**Date:** 20070425

**File:** 166-02-31387

**Citation: 2007 PSLRB 39**

*Public Service Staff Relations Act*

Before an adjudicator

BETWEEN

**ERICKA R. FLETCHER**

Grievor

and

**TREASURY BOARD**
**(Department of Human Resources and Skills Development)**

Employer

Indexed as
*Fletcher v. Treasury Board (Department of Human Resources and Skills Development)*

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

**REASONS FOR DECISION**

***Before:*** Dan Butler, adjudicator

***For the Grievor:*** Daniel Fisher, Public Service Alliance of Canada

***For the Employer:*** Mark Sullivan, Treasury Board Secretariat, and Adrian Bieniasiewicz, counsel

Heard at Toronto, Ontario,
February 6, 2007.

## I. Grievance referred to adjudication

[1] On March 25, 2002, Ericka R. Fletcher ("the grievor") presented a grievance challenging the termination of her employment as communicated to her in a letter dated March 8, 2002. At the time she received the letter, the grievor was employed at the CR-05 group and level with what was, at the time, Human Resources Development Canada in Toronto, Ontario. As corrective action, the grievor sought reinstatement at the same group and level and requested that she ". . . be made whole."

[2] Unsuccessful at the final level of the grievance procedure, the grievor's representative referred the matter to adjudication under the *Public Service Staff Relations Act (PSSRA)*, R.S.C., 1985, c. P-35, on July 18, 2002. On the same date, the grievor's representative requested that the Public Service Staff Relations Board ("the PSSRB") hold the reference to adjudication in abeyance pending a decision by the Canadian Human Rights Commission ("the CHRC") with respect to a complaint filed by the grievor under the *Canadian Human Rights Act* (*CHRA*), R.S.C., 1985, c. H-6. The PSSRB granted this request.

[3] On several subsequent occasions in 2003 and 2004, PSSRB staff wrote to the grievor's representative for updated information about the file. The responses received from the grievor's representative indicated that settlement discussions were underway. The grievor's representative undertook to inform the PSSRB once a settlement was finalized.

[4] On August 25, 2004, the employer wrote to the PSSRB and provided it with a copy of the CHRC's decision that dismissed the grievor's complaint on the grounds that ". . . no evidence was found to support the complainant's allegations." The employer submitted that, with the *CHRA* redress mechanism now exhausted, and in the absence of a CHRC decision to request the grievor to exhaust the grievance process, the grievor did not have the right to present a grievance under section 91 of the *PSSRA*. The employer took the position that an adjudicator was, therefore, deprived of jurisdiction over the matter. The employer requested that the PSSRB dismiss the reference to adjudication without a hearing for lack of jurisdiction.

[5] The grievor's representative wrote to the PSSRB on September 7, 2004, outlining his contention that sections 91 and 92 of the *PSSRA* permitted the filing of a grievance relating to non-prohibited grounds of discrimination. He stated that ". . . [t]he scope of

the grievance is now limited to the determination of non-prohibited grounds." He asked the PSSRB to convene a preliminary hearing to consider the matter of jurisdiction raised by the employer.

[6] The PSSRB scheduled a hearing for January 12 to 14, 2005, at which the issue of jurisdiction was to be the initial subject. On subsequent request of the grievor's representative, unopposed by the employer, the PSSRB consented to a postponement and rescheduled the matter to March 21 to 24, 2005. Several weeks prior to these dates, the grievor's representative informed the PSSRB that both parties were agreed that there should be a further postponement, and that the PSSRB should ". . . not reschedule the matter as the parties are near a settlement. . . ." The PSSRB granted the postponement request.

[7] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act (PSMA)*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *PSMA*, this reference to adjudication must be dealt with in accordance with the provisions of the *PSSRA*.

[8] With no notice from the parties that a settlement had been achieved, the Chairperson of the Public Labour Relations Board ("the PSLRB") set June 27 to 30, 2005, as the next dates for the adjudication hearing. At the end of May 2005, the parties jointly requested that the scheduled hearing dates instead be used for the purposes of exploring the possibility of a mediated settlement. The Chairperson agreed to postpone the hearing and appointed a mediator to assist the parties.

[9] I note that the file contains a handwritten letter sent by the grievor directly to PSLRB staff, dated June 27, 2005, that reads in part:

. . .

