



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

DONALD COTTRELL

Complainant

and

ROBERT LE MOULLEC

Respondent

RE: Complaint under section 23 of the
Public Service Staff Relations Act

Before: J. Barry Turner, Board Member

For the Complainant: David Landry, Public Service Alliance of Canada

For the Respondent: Ms. Judith Begley, Counsel



Heard at Winnipeg, Manitoba,
April 23, 1997.

DECISION

Donald Cottrell who injured his right foot sometime in 1990, and subsequently received poor surgical attention that kept him away from work as a Public Works Canada employee in Winnipeg, Manitoba, is presently on workers compensation. He submitted a complaint under section 23 of the *Public Service Staff Relations Act* on September 2, 1992 (Exhibit G-1) directly to the Public Service Staff Relations Board against seven persons, some from the employer and some from the bargaining agent. He complains the employer has not respected sections 8 and 91 of the *Public Service Staff Relations Act* or complied with Part VIII of the *P.S.S.R.B. Regulations and Rules of Procedure*. He subsequently withdrew his complaint against five of the seven persons in a letter to the Public Service Staff Relations Board dated March 25, 1993 (Exhibit G-3), leaving Mr. Robert Le Moullec, for the employer, and Carla Knight for the bargaining agent, on the list. He withdrew his complaint against Carla Knight before me.

The complaint was first scheduled to be heard by former Vice-Chairman Tenace on March 26, 1993 but was postponed at the request of the parties. For whatever reasons, the issue was not revisited until February 6, 1996 (Exhibit G-4) when the Board initiated action to reschedule the hearing.

Section 23 of the *Public Service Staff Relations Act* (PSSRA) as it was in 1992 reads:

23. (1) *The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*

(a) *to observe any prohibition contained in section 8, 9 or 10;*

(b) *to give effect to any provision of an arbitral award;*

(c) *to give effect to a decision of an adjudicator with respect to a grievance; or*

(d) *to comply with any regulation respecting grievances made by the Board pursuant to section 100.*

(2) *Where, under subsection (1), the Board determines that any person has failed to observe any prohibition, to give effect to any provision or decision or to comply with any regulation as described in that subsection, it may make an*

order, addressed to that person, directing the person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate and,

(a) where that person has acted or purported to act on behalf of the employer, it shall direct its order as well

(i) in the case of a separate employer, to the chief executive officer thereof, and

(ii) in any other case, to the Secretary of the Treasury Board; and

(b) where that person has acted or purported to act on behalf of an employee organization, it shall direct its order as well to the chief officer of that employee organization.

I am being asked to declare if Mr. Cottrell's complaint against Mr. Le Moullec should be upheld.

The hearing lasted one-half day with six exhibits entered into evidence on consent of the parties and only the respondent testifying.

Preliminary Arguments

Ms. Begley argued that the extreme and unexplained delay, not only in filing the initial complaint in September 1992 about events that took place in 1991, but the long time that has passed since then, will make the recall of facts very difficult for all concerned. She also argued that section 91 of the Act and Part VIII of the Regulations are beyond the scope of a complaint under section 23 of the PSSRA since there was no intimidation or threat towards the complainant or intention to keep him from filing his complaint. She argued that the remedy sought in Exhibit G-1 is beyond my jurisdiction.

Mr. Cottrell is requesting in Exhibit G-1, page 8, paragraph 3:

To use the authority empowered by the Board in determining appropriate actions up to and including discipline measures and prosecution in addition to release of employment of Robert Le Moullec for also indicating interference with WCB as in letter included. Including those of the employee organization.

Mr. Landry agreed that the long delay has not been helpful to anyone. He also agreed that section 91 of the PSSRA and Part VIII of the Regulations do not come into play before me, but that section 8 does.

Section 8 of the PSSRA as it was in 1992 reads:

Prohibitions

8. (1) *No person who is employed in a managerial or confidential capacity, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*

(2) *Subject to subsection (3), no person shall*

(a) *refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*

(b) *impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or*

(c) *seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*

(i) *to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or*

(ii) *to refrain from exercising any other right under this Act.*

(3) *No person shall be deemed to have contravened subsection (2) by reason of any act or thing done or omitted in relation to a person employed, or proposed to be employed, in a managerial or confidential capacity.*

Mr. Landry argued that what Mr. Cottrell really wants by way of remedy is to be reinstated to Injury on Duty status retroactive to February 1, 1991 with accompanying benefits as he indicated in Exhibit G-6 dated April 22, 1997. He also said, however, that the complainant still wants Mr. Le Moullec, the respondent, to be disciplined.

