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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

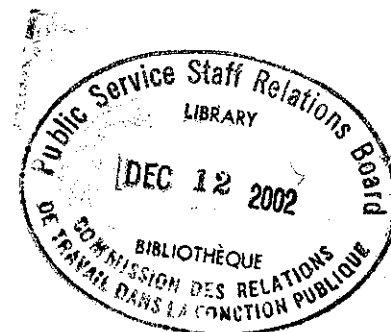
MICHAEL JAMIESON

Grievor

and

TREASURY BOARD
(National Defence)

Employer

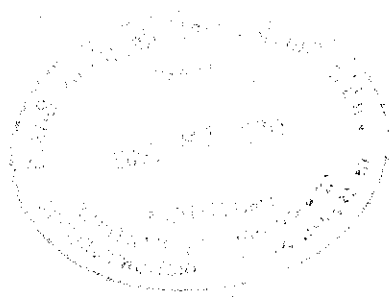


Before: Yvon Tarte, Chairperson

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Jennifer Champagne, Counsel

Heard at Kingston, Ontario,
September 30, October 1 and 2, 2002.



DECISION

Background Information

[1] The grievor, Michael Jamieson, started working as a certified plumber in 1978. In June 1981, he joined the Department of National Defence (DND) at CFB Kingston as a plumber, GL-PIP-9. At that time, DND hired both plumbers and steamfitters who worked in separate shops.

[2] In 1995, DND was required to review and rationalize base operations because of the government's expenditure reduction program. Authorities at CFB Kingston decided as a cost reduction exercise to consolidate the plumbing and steamfitting shops, going from a total of 20 employees in both shops to 12 employees in the combined shop. Following this decision, employees who wished to continue working in the consolidated workshop were required to obtain certificates in the second trade they would be required to work at.

[3] The grievor who wanted to continue working at the base failed over time to qualify as a steamfitter. His employment was therefore terminated for non-disciplinary reasons effective June 23, 2000 (Exhibit E-1).

The Evidence

For the Employer

[4] The employer called four witnesses and tendered 25 exhibits.

[5] Colonel M. Skidmore was Base Commander at CFB Kingston from July 1998 to June 2000. He explained the circumstances which led the employer to rationalize its operations and consolidate the plumbing and steamfitting shops.

[6] The decision to require dual certificates for persons working in the combined shops was made in 1995. In order to ensure union support for the consolidation plan, Colonel Skidmore consulted with officials at the Union of National Defence Employees, a component of the Public Service Alliance of Canada, the grievor's bargaining agent.

[7] Plumbers wanting to continue working at the base were given an opportunity to work with qualified steamfitters and to participate at the employer's expense in a course given by Local Union 221, United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Local 221).

[8] All plumbers at CFB Kingston who stayed on in the consolidated shops took the provincial steamfitter exam. The grievor wrote the exam in the summer of 1999, and was one of the last plumbers to do so. In the end, Mr. Jamieson was the only CFB Kingston plumber who took the exam and failed. He missed by one point.

[9] Following the failed exam, the employer believed the grievor could easily succeed at a second attempt with a bit more training and practical experience.

[10] The second witness called by the employer was John Telford who, from 1998 to 2000, was the business manager of Local 221. He holds certificates in both plumbing (1976-76) and steamfitting (1979-80). In 1997, Local 221 was asked by CFB Kingston to provide training to base plumbers to prepare them for the provincial steamfitting exam. The course provided was intended for 5th year apprentice steamfitters or plumbers who wished to be dual ticketed.

[11] According to Mr. Telford, many of the functions performed by plumbers and steamfitters are generic (Exhibit E-11). Given this fact, much of the normal work performed by a plumber would qualify as steamfitter schedule work (under Ontario Regulation 1079 pertaining to Steamfitters (Exhibit E-9)) and would therefore allow an experienced plumber to challenge the steamfitter exam for dual ticketing purposes.

