

Date: 20231023

File: 566-34-46649

Citation: 2023 FPSLREB 95

*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

CAMILLIO SENIOR

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as

Senior v. Canada Revenue Agency

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: Nathan Hoo, Public Service Alliance of Canada

For the Employer: Daniel Côté-Finch, counsel

Decided on the basis of written submissions,
filed June 23 and July 5 and 31, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Camillio Senior (“the grievor”) filed a grievance against his rejection on probation. The grievance was partially allowed at the final level of the individual grievance process. Nevertheless, it was referred to adjudication on February 3, 2023.

[2] The Canada Revenue Agency, the grievor’s former employer (“the employer”), objected to the referral to adjudication on two grounds. The employer argues that the grievance is moot, since the rejection on probation was voided and the grievor was paid the remainder of his term of appointment. The employer further submits that the grievor is now introducing new aspects to his grievance, thus contradicting the principle enunciated in *Burchill v. Canada (Attorney General)*, [1981] 1 FC 109 (CA), 1980 CanLII 4207 (FCA), that a grievance may not be modified at adjudication.

[3] Having considered the parties’ arguments, I find that further evidence is necessary to determine whether the grievor has been made whole and whether further remedies are warranted. There remain live issues between the parties, and thus the grievance is not moot. As to the *Burchill* principle, evidence is also needed to decide that issue. For the reasons that follow, the employer’s objections are dismissed.

II. Context

[4] The grievor was first hired by the employer on January 13, 2021, as a determinate taxpayer services agent with the usual 12-month probation period, as he was hired from outside the public service. On January 28, 2022, he received a new letter of offer for the position of collections officer in the Revenue Collections division for a term appointment ending November 14, 2022. On March 4, 2022, he was advised that the 12-month probation period had been extended to June 30, 2022, as he was newly appointed to the Revenue Collections division.

[5] On May 19, 2022, the employer ended the grievor’s employment, calling it a rejection on probation, citing unsuitability. In lieu of notice, he was provided with salary for the two weeks’ notice period.

[6] The grievor filed a grievance against the rejection on probation. The grievance was worded as follows:

I grieve that the employer rejected me while on probation, effective May 19, 2022, in contravention of Articles 5.4 and 5.4.1 of the Canada Revenue Agency's Procedures for staffing (Staffing Program).

[7] The grievor asked for the following remedies:

...

- 1. That the employer reinstate me into my position as a Collections Officer within the Collections and Verification division at the Northern Ontario Tax Services Office, effective immediately.*
- 2. That I be compensated, with interest, for all pay and benefits lost as a result of the employer rejecting me while on probation.*
- 3. That I be provided further remedy as deemed reasonable and appropriate in order to make me whole.*

...

[8] On January 26, 2023, the employer rendered its final-level decision on the grievance. The decision was as follows:

...

I understand that on May 19, 2022, you were informed of the employer's decision to reject you while on probation in accordance with the Canada Revenue Agency (CRA) Act. This decision followed the extension of your probation period on March 4, 2022. As per the CRA's Procedures for Staffing, I find that any extension to a probation period must take place as soon as possible to the end date of the probation period. As your probation period was set to end on January 24, 2022, I have determined that the extension did not take place as soon as possible thus rendering your rejection on probation, dated May 19, 2022, void.

In view of the foregoing, your grievance is partially upheld. As corrective measures, you will be administratively reinstated to your former position as a Collections Officer within the Collections and Verification division at the Northern Ontario Tax Services Office between the period of May 19, 2022 to November 14, 2022; the end date of your determinate contract. This period of time shall be coded as leave with pay for other reasons and you will be afforded the usual salary and benefits for which you would have been entitled. These corrective measures are deemed appropriate to make you whole and, as a result, no further corrective measures will be forthcoming including your request for interest.

...

[9] I asked the parties for their submissions on mootness, starting with the grievor.

III. Summary of the arguments

[10] One of the issues at the centre of this dispute is the grievor's loss of his reliability status. I note that the grievor uses the term "revocation", while the employer uses the term "cancellation". In this decision, I am not pronouncing on whether the reliability status was cancelled or revoked, as further evidence would be necessary to determine that point.

A. For the grievor

[11] The grievor argues that two issues remain to be decided: whether he has been made whole, and whether a panel of the Federal Public Sector Labour Relations and Employment Board ("the Board") may reinstate his reliability status.

[12] The grievor does not dispute that his collections officer position was a term position that ended on November 14, 2022.

[13] After he received the letter of rejection on probation, he sought other employment and was offered another appointment, with the same employer, for a term from November 16, 2022, to September 8, 2023. On November 9, 2022, he was informed that the employer had cancelled his reliability status and that he would have to go through the reliability status process again to obtain it. The offer for November 16, 2022, was rescinded, but he was told that once the reliability status was obtained, a new date would be set for his return.

[14] The grievor argues that, in its final-level decision on the grievance, the employer did not address the subsequent revocation of the grievor's reliability status or his rehire concerns.

[15] The grievor alleges that live issues remain to be addressed, which are whether the rejection on probation contributed to the loss of the reliability status and whether the grievor has been made whole.

