

Date: 20200831

Files: 566-02-06664 and 11661 to 11663

Citation: 2020 FPSLREB 85

*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

SUSAN KRUSE

Grievor

and

**TREASURY BOARD
(Canada Border Services Agency)**

Employer

Indexed as

Kruse v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Herself

For the Employer: Alexandre Toso, Treasury Board counsel

Decided on the basis of written submissions,
filed June 10, 11, and 12, 2020.

REASONS FOR DECISION

I. Summary

[1] This matter considers four grievances filed in response to the Canada Border Services Agency's (CBSA or "the employer") efforts to recover erroneously granted and unearned vacation leave credits from Susan Kruse ("the grievor"). A group of similarly affected employees also filed grievances and referred them to adjudication. I rejected the latter group of grievances in an earlier decision (2020 FPSLREB 81).

[2] The four grievances that are the subject of this decision were removed from the hearing of the other matters by the bargaining agent (the Public Service Alliance of Canada or "PSAC"). The details of why they were removed were not shared with the Board and are not relevant to their disposition in this decision.

[3] After that hearing and before the earlier decision was published, the grievor (through a personal representative) wrote to the Federal Public Sector Labour Relations and Employment Board ("the Board") and requested that a hearing of her four grievances be scheduled. Her bargaining agent then provided written notice to the Board that it had withdrawn its representation for the four grievances.

[4] Counsel for the employer objected to the grievor's request and stated that the Board had no jurisdiction to hear the grievances and requested that the files be closed. The grievor responded that she previously had her bargaining agent's representation when the grievances were initially filed and that she should now be allowed to pursue them at adjudication before the Board.

[5] It is well established that s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) requires that a grievor who files a grievance over a collective agreement issue must have bargaining agent representation.

[6] Even though initially, the bargaining agent provided representation for the four grievances at issue at the referral to adjudication, this does not overcome the fact that this representation has been withdrawn. I have no jurisdiction to hear these grievances. Accordingly, the grievances are dismissed.

II. Background

[7] In 2011, the grievor filed four grievances (bearing Board file numbers 566-02-06664 and 11661 to 11663). In them all, she alleged that improper calculations had been made related to her earning of vacation leave credits. The fourth also alleged that the employer manipulated data when it improperly determined her vacation leave.

[8] These four grievances were referred to adjudication in October 2015, together with 36 similar grievances filed by other employees in the same bargaining unit. The PSAC was the representative for all the grievances.

[9] A hearing was scheduled for Ms. Kruse's 4 grievances together with the other 36. It was to start on October 8, 2019. Before the hearing commenced, counsel for the bargaining agent advised the Board that it would not proceed with several of the grievances (including all four of Ms. Kruse's grievances). Accordingly, Ms. Kruse's grievances did not form part of the hearing that began on that date.

[10] On October 15, 2019, the Board wrote to the PSAC to advise that the PSAC was responsible for advising the Board in writing that the grievances had been withdrawn.

[11] On May 11, 2020, the Board received an email from John King stating, "Susan Kruse (the *grievor*) wishes to proceed and self-represent on this matter and is now officially informing the Board that she has elected to do so." Neither the employer nor the bargaining agent was copied on it.

[12] Before the Board responded, on May 22, 2020, counsel for the bargaining agent wrote to the Board, advising that it was withdrawing Ms. Kruse's four grievances.

[13] On May 25, 2020, the Board wrote to the parties. It stated that since it had been advised that the grievances had been withdrawn, the related proceedings were terminated, and the files had been closed.

[14] On May 26, 2020, Mr. King wrote to the Board to reiterate that he had written to the Board on May 11 to advise that Ms. Kruse wished to proceed to adjudication and to self-represent with respect to her grievances, stating the view that bargaining agent representation was not required to proceed.

[15] On May 29, 2020, the Board wrote to Ms. Kruse as follows:

On May 11th and 26th, 2020, the Board received correspondence from Mr. John King advising that you wished to self-represent in the above-noted matters.

