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File: 566-02-627

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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

KATHERINE SPENCER

Grievor

and

**DEPUTY HEAD
(Department of the Environment)**

Respondent

Indexed as
Spencer v. Deputy Head (Department of the Environment)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Beth Bilson, adjudicator](#)

For the Grievor: [Karen Wilcock, Professional Institute of the Public Service of Canada](#)

For the Respondent: [Simon Kamel, counsel](#)

Heard at Edmonton, Alberta,
June 12, 2007.
(Written submissions filed July 16, August 14 and September 12, 2007.)

I. Individual grievance referred to adjudication

[1] This decision concerns the preliminary objection of the respondent that an adjudicator of the Public Service Labour Relations Board (“the Board”) does not have jurisdiction to hear a grievance filed by Katherine Spencer contesting the termination of her employment on March 31, 2006.

[2] Ms. Spencer filed a grievance in the following terms:

...

I grieve the termination of my employment effective March 31, 2006 as an improper lay-off and in violation of the WFA [Workforce Adjustment] provisions of my collective agreement.

I had been continuously employed with Environment Canada as a full-time term employee from March 3, 2003 to March 31, 2006 and my employment status should have been changed to indeterminate effective March 3, 2006.

...

She asked for the following corrective action:

...

That my employment status be deemed indeterminate as of March 3, 2006.

That I be reinstated to my indeterminate PC-02 position effective March 3, 2006 and thereby be eligible for the provisions of the WFA Directive of my Collective Agreement.
That I be made whole in every way.

...

[3] The grievance was not resolved by the grievance procedure, so it was referred to adjudication, and a hearing was scheduled for June 12 to 15, 2007. Before the hearing, in a letter dated May 15, 2007, Eric Daoust, an employer representation advisor for the Treasury Board, advised the Board that the employer was raising an objection to the Board’s jurisdiction to determine the grievance.

[4] When the hearing convened in Edmonton on June 12, 2007, counsel for the respondent raised the jurisdictional objection and submitted that there was no alternative to an adjournment for a ruling on the objection. After hearing brief oral arguments I allowed the adjournment, and a timetable was agreed for filing written

submissions on the jurisdiction's question. This ruling on the objection has been made based on those written submissions.

[5] Counsel for the respondent referred me to sections 208 and 209 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, which describe as follows the circumstances under which individual employees may file grievances and under which those grievances may be referred to adjudication:

208.(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) *by the interpretation or application, in respect of the employee, of*

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

Limitation

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Limitation

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

Limitation

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Order to be conclusive proof

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Reference to Adjudication

Reference to adjudication

209.(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

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

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act

for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

Application of paragraph (1)(a)

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

[6] In the written submissions filed on Ms. Spencer's behalf, her circumstances were described as follows, with specific references to documentation appended to the submissions:

. . .

Ms. Spencer's First Position with Environment Canada:

*While **unemployed** (i.e. on seasonal layoff from Parks Canada Agency, a separate, non-Treasury Board employer), Kate Spencer accepted a term appointment as a CR-04 with Environment Canada in Edmonton, effective March 3, 2003 to August 29, 2003. This appointment was the result of being a successful candidate on an open Environment Canada competition. The letter of offer from Environment Canada is at **Tab 1**. This appointment was going to be extended until December 31, 2003 (**Tab 2**) but Ms. Spencer accepted another term position with Environment Canada as a PC-02 effective July 21, 2003. Ms. Spencer held the CR-04 position from March 3, 2003, until July 20, 2003, a period of four months and 17 days.*

Kate Spencer's Second Consecutive Position with Environment Canada:

As mentioned above, on July 21, 2003, as a result of an internal competition, Ms. Spencer was offered and accepted another term position with Environment Canada. This position was a PC-02 (physical science) and closer to her career interests and field of study. The letter of offer, (Tab 3), was effective until December 31, 2003. By letter dated October 21, 2003, (Tab 4), Ms. Spencer's appointment was extended to May 31, 2004 then on May 27, 2004 it was extended again until August 31, 2004, (Tab 5). She held this position for a total period of thirteen months and ten days.

Kate Spencer's Third Consecutive Position with Environment Canada:

On September 1, 2004, (Tab 6), Ms. Spencer was appointed to another similar PC-02 position after being successful in an open competition with Environment Canada. This appointment was to expire on March 31, 2005 but was extended until March 31, 2006 by letter dated February 24, 2005, (Tab 7). Ms. Spencer held this position for one year and seven months, until her termination on March 31, 2006, (Tab 8).

...

