summarizes well the reasoning that is it preferable not to unduly intervene in a disciplinary decision:

> …
>
> *Ms. McMunagle argued that a suspension for one day ought to be deemed to be sufficient in the circumstances of this case. In this respect, I agree with the comments of Deputy Chairman Bendel in the case of Hogarth (Board file: 166-2-15583):*
>
> > *…an adjudicator should only reduce a disciplinary penalty imposed by management if it is clearly unreasonable or wrong. In my view, an adjudicator should not intervene in this way just because he feels that a slightly less severe penalty might have been sufficient. It is obvious that the determination of an appropriate disciplinary measure is an art, not a science. (page 5).*
>
> *While a lesser penalty might have served the legitimate needs of the employer equally well in the present case, the penalty imposed does not appear to me to be unreasonable. Accordingly, the*

> *grievance is dismissed and the disciplinary action of the employer is upheld.*
>
> …
>
> [Emphasis in the original]

[36] The Federal Court validated the principle as follows in *Chopra v. Canada (Treasury Board)*, 2005 FC 958:

> …
>
> *[45] No persuasive argument was made to support variation of the penalty imposed on Dr. Chopra, a five-day suspension from work without pay. There is no basis for the Court to vary the penalty, upheld by the adjudicator as "well within the parameters of appropriate discipline."*
>
> …

[37] According to the respondent, imposing a two-day penalty for incivility is not unreasonable. It cited two decisions involving the same physician, who was penalized for having been impolite with a patient (a three-day suspension) and then with the treating psychologist of another patient (a five-day suspension) (see Tanciu v. Treasury Board (Veterans Affairs Canada), PSSRB File No. 166-02-25763 (19950606), and Tanciu v. Treasury Board (Veterans Canada), PSSRB File No. 166-02-27712 (19970805)).

B. For the grievor

[38] The grievor maintains that there was no misconduct. According to him, what he said was interpreted as disrespectful, but it would be fairer to say that it concerned safety. No witnesses were heard as to the exact words he used when he spoke to the Gémitech employees.

[39] According to him, the respondent did not consider all the circumstances. He explained how frustrated he was by the lack of rigour in the administration of advance authorizations and the use of the key.

[40] He added that this case has serious deficiencies in procedural fairness, first with respect to the time it took to impose the suspension. The event occurred on March 9, 2015, and the penalty was imposed only on October 19, 2015.

[41] Second, the respondent did not follow the steps of the grievance process. Mr. Émond imposed the disciplinary action; he should not have been the decision maker at the first level. In addition, he stated in his testimony that he had never read

the complaint letter and that he simply relied on the investigation report. Consequently, he did not see that the signers of the complaint letter had acknowledged the validity of the grievor's concerns.

IV. Analysis

[42] The grievor maintains that there was no misconduct and that this case has a procedural fairness failure. Indeed, the decision maker at the first level should not have been the same person who imposed the penalty, for obvious reasons: it is difficult to reconsider one's reasoning. The grievor also emphasized the time it took to impose the disciplinary action. Of course, it is preferable that a penalty closely follow a misconduct, for both educational and dissuasion purposes. Yet, I cannot blame DND for conducting an investigation before making its ruling.

[43] I consider that the procedural fairness failures were corrected by the hearing before me, as confirmed by a number of Board decisions.

[44] Furthermore, I find the misconduct accusation proven. The testimonies of Mr. Roy and Mr. Parent essentially agreed, and the grievor did not deny confronting the Gémitech team about the lack of authorization and the use of the Lignec key. I believe that the grievor's aggressive behaviour towards the Gémitech team merited a sanction.

[45] When adjudicators hear disciplinary grievances, their analyses generally rely on the criteria in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1; namely: Was there misconduct that justified disciplinary action? If so, was the disciplinary action excessive, given all the circumstances? If it was excessive, what action should replace it?

[46] The respondent presented me with a good number of decisions to support its argument that a penalty should not be modified if it is within the bounds of what is reasonable. I agree with that principle. Indeed, once misconduct is proven, it is not for an adjudicator to alter a penalty somewhat because, for example, the adjudicator would have imposed four days of suspension instead of five.

[47] However, one of the decisions in the respondent's book of authorities varied the principle somewhat. In *Lewchuk v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 76, a nurse in a penitentiary refused a direct order to provide care to an inmate because she was afraid of her. Over the course of the

grievance settlement process, the employer reduced the disciplinary penalty from five days to three. After hearing all the evidence, the adjudicator wrote the following:

