

Date: 20211217

File: 566-02-11791

Citation: 2021 FPSLREB 140

*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

JOHN FALBO

Grievor

and

**TREASURY BOARD
(Office of the Comptroller General of Canada)**

Employer

Indexed as

Falbo v. Treasury Board (Office of the Comptroller General of Canada)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Mathieu Delorme, Association of Canadian Financial Officers

For the Employer: Caroline Engmann, counsel

Heard at Ottawa, Ontario,
February 6, 2020.
(Written submissions filed January 27 and February 11, 2016.)

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] John Falbo (“the grievor”) is employed by the Treasury Board (TB or “the employer”) at its Office of the Comptroller General of Canada. At the time material to the grievance, he was a financial analyst classified at the FI-04 group and level. His terms and conditions of employment were governed in part by a collective agreement entered into between the TB and the Association of Canadian Financial Officers for the Financial Management group dated September 30, 2013, which expired on November 6, 2014 (“the collective agreement”).

[2] On July 13, 2015, the grievor filed a grievance against the employer that stated as follows:

Grievance details:

I grieve the disciplinary action imposed on me by management in the letter of May 20, 2015 (“the Disciplinary Action”) on the following grounds:

- a) that the Disciplinary Action is unwarranted, punitive or inappropriate in the circumstances;*
- b) that management failed to consider mitigating and contributing factors, including but not limited to such things as medical factors and a lack of previous discipline;*
- c) that the Disciplinary Actions generally contravened a) the Agreement between Treasury Board and the Association of Canadian Financial Officers, including but not limited to article 46; b) Treasury Board’s “Guidelines for Discipline”; and c) Treasury Board’s “Policy on the Duty to accommodate Persons with Disabilities in the Federal Public [sic]; (d) Canadian Human Rights Act, including but not limited to sections 2,3,7 and 15; (e) s. 15 of the Canadian Charter of Rights and Freedoms; and f) any and all other policies, rules directives, legislation, principles or other law which may apply.*

Date on which each act, omission or other matter giving rise to the grievance occurred:

May 20, 2015

Corrective action requested:

Removal of all disciplinary measures imposed on me on May 20, 2015, including, but not limited to, a) rescinding the written letter of reprimand of May 20, 2015, b) compensation under paragraphs 53(2)(e) and 53 (4) of the Canadian Human Rights Act for pain

and suffering and willful and reckless conduct; and e) any other corrective action to remedy the matter and to make me whole.

...

[3] The grievance was heard directly at the final level of the grievance process, and the resulting decision dismissing it was rendered by letter dated October 15, 2015. The grievor referred the grievance to the Public Service Labour Relations and Employment Board (PSLREB) for adjudication on December 1, 2015, as a collective agreement grievance, under s. 209(1)(a) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*).

[4] On January 27, 2016, the employer objected to the PSLREB's jurisdiction to hear the grievance, alleging that the grievance did not relate to a disciplinary action under s. 209(1)(b) of the *PSLRA* or to the application of the collective agreement under s. 209(1)(a). On February 11, 2016, the grievor responded to that objection, alleging that the grievance related in part to the interpretation and application of the collective agreement. The matter was originally scheduled for a hearing on March 2 and 3, 2017, in Ottawa, Ontario; however, it was postponed at the grievor's request.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the Act").

[6] The hearing was rescheduled to February 6 and 7, 2020. The parties were instructed to be prepared to address the employer's objection to jurisdiction at the outset of the hearing. This decision addresses only that objection.

[7] The respondent was represented by counsel. On August 6, 2021, the Governor in council appointed that counsel a member of the Board (PC Number 2021-0814), effective September 13, 2021. I have had no discussions with that member of the Board with regard to this reference to adjudication and this decision.

II. Summary of the facts

[8] No witnesses were called. The facts were garnered from the documents submitted with the written submissions as well as from the parties' admissions in the course of their oral submissions before me, a disciplinary fact-finding document, and the grievor's third-level written submissions.

[9] At the outset of the hearing on February 6, 2020, the grievor withdrew his allegations relating to disability.

