

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

JOSEPH ANTHONY

Grievor

and

**TREASURY BOARD
(Fisheries and Oceans Canada)**

Employer

Before: Donald MacLean, Adjudicator and Board Member

For the Grievor: William Churchill, Counsel

For the Employer: Jock Climie, Counsel

Heard at Sydney, Nova Scotia,
May 9, 1998

DECISION

This saga of Joseph Anthony began in the fall of 1992 when he applied for a position as a fisheries officer with the Department of Fisheries and Oceans (the department). The position for which he applied was a job vacancy in Glace Bay, N.S. The Public Service Commission conducted the competition for the department.

The PS Commission recognized Mr. Anthony's qualifications and suitability for the position when he placed first among the candidates in the competition. Mr. Anthony also passed his physical and medical tests for employment as a fisheries officer. He was declared "Class A, fit for work" at the top of the eligibility list, on July 22, 1993. The eligibility list would remain effective for the next two years.

After his receipt of the results of the competition the department advised him that he would receive full-time employment by October 1, 1993. However, a "freeze" on hiring within the federal government intervened. The department had to revoke its intentions a month before he was to start.

Mr. Anthony contacted Neil Bellefontaine, the director general for the department's Scotia-Fundy Region. During a meeting in Sydney in March 1994, Mr. Bellefontaine assured Mr. Anthony that he would be hired in June of 1994. When May 1994 arrived Mr. Anthony visited the regional offices in Halifax, where Mr. Bellefontaine confirmed that Mr. Anthony would be hired in two weeks. Another delay in August 1994 led to a reconfirmation by Mr. Bellefontaine that indeed he would be hired after the "field review." Mr. Anthony had to be "patient", and to call "once a month to touch base."

Mr. Anthony did call Mr Bellefontaine's office each month during that winter and the spring of 1995. When he could not contact Mr. Bellefontaine directly after a few tries, Mr. Anthony contacted the office of the Minister of Fisheries. Mr. Anthony asked them to see if anything could be done for him.

Following the call, the Minister's office notified him that Mr. Bellefontaine would meet with him on July 11, 1995. At the meeting, Mr. Bellefontaine told Mr. Anthony that he would try to find him a "term position". He also added that Mr. Anthony would receive all necessary training and the same powers as any other fisheries officer. Still, there was no promise for Mr. Anthony that he would receive an indeterminate appointment. In fact, Mr. Bellefontaine advised Mr. Anthony that there was no guarantee that he would receive any work after the initial six months.

The day before Mr. Anthony's eligibility list was due to expire he received a call from Mr. Bellefontaine. He told Mr. Anthony that there was a temporary position as a fisheries officer available in Sydney. Later, Mr. Anthony received a job offer for a temporary position as a fisheries officer in Yarmouth, until January 30, 1996. He would not get any relocation expenses. The department would not reimburse him to move to Yarmouth.

When Mr. Anthony reported for work on in Yarmouth on August 14, 1995, his supervisor informed him that he needed training in Regina before he could work as a fisheries officer. However, since Mr. Anthony's was a term position, he could not receive training. While waiting to hear if he was going to receive training, Mr. Anthony worked "in sanctions and licensing" in the Yarmouth office of the department. He would do office work, receive applications and payment of fees and fines, answer telephone inquiries, and other similar work.

In September 1995, Mr. Anthony received news that the department was sending him to Regina (to the RCMP training centre) to receive his "National Training." His training would begin on October 16, 1995. It was to be for six weeks. The department issued him a uniform, as well as a sidearm.

On October 6, 1995, they sent him back to Sydney to get ready for his trip to Regina. On October 10, 1995, Greg Blanchard, from the department's human resources' office in Halifax, assured Mr. Anthony that everything was in order. Mr. Blanchard informed him of his flight itinerary for his trip to Regina.

Two days later Mr. Blanchard called Mr. Anthony again. This time he told Mr. Anthony that "everything (in Regina) was cancelled." Ottawa headquarters had only now

realised that Mr. Anthony was employed on a term basis. Later, Mr. Anthony was told to work the remainder of his term in Cape Breton. On October 18, two days after being informed that he was to work in Cape Breton, they told him that he would be working in Yarmouth. Another two days after that Mr. Anthony received instructions to await further notice in Sydney.

