Date: 20070111

File: 166-02-36185

Citation: 2007 PSLRB 6

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

EDWARD SYNOWSKI

Grievor

and

TREASURY BOARD
(Department of Health)

Employer

Indexed as
Synowski v. Treasury Board (Department of Health)

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

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Himself

For the Employer: Neil McGraw, counsel

For the Canadian Association of Professional Employees: Michelle Flaherty, counsel

Heard at Ottawa, Ontario,
August 21 to 23 and October 30 to November 1, 2006.

I. Grievance referred to adjudication

[1] Edward Synowski, the grievor, was Chief, International Affairs in the Office of Regulatory and International Affairs (ORIA) of the Health Products and Food Branch at Health Canada. He presented the following grievance alleging disguised discipline on August 17, 2004:

. . .

> *In accordance with clause 40.02 of the collective agreement, I believe that I have been treated unjustly, as well aggrieved by the Employer's continued efforts and actions of not allowing me to return to my substantive duties. The Employer had made official but unsubstantiated statements having negative impacts identifying me as a problem in the workplace. I believe that I am the victim of disguised discipline, as being demonstrated by negative official statements. A pattern of actions and events orchestrated by management which I will present during the grievance procedure, will establish and confirm my contention that I am subjected to disguised discipline.*
>
> *CORRECTIVE ACTION REQUESTED*
>
> *That management ceases and decease* [*sic*] *immediately all forms of disguised discipline. I return and assume all of my substantive duties immediately which are to manage the international files and staff.*
>
> *I reserve the right to prescribe other corrective measures during the grievance procedure*

. . .

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (*PSSRA*).

[3] This grievance was referred to adjudication on June 8, 2005. Mr. Synowski was subsequently terminated from his position. That termination is the subject of another grievance that is not before me. The employer requested that the present reference to adjudication be held in abeyance pending the final level reply to Mr. Synowski's termination grievance. The Chairperson granted the employer's request. The parties subsequently attempted to mediate the present grievance, without success.

An adjudication hearing was initially scheduled for May, 2006. The grievor requested a postponement of this hearing, and the request was granted by the Chairperson. The employer requested on April 21, 2006, that the present grievance be held in abeyance pending an adjudication hearing and decision on Mr. Synowski's termination grievance. Mr. Synowski objected. The employer's request was denied.

II. Preliminary matters

[4] At the commencement of the hearing, there were a number of issues to resolve: summonses, disclosure and the scope of the grievance hearing. My rulings on these matters are set out below.

A. Request to amend the grievance

[5] Mr. Synowski had amended his grievance during the grievance process. I ruled that since the original grievance only was referred to adjudication, I was without jurisdiction to allow an amendment to the grievance in the absence of the consent of the other party. The amendment referred to events subsequent to the date of the presentation of the original grievance referred to adjudication. The employer did consent to the modification of the language of the original grievance to include "constructive dismissal", but did not consent to include events subsequent to the presentation of the grievance. The grievance is accordingly amended to that extent only, to read as follows:

> . . .
>
> *. . . A pattern of actions and events orchestrated by management which I will present during the grievance procedure, will establish and confirm my contention that I am subjected to disguised discipline and constructive dismissal.*
>
> . . .
>
> [Emphasis added]

The scope of the evidence to be heard was therefore limited to the period up until August 17, 2004.

[6] It became clear when hearing submissions on the scope of disclosure of documents that there were also issues around the period of time covered by the grievance. Mr. Synowski wanted to introduce evidence going back to events that

occurred in 2002 and 2003. The employer submitted that the scope of the grievance should be limited to the events of the spring of 2004. I ruled that the grievance was limited to the events immediately preceding and including the spring of 2004, until August 17, 2004.

B. Relevance of summons

[7] At the commencement of the hearing, there were a number of outstanding issues relating to summonses requested by Mr. Synowski.

[8] Mr. Synowski served a summons on Claude Archambault, Labour Relations Officer with the Canadian Association of Professional Employees (CAPE). The summons requested that Mr. Archambault bring documents in the CAPE's possession. The CAPE was initially representing Mr. Synowski in his grievance but was no longer his representative at the time of the hearing. On the first day of the hearing, the CAPE objected to the summons. I struck the summons. After my ruling on the scope of the hearing and in light of the resolution of some of the disclosure issues (see below), I found that the evidence of Mr. Archambault was not necessary in the circumstances.