[12] The success rate of plumbers in challenging the steamfitter exam after having taken the Local 221 training program is nearly 100%. Out of approximately 250 plumbers who have taken the Local 221 training and exam over the years, all, except three (including the grievor), have passed.

[13] In Mr. Telford's opinion as a certified plumber and steamfitter, Mr. Jamieson was qualified to write and pass the provincial steamfitter exam.

[14] Major Brian McGee testified next. He first came to CFB Kingston in the summer of 1996. In the fall of 1998, he was appointed Engineering Service Officer, a position he held until December 1999, at which time he was appointed Deputy Base Commander, a position he held until the end of June 2001.

[15] Late in 1998, Major McGee was advised that the grievor had not yet obtained his steamfitter certificate. Given the requirement to be dual ticketed, Major McGee wrote to Mr. Jamieson in December 1998 to advise him that he had to obtain his steamfitter certificate no later than February 28, 1999 (Exhibit E-14).

[16] Following discussions with the grievor, during which Mr. Jamieson argued that he had received inadequate training to challenge the steamfitter exam and that the need for cross-qualification was questionable in any event, Major McGee advised Mr. Jamieson early in April 1999 (Exhibit E-16) that the grievor now had until June 28, 1999, with an alternate date of July 5, 1999, to write the steamfitter exam. As previously indicated, the grievor wrote the exam and failed by one point.

[17] During this time, Major McGee spoke to Peter Bacon and Laurie-Lee Round, both employees of the Ontario Ministry of Training, Colleges and Universities, Apprenticeship and Client Services Unit (the Ministry), who were involved in the Jamieson file. Major McGee sought and obtained their assurance that the employer in this case was acting properly according to provincial regulations.

[18] Early in September 1999, Major McGee again wrote to the grievor to indicate that both the Ministry and Local 221 were in full support of the employer's approach to the certification of CFB Kingston plumbers as steamfitters (Exhibit E-15). The grievor was also advised that he now had until November 5, 1999, to rewrite the steamfitter exam. The letter concluded by clearly stating that: 1) the grievor could not continue to be employed in his current position without the steamfitter qualification; 2) disciplinary action could be pursued if the grievor failed to write the exam; and finally, 3) failure to pass the exam could result in demotion for cause.

[19] The grievor failed to write the steamfitter exam in November 1999. On November 9, 1999, Major McGee advised Mr. Jamieson that his failure to write the exam amounted to misconduct and that an investigation would be conducted by the employer.

[20] Major McGee met with the grievor and his father on November 12, 1999. Again, the parties didn't agree on the need for cross-qualification or whether the grievor had enough steamfitter experience to write the required exam safely. Mr. Jamieson continued to maintain he did not have to comply with the direction to write the exam.

[21] On December 8, 1999, Mr. Jamieson forwarded an affidavit to the Ministry asserting that, during his employment with DND, he had "never done any steamfitting work". This action on the part of the grievor led the employer to conduct an investigation into what it considered to be misrepresentation by Mr. Jamieson. On December 16, 1999, the grievor was given a letter of reprimand for the

misrepresentation and for failing to write the steamfitter exam when ordered to do so (Exhibit E-19).

[22] The letter of reprimand was signed by Major McGee as Deputy Base Commander, a position he had assumed earlier in December. Captain Chris Hann, the employer's next witness, followed Major McGee in the position of Engineering Services Officer.

[23] In the meantime, the employer conducted a review of the grievor's worksheets to ascertain the true nature of his exposure to steamfitter work.

[24] On January 11, 2000, Captain Hann wrote to the Ministry concerning the employer's position with respect to Mr. Jamieson's eligibility to write the provincial steamfitter exam (Exhibit E-20). It should be noted that, following receipt of the December 8 affidavit, the Ministry had rescinded Mr. Jamieson's eligibility to write the steamfitter trade exam.

[25] The Ministry responded in late January, indicating that only Mr. Jamieson could apply to re-activate his application to write the exam.

