Date: 20210805

File: 566-33-42514

Citation: 2021 FPSLREB 88

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

ROBERT FRY

Grievor

and

PARKS CANADA AGENCY

Employer

Indexed as
Fry v. Parks Canada Agency

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Robert Basque, Q.C., counsel

For the Employer: Laetitia Auguste, counsel

Decided on the basis of written submissions,
filed February 9, March 12, April 20, June 30, and July 15, 2021.

REASONS FOR DECISION

I. Summary

[1] Robert Fry ("the grievor") was employed as the visitor experience manager (classified PM-06) at Fundy National Park of the Parks Canada Agency ("the employer"). He claims that he enjoyed several years of excellent performance appraisals. However, in 2018, problems arose in that his managers criticized his performance, stating that he had not met annual objectives. He disputed that criticism and alleges that management subjected him to harassment and intimidation with the goal of forcing him from his position.

[2] On October 23, 2020, the employer terminated the grievor's employment for the stated reason of unsatisfactory performance. He grieved that dismissal on November 5, 2020. The employer denied the grievance and on January 22, 2021, the grievor referred the grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication.

[3] According to ss. 209(1)(c) and (d) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), grievances about terminations for unsatisfactory performance or for any other reason that does not relate to a breach of discipline or misconduct can only be referred to the Board by employees in the core public administration or employees of a separate agency designated under s. 209(3). It is uncontested in this matter that the employer is a separate agency that is not designated under this provision.

[4] Consequently, grievances from its employees about terminations for unsatisfactory performance cannot be referred to the Board for adjudication. However, the grievor clarified to the Board that he was referring the grievance to adjudication pursuant to another provision, s. 209(1)(b) of the *Act*, which states that an individual grievance may be referred to adjudication if it arose from disciplinary action resulting in termination.

[5] The employer filed a preliminary objection to the Board's jurisdiction to adjudicate the grievance. It maintains that the grievance is about a non-disciplinary termination of employment and that s. 209(1)(b) is not engaged.

[6] For grievances such as this one to be properly before the Board, the referral to adjudication must have rested upon credible allegations of discipline or disguised discipline as an element of the grievor's dismissal from employment. The employer noted that the grievor's letter of termination states explicitly that his employment was terminated for performance-related reasons that were not disciplinary. The employer also noted that in his grievance, the grievor never alleged that his termination was the result of disguised discipline.

[7] I reviewed the parties' written submissions and chaired a case management conference call to discuss the grievance and the employer's motion to dismiss it. Then I offered the parties an opportunity to make further written submissions.

[8] Taking all this information into consideration, I conclude for the following reasons that the grievor has not put forward an arguable case or even suggested in his submissions that his termination either was disciplinary or resulted from disguised discipline.

[9] Therefore, the Board does not have jurisdiction to receive the referral to adjudication, and I order the matter dismissed.

II. Summary of the facts

[10] In the form used to refer his grievance to adjudication, the grievor was required to provide a detailed factual description of the events, circumstances, or actions that gave rise to the grievance.

[11] On the form, he confirmed that he was advised of his termination via a phone call and that the reason he was given was that "… notwithstanding significant efforts to assist you, you are not capable of meeting the requirements of your position … Furthermore, it is unlikely that any amount of additional training or support will help you overcome the identified deficiencies."

[12] He continued by outlining several examples of work projects and outcomes that were derived from successful projects, along with highlights of performance agreements. His comments focused upon the 2018-19 fiscal year. He highlighted a bridge project in a park and stated, "I am unclear on where the bridge issue was specifically mentioned in work objectives however it should be noted that it was not

supported in large part as the management of the field unit had not been engaged early in the discussion."

[13] In conclusion on this point, the grievor wrote, "Clear by this point that normal relationships and project progress were no longer functioning."

[14] And finally, he noted that in October 2018, a manager told him that the relationship was not working out, and that an offer of help was made to transition him to another role.

[15] The employer replied to the reference to adjudication by letter on March 12, 2021. It stated that the Board had no jurisdiction to receive it. The letter also noted that the termination letter and the final-level grievance response clearly indicated that the grievor's employment was terminated for poor performance and that at no time in the grievance process was it suggested that the termination was related to disguised discipline.

[16] The employer also noted that it has a policy in place that provides for an independent third-party review of terminations, which was available to the grievor but that he did not avail himself of it.

[17] The grievor replied in writing on April 20, 2021. He stressed his exceptional performance as documented over nine years of performance reviews. He also stated that between 2018 and 2020, one of his managers had harassed and intimidated him. He said that the intimidation was designed to attack his credibility, dignity, and self-worth. He also stated that discord with his management arose at that same time that was related to his performance goals and his attainment of them.

[18] I convened a case management videoconference on May 18, 2021. The status of the different aspects of the file were confirmed, and each party was asked to present a brief outline of the key aspects of its case. Both the grievor and the employer were represented by counsel.

[19] The matter of the employer's motion to dismiss the grievance for lack of jurisdiction was the focus of this discussion. Counsel for the employer outlined her position on the law and relevant jurisprudence and opined that the grievor had not alleged that he had been subject to any disciplinary action by the employer.

