Date: 20070328

Files: 466-HC-362
461-HC-23

Citation: 2007 PSLRB 32

Parliamentary Employment and Staff Relations Act

Before an adjudicator and the Public Service Labour Relations Board

BETWEEN

SATNAM VAID

Grievor and Complainant

and

HOUSE OF COMMONS

Employer and Respondent

Indexed as
Vaid v. House of Commons

In the matter of a grievance referred to adjudication and a complaint under section 13 of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator and Board Member

For the Grievor and Complainant: Paul Champ, counsel

For the Employer and Respondent: Jacques Emond and Raquel Chisholm, counsel

Heard at Ottawa, Ontario,
February 12 and 13, 2007.

I. Grievance referred to adjudication and complaint before the Board

[1] Satnam Vaid and the House of Commons have been involved in litigation about his employment since 1995. Mr. Vaid grieved his termination in 1995 and was reinstated by an order of the Public Service Staff Relations Board (PSSRB) in 1995 (PSSRB File No. 466-HC-260 (19950727)). He filed a human rights complaint against the House of Commons in 1997 and one against the Speaker of the House of Commons. The employer raised a preliminary jurisdictional matter before the Canadian Human Rights Tribunal (CHRT) that was ultimately appealed to the Supreme Court of Canada (SCC). The SCC's decision was issued on May 20, 2005 (2005 SCC 30). The SCC determined that Mr. Vaid was in the wrong forum and should have grieved under the *Parliamentary Employment and Staff Relations Act* (*PESRA*).

[2] On July 29, 2005, Mr. Vaid filed a complaint under paragraph 13(1)(*c*) of the *PESRA*, alleging a failure of the employer to give effect to the adjudicator's decision issued in 1995. He had also submitted a grievance on June 21, 2005, alleging discrimination and seeking reinstatement to his former position of chauffeur to the Speaker of the House of Commons. The allegations in the grievance relate to events that occurred both prior to the 1995 PSSRB decision and the period afterwards, up until 1997. This decision addresses both the complaint and the grievance.

[3] The employer made a motion to have both matters dismissed for delay. In the alternative, the employer argued that parts of both the complaint and the grievance are subject to the principles of *res judicata* (the final and binding nature of the 1995 decision) and issue estoppel. This decision relates solely to the preliminary objections raised by the employer. After hearing the submissions of the parties, it was clear that there was a consensus that the 1995 PSSRB decision was final and binding. Accordingly, I will not summarize the submissions of the parties on the issue of *res judicata*, as Mr. Vaid has conceded this objection.

[4] One witness testified on behalf of the employer. A number of documents were also admitted into evidence on consent.

II. Summary of the evidence

[5] Mr. Vaid was a chauffeur for the Speaker of the House of Commons at the time, Gilbert Parent. He grieved his termination, and the grievance was referred to adjudication before the predecessor of the Public Service Labour Relations Board ("the

Board"), the PSSRB. In a decision issued on July 27, 1995, the adjudicator allowed Mr. Vaid's grievance and reinstated him to his position at the House of Commons. The decision of the adjudicator, Yvon Tarte, is attached at Appendix "A".

[6] The adjudicator made the following findings:

. . .

> *Reasons for Decision*
>
> *In the world of labour relations, the employer has the intrinsic right to manage and organize its workplace. That right is however subject to whatever limits are imposed by law or collective bargaining.*
>
> *In many instances collective agreements will merely control how changes are made in the workplace rather than prohibit their occurrence. For instance, seniority under certain contracts will determine who gets what new assignment. In this case neither contract nor statute has been produced to indicate the existence of a limit on the employer's basic right to transfer staff and reassign duties to its employees.*
>
> *With these general principles in mind I must now assess the facts of this case. The employer argues that it has only sought to exercise its right to use its resources as it sees fit and that Mr. Vaid refused to cooperate.*
>
> *The evidence presented does not permit me to conclude that there was ever in fact a transfer or a reassignment of duties. At no time did the employer actually order the grievor to perform additional duties or work different hours. The discussions between Mr. Vaid and Mr. Gaon were more in the nature of negotiations. The employer's conduct in simply asking whether Mr. Vaid was willing to assume certain duties and in discussing the matter on several occasions could certainly have left the impression that it was prepared to negotiate and that its plans for a modified workforce were not set.*
>
> *It is clear from the evidence that the employer uses a system of written job descriptions. Yet no modified and duly approved job description was ever presented to Mr. Vaid. The existence of such a document would have crystallized the situation and forced the grievor to accept the revised position or move on to something else. Before an employee can be said to have refused to perform duties assigned to his position, the employee must be given a clear statement of those duties and be told in unequivocal terms that they now belong to the position and must be performed. This certainly*

> *was not done in this case. The fact that an employee refuses to voluntarily accept proposed changes to his duties and his hours of work does not, in itself, provide grounds to terminate his employment.*
>
> *Mr. Vaid has alleged discrimination and suggested that he might have been asked to clean dishes because of the colour of his skin. The evidence presented certainly does not permit me to reach that conclusion. It does however lead me to conclude that the employer acted precipitously and somewhat high-handedly in terminating Mr. Vaid.*
>
> *I see nothing wrong with the requirement that a driver run errands, answer phones, clean dishes or work split shifts but whatever is required of the employee must be clearly written down in an approved job description. In November, 1994, the grievor, through his counsel, advised the employer that he was prepared to perform any functions duly assigned to his job descriptions* [*sic*]*. This offer was never acted upon by the employer who continued to offer alternate positions.*
>
> *Neither the Speaker nor Mr. Gaon have testified. I have no direct evidence from which to conclude that Mr. Vaid ever refused to perform any function properly assigned to him and that the trust between employer and employee has been irremediably destroyed. The position of chauffeur in the Speaker's Office is a House of Commons position. It has not been occupied by exempt staff since 1986. The notion of a "comfort zone" would be more acceptable in the context of an exempt position but it looses* [*sic*] *some of its appropriateness when dealing with a House of Commons position.*
>
> *Mr. Vaid will therefore be reinstated into the chauffeur position in the Speaker's Office without loss of pay or benefits. Mr. Vaid shall, forthwith after reinstatement, reimburse to the employer the severance monies given to him upon termination. If new duties have been assigned to the position, a duly approved modified job description will be provided to the grievor upon his return to work or shortly thereafter.*
>
> . . .

[7] Upon his reinstatement, Mr. Vaid was provided with a revised job description (Exhibit G-2), was advised that there were new language requirements for the position, and was told that he was required to go on French language training. On April 8, 1997, Mr. Vaid advised his employer that he wanted to return to his position.

[8] Jacques Sabourin (now retired) was Director of Human Resources at the House of Commons in 1997. He testified that he met with Mr. Vaid on April 2, 1997. At that time, he prepared a summary of the meeting (Exhibit E-1, tab 2). Mr. Vaid was having difficulties meeting the language proficiency, and Mr. Sabourin proposed that the employer provide extra training. He advised Mr. Vaid that he was to be assigned to the Protocol Office. During the meeting, Mr. Sabourin had the impression that Mr. Vaid was alleging that he had been discriminated against, although Mr. Vaid did not use the word "discrimination". At a further meeting on April 7, 1997, Mr. Sabourin discussed options with Mr. Vaid (Exhibit E-1, tab 3). Mr. Vaid told him that he would continue taking additional French language training "under protest." Mr. Vaid also told Mr. Sabourin that he wanted to return to his former position as chauffeur.

[9] Mr. Vaid's counsel at that time (and up until August 2006) was Dougald Brown. On April 8, 1997, Mr. Brown wrote to counsel for the employer as follows (Exhibit E-1, tab 4):

. . .

> *I am writing to advise you that Mr. Vaid wishes to resume the duties of his substantive position of driver/office clerk in accordance with the decision of Mr. Tarte dated July 27, 1995. If immediate steps are not taken to comply with the Adjudicator's Order, I intend to file a complaint pursuant to s. 13(1)(c) of the* **Parliamentary Employment and Staff Relations Act**.
>
> *In the meantime, Mr. Vaid will continue with further language training . . . under protest and without prejudice to his right to request an Order from the Board directing compliance with Mr. Tarte's Order.*
>
> . . .
>
> [Emphasis in the original]

[10] In his letter, Mr. Brown also disputed the linguistic requirements of the position and stated that he had instructions to file a complaint with the Commissioner of Official Languages. Mr. Sabourin testified that he was not aware of any complaint made to the Commissioner regarding Mr. Vaid.