> *I do not recalled* [*sic*] *contacting your office by telephone or in writing. No complaint was ever filed by me nor did I rec'd* [*sic*] *any written notice from the Human Rights Commission.*
>
> *Since I had no prior written notice from your department, Labour Relations Board, I wish to inform you that I will not be attending on June 27 to 30, 2005.*

. . .

[10] Mediation proceeded on June 28, 2005, in the grievor's absence. The mediator reported back to the Chairperson that the grievance was not resolved at the session and that she understood that options for settlement were to be presented afterwards to the absent grievor for the grievor's consideration.

[11] On January 11, 2006, PSLRB staff wrote to the grievor's representative to ask for an update on the status of the file in follow-up to the mediation session six months earlier. PSLRB staff wrote again on March 8, 2006, to indicate that the Chairperson would proceed to schedule a hearing if the grievor's representative did not clarify the status of the matter by March 23, 2006. On subsequent request of the grievor's representative, the Chairperson provided an extension for responding to April 21, 2006. On April 19, 2006, the grievor's representative requested that the Chairperson schedule the matter for hearing at his ". . . earliest convenience." Notice of a hearing for July 10 to 13, 2006, was duly sent by PSLRB staff to the parties.

[12] The grievor did not appear at the hearing on July 10, 2006. The grievor's representative reported to the adjudicator that the grievor had not advised her representative that she would not attend the hearing, and that he had not received instructions from her to make representations at the hearing on her behalf in her absence.

[13] PSLRB staff wrote to the grievor on July 21, 2006, requiring her to confirm by September 11, 2006, whether she intended to pursue her grievance. This letter indicated that ". . . [f]ailure on your part to respond by that date may result in your grievance being dismissed and the file closed."

[14] The grievor wrote to PSLRB staff on September 11, 2006, in part as follows:

. . .

> *I am surprised at the contents in your letter at this point in time. There are no changes in the information submitted many years ago. I have not back* [*sic*] *down in my Human Rights complaints nor the grievance filed with* [my bargaining agent].

. . .

The employer indicated, in reply, that it was ready to proceed on the merits of the case (letter dated September 22, 2006).

[15] On September 29, 2006, PSLRB staff wrote to the parties and proposed dates for a rescheduled hearing. The letter concluded by stating: ". . . [the signatory registry officer has] been asked . . . to advise the parties that should the grievor fail to attend the re-scheduled hearing, the grievance will be dismissed and the file closed." A copy of the letter was delivered to the grievor by registered mail. Canada Post subsequently provided PSLRB staff with a signed receipt dated October 3, 2006, that confirmed delivery of the notice to the grievor.

[16] After receiving input on proposed hearing dates from the employer and the grievor's representative, the Chairperson scheduled the hearing for February 6 to 9, 2007. PSLRB staff's correspondence dated October 20, 2006, to this effect, indicated that ". . . should the grievor fail to attend the re-scheduled hearing, the grievance will be dismissed and the file closed." A copy of the notice was delivered to the grievor by registered mail. Canada Post subsequently provided the PSLRB with a signed receipt dated October 26, 2006, that confirmed delivery of the notice to the grievor.

[17] Following the usual practice, PSLRB staff sent a formal Notice of Hearing to the employer and the grievor's representative on December 14, 2006. This notice included the following paragraph:

. . .

> ***AND FURTHER TAKE NOTICE*** *that if you fail to attend the hearing or any continuation thereof, the adjudicator may dispose of the matter on the evidence and representations placed at the hearing without further notice to you.*

. . .

[18] On February 2, 2007, four days before the scheduled hearing, the grievor's representative wrote to PSLRB staff as follows:

. . .

> *. . . yesterday afternoon, the Union was advised through a third party that Ericka Fletcher will not be attending the upcoming adjudication hearing scheduled to begin on February 6, 2007 due to 'uncontrollable circumstances'. Please be advised that the Union has undertaken to seek reasons for the basis of the Grievor's intended absence.*

> *As the grievor will not be in attendance, the Union now seeks an adjournment. It is the Union's understanding that the Employer opposes any request for an adjournment.*
>
> *In the event that the PSLRB instructs the parties to proceed and the Grievor does not attend, the Union will once again renew its request for postponement. The Union also intends on making a motion to have the matter held in abeyance sine die pending settlement and/or confirmation of the Grievor's attendance at a hearing.*
>
> . . .