According to the Board's files, you have filed your grievances under section 209(1)(a) of the Federal Public Sector Labour Relations Act (FPSLRA). As per Board direction, I bring your attention to s.209(2) of the FPSLRA which states 'before referring an individual grievance related to matters referred to in paragraph [209] (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings'.

It is requested that you confirm directly that you are no longer represented by the PSAC. Also, if that is the case, please advise if you have chosen another representative or if you are self-representing.

[16] On June 1, 2020, Mr. King responded to the Board's email, stating that "Susan has requested that I respond to your inquiry." He included an outline of the grievances' background and issues.

[17] On June 2, 2020, the Board again wrote to Ms. Kruse, stating as follows:

The Board will only consider representations from your confirmed representative, or from yourself if you are self-representing.

*Therefore, as mentioned in our previous email, you are requested to **directly** confirm that you are no longer represented by the PSAC in these matters. If that is the case, you are also requested to advise if you have chosen another representative (be it Mr. King or someone else) or if you are self-representing.*

[Emphasis in the original]

[18] Ms. Kruse responded on June 3, 2020, confirming that the PSAC no longer represented her with respect to any of her four grievances as per its correspondence to the Board of May 22, 2020. Furthermore, she confirmed her choice to self-represent, with the assistance of Mr. King.

[19] On June 5, 2020, the Board wrote to Mr. King and Ms. Kruse with respect to her grievances as follows:

The Board wishes to inform you that Ms. Kruse's grievance files with the Board were closed on May 25, 2020, by an administrative error.

The Board received Ms. Kruse's email of June 3, 2020, confirming that she is representing herself, with Mr. King's assistance, with

respect to her grievances filed with the Board (FPSLREB files 566-02-06664 and 566-02-11661 to 11663).

However, the Board notes that Mr. King is using an email address which refers to CEUDA, a component of the PSAC. Mr. King is therefore asked to confirm whether he is providing assistance in his individual capacity or in his capacity as a representative of PSAC.

[20] By email the same day, Mr. King confirmed that he was helping the grievor in a personal capacity and that he was not in any way purporting to provide bargaining agent representation.

[21] Counsel for the employer wrote to the Board on June 8, 2020, expressing its view that given the withdrawal of the grievances, the Board had correctly closed the files, as per the express direction of the solicitor of record. The employer further objected to the Board's jurisdiction to hear the grievances, given the employer's understanding that the bargaining agent no longer supported them. In support of its argument, the employer referred to s. 209(2) of the *FPSLRA* and *Baun v. Statistics Survey Operations*, 2018 FPSLREB 54 at paras. 55 to 58.

[22] The Board wrote to the parties on June 8, 2020, as follows:

This will acknowledge receipt of Mr. King's email of June 5, 2020 and of Mr. Toso's email of June 8, 2020 (below).

The Board would first like to clarify that the withdrawal received from the PSAC was, in fact, processed in error.

*The PSAC withdrawal was received and processed **after** we had received correspondence from Mr. King advising that Ms. Kruse wanted to self-represent (and before Mr. King's email was acknowledged and responded to).*

The Board wishes to offer Mr. King or Ms. Kruse an opportunity to respond to the employer's submissions which states that these grievances cannot proceed before this Board in the absence of the PSAC's representation.

[Emphasis in the original]

III. Submissions

A. Grievor's arguments

[23] I have reproduced verbatim as follows the more relevant passages of the grievor's communication to the Board, dated June 10, 2020:

