

Date: 20061027

File: 166-02-37317

Citation: 2006 PSLRB 116



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

WAIMAN KWONG

Grievor

and

**TREASURY BOARD
(Immigration and Refugee Board)**

Employer

Indexed as
Kwong v. Treasury Board (Immigration and Refugee Board)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Dan Rafferty, Professional Institute of the Public Service of
Canada

For the Employer: Sandra Harrison-Martel

(Decided without an oral hearing)

REASONS FOR DECISION

Grievance referred to adjudication

[1] Mr. Kwong is a regional information technology manager with the Immigration and Refugee Board, classified as a CS-03 (computer systems). He is not in the CS bargaining unit, as he is an excluded employee (managerial exclusion: paragraph 2 (1)(j), *Public Service Staff Relations Act*). On May 7, 2002, he filed a grievance with regards to the effective date of a reclassification. He received a final-level reply on May 11, 2006. Mr. Kwong is being represented by the Professional Institute of the Public Service of Canada (PIPSC). The PIPSC referred his grievance to adjudication on June 22, 2006.

[2] By letter to the bargaining agent and the employer dated July 5, 2006, the Public Service Labour Relations Board (PSLRB) asked the parties for written submissions on whether this was a grievance that could be properly referred to adjudication. The issue has been correctly framed by the parties as whether Mr. Kwong, as an excluded employee, has a right to refer his grievance to adjudication.

[3] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

Written submissions

[4] The submissions on behalf of the bargaining agent are as follows:

Background

On June 22, 2006, the Professional Institute referred to adjudication the grievance of Mr. Kwong, who is a CS-03 employed by the Immigration and Refugee Board in Toronto. Mr. Kwong is not a member of the Professional Institute of the Public Service (PIPSC), nor is he a member of the Computer Systems Bargaining Unit, as he comes within the purview of paragraph (j) of the definition of "employee" pursuant to the Section 2(1) of the Public Service Staff Relations Act:

“ ‘employee’ means a person employed in the Public Service other than

(j) a person who occupies a managerial or confidential position.”

Mr. Kwong submitted his grievance in 2002. After a long delay, a final level reply was issued in April, 2006, denying the grievance. At that point, Mr. Kwong approached PIPSC to enquire as to whether PIPSC would be willing to support his grievance at adjudication and provide representation. Mr. Kwong is the supervisor of five PIPSC members who are pursuing identical grievances, invoking Article 20 and Article 47 of the CS collective agreement (Steve Cree et al - Reference No. 166-02-37310 to 37314). After a review of both the merits and the circumstances, PIPSC agreed to refer Mr. Kwong 's grievance to adjudication and to represent him before the Board.

Argument

I am assuming for the purposes of this submission that the question to be decided is limited to whether Mr. Kwong, as an excluded employee, has a right to refer his grievance involving the application or interpretation of the CS collective agreement to adjudication, and shall direct my argument to this question.

First of all, while Mr. Kwong is not considered an “employee” as that term is defined pursuant to Section 2(1) of the Act, the effect of the definition of “grievance” pursuant to Section 2(1) is to endow him with employee status for the limited purpose of the provisions of the Act which relate to grievances:

“ ‘grievance’ means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees, except that

(a) for the purposes of any of the provisions of this Act respecting grievances, a reference to an ‘employee’ includes a person who would be an employee but for the fact that the person is a person described in paragraph (f) or (j) of the definition of ‘employee’ ”.

Section 92(1) of the PSSRA stipulates 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

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award, ...

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.

As noted in the Reference to Adjudication document, Section 18(4), Mr. Kwong 's grievance relies on Articles 20 and 47 of the collective agreement.

Therefore, based on the effect of clause (a) of the definition of "grievance" cited above, Mr. Kwong comes squarely within the provisions of Section 92(1)(a). He presented the grievance up to and including the final level in the grievance process, the grievance involved the interpretation or application in respect of him of a provision of a collective agreement (ie., primarily pay/pay administration) and the grievance was not dealt with to his satisfaction.