[Emphasis in the original]

[7] This chronology of term appointments is important in relation to the *Term Employment Policy* to which the parties referred me. The pertinent portion of the policy reads as follows:

...

7. Policy Requirements

*1. Subject to section 7.2, where a person who has been employed in the same department/agency as a term employee for a cumulative working period (see definition in Appendix A) of **three (3) years** without a break in service longer than sixty (60) consecutive calendar days, the department/agency must appoint the employee indeterminately at the level of his/her substantive position. This appointment must be made in accordance with merit as provided for in the Public Service Employment Regulations established by the Public Service Commission. The "same*

department” includes functions that have been transferred from another department/agency by an act of Parliament or order-in-council.

. . .

[Emphasis in the original]

[8] Ms. Spencer’s claim in her grievance that she should be treated as an indeterminate employee and therefore that she should be entitled to avail herself of the workforce adjustment provisions of the collective agreement rested on that policy, as the cumulative length of her term positions with Environment Canada exceeded the three-year threshold.

II. Summary of the arguments

A. For the respondent

[9] Counsel for the respondent argued that determining this grievance requires an interpretation of Treasury Board’s *Term Employment Policy* rather than the collective agreement and that it therefore lies beyond the jurisdiction of an adjudicator under the *Public Service Labour Relations Act (PSLRA)*. The workforce adjustment provisions of the collective agreement are not in dispute; the respondent concedes that if Ms. Spencer is an indeterminate employee, there is no doubt that she would be able to take advantage of the workforce adjustment arrangements agreed to by the parties to the collective agreement. What is in dispute, from the respondent’s point of view, is whether Ms. Spencer is an indeterminate employee. The respondent takes the position that the “substantive position” referred to in the fourth line of section 7.1 of the *Term Employment Policy* is Ms. Spencer’s position with Parks Canada and that her successive term appointments with Environment Canada do not make her eligible for an indeterminate position in that department.

[10] Counsel for the respondent pointed out that Treasury Board’s *Term Employment Policy* must be viewed in the context of the provisions of the *Public Service Employment Act*, S.C. 2003, c. 22 (*PSEA*). If the respondent is correct in its interpretation of section 7.1 of the *Term Employment Policy*, Ms. Spencer is by default subject to subsection 58(1) of that Act:

58.(1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extension made under subsection (2).

[11] Subsection 59(1) of the *PSEA* reads as follows:

59.(1) Unless the employee requests otherwise of the deputy head, the period of employment of an employee who is employed for a specified term as a result of an appointment or deployment is converted to indeterminate in the employee's substantive position, at the end of the cumulative period of employment specified by the employer in circumstances prescribed by the employer.

The “cumulative period of employment specified by the employer” is that set out in the *Term Employment Policy*. From the respondent's point of view, however, that policy does not apply to Ms. Spencer.

B. For the grievor

[12] Ms. Wilcock argued on behalf of Ms. Spencer that determining the grievance does not require interpreting the *Term Employment Policy*. Since there is no dispute over Ms. Spencer's employment periods at Environment Canada and since those periods total more than three years of consecutive employment, the conversion to indeterminate status does not necessitate any interpretation. Ms. Spencer should be entitled to access the workforce adjustment provisions of the collective agreement.

[13] In her written submission, Ms. Wilcock carefully analyzes the provisions of the *PSEA* and those of the *PSLRA* that preclude certain circumstances from being amenable to the grievance procedure or to adjudication. For example, she points out that the combined effect of the two statutes is to make adjudication inaccessible for probationary employees; the termination of their employment may be effected by a notice from the employer under subsection 62(1) of the *PSEA*.

[14] Ms. Wilcock argued that such exclusions do not apply in Ms. Spencer's circumstances and that therefore there is nothing in the provisions of the statutes that prevents the Board from having jurisdiction over the grievance. It is the factual circumstances – which are not disputed – and not any interpretation of statutory provisions or Treasury Board policy that govern Ms. Spencer's entitlement to coverage under the workforce adjustment scheme.

III. Reasons

[15] The parties referred me to a number of previously-decided cases. They were of limited use, as it seems that none of them addresses the specific circumstances of this grievance. The cases dealt with such issues as whether a termination constituted a disguised disciplinary action that would fall under paragraph 209(1)(b) of the *PSLRA* (*Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73, and *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100); whether the term employment period had been calculated correctly (*Braconnier v. Treasury Board (Department of National Defence)*, 2006 PSLRB 109); whether an adjudicator of the Board has jurisdiction to entertain a grievance concerning the manner in which a performance appraisal was carried out (*Ball v. Canada Revenue Agency*, 2007 PSLRB 12); or whether a complaint concerning an employee designated as “casual” falls within a Board adjudicator’s jurisdiction (*Marinos v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-02-27446 (19971224)).

