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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

PEDRO SOUSA DIAS

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

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

In the matter of individual grievances referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Employer: Karl Chemsi, counsel

Heard by videoconference,
October 24 to 26, 2023.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Pedro Sousa Dias ("the grievor") is a border services officer, classified at the FB-03 group and level, working for the Canada Border Services Agency ("CBSA" or "the employer") at its Lansdowne, Ontario, port of entry. On December 30, 2021, he referred two grievances to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication under both ss. 209(1)(b) and (c)(i) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

II. Summary of the evidence

[2] This case arose out of events that began in March 2020 as the COVID-19 pandemic began to manifest in this part of the world. All workplaces were struggling to cope with the unprecedented global public health crisis. The federal government sent office workers home, but the need to provide critical services required most border services officers to remain in the workplace, with some exceptions. Little was known at the time about the COVID-19 virus. The employer began to develop guidance for management for dealing with exceptional circumstances, and it implemented several measures to cope with the situation.

[3] One early measure was to approve 6990 leave (leave with pay for other reasons), which was a discretionary leave available under the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") that expired on June 20, 2018 ("the collective agreement").

[4] In the very early days of the pandemic, the employer approved that leave based only on employees' verbal attestations that they had consulted their doctors or public health professionals and that they, or the people with whom they cohabited, were medically vulnerable to the COVID-19 virus. As set out in the employer's COVID-19 capsule entitled "Exploring flexibility for critical workers if you or someone you live with is vulnerable" ("the capsule"):

> …
>
> *a) All employees providing critical services who put in a request for modified or at home duties must first contact the Public Health Authority or a medical professional about their circumstances and medical situation. Given the pressures on the health network,*

> *Management will only request medical certificates in exceptional circumstances. Otherwise, a verbal declaration that the employee has consulted their doctor or a public health nurse will suffice.…*
>
> …

[5] In March 2020, the grievor experienced a brief flu-like illness as a result of which public health authorities advised him to isolate. On March 31, 2020, he was approved for four days of 6990 leave with no need to provide a medical certificate.

[6] He then continued working onsite for several months but became increasingly concerned about workplace health-and-safety issues that he felt posed a risk to him and, therefore, to his wife who he understood to be at risk of a severe health outcome or death should she contract COVID-19 according to Health Canada guidelines. Accordingly, on June 3, 2020, he requested 6990 leave, and on June 4, 2020, his request was approved, effective June 5, 2020, as follows:

> …
>
> *In looking at your request for an accommodation, due to the fact that your wife is considered higher risk for severe illness should she contract COVID-19, management's questions and inquiries in relation to your situation is part of the accommodation process. We are attempting to have a better understanding about the particulars of your situation in order to determine if there is meaningful work available in the workplace that meet your accommodation needs. This process is a collaborative one, and I am appreciative of the information you have shared.*
>
> *In evaluating your request, based on the information provided, management is in support of offering you Leave with Pay for Other Reasons, effective June 5, 2020 with an ongoing review. I will connect with you via email on a weekly basis to determine extensions of this leave for the following week.*
>
> *Management is continually reviewing the operational requirements and the requests for Leave with Pay for Other Reasons. As circumstances change, you may asked to return to work given your role as an officer who provides critical services. Your flexibility and continued commitment to doing your part to safeguard Canadians is greatly appreciated.*
>
> …
>
> [*Sic* throughout]

[7] On or about June 25, 2020, the employer began to review the situations of the nine employees, of which the grievor was one, who had been approved for 6990 leave based on their verbal attestations. The review was to determine, in each case, if the

leave was still required, if any changes were needed, or if the leave should be discontinued. In a message to management, the purpose of the review was explained as follows:

> …
>
> *In the early days of COVID-19 (March 2020), there was little expert health information available and minimal public health guidance for workplaces such as the CBSA. Consequently, at that time, the Agency was still developing its full scale occupational health and safety (OHS) response.*
>
> *A key part of our early response was approval for the broad used of **leave with pay for other reasons** as a means to help ensure the safety of our employees, their families, respective dependants, and the public.*
>
> *Since those early days, there have been significant advances in terms of expert health information, guidance from **public health**, and the implementation of numerous **OHS** measures within our workplaces.*
>
> *In order to ensure that the Agency is well positioned for the next stage of COVID-19 response, appropriately implement business resumption measures, continue to prioritize employee health and safety requirements, and manage CBSA resources effectively, it is important that the Agency fully review the use of leave with pay for other reasons cases and update its use to reflect the current conditions and those anticipated in the coming months.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[8] The employer asked for signed attestations and medical information via a medical questionnaire that employees were asked to take to their doctors to be completed.