This is not the end of it, however. Section 92(2) of the PSSRA provides that an employee may refer a grievance relating to the interpretation or application of a provision of a collective agreement if

"the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings."

The terms and conditions of employment for unrepresented employees, with certain exceptions, are governed by the the Public Service Terms and Conditions of Employment Regulations ("the Regulations") made pursuant to the Financial Administration Act. The Regulations define "employee":

employee means a person employed in Part I Service, classified in one of the occupational categories defined and listed in Section 2 of the Public Service Staff Relations Act other than a person who is employed as a teacher, or a principal in the Department of Indian Affairs and Northern Development, a person to whom the Ships' Crews Regulations, 1964, the Ships' Officers Regulations, 1964 apply, or any person whose terms and conditions of employment are set out in the Management Category Terms and Conditions of Employment Directive (employé);

It is clear that Mr. Kwong, as an excluded CS-03, comes within this definition.

The Regulations also define "relevant collective agreement":

relevant collective agreement means the collective agreement for the bargaining unit to which the employee is assigned or would be assigned were the employee not excluded. For the Personnel Administration Group, the Organization and Methods Group and the Management Trainee Group, the relevant collective agreement is that applying to the Program Administration Group. The relevant collective agreement for employees who are students participating in a formal cooperative or work experience program, or who are employed under a summer employment program shall be the collective agreement of the predominant group whose duties are being understudied or performed during the work term (convention collective applicable)

Once again, it is clear that, for Mr. Kwong, the relevant collective agreement is the CS collective agreement.

With respect to the issue of pay, the Regulations provide as follows:

Remuneration - General

Entitlement to remuneration

20.(1) Subject to these regulations and any other enactment of the Treasury Board, an employee is entitled to be paid, for services rendered, the appropriate rate of pay in the relevant collective agreement or the rate approved by the Treasury Board for the group and level of the employee's classification.

Section 20(1), then, has the effect of stipulating that Mr. Kwong's rate of pay is governed by the provisions of the CS collective agreement.

In sum, the relevant collective agreement for Mr. Kwong, wherever that phrase occurs in the Regulations, is the CS collective agreement. One of the references to the "relevant collective agreement" occurs with respect to remuneration, which is the subject matter of the grievance.

It is important to note the manner in which Section 92(2) of the PSSRA is worded:

"Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph 1(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award applies, signifies in the prescribed manner its approval of the reference of the grievance to

adjudication and its willingness to represent the employee in the adjudication proceedings.”

As we have established earlier, Mr. Kwong is, pursuant to the definition of “grievance” under Section 2(1) of the Act, considered to be an “employee” for the purposes of “any provisions of this Act respecting grievances”. In addition, the grievance is “a grievance described in paragraph [92]1(a)” of the Act, relating as it does to “the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award”.

In order for Mr. Kwong to be entitled to refer such a grievance to adjudication, the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award applies must approve the reference and indicate its willingness to represent the employee. In the instant case, the Professional Institute is the bargaining agent for the bargaining unit (CS) to which the collective agreement applies. PIPSC has signified its approval as required and indicated its willingness to represent Mr. Kwong .

Precedent Cases

There are very few PSSRB decisions on this issue. The two that seem most closely related to the present matter are the decision by Deputy Chairperson Wexler in 1994 in O’Neil and Treasury Board (Files 166-2-25361 to 25368, 166-25613 to 25615 and 172-2-827) and the decision by Chairperson Tarte in 2002 in Green-Davies v. Treasury Board (File 166-2-30865).