[9] The employer undertook that it would call Judith Lockett, Director General of the ORIA, (Mr. Synowski's supervisor) as part of its case. Mr. Synowski therefore agreed to withdraw his request for a summons for Ms. Lockett.

[10] The employer objected to the calling of Karen Dodds, Executive Director for the Pest Management Regulatory Agency at Health Canada, as she was not Mr. Synowski's direct supervisor during the period in question. Mr. Synowski alleged that she was directly involved in some of the decisions, as Ms. Lockett had advised him that she was acting on Ms. Dodds' instructions. On this basis I allowed the summons to stand, subject to addressing the technical requirements of service. Mr. Synowski ultimately decided not to call Ms. Dodds as a witness.

[11] The employer also objected to the summons for Patrick Borbey, Associate Deputy Minister at Health Canada at the time of the grievance. Mr. Synowski alleged that Mr. Borbey was involved in the decisions relating to a harassment complaint filed by Mr. Synowski and with the conduct of the Human Resources Services Directorate of Health Canada. I ruled that this summons be struck, as there was no allegation in the grievance that directly involved Mr. Borbey.

C. Disclosure of documents

[12] With regard to disclosure, I ruled that Mr. Synowski could provide a detailed list of requested documents to the employer, but that I would not order a blanket disclosure that would amount to a "fishing expedition". Mr. Synowski submitted that correspondence between his bargaining agent and himself was in the employer's possession, as his office had been sealed and he had been prevented from removing these documents. I ordered the employer to look for such documents and provide those documents to Mr. Synowski, if they were in the employer's possession. The employer did provide the documents on the following day. Mr. Synowski requested an adjournment until the next day to review the documents. The employer did not object. I granted the adjournment.

[13] Mr. Synowski stated that he wanted to proceed at the resumption of the hearing (the following day) with the documents he had, and not have further delays while the employer responded to a detailed disclosure request. I advised Mr. Synowski of the risks associated with proceeding on this basis, and that he was thereby waiving his right to raise issues of disclosure in any further proceedings. Mr. Synowski insisted that the hearing proceed, and I allowed it to proceed on that basis.

[14] On August 23, 2006, Mr. Synowski requested a further adjournment to review documents that had come into his possession the previous day (as the result of requests under the *Access to Information Act* and the *Privacy Act*). I granted an adjournment.

[15] Mr. Synowski asked that the employer be ordered to pay his costs of obtaining representation. I ruled that I was without jurisdiction to make such an order.

[16] Mr. Synowski asked that I reconsider my rulings of the previous day with regard to the scope of the hearing. I advised him that the rulings were final, and could only be challenged on judicial review after the issuance of a final decision.

[17] Mr. Synowski requested a "mistrial", to enable him to go directly to the Federal Court to object to my rulings. I explained that there was no provision under the *PSSRA* for such a ruling.

[18] It became clear that a continuation of the hearing would be required. I asked that the parties bring to my attention any outstanding disclosure issues prior to the continuation of the hearing, and such issues could then be dealt with prior to the resumption of the hearing, by way of written submissions or by way of a conference. Prior to the continuation of the hearing, an issue arose with regard to the disclosure of a harassment investigation report.

[19] The employer informed me by email on October 23, 2006, that Mr. Synowski had requested an unvetted copy of a harassment investigation report from the Access to Information and Privacy Directorate of Health Canada. Mr. Synowski had received a copy of the report that had been vetted, as it contained personal information protected information under the *Access to Information Act*. The employer stated that it was prepared to disclose an unvetted copy of this report on the following conditions: the unvetted copy was to remain confidential, it may only be used in the context of the references to adjudication, and the unvetted copy will be returned upon completion of these proceedings.

[20] Mr. Synowski responded on October 24, 2006, as follows:

. . .

> *. . . This report is highly relevant to my case.*
>
> *I would agree to maintain personal confidentiality as per the Privacy Act and to return the document upon completion of these proceedings but I do not agree to any future limitation of using this document and the information contained in it. If the document makes it evident that Health Canada or individual employees of the Government are liable for civil or other legal actions, then I reserve the right to use the unvetted report. Nor am I waiving any rights to have other courts or officials request the document in the future.*

. . .

