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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

HEATHER NASH

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Nash v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Joanne Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Herself

For the Respondent: Amanda Bergmann

Decided on the basis of written submissions, filed November 4; and December 21 to 23 and 30, 2021, and January 18, 2022.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Heather Nash ("the grievor") was formerly employed by the Treasury Board at the Canada Border Services Agency ("the employer") as a CR-03 mail clerk ("the CR-03 position"). She received approval for medical retirement in 2015. Effective September 2, 2016, she medically retired from the federal public service.

[2] On August 8, 2016, the grievor initiated the following grievance:

> …
>
> *i grieve that the employer discriminated against me in employment contrary to the provisions of the canada human rights code. I have a physical disability that the employer has been made aware of and yet they have failed to accommodate me as require or even acknowledge the disability.*
>
> …
>
> [*Sic* throughout]

[3] The grievor requested the following corrective action:

> …
>
> *that i be returned to work to a position that properly accomodates my disability. that i be made whole in ever way including that i be paid all lost wages, benefits, pension credits and other benefits that my accrue as an employee.*
>
> [*Sic* throughout]

[4] On May 1, 2017, the grievor referred the grievance to adjudication before the Public Service Labour Relations and Employment Board (PSLREB) under s. 209(1)(c) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2). She provided notice of the reference to adjudication to the Canadian Human Rights Commission.

[5] On November 4, 2021, the employer filed a preliminary objection to the Board's jurisdiction. This decision addresses that objection.

[6] 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 *Public Service Labour Relations Act* 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*").

[7] In this decision, the Board and its predecessors are each referred to as "the Board".

[8] This case proceeded in writing at the request of the grievor and with medical information indicating that she is unable to participate in an oral hearing.

II. The facts

[9] The history of the grievor's public service tenure provides some context for the events underpinning the grievance. The Board summarized it as follows in its instructions to the parties on October 20, 2021:

> …
>
> *The grievor was terminated from her employment as a PM-02 Customs Inspector in August 2001 due to her disability. An Independent Third-Party Reviewer (ITPR) found on October 17, 2007 that the grievor was discriminated against on the basis of her disability and she received compensation for this. The grievor, assisted by her bargaining agent, and the employer signed a Memorandum of Agreement (MOA) regarding the grievor's return to work in 2009 at a CR-03 group level. On August 8, 2016, the grievor accepted medical retirement and provided a retirement date of September 2, 2016.*
>
> …

[10] Documents received with the parties' submissions indicate that following the independent third-party reviewer's (ITPR) decision, the employer and the grievor's bargaining agent executed a memorandum of agreement (MOA) in 2009, of which one term explicitly stated the following:

> …
>
> *The Employee and the PSAC agree:*
>
> *7. To consent to the demotion for non-disciplinary reasons to a lower-level position, CR-3 mail room clerk at the Windsor St Clair Regional Office of the CBSA, on March 1st, 2010.*
>
> …

[11] In accordance with the MOA, the employer prepared a deployment offer for the CR-03 position. Upon reporting for duty on March 1, 2010, the grievor signed it to indicate her acceptance.

[12] On January 20, 2011, the grievor commenced leave without pay due to illness. She later transitioned to long-term disability benefits from the Sun Life insurance company ("Sun Life") effective February 5, 2011. She never returned to the workplace.

[13] According to documents before the Board, on February 6, 2013, Sun Life advised the grievor that she was "… considered totally disabled from performing any commensurate occupation." Total disability benefits were approved.

[14] On October 14, 2013, the grievor's physician advised that she was "… permanently disabled and unable to return to work."

[15] On March 11, 2013, March 14, 2016, and July 21, 2016, the employer issued and reissued letters to the grievor offering three options: retirement, resignation, or termination. The effect of each option would have been to end her public service employment. Throughout these years, the grievor continued to indicate her wish to return to work. Plans to return her to the workplace were explored with a work-health consultant retained by Sun Life. However, she was never able to return to work.

[16] In 2015, Health Canada approved the grievor for medical retirement. As noted, she medically retired from the federal public service effective September 2, 2016. Shortly before that date, she initiated the grievance that was referred to adjudication.

III. Preliminary objection to the Board's jurisdiction

A. For the employer

[17] On October 20, 2017, the employer objected to the Board's jurisdiction over the grievance. The bases of the objection were described in its submission of November 4, 2021.

[18] The employer noted that the Board could only consider allegations of discrimination arising from matters falling under s. 209(1) of the *Act* and argued that the grievance did not arise from any referable grounds.

[19] Although the grievance was referred to the Board under s. 209(1)(c) of the *Act*, the employer reviewed the applicability of each paragraph of s. 209(1) to the Board's authority to proceed with the adjudication of the grievance. The arguments are summarized as follows.