[10] The grievance refers to a letter of reprimand dated May 20, 2015 ("the letter of reprimand"), which Mr. Séguin gave the grievor. Its relevant portions state as follows:

...

Further to the disciplinary fact-finding held on May 4, 2015, I find that you have failed to abide by the TBS Departmental Code of Conduct in that you were disrespectful and your behaviour was inappropriate during our meeting of April 1, 2015, held between 16:00 and 16:30, when you ... is not acceptable and does not demonstrate fostering a work environment that promotes teamwork, respect and dignity. This behaviour is unacceptable and can be neither condoned nor tolerated.

Therefore, in accordance with the authorities delegated to me under Section 12(1)(c) of the Financial Administration Act (FAA), I have decided that a written reprimand is an appropriate sanction. In determining the appropriate disciplinary sanction, I have considered aggravating and mitigating factors such as, but not limited to, your years of service, the absence of discipline from your personnel file as well as the absence of remorse, unapologetic tone and inconsistency in your statements during the disciplinary fact-finding.

...

[11] While the facts with respect to the subject matter of the meeting on April 1, 2015 ("the April 1 meeting"), referred to in the letter of reprimand, were not completely clear, the subject of the grievor's annual performance review came up.

A. The collective agreement

[12] The provision of the collective agreement relevant to this decision states as follows:

...

ARTICLE 46

NO DISCRIMINATION

46.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, marital status, family status, mental or physical disability, conviction for which a pardon has been granted, membership or activity in the Association.

...

B. The disciplinary fact-finding process

[13] A document, entitled “Disciplinary Fact-Finding”, referred to the April 1 meeting as being the day on which Mr. Séguin met with the grievor about his performance and in which it was alleged that the grievor had acted inappropriately, which led to the fact-finding process and the letter of reprimand.

[14] According to the Disciplinary Fact-Finding document, a fact-finding meeting was held on May 4, 2015, which the grievor and a bargaining agent representative attended. The grievor was questioned about his behaviour at the April 1 meeting. Nothing in the document records the grievor referring to Mr. Séguin making any comments, derogatory or otherwise, about the grievor’s heritage. The reference to his heritage in the document is as follows:

...

Mr. Falbo mentioned that due to his Italian background, he naturally has a voice that carries and sounds loud. I feel the need to specify that during the fact-finding meeting Mr. Falbo’s voice did not sound louder than normal and there was [sic] 5 people in the room, two of which were typing of [sic] keyboards most of the words spoken.

[Sic throughout]

[15] The Disciplinary Fact-Finding document also stated the following: “Mr. Falbo alleged that he had been on medication following a doctor’s appointment he attended earlier that day.”

[16] In a section that appears to set out questions and answers, the document notes the grievor’s answer about a portion of the discussion at the April 1 meeting. His responses to certain questions were recorded as follows:

...

Originally he called it Follow Up Meeting. Came back from certified sick leave off two weeks prior to that. That morning didn't feel well had dr note and shouldn't have come in, was on pain meds.

...

Don't recall all the details I was on pain meds and came back from sick leave.

...

[Sic throughout]

[17] In a couple of other places in the Disciplinary Fact-Finding document, the person recording the meeting referenced the grievor talking about being sick or having been off work due to being sick or to being on pain medications.

[18] The "Grievors [sic] 3rd Level Written Submissions" dated September 17, 2015, contain the following excerpts that are relevant with respect to the jurisdiction issue:

...

On May 20, 2015, Mr. Séguin issued a written reprimand to Mr. Falbo upon the concluding that there had been a failure by him to abide by the TBS Departmental Code of Conduct during a meeting the two had on April 1, 2015.

... Mr. Falbo grieved the written reprimand with the approval of his Bargaining Agent, the Association of Canadian Financial Officers (ACFO). Specifically, Mr. Falbo alleges a) that the disciplinary action is unwarranted, punitive or inappropriate in the circumstances; b) that management failed to consider mitigating and contributing factors; and c) that the disciplinary action contravened, inter alia, the TBS Guidelines for Discipline, the FI collective agreement, the Canadian Human Rights Act and s 15 of the Canadian Charter of Rights and Freedoms.