[26] Captain Hann wrote to the grievor of February 11, 2000, to suggest that he challenge the exam no later than February 29, 2000 (Exhibit E-22). Mr. Jamieson did not accept Captain Hann's suggestion.

[27] The employer then made arrangements for the grievor to write the steamfitter exam on April 27, 2000 (Exhibit E-23). Mr. Jamieson was told in writing to contact the Ministry to confirm his intent to take the exam. The letter also made it clear that failure to write the exam could lead to other employment options including demotion or termination.

[28] Mr. Jamieson did not write the exam on April 27, 2000. Captain Hann therefore wrote to the grievor to advise that (Exhibit E-24):

As you did not present yourself for this test, management has done a review of positions at your present group and level for which you are qualified. Unfortunately, no positions were identified. However, management is able to offer you a deployment to a lower level position. Please find attached an offer of deployment for you to a GL ELE 03, Tradeshelper position.

Please be advised that should you choose not to accept this deployment, management will be forced to consider the possibility of terminating your employment. I sincerely hope that this will not be necessary.

[29] On May 18, 2000, the grievor was advised by Colonel Skidmore that the employer was proceeding to terminate his employment for non-disciplinary reasons should he fail to obtain a steamfitter licence by June 16, 2000.

[30] On June 12, 2000, Brigadier-General J.C.M. Gauthier, Commander, Land Force Central Area Headquarters, advised the grievor, that Colonel Skidmore's recommendation to terminate his employment for non-disciplinary reasons had been accepted. Mr. Jamieson was told that his employment would be officially terminated on June 23, 2000, unless he had obtained a provincial steamfitter license prior to that date.

For the Grievor

[31] Joe McAuliffe worked as a tradeshelper with the grievor from 1992 until 1998, when he was forced off work because of a work-related injury. Mr. McAuliffe had, at the time of the hearing in this matter, just recently returned to work.

[32] Mr. McAuliffe asserts that whenever he worked with Mr. Jamieson between 1992 and 1998, they only ever performed plumbing-related duties.

[33] The witness, however, agreed that much of the generic work referred to in Exhibit E-11, prepared by John Telford, was performed by the grievor as a plumber.

[34] Brian Carter is the grievor's brother. Mr. Jamieson and Mr. Carter only met for the first time in May 2000 shortly before the grievor's termination. Mr. Carter, who was given up for adoption when he was very young, has never worked as a plumber or steamfitter.

[35] Mr. Carter did some investigative work on behalf of his brother and came to the conclusion, after talking to Ministry personnel, that the grievor did not have the necessary work-related experience to challenge the provincial steamfitter exam.

[36] Mr. Jamieson, who testified next, started working as a certified plumber for DND in 1981. The grievor first heard of the amalgamation of the plumbing and steamfitting shops at CFB Kingston on April 1, 1996, at a meeting which lasted no more than

½ hour. At this meeting, the grievor understood that dual ticketing was voluntary. Mr. Jamieson believes that it was in December 1998 (Exhibit E-14) that he was told officially for the first time that dual ticketing was mandatory.

[37] The grievor has never felt qualified to write the steamfitter exam. Mr. Jamieson holds the view that before he can challenge the steamfitter exam he must have clocked 4000 to 5000 hours of steamfitter-related worked.

[38] By his account, the grievor feels that he has received approximately 100 hours of training and 550 hours of work-related experience, far short of the 4000/5000 required.

[39] It was for these reasons that Mr. Jamieson presented an affidavit (Exhibit E-5) to the Ministry in December 1999, attesting that he had never done any steamfitting work.

[40] The grievor, however, acknowledges that he wrote the provincial exam in the summer of 1999, even though he did not feel qualified to do so. Following receipt of his affidavit (Exhibit E-5), the Ministry rescinded his eligibility to write the steamfitter exam.

[41] In March 2001, the Ministry wrote to the grievor (Exhibit E-6) in response to the latter's request for a written summary of the history and status of his application for certification. The Ministry wrote:

Under the Trades Qualification and Apprenticeship Act, a person holding certification as a 306A Plumber may apply for eligibility to challenge the 307A Steamfitter certification exam, if the individual provides evidence of having worked in the trade doing steamfitting work in excess of 4000 hours.

