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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

DAVID FAUTEUX, AMY BELLEFLEUR, VALÉRIE DUBOIS, ANIK ROSSIGNOL, AND VÉRONIQUE BELLEMARE

Grievors

and

DEPUTY HEAD
(Canadian Food Inspection Agency)

Respondent

Indexed as
Fauteux v. Deputy Head (Canadian Food Inspection Agency)

In the matter of individual grievances referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: William Desrochers, counsel

For the Respondent: Richard Fader and Marie-France Boyer, counsel

Decided on the basis of written submissions, filed June 10 and 23 and July 18 and 25, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

[1] The grievors, David Fauteux, Amy Bellefleur, Valérie Dubois, Anik Rossignol, and Véronique Bellemare, are employees of the Canadian Food Inspection Agency ("the employer" or "the Agency"). Each filed a grievance about the *Policy on COVID-19 Vaccination for the Canadian Food Inspection Agency* ("the policy") and about the employer's decision to place them on unpaid administrative leave due to failing to comply with the policy.

[2] The grievances are all very similar and followed a similar course. They were filed with the employer, which dismissed them at the first level of the grievance process. The grievors then referred them to adjudication without presenting them at the other levels of the grievance process. There is one exception. The employer did not render a decision with respect to Ms. Rossignol's grievance. However, her grievance, like the others, was referred to adjudication without being presented at the subsequent levels of the grievance process.

[3] The employer objected to the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board") to hear these grievances as they were not presented at all the levels of the grievance process and therefore could not be referred to adjudication.

[4] For the following reasons, I find that the referral to adjudication was premature. The Board has no jurisdiction to hear the grievances.

I. Individual grievances referred to adjudication

[5] The policy came into effect on November 8, 2021.

[6] The grievors held positions in the Engineering and Scientific Support (EG) group in different regions of the country. Under the policy they, just like all Agency employees, were required to confirm their vaccination status. They refused to comply with the policy.

[7] Apart from one grievor who was on leave when the policy came into effect and still on leave when the written submissions were filed, the grievors were placed on unpaid administrative leave in early December 2021 until they complied with the policy. The policy was suspended in June 2022.

[8] As indicated, the grievors filed grievances challenging the policy and asking that the employer waive the application of the policy so as to not place them on unpaid leave or, alternatively, to end their leave and retroactively pay them the salary that they had been denied.

[9] Two grievances were drafted in French and three in English. Subject to certain variations in their wording, they all also indicated that they related to disciplinary action that led to suspension and financial penalty as well as a unilateral change to employment conditions that, according to them, constituted constructive dismissal.

[10] Again, with some variation in the wording, the last paragraph of each grievance indicated that were it not resolved following "the levels provided for" in the collective agreement, it could be referred to adjudication, in accordance with the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") and its regulations, "… as it involves disciplinary action resulting in suspension and a financial penalty, as well as a unilateral and substantial alteration of my conditions of employment … and therefore is constructive dismissal." The English-language grievances stated that the purpose of the disciplinary action that the Agency imposed was to force the grievors to resign and therefore was constructive dismissal.

[11] One grievor, Mr. Fauteux, asked that his grievance be heard directly at the final level of the grievance process. His grievance also indicated that he intended to refer it to adjudication were it not resolved to his satisfaction after being heard "at the, only, final level". The employer dismissed the request.

[12] Each grievor, with the possible exception of Ms. Rossignol, was invited to a hearing at the first level of the grievance process set out in the collective agreement. The relevant collective agreement is the *Collective Agreement between the Canadian Food Inspection Agency and the Public Service Alliance of Canada (PSAC) regarding the Public Service Alliance of Canada (PSAC) Bargaining Unit* agreed to on December 30, 2020 ("the collective agreement").

[13] The grievors did not attend the first-level hearing. The employer rendered its decision on the grievances based on the information it had available.

[14] The employer dismissed the grievances of Mr. Fauteux and Mses. Bellefleur, Dubois, and Bellemare at the first level. In each case, its decision indicated that if the

grievor disagreed with the decision, he or she could transmit the grievance to the next level of the grievance process, under the collective agreement.

[15] As previously mentioned, no decision was rendered with respect to Ms. Rossignol's grievance.

[16] Instead of submitting their grievances to the next level, the grievors referred them to the Board under s. 209(1)(b) of the *Act*. That provision allows referring a grievance to adjudication about a disciplinary action that resulted in termination, demotion, suspension, or financial penalty.

[17] As indicated, the employer made a preliminary objection that the Board does not have jurisdiction to hear the grievances because they were not presented at all the necessary levels, as required by s. 225 of the *Act* and the collective agreement.

[18] At a case management conference held in May 2022, the parties agreed that the employer's objection would be decided on a preliminary basis, based on written arguments. Under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide any matter before it based on written arguments, without holding a hearing.

[19] The five files were consolidated for the purposes of this decision.

II. The collective agreement, the *Act*, and the *Regulations*

[20] Before summarizing the parties' arguments, a review should be made of the collective agreement articles and the provisions of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") and of the *Act* relevant to those arguments.

