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File: 166-2-31001

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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ALAIN GINGRAS

Grievor

and

TREASURY BOARD
(Citizenship and Immigration Canada)

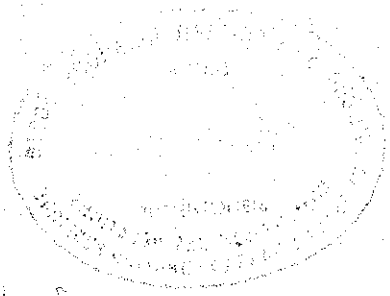
Employer

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Grievor: Ron Cochrane, Professional Association of Foreign Service Officers

For the Employer: Harvey Newman, Counsel

Heard at Ottawa, Ontario,
March 12, 2002.



[1] Mr. Alain Gingras ("the grievor") has referred to adjudication a grievance under subparagraph 92(1)(b)(i) of the *Public Service Staff Relations Act* (PSSRA). That subparagraph reads as follows:

> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> [...]
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> [...]
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

[2] The grievor occupies a position of Immigration Officer (FS-02) in the Department of Citizenship and Immigration Canada. He has been working in Ottawa following the events which gave rise to his grievance and led to his departure from Manila, Philippines.

[3] His grievance, dated May 17, 2001, reads as follows:

> [Translation]
>
> *I would like to present a grievance against the employer's decision to end my assignment, allegedly because of misconduct.*
>
> *Corrective Action Requested*
>
> *I would like the decision to be rescinded and removed from my file. I would also like any documents relating to the decision to be removed from my file and handed over to me.*

[4] At the time of the reference to adjudication, in November 2001, the grievor's representative, Ron Cochrane, wrote to the Board the following:

[...]

> *Mr. Gingras had his assignment to the Philippines terminated one year after his posting for alleged misconduct. The early termination of the Gingras posting has resulted in a financial penalty for Mr. Gingras.*

[5] On December 13, 2001, the employer objected to having the grievance proceed to adjudication.

[...]

> *It is respectfully submitted that an adjudicator lacks jurisdiction to hear this matter, as it does not meet the criteria set out in section 92 of the* Public Service Staff Relations Act *since management's decision to terminate Mr. Gingras' appointment as a* Visa Officer *in Manila was not a disciplinary action constituting suspension or financial penalty.*

[...]

[6] At the hearing, the employer objected to the jurisdiction of an adjudicator to hear this matter on two grounds: (1) on its face, the grievance does not allege disciplinary action and (2) the decision to recall was administrative and not disciplinary. This decision deals only with the first preliminary objection.

Employer's Representations

[7] Although the grievor could grieve under section 91 of the PSSRA and have his grievance answered internally at the different steps of the grievance procedure within the Department, the grievance is not adjudicable on its face because it does not allege "disciplinary action resulting in a financial penalty", as those terms are used in subparagraph 92(1)(b)(i) of the PSSRA.

[8] Prior to the reference to adjudication, the employer did not deal with the grievance as being one of "disciplinary action resulting in a financial penalty" as can be confirmed by the employer's answers (May 31, 2001 and October 20, 2001) to the grievance.

[9] It is only after the internal grievance process was completed that the words "disciplinary action resulting in a financial penalty" were used in the accompanying letter to the reference to adjudication.

[10] Indeed, the recall of the grievor from Manila (i.e. the termination of the assignment) was never considered to be disciplinary action. There is no record of a financial penalty or of disciplinary action either on the employer's or the grievor's file. The grievor's bargaining agent, in an attempt at legerdemain, is trying to make this grievance adjudicable. This is improper; it is an abuse of process and should not be countenanced. Jurisdiction should be renounced. The *Burchill* decision (Board file 166-2-5298) settles the matter.

Grievor's Representations

[11] A foreign service officer is hired to a level (in the instant case, FS-02) and not to a position. An officer receives an assignment somewhere in the world and this assignment has a duration which lasts between two to four years.

[12] At the time of his or her departure, the foreign service officer knows the duration of the assignment. When the assignment comes to an end earlier than the anticipated term, it raises the question: why?

[13] At the time of the grievance, the Department and the ambassador knew the grievor was grieving the employer's decision to terminate his posting two years early. The Department, the ambassador and the grievor all knew that the early recall to Ottawa, Ontario, would result in the grievor's losing his foreign service premium to which he is entitled under the collective agreement.

[14] The loss of this premium if related to disciplinary action has been recognized by the Federal Court of Appeal (*Massip v. Canada (Treasury Board)* (F.C.A.) January 11, 1985) as a financial penalty.

[15] Furthermore, at the actual hearing of the grievance with the Assistant Deputy Minister (ADM) (last level of the grievance process), the grievor's representative, Ron Cochrane, was present. Mr. Cochrane affirmed that, amongst the aspects discussed, there were: (1) the fact that the employer did not see the recall as disciplinary action; (2) the fact that the grievor would lose his foreign service premium upon his return to Ottawa; and (3) the fact that as a result of the *Massip* decision (*supra*), the bargaining agent and the grievor were confirmed in their view that the loss of the foreign service premium was a financial penalty. (Counsel for the employer

indicated that he did not dispute that those questions were discussed at the meeting with the ADM.)

[16] The grievor's representative emphasized that at the time of the grievance, both parties knew the grievor would suffer a financial penalty as a result of his early recall. Therefore, the employer was not and is not taken off guard and did not suffer prejudice. (Counsel for the employer conceded that on the date of the grievance, i.e. May 17, 2001, both parties knew that upon the grievor's arrival in Ottawa, the foreign service premium would cease.)

