Date: 20070227

File: 166-02-35129

Citation: **2007 PSLRB 23**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MARTIN OUELLET

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Ouellet v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Jean-Pierre Tessier, adjudicator

For the Grievor: James Cameron, counsel

For the Employer: Stéphane Hould, counsel

Decided on the basis of written submissions
filed May 2006.
(P.S.L.R.B. Translation)

Grievance referred to adjudication

[1] Martin Ouellet ("the grievor") has worked for the Correctional Service of Canada ("the employer") since 1991. During 2003 and 2004, he was a parole officer.

[2] Following a disciplinary investigation, the grievor was transferred to a position as a linen attendant.

[3] On January 16, 2004, the grievor filed a grievance contesting the administrative measure imposed by the employer. His grievance reads as follows:

> [Translation]
>
> . . .
>
> *I contest the administrative measure (reassignment as a linen attendant) imposed on me by the employer on December 11, 2003.*
>
> *He asks for the following corrective action:*
>
> *That the decision be rescinded / That I remain assigned to a position at a pay level equivalent to my current classification (WP-04). That my pay at the WP-04 level continue. That all information related to this decision be removed from my file.*
>
> . . .

[4] The grievance was referred to adjudication in November 2004. The hearing was to have been held in March 2006, but the parties chose to submit written arguments following an objection by the employer regarding the adjudicator's jurisdiction to hear the grievance.

[5] 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*").

The facts and arguments of the parties

[6] In his written arguments, the grievor's representative presents the facts as follows:

> [Translation]
>
> . . .
>
> *Mr. Ouellet has worked for the Public Service of Canada since 1991. At the time he filed his grievance, he was a parole officer at the Drummondville Institute at the WP-04 group and level. Following a disciplinary investigation of an event that occurred on October 23, 2003, Mr. Ouellet was called to a meeting on December 11, 2003 with the warden of the institution, Ms. France Poisson, to follow up on the report of the disciplinary investigation. At that meeting, the employer imposed a monetary sanction of $800.00 on the grievor and gave him the choice of dismissal or transfer to a linen attendant position (GS-STS-04). Mr. Ouellet accepted the new position, which was, in effect, a demotion.*
>
> *On January 16, 2004, Mr. Ouellet filed the following grievance:*
>
> > *I contest the administrative measure (reassignment as a linen attendant) imposed on me by the employer on December 11, 2003.*
>
> *He asks for the following corrective action:*
>
> > *That the decision be rescinded / That I remain assigned to a position at a pay level equivalent to my current classification (WP-04). That my pay at the WP-04 level continue. That all information related to this decision be removed from my file.*
>
> . . .

[7] It is precisely on this issue that the employer raised a preliminary objection. According to the employer, this case involves a transfer or deployment to another position.

[8] The employer adduced the following arguments in support of its preliminary objection:

[Translation]

. . .

The grievance before the adjudicator contests "the administrative measure (reassignment as a linen attendant) imposed on December 11, 2003." As corrective action, Mr. Ouellet requests, among other things, that the administrative measure be rescinded (see wording of grievance, Appendix A).

Although Mr. Ouellet uses the term "reassignment" and states that the measure was communicated to him on December 11, 2003, the measure was not actually taken officially until January 29, 2004 and constituted an indeterminate deployment taking effect on February 2, 2004, as stated in the appended letter (see Appendix B).

The grievance in this case was filed on January 16, 2004, more than a year before the coming into force of the new Public Service Labour Relations Act, *S.C. 2003, c. 22 (see Appendix A). Consequently, it is the former* Act *that applies to this case.*

Section 91 of the PSSRA *confers on the employee a right to present a grievance against any action that affects his conditions of employment. However, the employee's right can only be exercised if "no administrative procedure for redress exists in another Act of Parliament" (see 91(1)).*

If the employee does not receive satisfaction after taking his grievance to the final level of the applicable process, the grievor may refer it to adjudication if it falls within the types of grievances set out in section 92 of the same legislation.

It follows that the adjudicator may not hear a grievance that is not receivable under the terms of section 91, since the grievor must exhaust the other administrative procedure for redress open to him.

