Date: 20070228

File: 166-32-36186

Citation: 2007 PSLRB 24

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

WALTER O. OLSON

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Olson v. Canadian Food Inspection Agency

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

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: James Bart, Professional Institute of the Public Service of Canada

For the Employer: Stéphane Hould, counsel

Heard at Lethbridge, Alberta,
November 29 and 30 and December 1, 2005.
(Written submissions filed June 23, July 7 and August 4, 2006.)

I. Grievance referred to adjudication

[1] Walter O. Olson ("the grievor") was an employee of the Canadian Food Inspection Agency ("the Agency") covered by the collective agreement signed by the Agency and the Professional Institute of the Public Service of Canada for the Veterinary Medicine Group bargaining unit on May 27, 2002 ("the collective agreement"). On October 13, 2004, the grievor filed a grievance alleging that the Agency had terminated his employment for disciplinary reasons, in bad faith and in violation of article D12 of the collective agreement ("article D12") and of the Employment Transition Appendix, which forms Appendix B to the collective agreement ("the ETA"), and section 13 of the *Canadian Food Inspection Agency Act* ("the *CFIAA*"), S.C. 1997, c. 6. The grievor asked to be restored to an appropriate position and sought full redress.

[2] The wording of the grievance is as follows:

> *On approximately Sept. 14, 2004, I received a letter from my employer advising me that my services were no longer required. I believe that this action is disciplinary and was undertaken in bad faith. Furthermore, the actions of the Employer in relation to my employment status constitute unfair and unjust termination of my employment. All of the Employer's actions in this regard violate Appendix B of the Collective Agreement, Art. D.12 of the Collective Agreement and section 13 of the C.F.I.A. Act.*

[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 *PSSRA*").

[4] The record does not indicate under which paragraph of subsection 92(1) of the *PSSRA* the grievance was referred to adjudication. Subsection 92(1) reads 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,*

. . .

[5] The grievor's bargaining agent approved the reference to adjudication and indicated that it was relying on article D12, the ETA and section 13 of the *CFIAA*. The grievance was referred to adjudication by a letter dated June 6, 2005, which states:

. . .

> *The grievance relates to the interpretation and application of clause D.12 and Appendix B of the Veterinary Medicine Group Collective Agreement and Section 13 of the CFIA Act. . . .*

. . .

II. <u>Procedural matters</u>

[6] By a letter dated November 17, 2005, the Agency advised that it intended to raise two jurisdictional issues:

. . .

> *. . . The grounds for the objection are: (1) the employer's actions are not disciplinary in nature, therefore not within the adjudicator's purview under section 92* PSSRA*; and (2) the alleged violation of the anti-discrimination clause of the collective agreement (D.12) is barred from the adjudicator's jurisdiction as per the Federal Court of Appeal's decision in* Boutilier *[2000] 3 F.C. 27.*

. . .

[7] At the hearing, the grievor's representative advised that he had not drafted the grievance form and was abandoning the allegations related to a violation of article D12 and section 13 of the *CFIAA*. Given the position of the grievor's representative on

article D12 and section 13 of the *CFIAA*, the only remaining jurisdictional issue is whether the Agency's actions in terminating the grievor's employment were non-disciplinary and, therefore, outside the adjudicator's purview under section 92 of the *PSSRA*.

[8] After hearing preliminary arguments from the parties, I decided to hear all the evidence in this case, on the jurisdictional issue as well as on the merits of the case. The evidence on the jurisdictional issue appeared to be intertwined significantly with the evidence on the merits of the case. That said, at the hearing, I indicated that I would first consider the jurisdictional issue and would give reasons on the jurisdictional issue alone, if I found that I had no jurisdiction.

[9] In the course of considering my decision, I became aware of an issue that I wished to raise with the parties. Order in Council SOR/97-168 designates the Agency under subsection 92(4) of the *PSSRA* for the purposes of paragraph 92(1)(*b*) of that *Act*. I asked the parties to consider the effect of that Order on the arguments, evidence and hearing process and to provide written submissions.

[10] I received written submissions from the Agency on June 23, 2006, and from the grievor on July 7, 2006, and a rebuttal submission from the Agency on August 4, 2006. Neither of the parties applied to reopen the hearing or to call further evidence.

[11] After considering the evidence as well as the helpful submissions and authorities provided by the parties, I have determined that I have jurisdiction to review the Agency's decision to terminate the grievor's employment. I have also determined that it is within my jurisdiction to review whether the Agency breached the terms of the ETA.

III. Summary of the evidence

[12] I heard oral testimony from the grievor, Larry Turner, Ray Fletcher, Susan Meszaros, Judith Bossé and Michael Hwozdecki.

[13] The grievor was employed by the Agency as a VM-02 Animal Care Veterinarian and Theriogenologist (expert in animal reproduction) at the Animal Diseases Research Laboratory near Lethbridge, Alberta ("the Laboratory"). He worked with the herd on the Laboratory's farm program.

[14] The grievor was recruited to work at the Laboratory in 1985 by Dr. Stockdale, a former Director of the Laboratory, after the grievor had completed his master's degree in veterinary medicine. He was expected to work on his Ph.D. while he was employed at the Laboratory. He started working as a VM-01 and after he completed his Ph.D. he became a VM-02. He had been with the Laboratory for 19 years when he was advised that his position was surplus. As he indicated, this news came as a great shock to him since Canada was in the midst of the Bovine Spongiform Encephalopathy (BSE) crisis at the time. In his view, this was the most significant crisis in food safety and animal health since the 1952 foot-and-mouth disease epidemic. He felt that there needed to be "more science than ever done," given the BSE crisis.

[15] While the declaration that his position was surplus came as a shock to the grievor, it could not have come as a complete surprise. In the winter of 2002 and the spring of 2003, Dr. Turner, Associate Director of the Laboratory, undertook a review of the farm program as well as a review of sample reception, diagnostics and research in order to determine how the Agency could be more fiscally responsible. The grievor reported directly to Dr. Turner. By May 2003, after reviewing the farm operations, Dr. Turner concluded that the Laboratory was overstaffed. The grievor's position was one in a group of positions identified as possibly being made surplus, along with a position in sample receiving and one in diagnostics.

[16] Dr. Turner consulted with a human resources (HR) manager and with Bill Yates, Director of the Laboratory. Dr. Turner had a "hands-on view" of the farm operations while the grievor was on vacation in June 2003. Dr. Turner came to the conclusion that the position occupied by the grievor was surplus to the needs of the Agency.

[17] After the grievor returned from his vacation in early August 2003, Dr. Yates arranged for a meeting. At the meeting on August 6, 2003, Dr. Yates informed the grievor of "the direction that he was going" and asked the grievor to contact someone in the HR section so that he could review his options. Dr. Yates followed up with an email message dated August 7, 2003, concerning the surplus designation of the VM-02 position at the Laboratory.

[18] Dr. Turner had no authority to sign a letter declaring that the grievor's position was surplus to the needs of the Agency. However, he prepared the wording of the letter for signature by Dr. Yates. He also conducted a review of the laboratories in the Western region in order to determine if there were any positions available for the

grievor. Dr. Turner determined that there were no available positions in the Nepean, Lethbridge, Saskatoon or Winnipeg laboratories. After contacting the Animal Health or Meat Hygiene Section, Dr. Turner determined that there was a VM-02 position available in meat hygiene at a Fort MacLeod meat packing plant.

[19] Dr. Turner met with the grievor on September 30, 2003, and delivered a letter advising him of a discontinuance of function and his entitlements under the ETA. Dr. Turner also provided to the grievor a reasonable job offer in the form of a letter offering an indeterminate appointment as veterinarian-in-charge (VM-02) at the Fort MacLeod plant, subject to retraining. The letter of offer was written by Mr. Hwozdecki, the Agency's Inspections Manager, Animal Health Programs, Alberta South region.