[11] Counsel for the employer replied to Mr. Brown in a letter dated May 5, 1997 (Exhibit E-1, tab 6), and stated that it was the employer's view that it had complied with the adjudication decision. He further advised that the Speaker's Office was being

reorganized and that all indeterminate positions were to be declared surplus. Mariette Grant, personal assistant to the Speaker, wrote to Mr. Sabourin on May 1, 1997 (Exhibit E-1, tab 5), about the decision of the Speaker to reorganize his office and make all staff politically exempt (and therefore not subject to the *PESRA*).

[12] Mr. Sabourin wrote to Mr. Vaid on May 12, 1997, telling him that the Speaker's Office was being reorganized and providing him notice that his position was being declared surplus effective May 29, 1997 (Exhibit E-1, tab 7). Mr. Brown wrote to counsel for the employer on May 22, 1997 (Exhibit E-1, tab 8), stating that he would be taking the entire matter up "in due course" with the members of the Board of Internal Economy (BIE). The BIE is a management board for the House of Commons made up of representatives of all political parties. Mr. Sabourin testified that to his knowledge, neither Mr. Vaid nor his counsel raised this matter with the BIE. He stated that he would have been advised if the BIE had been contacted.

[13] Mr. Vaid filed two substantively identical complaints with the Canadian Human Rights Commission (CHRC) on July 10, 1997: one against the House of Commons and the other against the Speaker of the House of Commons. Mr. Vaid alleged that his right to equal treatment in employment had been infringed because of his race, colour and ethnic or national origin. The SCC summarized the allegations as follows:

> . . .
>
> *- [The appellant Speaker] suggested that I was overqualified for the position.*
>
> *- [The appellant Speaker] questioned my wife regarding her employment and made her feel as though he was trying to assess whether she could financially support me in the event that I lost my job.*
>
> *- While I was driving the [appellant Speaker] in February 1994, he initiated a conversation about the caste system in India. He pressed me to tell him into which caste I had been born.*
>
> *- [The Speaker's Executive Assistant] indicated that because of budgetary cuts, he wanted to place me on a split shift and asked me to take on additional duties, including washing dishes. I responded that I would work a split shift, and I would wash dishes if he could demonstrate that other chauffeurs were also asked to take on this duty.*

> *- In March 1994, I started wearing a soft cervical collar on the job, necessitated by a whiplash injury suffered earlier in the year. On March 25, 1994, the Executive Assistant advised me that I was not to drive the [appellant Speaker] while wearing the collar. My driving duties were taken away and assigned to a white, unilingual (English) employee.*
>
> *- On October 14, 1994, the [appellant House of Commons] contacted me to offer me work as a photocopier operator, a messenger or a mini-van operator. Alternatively, I was offered a severance package. I advised the [appellant House of Commons] that I wished to be reinstated to my position as chauffeur to the Speaker immediately.*
>
> *- Since my driving duties were taken away from me in March 1994, they have been carried out by two other employees, both of whom are white.*
>
> *- I believe that my right to equal treatment in employment has been infringed upon by the respondent because of my race, colour and ethnic or national origin.*
>
> . . .

[14] In addition, the complaints to the CHRC referred to the grievance against his termination and the subsequent decision of the PSSRB. The complaints also referred to his surplus letter of May 12, 1997 (Exhibit E-1, tab 7).

[15] Mr. Vaid was deployed to the position of Office Assistant, effective January 4, 1999 (letter dated April 20, 1999, Exhibit E-1, tab 12). Mr. Brown wrote to the Clerk Assistant of the House of Commons on May 4, 1999 (Exhibit E-1, tab 13), as follows:

> . . .
>
> *We do not agree with the description of Mr. Vaid's status as set out in your letter.*
>
> *As you may know, the Public Service Staff Relations Board ordered Mr. Vaid reinstated into the position of chauffeur in the office of the Speaker of the House of Commons. Our position is that there was no lawful basis for the removal of Mr. Vaid from that position. Nor was there any lawful basis for refusing to comply with the Order of the Public Service Staff Relations Board.*
>
> *The treatment of Mr. Vaid is the subject of a complaint to the Canadian Human Rights Commission, a copy of which is enclosed . . . I wish it to be clearly understood that his continuing to perform his current duties as Office Assistant is*

> *without prejudice to our position that he ought to be reinstated to the position of chauffeur to the Speaker of the House of Commons.*
>
> . . .

[16] Before the CHRT, the employer objected to the jurisdiction of the CHRT on the basis of parliamentary privilege. The CHRT dismissed the objection in 2001 (40 C.H.R.R. D/229), and the employer appealed to both the Federal Court (2001 FCT 1332) and the Federal Court of Appeal (2002 FCA 473 (QL)), losing both. The employer further appealed to the SCC.

[17] The SCC ruled in Mr. Vaid's favour on the issue of parliamentary privilege. However, it concluded that Mr. Vaid was in the wrong forum:

> . . .
>
> *83 PESRA confers labour relations' jurisdiction over employees like the respondent Vaid, the subject matter of his grievance (discrimination) and the remedial powers to resolve such a grievance. The issue is whether PESRA's system of redress, which runs parallel to the enforcement machinery provided under the* Canadian Human Rights Act, *manifests a parliamentary intention to oust the dispute resolution machinery of the Canadian Human Rights Commission. I conclude that it does.*
>
> . . .
>
> *87 It was therefore open to the respondent Vaid to submit a grievance under PESRA in 1997 as did* [*sic*] *in 1995 (with partial success) to pursue his workplace complaints.*
>
> . . .
>
> *88 While the respondent Vaid's complaints do not specify the relief he seeks . . . .PESRA adjudicators are invested with broad powers to resolve workplace grievances. The relief sought by the respondent Vaid in 1995 was reinstatement. The PESRA adjudicator ordered reinstatement once. If the respondent Vaid's complaint of constructive dismissal is well-founded, a PESRA adjudicator has authority to do so again. The PESRA adjudicator also considered (and rejected) the respondent Vaid's earlier complaints of discrimination and harassment, as mentioned above. Those, too, were issues that could be* and were *dealt with under PESRA.*
>
> . . .

89 Section 2 of PESRA provides that where other federal legislation deals with "matters similar to those provided for under" PESRA, PESRA prevails, i.e.,

> *. . . except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act . . . shall apply. . . .*

. . .

*93 The fact that the respondent Vaid claims violations of his human rights does not automatically steer the case to the Canadian Human Rights Commission because "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute" (*Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929, at para. 49;* St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, *[1986] 1 S.C.R. 704, at p. 721).*

94 In this case, the complaint against the House of Commons alleges dismissal and discrimination. The "facts giving rise to the dispute", as set out in the complaint, make only one explicit reference to the respondent Vaid's ethnic origin, namely that "[the Speaker] initiated a conversation about the caste system in India. He pressed me to tell him into which caste I had been born" (appellants' record, at p. 247). Other than that, the respondent Vaid relates a number of events in the course of his employment which, on the face of it, allege demeaning or unreasonable treatment inconsistent with the alleged terms of employment. The respondent Vaid takes the view that this behaviour was motivated *by racial prejudice. His allegations are specific to the former Speaker and his Executive Assistant, i.e.:*

. . .

[At this point, the Court sets out the allegations in the human rights complaints.]

There is nothing here, in my respectful opinion, to lift these complaints out of their specific employment context.

95 It is true, as the respondents submit, that PESRA is essentially a collective bargaining statute rather than a human rights statute. The substantive human rights norms set out in the Canadian Human Rights Act *are not set out in PESRA. Nevertheless, PESRA permits employees who complain of discrimination to file a grievance and to obtain substantive relief. I do not suggest that all potential claims to relief under the* Canadian Human Rights Act *would be barred by s. 2 of PESRA, but in the present type of dispute, there is clearly a measure of duplication in the two statutory regimes and the purpose of s. 2 is to avoid such duplication.*

> *Parliament has determined that grievances of employees covered by PESRA are to be dealt with under PESRA. A grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations (see* Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42.*
>
> . . .
>
> *100 In the result Mr. Vaid's workplace complaints ought to have been considered in 1997 as they were (with partial success) in 1995, by way of a grievance under PESRA.*
>
> . . .