> …
>
> *[114] It is a well-accepted principle of labour law that adjudicators, arbitrators, and such boards should not be involved in the actual management of the workplace because that is the prerogative of management. Accordingly, we are often reminded that it is not our role to be "tinkering" with the precise measure of discipline imposed by an employer. Would I then be "tinkering" with the employer's measure of discipline if I reduced the three day suspension to a two day suspension in light of my conclusions regarding the grievor's health at the time of the incident that gave rise to her discipline? Had the employer not already reduced the initial five day suspension to three days, I believe I would have reduced the suspension pursuant to my jurisdiction in light of her health and her belief that the proposed plan for treatment was not safe. It is difficult to hypothesize at this stage whether I would have reduced the penalty to a two day suspension or to a three day suspension.*
>
> *[115] The employer's decision to reduce the penalty for the reason stated was sensitive and I commend it for having taken that step. I do not wish to discourage employers from reducing initial penalties upon further review, and I am conscious of the wisdom of not getting involved in the management of the workplace by "tinkering" with the measure of penalties.*
>
> *[116] In considering the facts of the case and all the mitigating circumstances, with particular regard to the fact the employer reduced the discipline at level three of the grievance process; nevertheless, I have concluded it seems just and reasonable in the circumstances, to further reduce the discipline from a three day suspension to a two day suspension. The primary reasons for so concluding are that* [the adjudicator lists the factual reasons justifying her intervention].
>
> *[117] For all of these reasons, the grievance is partially upheld. The penalty of a three day suspension is reduced to two days ….*
>
> …
>
> [*Sic* throughout]

[48] When weighing a disciplinary penalty, an adjudicator must consider all the facts of the misconduct. It may appear somewhat ridiculous to transform a two-day suspension penalty into a one-day suspension (the conclusion that I will reach), but I do not think it is pointless. The parties asked me to assess the grievor's misconduct. I did so and reached different conclusions than did the respondent. It seems to me that his culpability is less than what the respondent assessed. Therefore, it appears natural to accordingly reduce the penalty imposed on him.

[49] The grievor is accused of using “disrespectful language” with Gémitech representatives and of denigrating a colleague who works for their affiliate company, Lignec, in front of them. I do not know if I would have termed the grievor’s words “disrespectful language”, but I agree with the respondent that the treatment meted out to the Gémitech representatives was outside the norm and that it was unacceptable. The representatives were professionals who were on the base to perform work that had been agreed to. Above all, they were prepared to work with the Parent brothers to ensure that the work was carried out efficiently and in complete safety. They did not deserve to be received as criminals or to receive a lecture on safety that should instead have been directed at the respondent.

[50] That said, the grievor did highlight well his concerns about the lack of a protocol for using the substation key and the absence of an authorizing document detailing the work to be performed both by Gémitech and by the Parent brothers to secure the worksite. These deficiencies cannot be attributed to the grievor but to the respondent and to some extent to DCC, which was responsible for the contract with Gémitech. I fail to understand why Mr. Simard did not intervene from the beginning, when it was noticed that the Gémitech representatives had already entered the substation, or why he did not have the work authorization document in hand. At the hearing, he was unable to explain his inaction. However, the next day, he had Mr. Roy sign the authorization document, and then, he signed it himself.

[51] The disciplinary action imposed on the grievor did not take into account his real concern for safety. Mr. Émond stated that he had “praised” him for his serious attention to safety, but the suspension letter and the response at the first level of the grievance process do not consider it as motivation for the grievor and therefore do not apply it as a mitigating factor. He is even accused of justifying his behaviour “on the pretext of safety deficiencies”.

[52] However, even the Gémitech representatives’ initial complaint outlined the validity of the grievor’s safety concerns. Instead, Mr. Émond spoke instead about the grievor’s lack of remorse and sense of “regency”. I did not understand a feeling of “regency” in the grievor’s words but rather one of responsibility. His overly strong reaction to the Gémitech representatives entering the substation was driven by a real and valid concern tied to the lack of proper authorization. CSA and DND standards confirm that electrical work must be detailed and authorized, for obvious safety and

civil liability reasons. The grievor's concern for safety constitutes a mitigating factor that must be factored into the assessment of the misconduct, and consequently, of the penalty.

[53] According to the testimonies of the grievor, Mr. Parent, and Mr. Roy, it seems that there is no longer any risk of the unfortunate situation of March 9, 2015, being repeated because there is now a well-established protocol for obtaining the key. The work authorization document has been rewritten to the satisfaction of the Parent brothers. It is always prepared in advance and is complete, and once signed, it legally transfers responsibility for the work to the contractor who signs it.

[54] Had those measures been in place on March 9, 2015, this entire matter could have been avoided of three days of hearings for a disciplinary action of a two-day suspension.

[55] Because the grievor's misconduct was offset by his concern for ensuring a safe worksite, I find that the two-day suspension was excessive in the circumstances of the case as a whole. Nevertheless, I still consider that misconduct occurred because of how he treated the Gémitech representatives. I have taken into account the reprimand letter in his file. Under the circumstances, I reduce the penalty by one day.

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

(The Order appears on the next page)

Order

[57] The grievance is allowed in part. The disciplinary action that imposed the two-day suspension is set aside. It is replaced by the disciplinary action of a one-day suspension deemed to have been imposed on October 19, 2015.

[58] The respondent must pay one day of salary to the grievor at his current rate of pay.

December 19, 2019.

FPSLREB Translation

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