[21] On October 26, 2006, the employer withdrew its offer to disclose the harassment investigation report in advance of the resumption of the hearing.

[22] At the resumption of the hearing I heard submissions from both parties on the disclosure of this document. Mr. Synowski reiterated his request for disclosure of the unvetted harassment investigation report. Mr. Synowski was in agreement with the conditions set out in the employer's email correspondence of October 23, 2006, with

the exception of the condition that he not use the document outside the adjudication hearing.

[23] The employer stated that the harassment investigation report was not part of this adjudication. The employer was aware of a complaint to the Privacy Commissioner filed by Mr. Synowski. Although the employer's offer of disclosure was a sign of good faith, it alleged that, ultimately, the harassment investigation report was not relevant to the present grievance. In the alternative, the employer submitted that, if that information is relevant, it should remain within these proceedings. The employer agreed that these proceedings would include any possible judicial review of this decision.

[24] Mr. Synowski stated that the harassment investigation report was relevant, as it set out the basis for his allegations that the harassment actions of the employer were punitive and constituted constructive dismissal.

[25] The employer stated that any link between the harassment investigation report and the reassignment of duties would have to be established through testimony. The employer submitted that it was up to the Privacy Commissioner to vet the harassment investigation report and this adjudication hearing should not be used to circumvent the process under the *Privacy Act*. The employer submitted that it was up to Mr. Synowski to show that the information was somehow relevant to the adjudication of the present grievance.

[26] Mr. Synowski also stated that he had only received disclosure of documents as ordered by me. He argued that this was indicative of the employer’s consistent refusal to give information and to delay or stall the proceedings. The employer apologized for the delay in forwarding the material to Mr. Synowski and stated that it was an administrative error.

[27] I ruled that an unvetted copy of the harassment investigation report was to be disclosed to Mr. Synowski. I noted that there is a difference between ordering disclosure of a document and admitting it into evidence. These proceedings are separate and apart from any proceeding under the *Privacy Act* or *Access to Information Act*. It is not my place or role to get in the middle of any such proceedings. For that reason I stated that I need not wait for findings or rulings of the Privacy Commissioner. I can order disclosure of an unvetted copy of the harassment

investigation report with any necessary conditions to protect privacy interests. I ordered disclosure with the conditions initially suggested by the employer in its correspondence dated October 23, 2006. With regard to the condition that the document not be used in other proceedings I made a few comments. This document is being produced only for this hearing and my ruling cannot be binding on any other proceedings. The employer does not lose its right to object to the production of this document at any other proceeding.

[28] After viewing the unvetted harassment investigation report, Mr. Synowski returned it to the employer and stated that he would rely on the vetted copy already in his possession.

[29] The parties made brief opening statements. I then reviewed with Mr. Synowski the procedures for presenting a case. After some discussion, I granted an adjournment until the next day to allow Mr. Synowski time to prepare his case.

III. Summary of the evidence

[30] Mr. Synowski's position was classified as an ES-06. His work description (Exhibit E-1) lists the following key activities of his position:

. . .

> *Initiates, plans and directs projects and studies developed to collect and analyse information and statistical data regarding international health products and food programs and initiatives and broaden Canada's knowledge base.*
>
> *Develops, implements and maintains broad consultative processes with key stakeholders; coordinates, chairs and leads interdepartmental collaboration on international health products and food issues to obtain and incorporate public/stakeholder and government concerns in policy/ program development.*
>
> *Provides expert advice to Director General, Assistant Deputy Minister HPFB, the Minister and Deputy Minister of Health on the socio-economic and health related implications of international policies, agreement and programs and recommends new programs/initiatives to support the development of global strategies for improved health.*