[21] The collective agreement sets out a three-level grievance process (clause 17.03).

[22] If the decision on or settlement of a grievance at the first level is not satisfactory to the employee, or if the employer did not provide a response within 15 calendar days of the date on which the grievance was filed, the grievor may present the grievance at the second level. The same applies for presenting the grievance at the third and final level of the process (clauses 17.11 and 17.12 of the collective agreement).

[23] An employee who fails to present his or her grievance at the next level within the prescribed time limits is deemed to have abandoned the grievance, unless the employee is unable to comply with the prescribed time limits due to circumstances beyond his or her control (clause 17.19 of the collective agreement).

[24] The three-level grievance process has only two exceptions, which are when the nature of the grievance is such that a decision cannot be made below a level of authority and the parties agree to eliminate a level or all the levels except the final one (clause 17.16 of the collective agreement), or if the grievance is related to the employee's demotion or termination for cause under ss. 12(2)(c) or (d) of the *Financial Administration Act* (R.S.C. 1985, c. F-11; "the *FAA*"). In those cases, the grievance is presented only at the final level (clause 17.17).

[25] Under clause 17.21 of the collective agreement, an employee who filed a grievance about a disciplinary action resulting in a suspension or a financial penalty, or termination of employment or demotion within the meaning of the *FAA* "… up to and including the Final Level in the grievance procedure …" can refer the grievance to adjudication under the provisions of the *Act* if the grievance was not resolved to his or her satisfaction.

[26] In addition, s. 71 of the *Regulations* states that a grievance about, among other things, a termination can be presented at the final level of the grievance process without having been presented at the lower levels. However, s. 71 must be read in conjunction with s. 237(2) of the *Act*, which states that a collective agreement's articles take precedence over inconsistent provisions in the *Regulations*.

[27] The *Act* imposes requirements that must be respected to refer a grievance to adjudication. Section 225 states that no grievance may be referred until it has been presented at all "… required levels in accordance with the applicable grievance process"; that is, in accordance with the grievance process set out in the collective agreement.

[28] Section 209(1) of the *Act* also states that a grievor may refer a grievance to adjudication about a disciplinary action resulting in termination, demotion, suspension, or financial penalty only once the grievance has been presented at "… up to and including the final level in the grievance process …".

III. Summary of the arguments

[29] The grievors' written arguments focused primarily on the merits of their grievances; that is, the nature of the employer's decision to place them on unpaid leave, which they characterized as disciplinary action resulting in constructive dismissal or implicit termination.

[30] According to the grievors, the policy was such a serious disciplinary action against unvaccinated employees that it amounted to constructive dismissal or implicit termination. They argued that they were entitled to require that their respective grievances be presented directly at the final level of the grievance process, under clause 17.17 of the collective agreement. Thus, the employer's first-level response should, in each file, be deemed the final-level response, which would thus allow the grievors to refer their grievances to adjudication under s. 209(1)(b) of the *Act*.

[31] The grievors argued that the application of the concept of constructive dismissal in the federal public service is uncertain and that the Board should clarify that issue since, according to them, doing so is imperative to dealing with the employer's preliminary objection. According to the grievors, they were constructively dismissed or were entitled to consider as a constructive dismissal the employer's decision to place them on unpaid leave indeterminately.

[32] The employer submitted that the Board need not consider the grievances' merits, the application of the concept of constructive dismissal, or the nature of the Agency's decision to deal with the preliminary objection that the grievance process was not complied with. The Board does not have jurisdiction to hear these cases because it has no authority to hear a grievance that was not presented at up to and including the final level (see *Brown v. Deputy Head (Department of Social Development)*, 2008 PSLRB 46 at para. 26, and *Tuquabo v. Canada Revenue Agency*, 2006 PSLRB 128 at para. 16). The grievances were decided only at the first level, and the grievors did not take the steps to present their respective grievances at the following levels.

[33] Section 225 of the *Act* states that a grievance cannot be referred to adjudication until it has been presented at all the required levels, in accordance with the collective agreement. The grievors did not do it, and the Board has no jurisdiction or discretion

to allow them to circumvent the requirements of s. 225 (see *Martel v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 35 at para. 26).

[34] The grievors referred their grievances to the Board under s. 209(1)(b) of the *Act*, which relates to " … a disciplinary action resulting in termination, demotion, suspension or financial penalty …". The employer argued that the grievances had to be presented up to the final level of the grievance process. The parties had no agreement under which the grievors could present their grievances directly at the final level, and none of the grievors was dismissed. They are all still employed by the Agency.

IV. Analysis

[35] The grievors characterized their grievances against the policy as grievances against constructive dismissal or implicit termination that resulted from the employer's decision to place them on unpaid leave for failing to comply with the policy. The employer challenged that characterization. According to the Agency, none of the grievors was dismissed. They were placed on unpaid administrative leave, which ended in June 2022 when the application of the policy was suspended.

[36] To decide the employer's preliminary objection, I must determine whether the grievors could refer their grievances to adjudication without presenting them at each level of the grievance process set out in the collective agreement. To do that, I must decide whether the grievors were entitled to treat the employer's first-level decision as a final-level decision based on them characterizing their respective grievances as being about constructive dismissal or implicit termination.