[18] On June 21, 2005, Mr. Vaid filed a grievance alleging discrimination. The grievance details were an exact reproduction of those set out in the human rights complaints, with a slight variation in the last paragraph, that reads as follows:

> . . .
>
> *I believe the House of Commons has infringed my right to equal treatment in employment on the basis of my race, colour and national or ethnic origin and I hereby grieve this discrimination against me.*

[19] As corrective action, Mr. Vaid requested immediate reinstatement to his former position as chauffeur/personal assistant, and to be made whole.

[20] Mr. Vaid filed a complaint under section 13 of the *PESRA* on July 29, 2005. In the complaint, he alleges that he has never been reinstated to his chauffeur position. In the section of the complaint form where the complainant is asked to identify steps taken for adjustment of the complaint, Mr. Vaid listed his human rights complaints and subsequent history. He also noted that there had been communication between his counsel and counsel for the employer "but no solution has been forthcoming." He requested the following order:

> . . .
>
> *15. The employer has had almost ten years to implement the Adjudicator's decision, and has been unwilling to do so. Mr. Vaid therefore seeks an order that the Board give effect to the Adjudicator's decision and order the employer to reinstate him into the position of chauffeur to the Speaker of the House of Commons.*

[21] Mr. Vaid changed legal counsel in August 2006 when he retained Paul Champ, counsel with a different law firm.

[22] Due to an administrative error on the part of this Board, the complaint was not brought to the employer's attention until September 7, 2006.

[23] Mr. Sabourin took a pre-retirement assignment outside of the House of Commons in July 1998 and retired in 1999. He testified that others involved with Mr. Vaid's case have retired from the House of Commons. He was not certain about the status of Ms. Grant, the personal assistant to the Speaker.

III. Summary of the arguments

A. For the employer

1. Dismissal of complaint and grievance for delay

[24] Counsel submitted that in labour relations, complaints should be filed and acted on as quickly as possible where any delay would prejudice a fair hearing. Mr. Vaid was provided with a revised job description in August 1995. For two years there was no complaint or grievance filed. In 1997 his counsel stated that he intended to file a complaint. Through his counsel Mr. Vaid was aware of what he could do and had threatened to do it. The employer's position was made clear in a letter dated May 5, 1997 (Exhibit E-1, tab 6). Mr. Vaid did not file a grievance or a complaint.

[25] Counsel argued that there was nothing stopping Mr. Vaid from filing a grievance or a complaint at the same time as he filed his complaints under the *Canadian Human Rights Act* (*CHRA*). The decision of the SCC held that Mr. Vaid should not have gone to the CHRC, as he had the opportunity to file a grievance under the *PESRA*. After filing a grievance and a complaint in 2005, Mr. Vaid did not pursue either until August 2006, when Mr. Champ became his counsel.

[26] Counsel noted that in *Harrison v. Public Service Alliance of Canada*, PSSRB File No. 161-02-725 (19951023), a delay of three years was held to be unreasonable. Here, the delay is at least eight years. Although there is no time limit for filing a complaint under the *PESRA*, there is now a 90-day time limit under the *Public Service Labour Relations Act* (*PSLRA*).

[27] Counsel submitted that the length of the delay created a presumption of prejudice in favour of the employer (*Redpath Sugars, Division of Redpath Ind. Ltd.,* [1997] O.L.R.D. No. 3600). Mr. Sabourin testified that all the individuals involved with Mr. Vaid's case are now retired and are no longer dealing with the matter on a regular basis. In *Teeluck v. Public Service Alliance of Canada*, 2001 PSSRB 45, the complainant was unrepresented. In Mr. Vaid's case, he has been represented by competent counsel since 1994. Furthermore, his counsel was aware of the statutory framework for parliamentary employees.

[28] Counsel noted that Mr. Vaid did not testify and that there was no evidence to establish circumstances that were exceptional or outside of his control.

[29] Counsel submitted that Mr. Vaid went to the wrong forum to resolve his issues with the employer. He had previously filed a grievance under the *PESRA* and was mainly successful. There was nothing to stop him from filing a grievance or a complaint in 1997, and he has provided no reasonable explanation for not doing so. The fact that the employer challenged the right of the CHRT to hear the complaints did not excuse Mr. Vaid from filing a grievance or a complaint under the *PESRA*, especially when threatening to do so.

2. Issue estoppel

[30] Counsel argued that since the 1995 PSSRB decision is final, I should use my discretion and rely on the findings in that decision. In particular, the employer wanted to rely on the adjudicator's findings in the following areas:

- Mr. Vaid's allegation that he was "surprised" to learn that there were changes in his job description when the decision found that there were discussions about changes in duties and language requirements as early as 1994;

- Mr. Vaid's grievance and complaint imply that Mr. Vaid's surplus status arose out of his return-to-work request in 1997, when the decision found that the origins of the reorganization started in 1994; and

- the finding of no discrimination by the adjudicator for events prior to the issuance of the decision.

[31] Counsel referred me to the test in *Danyluk v. Ainsworth Technologies Inc.*, 2001, SCC 44. Counsel submitted that the parties were the same and the decision was judicial and final. Counsel further submitted that I should exercise my discretion and grant the motion for dismissal. Counsel referred me to the seven factors to consider in exercising discretion set out in *Danyluk*:

1) the wording of the statute;

2) the purpose of the legislation;

3) the availability of appeal;

4) the safeguards available to the parties;

5) the expertise of the decision-maker;

6) the circumstances giving rise to the prior administrative proceeding; and

7) the potential injustice.

[32] Counsel noted that there is a provision in the *PESRA* for a review of an adjudicator's decision (section 17). Mr. Vaid is not seeking a review, but is seeking to re-litigate matters already conclusively dealt with by the adjudicator in the 1995 decision. Re-litigation is not in accordance with the underlying purpose of a labour relations statute. The availability of an appeal process and judicial review is also a factor that should be considered. There were sufficient safeguards at the 1995 hearing. It was a two-day hearing, Mr. Vaid was represented, and there were procedural safeguards. The adjudicator had sufficient expertise. No injustice was suffered by Mr. Vaid; he had his day in court and the issues were fully canvassed.

B. <u>For Mr. Vaid</u>

1. <u>Dismissal of complaint and grievance for delay</u>

[33] Counsel argued that in the absence of statutory time limits for the filing of a complaint under the *PESRA*, the dismissal sought by the employer is discretionary. The overriding and ultimate consideration is that justice should be done between the parties. Mr. Vaid's case is an exceptional one. In 1997, the House of Commons did not tell Mr. Vaid that he should grieve his matters. In fact, at all levels prior to the SCC, Mr. Vaid was never told that he should grieve. Mr. Vaid did a service to his country by

contesting the employer's position on parliamentary privilege. The interrelatedness between the *Public Service Staff Relations Act* and the *CHRA* was being debated at the time of Mr. Vaid's complaint (e.g., *Canada (Attorney General) v. Boutilier,* [2000] 3 FC 27 (F.C.A.)). The relationship between the *PESRA* and the *CHRA* was almost entirely unlitigated. From 1995 on, Mr. Vaid did everything possible to have this matter adjudicated. He always had the continued intention that his allegations be heard.

[34] Counsel stated that the determination of dismissal for delay was tied to the notion of waiver or acquiescence. The acts done during the interval between the events complained of and the filing of the complaint or grievance are important factors (*M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6). Mere delay is not sufficient to support the dismissal of a matter for delay. It is important to balance justice and injustice.

[35] Counsel argued that the response to cases of delay is not mechanical, but requires an examination of the reasons for the delay and the prejudice suffered. There is prejudice suffered by both sides as a result of the delay in this case. If the SCC had ruled the other way, the parties would have been before the CHRT. I was referred to the factors for assessing delays as set out in *Abitibi-Price, Inc. v. United Paperworkers International Union, Local 1375* (1993), 38 L.A.C. (4th) 59. A key factor is whether the employer was surprised by the existence of a dispute. It is clear that the employer was aware of Mr. Vaid's dispute. There is a reasonable explanation for the delay, and there is no allegation of bad faith on the part of Mr. Vaid. In terms of the nature and severity of the delay, there is no evidence that it is impossible to assess or evaluate the evidence related to this case. The retirement of some of the witnesses does not constitute "substantial prejudice" (*Clements v. The Crown in right of Ontario (Liquor Board of Ontario)* (1981), 28 L.A.C. (2d) 289).