The employer argues that, in this instance, another administrative procedure for redress is open to Mr. Ouellet under the former Public Service Employment Act, *R.S.C.* [*sic*] *c. P-32 (*PSEA*), which takes precedence over his right to file a grievance. Accordingly, the adjudicator cannot hear Mr. Ouellet's grievance because it is not receivable, regardless of the whether the merit of grievance can be adjudicated under section 92 of the* PSSRA. *The adjudicator must dismiss the grievance for want of jurisdiction.*

. . .

[9] The grievor's representative argued that the matter involves contesting a disciplinary measure. He argued as follows:

> [Translation]
>
> . . .
>
> *We submit that the adjudicator seized with Mr. Ouellet's grievance has jurisdiction to hear it because it is clear and obvious that he is contesting a disciplinary measure imposed on December 11, 2003.*
>
> *At the disciplinary meeting on December 11, 2003, the institution's warden gave him the choice of dismissal or a demotion. Being a man of a certain age approaching retirement, Mr. Ouellet did not believe he had any choice but to accept the demotion.*
>
> *The demotion represents a very substantial monetary sanction since the salary difference between the parole office position and the linen attendant position is several thousands of dollars. In addition, the working conditions are not comparable. Lastly, and even more importantly, the demotion will have a major impact on Mr. Ouellet's pension, given that he planned to retire in 2006. All these factors must be taken into consideration when determining that Mr. Ouellet chose the correct course to object to the disciplinary measure imposed by the employer and finding that the adjudicator has jurisdiction to decide the grievance.*
>
> *Mr. Ouellet filed his grievance in good faith, believing that he was following the appropriate process to be heard and to have an opportunity to obtain the remedy requested. By raising a legal argument several weeks before the grievance hearing, the employer is now attempting to prevent Mr. Ouellet from seeking any redress. If Mr. Ouellet tries to follow the process set out in sections 34.3 to 34.5 of the former* Public Service Employment Act, *as suggested by the employer in its written arguments, the deputy head will certainly deny his complaint because it is filed outside the specified time limits. Thus, if the preliminary objection is allowed and the grievance dismissed, Mr. Ouellet will find himself with no redress and no response as to the merit of his grievance.*
>
> . . .

[10] The employer argued as follows with respect to the case law:

[Translation]

. . .

> *The case law is clear on the responsibility of the adjudicator to declare himself without jurisdiction when the question raised by the grievance before him under the* PSSRA *is open to another administrative procedure for redress under another Act of Parliament.*

. . .

[11] It referred to the following decisions in support of its arguments: *Re Cooper*, [1974] F.C.J. No. 1016 (C.A.) (QL); *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.); *Chopra v. Canada (Treasury Board)*, [1995] 3 F.C. 445; and *Ryan v. Canada (Attorney General)*, 2005 FC 65.

[12] In reply to the arguments presented by the grievor's representative, the employer pointed out that this matter is limited to the question of the deployment. It added that the issue of the $800 sanction had been resolved between the parties, as mentioned in a letter from the union dated March 16, 2005.

Reasons

[13] The parties have agreed that the question at issue is whether the adjudicator seized with the grievance under the former *Act* has jurisdiction to hear the grievor's grievance.

[14] Before addressing this question, it is necessary to determine the nature of the grievance. Does the grievance relate to a deployment question for which other redress is possible under the *Public Service Employment Act* ("the *PSEA*") applicable at the time that the deployment occurred?

[15] I must base my findings regarding the nature of the grievance on the arguments adduced by the parties and the appended documents.

[16] The grievor's representative referred to an incident that occurred on October 23, 2003 without identifying it. It can be assumed that it was a major incident because a disciplinary investigation was conducted. On December 11, 2003, following the investigation, the employer gave the grievor the following two options: dismissal or transfer to a new position.

[17] The grievor's representative indicated that the grievor had accepted a transfer. The employer subsequently prepared a letter of deployment dated January 29, 2004 that was given to the grievor and signed on February 2, 2004. February 2, 2004 was the effective date of the deployment.

[18] In his arguments, the grievor's representative claimed that the grievor did not understand the impact of his actions at the December 11, 2003 meeting. The representative states:

> [Translation]
>
> . . .
>
> *At the meeting on December 11, 2003, the institution's warden gave him the choice of dismissal or a demotion. Being a man of a certain age approaching retirement, Mr. Ouellet did not believe he had any choice but to accept the demotion.*
>
> . . .