1. Section 209(1)(a)

[20] Section 209(1)(a) of the *Act* addresses the interpretation or application of a collective agreement or arbitral award. As provided in s. 209(2), before proceeding, a grievor requires bargaining agent approval to self-represent before the Board in such a matter. The grievor did not receive the requisite approval. Therefore, the grievance was barred from proceeding to adjudication under s. 209(1)(a).

2. Section 209(1)(b)

[21] Section 209(1)(b) of the *Act* permits the reference to adjudication of a grievance arising from a disciplinary action resulting in termination, demotion, suspension, or financial penalty. The grievance did not allege any form of discipline. Accordingly, s. 209(1)(b) does not apply, and the Board had no jurisdiction over the grievance.

3. Section 209(1)(c)

[22] Section 209(1)(c) of the *Act* is divided into two parts. The first part addresses a demotion or termination provided in the *Financial Administration Act* (R.S.C., 1985, c. F-11; "*FAA*") under ss. 12(1)(d) and (e) for unsatisfactory performance or for a reason other than a breach of discipline or misconduct. The second part concerns a deployment without consent.

[23] The remedy sought is the grievor's return to a position that accommodates her disability. The employer argues that her termination in 2001, reinstatement to a lower-level CR-03 position in 2010, and medical retirement in 2016 are the only events to which the grievance might refer.

[24] The ITPR issued a decision to address the termination. It was the appropriate review authority at that time. Therefore, its decision conclusively decided the matter (also referred to as *res judicata*) following *Tuccaro v. Canada*, 2014 FCA 184, as the same parties were involved, the question was the same, and the ITPR's decision was final.

[25] Following the ITPR's decision, the employer rescinded the termination and reinstated the grievor to the workplace, in accordance with the terms of a memorandum of settlement. If the grievor felt that the conditions of employment or the accommodation measures at reinstatement were inadequate, she could have grieved at the appropriate time. She did not, and that time has now passed.

[26] The demotion arose from the ITPR's decision. It involved deploying the grievor from a PM-02 to the CR-03 position. It was voluntary and was implemented in accordance with the memorandum of settlement's terms. The Board has no authority to second-guess the parties' agreement, which explicitly stated that the demotion was for non-disciplinary reasons and that it was made in full and final settlement of all employment-related issues between the grievor and the employer.

[27] Furthermore, the grievor does not allege that she accepted medical retirement under duress. In any event, the medical retirement came into effect on September 2, 2016, after the grievance was filed.

4. Section 209(1)(d)

[28] This section has no application. It requires the employee to be employed in a separate agency, which the grievor was not. She previously was employed in the core public administration as defined in the *FAA*.

[29] In addition, the employer relied on the grievor's medical retirement from the public service as a bar to the Board's jurisdiction, citing s. 211 of the *Act*, which bars the referral to adjudication of any grievance against a termination under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). As medical retirement is a voluntary termination under the *PSEA*, it falls outside the Board's jurisdiction.

B. For the grievor

[30] The grievor provided four submissions between December 21 and 30, 2021, to reply to the preliminary objection. They provide a comprehensive review of events starting as early as her assessment for a customs inspector position (PM-02) in 1999.

[31] The grievor reiterated that she filed the grievance under s. 209(1)(c) of the *Act* and stated the following: "At not [*sic*] time was the grievance I filed about a termination from 2001. It was always about statements made by the employer in the June 30, 2016 meeting."

[32] The grievor indicated that during the June 30, 2016, meeting, an employer representative told her that he did not believe that she was disabled and that the employer did not have to accommodate her disability. She provided affidavits from other attendees at the meeting to that effect.

[33] In the grievor's view, any past action to accommodate her must be viewed through that lens. This is the essence of the grievance.

IV. Analysis

[34] Parliament created the Board, and its authority flows from the *Act*. When the grievance was referred to adjudication, the Board was governed by the *Act.*

[35] In the matter of grievances referred to adjudication, the Board's authority is circumscribed by s. 209(1) of the *Act*. When the grievance was referred to adjudication, it provided as follows:

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*	***209 (1)*** *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :*
(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*	***a)*** *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*
(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*	***b)*** *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*
(c) *in the case of an employee in the core public administration,*	***c)*** *soit, s'il est un fonctionnaire de l'administration publique centrale :*
(i) *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not*	***(i)*** *la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la* Loi sur la gestion des finances publiques *pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance*

relate to a breach of discipline or misconduct, or	*du rendement, un manquement à la discipline ou une inconduite,*
***(ii)** deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*	***(ii)** la mutation sous le régime de la* Loi sur l'emploi dans la fonction publique *sans son consentement alors que celui-ci était nécessaire;*
***(d)** in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*	***d)** soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).*

[36] The grievor stated clearly that the reference of her grievance to adjudication was based on s. 209(1)(c) of the *Act*. Nonetheless, with due regard for the fact that she was self-represented, the Board reviewed all the provisions of s. 209(1) before deciding whether it has jurisdiction over the matter.