Ms. Begley argued that the above request by the complainant is beyond my jurisdiction. I agreed and indicated that, not only was this request beyond my authority, but that Exhibit G-6 was a significant alteration to the original complaint and is more properly the subject matter of a grievance rather than of a complaint. I advised Mr. Landry that according to the Federal Court of Appeal decision in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109, it is not possible to adjudicate on Exhibit G-6 as requested at this point in the proceedings. Mr. Landry understood.

When I pressed Mr. Landry to explain to me what the actual complaint really was, he responded that Exhibit G-6 dated April 22, 1997 was the real complaint but that paragraphs 3, 4 and 2 on pages 9, 10 and 11 respectively of Exhibit G-1 were what was submitted in September 1992.

Exhibit G-1, page 9, paragraph 3 reads:

In December 1990 or January 1991 Robert Le Moullec informed the Workers' Compensation Board of Manitoba that "I was playing the game." As noted in letter from my file which is attached to this statement.

Exhibit G-1, page 10, paragraph 4 reads:

In March 1991 Robert Le Moullec attempted to humiliate me in front of local U.P.W.E. president Peter Chartrand. Saying there was no reason to grieve and they were nuisance grievances that I initiated.

Exhibit G-1, page 11, paragraph 2 reads:

In April 1991 while signing grievance transmittal forms for 2nd level Robert Le Moullec attempted to convince me to abandon grievances by saying he could not understand why I was continuing on with them and that they were of nuisance quality.

Mr. Landry concluded that Mr. Le Moullec had therefore in effect interfered with Mr. Cottrell's claim for workers compensation benefits.

1. Mr. Robert Le Moullec was a Human Resources Manager, Public Works Canada, Winnipeg, at the time of the complaint. He could not remember the exact details but he agreed that he said Mr. Cottrell was "playing the game" within the context of Mr. Cottrell telling the Workers Compensation Board (WCB) that he had been offered

another job at the time in spite of his ongoing medical problem with his right foot. Mr. Le Moullec had met with Mr. Cottrell often regarding his medical problem. He added that he never told Mr. Cottrell that his grievances in 1991 were "nuisance grievances", nor did he try to humiliate him in front of Mr. Peter Chartrand, President of the Local in March 1991, since that was not Mr. Le Moullec's style. He added he was always respectful towards the complainant. He also denied ever trying to coerce Mr. Cottrell into withdrawing his grievances (Exhibit G-5) since he believed it was Mr. Cottrell's right to grieve. He said he may have asked the complainant why he wanted to pursue his grievances but Mr. Le Moullec transmitted all of them, even the ones that had been allowed. Mr. Le Moullec denied that he ever intimidated or threatened Mr. Cottrell regarding his determination to pursue his rights.

During cross-examination, Mr. Le Moullec recalled the meeting with Mr. Chartrand to review the complainant's file regarding annual leave and sick leave. He could not recall talking about the grievances. He added that Mr. Cottrell did not understand at the time that his record of employment information had not had the effect of terminating his employment, nor did he understand being taken off Injury on Duty (IOD) status and being put on compensation status. Mr. Le Moullec added that "*I made no attempt to humiliate Mr. Cottrell or to not allow him to exercise his rights.*"

Mr. Le Moullec said that Mr. Cottrell had been on IOD status many months longer than the rules allow. Mr. Le Moullec felt sorry for him and therefore left him on IOD status longer than he should have. When Mr. Le Moullec learned Mr. Cottrell told the WCB that Public Works was going to offer him a job, which at the time was not true, Mr. Le Moullec used the phrase that the complainant was "playing the game" with the WCB.