[20] Dr. Turner devised a training plan in conjunction with Dr. Meszaros, a VM-02, who had occupied the meat hygiene position at an establishment in Brooks, Alberta. In this process, he compared the job description for the grievor's surplus position with a revised job description for the proposed position. Dr. Turner also drew upon his own experience, as he had started working with the Agency in meat hygiene prior to working in animal health. While Dr. Turner prepared the training plan agreement and the training plan was being drawn up by the Agency, there was some consultation with the grievor, who signed the training plan agreement, as did Dr. Yates, Dr. Turner, Dr. Meszaros and Mr. Hwozdecki.

[21] There are substantial differences between the grievor's surplus position and the proposed position. In his surplus position, he worked as a scientist with the Agency in animal health. The only slaughterhouse experience he had was occasionally attending to pick up a carcass for *post mortem* inspection for research purposes. In the proposed position, he would be working in the environment of a meat packing plant dealing with food safety concerns, performing *ante mortem* and *post mortem* carcass inspections, supervising inspectors, and generally supervising the food safety at the Fort MacLeod plant. The general focus of a VM-02 working in meat hygiene at a meat packing plant is to decide whether a carcass should be put into the food chain or removed from it. The work is performed in an industrial setting in a slaughterhouse environment. The Fort MacLeod plant dealt with the slaughter and export of horsemeat and occasionally bison meat.

[22] Mr. Hwozdecki indicated that he viewed the offer to the grievor as a "win-win" situation. He was contacted by Dr. Turner after Larry Ford, the incumbent veterinarian-

in-charge at the Fort MacLeod plant, had notified him that he was going to retire. Mr. Hwozdecki could avoid delay in staffing the position by making an offer to the grievor, rather than continuing a staffing process; the offer would allow someone in a surplus position to continue working with the Agency and would allow for a continuous supervisory presence at the Fort MacLeod plant.

[23] The grievor accepted the position at the Fort MacLeod plant and engaged in the training plan. He had fully completed the first four months of the training program by April 23, 2004. The training program consisted of his shadowing Dr. Meszaros on the job at the Maple Leaf pork plant in Brooks. Dr. Meszaros was familiar with the HR and operational issues at the Fort MacLeod plant, as she was handling leave applications from that plant and had worked there in an *ad hoc* capacity. The grievor engaged in self-study of modules of the training programs.

[24] The grievor then shadowed Dr. Fletcher, the supervising VM-02 veterinarian-in-charge at the Fort MacLeod plant, on the job for about four weeks, commencing on April 21, 2004. He was then on his own to run the plant as the acting veterinarian-in-charge. The grievor found the work at the Fort MacLeod plant to be difficult. There was a heavy workload and he was routinely working 50 hours per week. He had concerns about the plant's compliance with regulations. In some areas the plant was deficient, and in other areas its operation was marginal. The grievor had extreme anxiety about being left on his own, as he was unfamiliar with the audit and paperwork requirements at the Fort MacLeod plant. Dr. Fletcher came back on one occasion to assist him with the month-end reports.

[25] Further, the Fort MacLeod plant appears to have had some HR difficulties. One of the difficulties was that there had not been much continuity in the VM-02 position and that the position had been filled on a rotational basis out of Lethbridge. There were difficulties in the relationships among the inspectors, the *ad hoc* supervising veterinarians who visited on a rotational basis and staff at the plant. At the time of the grievor's arrival, the plant was staffed with five inspectors. However, one inspector retired and was not replaced. The grievor found the work environment to be tense and lacking in collegiality. There were instances of insubordination by inspectors. It was the grievor's view that the lack of a permanent VM-02 at the plant had created a situation where the inspectors became self-supervising. There were conflicts between the inspectors due to differing personalities. The grievor felt that he had little or no

support from Mr. Hwozdecki, whose office is located in Calgary. The grievor found Mr. Hwozdecki difficult to contact. He was given no training in how to handle HR issues that could arise in the plant.

[26] Dr. Fletcher described the inspectors as extremely resistant to taking direction from visiting veterinarians, particularly about the requirement to have two inspectors on the floor during processing. Dr. Fletcher described the HR situation at the Fort MacLeod plant as "a bit of a mess and the inspecting staff were difficult and there was a lack of support from HR and the inspection manager." He described the VM-02 position at the Fort MacLeod plant as a very busy VM-02 position, which he enjoyed.

[27] It is apparent from the evidence that the grievor had no difficulties with the technical aspects of the VM-02 veterinary work. Dr. Meszaros noted that the grievor appeared to be unenthusiastic about the work.

[28] Dr. Meszaros was also concerned with the amount of leave taken by the grievor and contacted Mr. Hwozdecki, who, in turn, contacted Dr. Turner. Dr. Turner's evidence was that the grievor had no earlier problems with excessive use of sick leave. This fact is confirmed in an email message from Dr. Yates to Mr. Hwozdecki. The grievor did not have an attendance problem when he worked at the Laboratory. There were periods of time when the grievor was absent from work, and he indicated that he took five weeks of sick leave between early January and the middle of February 2004. These absences appear to have been excused by the Agency. The Agency was, however, concerned about the absences and their impact on the retraining program. The training program was extended to make up for the sick leave taken.

[29] There is a strong suggestion in the correspondence filed as exhibits at the hearing that Mr. Hwozdecki was concerned that the grievor would not be successful in the training program. On March 1, 2004, Mr. Hwozdecki sent an email message to Dr. Turner and others about the grievor's progress:

. . .

> *The plan to have Dr. Olson integrate into our Animal Programs operations cadre appears to be coming unglued and given the fact he has missed 17 days in addition to the leave currently submitted, I do not believe I can commit further to the agreement Operations had made with the Labs. I am reluctant to do this because of the high degree of*

> *cooperation Dr. Turner and I have achieved in other such endeavours.*
>
> *While I wish not to complicate issues with Drs. Turner and Yates, I am in essence creating a whole other set of issues operationally in plant in Fort Macleod* [*sic*] *while this has played out that Dr. Meszaros and I must move quickly to resolve.*
>
> *Pat, Scott, Larry, I seek your thoughts and advice as I look to next steps.*

. . .

[30] The grievor approached Mr. Hwozdecki with a proposal for a one-year leave without pay for personal reasons. The grievor sent an email message on March 15, 2004, requesting discussion of this request during a meeting scheduled for March 17, 2004.

[31] From the Agency's point of view, the grievor's leave application made little sense, given that it had held the position open for him rather than completing a staffing process. The grievor was engaged in a training program and the Agency sought continuity at the Fort MacLeod plant. The Agency's concerns were summarized by the grievor in an email message to Mr. Hwozdecki dated May 26, 2004:

. . .

> *Michael said that to put Walter into the mix, upon his return would "forgo one year in the crucial development* [at the Fort MacLeod Plant]*". Michael stated that he does not want to "put things on hold for a year". Michael's concern in managing the area and Fort MacLeod, is that one year will put a hold on "addressing issues". Michael said that there are operational issues such as moving to the new building, dealing with blue prints, staff relations issues, problems with individual staff, problems with dealing with scheduling issues and having two inspectors on the floor. Michael also said that we have people at one another's throats and that we (CFIA) needs continuity and consistency to help deal with people's baggage.*

. . .

[32] The grievor made a formal leave request on May 25, 2004. This leave request was denied by Mr. Hwozdecki on June 1, 2004, by letter:

. . .