[19] Although he is a man of a certain age and approaching retirement, the grievor was able to determine the difference between dismissal and a deployment. It is precisely because he was going to retire soon that he did not want to be dismissed.

[20] Even if it is accepted that the grievor may have been intimidated or upset at the December 11, 2003 meeting, six weeks passed before the deployment took effect.

[21] The grievor signed the offer of deployment on February 2, 2004, while noting that a grievance process was ongoing (letter of January 29, 2004).

[22] Reviewing the wording of the grievance, I can only conclude that it is an objection to an administrative measure, specifically, a reassignment (deployment). The grievance states:

> [Translation]
>
> . . .
>
> *I contest the administrative measure (reassignment as a laundry clerk) imposed on me by the employer on December 11, 2003.*

> *He asks for the following corrective action:*
>
> > *That the decision be rescinded / That I remain assigned to a position at a pay level equivalent to my current classification (WP-04). That my pay at the WP-04 level continue. That all information related to this decision be removed from my file.*
>
> . . .

[23] The second paragraph reveals the grievor's intentions. He is not asking to be reinstated in his position; rather, he wants to be assigned to a position at a pay level equivalent to his WP-04 classification and that his pay level be continued.

[24] What needs to be understood from all of the circumstances and the wording of the grievor's grievance is that the grievor did not want to be dismissed and that he agreed to a transfer. However, in January 2004, he undoubtedly realized that the deployment offered to him shifted him from a parole office position (WP-04) to a linen attendant position that would pay much less.

[25] On February 2, 2004, the grievor accepted the deployment subject to his grievance that, by all accounts, contests the way in which the deployment occurred.

[26] Reviewing the redress set out in the *PSEA*, is there redress that meets the grievor's expectations and the corrective action that he requests?

[27] The procedures for redress and corrective action set out in the *PSEA* are found mainly in the following provisions:

> . . .
>
> ***34.3*** *(1) An employee who is deployed and any other employee in the work unit to which the deployment is made may, within such period and in such manner as the Treasury Board may provide for, complain to the deputy head concerned that the deployment was not authorized by, or made in accordance with, this Act or constituted an abuse of authority.*
>
> ***34.4*** *(1) An employee who lodged a complaint under subsection 34.3(1), or whose deployment is the subject of such a complaint, and who is not satisfied with the disposition of the complaint or any corrective action taken in respect thereof, may, within the period provided for by the*

> *regulations of the Commission, refer the complaint to the Commission.*
>
> *(2) On the referral of a complaint under subsection (1), the Commission shall designate a person to investigate the deployment.*
>
> *(3) An investigator designated under subsection (2) shall conduct the investigation in such manner as the Commission may prescribe and give the employee who referred the complaint to the Commission, the employee who was deployed and the deputy head an opportunity to be heard.*
>
> *(4) On completion of the investigation, the investigator shall prepare and send to the employee who referred the complaint to the Commission, the employee who was deployed and the deputy head a report in writing setting out such findings and recommendations with respect to the deployment as the investigator sees fit.*
>
> ***34.5** (1) If the investigator is not satisfied with the response of the deputy head to a report prepared under subsection 34.4(4), the investigator shall report the matter to the Commission.*
>
> *(2) On receiving a report under subsection (1), the Commission may order the deputy head to take such corrective action, including revocation of the deployment, as the Commission considers appropriate.*
>
> *(3) The Commission may not, pursuant to subsection (2), direct a deputy head to deploy any employee.*
>
> . . .

[28] As I stated earlier, the grievor agreed that he could not retain his parole officer position as a result of the events of October 23, 2003; in the employer's view, he could be dismissed. He therefore accepted a deployment subject to contesting the manner in which it was made, that is, objecting to the level of the position to which he was transferred, etc. These are matters that must be decided by redress under the *PSEA*, which governs deployments, defined under that legislation as the "transfer of an employee from one position to another." The grievor's counsel claimed in his written comments that the measure contested by Mr. Ouellet was in fact a disciplinary measure leading to a monetary sanction. It is not on that basis that the grievor contested the measure and it is my view that neither the grievance nor its subsequent reference to adjudication give this reason for contesting the measure. The principles

arising from *Burchill v. Attorney General of Canada,* [1981] 1 FC 109 do not appear to apply in this instance:

. . .

