Date: 20240530

File: 566-23-46264

Citation: 2024 FPSLREB 74

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

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BETWEEN

CANDIDA QUAST

Grievor

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Employer

Indexed as
Quast v. Office of the Superintendent of Financial Institutions

In the matter of an individual grievance referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Malini Vijaykumar, counsel

For the Employer: Chris Hutchison, counsel

Decided on the basis of written submissions,
filed December 18, 2023, and January 12 and 29, 2024.

REASONS FOR DECISION

I. Overview, and background to the grievance

[1] Candida Quast ("the grievor") was terminated for unsatisfactory performance from her position classified at the RE-05 group and level with the Office of the Superintendent of Financial Institutions ("OSFI" or "the employer") on August 25, 2022. She filed her grievance on September 2, 2022, which the employer decided at the final level on November 25, 2022. The Professional Institute of the Public Service of Canada ("PIPSC" or "the bargaining agent") referred the matter to adjudication with the *Federal Public Sector Labour Relations and Employment Board* ("the Board") as "…a disciplinary action resulting in termination, demotion, suspension or financial penalty – s. 209(1)(b)…" on December 8, 2022.

[2] The matter was scheduled for a hearing before the Board on February 12, 2024. On December 18, 2023, the employer wrote to the Board, objecting to its jurisdiction and stating that since the OSFI is a separate employer, outside the core public administration, the Board does not have jurisdiction to hear this grievance.

[3] The grievor responded on January 12, 2024, acknowledging two things, first that PIPSC withdrew its support for the grievance in October of 2023, and second that although the grievance was referred to adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), the Board should hear it under s. 209(1)(a) because it involves the interpretation or application of a collective agreement provision.

[4] In its January 29, 2024, rebuttal, the employer reiterated that the grievance was "improperly referred" to adjudication and that the Board has no jurisdiction to hear it. In its rebuttal, it also stated that the grievor's bargaining agent withdrew its representation and did not support referring the grievance to adjudication under s. 209(1)(a). Therefore, the Board lacks jurisdiction to hear it.

[5] Section 209(2) of the *Act* is clear: "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."

[6] I find the employer's objections have merit and that the Board is without jurisdiction to hear the grievance under either s. 209(1)(a) or (b) for the reasons that follow. I order the closure of the file.

II. Summary of the written submissions

A. The employer's jurisdictional objection, dated December 18, 2023

[7] This matter was scheduled for a hearing on Monday, February 12, 2024, in Ottawa, Ontario. On December 18, 2023, the employer objected to the Board's jurisdiction to hear it because the grievance does not meet the requirements of s. 209 of the *Act*. It stated as follows:

> …
>
> *Employees in the public service who have pursued a grievance up to the final level of the grievance process and are not satisfied with the outcome, are entitled, under certain circumstances, to refer the grievance to adjudication. However, the course an employee may follow depends on the nature of the grievance and whether the employee is part of the core public administration, a designated separate agency, or an undesignated separate agency.*
>
> …

[8] Noting that the OSFI is a separate agency outside the core public administration, the employer cited *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94, for the proposition that the Board does not have jurisdiction over terminations of employment for reasons other than discipline. The grievor's employment was terminated in accordance with s. 12(2)(d) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) for unsatisfactory performance. The grievor acknowledged as much. She wrote this in her grievance presentation: "I grieve the termination of my employment for unsatisfactory performance …".

[9] As a result, argued the employer on December 18, 2023, the grievance was improperly referred to adjudication. It cited *K.V. v. Canadian Security Intelligence Service*, 2022 FPSLREB 17, a recent decision, in which the Board concluded that it was without jurisdiction to hear a matter referred to adjudication under s. 209(1)(b) that was clearly not related to a disciplinary action.

[10] The employer continued as follows:

> …

> *For an employee to refer an individual grievance for demotions or terminations of employment for unsatisfactory performance under section 209(1)(c) of the* Act *requires that the employee be part of the core public administration. As OSFI is a separate employer, it does not form part of the core public administration. Accordingly, section 209(1)(c) is not available to OSFI employees.*
>
> *For Ms. Quast to have access to adjudication, the requirements set forth under section 209(1)(d) of the* Act *would need to be met. Section 209(1)(d) allows for an employee of a separate agency designated under subsection (3) to refer an individual grievance to adjudication for matters pertaining to a demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*
>
> *Subsection 209(3) of the* Act *requires the Governor in Council, by order, designated [sic] any separate agency for the purposes of 209(1)(d). The employer is not designated under section 209(3) of the* Act *for the purposes of 209(1)(d). Only the Canada Revenue Agency and the Canadian Food Inspection Agency are so designated. Consequently, the Board lacks the jurisdiction to entertain this matter.*
>
> *…*