> *I had stated at that time I would not entertain your request and I will now explain that there are two reasons for this denial:*
>
> *First, you have spent the last 7 months of your surplus period training in preparation for appointment to the VM02 position in Fort Macleod* [*sic*]*. After some absenteeism, July 24, 2004 is now the anticipated month of appointment. This is a critical time as it will allow you to practice and use the skills you developed during your training. Were you to go on leave for a one year period immediately upon appointment, it would be to the detriment of the training provided and this could have a serious impact upon your subsequent on-the-job performance.*
>
> *Second, as I have explained to you in the past, the Fort Macleod* [*sic*] *work site is in dire need of the leadership and consistency that an ongoing incumbent veterinarian-in-charge would provide the centre in order to manage the staff and the plant operations. Because of your surplus status and the retraining required, I have filled this position by rotating VM01's through the plant since it was determined your placement would be a reasonable job offer to you. This was seen as a term strategy solely to provide you with the opportunity to update your skills. This rotation cannot continue for an additional year given the staff and operational issues at this work site. The vet in charge position must be filled permanently. Your presence is required. Until such time as the affairs of this centre have been effectively remedied, I am unfortunately unable to consider your request for one year's Leave Without Pay and your request is hereby denied.*
>
> *Your request will be reconsidered in six months.*
>
> . . .

[33] Mr. Hwozdecki made the decision to deny the leave request on the basis of operational considerations. He expressed that it was important during a training program to put the training to use. He indicated that he did not see how it would be beneficial to either the Agency or to the grievor to have the grievor go on leave during the middle of the training program.

[34] By a memorandum dated June 2, 2004, Mr. Hwozdecki requested that the grievor prepare an action plan dealing with staffing concerns at the Fort MacLeod plant. The grievor did not complete an action plan or submit one to Mr. Hwozdecki. Mr. Hwozdecki met with the grievor on June 3, 2004, and spoke with him again by conference call on June 25, 2004.

[35] The grievor took sick leave from July 4 to July 23, 2004.

[36] Mr. Hwozdecki wrote to the grievor on July 20, 2004:

. . .

> *It has been clearly spelled out to you that the Fort Macleod* [*sic*] *worksite is in dire need of leadership and consistency that only an ongoing incumbent veterinarian-in-charge can provide to ensure effective staff relations as well as the successful day to day operation of the plant. Regrettably, you have not demonstrated this leadership. This shortfall was addressed in our face to face meeting on June 3, 2004 and most recently in our teleconference last Friday June 25, 2004. At the former session you were presented with a number of short term goals as well as an action plan format that would be used to engage the Inspection Manager in useful dialogue that would assist in your last but most crucial step of your retraining. The later session was used to discuss the fact that no action ensued from the previous meeting.*
>
> *Further to our teleconference on June 25, 2004, I wish to advise you that as of June 30, 2004 your training period has expired. During the last month of your training period, it appeared that you did not participate or cooperate fully. You appeared unwilling or reluctant to assume supervisory authority. I note that one staff relations issue you told us you addressed, namely the jewellery issue, remained unresolved as of June 25th, and at no time did you take this issue further. Unfortunately, you failed to demonstrate that you meet the required level of competency for supervision.*
>
> *Therefore, you will not be appointed to the VM-2, Veterinarian-in-Charge position at* [the Fort MacLeod Plant].
>
> *As of July 1, 2004, the responsibility for your employment now reverts to Science Branch, Lethbridge Laboratory.*

. . .

[37] By a letter dated July 20, 2004, Dr. Turner notified the grievor that he remained a surplus employee of the Laboratory's Science Branch, indicated that he was aware that the grievor was on sick leave and stated that he expected the grievor to report by telephone to confirm his duty status on July 23, 2004. Dr. Turner instructed the grievor not to report to the Laboratory because there was no work available for him.

[38] Dr. Turner reviewed the available employment options within the Laboratory's Science Branch and determined that the situation remained bleak and that there were no Laboratory positions available for the grievor.

[39] By a letter dated July 30, 2004, Dr. Bossé, the Agency's Vice-President, Science Branch, notified the grievor that he was to be laid off in accordance with the terms of the collective agreement. Prior to signing the layoff letter, Dr. Bossé determined that there were no alternative research positions available for the grievor. Dr. Bossé was not aware of the particulars of the grievor's research background. However, during cross-examination, Dr. Bossé further indicated that the area in which the grievor had research expertise was becoming less of a priority for the Agency.

[40] At the time of the hearing, the grievor was working as a senior lecturer at Massey College in New Zealand and had been working there for 51 weeks. The grievor received no other job offers from the Agency and does not believe that he was given a reasonable opportunity to complete his training program. In short, there were many staffing problems at the Fort MacLeod plant that he would have been unable to solve overnight.

[41] While the grievor did not receive any further job offers from the Agency, the evidence clearly demonstrates that there were no research positions at the Agency during the relevant time period. The evidence further demonstrates that the grievor did not supply the Agency with the résumé that it had requested (letter dated November 1, 2004 from Dr. Turner to the grievor) to assist in appointment activities. The grievor did not ask to be considered for appointment to a position at the VM-01 group and level in another establishment, and the Agency did not consider such an appointment.

IV. Summary of the arguments

A. Oral arguments

[42] The Agency has argued that the adjudicator has no jurisdiction to rule on this grievance. The grievor's position was declared surplus. He was given a reasonable job offer. Given the different nature of the duties of the proposed position, the Agency provided that the job offer was conditional on success in retraining and provided six months of training. The training period was extended by six weeks due to a high rate

of absenteeism by the grievor; he failed to complete the training program successfully and, in particular, failed to demonstrate the leadership required.

[43] The Agency has stated that the layoff contained no disciplinary element, and that the adjudicator, therefore, has no jurisdiction to review the grievor's layoff. Given that this grievance concerns a separate employer, the Agency argued that I must be satisfied that the termination of employment was done for disciplinary reasons, was contrived or was a sham if I am to have any jurisdiction in this matter: *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (T.D.) (QL); *Earle v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-27346 (19970630); and *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167. The grievor has a difficult task or the test has a very high standard or threshold that must be met*: Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33, and *Fedoryk v. Treasury Board (Canadian Transport Commission)*, PSSRB File No. 166-02-15695 (19860812).

[44] The grievor has stated that he was laid off improperly. The Agency violated clauses 1.1.1, 4.1.1, 4.1.3, 4.2.3 and 4.2.6 of the ETA. These clauses read as follows:

. . .

> ***Part I***
>
> ***Roles and responsibilities***
>
> ***1.1 Agency***
>
> ***1.1.1*** *Since indeterminate employees who are affected by employment transition situations are not themselves responsible for such situations, it is the responsibility of the Agency to ensure that they are treated equitably and, wherever possible, given every reasonable opportunity to continue their careers as Agency employees.*
>
> . . .
>
> ***Part IV***
>
> ***Retraining***
>
> ***4.1 General***
>
> ***4.1.1*** *To facilitate the appointment of affected employees, surplus employees and laid-off persons, the Agency*

> *shall make every reasonable effort to retrain such persons for:*
>
> *(a) existing vacancies,*
>
> *or*
>
> *(b) anticipated vacancies identified by management.*
>
> ***4.1.2*** *The Agency shall be responsible for identifying situations where retraining can facilitate the appointment of surplus employees and laid-off persons; however, this does not preclude the employee's* [*sic*] *obligation to assist in their own marketing and the identification of employment options including but not limited to retraining possibilities.*
>
> ***4.1.3*** *Subject to the provisions of 4.1.2, the President shall approve up to two years of retraining.*
>
> ***4.2 Surplus employees***
>
> . . .
>
> ***4.2.3*** *Once a retraining plan has been initiated, its continuation and completion are subject to the ongoing successful performance by the employee at a learning institution or ongoing satisfactory performance if the training is "on-the-job".*
>
> . . .
>
> ***4.2.6*** *An employee, unsuccessful in retraining, may be laid off at the end of the surplus period, provided that the employer has been unsuccessful in making the employee a reasonable job offer.*
>
> . . .

