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Citation: 2006 PSLRB 93

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

ANDREW G. FOK AND DAVID A. GRANGER

Grievors

and

TREASURY BOARD
(Department of Transport)

Employer

Indexed as
Fok and Granger v. Treasury Board (Department of Transport)

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

REASONS FOR DECISION

Before: Barry Done, adjudicator

For the Grievors: Phillip G. Hunt, counsel

For the Employer: Jennifer Champagne, counsel

Heard at Ottawa, Ontario,
June 22, 2006.

Grievances referred to adjudication

[1] The parties agreed to proceed in this matter by an “Agreed Statement of Facts”.

[2] 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*, these references 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*").

Summary of the evidence

[3] On November 26, 2004, Robert Richard, Chief of Turbo-Jet Training, emailed both grievors concerning the requirement to use their annual leave credits in excess of the allowable 25-day carry-over limit by the end of the fiscal year (Exhibit 3).

[4] The email required the grievors to submit a plan by December 1, 2004, showing how they would do this, and, failing submission of such a plan, they were advised that those annual leave credits would be scheduled for them.

[5] Both grievors grieved this direction later the same day.

[6] Approximately two weeks later, on December 8, 2004, the employer softened this direction somewhat, agreeing to pay out one-fifth of the annual leave credits in excess of the 25-day limit (Exhibit 4).

[7] Again, seven weeks after this modification, on January 24, 2005, the employer further modified its position. This latest modification completely reversed the earlier ultimatum to either schedule and use the annual leave credits in excess of 25-days by the end of the fiscal year or have those days scheduled by the employer.

[8] According to the memorandum of January 24, 2005, now all annual leave credits in excess of the maximum carry over were to be paid out (Exhibit 5).

[9] Both the first and, more importantly, the more recent modifications regarding the liquidation of excess annual leave credits were made before the first-level grievance reply was issued (Exhibit 6).

[10] Concerned that these subsequent events may have made the grievances moot, I put both parties on notice of my concern, through the Registrar's Office, prior to the hearing.

[11] The reply, through the Registrar's Office, was that the parties wanted a decision on the matter. Again, at the outset of the hearing, I raised my concern and invited submissions from the parties on the issue of my jurisdiction. The parties advised that they wanted a declaratory order only, as no adjustment of the grievor's leave banks was required.

Reasons for decision

[12] As I advised the parties at the hearing, I cannot assume jurisdiction simply by consent of the parties alone. The collective agreement applicable to these grievances is the one between the Treasury Board and the Canadian Federal Pilots Association, Group: Aircraft Operations (All Employees), Expiry Date: January 25, 2004 (Exhibit 1). It contains a grievance procedure and clause 35.05 of that procedure determines who is entitled to present a grievance:

. . .

> *. . . an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by an action or lack of action by the Employer . . . is entitled to present a grievance. . . .*

. . .

[13] That entitlement only arises when the employee feels that he or she has been treated unjustly or has been aggrieved by an action or a lack of action on the employer's part (emphasis added). I note the past tense, in other words, something must have happened as a condition precedent to the entitlement to grieve. This, of course, precludes the filing of premature or prospective grievances.

[14] The collective agreement grievance procedure mirrors section 91 of the former *Act*. Clause 35.05 of the collective agreement reads: ". . . Subject to and as provided in section 91 of the *Public Service Staff Relations Act* . . . ." A close read of paragraph 91(1)(a) provides "Where any employee feels aggrieved (a) by the interpretation or application, in respect of the employee . . . . [emphasis added]". These grievances are individual grievances brought under the former *Act*, and are not union policy

grievances, and, as such, must be against some actual personal effect of a policy or directive, as opposed to something that might happen in the future.

[15] The directive being challenged provides potentially for the employer to take some action (scheduling vacation leave) if the employee fails to take some action (providing a plan by December 1, 2004, indicating how excess leave credits will be used before the end of the fiscal year, March 31, 2005).

[16] The grievances are prospective in nature, and I have no jurisdiction to hear them. Obviously, if one is not entitled to present a grievance in accordance with the collective agreement or the former *Act*, there is no grievance that can be referred to adjudication.

[17] There is nothing new in my finding that the grievances are premature. From 1982, in *Reid v. Treasury Board (Department of National Defence*), PSSRB File No. 166-02-12631, through 1993, in *Nicholson v. Treasury Board (Ministry of Transport),* PSSRB File No. 166-02-22548, there are no fewer than seven decisions concerning jurisdiction over premature or prospective grievances, all of which reject jurisdiction. There is no compelling reason for me to deviate from this consistent approach, and I agree with adjudicator Steward's reasoning in *Reid*, at paragraphs 25 and 26, which read as follows:

. . .

> *[25] Although the grievor suffered no financial loss, he believes that he has a legitimate grievance. However, it was not demonstrated to me that I have jurisdiction under subsection 91(1) of the Act to decide the matter because that section, reproduced below, makes it clear that Mr. Reid's right to present a grievance to adjudication can only be exercised with respect to the interpretation or application "in respect of him" of a provision of a collective agreement.*
>
> *[26] This means that Mr. Reid must have an actual grievance, and not a prospective one, in order for me to have jurisdiction. By his own admission, the grievor has suffered no prejudice and the only redress he seeks is a declaration that his interpretation of paragraph 30.12(b) of the collective agreement is correct. Clearly, he has no grievance per se and I have, therefore, no jurisdiction to make an award.*

. . .

[18] I also have come to the conclusion that these grievances are moot. Further, the "Agreed Statement of Facts", at point 7, makes it clear that, effective January 24, 2005, the challenged direction no longer applied to these grievors, nor, in fact, to any employee funded by the Transport Canada portion of the budget (Exhibit 5). Effectively, at that point, there was no longer a dispute between the parties, no cause of action.

[19] Given the above, I therefore find that these grievances are both moot and premature.

[20] Any comments I might make as obiter will not be helpful to the parties. However, I will add that if this problem is a continuing one recourse can be had via the *Public Service Labour Relations Act*.

Reasons

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

(The Order appears on the next page)

Order

[22] The grievances are dismissed.

July 28, 2006.

Barry Done,
adjudicator