[19] The employer responded to the grievor's representative's request as follows:

> . . .
>
> *By letter dated October 20, 2006, the Board informed the parties that the matter had been scheduled for hearing from February 6 to 9, 2007 in Toronto. This letter also reiterated that "…should the Grievor fail to attend the re-scheduled hearing, the grievance will be dismissed and the file closed". The official Notice of Hearing is dated December 14, 2006. At no time since then has there been any indication either from the Grievor or the Bargaining Agent that there were any problems with the dates scheduled for the resumption of this hearing.*
>
> *Furthermore, Mr. Fisher's letter does not provide any reasonable explanation as to why a further indefinite delay is required to conclude this matter.*
>
> *It should also be noted that there are no settlement discussions under way or contemplated.*
>
> *In the absence of overwhelming extenuating circumstances, the matter should proceed as scheduled, and if the Grievor does not attend, the matter should be dismissed in accordance with the Board's prior notices.*
>
> . . .

[20] The Chairperson dismissed the request for adjournment on February 2, 2007, and indicated to the parties that ". . . the assigned adjudicator can hear and determine any further motions at the commencement of the hearing."

## II. Preliminary Matters

[21] At the outset, the grievor's representative confirmed that the grievor was not in attendance. He renewed his application for a postponement on her behalf, this time on

a *sine die* basis. The employer opposed the request and argued that I should dismiss the grievance on the basis that it had been abandoned by the grievor.

[22] I received the submissions of the parties and then reserved my ruling, adjourning the hearing on the merits of the grievance in the interim. I left the employer and the grievor's representative with the understanding that I would not issue my written ruling before April 1, 2007, to facilitate any further settlement efforts that might ensue. Allowing the parties a final window of opportunity to resolve this matter on a voluntary basis was, in my view, a reasonable response to the circumstances of this case, as argued below. Regrettably, the parties were unable to report success by April 1, 2007.

## III. Summary of the arguments

### A. For the grievor

[23] The grievor's representative admitted that he was unable to offer an explanation for the grievor's failure to attend this hearing. He indicated only that, as reflected in his letter of the previous week to PSLRB staff, he had heard through a third party that the grievor would not attend due to "uncontrollable circumstances." He stated that he had on numerous occasions attempted to contact the grievor in an effort to secure her attendance and participation in this hearing and in previous proceedings. Those efforts were unsuccessful.

[24] The grievor's representative argued that the grievor's absence significantly hampered his ability to protect her rights. He noted, however, that he had standing as the grievor's designated representative in this reference to adjudication, irrespective of her presence. He stressed that he took very seriously his obligation to protect the grievor's rights ". . . wherever and however possible," and ". . . to the very end." The grievor's representative had ". . . been informed of the grievor's intent to pursue her grievance . . ." although, admittedly, the record seemed to contradict her stated intent. His request to adjourn *sine die* seeks to secure for the grievor an opportunity sometime in the future to require the employer to meet its onus to prove the merits of its decision to terminate the grievor's employment.

[25] The grievor's representative believes that there are compassionate grounds for granting the adjournment request. He offered his impression that the grievor may lack the "wherewithal" to fully appreciate her role in this process. He indicated that this

reference to adjudication arose when the employer terminated the grievor's employment for refusing to submit to a "fitness for work" assessment following a number of incidents in the workplace. The grievor's representative felt that the record of her subsequent behaviour suggested a health-related problem, and that she probably did not understand the ramifications of her actions. He conceded, however, that this was ". . . simply [his] opinion based on the conduct of the grievor so far." He had no substantive evidence to introduce concerning the grievor's health.

[26] The grievor's representative argued that an adjudicator should opt to protect the grievor's rights when balancing the prejudice to the employer caused by a delay versus her possible health-based inability to participate. He suggested that, if the grievor's health circumstances change in one or two years, the grievor might wish to pursue her case actively and be able to do so. Nonetheless, when questioned concerning prospects for a hearing in the near or medium term, he stated that he had no basis for believing that this situation will change.

[27] The grievor's representative closed his arguments by asking that, if I decide that the grievor has abandoned her grievance, I provide a window of three months for one last chance to explore potential settlement options.