[45] The grievor has stressed that the ETA is incorporated by reference into the terms of the collective agreement, citing *Carby-Samuels v. Treasury Board (Energy, Mines and Resources Canada)*, PSSRB File No. 166-02-23181 (19930311); *Saveland v. Treasury Board (Health and Welfare Canada)*, PSSRB File No. 166-02-16671 (19890809); *Graham v. Treasury Board (Federal Judicial Affairs)*, PSSRB File No. 166-02-24158 (19931020); and *Robert v. Treasury Board (Supply and Services Canada)*, PSSRB File No. 166-02-22963 (19930111).

[46] The grievor has argued that the Agency did not make a reasonable effort to find him an existing vacancy. In particular, the Agency did not consider the grievor for appointment at the VM-01 group and level.

[47] The grievor has submitted that the Agency did not provide six months of training arguing that it provided a six-month period of on-the-job familiarization or orientation, which is different from training, and cited *Ivaco Rolling Mills Ltd v. United Steelworkers of America, Local 7940* (1997), 69 L.A.C. (4th) 1, and *Labatt Breweries Ontario v. Brewery, General and Professional Workers' Union, Local 1* (2003), 116 L.A.C. (4th) 81. If the Agency's concern was with the grievor's management or HR abilities, even so it is clear that the Agency provided him with no training. He was simply put into the job, without any training in HR management. Further, the Agency should have provided up to two years of training under clause 4.1.3 of the ETA.

[48] The grievor has claimed that objective evidence provided by Dr. Fletcher has demonstrated that the grievor was capable of managing and supervising the workforce at the Fort MacLeod plant. The Agency has failed to discharge its burden to show by objective evidence that the grievor was incapable of managing or supervising the workforce, as in *Saskatchewan v. Saskatchewan Government Employees' Union* (1988), 2 L.A.C. (4th) 423.

[49] The grievor has stated that it is not appropriate to apply a minimalist standard in assessing whether he was capable of assuming the duties of the veterinarian-in-charge position since he was not a probationary employee, but a permanent employee with seniority who would be adversely affected by a decision involving termination of employment, and he was an employee with entitlements under the ETA. It is not sufficient for the Agency to prove that it was honest, unbiased and not actuated by ill will or malice and that its decision was reasonable. While it may be appropriate to defer to the Agency in a decision as to whether an employee can be retrained, in this case the Agency had already made that determination, and what was in question was the adequacy of the training opportunity provided to the grievor.

[50] The grievor has contended that the adequacy of training is an issue that the Agency must prove to a just cause standard. The Agency must meet the test specified in *Edith Cavell Private Hospital v. Hospital Employees' Union, Local 180* (1982), 6 L.A.C. (3d) 229, and as applied in *British Columbia Hydro v. Office and Technical Employees' Union, Local 378* (1984), 14 L.A.C. (3d) 69. The Agency must establish that it defined a

level of performance, that the standard of performance was communicated to the grievor, that the grievor was given supervision and instruction as to how to meet the standard, and that the grievor was incapable of meeting the standard. If the adjudicator applies the standard set out in *Edith Cavell*, then the Agency failed to provide a reasonable training opportunity and therefore the adjudicator has jurisdiction. The grievor has argued that an appropriate remedy would be to reinstate him to his VM-02 position at the Fort MacLeod plant for training and that I remain seized of the implementation of the training program.

[51] In reply, the Agency has stated that the adjudicator has no jurisdiction to consider the adequacy of a training program. This is a matter for consideration by the Agency under section 7 of the *PSSRA* since the Agency has the right to determine the organization of its workplace, assign duties and classify its positions, as in *Arnould v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 80.

[52] The Agency has pointed out that, in respect of a separate employer, non-disciplinary termination of employment is not within an adjudicator's jurisdiction, and cited *Rinke and Vanderwoud v. Canadian Food Inspection Agency*, 2004 PSSRB 143. Once an employer has shown an employment-related reason for discharge, the burden of proof shifts to the employee in establishing that the termination of employment is a sham or camouflage. An adjudicator must determine not whether the Agency's decision was made in good faith but whether it had a disciplinary element. The Agency's actions cannot be so trivial as to constitute a sham, but it is outside the jurisdiction of an adjudicator to assess whether the training program was adequate or whether the Agency's rationale for the assessment of the grievor's performance was correct.

[53] The Agency has stated that the allegations concerning breaches of specific clauses of the ETA were not set out in the grievance. According to the decision in *Burchill v. Canada (Attorney General),* [1981] 1 F.C. 109 (C.A.), there can be no such thing as a basket-clause grievance. It is not now open to the grievor to raise these new issues and to do so would be a breach of natural justice.

[54] The Agency has stated that if I find that I have jurisdiction, it is apparent from the merits of the case that there was no breach of the collective agreement. The evidence clearly establishes that the Agency made a reasonable job offer, made a training program available and extended the training program, and that the grievor

simply did not perform satisfactorily. Since no other positions were available, he was laid off. The Agency asks that the grievance be dismissed.

B. Written submissions

[55] By way of written submissions, the parties addressed the effect of Order in Council SOR/97-168 on the arguments, evidence and hearing process. That Order designates the Agency under subsection 92(4) of the *PSSRA* for the purposes of paragraph 92(1)(*b*) of that *Act*.

[56] In its written submissions dated June 23 and August 4, 2006, the Agency states that its designation for the purposes of paragraph 92(1)(*b*) of the *PSSRA* does not affect this grievance, as the grievor alleged that he was laid off for disciplinary reasons. The grievor did not ". . . contest a non-disciplinary termination . . .", nor did he argue that his employment was terminated for non-disciplinary reasons. The Agency argues that the grievor cannot change the nature of the grievance and cites *Burchill*; *Schofield v. Canada (Attorney General)*, 2004 FC 622; and *Canada (Attorney General) v. Shneidman*, 2006 FC 381. Even though it is open to an adjudicator to assume jurisdiction on this matter as a non-disciplinary termination of employment, the adjudicator ought not to do so because doing so would alter the essence of the grievance, which is termination of employment for disguised disciplinary reasons.

[57] The Agency states that, as for rejections on probation, once an employer has shown dissatisfaction with an employee's suitability for the position, the burden of proof shifts to the employee in establishing that the employer camouflaged a termination of employment and cites *Archambault v. Canada (Customs and Revenue Agency)*, 2005 FC 183, and *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.). The Agency states that the evidentiary standard that a separate employer must meet in the case of a layoff cannot be the usual just cause standard. The Agency states that the burden of proof is on the grievor to ". . . establish that the employer's conduct camouflaged a termination behind a false lay-off."

[58] In his written submission dated July 7, 2006, the grievor states that, under subsection 92(1) of the *PSSRA*, the adjudicator has the jurisdiction and the duty to hear and to render a decision in respect of the grievor's contention that the Agency violated the terms of the ETA. As an employee of a separate employer, the grievor is not governed by the *Public Service Employment Act* ("the former *PSEA*"), R.S.C., 1985, c. P-33; the ostensible authority for termination of the grievor's employment must

reside in paragraph 11(2)(*g*) of the *Financial Administration Act* (*FAA*), R.S.C., 1985, c. F-11. The employment of employees of a separate employer can be terminated under paragraph 11(2)(*f*) or 11(2)(*g*) of the *FAA*. The adjudicator is entitled to look into the matter in order to ascertain the true nature of the case, for which point the grievor cites *Penner*.