> *Coordinates and represents Health Products and Food Branch interests in multi-lateral fora and undertakes bilateral activities in support of the development and implementation of international programs, agreements and policies and the advancement of Canadian positions in the international fora.*
>
> *Provides for the personal development and effective utilization of Division staff, their effective interactions with colleagues throughout the HPFB and Department and in other agencies; the cost conscious planning and management of resource allocations.*
>
> *Provides analytical and statistical reports and information on international negotiations and activities to departmental colleagues engaged in the development of domestic policies, plans and strategies and the preparation of reports to the Director General, Assistant Deputy Minister HPFB, the Minister and Deputy Minister of Health.*
>
> *Identifies and defines opportunities and constraints for the development of strategies, programs and policies which will increase global action on priority health products and food issues.*
>
> *Contributes as a member of the DG's Management Team to the Office's strategic program planning and overarching policy and service delivery frameworks and provides leadership relative to the implementation of assigned program elements that cut across the various Branch Directorates and supports the effective delivery of international initiatives.*
>
> *Initiates, plans and directs papers and briefing materials for the Director General, Assistant Deputy Minister HPFB, Deputy Minister and Minister; reviews, edits and advises on the content of Cabinet Documents supporting the need for program funding and policy development.*
>
> *Supervises staff, organizes and directs the work of research consultants, writers, students and project team members.*
>
> . . .

[31] Mr. Synowski filed a harassment complaint against his then supervisor in November 2003. Mr. Synowski testified that the harassment investigation report (completed in October 2004) found in his favour. Mr. Synowski also testified that the actions of the employer to "try to get rid of" him were a direct result of the findings of the harassment investigation. He also alleged that the former Assistant Deputy Minister (ADM) of the Health Products and Food Branch was involved in efforts to "get

rid of him". The employer objected to the admissibility of the harassment investigation report. I allowed the introduction of the report (Exhibit G-9) in order for Mr. Synowski to cross-examine Ms. Lockett on her motivation for her interaction with him and not for the truth of its contents. Mr. Synowski did not put to Ms. Lockett the allegation that her actions were motivated by the harassment investigation report.

[32] Ms. Lockett arrived at the ORIA in October 2003. She testified that the ORIA was "not in a good situation" at that time. The previous Director General had left nine months earlier and people in the ORIA were discouraged and felt that they had been abandoned. She testified that her mandate was to restructure the ORIA to "meaningfully contribute" to the Health Products and Food Branch. Her mandate included ensuring that the ORIA became a centre for expertise in "all things international" and play a strategic policy role.

[33] Mr. Synowski was scheduled to go on French language training in November 2003. Ms. Lockett asked him to delay the start of his training in order to assist in drafting a Memorandum of Understanding. On November 14, 2006, Ms. Lockett met with Mr. Synowski. In an email dated November 25, 2003 (Exhibit G-2), Ms. Lockett summarized the results of the meeting as follows:

. . .

- *You will continue with language training until March 2004 or until you reach the required level*
- *During this time, you will be looking for another job*
- *During this time, I will assist you in terms of letting you know of opportunities I hear of or providing references*
- *If you do not have a new job by the time you finish language training, you will return to ORIA*
- *In returning to ORIA, you will keep your current level and title, but will report directly to me doing special projects*

[34] Ms. Lockett testified that it was clear to her that Mr. Synowski regarded language training as a "springboard" to other positions. Mr. Synowski replied to the email on November 28, 2003 (Exhibit G-2), that he did not agree that the conversation had concluded as she had suggested. He wrote that he did not agree that he would be doing special projects on his return to the ORIA.

[35] On November 17, 2003, Mr. Synowski began his French language training.

[36] On January 27, 2004, Ms. Lockett met with Mr. Synowski at a restaurant near Mr. Synowski's language school, after the end of the school day. The purpose of the meeting was to update him on the reorganization of the ORIA. Ms. Lockett was meeting with all staff individually. Ms. Lockett told him that his work description was going to be rewritten and that she anticipated that the changes would be significant. Because the changes would be significant, she told him that it would likely constitute a new job and that he would have to compete for it. Mr. Synowski asked her why he was not being declared surplus and she told him that no determination of surplus status had been made yet. Mr. Synowski later wrote in an email to Ms. Lockett that he felt that he was being removed from his position unjustly (Exhibit E-3). Mr. Synowski stated at the hearing that he thought that it was unprofessional to have such a meeting at a restaurant. He put this to Ms. Lockett in cross-examination, and she testified that she did not view it as inappropriate and that she had had meetings with staff at restaurants on other occasions.

[37] The day after the meeting of January 27, 2004, Mr. Synowski went on sick leave. Initially, he advised Ms. Lockett that he would be off on sick leave until March 2004 (the commencement of his new language training class placement). His doctor later provided a medical certificate indicating that Mr. Synowski would be off sick until July 1, 2004.