[36] Counsel submitted that prejudice was not "unequivocally and unavoidably the result of the delay" (*Abitibi-Price, Inc.*). The employer did not tell Mr. Vaid that he should have grieved until much later in the process. It was the employer that took the CHRT decision all the way to the SCC, losing at each step of the way.

[37] Counsel also referred me to the summary of factors to use in assessing prejudice in Brown and Beatty, *Canadian Labour Arbitration*, at para 2:3214, and submitted that none of those factors apply to this case:

> *Under the doctrine of laches or undue delay, mere delay alone usually will not be a bar to arbitration. Rather, in each case it will be necessary to determine whether the delay caused prejudice to the party objecting. And in that regard, arbitrators have held that the absence of an important witness, a change in position such as entrenching a practice, the destruction of important records, or a lessening of the company's ability to deal with the dispute or to have a "fair hearing", was of sufficient prejudice to warrant dismissal of the grievance.*
>
> [Footnotes omitted]

[38] Counsel noted that should the grievance and complaint proceed, precautions can be taken as set out in *Gagnon v. Public Service Alliance of Canada*, PSSRB File No. 161-02-687 (19930621). It is fair and appropriate to place a lot of caution on oral testimony. He submitted that this is a "document-heavy" case.

[39] Counsel submitted that Mr. Vaid did not proceed with a complaint and grievance in 1997 because he decided to take the human rights route. There could have been concurrent processes, but they would have been duplicative and costly for an individual to bear. It was definitely not clear that the PSSRB could consider the *CHRA*. It was reasonable for Mr. Vaid to want relief from one forum and not have to pay for three separate ones.

[40] Counsel argued that the *PESRA* is ambiguous on the appropriate forum and that it is not fair to wait until now to suggest that Mr. Vaid should have proceeded by way of a grievance and complaint. Parliament should be held to a higher standard than other employers. Mr. Vaid was represented by experienced counsel, and Federal Court judges agreed with him for some time on the appropriate route for addressing his concerns.

[41] Counsel noted that the triggering event was the elimination of Mr. Vaid's position in May 1997. It is from that point that the delay should be measured. The delay between August 2005 and August 2006 was not Mr. Vaid's fault. The *P.E.S.R.A. Regulations and Rules of Procedure* are clear: it is this Board that serves the respondent with the complaint. Mr. Vaid does not have the power to get a hearing scheduled.

[42] Counsel submitted that the prejudice of proceeding in the circumstances is not significant. The focus of the complaint and grievance are on the good faith of the reorganization in May 1997, and the hearing will not get into "he said, she said" testimony. It is clear that the House of Commons was aware of the allegations in 1997.

2. Issue estoppel

[43] Counsel submitted that Mr. Vaid's allegation that the surplus declaration in 1997 was discriminatory was not addressed in the 1995 PSSRB decision. Discrimination was not squarely before the adjudicator. There was no hard finding of fact on some critical issues. There were no findings on the discussions about race with Mr. Parent. There was no evidence on the meeting between Mr. Parent and Mrs. Vaid. Those issues are still "alive", and I should hear evidence on them. He referred me to *Sherman v. Canada Customs and Revenue Agency*, 2004 PSSRB 125, and *Basudde and Chopra v. Health Canada*, 2006 CHRT 10. Hearing evidence on this was not contrary to the findings of the adjudicator in 1995, and I should exercise my discretion to hear evidence on these matters.

C. Rebuttal

[44] Counsel submitted that counsel for Mr. Vaid was making "revisionist history" to provide a reasonable explanation for the delay.

[45] Counsel also objected to the suggestion that Parliament should be held to a higher standard than other employers. There is a major distinction between Parliament and the House of Commons. The House of Commons is the employer of the administrative staff that serves Parliament; Parliament is not before this Board.

[46] Counsel stated that he had never heard of an obligation on the part of an employer to tell an employee where to go for recourse, especially when that employee is already represented by counsel. The SCC confirmed that the *PESRA* was clear on the appropriate forum. The suggestion that the employer was to blame for the delay by appealing all the way to the SCC amounted to penalizing the employer for taking legal recourse. This was not valid law.

[47] Counsel also noted that the *P.E.S.R.A. Regulations and Rules of Procedure* are clear: it is the responsibility of the grievor to move the grievance through the process.

IV. Reasons

[48] Mr. Vaid has been litigating employment-related events since 1995. After approximately 12 years, he has reached the end of the road. For the reasons set out below, I have concluded that both the grievance and the complaint should be dismissed for delay.

[49] Counsel for Mr. Vaid suggested that Parliament should be held to a higher standard than other employers. I disagree. The House of Commons is an employer like any other and should not be held to a different standard than any other employer.

[50] There are no time limits for the filing of a complaint under section 13 of the *PESRA*. There are time limits for the filing of a grievance and for the referral of a grievance to adjudication. There is no dispute that Mr. Vaid missed the deadline for the filing of his grievance. This Board has the discretion to extend time limits for the filing of grievances in appropriate circumstances. Although there is some similarity in the analysis when looking at delays in complaints and grievances, I will look at each separately.

A. The complaint

[51] There is no statutory time limit for the filing of a complaint under the *PESRA*. I can draw no conclusions from the recent addition of a 90-day time limit under the *PSLRA*. The *PESRA* is a different statute and has not been amended.

[52] This Board and its predecessor (the PSSRB) have dealt with delays in the filing of complaints on a number of occasions, and the general principle was summarized as follows in *Walcott v. Turmel*, 2001 PSSRB 86*:*

. . .

> *[28] . . . complaints should be filed within a reasonable time frame following the events on which they are based. When such is not the case, the complainants bear the burden of establishing that circumstances which are exceptional or outside of their control prevented them from acting any sooner. They must establish that the delay in filing their complaints is not unreasonable.*

. . .

[53] As noted in *Teeluck*, "mere delay" is not sufficient; there must be proof of prejudice to the party seeking dismissal of the complaint. However, as noted in *McConnell v. Professional Institute of the Public Service of Canada*, 2005 PSLRB 140, lengthy delays measured in years result in a presumption of prejudice to the respondent (the employer in this case). The decision of the Ontario Labour Relations Board in *Redpath Sugars* articulates the rationale for this approach:

. . .

> *¶24 . . . Although the Board will normally require parties seeking to have an application dismissed for undue delay to provide evidence of specific prejudice resulting from the delay, in cases where the delay is extreme, the Board is prepared to assume that the elapse of a significant period of time is inherently corrosive of the memory of witnesses and, therefore, that the ability of a party to prepare its defence to the allegations raised is significantly impaired. In such instances, the opposing parties need not establish prejudice because the prejudice is assumed . . . .*
>
> *¶25 As the Board has on many occasions found, a delay of over 12 months' duration is considered extreme. . . .*

. . .

[54] The length of the delay in this case, on the basis of the most favourable calculation for Mr. Vaid, is approximately eight years. This creates a presumption of prejudice to the employer.

[55] In addition, the employer was led to believe that Mr. Vaid had dropped any plans to file a section 13 complaint through the words and actions of his counsel. Mr. Brown clearly indicated his intention to file a complaint under section 13 of the *PESRA* in 1997. Counsel for the employer was equally clear that it was the employer's view that the order had been complied with. No complaint was filed, and it was reasonable for the employer to assume that this avenue of recourse had been abandoned by Mr. Vaid.

[56] This is not a case of a self-represented grievor who is not familiar with the statutory framework for labour relations in the parliamentary sector. Mr. Vaid was represented by counsel — counsel who demonstrated his knowledge of the avenues of recourse open to Mr. Vaid in his correspondence with the employer. I should be clear

that being self-represented would not, in my view, be sufficient in itself to justify a delay of eight years in pursuing recourse under the *PESRA*.