In the O’Neil case, the grievor was an employee occupying a secretarial position (ST-SCY-O4) which had been excluded pursuant to Section 2(j) of the PSSRA as a managerial or confidential exclusion. She sought, among other things, to refer eleven grievances to adjudication pursuant to paragraph 92(1)(a) and 92(2) of the Act. The Public Service Alliance of Canada, which was the bargaining agent for the ST Group, did not support the references. In her reasons for decision, Mrs. Wexler dismissed the grievances:

“Therefore it follows that without the support of the bargaining agent and, as well, because Ms. O’Neil is a person occupying a position identified as a managerial or confidential position, her grievances are not referable to adjudication. In other words, she cannot refer her eleven grievances to adjudication in light of paragraph 92(1)(a) and subsection 92(2) of the Act” (p.6, first paragraph)

This case is of limited assistance in view of the fact that the bargaining agent in this situation did not support the references to adjudication. In addition, the definition of “grievance” under Section 2 of the PSSRA, which effectively endows employee status on certain classes of excluded employees for the purpose of the grievance provisions of the Act, was not addressed.

The Green-Davies case is of even less assistance. In that case, the grievor was an unrepresented employee excluded under Section 2 of the PSSRA. As Mr. Tarte noted, at paragraph 8 of the decision,

“Ms. Green-Davies belongs to the PE Group, for which there is no bargaining unit, no collective agreement or arbitral award and no bargaining agent. As an unrepresented employee covered by the PSSRA, Ms. Green-Davies cannot therefore refer a grievance under paragraph 92(1)(a) of the PSSRA to adjudication.

In the end, each of the above cases were decided strictly on the basis of factual situations entirely different from those in this case and are only applicable to the extent that, based on the facts presented, they were correctly decided.

Conclusion

We therefore submit that all of the conditions required for the reference of Mr. Kwong’s grievance to adjudication have been met and request that the Board retain jurisdiction forthwith.

[Sic throughout]

[5] The submissions on behalf of the employer are as follows:

. . .

Introduction

On June 22, 2006, with the support of the Professional Institute of the Public Service of Canada (PIPSC), the above-noted grievance was referred to adjudication. Mr. Kwong’s grievance pertains to the effective date of his reclassification and his referral to adjudication invokes articles 20 and 47 of the CS Collective Agreement. The grievor, whose position is classified as a CS-03, is “a person who occupies a managerial or confidential position” pursuant to paragraph (j) of the definition of “employee” contained in Section 2 of the Public Service Staff Relations Act (PSSRA).

It is the Employer's position that Mr. Kwong is not entitled to refer his grievance to adjudication under s. 92(1)(a) of the former PSSRA as he is not subject to the CS Collective Agreement but to the Terms and Conditions of Employment set out by the Treasury Board, Secretariat.

The Employer is also assuming that, for the purpose of this submission, the question to be decided is limited to whether the grievor, as an excluded employee, has a right to refer his grievance to adjudication.

Arguments

First and foremost, it is clear that, the Employer and, as per PIPSC's submissions, the bargaining agent, both agree that Mr. Kwong is a CS-03 who occupies a managerial or confidential position. He is not considered an employee as per the definition of "employee" contained in Section 2 of the PSSRA except as identified in that same section under the definition of "grievance" which provides him with the right to grieve. Mr. Kwong does have the right to file a grievance however he does not have the authority to refer his grievance to adjudication. The reason for this is that, because he is in a position that is excluded, he does not meet the required criteria in order to have the possibility of referring his grievance to adjudication. This criteria has been established by the PSSRA under section 92(1) and is 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

- (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
- (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*
 - (ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
- (c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*

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. ’ ”

As the grievor, who is in an excluded position, is not subject to the interpretation or application of a provision of a collective agreement and because his grievance does not deal with either disciplinary action resulting in suspension or a financial penalty or a termination of employment, he clearly does not meet the requirements in order to be allowed to refer his grievance to adjudication.

The bargaining agent's second argument was that because they were willing to represent the excluded grievor that he could refer his grievance relating to the interpretation or application of a provision of a collective as set out under section 92(2). The Employer argues that this is, once again, not applicable since it has clearly been demonstrated above that the grievor does not meet the requirements to refer his grievance to adjudication under Section 92(1) be it with or without the support of the bargaining agent.