- *Susan Kruse and I both agree with the Board's decision to reopen these files and strongly believe that the Board should continue with these proceedings as requested. This is as much a matter of what is fair, what is reasonable, what is required to protect one's right to fundamental justice and what is necessary to help ensure justice is served with the victim being appropriately and completely reimbursed & compensated for that which was wrongfully taken from her ten years ago.*
- *Susan's grievances had been referred by the bargaining agent, filed and scheduled to be presented before the Board last October, which should address your concern with respect to section 209(2) of the FPSLRA.*
- *As recently as October 03, 2019 it was once again confirmed by counsel representing the PSAC that these same grievances, inclusive of the aforementioned three grievances of Susan Kruse, were still scheduled to be presented with the group of thirty eight, the following week. And still once again on October 7, 2020 Susan received notice from her representative, which included the time and address of the hearing location.*
- *This written correspondence would not have been addressed to Susan if the bargaining agent had changed it's mind and no longer approved to represent Susan's three grievances during the adjudication proceedings. These facts further demonstrate the intent and approval of the bargaining agent in regard to your concern as to whether section 209 (2) had been met.*
- *As counsel for the employer involved in the discussion and the drafting of the settlement offer that took place between yourself and the union representative(s) on the morning of the hearing, I trust you witnessed Susan's absence, were made aware that she never requested or authorized mediation with the employer that would result in the removal of her three (3) grievances from the group presentation that day, of which she patiently waited years to be scheduled. The secrecy of said discussions itself and the unacceptable exclusion of Susan from these discussions and finalizing the offer before it was shared with Susan some three months after the fact, was a clear deviation of fair process. Susan was informed that this was the employer's one and final offer. It was because Susan could not accept the terms of the settlement offer that the bargaining agent eventually served notice to withdraw said grievances. It was not because the bargaining agent did not approve to represent her during the adjudication process. I will assume that both union and employer conveyed the joint message to the Board the morning of the hearing that these grievances had been resolved, and before the complainant was even made aware of what the terms of the settlement offer were.*
- *The fact remains that the Board was duly notified by the complainant on May 11, 2020 of Susan's desire to proceed with what were still active grievances at that time. Apparently the PSAC was not aware of Susan's correspondence to the Board of*

May the 11th requesting to proceed and self-represent, prior to it withdrawing these complaints on May 22nd.

- *Once again, this does not change the fact that the PSAC did previously agree to represent her grievances during the group adjudication proceedings, which did proceed as scheduled. I trust the Adjudicator was also made aware by counsel at the outset of the hearing that Susan's three grievances were not removed from the group presentation for any reason other than the grievances were believed to be appropriately resolved to the satisfaction and approval of the complainant, which was later proven not to be the case.*
- *It was also because of the question of jurisdiction as to whether the Board could hear Board file 566-02-06664 and for reason that this grievance in particular was not included on the initial list with the related thirty eight other vacation leave claw back grievances, that Susan notified the Board requesting to proceed with this grievance.*
- *Apart from arguing semantics, this grievance was referred by the bargaining agent, the Board does have jurisdiction to address this grievance under 208(1)(a)(i) of the FPSLRA as well as section 209(1)(a), requiring no prior approval of the bargaining agent.*
- **208 (1)** *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
 - (a) by the interpretation or application, in respect of the employee, of*
 - i. a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment,*
- *Contrary to (the employer's) opinion that all of these grievances require union approval prior to being allowed to proceed, counsel representing the Customs Immigration Union previously provided an opinion that Susan should be able to proceed and self-represent on at least two of the three grievances identified on the initial list of 38, regardless of receiving the approval of the bargaining agent to self represent. Perhaps it is because there is no specific Article of the collective agreement cited in the actual language of these grievances, thus requiring the approval of the bargaining agent?*
- *What both the union and employer should realize by now is, there is nothing either of them can say or do at this point that will change the facts, absolve the government of it's demonstrated, willful and continued practice of falsifying the employment record of Susan Kruse for the past ten years, excuse the CIU's and PSAC's condonation of the employer's practice to falsify the employment records of their membership through their complicity, or excuse the CBSA and the Treasury Board*

Secretariat for its erroneous interpretation and application of the collective agreement resulting in the wrongful and illegal stealing back of earned vacation leave already used by the complainant at a time when Susan was the sole provider for her family.