[59] The grievor states that, if the adjudicator concludes that the present case is not a legitimate termination of employment under paragraph 11(2)(*g*) of the *FAA*, then it must be a termination of employment under paragraph 11(2)(*f*) of that *Act*, and the concepts of just cause and progressive discipline apply. The Agency did not provide the grievor with his full rights under the collective agreement, and therefore the termination of employment is void *ab initio*, as in *Shneidman*. Unlike *Shneidman*, the present grievance permits the adjudicator to consider the termination of the grievor's employment and the breach of the collective agreement, as the grievance raises both issues.

[60] The grievor reiterates his earlier argument and indicates that, once the Agency declared his position surplus, he became eligible for entitlements under the ETA, including the right to retraining for up to two years. When the Agency terminated the grievor's training prematurely, he was denied his full entitlements under the collective agreement. Having terminated the grievor's training program, the Agency assumes the burden of establishing that the grievor's ongoing performance was unsatisfactory, and that decision is subject to review by the adjudicator. The grievor states that the principles of just cause and progressive discipline apply in considering the termination of his employment, and cites *Canada (Attorney General) v. Matthews*, [1997] F.C.J. No. 1692 (T.D.) (QL), and *Matthews v. Canadian Security Intelligence Service*, PSSRB File No. 166-20-27336 (19970305).

[61] In its written submission dated August 4, 2006, the Agency states that the grievor's employment was terminated because he did not successfully complete the training program for the veterinarian-in-charge position. He was returned to his surplus position and was laid off because of the unavailability of other positions. The adjudicator cannot review the training program, as in *Arnould*. In the alternative, the Agency states that it did establish the grievor's unsatisfactory performance. The adjudicator must be satisfied that the termination of employment was disciplinary in order for the grievor to have discharged his burden.

[62] The Agency argues that the Federal Court quashed the adjudicator's decision in *Shneidman* and that the void *ab initio* principle does not survive. The Agency reiterates that the grievor's allegations of breach of contract cannot be considered, as this would change the essence of the grievance, and cites *Burchill* and *Shneidman*.

V. Reasons

A. Jurisdiction

[63] The Agency has been established as a separate employer under sections 12 and 85 of the *CFIAA*. Under section 13 of that *Act*, the president of the Agency has the authority to appoint the employees of the Agency, set their terms and conditions of employment and assign duties to them.

[64] While the Agency is a separate employer, it has been designated by Order in Council SOR/97-168 under subsection 92(4) of the *PSSRA* for the purposes of paragraph 92(1)(*b*) of the *PSSRA*. In the absence of such a designation, an adjudicator's jurisdiction would be limited to the extent set out in paragraphs 92(1)(*a*) and (*c*) of the *PSSRA*. Whether an adjudicator has jurisdiction to consider this grievance rests on paragraphs 92(1)(*a*) and (*b*) of the *PSSRA* and on the wording of the grievance.

[65] The Agency has argued that its actions were not disciplinary in nature, and that therefore an adjudicator has no jurisdiction to review the grievance. In my view, this argument is based in part on the mistaken premise that paragraph 92(1)(*c*) of the *PSSRA* sets out an adjudicator's jurisdiction over a termination grievance filed by an employee of the Agency. Because the Agency has been designated under subsection 92(4) of the *PSSRA* for the purposes of paragraph 91(1)(*b*) of that *Act,* an adjudicator may consider grievances involving the Agency's disciplinary actions resulting in suspension or financial penalties under subparagraph 92(1)(*b*)(i) of the *PSSRA*, and may also consider any termination of an Agency employee's employment or demotion, under paragraph 11(2)(*f*) or (*g*) of the *FAA*.

[66] The Agency's remaining objection is that the grievor's argument with respect to a violation of the ETA is a new grievance that was not dealt with during the grievance process. An adjudicator, under the *PSSRA,* is limited to considering the grievance that was presented during the grievance process, in *Burchill*.

[67] In *Shneidman*, the Federal Court recently considered whether an adjudicator committed a jurisdictional error in interpreting the scope of the grievance. In that case,

the adjudicator considered that she had jurisdiction to consider whether the employer's decision was void *ab initio* for failing to allow representational rights in an investigative process that resulted in termination of the employee's employment. The adjudicator considered that she had jurisdiction to review the investigatory process prior to the termination of employment, and the court held that the grievance related only to the dismissal and not to the pre-termination process.

[68] It is important to determine the scope of the grievance presented. *Shneidman* dealt with a reference to adjudication under paragraph 92(1)(*c*) of the *PSSRA* against the then Canada Customs and Revenue Agency, a separate employer not designated under subsection 92(4) of the *PSSRA*. The Federal Court stated:

. . .

> *[19] The law as set out in* Burchill v. Canada, *[1981] 1 F.C. 109 (C.A.), and applied in* Schofield v. Canada (Attorney General), *[2004] F.C.J. NO 784 (T.D.) establishes that an adjudicator does not have jurisdiction to hear a complaint that is not included in a grievance. In* Canada (Treasury Board) v. Rinaldi, *[1997] F.C.J. No. 225 (T.D.) the Court held that an adjudicator may have jurisdiction where the language of the original grievance is broad enough to encompass the issue raised for adjudication. Accordingly, the issue in this case is whether the Grievance, which expressly grieves only the decision to terminate, can be read to encompass pre-termination violations of the collective agreement.*
>
> . . .
>
> *[22] . . . The language of the Grievance is clear, and it does not invoke the collective agreement or raise pre-termination issues. . . .*

. . .

[69] I have reviewed the wording of the grievor's grievance set out in the grievance form, which I have reproduced:

> *On approximately Sept. 14, 2004, I received a letter from my employer advising me that my services were no longer required. I believe that this action is disciplinary and was undertaken in bad faith. Furthermore, the actions of the Employer in relation to my employment status constitute unfair and unjust termination of my employment. All of the Employer's actions in this regard violate Appendix B of the*

> *Collective Agreement, Art. D.12 of the Collective Agreement and section 13 of the C.F.I.A. Act.*
>
> [Emphasis added]

[70] The grievance at hand, as presented, raises an issue involving the termination of the grievor's employment. The grievor alleged that the action was disciplinary and was taken in bad faith. The grievance also alleges that the Agency's actions constituted an unfair and unjust termination of employment. The wording of the grievance clearly raises both disciplinary and non-culpable discharge reasons for termination. The grievance alleges that the Agency violated the ETA. At the hearing, however, the grievor's representative abandoned the part of the grievance regarding article D12 of the collective agreement and section 13 of the *CFIAA*.

[71] There appears to have been some consideration of the ETA during the course of the grievance process. In a grievance reply dated July 15, 2005, Dr. Bossé stated:

> . . .
>
> *You have alleged that your lay off is disciplinary and that the action was taken in bad faith. I have been advised that no disciplinary infractions have been noted by your managers and that no disciplinary action has been taken against you by them. Neither you nor your representative provided any information that would explain your allegation. I therefore conclude that the decision to lay you off was not disciplinary in nature. The decision was based on your failure to maintain satisfactory performance despite coaching and assistance provided by your mentors. I have been advised that you were provided with ongoing feedback on your performance, but failed to make the necessary improvements, based on either your initial or modified training plan. I have concluded that the provisions of Appendix B of your collective agreement have been respected. Consequently, your grievance is denied and no corrective action will be granted.*
>
> . . .
>
> [Emphasis added]

[72] The allegations related to a breach of the ETA were not specifically set out in the reference to adjudication, and the Agency has argued that the grievor presented a new grievance at this hearing. The Agency has further argued that an adjudicator has no

jurisdiction to consider the new grievance. In *Burchill,* the Federal Court of Appeal held as follows, at 110:

. . .

> *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)* [which became subsection 92(1) of the *PSSRA*]*. Under that provision it is only a grievance that has been presented and dealt with under section 90* [section 91 of the *PSSRA*] *and that falls within the limits of paragraph 91(1) (a) or (b)* [paragraphs 91(1)(*a*) or (*b*) of the *PSSRA*] *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)* [subsection 92(1) of the *PSSRA*] *was not laid. Consequently, he had no such jurisdiction.*

. . .