Another argument brought forth by the bargaining agent was that the definitions of “employee” and “relevant collective agreement”, provided in the applicable terms and conditions of employment for unrepresented employees, permitted the requirements for referral to adjudication under section 92(1)(a) of the Act to be met. This is false as only employees who are bound by a collective agreement can allege a breach of a collective agreement and refer that grievance to adjudication. It is clearly identified under section 59 of the PSSRA that the collective agreement is binding on employees in the bargaining unit only:

“ ‘59. A collective agreement is, subject to and for the purposes of this Act, binding on the Employer, on the bargaining agent that is a party thereto and its constituent elements, and on the employees in the bargaining unit in respect of which the bargaining agent has been certified, effective on and after the day on and after which it has effect pursuant to subsection 58(1).’ ”

The grievor is excluded from the bargaining unit therefore the grievor is not bound by the collective agreement. This is again confirmed by the definition of employee in the CS collective agreement. The employee's terms and conditions of employment are as set out in the Terms and Conditions of Employment Policy. That Policy states the following in the Policy Statement section:

“The terms and conditions of employment of employees, including casuals, terms, part-time workers and excluded and unrepresented employees, are as set out in the relevant collective agreement and as supplemented in the Public Service Terms and Conditions of Employment Regulations (Appendix A) and other relevant policies.”

As an excluded employee, the grievor's terms and conditions are the same as those set out in the collective agreement, however he is not covered by the collective agreement. As such, Mr. Kwong cannot grieve or refer to adjudication any alleged breach of a collective agreement that he is not bound by.

Jurisprudence

The issue of jurisdiction in similar cases has already been decided by the adjudicators appointed under the PSSRA in the Beaulieu (Board file 166-2-27335) and Montgomery (Board file 166-2-2078) decisions. These decisions clearly demonstrate that the PSLRB does not have jurisdiction to hear such grievances.

In Beaulieu (supra), the issue was whether the PSSRB had jurisdiction to hear the grievance of an excluded lawyer who filed a grievance against the Employer's refusal to answer her questions. In this case, the adjudicator found that since the grievance did not relate to a disciplinary measure and since the grievor was not subject to a collective agreement and therefore could not refer a pay grievance to adjudication, he did not have the necessary jurisdiction to dispose of the grievance.

In Montgomery (supra) the Board clearly established that those who have been “excluded” from bargaining units as “managerial or confidential” personnel do not have the right under the statute to refer their claims to adjudication, even where the Employer has decided unilaterally to make certain provisions of the “relevant collective agreement” applicable to them.

Conclusion

The Employer respectfully submits that the wording of the PSSRA under section 92(1) does not support this reference to adjudication.

[Sic throughout]

[6] The reply on behalf of the bargaining agent is as follows:

...

The Employer's contentions ... that Mr. Kwong's grievance does not satisfy the requirements of Sections 92(1) and 92(2), PSSRA are simply bald assertions made without any supporting argument. The Employer has failed to demonstrate in what manner the grievor has failed to satisfy the criteria set out in that section.

The Employer also asserts ... that "only employees who are bound by a collective agreement can allege a breach..." In support, reference is made to Section 59. However, the purpose of that section appears to be to emphasize that the collective agreement is deemed to deal exhaustively with issues and items which are embodied therein and that none of the parties are free to make their own "side deals" or arrangements outside the context of the agreement. It does not affect Mr. Kwong, who is made subject to the provisions of the collective agreement by way of the Public Service Terms and Conditions of Employment Regulations. Section 92 does not refer to Section 59, nor does it state that only bargaining unit members may refer a collective agreement grievance to adjudication. Indeed, this would contradict the "exception" set out in Section 2 regarding the right of certain excluded employees with respect to the grievances. Again, the Employer's assertion that Mr. Kwong is not "covered" by the collective agreement does not advance the argument very far. The fact is that the PSTCE Regulations specify that Mr. Kwong's terms and conditions of employment are "as set out in the relevant collective agreement". One could just as easily say that he is "covered" by the collective agreement, if not "bound" by it.

