Date: 20080716

Docket: T-1461-07

Citation: 2008 FC 874

Ottawa, Ontario, July 16, 2008

PRESENT: The Honourable Mr. Justice Louis S. Tannenbaum

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

THU-CUC LÂM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the adjudicator's decision dated July 9, 2007.

The adjudicator's order reads as follows:

> . . .
>
> 1. The grievance is allowed in part.
> 2. The employer must reconsider its decision of October 3, 2004. It would be preferable for the employer to let the grievor know that it is sorry for the March 18, 2003 incident and that it hopes that such incidents will not occur again in the future.

Facts

[2] The respondent, Thu-Cuc Lâm, has been working for Health Canada, represented in this case by the Attorney General of Canada (hereinafter "the applicant"), since 1998. In 2000, she began working as a consultant for the Population and Public Health Branch (PPHB), Quebec Region.

[3] In 2003, the respondent reported a harassment situation. On March 18, 2003, the respondent and her union representative met with her manager and the Director General. Everyone was seated around a table. The manager pointed his finger close to the respondent's face and said to her, [TRANSLATION] "I no longer trust you." According to the union representative, the respondent recoiled.

[4] The respondent, intimidated by the gesture, was so distraught that she returned home and then saw her doctor.

[5] The respondent made a verbal complaint to her Director General on June 3, 2003, and filed a written complaint on July 3, 2003. She asked that she no longer be required to report to her manager.

[6] On August 25, 2003, the Director General wrote to the respondent and stated that, following an investigation, her complaint was found to be without merit. During the investigation, the Director General did not meet with the respondent or the manager.

[7] It was not until October 3, 2003, that the Director General of the Quebec region set up a meeting with the respondent and the manager. At that meeting, the manager stated that he was deeply sorry for his gesture but refused to apologize because he often made gestures with his hands when he talked.

[8] Dissatisfied with the result and the process, the respondent filed the following grievance:

> [TRANSLATION]
> I contest the decision by Health Canada (Appendix 3) regarding the handling of my harassment complaint.
> Whether in the November 26, 2003 decision or the manner in which the investigation was handled, the employer's representatives failed to respect the spirit and letter of the Health Canada and Treasury Board policies on harassment.

[9] The respondent relied on articles 1 and 19 of the collective agreement and asked for the following corrective measures: that the investigation be handled in accordance with the Health Canada policy on harassment, that she be given a copy of the investigation report and the investigators' findings and that her manager apologize to her.

[10] The grievance was referred to adjudication and heard together with three other grievances contesting disciplinary measures that had been imposed in 2003 and 2004. The three grievances involving the disciplinary measures were dismissed. The grievance dealing with eliminating the discrimination and the harassment was allowed in part.

[11] The adjudicator stated that he did not share the employer's conclusion regarding the respondent's complaint and the way in which the employer handled it:

> Although the respondent manager's gesture was involuntary, I believe that the employer should take into consideration the fact that the grievor felt intimidated.
> In my opinion, the employer should have told the grievor that it was sorry that she had felt intimidated.
> The employer should have indicated that it did not want such a situation to occur again. I do not believe that we can tolerate having employees and managers pointing their fingers at one another in meetings, particularly as in this case, where the parties were seated next to one another.
> For the reasons listed above, I do not believe that there was any breach of article 19 of the collective agreement concerning discrimination.
> However, I believe that the employer did not comply with the letter and spirit of article 1 of the collective agreement and improperly applied the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace*. The hearing remedied the process, but the employer should reconsider its decision on the validity of the complaint. Article 19 does not apply to the grievor's case.

[12] The adjudicator ordered the employer to reconsider its decision about the harassment complaint. He wrote: "It would be preferable for the employer to let the grievor know that it is sorry for the March 18, 2003 incident and that it hopes that such incidents will not occur again in the future."

[13] The respondent testified that all she wanted was an apology.

[14] The standard of review in a case like this is correctness, and, in my view, the adjudicator's decision should be set aside for the following reasons.

Grievance

[15] The grievance is reproduced below:

> [TRANSLATION]
>
> STATEMENT OF GRIEVANCE
>
> I contest the decision by Health Canada (Appendix 3) regarding the handling of my harassment complaint.
> Whether in the November 26, 2003 decision or the manner in which the investigation was handled, the employer's representatives failed to respect the spirit and letter of the Health Canada and Treasury Board policies on harassment.
> Due to these facts and those expressed in the harassment complaint (Appendix 4) the employer has contravened the:
> Health Canada policy on harassment,
> Treasury Board policy on harassment,
> collective agreement article 1,
> collective agreement article 19, and
> all other articles in the collective agreement and pertinent policies.
>
> CORRECTIVE MEASURES
>
> 1. That the investigation be handled in accordance with the Health Canada policy on harassment;
> 2. That I be given a copy of the investigation report along with the investigators' findings;
> 3. That Mr. Guassiran apologize to me in writing for his inappropriate gesture; and
> 4. To be represented by the PSAC and to be present at every step of this grievance, at the employer's expense.
>
> (Emphasis added.)

[16] Thus, we see that the grievor asked for the following corrective measures:

> 1- That the investigation be handled in accordance with the Health Canada policy on harassment;
> 2- That I be given a copy of the investigation report along with the investigators' findings;
> 3- That Mr. Guassiran apologize to me in writing for his inappropriate gesture; and

> 4- To be represented by the PSAC and be present at every step of this grievance, at the employer's expense.

