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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

JOHN SCHOFIELD

Grievor

and

TREASURY BOARD

(Department of Foreign Affairs and International Trade)

Employer

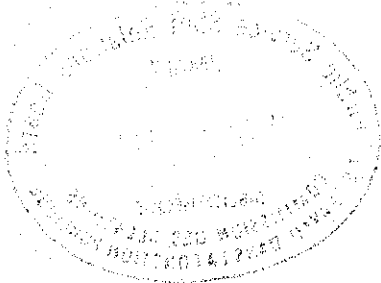


Before: Marguerite-Marie Galipeau, Deputy Chairperson

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

For the Employer: Harvey Newman, Counsel

Heard at Ottawa, Ontario,
March 4 to 8, 2002.



DECISION

[1] This decision follows the preliminary remarks and opening statements of both parties, delivered at the beginning of the hearing held following the reference to adjudication of a grievance filed by John Schofield, FS-02, who is employed at the Department of Foreign Affairs and International Trade (DFAIT) and was, at the time of the grievance, Consul and Senior Trade Commissioner.

[2] The grievance, which was presented on March 17, 2001, reads as follows:

I grieve that I have been unjustly disciplined for alleged misconduct that has resulted in my being prematurely recalled from my assignment in Düsseldorf.

[3] The corrective action requested reads as follows (Exhibit E-1, tab 3):

*-That the decision to recall be rescinded.
-That all matters related to this issue be removed from my file.*

[4] The employer objected both before and at the hearing to the jurisdiction of an adjudicator to hear and decide this matter.

[5] The employer argued that the decision to recall the grievor was an administrative measure and not disciplinary action as per subparagraph 92(1)(b)(i) of the *Public Service Staff Relations Act* (PSSRA).

[6] In addition, the employer argued that the grievor had the burden of demonstrating that not only had there been disciplinary action, but also that this disciplinary action resulted in financial penalty.

[7] Counsel described the factual backdrop as follows. In the late summer of 2000, a complaint (Exhibit E-1, tab 8) was filed by locally engaged staff in Düsseldorf relating to the management of the office by the grievor. These concerns came to the attention of Mr. Summerville, Minister of the Embassy. Mr. Summerville looked into these concerns. In December 2000, Mr. Summerville recommended that the grievor be relieved of his assignment. After consideration of the matter with Department representatives in Ottawa, it was decided to do so by the summer of 2001.

[8] The grievor was given a cross posting to the Consulate General in Detroit, where he presently holds the position of Consul and Trade Commissioner.

[9] The grievor's assignment in Düsseldorf came to an end one year prior to its intended four-year term (the grievor stayed in Düsseldorf for approximately half a year after the recommendation to end his posting in Düsseldorf).

[10] Counsel for the employer stated that the grievor's removal from his posting in Düsseldorf was taken for administrative reasons in order to ensure the proper functioning of the Consulate in Düsseldorf. Since the grievor is a rotational employee, is appointed to an FS-02 position, but is not appointed to a particular position per se, it was decided to move him from Düsseldorf to Detroit.

[11] Counsel for the employer stated that the grievor had not been the subject of disciplinary action nor of a financial penalty. He retained his group and level, continued to receive all advantages to which FS officers are entitled, and there is no record of disciplinary action on his file.

[12] For his part, the grievor's representative stated that there was disciplinary action and that this disciplinary action was the grievor's removal from his assignment in Düsseldorf. He stated that in order to avoid losing his foreign service premium by going back to Ottawa, the grievor accepted a cross posting in Detroit and in that sense it could be argued that he had mitigated his damages. However, although the grievor did not lose his foreign service premium, he had to take eight weeks of sick leave in May and June 2001 and, according to his representative, the evidence would show that the necessity of taking this leave was directly related to the events surrounding his removal from his assignment in Düsseldorf. The grievor's representative stated that the eight weeks of sick leave taken by the grievor constituted the "financial penalty" required under subparagraph 92(1)(b)(i) of the PSSRA in order to render his grievance adjudicable. He further argued that the grievor's new assignment could be viewed as a demotion in that, although his group and level and salary remained the same, he was no longer allowed to supervise staff.

[13] The chronology of events as described by the grievor's representative is as follows:

September 7, 2000:	locally engaged staff complain against the grievor;
October 24, 2000:	the grievor hears about it for the first time;
November 2000:	the grievor attempts to respond to his employer's concerns;

January 2001: a recommendation is made for the early termination of his assignment in Düsseldorf (Exhibit E-1, tab 23);
the grievor consults doctors;
March 26, 2001: the grievor files the present grievance;
May 2001: the grievor takes three weeks of sick leave;
June 11, 2001: the grievance is answered at the final level;
July 2001: the grievor takes five weeks of sick leave;
July 26, 2001: the grievor starts his new posting in Detroit.

[14] As part of his objection, counsel for the employer stressed that this grievance should be dismissed on the basis that no *prima facie* case could be made that the grievor had suffered a financial penalty at the time of his grievance (March 2001) as it was clear from the facts as described by the grievor's representative that, even if the sick leave could be argued to be a form of financial penalty (and counsel was not admitting that it was), this sick leave was taken several months after the grievance. He also pointed out that the employer had not had the opportunity to respond throughout the grievance procedure to this new argument that the sick leave taken was a financial penalty. He also stated that the grievance did not and could not allege as much as this sick leave occurred after the grievance. Counsel finally pointed out that no request to amend the grievance had been made either.

[15] Counsel for the employer summarized his argument by saying that since no financial penalty could be established, the case should come to a shuddering halt. He also stated that there could not be a demotion without loss of pay, that demotion was not alleged in the grievance and that the grievor ought not now be allowed to create a different grievance.

Reasons for Decision

[16] This grievance is dismissed for want of jurisdiction.

[17] I am of the view that the facts as presented by the grievor's representative and on which the grievor relies, even if they were proven, would not establish a *prima facie* case of "disciplinary action resulting in financial penalty" preceding the grievance.

[18] Even if it could be argued that the early termination of the grievor's assignment can be viewed as disciplinary action (and this would be a heavy onus on the grievor to demonstrate), in view of the employer's right to manage the office, assign duties and take the appropriate administrative measures, there remains that the financial penalty alleged by the grievor (i.e. sick leave) is, *prima facie* at least, not a financial penalty but a type of leave which, in addition, has occurred after the grievance. Assuming an argument could be made that in this particular case the sick leave taken by the grievor should be deemed to constitute a financial penalty (and this too is a very heavy onus to bear), the fact remains that it occurred several months after the grievance. I believe that this prevents the grievor from arguing that, at the time of signing the present grievance, he had incurred disciplinary action resulting in financial penalty. Therefore, even if the facts as alleged and presented to me by the grievor's representative were proven, the conclusion that there did not exist a financial penalty at the time of the grievance would remain the same. In addition, the grievance itself neither alleged a financial penalty nor mentioned it in the corrective action requested nor was any request made to amend the grievance. As for the argument that the Detroit posting is a demotion, I agree with the argument made by counsel for the employer.

[19] For all these reasons, this grievance is dismissed for want of jurisdiction.

Marguerite-Marie Galipeau
Deputy Chairperson

OTTAWA, May 7, 2002.