[57] The human rights complaints filed by Mr. Vaid are also not a valid reason for a failure to pursue a complaint under the *PESRA* in a timely manner. The CHRT had no jurisdiction to enforce an order of the PSSRB.

[58] I therefore conclude that it is appropriate in the circumstance to dismiss the complaint.

B. The grievance

[59] The grievance filed by Mr. Vaid relates to events that occurred between 1994 and 1997. It was conceded by Mr. Vaid that, for the most part, the grievance at adjudication would be limited to events that happened after 1995 (the date of the first PSSRB decision). Given the marked similarities in the language of both the human rights complaints and the grievance, it is clear that the human right complaints have essentially been transformed into a grievance. This flows from the SCC's decision and its conclusion that Mr. Vaid should have grieved rather than filing human rights complaints.

[60] The time limits for the filing of a grievance are contained in Mr. Vaid's collective agreement. Although that collective agreement was not in evidence before me, it was common ground that the time limits had not been respected. In the circumstances, I find that it is not appropriate to exercise my discretion to extend the time limits in this case. Mr. Vaid has not provided a reasonable explanation for his delay in filing a grievance. The only explanation provided was that he had filed human rights complaints. I agree that there was confusion in how to deal with human rights matters in the federal public service. However, the *PESRA* did not pose such difficulties in addressing human rights issues. In the 1995 decision, the adjudicator dealt with the issue of discrimination, and this was not challenged by the employer. The SCC recognized that the adjudicator had considered (and rejected) Mr. Vaid's complaint of discrimination in 1995.

[61] Without a reasonable explanation for the delay in filing the grievance, it is not appropriate to provide any relief to Mr. Vaid.

[62] In view of my determination on the delay in filing of both the complaint and the grievance, I do not need to address the issue estoppel objection raised by the employer.

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

(The Order appears on the next page)

V. Order

[64] The complaint is dismissed.

[65] The grievance is dismissed.

March 28, 2007.

Ian R. Mackenzie,
adjudicator and Board Member

APPENDIX A

Cited as:
Vaid and House of Commons

Between
Satnam Vaid, grievor, and,
House of Commons, employer
Parliamentary Employment and Staff Relations Act

[1995] C.P.S.S.R.B. No. 74

(1995) 28 PSSRB Decisions 36 (Digest)

PSSRB File No. 466-HC-260

Canada Public Service Staff Relations Board

Before: Y. Tarte, Deputy Chairperson

Heard: Ottawa, Ontario, June 15 and 16, 1995
Decision: July 27, 1995

(19 pp.)

Insubordination -- Management rights -- Job description -- Reinstatement -- Evidence -- Termination -- Refusal to perform modified duties -- Refusal to accept alternate position -- grievor employed as chauffeur to Speaker of House of Commons -- to comply with budget reduction goals of the Board of Internal Economy it was decided that the Speakers' chauffeur would be required to assume additional responsibilities (assistant valet and receptionist duties) -- in late August 1994 during discussions with management as to the various changes that might be made to the duties of the position the grievor indicated that he would be unwilling to accept split-shifts or assistant valet duties -- on September 22, 1994 the grievor was told not to report to work although his salary continued to be paid -- employer of the view that because the grievor was unwilling to work under the changed requirements of the position he could not remain in the chauffeur position -- grievor was offered other positions with the same salary and benefits and was asked to advise the employer by November 29, 1994 which alternate job he had chosen -- the grievor did not select another position but responded through his counsel that he was prepared to carry out all the duties that might be assigned to him as chauffeur -- by letter of January 11, 1995 the grievor was advised that his refusal to take an alternate position left no other option than to terminate his employment as of that date -- the letter also stated that since he had originally refused to do the modified duties of the chauffeur position and had implied discrimination the Speaker had lost confidence in his ability to perform the confidential and trusted duties of a chauffeur -- adjudicator acknowledged the employer has the right to organize and manage its workplace subject to limits imposed by statute or collective bargaining -- on basis of evidence adduced adjudicator could not conclude that grievor had been subjected to discrimination nor could he conclude that there had, in fact, been a reassignment of the duties of the chauffeur position -- no modified and duly approved job description was ever presented to the grievor.

Grievance allowed.

Appearances:

Dougald E. Brown, Counsel, for the grievor;
Jacques A. Emond, Counsel, for the employer.

DECISION

The Grievance

Mr. Vaid has grieved the termination of his employment as chauffeur for the Speaker of the House of Commons on January 11, 1995. By way of remedy, the grievor seeks to be reinstated into the chauffeur's position without loss of pay or benefits. Mr. Vaid also indicated in his grievance document that he would, upon reinstatement, refund the monies given to him as a separation package. This matter was referred to adjudication pursuant to paragraph 63(1)(c) of the Parliamentary Employment and Staff Relations Act.

The Evidence

Mary Ann Griffith has worked for the House of Commons since 1970. She has been Deputy Clerk of the House of Commons since 1987 and since March 1994, she has been responsible for its administration.

Following the election of the Liberal Government in 1993, the House of Commons was required to reduce its expenses. Its 240 million dollar budget was to be reduced to 210 million over 3 years. Since salaries accounted for a major portion of the House of Commons budget an early retirement package was developed in consultation with the unions involved. The planned reductions applied to all sectors of the House of Commons, including the Speaker's Office which employs both House of Commons staff and exempt staff hired directly by the Speaker.

The House's Board of Internal Economy recommended that the Speaker's Office budget be cut by 25% commencing in late spring/early summer 1994. The House of Commons expected to move some employees into positions freed by persons accepting the early retirement package. It also decided to guarantee existing salary levels for all employees who were asked to assume new or amended duties.

Since 1994, several employees have left the Speaker's Office. The employees who have stayed on were required to assume new functions when the existing workload was divided amongst fewer employees. Activities in the Speaker's Office usually commence at 7 a.m. and go on to 9 p.m. or later. The Office must be staffed during those hours.

In order to meet the reduction goals and still properly serve the Speaker of the House of Commons it was decided that the Speaker's chauffeur would be required to assume additional responsibilities. It was felt that the chauffeur should be required to perform assistant valet and receptionist duties. The assistant valet duties might include setting up rooms for functions and cleaning up after. The receptionist duties require a certain knowledge of French.

Ms. Griffith indicated that House of Commons employees are loaned to the Speaker's Office. The Speaker has the last say in who will hold certain position in his office. It is important that the Speaker feel comfortable with the employees who serve him.

In mid-August 1994, Steve Gaon, then Executive Assistant to the Speaker, phoned the witness to ascertain whether the duties and hours of work of positions in the Speaker's Office could be changed. Mr. Gaon was referred to Jacques Sabourin, Director General of the Human Resources Directorate of the House of Commons. A few weeks later, Mr. Gaon again phoned Ms. Griffith to indicate that Mr. Vaid was unwilling to accept split-shifts or assistant valet duties. The witness suggested a meeting between Mr. Vaid and Mr. Sabourin or Rose Bussière, the Director of Personnel Operations. Mr. Vaid in fact met with Ms. Bussière on two occasions. On September 22, 1994, the grievor was told not to report to work even though his salary continued to be paid.