[16] The decision in *Hanna v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-26983 (19960624), deals with a question related to the one put forward by Ms. Spencer’s, although it is not identical – the question of whether the discontinuation of employment at the end of a term contract is a “termination” for the purposes of reference to adjudication. Although that case does not directly relate to this case, it contains a useful reminder about the jurisdictional question:

...

Assuming for the purposes of this decision that the grievor met the requirements of subsection 91(1) [now section 208(1)] for the presentation of a grievance, I am unable to see how such a grievance could be referred to adjudication under section 92 [now section 209] of the Act.

The jurisdiction of an adjudicator under section 92 is fairly limited and cannot be expanded even with the consent of the parties. The jurisdiction is limited to the interpretation or application of a collective agreement on the one hand, and termination of employment and disciplinary action on the other.

...

[17] It is true that there is no dispute about the “facts” in the sense that the parties agree about what periods of employment Ms. Spencer served and where she served them. There is, however, a clear disagreement about the implications of those facts vis-à-vis the employer’s *Term Employment Policy* – what should be considered as her “substantive position,” for example, and perhaps whether her service at Environment Canada can be viewed as uninterrupted. The question for me is whether I have jurisdiction over those points of contention as an adjudicator under the *PSLRA*.

[18] In her written submissions, Ms. Wilcock gave examples of situations where the jurisdiction of an adjudicator is specifically excluded by statutory provisions. She went on to suggest that where such specific exclusions are not spelled out by the statute, the inference can be drawn that adjudicators of the Board do have jurisdiction to determine the grievance.

[19] The flaw in that approach is that it ignores the limitations on jurisdiction contained in section 209 of the *PSLRA*, which defines the scope of jurisdiction within which adjudicators must operate. The *PSLRA* does not contemplate that adjudicators have some sort of plenary or original jurisdiction that is confined only by specific exceptions that it contains or that are contained in related statutes; rather, section 209 sets out a restricted jurisdiction, which is further limited by other exceptions and caveats.

[20] Comparing sections 208 and 209 of the *PSLRA* shows that the range of issues that can be referred to adjudication under section 209 is considerably narrower than that of the matters that can be the subject of an individual grievance under section 208. While a grievance can be filed concerning many issues that touch on the terms and conditions of employment, section 209 contemplates that only a limited number of those issues can be determined by an adjudicator, as outlined in paragraphs 209(1)(a) to (d).

[21] It appears that no objection was raised to Ms. Spencer filing a grievance under section 208 of the *PSLRA*, but Ms. Wilcock failed to show how this grievance fell within any of the areas of jurisdiction for an adjudicator enumerated in subsection 209(1). The grievance does not invoke any question of interpretation or application of the collective agreement, and no suggestion has been made that it falls within any of the situations outlined in paragraph 209(1)(b), (c) or (d). The pith and substance of the grievance is whether or not, by operation of the *Term Employment Policy*, Ms. Spencer

is eligible to take advantage of the lay-off protections outlined in the collective agreement. Although it is conceivable that once the threshold question of whether Ms. Spencer should be treated as an indeterminate employee is answered, there might remain a question regarding her status that falls under the collective agreement, I cannot answer the threshold question. I have therefore concluded that the jurisdictional objection raised by the employer must be allowed.

[22] It is not clear whether there is any other recourse available for determining Ms. Spencer's status question. Counsel for the respondent appended a document to his written submissions that seems to be a newsletter from the Public Service Alliance of Canada, the bargaining agent representing a large number of employees in the federally-regulated public sector. In the document, that bargaining agent complains that Treasury Board's *Term Employment Policy* fails to provide recourse to adjudication when there is no resolution of a grievance about whether an employee should be made indeterminate under the policy. Although the document comes from a different bargaining agent than the one representing Ms. Spencer, and although it was not subjected to the rigours of examination in the context of a full hearing, it is suggestive of a remedial gap for employees facing the situation in which Ms. Spencer finds herself. If that is the case it is indeed unfortunate, but that gap cannot provide the basis for expanding the jurisdiction of an adjudicator as set out in section 209 of the *PSLRA*.

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

(The Order appears on the next page)

IV. Order

[24] The respondent's objection regarding my jurisdiction is allowed.

[25] The grievance is dismissed.

December 20, 2007.

**Beth Bilson,
adjudicator**