[9] Candace Ricci, an administrative superintendent at Lansdowne at the time, testified before the Board. She was responsible for carrying out the review process. A regional review committee had been struck to review the leaves. A subcommittee prepared the files, conducted preliminary reviews, and made recommendations.

[10] Initially, the grievor was one of three employees who did not wish to have their medical questionnaires completed, but ultimately, the employer received eight completed questionnaires. One employee, whose specialist would not complete the questionnaire, discussed the matter with Ms. Ricci, who resolved it by suggesting that

he have his family doctor complete it. The grievor was the only employee who did not provide a completed questionnaire.

[11] Ms. Ricci began each review by meeting with the employee, either in person or by phone. She met with the grievor by phone on August 12, 2020. He advised that he disagreed with the employer's approach. On August 28, 2020, he confirmed in an email that he had already attested to his wife's medical vulnerability (and did so again in that email) but that he would not have the requested medical questionnaire completed.

[12] On September 9, 2020, the regional review committee reviewed the grievor's situation and determined that it required answers to two questions and the completion of the written attestation and the medical questionnaire. The subcommittee recommended that he be removed from 6990 leave and that he be assigned to telework as an interim measure, to give him time to obtain and provide the required medical information.

[13] On September 11 and 21, the employer again asked the grievor to provide the requested information. He answered the two questions but did not provide the written attestation or a completed medical questionnaire. He remained on 6990 leave until September 27, 2020.

[14] The employer had been working on a telework arrangement for the nine employees on 6990 leave. On September 28, 2020, they all began teleworking on the Border Watch Line. Also on September 28, 2020, the employer sent the grievor the following:

> …
>
> *Today was the deadline for the return of the medical questionnaire, and I have not received it. The Regional Review will be taking place next week, and in order to substantiate your request for either 6990 leave or accommodation in the form of telework due to living with a person who is at high risk for illness due to COVID 19, this is required to be completed.*
>
> …

[15] On September 30 and October 2, 2020, the employer asked again for the information.

[16] On October 7, 2020, there was another committee review, this time of the grievor's continued telework, as he was no longer on 6990 leave. On the same day, the employer asked him again to complete the attestation form and the medical questionnaire.

[17] On October 20, 2020, the employer sent its final request and asked to have the information by November 18, 2020, failing which it would no longer be able to support the grievor's telework arrangement. Despite this, further requests were sent to the grievor on October 23 and November 13 and 23, 2020.

[18] Finally, on February 4, 2021, the employer terminated the grievor's telework assignment effective February 12, 2021, but advised him that if he provided the requested documentation, it would revisit its decision.

[19] This is what the grievor grieved — the employer ended his telework assignment such that he was forced to use several types of earned leave until he could return to regular duties, which he felt he could do only once he and his wife were vaccinated.

[20] He argued that the termination of his telework assignment amounted to what felt like a termination of employment because it had no end date, given the unknown future of the pandemic, or that it was a suspension that forced him to use his earned leave, which he characterized as a financial penalty.

III. The employer's preliminary objection

[21] The employer objected to the Board hearing these grievances. It submitted that the Board is without jurisdiction as these grievances cannot be adjudicated under either ss. 209(1)(b) or (c)(i) as they do not relate to any of the topics outlined in those sections.

[22] Section 209(1)(b) provides that a grievor may refer to adjudication a grievance related to a disciplinary action resulting in termination, demotion, suspension, or financial penalty. The employer stated that no disciplinary action was imposed on the grievor; that he was neither terminated, demoted, suspended, nor subject to a monetary penalty; and that the grievances, on their faces, show that no discipline was imposed.