On October 18, 1994, the grievor, through his counsel, wrote to the Speaker of the House of Commons (Exhibit E-2). In this correspondence, Mr. Brown referred to unacceptable alternatives suggested by Ms. Bussière. The letter went on to say:

> *I am writing to ask you to immediately reinstate Mr. Vaid to his position as chauffeur. This would reassure all those who are aware of Mr. Vaid's situation, including many of the employees under your direction, that Mr. Vaid's treatment has nothing to do with his colour and his ethnic background.*
>
> *Failing a positive response from you or your officials within five days of your receipt of this letter, a formal grievance requesting Mr. Vaid's reinstatement will be filed pursuant to the Parliamentary Employment and Staff Relations Act concerning the action taken against Mr. Vaid and will be pursued to adjudication before the Public Service Staff Relations Board. As you may be aware, an Adjudicator has the duty to apply the provisions of the Canadian Human Rights Act in cases where such issues arise.*

On November 16, 1994, the Employer, through its counsel wrote the following to Mr. Brown (Exhibit E-3):

> *Further to our meeting of November 8, 1994, I have had an opportunity to have further discussions with my client. I have been instructed to advise you of the following.*
>
> *It is our position that Mr. Vaid is an employee of the House of Commons and, not specifically an employee of the Speaker of the House of Commons. As such, it is management's right to transfer employees to other positions.*
>
> *You will recall, from our meeting of November 8, that the problems with Mr. Vaid arose out of a budget cut-back in the Speaker's Office. In fact, the Speaker's Office reduced its expenditures by approximately 25%. One of the ways of reducing these expenditures was to review and analyze the need for the various staff assigned to the Speaker's Office. As a result of that analysis, approximately four positions were eliminated, and one of those positions was the "Assistant Valet". With a reduction of the positions, the remaining staff were required to take on additional duties and/or different work schedules.*

To that end, Mr. Gaon met with Mr. Vaid to propose different scheduling options and additional job duties. Mr. Vaid was asked if he would be willing to work a split shift and indicated that he would not. He was asked if he would help the Valet and Maître d' in ensuring that the necessary equipment was in place for various Speaker's functions and assisting in the cleanup for those functions. Mr. Vaid was also asked to help ensure cleanliness and good order in parts of the Speaker's Office. Mr. Vaid indicated to Mr. Gaon that he would not be prepared to either work a split shift or to assist the Valet and Maître d'.

In September of this year, Mr. Vaid was approached by both Mr. Gaon and Mrs. Rose Bussière, Director, Personnel Operations and was offered other jobs in the House of Commons, but your client was not interested in any of those proposed jobs.

Because of Mr. Vaid's refusal to work under the changed requirements of his position, it is our position that Mr. Vaid cannot remain in his assigned duties as chauffeur to the Speaker of the House of Commons.

The House is prepared to offer Mr. Vaid another position within the House of Commons from one of the following choices:

a) Car driver
b) Bus/truck driver
c) Customer services counter clerk in Material Management
d) Postal & distribution counter clerk

Mr. Vaid is expected to indicate to Mr. Jacques Sabourin, Director General, Human Resources Directorate, by November 29, 1994, which job he has chosen and report for work at the time and place as directed by Mr. Sabourin. Mr. Sabourin would be pleased to meet with Mr. Vaid to discuss any of the above proposed positions in further details.

It is our position that any of the above positions is a reasonable alternative job which maintains Mr. Vaid's salary and benefits. In the event that the position so chosen is at a salary less than what he is presently making, his present salary will be protected. His benefits, of course, will be maintained.

I trust that this letter provides a full explanation as to the reasons for the removal of Mr. Vaid from the position as chauffeur. My client denies vigorously any insinuation that his removal was caused by any other factors.

It is our hope that this offer of a transfer to another position puts this matter to rest.

If you have any questions or require further clarification, please do not hesitate to contact my office.

On November 29, 1994, Mr. Brown responded (Exhibit E-4):

I acknowledge receipt of your letter of November 16th, 1994.

I am puzzled by your statement: "Because of Mr. Vaid's refusal to work under the changed requirements of his position, it is our position that Mr. Vaid cannot remain in his assigned duties as chauffeur to the Speaker of the House of Commons".

As I indicated when we met on November 8th, my understanding is that Mr. Vaid did not refuse to take on additional duties or take on different work schedules. Moreover, I find it difficult to believe that refusal to carry out duties would not have resulted in disciplinary action at the time.

In any event, I made it clear at our meeting on November 8th that Mr. Vaid was fully prepared to carry out all the duties that might be assigned to him as chauffeur.

Your letter refers to "the changed requirements of his position". Mr. Vaid has provided me with a copy of a job description that was provided to him in early March, 1994. My understanding is that this was never amended. However, to ensure that there is absolutely no misunderstanding about Mr. Vaid's position in this matter, he is and always has been prepared to carry out all the duties on his existing job description or on an amended job description for the chauffeur position.

In view of the above, I do not see any lawful reason why Mr. Vaid should not be allowed to resume the duties of the position which he has occupied for the past ten years, apparently to everyone's satisfaction. He has confirmed to me that he is fully fit. Moreover, after our discussion, I had enquiries made and I am satisfied that Mr. Vaid's co-workers considered him helpful and cooperative and that they are concerned and upset about the treatment accorded to Mr. Vaid.

In summary, our position is that Mr. Vaid is the incumbent of the position of chauffeur. He does not consent to being removed from that position nor is there any basis for his removal. He does not wish to be transferred against his will to another position and for that reason I have advised him that it is not necessary for him to indicate to Mr. Sabourin which other position he wishes.

> *If Mr. Vaid is not allowed to resume his duties immediately, he will pursue his remedies under the Parliamentary Employees Staff Relations Act. I would appreciate hearing from you in this regard.*

On December 7, 1994 (Exhibit E-5) Mr. Vaid was warned that if he did not accept "one of the selected alternate options" by December 12, 1994, his employment would be terminated. The grievor's counsel replied on December 9, 1994, that his client would not "consent to being transferred against his will to another position which would no doubt put him in a vulnerable position" (Exhibit E-6). The employer's counsel then replied to the grievor on December 13, 1994 that accepting another position with the House of Commons could not put him in a vulnerable position (Exhibit E-7).

On January 11, 1995, Ms. Griffith advised Mr. Vaid that his employment with the House of Commons was being terminated (Exhibit E-1). She wrote:

> *You will recall that following a discussion with Ms. Rose Bussière, Director, Personnel Operations, on September 22, 1994, you were requested not to report to work for the time being. This would allow you and the Human Resources Directorate time to identify an alternate position for you.*
>
> *This discussion arose out of your refusal, at that time, to do changed work duties and work split shifts as Chauffeur for the Speaker of the House of Commons.*
>
> *Shortly thereafter, you retained counsel, Mr. Dougald Brown, and we received a letter from him on October 18, 1994, in which Mr. Brown, on your behalf, demanded that you be reinstated in your position as Chauffeur. Mr. Brown further stated that our failure to put you back in the duties you were previously performing would raise an inference of a breach of the provisions of the Canadian Human Rights Act.*
>
> *On November 16, 1994, the House of Commons, through their solicitor, provided Mr. Brown with a response as to the reasons giving rise to your transfer to another position. We offered you a choice of four indeterminate positions within the House of Commons and we asked you to contact Mr. Jacques Sabourin, director General of Human Resources, by November 29, 1994 to discuss in more detail the nature of the positions offered. Mr. Brown advised us on that same day that you did not consent to any transfer and you made no attempt to discuss with Mr. Sabourin any of the positions offered to you.*
>
> *Subsequently, on December 7, 1994, Mr. Brown was advised that if you did not report to Mr. Sabourin to commence work in one of the four positions by Monday, December 12, 1994, the House of Commons would have no other option but to terminate your employment and that they would offer you a termination package if you wished to*

resign. By letter dated December 9, 1994, your counsel advised us that you continued not to consent to being transferred to another position which might place you in a vulnerable position. On December 13, 1994, we attempted to clarify, through your counsel, that the acceptance of any of the positions previously offered would not put you in a vulnerable position in that this would not result in you being laid off or having your present salary and benefits reduced.

Since you originally refused to do the modified duties of the chauffeur position, and you inferred a claim of discrimination, the Speaker has lost confidence in your ability to perform the confidential and trusted duties that are involved as a Chauffeur.

Your refusal to take any of the alternative positions offered to you has left us with no other option than to terminate your employment with the House of Commons as of today, January 11, 1995, at the close of business. In order to assist your transition to future employment, we are prepared to offer you a separation package, as set out below:

Severance pay	*$ 6,248.66 (10 weeks)*
Additional Separation Payment	*$ 28,743.83 (46 weeks)*
TOTAL	*$ 34,992.49 (56 weeks)*

Please contact Beatrice Timm, Chief of Pay and Benefits Section at 992-1900 to make arrangements for your termination benefits.

We wish you well in your future endeavours.

Ms. Griffith testified that Mr. Gaon has resigned from his position as Executive Assistant to return to private practice. She also indicated that she was aware that complaints had been made against Mr. Gaon prior to his departure.

Ms. Griffith explained that the Speaker's loss of confidence in Mr. Vaid was based on the grievor's refusal to accept changes to the duties of the Chauffeur position. She also indicated that the Chauffeur position in the Speaker's Office still exists but in a modified form. The witness was not aware of the existence of a new job description to reflect the changes in the duties of the position.