Finally, on October 23, 1995, he was to report back to Yarmouth, where he would be sworn in as a fisheries officer. However, he would not be carrying a sidearm in his duties. Contented that he would finally be working as a fisheries officer Mr. Anthony accepted this proposal. Nevertheless, this scenario was short lived, since on the following day, Mr. Anthony was informed that there were problems and that he should await for instructions on the next day.

On October 27, 1995, the department told Mr. Anthony that he would not be working as a fisheries officer because he had not been trained. Still, he could choose to work either in the licensing office, or as a deck hand on a patrol boat, for the remainder of his term position. Mr. Anthony turned down this proposal. To do office work or to become a deckhand would be an embarrassment. He stated that he would not accept anything other than a position as a fisheries officer. He would not be made a fool of any longer. The department's reply was that Mr. Anthony would not be sworn in as a fisheries officer. Mr Anthony expressed his frustration that he would not resign as a fisheries officer, since he was never given the position in the first place. In addition, Mr. Anthony advised the department that he would be looking for reimbursement for the expenses that he had incurred in order to meet the demands of the department.

On November 4, 1995, Mr. Anthony signed a letter confirming that he would not be reporting to work in Yarmouth. Consequently, the department terminated his employment from the department on November 7, 1995. For the next 12 months Mr Anthony pursued his claim for reimbursement of his expenses to go to Yarmouth. He would also make inquiries about his returning to work as a fisheries officer. He would ask about jobs being available. The response was always that there were none.

Nothing developed until November 1996 when the department agreed to reimburse his expenses.

In return for absolving "the Department of Fisheries and Oceans of any further alleged liability related to your period of employment" (exhibit 6), the department reimbursed Mr. Anthony's expenses claim (\$4,640.00). He got his cheque in December 1996. It covered his out of pocket expenses incurred by accepting the position in Yarmouth, including meals and incidentals for 60 days, apartment costs, and mileage for two return trips between Sydney and Yarmouth. The text of the letter is as follows:

This is further to various conversations on the issue of monies you are claiming related to your temporary employment with the Department of Fisheries and Oceans during the period of August 14 to November 7, 1995.

As discussed, the Department has agreed to cover out of pocket expenses you incurred by accepting the position in Yarmouth, Nova Scotia. These include meals and incidentals for 60 days, accommodation costs for an apartment for the months of August through October, and mileage for two return trips between Sydney and Yarmouth. The total amount involved is \$4640.00.

Your acceptance of this payment absolves the Department of Fisheries and Oceans of any further alleged liability related to your period of employment. A travel expense cheque will only be issued following receipt of a signed copy of this letter.

(sgd: P. Partington, for the department)

I agree that the acceptance of the payment noted above absolves the Department of Fisheries and Oceans of any perceived responsibility/liability relating to my temporary employment with the Department.

(sgd: Joseph Anthony).

While he eventually received a cheque for his expenses, at no time did anyone in the department hold out any prospect of his becoming a fisheries officer.

In the period since his termination, Mr. Anthony made inquiries to other sources concerning his dream of becoming a fisheries officer that had turned sour. He talked to personnel in the office of the Ombudsman for Nova Scotia, Russell MacLellan's office (his member of Parliament), Department of Human Resources Development Canada (the employment office). It was all to no avail. Nobody could help him. It was people in the HRDC employment office who referred him to the Public Service Staff Relations Board

Although he had received some PSAC literature when he began his term position, he did not try to contact the PSAC union office. Nor did he talk to a lawyer about his plight. He had no money to do so.

It was only in February 1997 that Mr. Anthony learned of the existence of the Board. He immediately sent his grievance application to the Board's offices in Ottawa.

Mr. Anthony now wishes to file a grievance against the department. He is demanding either monetary compensation, training or employment from the department.

The question before the Board in this instance does not concern the merits of the grievance. Rather, it is whether Mr. Anthony should be granted an extension from the 25-day limit that is prescribed in the Regulations under the Public Service Staff Relations Act. I note that in his application for the extension of time Mr. Anthony did not base his argument on the Master Agreement between the Public Service Alliance of Canada and Treasury Board. The agreement has the same 25-day time limit for presenting a grievance.

Mr. Anthony stopped working for the department in November 1995. He filed his grievance and his application to extend the time limits before the Board in February 1997.

Summary of the Representation on Behalf of the Parties

Argument for the Applicant

Mr. Anthony wanted to be a fisheries officer. Although he was never promised full-time employment as a fisheries officer, he was offered a term position and training as a fisheries officer. Mr. Anthony claims he never had training, nor did he work as a fisheries officer.