Mr. Falbo never had a history of discipline in his 16 federal public service. The written reprimand imposed arose only due to bad faith and discrimination by Alain Séguin which had the effect affecting Mr. Falbo at a moment of vulnerability. In the circumstances, it is clear that there is no just-cause for the discipline imposed on Mr. Falbo and that, in fact, he was discriminated against. Our views follow.

Prior to the meeting of April 1, 2015, Mr. Falbo had been away on medically certified sick leave for 2 weeks. He had been dealing with several medical issues over the previous months, of which Mr. Séguin and TBS were aware.

On April 1, 2015, in the morning Mr. Falbo attended a medical appointment and obtained a sick note ... Mr. Falbo reported that he was in much pain that day and was prescribed prescription drugs which were impacting his ability to focus that day.

Despite feeling ill, Mr. Falbo returned to work in the afternoon of April 1, 2015

...

12. Mr. Séguin knew from at least December 2014 that John was suffering from medical issues. John had met with Alain around that time and gave an emotional account in his office of his issues and that they were causing him stress, anxiety and he needed help to control these medical issues. John reports that Mr. Séguin seemed to agree that help was needed, However, rather than inquire on how to address the issues that John was having, Mr. Séguin discriminated against him due to his disability by picking a moment of vulnerability to spring difficult subjects on him. John is very sensitive to his medical issues and he feels hurt that he was placed in this situation. He feels that his Employer has shown very little disregard for his condition in acting in this way. Had they bothered they inquired into any accommodation needed before springing these issues on John, they would have been able to obtain information saying that John was vulnerable in this situation and should not be presented with issues in the way that Mr. Séguin did. This was discriminatory towards John.

...

15. He said that he does have a loud voice, louder than most, unless he is feeling non-confident. While speaking to Mr. Falbo on April 1, 2015, Mr. Séguin responded to MR. Falbo's loud voice by saying, "you Italians all have a temper". John was hurt by these comments and it exacerbated an already difficult situation. John reports that Mr. Séguin has previously made similar comments. At one point before his 2 week sick leave - when the two were talking about former clients - John said he wanted more active involvement with [a client]. John was told, "all you Italians have a loud voice". Our Neighbour is Italian, "when we have wine they are so loud!"

...

[Sic throughout]

[19] At the hearing, the grievor stated that he was not alleging that any derogatory comments were made about his heritage either during the Disciplinary Fact-Finding meeting (May 4, 2015) or when he was disciplined (May 20, 2015).

III. Summary of the arguments

[20] The grievor referred me to *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68, *Haynes v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 85, *Lovell and Panula v. Canada Revenue Agency*, 2010 PSLRB 91, *Parkolub and*

Hu v. Canada Revenue Agency, 2007 PSLRB 64, and *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145.

[21] The employer also referred me to *Parkolub and Hu* as well as to *Canada (Attorney General) v. Robitaille*, 2011 FC 1218, and *Re Attorney-General of Canada and Lachapelle et al.*, 1978 CanLII 2083 (FC).

IV. Reasons

[22] The employer has objected to the Board's jurisdiction to adjudicate this grievance. It took the position that this grievance does not fall within s. 209(1)(a) of the Act. For the reasons that follow, the objection is allowed, and the grievance is dismissed.

[23] At all material times, section 208 of the Act stated 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*

(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, or*

(ii) *a provision of a collective agreement or an arbitral award; or*

(b) *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

...

[24] The Board's jurisdiction to hear grievances filed under s. 208 of the Act is set out in s. 209, which stated as follows at all relevant times:

209 (1) *An employee ... 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 ...*

...

[25] The jurisprudence of the Board (and its predecessors) when it comes to ss. 208 and 209 of the *Act* (and the relevant sections of the predecessor legislation) has been clear in distinguishing that not all matters that may be grieved may be dealt with at adjudication.