- It is the complainant that is in control of this information and how it is used once this process has run its course, not the union or employer. Various individuals both elected and appointed, all in positions of authority that could and should have intervened, have remained silent despite having been advised as far back as 2011 of section 398 of the Criminal Code and that every one who, with the intent to deceive, falsifies an employment record, by any means is guilty of an offence punishable on summary conviction. Ten years later and Susan is still waiting and fighting to be heard.*
- Let that sink in for a moment. All three elements (The offence, Mens Rea & Actus Reus) are present and documented, which will eventually result in what I believe should be a very eye opening and successful prosecution.*
- The employer's concerns in regard to section 209(1)(a) and 209(2) should now be addressed, especially in the absence of any new notice from the bargaining agent confirming its objection to Susan proceeding and self-representing on these grievances, now that these files have since been reopened and the administrative error to terminate these proceedings has been recognized and corrected by the Board.*
- Should the Board however reconsider and once again terminate these proceedings despite this and previous correspondence sent to it on behalf of Susan Kruse, we respectfully request to receive the Board's decision detailing in writing as to why the circumstances surrounding these grievances in conjunction with the interpretation and application of the PSLRA are sufficient grounds that supersede this complainant's guaranteed right to fundamental justice as per section seven of the Charter of Rights and Freedoms.*
- As this matter may now be considered as being before the Board, I also request that the FPSLRB clarify any jurisdictional limitations it may have in regard to Board file 566-02-6664. Specific to its jurisdiction to address the labour and employment aspects of this grievance as well as any jurisdictional limitations the Board may have in addressing those issues and/or concerns deemed to be in contravention of the Criminal Code of Canada.*

[Sic throughout]

B. Employer's arguments

[24] Mr. King suggests that the requirement under s. 209(2) of the *FPSLRA* was met because the bargaining agent had supported the grievances in the past. However, they were no longer adjudicable once the bargaining agent withdrew its support.

[25] The case cited in the employer's previous correspondence specifically dealt with a situation in which a bargaining agent supported a grievance as of its filing but later withdrew its support (see *Baun*, at paras. 55 to 58 and 143). It does not matter whether the bargaining agent expressed its opposition to the grievance proceeding; it must represent the grievor at adjudication.

[26] Good reasons support this prohibition in s. 209(2). In a unionized setting, the bargaining agent is responsible for the interpretation and application of a collective agreement to employees in the bargaining unit. One of its primary functions is to decide the relevant workplace considerations it will prioritize. For instance, it can base a decision on its interpretation of the relevant collective agreement, the effect on other employees, or its assessment of the grievance's merit. Allowing individual employees to proceed on their own with grievances about the application or interpretation of a collective agreement would undermine the bargaining agent's role in that respect.

[27] Lastly, the Board does not have inherent jurisdiction in all labour and employment matters in the federal public service. It is bound to apply the provisions of the *FPSLRA*. It cannot assume jurisdiction under s. 208, as it only allows an employee to present an individual grievance to the employer. Section 209, which deals with referring a grievance to the Board, explicitly requires a grievor to obtain bargaining agent approval and representation at adjudication. Since the grievor does not have her bargaining agent's support, the grievances should be dismissed.

C. Grievor's rebuttal arguments

[28] The grievor's rebuttal arguments read as follows:

The circumstances surrounding the case(s) of Baun, her appeals or any other Board decision for that matter, are obviously quite different from each other as they are from the circumstances and facts surrounding Susan Kruse and these complaints.

Regardless of the section of the Act under which these grievances were initially referred to adjudication, whether referred under

section 209(1)(a) by accident or because there is no alternative choice or option available or made known to Susan under which she could have referred an individual grievance, Susan's intent to advance her grievances to an adjudication proceeding was made clear to all parties.

Susan has followed the process available to her and did as expected and requested of her by her union representatives.