[37] Concerning s. 209(1)(a), the reference to adjudication did not have the requisite bargaining agent approval to represent the grievor in this matter as set out in s. 209(2). Without that approval, the Board has no authority to proceed with the matter under s. 209(1)(a).

[38] As for s. 209(1)(b), on its face, the grievance does not allege that the employer imposed any element of disciplinary action. There is equally no mention of discipline in the grievance replies. I accept that the grievor does not allege that she received discipline related to the events at issue. In the absence of disciplinary action, the Board has no jurisdiction under s. 209(1)(b). (See *Matchett v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 6.)

[39] Turning to s. 209(1)(c), this case does not allege demotion, termination of employment for unsatisfactory performance or any other reason that does not relate to a breach of discipline or misconduct, or a deployment without consent.

[40] Rather, the documents show that the grievor settled the matter of her 2001 termination and that in 2010, she agreed to return to work in the CR-03 position. She transitioned to long-term disability in 2011. In 2013, her physician advised that she

was permanently disabled and not fit to return to any work. She medically retired from the public service, effective September 2016.

[41] It may be that the grievor came to the Board to state that her employment was involuntarily terminated as she felt pressured to accept medical retirement in the face of the options that the employer presented from 2013 to 2016. But that is not apparent from the grievance.

[42] Even if it were, the argument was thoroughly canvassed in *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90, which is a comparable case in which the grievor was absent from the workplace for an extended period without a foreseeable return-to-work date. The employer presented the grievor with similar options, and he selected what he considered was forced medical retirement. He argued that as he was forced to retire, that it was a termination that fell under s. 209(1)(c) of the *Act*, and that the employer could have continued to accommodate him with leave.

[43] In *Mutart*, at para. 92, the Board held that resignation from the public service, including medical retirement, is voluntary, stating that it is "… a unilateral severance of the employment relationship initiated by an employee."

[44] Furthermore, the Board found that it had no authority over resignation. Firstly, the *PSEA* provides for resignation in s. 63, and secondly, s. 211 of the *Act* expressly proscribes "… the referral to adjudication of an individual grievance with respect to … any termination of employment under the *Public Service Employment Act* …".

[45] Therefore, although the grievor in *Mutart* stated that he had retired under protest and that he had preferred to remain on extended leave, the Board found that his election to medically retire from the public service barred it from considering the matter further.

[46] Consistent with that reasoning, in *Stevenson v. Treasury Board (Department of Employment and Social Development)*, 2016 PSLREB 17 at para. 71, the Board stated that "[f]inancial pressure is not duress, and deciding to retire as a result is not involuntary …".

[47] The grievor in this case elected to medically retire from the public service. This decision was supported by medical evidence submitted by her own medical

professional. Medical retirement is a voluntary action taken by an employee to sever the employment relationship. It does not constitute termination of employment. Consistent with *Mutart* and *Stevenson*, the Board has no jurisdiction to consider it under s. 209(1)(c).

[48] To conclude with respect to s. 209(1)(c), the grievance does not address a demotion, termination, or deployment that would bring it within the Board's jurisdiction.

[49] With respect to s. 209(1)(d), the grievor was not an employee of a separate agency but of the employer. It forms part of the core public administration as set out in Schedule IV to the *FAA*. Therefore, s. 209(1)(d) was not available to her to use as a basis for the Board to accept the referral to adjudication.

[50] Lastly, throughout her submissions, the grievor repeated that her grievances related to statements that a departmental representative made to her on June 30, 2016. She alleged that he stated that he doubted that she was disabled. In her view, the statement violated her human rights.

[51] As noted, s. 209(1) circumscribes the Board's authority to proceed to the adjudication of a grievance. The grievance must be tied to the grounds set out in s. 209(1). This grievance does not engage any of those grounds. It is a standalone human rights complaint that alleges that words used at the June 30, 2016, meeting were discriminatory. The grievor made this clear in her written submissions to the Board.

[52] The Board is empowered to interpret or apply the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6) only in cases in which it has jurisdiction over the substance of the grievance. In this case, it does not have that jurisdiction, and the matter can proceed no further (see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115; upheld in 2015 FC 50).

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

(The Order appears on the next page)

V. Order

[54] The Board is without jurisdiction to proceed with this matter.

[55] The file is ordered closed.

April 13, 2023.

Joanne Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board