[73] In my view, it is unnecessary for the full arguments to be disclosed in the grievance form. It is important to consider whether the allegations raised at the hearing are included in the grievance. If these allegations are not included in the grievance the adjudicator has no jurisdiction to consider them, as in *Shneidman*.

[74] In this case, the grievance form includes an allegation that the actions taken by the Agency constituted an unfair and unjust termination of employment and a violation of the ETA. It is clear that Dr. Bossé took the position that the decision to declare the grievor's position surplus was not a disciplinary decision and no discipline was involved. Dr. Bossé further indicated that the grievor failed to maintain satisfactory performance despite coaching and assistance, and failed to use feedback to modify his performance. Dr. Bossé appears to have considered and determined that the grievor's performance was unsatisfactory and that the Agency was entitled to terminate the training program and therefore had not breached the ETA. This allegation was raised in the grievance and addressed during the grievance process. As the grievance raises a breach of the ETA, I have jurisdiction to consider this issue.

B. <u>Whether the Agency has breached the ETA</u>

[75] In my view, there are two issues in this case. The main issue is whether the Agency has breached the ETA. A sub-issue is whether the Agency has engaged in discipline in its decision to lay off the grievor and in all its dealings with him.

1. Burden of proof

[76] The grievor has argued that since the Agency terminated the training plan it was up to the Agency to prove, to a balance of probabilities standard, that the Agency had just cause to terminate the grievor's employment. In my view, the appropriate standard for reviewing the Agency's decision is not a just cause standard.

[77] The ETA, which deals with employment transition, is incorporated into the collective agreement and provides entitlements to employees whose services are no longer required. Under the ETA, once a retraining plan has been initiated, the continuation or completion of a plan is subject to ongoing satisfactory performance if the training is on-the-job training, under clause 4.2.3. The assessment of performance is a management right, circumscribed by article D9 of the collective agreement (employee performance review and employee files). The Agency is the judge of successful performance, and traditionally an adjudicator has very limited jurisdiction regarding performance assessment grievances. Part of the underlying theme is that an employer has the right to manage its workforce, and is better situated than adjudicators to make informed decisions as to an employee's suitability for employment or job performance. Adjudicators take a reserved approach as illustrated in *Earle* at para 144:

. . .

> *During the probationary period the trainer must at some point decide if the trainee is going to make it or not. The decision may be found during phase one of training or phase five, but it is a decision that I should not interfere with unless it is found to be totally without foundation. It was not. Nor was it done artificially. In fact, a training period is established for the specific purpose of allowing the employer to determine if a probationary employee is suitable for the position he or she is being trained for.*

. . .

[78] Appointment by the Agency to the proposed position depended on whether the grievor completed the training to the Agency's satisfaction. While the grievor was not a probationary employee, as he was the incumbent of another position with the Agency,

the Agency was required to exercise judgement as to his suitability for appointment. The standard to be applied in reviewing the Agency's decision that the grievor's training was unsuccessful cannot be a just cause standard. As the Agency's decision to terminate the grievor's training plan was made under the ETA and as the ETA is incorporated in the collective agreement, the burden of proof is on the grievor, to a balance of probabilities standard.

[79] The parties have presented arguments based on the concept of disguised discipline. For example, the Agency has argued that the appropriate standard is for the grievor to ". . . establish that the employer's conduct camouflaged a termination behind a false lay-off."

[80] Adjudication decisions under the *PSSRA* regarding grievances involving disguised discipline have arisen in a context where the former *PSEA* applied to the grievor and the adjudicator would have been required to decline jurisdiction because there was another administrative procedure for redress provided in or under the former *PSEA*: subsection 91(1) of the *PSSRA*. Those decisions dealt with allegations that the employer's decision was really a sham to prevent an adjudicator from enquiring into the real, disciplinary motives for termination. Section 8 of the former *PSEA* and section 13 of the *CFIAA* make it clear, however, that the former *PSEA* does not apply to the Agency.

[81] While the context in which previous adjudication decisions dealt with issues of disguised discipline was different from this grievance, I am satisfied that the principles that those decisions developed about the burden of proof are appropriate to determine whether an employee has been successful or unsuccessful in training while in employment transition, where the employee is alleging that the assessment of his performance was tainted by disciplinary motives and bad faith. A layoff under the ETA is a method of terminating an employee's employment that has no connection to the Agency's right to terminate employees' employment for incompetence or for disciplinary reasons. It is clear from the authorities that employment transition cannot be used for replacing employees with performance issues or employees whose employment should be terminated for disciplinary reasons.

[82] In the case of a grievance alleging disguised discipline, the authorities indicate that the adjudicator must be satisfied that in substance the facts that gave rise to the grievance amount to a disciplinary action. In specific circumstances, a layoff may well

be a disguised disciplinary termination of employment. The Federal Court has commented on the difficulties of proving a disguised dismissal hypothesis in *Rinaldi*:

. . .

> *. . . The hypothesis on which the Adjudicator based her decision in fact concerns a situation in which an employer disguises an unlawful dismissal under cover of the abolishment of a position through a contrived reliance on* [the former *PSEA*]*. . . .*
>
> *However, I must say that the hypothesis adopted by the Adjudicator is not likely to be easy to prove. The respondent's assertion that he can prove his employment was not terminated under the* [former *PSEA*] *when the employer is relying on section 29 of that Act is far from obvious. A reorganization under subsection 29(1) takes place when restraint measures (which are easily proven) result in the abolishment of positions (which once again are easily proven). If the reorganization that results in the abolishment is not challenged and/or a de facto abolishment of positions occurs, it is hard to imagine how the resulting lay-offs can have been effected otherwise than as a result of the discontinuance of functions within the meaning of section 29.*
>
> *This is just as true if the respondent can prove a turbulent employment relationship. He would then also have to show that the employer's reliance on section 29 is contrived. [See Note 15 below] While such evidence cannot be excluded at the conceptual level, it is hard to imagine how the respondent would be able to establish it. . . .*
>
> ---
>
> *Note 15: . . . When the employer argues that the employment was terminated under the* [former *PSEA*], *the only way to show that it was not would be to prove that the conditions required to apply it were in fact not present at the relevant time and that the employment cannot therefore have been terminated under that Act.*
>
> ---

. . .

[Emphasis added]

[83] The concept of work force adjustment is included in the collective agreement. It is made explicit by the ETA at page 129 that:

. . .

> *Employment Transition (transition en matière d'emploi) – is a situation that occurs when the President decides that the services of one or more indeterminate employees will no*

> *longer be required beyond a specific date because of a lack of work or the discontinuance of a function within the Agency. Such situations may arise for reasons including but not limited to those identified in the Policy section above.*
>
> . . .

[84] In this case, the grievor challenges a work force adjustment decision, alleging bad faith and disguised disciplinary reasons. I am satisfied that despite some differences in the labour relations regime, decisions such as *Rinaldi*, although not binding, are persuasive in establishing the burden of proof for reviewing the Agency's decision whether the grievor has been successful in training. In other words, the grievor must establish his allegation that the Agency merely alleged a layoff to disguise what is really a disciplinary termination of employment.