In June 1997, an application for approval to challenge the certification exam was received in this office. This application consisted of an application signed by yourself and a letter signed by Local Union 221 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The evidence contained in both these documents was assessed as collaborative and you were approved as eligible to challenge the certification exam.

Subsequently in December 1999, you presented us with a sworn affidavit that you had "never done any steam-fitting

work." Based on this new information, we no longer had collaborative evidence and your eligibility to challenge the certification exam was rescinded. Your application will remain rescinded until such time that we receive additional collaborative evidence.

[42] Prior to his termination, Mr. Jamieson was offered a demotion without salary protection, to a tradeshelper position. The grievor was insulted by this offer since he is a qualified plumber and the salary drop would have been in the \$13,000 range. Mr. Jamieson was not offered another plumber position elsewhere in Canada.

[43] Most of the grievor's plumber colleagues, some of whom had less plumbing experience than Mr. Jamieson, wrote the steamfitter exam in July 1996. All passed.

[44] Even though Mr. Jamieson filed a classification grievance in February 1997 dealing with the addition of steamfitter functions to his job description, and even though he took the steamfitter training offered by his employer in April 1997, Mr. Jamieson maintains that cross-training and dual ticketing only became mandatory in December 1998 (Exhibit E-14).

[45] The grievor generally agreed with the evaluation done by Mr. Telford in Exhibit E-11 of the generic elements between the plumbing and steamfitting trades.

[46] Finally, two letters which postdate the termination of Mr. Jamieson were filed on consent. The first, dated March 29, 2001 (Exhibit E-7), is from the Ministry to the employer. It reads in part:

Under the Trades Qualification and Apprenticeship Act, a person holding certification as a 306A Plumber may apply for eligibility to challenge the 307A Steamfitter certification exam, if the individual provides evidence of having worked in the trade doing steamfitting work in excess of 4000 hours. The evidence is assessed with a key component being the presence of verifiable and corroborating evidence from different sources. The applicant presenting independent evidence from a qualified independent party and verifying that this evidence is true normally provides this corroboration. The assessment is only for eligibility to challenge the exam. The certification exam is the final arbiter of qualification.

[47] The second letter, dated October 30, 2001, also from the Ministry to the employer, reads in part (Exhibit E-8):

I am writing in response to your October 24, 2001 request that I review a summary of training information to determine if an individual with a similar package of information would be deemed eligible to challenge the Certificate of Qualification exam for Steamfitter.

As you know a person holding certification as a 306A Plumber can be deemed eligible to challenge the 307A Steamfitter exam, if they present evidence of having worked in the trade doing steamfitting work in excess of the 4000 hours. The evidence is assessed with a key component being the presence of verifiable and corroborating evidence from different sources. The applicant presenting independent evidence from a qualified independent party and verifying that this evidence is true, normally provides this corroboration.

The package that you presented clearly indicates that the individual has 828 hr of exclusive steamfitting training and work experience. The package also presents that the individual has worked as a plumber for 19 years and provides an analysis of the training and work experience that is present in both trades. While this infers that the individual would likely have acquired the remaining 3172 hours of steamfitting experience, the package is not implicit.

In a package like this we would want to ensure that the individual was in fact doing tasks common to plumbing and steamfitting during those 19 years. Although uncommon, it could be possible that a licensed plumber had worked exclusively on plumbing administrative work for all of those 19 years and had not acquired the inferred skills.

Arguments

For the Employer

[48] This well-documented case reflects the tremendous efforts made by the employer to assist the grievor in obtaining a steamfitter certificate from 1996 until the time of Mr. Jamieson's termination.

[49] The evidence shows that the grievor was asked to write the required provincial exam on at least six occasions. He was also warned on many occasions that failure to do so could lead to his termination.