He noted that an employee is either fit to return to work with or without limitations but he did not know Mr. Cottrell's status as "*fit to engage in some type of work*" in a letter dated December 7, 1990 from the WCB (Exhibit G-1, page 24). He was not Mr. Cottrell's manager; he emphasized again to Mr. Landry that he never tried to convince Mr. Cottrell not to pursue his grievances.

Argument for the Complainant

Mr. Landry argued that the complaint, whereby Mr. Cottrell was intimidated by the respondent while submitting his grievances, falls under subparagraphs 8(2)(c)(i) and (ii) of the PSSRA, and that Mr. Cottrell was undermined in front of the President of the Union Local, Mr. Chartrand. He said the employer could also have kept Mr. Cottrell on IOD status leave for a more reasonable period as is allowed in the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, Article M-21.11.

Article M-21.11 reads:

M-21.11 Injury-on-duty Leave

An employee shall be granted injury-on-duty leave with pay for such reasonable period as may be determined by the Employer when a claim has been made pursuant to the Government Employees' Compensation Act, and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:

(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct,

or

(b) an industrial illness or a disease arising out of and in the course of the employee's employment,

if the employee agrees to remit to the Receiver General of Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease providing, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.

(emphasis added)

Mr. Landry referred me to the decision in *Sabiston* (Board file 166-2-10395).

He concluded that the removal of Mr. Cottrell from IOD status was a poor decision by the employer.

Argument for the Employer

Ms. Begley argued that the remedy sought in this complaint is not within my jurisdiction and the complaint itself is more properly the subject of a grievance rather than of a complaint. She said that the *Sabiston* decision (supra) is of no relevance to this complaint. She said the long delay factor is prejudicial to Mr. Le Moullec because of "faded memories in the matter". She added that the allegations do not raise a *prima facie* case for a complaint because there is no clear and cogent evidence before me and there was absolutely no intent by Mr. Le Moullec to "*seek by intimidation, threat of dismissal or any other kind of threat*" to compel the complainant to refrain from exercising any right under the PSSRA as paragraph 8(2)(c) thereof reads in part.

She reminded me that Mr. Le Moullec explained honestly what was going on when the complainant was removed from IOD status to Workers Compensation. There is also no supporting evidence that Mr. Le Moullec attempted to humiliate Mr. Cottrell in front of Local President Chartrand. Mr. Le Moullec was only trying to clarify that Mr. Cottrell's employment had not been terminated.

Counsel reminded me that Mr. Le Moullec denied interfering in Mr. Cottrell's right to present his grievances and added that Mr. Le Moullec as a courtesy even forwarded the grievances that had been granted. She also reminded me at this point in the proceedings the substance of the complaint cannot be changed as Mr. Landry would have me do with Exhibit G-6.

In rebuttal, Mr. Landry concluded that Exhibit G-6, the April 22, 1997 letter from Mr. Cottrell, does not change the substance of the complaint but merely brings a general remedy to a specific remedy, under what can only be seen as an overall abnormal situation. He requested that I therefore grant the complaint.

Decision

Subparagraphs 8(2)(c)(i) and (ii) prevent a person from intimidating or threatening an employee in relation to the exercise of any right under the PSSRA.

Mr. Le Moullec denied having threatened or attempted to intimidate the grievor in relation to the exercise of any of his rights under the PSSRA. As the complainant did not testify, there is no cogent evidence before me that would allow me to declare

that Mr. Le Moullec is in violation of section 8. The allegations or complaints against him must therefore fail. On the contrary, I find that Mr. Le Moullec tried to be helpful to Mr. Cottrell, especially by allowing him to stay on IOD status longer than was warranted.

Nor is it possible to alter the nature of the complaint at the hearing as the complainant would have me do by Exhibit G-6. Article M-21.11, Injury-on-Duty of the Master Agreement, is also not the issue before me. Although the decision of the Federal Court of Appeal in *Burchill* (supra) relates to grievance adjudication, I believe that the same principle applies to other proceedings under the PSSRA, such as complaints.

It is unfortunate that Mr. Cottrell has undergone years of personal disruption due to his initial injury; however I cannot allow his complaint against Mr. Le Moullec to stand.

For all these reasons, the complaint is dismissed.

**J. Barry Turner,
Board Member.**

OTTAWA, May 14, 1997.