What is paramount and undeniable with emphasis on the rule of law, due process, fundamental justice and all applicable guaranteed rights and protections of an individual under the Charter of Rights and Freedoms, Susan Kruse has yet to have an opportunity to meet with the employer and present her grievances at any level of the grievance process, nor has Susan ever had an opportunity in the past ten years to present evidence in relation to any grievance before an independent third party.

All of Susan's coworkers have now had their complaints either presented before the Board and/or resolved, with the exception of Susan's.

The bargaining agent has the authority to select and assign its representatives and if it so chooses, it can authorize Susan to proceed and self represent with my or anybody's assistance. Yes, that individual can too be the grievor herself.

The Board can pronounce on its own jurisdiction and it pronounces only on matters that are properly before it. Reason alone to advance all grievances so as to enable the Board to do its work.

Section 209 of the FPSLRA is actually silent on whether an individual can refer a grievance under section 208(1)(a)(i) to adjudication. There is no restriction preventing an employee from referring such a grievance under either section 208 or 209 and no reference requiring the approval of the bargaining agent under section 209 for a grievance under section 208(1)(a)(i). With consideration to the intent and purpose of the redress process, it only makes sense that all grievances are treated in a consistent manner with the same option to be presented before an adjudicator. Without a formal adjudication procedure on these complaints there can be no decision of which to appeal, which further perverts justice and ones right to it.

In the absence of receiving any objection or confirmation from the bargaining agent opposing the continuation of this process or denouncing its support on these grievances, I suggest that Susan be afforded the benefit and opportunity to proceed with a hearing and have her complaints heard as originally scheduled. This would be fair, and reasonable and by proceeding in this manner will ensure Susan's right to fundamental justice and due process has been acknowledged and adhered to as well as maintain the integrity and credibility of this redress process.

[Sic throughout]

IV. Analysis

[29] The grievor seeks to refer her grievances to adjudication with the Board under s. 209 of the *FPSLRA*, which reads as follows:

Reference to adjudication

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.*

[30] The grievor did not allege that the problems that led to her grievances were in any way linked to a disciplinary action. Nor did her submissions lead to any such speculation.

[31] Therefore, she can only reply upon s. 209(1)(a) only as a statutory means for the Board to hear her reference to adjudication.

[32] However, as noted by the employer, s. 209(2) requires such a reference to be approved by the bargaining agent representing the grievor. While representation was provided initially, later, it was withdrawn.

[33] The bargaining agent chose not to pursue these four grievances at the hearing of the group of grievances presented on the same matter of the recovery of erroneously granted and unearned vacation leave credits.

[34] Months later, when the grievor sought to pursue adjudication for the four grievances herself, the bargaining agent notified the Board in writing that it was withdrawing its representation from the request to refer them to adjudication. As noted earlier, the grievor herself confirmed that the bargaining agent no

longer represented her on these four grievances. She stated that she was choosing to self-represent, with the assistance of Mr. King.

[35] As was the case when this same issue came before the Board in *Baun*, at paras. 55 to 58, when a bargaining agent withdraws its representation from a referral of a grievance filed under s. 209(1)(a) (not for a disciplinary reason) to adjudication, despite its earlier support, s. 209(2) of the Act stops the matter from proceeding to a hearing.

[36] The grievor asserted her desire to present before the Board matters involving the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982, 1982, c. 11 (U.K.)*) and the *Criminal Code* (R.S.C., 1985, c. C-46). *Charter* matters are properly presented when the Board has jurisdiction under s. 209 of the *FPSLRA*, as noted earlier. Allegations related to offences in the *Criminal Code* should be taken up with local law-enforcement authorities.

[37] A significant part of the grievor's submissions in this matter were directed to her concerns over how she was represented in the presentation of her grievances and in how they were handled up to but excluding the hearing I conducted for the 36 related grievances. None of these matters are properly presented to the Board in a collective agreement grievance under s. 209(1)(a) of the *FPSLRA*.

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

(The Order appears on the next page)

V. Order

[39] The grievances are dismissed.

August 31, 2020.

**Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board**