[50] Mr. Jamieson's position that dual ticketing was optional until December 1998 is not consistent with the evidence presented, including the grievor's own testimony.

[51] The employer in this case followed the Treasury Board guidelines for non-disciplinary demotion or termination for cause (Exhibit E-3). At no time did the employer act in a manner that was arbitrary or discriminatory.

[52] The grievor can only blame himself for his predicament. Mr. Jamieson's employment was terminated because he refused to do what was necessary to obtain a steamfitter certificate which was an essential requirement of his position.

[53] The affidavit (Exhibit E-5) which the grievor filed with the Ministry was a gross misrepresentation of reality. It was only after he had written the exam in 1999 and failed that he decided out of the blue that he really didn't have the necessary experience to do so after all.

[54] Mr. Jamieson consistently refused to take on steamfitting work. He just wanted to continue as a plumber. Of the nine or ten plumbers who stayed on at CFB Kingston after the shop consolidation, the grievor is the only one to fail to obtain a dual certificate.

[55] This case does not give rise to a workforce adjustment situation under the Workforce Adjustment Policy (WFAP). The grievor's position was not abolished; it was modified with the addition of steamfitter duties. Mr. Jamieson's classification grievance in 1997 corroborates this position.

[56] Mr. Telford's testimony is critical in this case. It shows that there are numerous similarities between the plumbing and steamfitting trades. Mr. Telford was of the view that a person who works as a plumber for 20 years must necessarily have gained the experience required to challenge the steamfitter exam.

[57] Mr. Jamieson created obstacles for himself and refused to cooperate with the employer. The legitimacy of the shop consolidation process has never been in question. Quite the contrary, union officials, including Mr. Telford, supported the employer in its endeavours.

[58] In support of its position, the employer referred to *Hogan and Treasury Board* (Board file 166-2-26360), *Pachowski and Treasury Board* (2000, 195 F.T.R. 176) and *Stitt and Treasury Board* (Board file 166-2-25981).

[59] The employer acted in good faith in this case and made all reasonable efforts to help the grievor but, when faced with the grievor's lack of cooperation, it had no choice but to terminate his employment.

For the Grievor

[60] Before terminating Mr. Jamieson's employment, the employer should have provided him with the necessary training and experience to successfully write the provincial steamfitter exam. What the employer did in this case to help the grievor falls far short of this requirement. The provincial regulation requires 4000 hours of non-exempt steamfitter experience. No such training was provided by the employer.

[61] The employer's offer of a demotion was insulting and inappropriate. The facts of this case indicate that a work force adjustment situation has occurred. As such, the grievor is entitled to salary protection at the very least (Exhibit G-4).

[62] The employer has also violated Articles 22 (Health and Safety), 23 (Job Security) and 24 (Technological Change) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada (Code 300/99, expiry date August 4, 1999, Exhibit G-4).

[63] In the final alternative, Mr. Jamieson's termination amounts to a disguised disciplinary discharge for which there is no justification.

[64] The case law referred to by the employer deals with situations which are fundamentally different from Mr. Jamieson's situation.

[65] The grievor should therefore be reinstated retroactively to June 2000. If the employer still wants Mr. Jamieson to learn another trade, then it will have to provide him with necessary training. In the alternative, if the grievor cannot be reinstated in his old position, Mr. Jamieson should be placed in a lower position with salary protection as is required by the collective agreement.

Analysis and Reasons for Decision

[66] I will, first off, reject summarily the grievor's argument that we are dealing with a hidden disciplinary discharge. The evidence does not allow me on an objective basis to conclude that a disciplinary motive was involved in Mr. Jamieson's termination. The

termination of the grievor's employment came about because he did not meet the essential requirements of his position.

[67] I also disagree with the grievor that the facts in this case give rise to a WFAD situation, to a health and safety issue or to the application of the technological change clause in the collective agreement.