[37] The grievance process exists for a reason. With some exceptions, it should not be circumvented before referring a matter to adjudication. The purpose of such a process was described as follows in *Laferrière v. Deputy Head (Canadian Space Agency)*, 2008 PSLRB 53 at para. 28:

> …
>
> *[28] The internal grievance resolution procedure exists to provide the parties with the possibility of finding solutions to their disputes themselves. The various levels of the procedure provide an equivalent number of opportunities for dialogue and discussion, with the goal of reaching a solution. If no agreement is achieved, the parties may then turn to a third party who has the authority to impose a solution. This constitutes the foundation of the grievance*

> *systems of Canadian labour relations regimes, and the* Act *is no different in that regard.*
>
> …

[38] The purpose of the levels of the grievance process is to create opportunities for dialogue and discussion, thus promoting the fair and effective resolution of disputes between an employee and his or her employer. For that reason, the *Act*, the *Regulations*, and the collective agreement insist on compliance with the grievance process before making a referral to adjudication, and they recognize very few exceptions.

[39] Section 225 of the *Act*, a legislative provision with respect to the Board's jurisdiction, states that a grievance cannot be referred to adjudication until it has been presented at all the levels required by the collective agreement. In addition, the section of the *Act* that lists the types of grievances that may be referred to adjudication states that a grievance may be so referred only after it has been presented at up to and including the final level of the applicable process (see s. 209(1) of the *Act*).

[40] The legislator also stressed the importance of the grievance process by including s. 241(2) of the *Act*, which provides that failing to present a grievance at all levels required under the collective agreement is excluded from the defects in form or technical irregularities that the Board can tolerate. The referral of a grievance to adjudication can be invalidated due to the failure to comply with the grievance process.

[41] The Board has repeatedly found that it does not have jurisdiction over grievances when the grievors did not meet the conditions set out in the *Act* for referrals to adjudication, including complying with the grievance process (see, among others, *Brown*, at para. 29, *Laferrière*, and *El-Menini v. Canadian Food Inspection Agency*, 2018 FPSLREB 40).

[42] The grievance process set out in the collective agreement has three levels. The grievances at issue were presented only at the first level.

[43] The grievors did not claim that a lack of understanding of the steps to take or that circumstances beyond their control prevented them from complying with the grievance process. They intentionally referred their grievances to adjudication before

presenting them at the second level. They chose to treat the employer's first-level response as a final-level decision.

[44] Four of them took no steps to reach an agreement with the employer to present their grievances directly at the final level, as provided in clause 17.16 of the collective agreement. The request of the only grievor who did so was denied. The employer insisted on compliance with the grievance process set out in the collective agreement.

[45] Section 71 of the *Regulations* provides for eliminating levels in some circumstances, notably for a termination grievance. Such grievances **may** be presented at the final level. However, clause 17.17 of the collective agreement is more specific and takes precedence over s. 71 of the *Regulations* (see, for example, *Association of Justice Counsel v. Treasury Board*, 2019 FPSLREB 90 at paras. 65 to 69; see also s. 237(2) of the *Act*). Clause 17.17 of the collective agreement states that a grievance is presented at the final level only if the employer terminates an employee for cause under ss. 12(2)(c) or (d) of the *FAA*. Although the grievors relied on clause 17.17 in support of their argument that their respective grievances could be presented directly at the final level of the grievance process, they did not claim that they were subjected to such a termination.

[46] The grievors argued that they were constructively dismissed and that they were entitled to treat the employer's first-level decision as a final-level decision.

[47] I make no finding as to whether the concept of constructive dismissal applies to the federal public service or whether applying the policy was in fact a constructive dismissal or implicit termination. Those are important legal and substantive questions. However, to bring them to the Board, the grievors had to comply with the grievance process set out in the collective agreement to be able to refer their respective grievances to adjudication under the *Act*'s requirements, which they did not do.

[48] I cannot accept that a grievor may unilaterally ignore the grievance process set out in the collective agreement based solely on his or her description of the grievance as being related to constructive dismissal or implicit termination. A grievor is not entitled to treat the employer's first-level response, or the absence of a first-level response, as a decision at the final level of the grievance process based solely on his or her characterization of the situation. Accepting the position that the grievors advanced would be contrary to the collective agreement and the spirit and intent of the *Act*.

[49] The grievors are free to interpret the Agency's decision as a constructive dismissal and to assert their rights. However, they must do so in accordance with the process established in the collective agreement and the *Act*. Allowing them to refer their grievances to adjudication without following the grievance process would be contrary to the objective of the grievance process as described in *Laferrière*.

[50] Because the grievors did not comply with the grievance process, the grievances were not appropriately referred to adjudication under the *Act*, and therefore, the Board does not have jurisdiction to deal with them.

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

(The Order appears on the next page)

V. Order

[52] The employer's preliminary objection is allowed.

[53] The grievances are denied.

October 7, 2022.

FPSLREB Translation

Amélie Lavictoire
a panel of the Federal Public Sector
Labour Relations and Employment Board