[85] *Lundin* was a case that involved a Canada Customs and Revenue Agency ("the CCRA") employee. Unlike the Agency, the CCRA has not been designated for the purposes of subsection 92(1) of the *PSSRA*. The adjudicator specifically considered the differences from cases in the part of the public service covered by the former *PSEA* and found that the test was one of disguised discipline. *Lundin* found as follows at ¶105:

> . . .
>
> *[105] It is not necessary to address the good faith of the employer in its decision to reject on probation (or, in other words, to assess whether the decision to reject on probation was made in bad faith) . . . once an employment-related reason for rejection on probation has been proven, the burden shifts to the grievor to demonstrate, as stated in* Dhaliwal *(*supra*), "that the employer's actions were, in fact, a sham or a camouflage or made in bad faith and, therefore, not in accordance with section 28 of the* [former *PSEA*]*." Although the analysis required in determining whether a termination is disciplinary or non-disciplinary does not refer to "bad faith", the analysis is similar: I must assess whether the rejection on probation was in fact "non-disciplinary" or if the employer merely alleged a non-disciplinary termination in order to disguise what is in reality a disciplinary termination. In other words, I must determine if the employer's reliance on a non-disciplinary reason was a "sham" or "camouflage" for disciplinary action. . . .*
>
> . . .
>
> [Emphasis added]

[86] The rights of employees of the Agency regarding workplace adjustment are set out in the ETA. Adjudicators have held in prior cases that it is not for the adjudicator to determine whether the employer's right or authority to manage its workforce was exercised in a correct manner and that the only question is whether there was a disciplinary element to the termination of an employee's employment. In this case, the issue of bad faith would also have to be considered. By extension, it is also argued that the adjudicator has no jurisdiction to review the grievor's training plan or training. In my view, it is important to hear the evidence and decide the case on the basis of all the facts proven. In all labour relations matters, it is important to consider the true substance of the facts underlying the grievance. That being said, the grievor must establish, on a balance of probabilities, that his layoff was in breach of the ETA or that, as in *Rinaldi* and *Lundin*, the Agency merely alleged a layoff to disguise what was really a disciplinary termination of employment.

2. Decision to declare a discontinuance of function

[87] In reviewing the facts of this case, I consider it apparent that the Agency did not single out the grievor in its decision to determine that his function was discontinued and that his position was surplus. Dr. Turner made a business decision to eliminate at least three positions for economic reasons. This was the unchallenged evidence of Dr. Turner. This evidence is supported by the letter dated September 30, 2003, to the grievor from Dr. Turner that referred to a discontinuance of function for an animal care veterinarian to oversee the herd. This letter referred to the ETA. No evidence was adduced by the grievor that permits me to conclude that the elimination of his position amounted to a breach of the ETA or to consider an alternative disguised discipline hypothesis.

3. Offer of employment

[88] Dr. Turner's letter of September 30, 2003, also contained a job offer. This letter was coupled with a letter from Mr. Hwozdecki containing an offer of indeterminate appointment subject to the successful completion of retraining.

[89] A reasonable job offer may not necessarily be a position where the working conditions are at all similar to the eliminated position. It is apparent that the working conditions in meat hygiene are objectively less satisfactory than in a research environment. The grievor had no history of working in a meat hygiene environment. He started with the Agency in a research capacity. He has a Ph.D. and is a qualified

research scientist. Moving from a research environment to a meat hygiene environment, in my view, would constitute a difficult adjustment in terms of attitude and working conditions. It also appeared to be a more stressful, conflict-filled environment than the grievor had experienced in the Science Branch. The objective and unchallenged evidence of Dr. Meszaros indicates that the grievor did not appear interested in the meat hygiene position.

[90] It is possible that an employer may provide a particular, difficult "reasonable offer" as a disguised disciplinary action. No example of this possibility was provided to me in the case authorities cited, but it is a theoretical possibility. I am not satisfied in this case that the Agency offered the grievor a difficult position in order to terminate his employment or as a sham or a camouflage for discipline.

[91] The authorities suggest that a letter of indeterminate appointment, subject to the successful completion of retraining, is a reasonable job offer, as noted in *Carby-Samuels*. While this is an authority arising from the labour relations of the central public service, I am satisfied that the principle is applicable to employment transition cases in the Agency. The uncontradicted evidence of Dr. Turner and Dr. Bossé was that no research positions were available in any laboratory in Canada. The grievor was given a reasonable job offer, given that no research position was available in the Agency. The Agency gave the grievor an opportunity to work by making him a reasonable job offer.

[92] I was presented with no evidence supporting a finding that the Agency has breached the ETA or has engaged in disguised discipline in offering the grievor the veterinarian-in-charge position at the Fort McLeod plant upon successful training.

4. <u>Adequacy of the training plan</u>

[93] The grievor was also given a training plan. Considerable effort appears to have been put into devising a plan that would allow him to be trained. While the training plan was being drawn up by the Agency there was some consultation with the grievor, who signed the training plan agreement. No evidence was tendered suggesting that the training plan agreement was inadequate, that it was a sham or that it was a set-up intended to ensure that the grievor would fail to become the successful incumbent. I note in particular that, at the time the job offer was made, the Agency's representative, Mr. Hwozdecki, saw it as a "win-win" solution that allowed the Agency to staff the proposed meat hygiene position without the need for the expense or delay of a staffing

process, while permitting it to retain the services of an experienced veterinarian, albeit one without a background in meat hygiene. Mr. Hwozdecki also held the proposed position open by rotating veterinarians through the position until the grievor became available.

[94] The grievor's major point is that the Agency did not provide adequate training; it only provided familiarization. Under clause 1.1.30 of the ETA, the Agency has an obligation to prepare a retraining plan, which is to be agreed to in writing by the appropriate manager. Both the Agency's representative, Dr. Turner, and the grievor approved the training plan. The ETA defines retraining as follows:

> *Retraining (recyclage) – is on-the-job training or other training intended to enable affected employees, surplus employees and laid-off persons to qualify for known or anticipated vacancies within the Agency.*

[95] The Agency clearly provided on-the-job training that would have enabled the grievor to qualify for appointment as the veterinarian-in-charge at the Fort McLeod plant. The grievor relied on *Ivaco* and *Labatt* in arguing that on-the-job training is familiarization and not training. These authorities arise from private sector arbitrations. On-the-job training is a form of retraining that is expressly provided for in the ETA. The authorities cited arise from another labour relations context and contradict the definition provided in the ETA and therefore I place no reliance on these authorities. I reject the grievor's argument that on-the-job training is familiarization and not training.

[96] The one gap in the training program, which has become apparent through the evidence, is the lack of any training to deal with difficult personalities or conflict in the workplace. There is no indication that the grievor ever requested this specialized form of training. Furthermore, the adequacy of the training program was not a matter raised by the grievor during the course of the training period. He did not ask for any additional training or identify defects in the training plan to which he agreed or in the training provided. It appears that the Agency sought to address this issue by exposing the grievor to the difficulties of the workplace, with the hope that he would gain experience through the exercise of management responsibilities. It was clear at least to Dr. Fletcher that the grievor had the capacity to supervise.

[97] In my view, the adequacy of a training program is a matter that is purely within the purview of the Agency. The *PSSRA* does not remove the Agency's right or authority

to determine its organization, to assign duties or to classify positions. Dr. Turner, in my view, appears to have put careful effort into determining what training the grievor needed in order to be successful in a transition from a position as a research scientist to a position as veterinarian-in-charge of a meat packing plant. The grievor has not established a breach of the collective agreement.

[98] The inadequacy of a training program was argued as a basis for finding a disciplinary element and rejected in *Earle*. This argument, however, is difficult to make in light of the authorities. In light of Note 15 in *Rinaldi*, where an employee fails to prove that the conditions required to terminate a position were not present, and the employer's decision is unchallenged, it may be difficult to prove disguised discipline based on inadequate training. *Earle* was a rejection-on-probation case from a central government department where the former *PSEA* applied and is of persuasive value only. I note that *Rinaldi* was a case that involved the former *PSEA* and the layoff provisions of that Act (section 29) and is also of persuasive value only.