[23] The employer argued that the essence of the grievances was whether the grievor could continue either teleworking or being on 6990 leave. These matters come under s. 209(1)(a) of the *Act* and relate to the interpretation or application of the collective agreement. As such, he would need his bargaining agent's support to refer these grievances to adjudication, as set out in s. 209(2) of the *Act*.

[24] Unlike those cases in which an employee challenges an employer's characterization of a termination as administrative and argues that it was disguised discipline, in this case, there was no discipline. It was about entitlements under the collective agreement or employer policy, none of which he could refer to adjudication without his bargaining agent's support.

[25] The employer also noted that the grievor had checked two of the grievance form boxes, indicating that the grievances were being referred to the Board not only under s. 209(1)(b) but also under s. 209(1)(c)(i). This was contradictory in that s. 209(1)(b) refers to disciplinary action, and s. 209(1)(c)(i) refers to actions other than disciplinary actions.

[26] The employer submitted that as the Board's jurisdiction is derived strictly from the *Act*, and as the subject of the grievances has nothing to do with discipline, the Board has no jurisdiction and should so decide based on the preliminary objection, without proceeding to hear evidence.

IV. The grievor's response to the employer's objection

[27] The grievor submitted that at the start of the COVID-19 pandemic, he was placed on 6990 leave with pay due to his wife's health condition, which put her at risk of a severe health outcome or death due to COVID-19, according to Health Canada guidelines. Later, he was assigned to telework.

[28] In his view, by first placing him on leave with pay and then on telework, the employer acknowledged that he was unable to return to onsite work. He had informed the employer that he would return to his normal duties as soon as he and his wife could be vaccinated against COVID-19.

[29] However, the employer directed him to have his wife see her doctor for a note that she was in a vulnerable group according to the Public Health Agency of Canada

and to ask the doctor to assess the risk of viral transmission in the workplace, given the employer's new protective measures that had been implemented in the workplace.

[30] That direction was unreasonable. It did not make sense to have a doctor assess the workplace; normally, the health and safety committee would agree on a subject matter expert to do it. In this case, anybody who was on leave or teleworking was asked to go to their doctor. Every medical situation is different, and each doctor would have their own views of the efficacy of protective measures in the workplace.

[31] Even more concerning to the grievor was that in his view, the information to be taken to the doctor included inaccuracies; that is, the employer had already breached some of the new protective measures listed (the pod system) or was inconsistently enforcing them (wearing a mask).

[32] Due to these issues with the employer's direction, the grievor felt that he was unable to comply, and as a result, the employer terminated the telework assignment and denied him the ability to continue working from home.

[33] There was no reason to terminate his telework assignment other than to punish him for not following the direction. The employer lost an employee who was doing meaningful, productive work and doing a good job of it, according to his telework supervisors. In his view, there was nothing to be gained other than removing him from the workplace.

[34] In January 2021, shortly before he received an ultimatum on February 4 to provide the information, followed by the February 12 termination of his telework assignment, the employer sent communications that advised that COVID-19 infection rates were increasing and that those working at home should continue to do so.

[35] As well, had its direction complied with CBSA or Treasury Board policy, then the employer could argue that it was an administrative measure. However, it was not following the Treasury Board directive or policy, and what it requested was not a Treasury Board requirement. It did not have the authority to direct him to do it; therefore, its direction to him could not have been administrative, only punitive.

[36] His telework assignment was not an accommodation. In his view, by its actions, the employer attempted to tie the pandemic-related health-and-safety concern to the accommodation process, to circumvent the Treasury Board directive.

[37] By removing him from telework, while being fully aware that he could not return to the workplace, given his wife's condition, the employer knowingly placed him in a situation of being unable to work.

[38] In the grievor's view, this constituted a suspension that resulted in a financial penalty as he was forced to use his earned leave. Further, as it had no end date, and given the uncertainty as to what the future held with respect to the pandemic, it felt like a termination. His employment was effectively, if temporarily, terminated.

V. Reasons for decision

A. The *Act* and the grievances

[39] Section 209 of the *Act* identifies the matters that an employee may refer to adjudication, 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 relate to a breach of discipline or misconduct** ….*	***(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*

	du rendement, un manquement à la discipline ou une inconduite,
…	[…]
(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.	***(2)** Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.*
…	[…]

[Emphasis added]

[40] The grievance bearing Board file no. 566-02-44973 states as follows: "I grieve the termination of my telework assignment as a contravention of the Treasury Board's direction and the Emergency Response Act regarding the covid19 [*sic*] pandemic."