B. The grievor's reply, dated January 12, 2024

[11] The grievor contested the employer's objection, distinguishing *Reddy* on the basis of the circumstances under which a grievance is referred to adjudication and adding this:

> *…*
>
> *However,* Reddy *did not contend with s. 209(1)(a) of the* Act*, which permits a grievance to be referred to adjudication if it involves the interpretation or application in respect of the employee of a provision of a collective agreement or arbitral award. Article 35 of the PIPSC-OSFI collective agreement provides (emphasis added):*
>
>> ARTICLE 35
>>
>> EMPLOYEE PERFORMANCE REVIEW AND EMPLOYEE FILES
>>
>> The parties share the belief that the performance review process is a shared responsibility and consists of discussions between the employee and the employee's supervisor. The parties agree that the performance review process is a continuous cycle and it helps the employee and the supervisor to work together to establish objectives, monitor progress and assess results. **The parties further agree that the supervisor will provide the employee with feedback and support mechanisms in order to help achieve agreed upon objectives.**

…

[Emphasis in the original]

[12] The grievor stated the following in her reply:

…

> *While the Grievor agrees that this matter was originally referred under s. 209(1)(b) of the Act (disciplinary termination), her grievance form, the evidence and arguments she presented at her internal grievance meeting, and the final level grievance response all consistently treat this matter as a breach of Article 35 of the PIPSC-OSFI collective agreement, rather than a disciplinary matter.*

…

[13] The grievor went on to state that therefore, the grievance form and the employer's final-level response are consistent with a referral to adjudication under s. 209(1)(a) for a breach of article 35 of the relevant collective agreement and cited *Bratrud v. Office of the Superintendent of Financial Institutions Canada*, 2004 PSSRB 10, as a precedent for the Board retaining jurisdiction to hear the grievance.

[14] The grievor then acknowledged that PIPSC withdrew its representation in October 2023 but added this:

…

> *… However, this Board has interpreted s. 209(2) as allowing for a grievor to self-represent with the bargaining agent's approval. For example, in* Nash v Deputy Head (Canada Border Services Agency), *2023 FPSLREB 35 at para 20, this Board noted: "[as] provided in s. 209(2), before proceeding, a grievor requires bargaining agent approval to self-represent before the Board in such a manner [sic]".*
>
> *In this case, PIPSC did give the Grievor its consent for her to represent herself with external counsel on this grievance referral. To be clear, that consent was given in light of this being a termination grievance originally referred under s. 209(1)(b), and PIPSC has not provided specific consent to advance this grievance under s. 209(1)(a). However, it is respectfully submitted that the Grievor should be permitted to advance her grievance under s. 209(1)(a) for the reasons outlined above.*
>
> *It must be noted that if the Board does not take jurisdiction over this grievance, that will effectively render the Grievor without access to any system of independent third-party* de novo *adjudication over her termination. Were she a non-unionized employee of OSFI, she would have the right to sue in superior court for wrongful dismissal: see* Pearce v Canada (Staff of the Non-Public Funds, Canadian Forces)*, 2021 ONCA 65 at para 26. Were*

> *she an employee of the core public administration, she would have the right to adjudication for her non-disciplinary termination. But because she is a unionized employee of an undesignated separate agency, she is left without any recourse to an independent external adjudication over the facts of her termination, simply because it was a "non-disciplinary" termination – unless this Board permits her to proceed under s. 209(1)(a).*
>
> *…*

[15] Thus, the grievor urged the Board to assume jurisdiction under s. 209(1)(a).

C. The employer's rebuttal, dated January 29, 2024

[16] The employer repeated its earlier assertion that this grievance was improperly referred to adjudication and that the Board lacks jurisdiction to hear it.

[17] The employer added that the bargaining agent explicitly withdrew its support for a referral to adjudication under s. 209(1)(a) of the *Act*.