**B. <u>For the employer</u>**

[28] The employer strongly opposed the request for an adjournment *sine die*. It argued that this marked the second time the grievor has failed to attend her adjudication hearing, each time without offering a cogent reason for her absence. It then traced the record of the file from the PSSRB's initial attempts to schedule a hearing in early 2005 through the June 2005 mediation session, the scheduled July 2006 hearing and the current hearing dates. It maintained that the parties had agreed following the grievor's failure to attend the hearing last July that, if she failed to appear once more, her case should be dismissed. The grievor subsequently received two letters from PSLRB staff that clearly outlined the consequences of a further failure to attend. She knew of the current hearing dates, and there has been no indication of any objection on her part to these dates. The fact that she has not appeared at this hearing tells us that she is not interested in pursuing her case. The adjudicator should draw an adverse conclusion from her behaviour.

[29] Agreeing to the grievor's representative's request, according to the employer, will cause it significant further prejudice. It cannot know whether its witnesses will still be available at some unknown time in the future. Those witnesses prepared in detail for the current hearing, once again in vain. This grievance was filed more than five years ago. The employer is entitled to closure, the case cannot go on indefinitely and ". . . at some point it must stop."

[30] The comments of the grievor's representative about the grievor's health and the possibility that it may improve are pure speculation.

[31] The employer offered four adjudication decisions in support of the proposition that a grievance can be dismissed when the grievor fails to attend a hearing: *Skerkowski v. Staff of the Non-Public Funds, Canadian Forces*, PSSRB File No. 166-18-14060 (19831017); *Auger v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-13597 to 13599 (19831017); *Stock v. Communications Security Establishment, Department of National Defence*, PSSRB File Nos. 166-13-25662 and 25663 (19950322); and *Gillis v. Treasury Board (Human Resources Development Canada)*, PSSRB File No. 166-02-26594 (19960220).

[32] The employer concluded by asking that I deny the adjournment request and dismiss the grievance as abandoned. The employer noted, nevertheless, that it shared the impression that the grievor might have a serious health problem and agreed that it might be appropriate to allow some final opportunity to explore the possibility of a voluntary settlement in recognition of her 30 years of employment.

**C. <u>Grievor's rebuttal</u>**

[33] The grievor's representative reiterated that it was within the power of an adjudicator to provide a window of time for the purposes of settlement discussions. He emphasized that there were compassionate grounds for finding a way to protect the grievor's interests while moving the case forward. By the employer's own admission, the grievor may not currently have the "wherewithal" to proceed.

[34] The grievor's representative argued, without providing details, that all of the case law presented by the employer could be entirely distinguished from this case. He did not offer any other decisions in rebuttal.

## IV. Reasons

[35] In the circumstances of this reference to adjudication, granting the grievor's representative's request to adjourn *sine die* would mean accepting that this file will remain open for an indefinite and possibly very lengthy period. The grievor's representative obviously seeks through his request to protect the right of a grievor whose employment has been terminated to test the merits of the employer's decision before a third party. The interest expressed through this request is obviously very serious, with the grievor's employment itself ultimately at stake. At the same time, there are serious interests on the side of the employer that must also be considered. By the time this decision is issued, it will have been over 56 months since the grievor referred her case to adjudication, and over five years since the decision was made to terminate her employment. It is well recognized in arbitral jurisprudence that an employer has a legitimate interest in the timely resolution of a dispute. The difficulties of presenting effective evidence and the weight of corrective action may both mount with the passage of time. My task is to assess how to balance the possible prejudice to the employer of a further delay in an already protracted proceeding against the presumed interest of the grievor to have her case heard at some point.

[36] I believe that there is also a third interest at play in this matter, although perhaps from the background. It is the general public interest in an efficient administration of justice that avoids undue delays, promotes the final resolution of conflict and is respected by the parties. This interest becomes a concern in this case, to the extent that the grievor appears not to have cooperated with the efforts to provide her a hearing and to have disregarded the Chairperson's notices and instructions. To some extent, a decision to grant a further postponement in this context could be read by others as rewarding behaviour that undermines a well-functioning dispute resolution process.

[37] The history of this file makes it extremely difficult to favour the grievor's interests. The evidence that she actively seeks a hearing for her case has been fleeting, at the very best. Beyond her September 11, 2006, letter in which she states ". . . I have not back [*sic*] down in my Human Rights complaints nor the grievance filed with [my bargaining agent] . . .", there is nothing concrete to indicate a determination on her part to proceed. At the hearing, her representative submitted that he had ". . . been informed of the grievor's intent to pursue her grievance." At the same time, he was compelled, in honesty, to concede that the record contradicts this assurance.