In my opinion, the grievor already received an apology from Mr. Guassiran at the meeting on October 3, 2003 (paragraph 255 of the decision), when he stated that he was deeply sorry for his gesture.

[17] At paragraph 278 of his decision, the adjudicator said:

> In my opinion, the employer should have told the grievor that it was sorry that she had felt intimidated.

[18] We point out, however, that, in the corrective measures, the respondent asked that Mr. Guassiran apologize, not the employer.

[19] In my view, saying [TRANSLATION] "I am sorry" is the same as an apology. The dictionary *Le Petit Robert* gives the following definition: [TRANSLATION] "sad" to be sorry, to regret.

[20] In the *Dictionnaire des synonymes* (Hector Dupuis, Romain, Légaré), we find [TRANSLATION] "to regret". . . synonym "to be sorry".

[21] Furthermore, the order (paragraph 284 of the decision) is not an order at all. I quote from the so-called order:

> The employer must reconsider its decision of October 3, 2004. It would be preferable for the employer to let the grievor know that it is sorry for the March 18, 2003 incident and that it hopes that such incidents will not occur again in the future.

[22] The adjudicator is a decision-maker and, as such, he should decide, not express a wish.

[23] The applicant submits that the adjudicator exceeded his jurisdiction by deciding that article 1 of the collective agreement applied and that the employer did not comply with the letter and spirit of that article.

[24] Paragraphs 281 and 282 of the adjudicator's decision read as follows:

> [281] However, I believe that the employer did not comply with the letter and spirit of article 1 of the collective agreement and improperly applied the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace*. The hearing remedied the process, but the employer should reconsider its decision on the validity of the complaint. Article 19 does not apply to the grievor's case.
>
> [282] In light of the spirit and letter of article 1 of the collective agreement and based on the Treasury Board Secretariat's policy on harassment, the employer must reconsider its decision of October 3, 2004. It would be preferable for the employer to let the grievor know that it is sorry for the March 18, 2003 incident and that it hopes that such incidents will not occur again in the future.

[25] Article 1 of the collective agreement provides:

> 1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the Alliance and the employees and to set forth herein certain terms and conditions of employment for all employees described in the certificate issued by the Public Service Staff Relations Board on June 7, 1999 covering employees in the Program and Administrative Services Group.

> 1.02 The parties to this Agreement share a desire to improve the quality of the Public Service of Canada and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and efficiently served. Accordingly, they are determined to establish, within the framework provided by law, an effective working relationship at all levels of the Public Service in which members of the bargaining units are employed.

[26] The adjudicator wrote the following in paragraphs 266 and 267 of his decision:

> [266] That article indicates that the purpose of the collective agreement is to maintain harmonious relationships between the employer and employees. In clause 1.02, the text reads: ". . . a desire to . . . promote the well-being . . . of its employees . . . Accordingly, they are determined to establish, within the framework provided by law, an effective working relationship. . . . "
>
> [267] In my view, the Treasury Board policy on harassment in the workplace (Exhibit F-57) is consistent with the objectives of article 1 of the collective agreement.

[27] The adjudicator properly found that article 19 of the collective agreement does not apply in this case because it does not mention personal harassment. However, by deciding that the Treasury Board harassment in the workplace policy is consistent with the objectives of article 1 of the collective agreement, he misinterpreted the article and exceeded his jurisdiction. Furthermore, his decision is unreasonable.

[28] Article 1 of the collective agreement is a general clause, an introduction or a preface that does not grant any substantive right to employees. There is nothing in the collective agreement that could support the finding that it was meant to include the Treasury Board policy.

JUDGMENT

FOR THE FOREGOING REASONS, THE COURT ORDERS AND ADJUDGES that:

(1) The application for judicial review is allowed with costs;

(2) The adjudicator's decision regarding the harassment grievance (file #166-02-36590) is set aside; and

(3) The harassment grievance is remitted to the Public Service Labour Relations Board so that it is dismissed based on the reasons for this decision.

"Louis S. Tannenbaum"
Deputy Judge

Certified true translation
Mary Jo Egan, LLB

Legislation, authors and jurisprudence consulted

1. *Public Service Labour Relations Act*, R.S.C. 1985, c. P-35, section 92

2. Palmer and Palmer, *Collective Agreement Arbitration in Canada*, 3rd ed., Butterworths, 1991, pp. 100-105; 117-121; 128

3. *Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)*, [2005] F.C.J. No.1849

4. *Bratrud v. Office of the Superintendent of Financial Institutions*, [2006] C.P.S.L.R.B. No. 65

5. *Chénier v. Treasury Board (Solicitor General of Canada – Correctional Service)*, [2003] C.P.S.L.R.B. No. 24

6. *Croisetière-McGurran and Social Sciences and Humanities Research Council of Canada* [1986] C.P.S.S.R.B. No. 185

7. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226

8. *Kolski v. Treasury Board (Agriculture Canada)*, [1994] C.P.S.S.R.B. No. 149

9. *Shneidman v. Canada (Attorney General)*, [2007] F.C.J. No. 707

10. *UCCO-SACC-CSN v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 120

11. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247

12. *Parry Sound (Social Services) v. O.P.S.E.U.*, [2003] 2 S.C.R. 157

13. *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056

14. *Toronto Transit Commission and A.T.U. (Stina) (Re)*, (2004) 132 L.A.C. (4th) 225

15. *Voice Construction Ltd. v. Construction & General workers' Union, Local 92*, [2004] 1 S.C.R. 609

FEDERAL COURT

SOLICITORS OF RECORD

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