[41] The grievance bearing Board file no. 566-02-44974 states: "I grieve the termination of my telework assignment as a contravention of the CBSA's direction (capsule) regarding the covid19 [*sic*] pandemic."

[42] As noted earlier in this decision, each grievance was referred under both ss. 209(1)(b) and (c)(i) of the *Act*. However, at the hearing, the grievor clarified that he invoked s. 209(1)(b) only and argued that the termination of his telework assignment was disguised discipline.

B. The grievor was not terminated, suspended, or subjected to a financial penalty

[43] The employer asked the Board to conclude that it lacks jurisdiction in this matter because the employer's actions were administrative, not disciplinary. Therefore, the grievor could not challenge them under s. 209(1)(b) but only under s. 209(1)(a), and only with bargaining agent support. The employer submitted that that was clear on the faces of the grievances and that the Board could make that determination by simply confirming a few facts with the grievor, without the need to hear evidence.

[44] The employer's objection was compelling; however, the grievor was self-represented and had the onus to demonstrate that he had been subjected to a termination, suspension, or financial penalty, as he alleged. To ensure that he had every opportunity to make his case that his grievances were referable to adjudication

under s. 209(1)(b), as alleged, I reserved my decision on the employer's objection and heard the evidence.

[45] The grievor did not make out his case. He was unable to demonstrate that there was any discipline, much less a termination, suspension, or financial penalty, as would be required for him to refer his grievances to adjudication under s. 209(1)(b). In *Bergey v. Canada (Attorney General)*, 2017 FCA 30, the Federal Court of Appeal stated at paragraph 37 that "… distinguishing between a disciplinary and a non-disciplinary employer action requires consideration of **both** the employer's actual (as opposed to stated) intentions in taking the action and of the impact of the action on the employee's career" [emphasis in the original]. The employer's evidence was that it required the grievor to provide medical information so that it could assess the ongoing need for his telework assignment or 6990 leave. Ultimately, it ended that assignment when he did not provide the information.

[46] The employer's stated intention in reassessing the situation of each employee who had earlier been approved for leave based on their attestations alone, with no medical information, included implementing business resumption measures and managing CBSA resources effectively. Approving leave that way in the early days of the pandemic was to safeguard the health and safety of its employees and their cohabitants, at a time when the CBSA was still developing its full-scale occupational health and safety response to the pandemic.

[47] Although I do not doubt that most employees would have assumed as much in any event, the documentary evidence sets out that it was also made clear to employees that telework assignments and 6990 leave were interim measures and that like all the measures taken in the early responses to the pandemic, they would evolve as the situation evolved. The CBSA's measures evolved with advances in public health information and guidance, and with the implementation of numerous occupational health and safety measures in its workplaces. They were also consistent with the CBSA's telework policy and its policy on the duty to accommodate.

[48] The grievor criticized the employer's requirement for further medical information because, in his view, it was not required by the Treasury Board and, therefore, could not be imposed on him. Or, as he put it: "I didn't comply with the

direction because they weren't complying with policy and directives, therefore, they did not have the authority to make me do this."

[49] He disagreed with the questions on the medical questionnaire. He disagreed with the list of health-and-safety measures that the employer put on the medical questionnaire, as he felt that they were not all followed or enforced. He felt that he had twice attested to his wife's condition and that he should not have to do it again. (However, I note that it was established at the hearing that although the grievor had twice attested in an email to his wife's condition, he had never attested to having consulted a doctor or public health official, as the written attestation form required.)

[50] The grievor relies on *Christenson v. Deputy Head (Canada Border Services Agency)*, 2013 PSLRB 25, which upheld the grievances of three CBSA firearms trainers against their five-day suspensions for breaching a firearms policy. In that case, the adjudicator held that the text of the policy was unclear as to whether it applied to trainers and further that it had been applied inconsistently. No one had warned or directed the grievors that the policy applied to them, even when members of management knew that they were not following it.