[26] Section 209(1)(b) of the *Act* permits referring a grievance to adjudication that relates to discipline imposed on an employee when it amounts to a termination of employment, suspension from work, demotion with respect to the employee's position, or a financial penalty, while s. 209(1)(a) permits referring to adjudication a grievance that relates to an alleged breach of a collective agreement.

[27] However, the grievor has not referred his grievance to adjudication under s. 209(1)(b) of the *Act* with regard to a disciplinary action and, as such, the issue of a disciplinary action — in the form of a written reprimand — is not before me. What the grievor is attempting to refer to adjudication, under s. 209(1)(a) of the *Act*, is that part of his grievance that deals with an alleged violation of the no-discrimination clause of the collective agreement. As I have already mentioned, the grievor withdrew his allegations relating to disability at the outset of the hearing. What remains are now allegations of discrimination based on ethnic origins.

[28] The grievance states that May 20, 2015, was the date on which the action being grieved occurred. On that day, the grievor was disciplined via the letter of reprimand. The grievance clearly states that he grieves the disciplinary action. It states as follows: "I grieve the disciplinary action imposed on me by management in the letter of May 20, 2015 ('the Disciplinary Action') ...".

[29] The grievor then elaborates by stating that the disciplinary action was unwarranted, punitive, or inappropriate. He does not state that he grieves comments made by Mr. Séguin. No suggestion is made that on May 20, 2015, Mr. Séguin made any derogatory comments about the grievor's heritage. Indeed, in his submissions before me, the grievor acknowledged that he was not alleging that any comments were made after the April 1 meeting.

[30] On May 1, 2015, the grievor participated in the fact-finding process by being interviewed. According to the Disciplinary Fact-Finding document, he reportedly stated to the interviewer that due to his heritage, he naturally has a voice that carries and that

appears loud. There is no reference to Mr. Séguin making any comments or referring to the grievor's heritage in the Disciplinary Fact-Finding document. It is, in fact, the grievor who referred to his own heritage to explain the behaviour at issue.

[31] While the allegations that Mr. Séguin made comments about the grievor's heritage did arise as a part of the grievance process for the purpose of questioning the validity of the disciplinary action that resulted in a written reprimand, this does not somehow allow the issue to morph into a distinct, stand-alone grievance about a breach of the no-discrimination clause of the collective agreement. Yet, that is exactly what the grievor is attempting to do.

[32] The grievor grieved a disciplinary action that resulted in a written reprimand. It is in relation to that discipline that his alleged discrimination based on ethnic origin must be rooted. The grievance was not an allegation of a breach of the collective agreement based on discrimination in the workplace on the basis of ethnic origin. The pith and substance or essence of the grievance was about the written reprimand, the allegation of discrimination must be tied to the decision to issue that written reprimand on May 20, 2015. For example, it is obvious that the grievor was alleging a breach of the collective agreement based on discrimination with respect to a disability, in relation to the reprimand, because that is exactly what the grievance says. The grievor cannot now ask the Board to pronounce on a breach of the collective agreement about other things that may have occurred in the work relationship, at various points in time, that were not tied to the decision to issue the written reprimand.

[33] It is clear that he is attempting to do exactly what the Federal Court of Appeal stated in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), cannot be done.

[34] The fact that in his grievance, the grievor stated that the disciplinary action contravened the collective agreement and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), 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.)), TB policies, and any and all other policies, rules, directives, legislation, principles, or other laws that may apply, does not somehow turn a grievance specifically about a written reprimand into one about alleged breach of the collective agreement relating to

discrimination in the workplace that took place before the date of that written reprimand.

[35] The fact that the grievance was referred to adjudication under s. 209(1)(a) of the Act rather than s. 209(1)(b) also does not assist the grievor. This is specifically referred to at paragraph 5 of *Burchill*, where the Court stated as follows:

[5] In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.

[36] If the grievor felt aggrieved by comments about his heritage that were made on or before the April 1 meeting, he certainly could have filed a grievance about it:

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

(The Order appears on the next page)

V. Order

[38] The objection to jurisdiction is allowed.

[39] The grievance is dismissed.

December 17, 2021.

**John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board**