[20] Counsel for the grievor made no submissions that he would be adducing evidence at a hearing to make out a case that the grievor had been disciplined.

[21] I then proposed a process to move the file forward and invited comments from both counsel. Neither counsel expressed any concerns or objections.

[22] I then explained and later confirmed in writing that the employer's counsel would be allowed to make any further written submissions that she wished to regarding her motion to dismiss. The grievor would then be allowed to make written submissions in reply, after which I would review the material and possibly rule on the employer's motion. If I did issue a ruling, and it was in favour of the employer, then no further submissions would be allowed, and the grievance's referral to adjudication would be rejected due to my lack of jurisdiction to hear it. However, if I rejected the motion, or if I felt that I required oral arguments or to receive evidence, then I would schedule a hearing. I proposed a timetable to receive the submissions, which was set with the parties' consent.

[23] The employer provided a detailed submission, supported by case law. It stated that the termination of the grievor's employment must have been disciplinary or disguised discipline for me to have jurisdiction to receive the referral to adjudication.

[24] The employer submitted that nowhere in the grievor's submissions did he allege that any of its actions that he objected to was a form of or related to any disciplinary action on its part or that of its management.

[25] The grievor's counsel wrote to the Board after receiving that submission and advised that the grievor would not make any further submissions beyond what was already on file, as I have noted previously in this decision.

[26] I listened carefully and asked questions of both parties at the case-management videoconference. I then reviewed their written submissions. Having done that, I cannot infer that any of the employer's impugned actions were in any way related to discipline.

III. The law and analysis

[27] The scope of the Board's authority to hear such grievances is clear and uncontroversial. Section 209 of the *Act* does not provide the Board with jurisdiction to

receive referrals to adjudication of grievances that arose from non-disciplinary terminations of employment at non-designated separate agencies, such as the Parks Canada Agency.

[28] The employer submitted that given that the grievor was terminated for a non-disciplinary reason, its decision to terminate him did not qualify for a referral to adjudication under s.209(1)(b). Disguised discipline is often raised to bring a matter that is otherwise not adjudicable within the purview of the Board's jurisdiction.

[29] The employer stated that it recognizes that the Board may assess whether a termination was actually disguised discipline, as the Federal Court of Appeal has ruled. (See *Boutziouvis v. Financial Transaction and Reports Analysis Centre of Canada*, 2013 FCA 118; *Monette v. Parks Canada Agency*, 2010 PSLRB 89 at para. 40).

[30] The employer noted, however, that the grievor did not allege that his termination was the result of disguised discipline in his submissions to the Board, nor did he raise an argument of disguised discipline in the course of the grievance procedure before its referral to the Board.

[31] As the employer correctly notes, the grievor is not entitled to alter his grievance to raise the argument of disguised discipline at adjudication. The grievance referred to adjudication must be substantially the same grievance that was presented throughout the grievance process (*Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109).

[32] Therefore, given these submissions, I must consider whether the grievance presents even an arguable case that would fall under s. 209(1)(b), and if not, dismiss it without hearing any evidence.

[33] As the Board recently noted in *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at paras. 83-84, while referring to *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2, the test to be applied in the current context is whether, if all the alleged facts are true, there is an arguable case that the grievor's termination was the result of disguised discipline.

[34] If the Board has any doubt about what the facts, assumed to be true, reveal, then it should err on the side of finding that there is an arguable case for the required link that the employer contravened the *Act*, and the Board must preserve the grievor's opportunity to have his grievance heard in a proceeding.

[35] I have considered all the grievor's allegations, as set out in his grievance, his referral to adjudication form as well as his written response to the employer's objection to jurisdiction. He makes it abundantly clear that he disagrees with the employer's claims of issues with his performance during his employment, highlighting his positive performance reviews over the years. He alleges that between 2018 and 2020, he experienced incidents of intimidation and attempts to portray him as unable to deliver on his approved work objectives. He contends that suggestions from management that he consider pursuing other employment opportunities were also a form of intimidation intended to force him to leave his position. However, at no time does he ever allude to any disciplinary action being taken against him on the employer's part nor does he allege in the slightest that his termination constituted disguised discipline.

[36] As such, I find that even if all the facts alleged in the grievance and the grievor's subsequent written submissions are true, there is not an arguable case that his termination was the result of disguised discipline.

[37] To paraphrase *Burns*, at paragraph 162, if a party does not advance an arguable case that would enable the Board to determine it has jurisdiction to adjudicate a grievance, the matter does not justify investing the Board's limited resources into the conduct of full hearings into its merits.

IV. Conclusion

[38] Given my finding that the grievor's submissions do not establish an arguable case that his termination was linked to disciplinary or disguised disciplinary actions by the employer, I conclude that I do not have jurisdiction to adjudicate the grievance.

[39] I allow the employer's motion to dismiss the grievance.

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

(The Order appears on the next page)

V. Order

[41] The grievance is dismissed for want of jurisdiction.

August 5, 2021.

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