[18] The employer cited examples of what it referred to as extensive and uniform case law on this issue, as follows, the first from *Cavanagh v. Canada Revenue Agency*, 2014 PSLRB 21 at para. 25:

> *[25] As the exclusive representative of all the employees in a bargaining unit and as a party to a collective agreement, a bargaining agent must be free to determine which issues relating to the interpretation and application of the collective agreement it wishes to pursue, subject only to the duty of fair representation. It must also be in control of the presentation of those issues through the grievance process and at adjudication. For those reasons, I believe that not only must the bargaining agent approve the filing of grievances concerning the interpretation and application of the collective agreement and provide representation through the grievance process, it must also approve the referral of such grievances to adjudication and provide representation at adjudication.*

[19] It added this, from *Kruse v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 85 at para. 35:

> *[35] As was the case when this same issue came before the Board in Baun, at paras. 55 to 58, when a bargaining agent withdraws its representation from a referral of a grievance filed under s.209(1)(a) (not for a disciplinary reason) to adjudication, despite its earlier support, s. 209(2) of the Act stops the matter from proceeding to a hearing.*

[20] Its final example was this one, from *Nash v. Deputy Head (Canada Border Services Agency)*, 2023 FPSLREB 35 at para. 37:

> *[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).*

[21] Thus, argued the employer in its rebuttal, this grievance cannot proceed to a hearing because the Board lacks jurisdiction to hear it.

III. Decision and reasons

[22] Sections 208 and 209 of the *Act* deal with references of grievances to adjudication and read in part as follows:

208 (1) *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*	***208 (1)*** *Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu’il s’estime lésé :*
(a) *by the interpretation or application, in respect of the employee, of*	***a)*** *par l’interprétation ou l’application à son égard :*
(i) *a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*	***(i)*** *soit de toute disposition d’une loi ou d’un règlement, ou de toute directive ou de tout autre document de l’employeur concernant les conditions d’emploi,*
(ii) *a provision of a collective agreement or an arbitral award; or*	***(ii)*** *soit de toute disposition d’une convention collective ou d’une décision arbitrale;*
(b) *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*	***b)*** *par suite de tout fait portant atteinte à ses conditions d’emploi.*
…	[…]
209 (1) *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has*	***209 (1)*** *Après l’avoir porté jusqu’au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n’est pas un* membre*, au sens du*

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

(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

(c) *in the case of an employee in the core public administration,*

(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, or*

(ii) *deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*

(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.*

…

paragraphe 2(1) de la Loi sur la Gendarmerie royale du Canada, *peut renvoyer à l'arbitrage tout grief individuel portant sur :*

a) *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*

b) *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*

c) *soit, s'il est un fonctionnaire de l'administration publique centrale :*

(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,*

(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) *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).*

[…]

[23] The grievor makes these three things abundantly clear in her submissions:

- she agreed with the employer that the matter should not have been referred to adjudication under s. 209(1)(b) and asserted that it had been argued as a collective agreement matter all along;
- the Board should treat the matter as having been referred to adjudication under s. 209(1)(a); and

- the bargaining agent withdrew its representation in October of 2023 and does not support a referral to adjudication under s. 209(1)(a).

[24] The grievor turned to paragraph 20 of *Nash* as the authority for the Board to accept the bargaining agent's approval for self-representation. That paragraph reads as follows:

> *[20] Section 209(1)(a) of the* Act *addresses the interpretation or application of a collective agreement or* [an] *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).*

[25] At paragraph 20, reproduced from *Nash*, above, the decision maker was summarizing the employer's submissions on ss. 209(1)(a) through (d) of the *Act*, in the context of a referral to adjudication under s. 209(2). Rather than rely on submissions made in the context of a different hearing, I find it preferable to turn to the statute itself. Section 209(2) states the following: "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."

[26] That provision speaks of the need for the bargaining agent's approval. It is silent on the issue of self-representation. The grievor in the present matter is ably represented by very competent counsel, but still lacks the bargaining agent's approval to refer this grievance to adjudication.

[27] The grievor plainly admitted that she does not have the bargaining agent's approval to proceed under s. 209(1)(a).

[28] I find that the grievor has acknowledged that she has no case to present under s. 209(1)(b) and that she has abandoned any argument under it. She now seeks to correct the course of her grievance by having the Board hear it as a matter under s. 209(1)(a) but I find that I am without jurisdiction to do so, for the reasons argued by the employer. While the grievor may argue that she once had the support of the bargaining agent under (a), she clearly no longer enjoys that support, which means that I am without jurisdiction for the reasons set out in the employer's submissions and in Board jurisprudence. Further, I accept the final submissions of the employer to the

effect that I would be without jurisdiction to hear this matter under (d) as OSFI is not a designated employer. In any event, the grievor has made no allegations to contest the employer' submissions on this front.

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

(The Order appears on the next page)

IV. Order

[30] The Board lacks the requisite jurisdiction to hear this grievance.

[31] The file is ordered closed.

May 30, 2024.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board