Mr. Anthony wishes to receive an extension from this Board so that he can file a grievance against the department. He intends to seek compensation, fisheries officer training or employment as a fisheries officer from the department.

Mr. Anthony acknowledges that he is late in filing his grievance before the Board. However, he only learned of the existence of the Public Service Staff Relations Board some two and one-half months after he received the expense reimbursement from the department in December 1996. As soon as he heard of the Board, he filed his grievance.

Besides, Mr. Anthony contends that his ongoing discussions with the department from November 1995 to November 1996 over reimbursement of his expenses attest to his efforts to

receive employment or damages from the department. These discussions amount to promissory estoppel by the department. Accordingly, they delayed the time frame of Mr. Anthony's claim until November 1996 or even December 1996, when he settled on the amount of his reimbursement. Furthermore, after his lay-off, Mr. Anthony sought assistance from the Ombudsman of Nova Scotia, but to no avail. This effort, in Mr. Anthony's opinion, is also proof that he was maintaining his claim to get his job back.

If this Board were to refuse Mr. Anthony's application for extension of time, Mr. Anthony claims that the prejudice to him would be severe. He would lose the opportunity to be employed as a fisheries officer, to be trained as a fisheries officer, or at the very least, to be compensated for the loss of these opportunities. Had he received the training that the department offered him, he would have been in very good position to receive future employment, if not as a fisheries officer, then in another area of law enforcement.

In support of his position, counsel for Mr. Anthony referred to the following case: *Brooke Siver*, Board File 149-02-121 October 30, 1992 (Lowden).

Argument for the employer

The employer requests that I reject the application for an extension of the time limit. While there are many contributing factors to the applicant's delay in filing his grievance, the evidence remains that Mr. Anthony was not diligent in his search for redress.

Considering the fact that Mr. Anthony felt so deeply wronged by the department, he should have sought advice in a more vigorous fashion. He could have consulted a lawyer. At the very least he could have consulted his bargaining agent, the Public Service Alliance of Canada. Had Mr. Anthony sought advice from a lawyer, or the PSAC, he would have, at the very least, been pointed in the right direction. As it stands now, he missed the 25-day deadline because of his own idleness.

Furthermore, the employer rejects the applicant's submission that he had discussions with the department in the period from November 1995 to November 1996. Do they prove that he was actively seeking his job back as a fisheries officer? They do not. Rather, those

discussions related only to reimbursement of his expenses, and not his re-employment. There was no evidence of promises or representations to him from the department

The argument of the applicant is flawed. In fact, the conversations resulted in the payment and the agreement that Mr. Anthony would absolve the department of any further liability to him. Now he claims that that resolution does not extend to his re-employment because the agreement, in exhibit 6, only pertains to the expense reimbursement. What he promised not to do is what he wants to do in his claim.

On the issue of balance of prejudice, counsel notes that the year and three-month delay in filing the claim hinders the employer's ability to present a full defence. In addition, the fact of signing the release and then filing this grievance, also causes it prejudice, since there was no legal obligation to pay the amount of his expenses (\$4,640.00).

While the question before the Board at this time is not the merits of the grievance, this Board should consider the applicant's probability of success before granting him an extension. The chances of success are nil since the Board does not have the jurisdiction to grant him training, damages, or employment.

To the applicant's submission that the employer had a duty to advise him of his recourses when it terminated his employment, the employer retorts that the applicant was never fired. In fact, he quit his job of his own free will. The employer was under no obligation to advise an employee who quit his job that he could find redress in such and such a forum.

In support of its position, the employer referred to the following cases :

- (1) ***Walter Stubbe and Treasury Board (Transport Canada - Canadian Coast Guard)***, Board File 149-02-114, July 10, 1992 (Vice-Chairperson Tenace).
- (2) ***Keith Rattew and Treasury Board (National Defense)***, Board file 149-02-107, June 24, 1992 (Deputy Chairperson Chodos).
- (3) ***Wayne Miller and Treasury Board (Indian and Northern Affairs Canada)***, Board file 149-02-149, April 4, 1995 (Vice-Chairperson Tenace).