[51] In this case, the grievor was not unclear about the CBSA's policies. Rather, he disagreed with them or felt that they were insufficiently enforced. In any event, all the grievor's criticisms of and disagreements with the employer's approach, on their own, have little significance. His opinions on these matters, while he is free to hold them, do not transform the employer's actions into discipline against him. As the Federal Court stated in *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at para. 21: "… the issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline …". Similarly, while the grievor spoke about a toxic workplace culture and a sense of retribution and reprisal among staff, in *Frazee*, the Federal Court also added that "… an employee's feelings about being unfairly treated do not convert administrative action into discipline …" (at paragraph 21).

[52] The grievor also relies on *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37 (application for judicial review dismissed, *Canada (Attorney General) v. Grant*, 2017 FCA 10). In that decision, the Board allowed three grievances about the CBSA's decision to suspend a grievor without pay, revoke her reliability

status and then terminate her employment. It found that suspending the grievor without pay was punitive and that suspending her reliability status was a reaction to perceived misconduct, not to security concerns. The Board found that the grievor's ultimate dismissal was out of proportion to the allegations of misconduct.

[53] The grievor claims that by ending his telework assignment the employer was intent on removing him from the workplace because he did not comply with the request for further medical information. In assessing the impact of the employer's actions, the grievor claims that the employer failed to consider the productive telework he was doing, which contradicted any need for him to return to work in-person. Also, the grievor points to the fact that following the end of his telework assignment, in February 2021, he did not return to work until June 2021. In his view, this prolonged absence from work indicates an intent to punish and that this punitive effect outweighs any initial administrative intent on the employer's part (see *Grant*, at para. 141; and *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70, upheld in *Basra v. Canada (Attorney General)*, 2010 FCA 24).

[54] The employer did not terminate the grievor's employment. At all times, he remained employed with the CBSA. According to the grievor, the employer ended his telework assignment knowing he could not return to work and that this was a punishment and a suspension. The problem with the grievor's argument is that the employer did not know that he could not return to work. This is precisely why the employer asked him to provide further medical information.

[55] Instead of providing that information or returning to work, the grievor used other types of earned leave until he decided to return to regular duties. He has not demonstrated that the employer's intent was other than what it stated (to implement business resumption measures and to manage CBSA resources effectively), or that it intended to punish or correct his behaviour by ending his telework assignment. Nor did the grievor establish that his period of leave after the end of his telework assignment was a consequence of the employer's actions or intended as a financial penalty (see *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17 at paras. 344 to 349; and *Rogers v. Canada (Revenue Agency)*, 2010 FCA 116 at paras. 13 to 21).

[56] To the contrary, the employer showed considerable patience. For several months, it kept the grievor on 6990 leave and then on telework. During this time, he repeatedly refused to even attempt to do what was required to keep him on telework. He was then asked to return to onsite work. The grievor did not establish that there was any immediate adverse effect on him due to the employer's actions throughout the entire process. This is also one of the indicia of discipline outlined in *Frazee*.

[57] The grievor could have challenged the issues that he asserts he felt strongly about concerning the employer's response to the pandemic by filing a grievance and, with his bargaining agent's support, referring it to adjudication under s. 209(1)(a). He chose not to even ask — he specified that the bargaining agent did not refuse to represent him in this matter; rather, he chose not to seek its support. If that is the case, then by making that choice, he put himself in the position of trying to make the argument that he was terminated, suspended, or subjected to a financial penalty.

[58] Consistent with the reasoning of numerous Board and court decisions, including *Frazee*, *Sharaf v. Deputy Head (Public Health Agency of Canada)*, 2010 PSLRB 34, *Rogers*, *Hood v. Canadian Food Inspection Agency*, 2013 PSLRB 49, *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114, *Theaker v. Deputy Head (Department of Justice)*, 2013 PSLRB 163, and *Price v. National Film Board*, 2021 FPSLREB 105, I have determined that the grievor was not subject to any disciplinary action, disguised or otherwise; therefore, I have no jurisdiction to adjudicate these grievances under s. 209(1)(b) of the *Act*.

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

(The Order appears on the next page)

VI. Order

[60] I declare that the Board is without jurisdiction to adjudicate these grievances.

[61] The grievances are dismissed.

May 13, 2024.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board