[99] As a theoretical possibility, an inadequate training program may be some evidence of disguised discipline. It may be part of a set-up designed to ensure that the employee fails and then is terminated. I cannot say, in looking at the training plan agreed to by all parties, that it was so grossly inadequate as to constitute a sham or camouflage for discipline. I see no basis for me to conclude that it was part of a set-up designed to ensure that the grievor failed. The contrary seems to be true; Mr. Hwozdecki would have liked the grievor to succeed in the training plan, as it would have solved the problem at the Fort MacLeod plant.

5. <u>Termination of the training plan</u>

[100] The grievor has also argued that he was entitled to up to two years of training and that the failure to provide two years' worth of training breached the collective agreement.

[101] Clause 4.2.1 of the ETA provides that a surplus employee is eligible for retraining when:

. . .

> *(a) retraining is needed to facilitate the appointment of the individual to a specific vacant position or will enable the individual to qualify for anticipated*

> *vacancies in occupations or locations where there is a shortage of qualified candidates;*
>
> . . .

For its part, clause 4.2.3 provides that continuation and completion of training are subject to ongoing satisfactory performance if the training is "on-the-job." Clause 4.2.6 further provides that an employee who is unsuccessful in retraining may be laid off where the Agency is unsuccessful in making the employee a reasonable job offer.

[102] The Agency determined that the grievor was unsuccessful in completing his training plan. The decision of whether a surplus employee has been successful or unsuccessful in training is a judgement call as to the suitability of the employee for the new work. In accordance with section 13 of the *CFIAA*, clause 1.1.12 of the ETA provides that it is the president of the Agency who decides whether an employee is suitable for employment:

> . . .
>
> ***Part I***
>
> ***Roles and responsibilities***
>
> ***1.1 Agency***
>
> . . .
>
> ***1.1.12*** *The President shall decide whether employees are suitable for appointment. Where the President decides that an employee is not suitable, he/she shall advise the employee, and his/her representative of the decision as to whether the employee is entitled to surplus and lay-off priority. The President shall also inform the bargaining agent of this decision.*
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> . . .

[103] The grievor has argued that the adjudicator should apply the standard set out in *Edith Cavell* in assessing whether the grievor successfully completed his training and demonstrated a capacity to perform the work involved in the proposed position. The standard set out in *Edith Cavell* is commonly applied to non-disciplinary terminations of employment and relates to an employee who occupies an existing position and fails to meet the requirements of that existing position. The facts in *Edith Cavell* did not involve an employee who was training for a new position and failed to perform satisfactorily during training. In assessing continuation of training and appointment

under the ETA, the Agency is concerned with the suitability of an employee in a new position. If the employee is unsuitable for appointment to the new position the ETA provides for other entitlements. The grievor has not established on a balance of probabilities that the Agency has breached the ETA in terminating his training plan.

[104] There is no doubt that the Fort MacLeod plant was difficult to manage. Part of that difficulty has to be attributed to the Agency's actions in rotating VM-01's through that plant as an interim supervisory measure. This temporary staffing measure was implemented with the intention of trying to keep the position open for the grievor, as the need to staff the position due to Dr. Ford's retirement was coincident with the Agency's need to find a reasonable position to offer the grievor.

[105] A troubling aspect of this case is why the Agency did not provide the grievor with any training in the management of difficult persons and difficult workplaces. I am, however, not satisfied that I can draw any inference of disguised discipline from the failure to provide training in this one area. Perhaps in retrospect this was a deficiency in the training plan. It was not a deficiency in the plan that was identified by any party during the training period.

[106] There is no evidence that the decision to terminate the training program was motivated by any disciplinary considerations. A review of the documentary and oral evidence indicates that the Agency offered a number of reasons for its conclusion that the grievor's performance was inadequate. The reasons expressed by the Agency and supported in the documentary and oral evidence were that the grievor failed to achieve a satisfactory standard of performance regarding the supervision of other employees. These reasons as worded reflect a termination of training for non-culpable reasons, not disciplinary reasons. There are no other reasons explaining why the grievor was unsuccessful during his training period. There were no hidden reasons.

[107] Furthermore, the Agency extended the training period. The Agency demonstrated on objective evidence that there was a rational basis for its conclusion that the grievor failed to complete the training program, despite an extension. The credibility of the Agency's witnesses was not successfully undermined through cross-examination.

[108] I am not satisfied that there is any evidence of disguised discipline. There is no evidence that would support an inference that there was disguised discipline, or

indeed that discipline played any role in the termination of the grievor's employment. It is more probable than not that the grievor was not interested in the proposed meat hygiene position. This is demonstrated by his application for a one-year leave of absence in the midst of a training program. He asked for a lengthy period of leave at a time when it made no objective sense from the perspective of either party to be taking leave, and he failed to produce an action plan to handle the human resources problems in the workplace.

6. Reasons for termination

[109] The Agency's expressed reasons for the end of the employment relationship were the lack of other work available to the grievor during the period of layoff, once he was transferred back to the Laboratory. The available evidence demonstrates that there was no work available for him at the Laboratory or elsewhere in the organization. The grievor has established no breach of the collective agreement on a balance of probabilities. There are also no hidden disciplinary reasons behind this conclusion. I have concluded that there is no disciplinary element to the Agency's decision to terminate the grievor's employment.

7. Failure to appoint at a lower level

[110] The grievor did not supply a résumé to the Agency and did not show any interest in appointment to a VM-01 position at another establishment. Under clause 1.1.16 of the ETA, appointment of surplus employees is usually made at a level equivalent to the position previously held. The ETA also directs the Agency to avoid appointment at a lower level except where all other avenues have been exhausted.

[111] On a balance of probabilities, I cannot find any breach of the ETA by the Agency in not appointing the grievor to a lower level position or any disciplinary motives on the part of the Agency in this regard.

8. Conclusion

[112] I have considered and reviewed the evidence relating to the Agency's decision to declare the grievor's Laboratory position surplus, the Agency's decision-making process relating to the making of an offer of employment, the Agency's training proposal and the training undertaken by the grievor. On the evidence before me, it appears that there has been a *bona fide* discontinuance of the herd research function. I have come to this conclusion after reviewing the entire factual matrix and asking

myself whether there is evidence that would support an inference of disguised discipline.

[113] The reason for layoff under the ETA was that the grievor's position had been declared surplus, the Agency made a reasonable job offer and the grievor failed to demonstrate that he met the requirements of the proposed veterinarian-in-charge position after being provided with training. Since he was not successful, his status remained that of an incumbent of a position that was declared surplus. He was not laid off because he failed to perform adequately the duties of his surplus position. He was laid off because the functions of his surplus position were discontinued and there was no other reasonable job opportunity available to him after he failed to demonstrate satisfactory performance regarding staff supervision, which was an essential duty for appointment to the proposed veterinarian-in-charge position. The grievor has not established a breach of the ETA.

[114] It is my view that there was no disguised discipline in the Agency's decision to eliminate the grievor's position, or in its decision not to appoint the grievor to the proposed veterinarian-in-charge position at the Fort MacLeod plant. The Agency provided a reasonable job offer subject to training and, since the grievor was unable to demonstrate satisfactory ongoing performance during training, the Agency terminated his training for the proposed veterinarian-in-charge position at the Fort McLeod plant. He was reinstated in his surplus position and laid off. The Agency has not used the ETA to lay off under the guise of employment transitions an employee whose employment the Agency could not otherwise terminate for just cause, as in *Matthews* (F.C.T.D.). By all accounts, the grievor was a good employee in his surplus Laboratory position, but was unsuitable for the proposed position at the meat packing plant.

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

(The Order appears on the next page)

VI. Order

[116] The grievance is dismissed.

February 28, 2007.

Paul Love,
adjudicator