Conclusion and Reasons for Decision

The 25-day limit on the filing of grievances is in the regulations and in article M-38 of the Master Agreement between PSAC and Treasury Board. It is not there because it is unreasonable. This limit contributes to stability in labour relations. For, without a time limit the employer would be under perpetual exposure to defend itself against grievances for incidents that are long since forgotten. The purpose for a time limit of 25 days was that it was considered a sufficient period in which to seek advice, to ponder one's options, or to decide whether or not to file a grievance.

Still, this Board has a discretion in granting extensions, when it deems that it is necessary to do so in the interest of justice. Section 63 of the P.S.S.R.B. Regulations and Rules of Procedure under the PSSR Act, allows that

63 Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times

(a) by agreement between the parties; or

(b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.

Deputy Chairperson Chodos stated in *Rattew, supra*, (at page 14-15) that the purpose of this provision

is not to render nugatory the time-limits provided by the parties in a collective agreement or in the Regulations. Rather, it is to allow the exercise of a redress provided in a legislation or in a collective agreement, notwithstanding the expiry of time-limits where to do otherwise would cause an injustice.

When deciding whether to grant an extension, the Board must consider all factors that contribute to the delay. As well, I must weigh the balance of prejudice that would result, if the extension were granted or not. There are no definite rules which outline how a particular request should be decided. Nevertheless, there is a principle that is discernible through every decision cited by both parties in this case. That principle ordains that we must look for some

evidence to suggest that the party requesting the extension has been diligent in exercising his rights.

In the instant case, Mr. Anthony feels that he was misled and unfairly treated by the department. Yet, his only attempts to get redress were to contact the Ombudsman of Nova Scotia, his MP, and HRDC. In my opinion this was not a very diligent way in which to seek some sort of redress.

He claims that the delay in filing his grievance was due to his ignorance of any recourse available to him. It is conceivable that an employee hired on a term position would not be aware of all his rights. Yet, it is incomprehensible how an employee who feels that his employer has wronged him essentially does nothing for over a year to redress the situation.

Mr. Anthony had in his possession a PSAC booklet; yet he never bothered to contact the bargaining agent. A simple telephone call to the PSAC would have likely pointed Mr. Anthony in the right direction. There is no proof that Mr. Anthony even contacted the Department of Fisheries and Oceans to express his grievance. Once again, had he at least done this, he would presumably have been pointed towards this Board.

The applicant says that the ongoing discussions concerning the reimbursement of expenses created a promissory estoppel that delayed his cause of action until November or December 1996. I can conceive of some circumstance where the doctrine of promissory estoppel can be used to support an argument for an extension of time to present a grievance.

However, there is no evidence to suggest that any conversation between Mr. Anthony and anyone at the department constituted demands for training, re-employment or damages. There were no demands, other than for his expenses. He does not say that he was misled by any responses by the department. He does not say that they were looking for another job for him. Any replies that he got from them concerning a job were not sufficient to create an estoppel. There was no detrimental reliance.

Mr. Anthony himself says that the payment that he received was for his expenses and nothing else. The only conclusion that I can come to, therefore, is that Mr. Anthony waited a full 15 months before deciding to file his grievance. Under the circumstances, to grant an

extension and permit Mr. Anthony to present his grievance before this Board would allow him to potentially prejudice the employer because of his own procrastination and failure to seek redress.

I conclude that Mr Anthony was not diligent in pursuing his grievance. Accordingly, I dismiss his application for an extension of time.

I have given only brief attention to the letter (exhibit 6) in which Mr. Anthony "absolves the Department of Fisheries and Oceans of any perceived responsibility/liability relating to my temporary employment with the Department." This agreement and its effect in this application reinforce my decision to dismiss the application. His signature statement does not limit the parameters of the resolution of that matter. It absolves the department from any liability relating to his employment. That is certainly wide enough to encompass any matter that arises out of his employment with the department.

In conclusion, no one disputes the fact that Mr. Anthony lived through a very disagreeable experience with the department. However, once Mr. Anthony perceived that his rights were violated he should have attempted to obtain redress. If he was not aware of his rights, he could have inquired about them. At the very least, early on in the period after he left the department he could have contacted the bargaining agent or a lawyer. In failing to do so, Mr. Anthony did not exhibit a sufficient degree of diligence. Accordingly, he is the person who is responsible for whatever prejudice he suffers by not being allowed to proceed with this grievance.

In the result I hereby deny the applicant's request for an extension of time to present his grievance.

Donald MacLean,
Adjudicator and Board Member

MONCTON, December 14, 1998.