[16] The grievor claims that the reliability status revocation was done in the context of the rejection on probation, which was subsequently voided by the employer. He suggests that the Board should be able to examine whether the revocation was reasonable, and it has the power to reinstate it if the revocation was unjustified.

[17] In addition, the grievor considers that he has not been made whole. The employer did pay salary and benefits to the end of his term, but not all losses attributable to the employer were covered. In the grievor's view, the rejection on probation was not fully corrected, as it led to the loss of the reliability status that prevented him from obtaining a further appointment with the employer. The grievor stresses that this loss of opportunity should be compensated.

[18] Therefore, the grievor argues that the mootness objection should be dismissed and that the grievance should be heard on its merits.

B. For the employer

[19] The employer seeks the dismissal of the grievance based on the mootness principle and the decision in *Burchill*.

[20] The employer recognizes that the rejection on probation was voided for technical reasons, and the grievor was compensated to the end of his term appointment. Therefore, the employer considers that the grievor was made whole, and consequently, the grievance is moot.

[21] The employer relies on *Mak v. National Research Council of Canada*, 2012 PSLRB 63, to claim that once the employer grants the corrective action requested, there remains no issue to decide. However, the employer acknowledges that this is tempered somewhat by the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, in that a decision maker may exercise their discretion to rule on an issue despite the parties' dispute having been resolved. However, according to the employer, in the labour relations context, it makes little sense for the Board to pronounce on a matter that the parties have resolved.

[22] As for the reliability status, the employer claims that it was never revoked; it was cancelled because the grievor's appointment ended. The employer understands the grievance as solely contesting the rejection on probation. It did not deal at all with the loss of reliability status. Following *Burchill*, the employer suggests that a whole new issue cannot be raised at adjudication; it must have been raised within the grievance process.

C. The grievor's reply

[23] The grievor disputes that the reliability status was not raised in the course of the grievance process. In his reply, he includes two documents that, according to him, show the matter was indeed discussed during the grievance process.

IV. Analysis

[24] Mootness, as defined by the Supreme Court of Canada in *Borowski*, is whether there remains a live issue to be resolved, and if not, whether the decision maker should exercise their discretion to rule on the merits of the dispute.

[25] The parties disagree on whether there is still a live issue that needs deciding. The grievor argues that the Board must still determine whether he has been made whole and examine the reliability status revocation related to the rejection on probation. The employer argues that the issue raised in the grievance, namely, the rejection on probation, was fully resolved by its final-level decision on the grievance.

[26] It is common ground that the rejection on probation was voided and that the grievor received monetary compensation for the early end of his term appointment.

[27] However, the grievor's reliability status, which is a condition of employment in the public service, was cancelled or revoked (as stated, I will not pronounce in this decision on which term should be applied) before the end of his term appointment. The term appointment ended on November 14, 2022, yet the reliability status had already been cancelled or revoked at that date. The grievor was never informed that a decision had been made to cancel or revoke his reliability status.

[28] By canceling or revoking his reliability status, the employer was in fact impeding a further appointment of the grievor. This is a consequence that meant further financial consequences beyond his term appointment.

[29] No evidence was presented in regard to the revocation or cancellation of the reliability status. The employer argues that it is purely administrative, linked to the end of the term appointment. The employer states as follows in its submissions: "The Grievor's reliability status was never revoked, as alleged. It was administratively cancelled, due to the contract's end date."

[30] Given the sequence of events, it seems much more likely the reliability status was cancelled or revoked not because of the end of the term appointment, but rather, because of the rejection on probation. The reliability status was cancelled or revoked before the employer issued its final-level decision on the grievance, voiding the rejection on probation. Therefore, it seems the reliability status ended not with the end of the term appointment, but with the rejection on probation.

[31] Since the rejection on probation was null, there was no reason for the reliability status to be cancelled or revoked. There was no reason why the reliability status would not still have been valid at the time the grievor was offered another term appointment.

[32] The grievor certainly has an arguable case that the employer's final-level decision on the grievance did not make him whole nor place him in the position he would have been in absent the rejection on probation. Had the term appointment simply ended, without the erroneous rejection on probation, the grievor would have been able to move to the next term appointment without interruption. The impediment to this scenario is the loss of the reliability status. Since it is directly linked to the rejection on probation, it can be argued that the grievance also covers that loss incidentally, though it was unknown to the grievor at the time he grieved the rejection on probation.

[33] It is therefore at least arguable that the case is not moot, as a live issue concerning the reliability status remains to be decided.

[34] It is also arguable that this is not an instance where the *Burchill* principle can be applied. The grievor did not directly raise the revocation or cancellation of the reliability status in his grievance, as he was unaware it had happened. However, as discussed above, it can be argued it was part of the rejection on probation. Moreover, the grievor asserts that the issue was raised with the employer, within the grievance process and before the employer's final-level decision on the grievance in January 2023, once it became known to the grievor in November 2022.

[35] Further evidence is needed to decide this case, and the grievor has established he has an arguable case. Consequently, the employer's objections are dismissed, and the case will be scheduled for a hearing on the merits.

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

(The Order appears on the next page)

V. Order

[37] The employer's objections are dismissed.

[38] The grievance will be scheduled for a hearing on the merits.

October 23, 2023.

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