Date: 20220315

File: 566-20-43845

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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

K.V.

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Employer

Indexed as
K.V. v. Canadian Security Intelligence Service

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Himself

For the Employer: Christian Demers, counsel

Decided on the basis of the documents on file and on written submissions filed on February 1 and 3, 2022.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] K.V. ("the grievor") referred a termination grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board"). He was terminated from his employment with the Canadian Security Intelligence Service ("the employer" or CSIS) on August 24, 2021, for medical reasons.

[2] The grievor submitted that the termination was unfair, as he would have been able to return to work had it not been for the hurdles created by the COVID-19 pandemic.

II. Sealing and anonymization order

[3] The employer requested that all unredacted documents in this file be sealed and that only redacted copies remain in the Board's files (with no identifying information, including names). The grievor did not object to this request.

[4] I granted this request on an interlocutory basis, pending a final decision. Since this is the final decision in this matter, I must now decide the request permanently.

[5] The Board adheres to the open court principle and applies the *Dagenais/Mentuck* test (per *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76) to determine if granting a confidentiality order is in the interests of justice.

[6] The test to grant a confidentiality order was stated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, and recently recast by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, in the following terms:

> …
>
> *[38] … the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*

…

[7] I believe that the elements of the test are met in this case.

[8] According to the preamble to the *Canadian Security Intelligence Service Act* (R.S.C., 1985, c. C-23; "the *CSIS Act*"), CSIS is the intelligence organization set up by Parliament for the protection of Canada's national security and the security of Canadians.

[9] The sealing order requested by the employer aims at protecting CSIS's employees' identity. The redactions are the names and identifying information of CSIS employees. As the employer stated, "Publicly identifying CSIS employees by their names not only puts them at risk but also impairs both the employees' and CSIS's ability to investigate threats to the security of Canada."

[10] I am also mindful of the following section of the *CSIS Act*:

…

> ***18 (1)*** *Subject to subsection (2), no person shall knowingly disclose any information that they obtained or to which they had access in the course of the performance of their duties and functions under this Act or their participation in the administration or enforcement of this Act and from which could be inferred the identity of an employee who was, is or is likely to become engaged in covert operational activities of the Service or the identity of a person who was an employee engaged in such activities.*

…

[11] I do not believe that there are any other measures to be taken to protect the identities of CSIS employees, save sealing the documents and placing redacted copies in the Board's file. For the purposes of this decision, taken on strictly jurisdictional grounds, there is no need to identify anyone who works or has worked at CSIS. Therefore, the salutary effects of the order, protecting the identities of CSIS employees, outweigh any deleterious effect. The impact of the confidentiality order is minimal to the intelligibility of this decision or to understanding the record before the Board.

[12] An order will issue accordingly. Unredacted documents will be sealed and replaced by redacted copies in the Board's file (with no identifying information,

including the names and contact information of CSIS employees), and the grievor shall be designated as "K.V."

III. The Board's jurisdiction

[13] On its own motion, the Board raised the issue of its jurisdiction to hear the grievance.

[14] Only certain individual grievances can be referred to adjudication before the Board under s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). Section 209 provides for four types of adjudicable grievances, a) the interpretation or application of a collective agreement or an arbitral award; b) a disciplinary action resulting in termination, demotion, suspension, or financial penalty; c) for employees of the core public administration, termination or demotion for unsatisfactory performance or for reasons other than a breach of discipline or misconduct, or deployment without consent; and d) for employees of separate agencies, termination or demotion for reasons other than a breach of discipline or misconduct, if the separate agency has been designated by an order of the Governor in Council.

[15] The employer is a separate agency listed in Schedule V to the *Financial Administration Act* (R.S.C., 1985, c. F-11). It has not been designated for the purposes of s. 209(1)(d) of the *Act*.

[16] From the grievance and the accompanying documentation, it is clear that the termination was made for medical reasons and not for a breach of discipline or misconduct.

[17] The parties were asked for their submissions on the matter. The employer stated that the Board did not have jurisdiction. The grievor submitted that the employer had indicated to him that his recourse was with the Board, and he provided an email to support this assertion.

IV. Decision

[18] Unfortunately, the advice was wrong. The Board's ability to adjudicate this grievance is circumscribed by s. 209 of the *Act*. The grievor referred the grievance to the Board as a disciplinary action, pursuant to s. 209(1)(b). However, there was no dispute that the termination was for medical reasons and was not related to a

disciplinary action. Otherwise, s. 209(1)(d) provides for the adjudication of a termination for any reason that does not relate to a breach of discipline or misconduct in the case of an employee of a designated separate agency. A termination for medical reasons is such a termination. However, again, while CSIS is a separate agency, it has not been designated for the purposes of the s. 209(1)(d) of the *Act*.

[19] Therefore, I find that the Board does not have jurisdiction to hear this grievance. While the Board cannot hear this grievance, it may be that the grievor has other recourse options.

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

(The Order appears on the next page)

V. Order

[21] The grievance is dismissed for lack of jurisdiction.

[22] All unredacted documents in this file are ordered sealed and shall be replaced by redacted copies (with no identifying information, including the names and contact information of CSIS employees).

March 15, 2022.

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