> ***4*** *The only question thus submitted for determination in the grievance procedure was whether the applicant still had indeterminate status or tenure notwithstanding his acceptance of a term position. . . .*
>
> ***5*** *In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)*(a) *or (*b*) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.*

. . .

[29] As a secondary argument, the grievor's representative argued that if the grievance is dismissed, the grievor would have no redress since any grievance filed in 2006 would be outside the deadline.

[30] While an interesting argument, I do not believe that it can be viewed as a certainty. It must be remembered that when the grievor signed the letter of deployment, he did so subject to the grievance that he wanted to present. The employer accepted this condition. It was therefore aware that the grievor wanted to contest the deployment. It would be difficult for the employer to object to a possible grievance under the *PSEA* on the grounds that it was taken by surprise and that the complaint was delinquent.

[31] Regardless of whether the grievor's redress under the *PSEA* would be denied, it does not alter the fact that such redress was available at the time of the deployment.

[32] Given the above, I must now determine whether I have jurisdiction to hear the grievor's grievance.

[33] As stated in subsection 91(1) of the former *Act*, the right to present a grievance can only be exercised if no administrative procedure for redress exists in another Act of Parliament. I agree with the arguments of the employer regarding the applicable rules on the matter:

> [Translation]
>
> . . .
>
> *After reviewing the case law on the matter and considering in particular the redress offered under the* Canadian Human Rights Act*, the Federal Court of Appeal reiterated this principle in* Boutilier*:*
>
> > " . . . The dispute resolution system in federal labour matters is, therefore, not as simple as one would like it to be. If another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance".
> >
> > . . .
> >
> > Differences in the administrative remedy, even if it is a "lesser remedy", do not change it into a non-remedy.
> >
> > . . .
> >
> > This result gives primacy in dispute resolution to the human rights administration, as well as other expert administrative schemes, where expertise and consistency is plainly favoured by Parliament, rather than decisions of ad hoc adjudicators. The *PSSRA* is different from most labour codes where arbitration is made the exclusive remedy. . . .
>
> *Further, in* Chopra*, Simpson J. was seized with the same question as in* Boutilier *and commented on the reasons that gave rise to section 91:*
>
> > Subsection 91(1) was introduced into the *PSSRA* as section 90 in 1966 [S.C. 1966-67, c. 72]. It was not disputed that its purpose at that time was the

> prevention of duplicate proceedings under the *PSSRA* and the *Public Service Employment Act* [now R.S.C. 1985, c. P-33]. . . .
>
> *Lastly, in* Lawson*, the adjudicator found that another administrative procedure for redress existed under sections 6 and 7 of the* PSEA*, which inhibited the right to submit a grievance under section 91 of the* PSSRA*. He therefore dismissed the grievance for want of jurisdiction.*
>
> *Consequently, in keeping with case law, if an administrative procedure for redress was open to Mr. Ouellet under the* PSEA*, the adjudicator must dismiss the grievance for want of jurisdiction.*
>
> . . .
>
> [Emphasis in the original]

[34] Required to rule on the interpretation of subsection 91(1) of the former *Act* in *Boutilier*, the Federal Court of Appeal stressed the importance of dealing with this question before proceeding with a hearing of the grievance on its merit.

[35] My review of the arguments of the representatives of the parties, the attached appendices, the wording of the grievance and the circumstances surrounding its presentation lead me to conclude that the grievor did not want to receive a disciplinary measure and chose instead to accept a deployment.

[36] Although he accepted the deployment, the grievor wanted to indicate that he was contesting the manner in which it was applied. He wanted a position at a WP-04 group and level and/or to retain the same salary.

[37] The *PSEA* offered him the opportunity to contest the transfer. This legislation states that the deputy head may take corrective action, including rescinding the deployment (section 34.3). If a complaint is filed with the Commission (section 34.4), an investigator is appointed and he may make recommendations (section 34.5). The Commission may order the deputy head to take corrective action.

[38] When there is other redress open to the employee, the adjudicator does not have jurisdiction to hear the grievance under subsection 91(1) of the former *Act*. As stated earlier, “another administrative procedure for redress” was open to the employee under the *PSEA*.

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

(The Order appears on the next page)

Order

[40] The grievance is dismissed for want of jurisdiction.

February 27, 2007.
P.S.L.R.B. Translation

Jean-Pierre Tessier,
adjudicator