Jurisprudence

The Employer refers to two Board decisions.

The first, Beaulieu, involved the attempt of a legal officer, a member of the LA Group, to refer a harassment complaint to adjudication. Members of the LA Group were not subject to any collective agreement pursuant to the Terms and Conditions of Employment Regulations. Rather, my reading of the PSTCE Regs is that members of the LA Group were subject to a separate regime set out in Annex A to the Regs. Therefore, Beaulieu has no relevance to Mr. Kwong.

With respect to the other case cited, Montgomery, that decision is 30 years old and does not appear to have been argued in the context of the definition of "grievance" in Section 2(1) of the PSSRA. Indeed, I have been unable to

establish whether the definition of “grievance” as it currently appears in Section 2(1) was in existence at the time. The fact that Chief Adjudicator Jolliffe states . . . that the grievors “are not employees as defined in section 2” of the Act, without any mention being made of the “exception” contained in the definition of “grievance” means that either no one raised the exception before the Board, or it did not exist at that time. In either case, the Montgomery decision is therefore of little or no value in light of this omission.

[Sic throughout]

Reasons

[7] Excluded employees are not covered by collective agreements. The terms and conditions of excluded employees are set by the employer. The employer has decided to use the relevant collective agreement (the agreement that the employee would be under but for his excluded status) as the basis for an excluded employee’s terms and conditions of employment. This does not have the effect of bringing the excluded employee under the protection of the collective agreement. To hold otherwise would be to make the concept of an excluded employee meaningless.

[8] The status of excluded employees was clearly stated some thirty years ago by Chief Adjudicator Jolliffe in *Montgomery et al. v. Treasury Board (Ministry of Transport)* PSSRB File No. 166-02-02078 (1976):

. . .

. . . those who have been “excluded” from bargaining units as “managerial or confidential” personnel do not have the protection of a collective agreement and do not have the right under the statute to refer their claims to adjudication, even where the employer has decided unilaterally to make certain provisions of the “relevant collective agreement” applicable to them.

. . .

[9] This principle was more recently articulated in *Clements v. Nannini et al.*, PSSRB File No. 161-2-707 (1994) (QL), where the Board stated:

. . .

. . . The fact that the employer has decided to apply to him certain of the terms and conditions contained in the collective agreement entered into between the Treasury Board and

CATCA does not in any way bring Mr. Clements within the bargaining unit.

. . .

[10] The CS collective agreement also confirms this conclusion. An “employee” is defined in the collective agreement as “a person so defined by the *Public Service Labour Relations Act* and who is a member of the bargaining unit” (subclause 2.01(h)). A “bargaining unit” is defined as the employees in the CS group, as described in the certificate issued by the PSLRB (subclause 2.01(a)). The “Application” article in the collective agreement states that the provisions of the collective agreement apply to the PIPSC, the employer and the employees (article 4). The “Grievance Procedure” article also refers to the rights of an “employee” (as defined in the collective agreement) (article 33). Furthermore, excluded employees are not required to pay dues to the bargaining agent. If the collective agreement applied to excluded employees, the bargaining agent would be able to enforce this requirement of the collective agreement and receive dues from excluded employees.

[11] The fact that the bargaining agent is willing to represent an excluded employee does not change anything, in my view. The requirement for bargaining agent approval for collective agreement grievances is designed to protect the interests of the bargaining agent, as the representative of all employees in the bargaining unit. It does not, in itself, give any rights to an employee.

[12] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[13] The grievance is dismissed.

October 27, 2006.

**Ian R. Mackenzie,
adjudicator**