Ms. Griffith acknowledged that as of November 29, 1994, the grievor had agreed in writing (Exhibit E-4) to accept to perform whatever duties were assigned to the chauffeur position.

Rose Bussière testified that she met Mr. Vaid in her office on September 14, 1994, at the request of the Speaker's Office. The meeting lasted approximately one hour during which they discussed proposed changes in duties, hours of work and the question of bilingualism. According to Ms. Bussière, Mr. Vaid was very angry at the changes being proposed. The grievor held the view that he had been subjected to discrimination. At this meeting, Mr. Vaid did not refuse to accept a split shift. He did indicate however that he did not want to do dishes since he believed that no other

chauffeur in the world was expected to do so. Ms. Bussière told the grievor she would look for an alternative position in the House of Commons.

The witness again met with Mr. Vaid on September 22, 1994 to advise him that the Speaker's Office wanted the grievor out immediately. Ms. Bussière told the grievor not to report to work even though he would continue to be paid. Mr. Vaid expressed an interest in positions related to protocol and environment. At the meeting of the 22nd of September, Mr. Vaid told Ms. Bussière that he was prepared to work whatever hours were required of him preferably with compensation time off in the summer months and also to perform assistant valet functions.

Ms. Bussière then met Mr. Vaid on October 14, 1994, at which time she advised him that four positions, none of which were in protocol or environment, were available. Mr. Vaid was not interested in any of the positions. They discussed the contents of a possible retirement package.

In cross-examination, Ms. Bussière acknowledged that Mr. Vaid had shown her a letter (Exhibit G-1) that the grievor had written to the Speaker on September 12, 1994. In that letter, Mr. Vaid alleges harassment and unfair treatment and requests a meeting with Mr. Parent "to further discuss and clarify issues regarding my employment as chauffeur". That letter was never answered. It was Ms. Bussière's opinion that the Speaker, like any other Member of Parliament, runs an autonomous office.

Jacques Sabourin has worked for the House of Commons since 1981. Ms. Bussière reports to him and he in turn, reports to Ms. Griffith. He repeated much of the testimony already given by Ms. Griffith. Mr. Sabourin added that the grievor had taken days off on sick leave in the spring and summer of 1994. He also identified a modified job description for the chauffeur position (Exhibit E-8). He could not say however whether the document had been "formalized".

Mr. Sabourin expressed the view that the Speaker of the House of Commons needed some latitude in selecting the staff for his office. He indicated that the Speaker needed a certain "comfort zone" which in Mr. Vaid's case, had been lost because of his refusal to accept new duties. The witness also indicated Mr. Vaid had, in previous years, always shown himself to be a discreet and trustworthy chauffeur for several previous Speakers of the House of Commons.

Mr. Vaid is 53 years of age, he is married and immigrated to Canada from India in 1972. He holds a Masters degree in Geography from the Punjab University and has nearly completed a course in cartography at Algonquin College.

The grievor was first hired as a chauffeur in 1984 by then Speaker Francis. At that time, the position was part of the Speaker's exempt staff. It was changed to a House of Commons position in December 1986.

Mr. Vaid produced several letters of recommendations from previous Speakers he has worked for (Exhibit E-2). The grievor first met Speaker Parent at approximately 11 p.m. on January 17, 1994, shortly after Mr. Parent's election to the position. Mr. Vaid drove the Speaker and his wife home. Mr. Vaid testified that Speaker Parent asked him during that first encounter why a man of his education would want to chauffeur for a living and that Mrs. Parent enquired as to what would happen if a Speaker didn't like him.

On January 24, 1994, the grievor was involved in a car accident on the road to the Speaker's residence at Kingsmere. As a result of this accident, Mr. Vaid suffered whiplash.

In February 1994, the Speaker asked to meet and met with Mr. Vaid's wife alone. To the grievor's knowledge this was not done with other employee's spouses. Also in February 1994, Mr. Gaon started working as the Speaker's Executive Assistant. Mr. Vaid first met Mr. Gaon at the end of February 1994, during a meeting in which he was told by the new Executive Assistant that because of budgeting cuts he would be placed on split shifts and asked to wash dishes. It was suggested by Mr. Gaon that Mr. Vaid might want to go work for another minister. Mr. Vaid indicated that he just wanted to provide the best service possible for the Speaker, that he would work whatever hours were required without claiming overtime and that he would wash dishes if it was shown to him that any other chauffeur was required to do so.

Following that meeting, the grievor was never specifically asked or ordered to wash dishes or clean up after functions. The only job description ever given to Mr. Vaid (Exhibit G-5) is dated 1987. A revised job description (Exhibit E-8) was never given or shown to him.

In March 1994, Mr. Vaid starting wearing a cervical collar at work. This was done on his doctor's recommendation because of residual pain from the January accident. As soon as he started wearing the cervical collar, Mr. Gaon told the grievor that he could not drive the Speaker of the House while wearing the collar. Mr. Vaid never resumed his functions as chauffeur after March 25, 1994. He was replaced by Mr. Kevin Blanchard who is not bilingual.

In June 1994, Mr. Vaid underwent the first of two operations to his wrists. The grievor returned to work in late June and early July without the cervical collar. The second operation took place in late July 1994. When Mr. Vaid returned to work at the beginning of September, he did not wear the cervical collar and was not subject to any restrictions with respect to driving. On September 6, 1994, Mr. Vaid met with Mr. Gaon to ascertain when he could resume as chauffeur for the Speaker. Mr. Gaon asked for a medical certificate which would guarantee that his wrist problem would never occur again. On the 7th of September, Mr. Vaid repeated his desire to offer the best possible service to the Speaker without claiming overtime. Mr. Gaon and Mr. Vaid again discussed the possibility of split shift and washing dishes. On September 9, Mr. Gaon asked the grievor to go work somewhere else in the House of Commons or for another minister. Mr. Gaon refused to put his request or the reasons for it in writing. In early September, Mr. Gaon asked the grievor if he would agree to learn French. Mr. Vaid indicated that he would be only too happy to learn a fifth language. Around that time, the Speaker's riding assistant gave Mr. Vaid an article on harassment in the workplace (Exhibit G-9).

In mid-September, Mr. Vaid was asked to meet with Rose Bussière in her office. Ms. Bussière expressed the view that the Speaker's Office was in a mess and that the grievor would be better off working elsewhere. Mr. Vaid showed Ms. Bussière the letter he had written to the Speaker on September 12, 1994 (Exhibit G-1).

Ms. Bussière and Mr. Vaid met again on September 22, 1994. They discussed the questions of split shifts, washing dishes and learning French. Mr. Vaid repeated the position he had already expressed to Mr. Gaon and was told not to report to work until further notice. At the grievor's request the employer's directive in this regard was put in writing by Ms. Bussière on September 26, 1994 (Exhibit G-2).

> *This is further to our meeting of September 22, 1994. As discussed during the meeting, I have requested that you not report to work until your current situation is resolved. During this time, you will continue to be paid your current*

> *salary and you will retain your employee status with the House of Commons.*

Following receipt of this letter, Mr. Vaid authorized his counsel to send Exhibits E-2 and E-4 (supra) to the employer. The grievor's employment was terminated on January 11, 1995 (Exhibit E-1).

Under cross-examination, Mr. Vaid stated that he had developed a close relationship with all the Speakers he had worked for prior to Mr. Parent. The grievor recognized the fact that traditionally the Speaker had been free to select his or her own staff.

Mr. Vaid expressed the view that Mr. Gaon had asked him to wash dishes because of the colour of his skin. He also believes that Mr. Gaon had manipulated him to put him in a bad light in the Speaker's eyes.

The grievor acknowledged that it was reasonable not to allow him to drive the Speaker while wearing a cervical collar.

Arguments

For the Employer

Mr. Vaid's grievance has to be put in the context of the cut-backs occurring at the House of Commons and Speaker's Office in late 1993 and early 1994. It was inevitable that things had to change both because of the reductions and the different personality and outlook of a new Speaker.

The grievor was not the only House of Commons employee whose duties were changed or who was asked to move to another position. Mr. Vaid was however the only one to object. The grievor refused to accept changes in his hours of work or duties. Ms. Griffith testified that the employer wished to maintain employment security even if it could not guarantee position security.