[68] A work force adjustment pursuant to the collective agreement is a situation that occurs when a deputy head decides that the services of an indeterminate employee are no longer required beyond a specified date because of lack of work, the discontinuance of a function, an involuntary relocation or an alternative delivery initiative. None of these situations applies to Mr. Jamieson. We are not dealing with the discontinuance of a function in this case, but rather with the addition of duties to a position, something which is specifically permitted by section 7 of the *Public Service Staff Relations Act*. That section clearly gives the employer the sole authority "to assign duties to and classify positions" within the federal public service.

[69] The health and safety clause of the collective agreement (Article 22) requires that the employer make reasonable provisions for the occupational safety and health of its employees. The article also requires the employer to consult with the bargaining agent on health and safety issues. Although Mr. Jamieson maintains that it would be unsafe for him to work as a steamfitter, no objective evidence of that fact was tendered. The evidence leads me to conclude the opposite, since all of the grievor's colleagues have successfully carried on with their dual ticketing and the assumption of steamfitting duties.

[70] Technological change (Article 24) is defined in the collective agreement as "(a) the introduction by the employer of equipment or material of a different nature than that previously utilized; and (b) a change in the Employer's operation directly related to the introduction of that equipment or material".

[71] Clause 24.07 of the collective agreement states that:

When as a result of technological change, the Employer determines that an employee requires new skills or knowledge in order to perform the duties of the employee's substantive position, the Employer will make every reasonable effort to provide the necessary training during

the employee's working hours without loss of pay and at no cost to the employee.

[72] Assuming for the sake of discussion that a technological change has occurred in this case (which I do not believe to be the case), I must conclude that the employer has made every reasonable effort to provide the necessary training to Mr. Jamieson.

[73] As the old saying goes, you can bring a horse to water but you can't make him drink. The employer made every reasonable effort to help Mr. Jamieson obtain the necessary certificate to continue working at CFB Kingston. For whatever reason, the grievor was not prepared to accept the employer's offers of help and training. Mr. Jamieson could easily have asked for and received additional exposure to steamfitting work. Rather than cooperate with the employer, the grievor resisted any attempt to move him along, putting up obstacles at every opportunity.

[74] I disagree with the grievor's position that work which is generic to plumbing and steamfitting cannot count in the requisite work exposure before an individual can challenge the other trade's exam. One need only refer to the Ministry's correspondence (Exhibit E-8) to come to that conclusion:

The package that you presented clearly indicates that the individual has 828 hr of exclusive steamfitting training and work experience. The package also presents that the individual has worked as a plumber for 19 years and provides an analysis of the training and work experience that is present in both trades. While this infers that the individual would likely have acquired the remaining 3172 hours of steamfitting experience, the package is not implicit.

In a package like this we would want to ensure that the individual was in fact doing tasks common to plumbing and steamfitting during those 19 years. Although uncommon, it could be possible that a licensed plumber had worked exclusively on plumbing administrative work for all of those 19 years and had not acquired the inferred skills.

(Underlining added)

[75] The employer throughout this unfortunate situation acted in good faith, making more than reasonable efforts to help Mr. Jamieson do what was necessary to keep his job. The reasons for the grievor's termination fall largely on his own shoulders. Mr. Jamieson was given ample opportunity to obtain the steamfitter's certificate.

When it became obvious that the grievor would not even try to improve and challenge the exam a second time, the employer offered a demotion.

[76] Mr. Jamieson refused the employer's offer because it was insulting when in fact, at least according to his representative, a demotion with salary protection would have been acceptable. The employer's guidelines for non-disciplinary demotions and terminations (Exhibit E-3) do not require salary protection in cases where an employee is appointed to a position at a lower maximum rate of pay.

[77] Neither the collective agreement nor the guidelines require salary protection in cases such as this one of demotion for cause.

[78] I must therefore, given what precedes, conclude that the employer's decision to terminate Mr. Jamieson's employment was justified.

[79] Accordingly, for all these reasons the grievance is denied.

**Yvon Tarte,
Chairperson**

Ottawa, December 10, 2002.