[38] Here is the picture that I see. Once the PSSRB received information in August 2004 that the CHRC had dismissed the grievor's human rights complaint, the PSSRB's staff initiated a series of efforts to schedule a hearing for her grievance, previously held in abeyance. On several occasions, the PSSRB consented to postponement requests, particularly in light of indications from the parties that settlement discussions were underway. Absent evidence of success in those discussions, the Chairperson moved ahead and scheduled a hearing for June 27 to 30, 2005. That hearing, on a subsequent joint request, was used for mediation. The grievor chose not to participate. After another passage of time and renewed efforts by PSLRB staff to determine the status of the file, the Chairperson scheduled new hearing dates for July 10 to 13, 2006. The grievor did not attend. Moreover, she did not inform her representative that she would not attend. She neither provided instructions to her representative about how to proceed nor offered any reason for not attending. In response to this unusual situation, PSLRB staff followed up by asking the grievor to confirm, by a specific date, whether she intended to pursue her grievance. PSLRB staff's correspondence indicated that ". . . [f]ailure on [the grievor's] part to respond by that date may result in [her] grievance being dismissed and the file closed." The grievor did reply on the last possible date, although hardly in clear terms. She did not explain in her reply why she had missed the July hearing. Nevertheless, the Chairperson again moved forward to schedule new hearing dates for the grievor, this time for February 6 to 9, 2007. PSLRB staff ensured that the grievor received full notice of the new dates through registered mail. It made clear the implications of non-attendance, most forthrightly in the October 20, 2006, letter that stated, ". . . should the grievor fail to attend the re-scheduled hearing, the grievance will be dismissed and the file closed." Come February 6, 2007, the grievor once more did not attend her hearing. She apparently provided no instructions to her representative, who stated that he had made reasonable efforts to contact her. Once more, she offered no cogent reason for not attending, through her representative or directly to PSLRB staff. The grievor's representative was able to report only imprecise, second-hand information to the effect that "uncontrollable circumstances" prevented her participation.

[39] Without a cogent explanation, this record does not reveal a grievor who accepts the obligation to pursue her case with diligence and assist her representative in the steps necessary to bring the matter to a hearing. Moreover, I have not been provided with any information that suggests that this reality will soon change. The grievor's

representative speculated at the hearing that circumstances might be different one or two years from now. Perhaps so, but such speculation does not offer a sound basis for weighing a finding against the employer's contrasting concerns.

[40] The sad element of this case is the untested possibility that there may be medical reasons that explain the grievor's behaviour, at least in some significant part. Both parties recognized in their submissions that there are signs in the history of this file of a grievor who may not at all times fully appreciate the consequences of her actions or inaction, or who may face other psychological impediments to her participation in this dispute resolution process. Regrettably, this too is only speculation — an inference based on the indirect record of the grievor's conduct. Her representative conceded that he had no substantive evidence that he could place before me to establish a cogent medical explanation for the grievor's behaviour. Here again, I do not believe that I can base a decision on speculation, however well intended, and even if shared by both parties. Had her representative been able to provide me with any satisfactory evidence that the grievor suffers from a medical condition that restricts her ability or capacity to participate in her case, then a real question of an obligation to accommodate those medical circumstances might well have arisen. It was the grievor's onus to bring forward such information, herself, through her representative or some other interlocutor. Without this evidence, the balancing of interests must, in the end, favour the employer's concern to bring finality to a matter now well into its fifth year.

[41] On this basis, I rule against the grievor's representative's request to adjourn this hearing *sine die*. I find further that the grievor has abandoned her grievance through her repeated inaction and failure to participate in the grievance process that she initiated. The grievor was absent at this and earlier proceedings. She did not provide cogent reasons for her absences. She has failed repeatedly to instruct her representative. She has failed to demonstrate diligence in pursuing her case. There is no reasonable prospect that this situation will soon change.

[42] I wish to note that I have reached my conclusions on the basis of my own assessment of this case and of the arguments made at the hearing before me. That said, I do attach weight to the general public interest considerations mentioned above and believe it to be very important that notices given for the efficient administration of justice are respected. In this light, I felt entitled to draw a clearly negative inference

from the grievor's lack of response, in particular to the PSLRB staff's October 20, 2006, letter. At the very least, that letter unequivocally established that the grievor's attendance at the February 6 to 9, 2007, hearing was expected and required and that she was so informed.

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

*(The Order appears on the next page)*

**V. Order**

[44] The application for a postponement of the hearing is dismissed.

[45] The grievance is also dismissed.

April 25, 2007.

**Dan Butler,**
**adjudicator**