The employer has the ultimate responsibility to determine how its operations will be run. The fact that Mr. Vaid had been chauffeur to previous Speakers did not act as a guarantee for future employment in that capacity. Any Speaker has the right to personally chose those who will work closely with him. Mr. Vaid understood this tradition.

The position of chauffeur to the Speaker is one of trust. Mr. Vaid broke the bonds of that trust when he refused to accept the changes to the position. Whatever was left of that trust was finally severed when Mr. Vaid made allegations of discrimination. In view of this serious conflict, the employer had no alternative but to move Mr. Vaid who steadfastly refused the employer's attempts to accommodate him and find alternative employment. In order to protect his rights, Mr. Vaid should have accepted one of the four positions offered and grieved later. The employee's refusal to accept an alternate position might even be considered by some to be insubordination.

Regardless, the employer took the high road and was very reasonable in its payment of severance.

Should Mr. Vaid's grievance be upheld, it would be preferable in the circumstances to award damages in lieu of reinstatement. The Anonsen (Board file 166-2-17193) and Re Extendicare Ltd. (St. Catharines) and Ontario Nurses' Association, (1981) 3 L.A.C. (3d) 243, cases deal with comparable situations where damages were awarded instead of reinstatement.

The employer was faced with a difficult situation. In light of Mr. Vaid's refusal to accept change and the ensuing loss of confidence, the House of Commons had no alternative but to terminate the grievor's employment. Mr. Vaid's grievance should therefore be dismissed.

For the Grievor

In its letter of January 11th, 1995 (Exhibit E-1), the employer had indicated two reasons to justify Mr. Vaid's termination.

The first reason is the grievor's alleged refusal to accept changes to the duties of his position. In fact the duties of the chauffeur position were never modified. The employer had not tendered any new job description for the position. Regardless of what went on before, Mr. Vaid clearly stated to his employer on November 29, 1994, (Exhibit E-4) that he was "prepared to carry out all the duties on his existing job description or on an amended job description for the chauffeur position". Furthermore, the employer has not even tendered evidence to show that even today the duties of the position are different from what Mr. Vaid had been required to perform in previous years.

The second reason given by the employer supposedly arises because of the Speaker's loss of confidence in Mr. Vaid. Part of the reasons advanced by the employer for this loss of confidence is the fact that the grievor alleged discrimination. In the circumstances of the case, it certainly was not unreasonable for Mr. Vaid to complain about the treatment he had received at the hands of Mr. Gaon. It is interesting to note that even the Speaker's riding assistant was concerned enough to transmit to the grievor unsolicited material on harassment in the workplace.

There is no evidence that Mr. Vaid could not perform the duties of the position of chauffeur to the Speaker or that he lacked trustworthiness. Yet the grievor was not permitted to drive the Speaker even in July 1994 when he was no longer wearing his cervical collar. The employer's true colours were clearly shown very early on when Mr. Gaon told Mr. Vaid that he was not wanted around the office.

The House of Commons has now advanced a new reason for the termination, one that is not contained in its letter of January 11, 1995. The additional rationale resides in the fact that traditionally the Speaker has been free to decide who his chauffeur will be. Tradition however does not govern this case. There is no right of unilateral deployment contained in the Parliamentary Employment and Staff Relations Act. The grievor's position was not exempted from the application of the Statute. It was never intended by Parliament that Mr. Vaid's employment be vulnerable in this way.

Mr. Sabourin spoke of the Speaker's "comfort zone" yet nothing has shown that Mr. Vaid did not fit within the necessary comfort level. Even if the Speaker has some discretion in the staffing of the chauffeur position, it cannot be unfettered. Nobody has said why Mr. Vaid might not be suitable for the position. Neither Mr. Gaon or Mr. Parent have testified. The unchallenged testimony of Mr. Vaid raises very troubling elements and puts in doubt the propriety of the employer's motives to terminate the grievor.

Mr. Vaid has maintained an excellent record over the ten years he has worked for the House of Commons. He is entitled to be reinstated. In most cases where damages are awarded in lieu of reinstatement there is an element of malfeasance on the part of the employee. The Lodba (Board file 166-2-21819) and Loiselle (Board file 166-2-21818) cases show that an improperly discharged employee can be reinstated even in cases where serious misconduct has occurred. The only just result in this case is to reinstate Mr. Vaid.

The employer has argued that Mr. Vaid should have accepted one of the positions offered to him and then grieved. The problem with this suggested scenario is that the grievance would necessarily have been against the transfer, a matter which is not adjudicable. Mr. Vaid's grievance must therefore be upheld.

Reply

If Mr. Vaid had accepted an alternate position, he would then have been in a position to complain of harassment under House of Commons policy.

The grievor's counsel has focussed on only one paragraph of the January 11th, 1995 letter (Exhibit E-1). That letter clearly states that the grievor's refusal to accept other suitable positions left the employer with no alternative but to terminate.

The employer has a complete discretion to redeploy employees and that discretion has not been qualified by statute. The evidence has shown obvious reluctance on the part of the grievor to accept additional or modified duties.

Discrimination cannot be inferred in this case. The grievor wants to take away from the Speaker the traditional right to select certain staff.

Reasons for Decision

In the world of labour relations, the employer has the intrinsic right to manage and organize its workplace. That right is however subject to whatever limits are imposed by law or collective bargaining.

In many instances collective agreements will merely control how changes are made in the workplace rather than prohibit their occurrence. For instance, seniority under certain contracts will determine who gets what new assignment. In this case neither contract nor statute has been produced to indicate the existence of a limit on the employer's basic right to transfer staff and reassign duties to its employees.

With these general principles in mind I must now assess the facts of this case. The employer argues that it has only sought to exercise its right to use its resources as it sees fit and that Mr. Vaid refused to cooperate.

The evidence presented does not permit me to conclude that there was ever in fact a transfer or a reassignment of duties. At no time did the employer actually order the grievor to perform additional duties or work different hours. The discussions between Mr. Vaid and Mr. Gaon were more in the nature of negotiations. The employer's conduct in simply asking whether Mr. Vaid was willing to assume certain duties and in discussing the matter on several occasions could certainly have left the impression that it was prepared to negotiate and that its plans for a modified workforce were not set.

It is clear from the evidence that the employer uses a system of written job descriptions. Yet no modified and duly approved job description was ever presented to Mr. Vaid. The existence of such a document would have crystallized the situation and forced the grievor to accept the revised position or move on to something else. Before an employee can be said to have refused to perform duties assigned to his position, the employee must be given a clear statement of those duties and be told in unequivocal terms that they now belong to the position and must be performed. This certainly was not done in this case. The fact that an employee refuses to voluntarily accept proposed changes to his duties and his hours of work does not, in itself, provide grounds to terminate his employment.

Mr. Vaid has alleged discrimination and suggested that he might have been asked to clean dishes because of the colour of his skin. The evidence presented certainly

does not permit me to reach that conclusion. It does however lead me to conclude that the employer acted precipitously and somewhat high-handedly in terminating Mr. Vaid.

I see nothing wrong with the requirement that a driver run errands, answer phones, clean dishes or work split shifts but whatever is required of the employee must be clearly written down in an approved job description. In November, 1994, the grievor, through his counsel, advised the employer that he was prepared to perform any functions duly assigned to his job descriptions. This offer was never acted upon by the employer who continued to offer alternate positions.

Neither the Speaker nor Mr. Gaon have testified. I have no direct evidence from which to conclude that Mr. Vaid ever refused to perform any function properly assigned to him and that the trust between employer and employee has been irremediably destroyed. The position of chauffeur in the Speaker's Office is a House of Commons position. It has not been occupied by exempt staff since 1986. The notion of a "comfort zone" would be more acceptable in the context of an exempt position but it looses some of its appropriateness when dealing with a House of Commons position.

Mr. Vaid will therefore be reinstated into the chauffeur position in the Speaker's Office without loss of pay or benefits. Mr. Vaid shall, forthwith after reinstatement, reimburse to the employer the severance monies given to him upon termination. If new duties have been assigned to the position, a duly approved modified job description will be provided to the grievor upon his return to work or shortly thereafter.