[17] In reply, counsel for the employer added that the grievor should have raised in the grievance the loss of the foreign service premium and the fact that it constituted, in his view, a financial penalty. As drafted, the grievance was not adjudicable. Counsel reiterated that it cannot be open to grievors not to state a position which would at least *prima facie* bring their case within the words of the PSSRA, "disciplinary action resulting in a financial penalty", which give jurisdiction to an adjudicator. Even if one posits that the employer was able to infer disciplinary action from reading the grievance, one should not infer a financial penalty as well. The only corrective action sought in the grievance is the quashing of the decision to terminate his assignment. In short, on its face, the grievance does not allege disciplinary action nor a financial penalty, and it was not open to the grievor, after the employer's answer at the last level, to amend the grievance because, as it is answering a particular grievance at various levels of the grievence procedure, the employer is entitled to know what it is dealing with. In addition, even if these arguments are not accepted, there is a further jurisdictional hurdle: the employer does not accept that disciplinary action has occurred and the onus rests with the grievor to establish disciplinary action. The grievor may have acted in a manner which could have attracted disciplinary action but the employer chose not to discipline him. The employer took an administrative decision within the bounds of the managerial authority it is given under the *Financial Administration Act* and which is confirmed at section 7 of the PSSRA.

[18] The bargaining agent's representative added the following points. It is not open to the employer every time it ends a post to allege administrative action. This is becoming more frequent. There has to be a reason to explain that an employee's posting is terminated earlier than anticipated. The grievor was in Manila and did not have the help of a grievance officer to help him draft the grievance.

Reasons for Decision

[19] The adjudicability of this grievance is brought into question by the employer. The employer objects to the jurisdiction of an adjudicator to hear this matter on two grounds: firstly, that on its face the grievance is not adjudicable because it does not allege "disciplinary action resulting in a financial penalty" and secondly, because, according to the employer, the decision to recall the grievor was an administrative decision and not "disciplinary action resulting in a financial penalty."

[20] This preliminary decision deals with the first ground. I will deal with the second ground once the hearing resumes after the issuance of the present decision.

[21] I am of the view that in the drafting of this particular grievance, the words used and not used do not constitute an obstacle to its adjudicability for the reasons that follow.

[22] The grievor did not have the benefit of a lawyer or his bargaining agent's advice when he drafted his grievance and therefore within limits should be given a certain degree of latitude.

[23] Although he has not qualified the employer's action to recall him from his posting in Manila as "disciplinary", he has clearly set out the object of his grievance, that is, the recall from his posting. He has, if not explicitly at least implicitly, suggested that he viewed his recall as "disciplinary" by stating that the employer's reason for recalling him was for misconduct on his part (« pour raison présumée d'inconduite »). It can at the very least be inferred from these words that he viewed the decision as "disciplinary".

[24] The words "financial penalty" were not used but counsel for both parties agree that both parties knew and understood at the time of the recall that since the recall was to Ottawa, the recall would result in the loss of the foreign service premium (as a result of the application of the collective agreement).

[25] Inasmuch as both parties knew that the grievor was losing the foreign service premium as a direct consequence of his being recalled to Ottawa, and inasmuch as it is clear, following the *Massip* decision (*supra*), that the loss of this premium is a financial

penalty, it is not fatal to the adjudicability of this grievance that the words "financial penalty" were not used.

[26] I am satisfied that, from the day it received the grievance, the employer understood the nature of the grievance; that is, that the grievor was asking the employer to set aside its decision to recall him to Ottawa, one of the consequences of which was to bring about the loss of the foreign service premium. Therefore, throughout the internal grievance procedure the employer understood the nature of the grievor's claim, it had the opportunity to turn its mind to the grievor's concerns and, in short, it was not caught by surprise nor prejudiced in any way.

[27] I feel confirmed in my conclusion by the following facts.

[28] Firstly, the grievor's representative in the case before me, Ron Cochrane, affirmed that at the last level of the grievance procedure both the loss of the foreign service premium and the disciplinary nature of the employer's decision were discussed by himself and the employer's representatives. On this point, counsel for the employer indicated that he did not dispute the veracity of Mr. Cochrane's statement. Therefore, I give full weight to this declaration and I am satisfied that the employer understood the issue it was facing.

[29] I should add that the employer's answer at the final level of the grievance procedure confirms Mr. Cochrane's statement.

[30] The employer writes the following:

> [Translation]
>
> [...]
>
> *I am satisfied that the decision to end your assignment was not disciplinary action but rather a step taken by management to put an end to inappropriate behaviour that showed a lack of judgement on the part of a visa officer.*
>
> [...]

[31] This paragraph corroborates Mr. Cochrane's statement that the disciplinary nature of the decision had been discussed at the third level and reinforces my conclusion that the imperfect drafting of the grievance did not in any way prejudice the employer's ability to fully address all aspects of the dispute.

[32] In conclusion, the employer's first objection is rejected. I will deal with the employer's second jurisdictional objection when the hearing reconvenes. The parties should be prepared to deal with the merits on the same occasion, as I may have to hear the evidence in order to decide the jurisdictional question and to determine if disciplinary action has occurred or not.

[33] The parties will be informed in the near future of the dates of resumption of the hearing.

Marguerite-Marie Galipeau
Deputy Chairperson

OTTAWA, May 7, 2002.