[38] Mr. Synowski wrote an email to Ms. Lockett on May 5, 2004, and advised her that he would be returning to work on May 24, 2004 (Exhibit E-5). In his email he stated that he had run out of leave credits and felt that he could ". . . better move my case forward while in the office. . . ." He also stated that he was not ready to return to language training until his issues were "sorted out":

. . .

> *. . . The reason for my stress still exists. But work does not carry the same pressure and it would allow us the opportunity to make progress on the restructuring by including all the facts in an open and honest dialogue.*

. . .

[39] Ms. Lockett replied to the email on May 10, 2004 (Exhibit E-5), and stated her concern about Mr. Synowski's return to work, as his doctor had indicated that the leave should extend until July 1, 2004. She wrote: ". . . My concern is that if you return before you are ready, it may be detrimental to your health." She told him that she was requesting a fitness-for-work assessment from Health Canada. Mr. Synowski replied by email the following day (Exhibit E-5):

. . .

> *. . . I am filing a harassment complaint against you for numerous reasons, one of them is the discrimination against an individual with an infirmity (a Human Rights category). You know full well how tense and stressed I was and then acted to compound my stress and tension when I was away from the office. That was the moment when I went on stress leave. You are the primary cause and one of the key elements to my going on stress leave, as well as the primary motivator in compounding a poisonous and hostile work environment. . . . But the stress occurred when you created actions behind my back. If I was back in the office I would be informed of your actions in a more appropriate way.*
>
> . . .
>
> *. . . My complaint against you is that you are doing everything in your power (legal authorities and covert actions) to keep me away. This is another one of those actions.*

. . .

[40] In the letter requesting the fitness-for-work assessment (Exhibit G-4), the department wrote as follows:

. . .

> *Mr. Synowski has indicated that he attributes his stress to work situations that have occurred over the year (and remain ongoing);*
> - *harassment complaints initiated by himself, including an additional one Mr. Synowski stated would be lodged against Mrs. Lockett*
> - *possible impact the current reorganization of ORIA may have on his position and his employment within the Office (the duties of his position are currently being rewritten to reflect a broader scope of responsibilities and depending on the outcome of the classification evaluation, he may be required to compete for the position)*

> *Recently, Mr. Synowski has demonstrated an increased level of stress. The correspondence Mr. Synowski sent to his manager and others, over the past several weeks, has been characterized by the use of accusatory language, derogatory personal remarks and misinterpretation of factual information. For instance, updates on the structure of the organization are converted to allegations that Mrs. Lockett is trying to get rid of him, accusing her of contributing to a "poisonous and hostile work environment", and that she and others outside the immediate work environment are collaborating against him. Much of what the manager writes to Mr. Synowski is related to factual information. His responses indicate that he has not absorbed the facts and is reacting to what be believes is his manger's "motives" and "behind his back tactics". The tone and content of the written communications to the manager, make her suspect that Mr. Synowski's level of stress has not decreased, as the volatility of the contents has been escalating progressively over the past several weeks.*
>
> *It is important to note that Mr. Synowski's condition, as it relates to stress at work, has made it difficult for management to maintain workplace health for office staff.*
>
> . . .

[41] The fitness-for-work assessment was completed and Mr. Synowski was found fit to return to work. Mr. Synowski alleged that the doctor who conducted the examination commented on the inappropriateness of the letter requesting the assessment. In an email to Mr. Synowski on May 21, 2004 (Exhibit G-6), Ms. Lockett wrote that because she was not expecting him to return so quickly, she had made no arrangements for his return. She said she would need time to brief him and to announce his return to staff members. She stated that she wanted him to be on "work at home" status for the week. Mr. Synowski replied that his situation did not allow him to work at home and that he would come to the office on May 25, 2004. On the morning of May 25, 2004, Ms. Lockett asked him not to return to the office until arrangements had been made for his reintegration and reassured him that his pay would continue (Exhibit G-7). Mr. Synowski met with Ms. Lockett later that day, at her request. At the meeting, she suggested that she would be reassigning him to the Legislative Renewal Secretariat in Health Canada. Mr. Synowski objected to this assignment on the basis that he had neither the experience nor the knowledge in the Legislative Renewal Initiative and it would be inappropriate for him to take on the assignment. In an email to Ms. Lockett he stated (Exhibit G-7):

. . .

> *. . . it would seem that you are actively trying to keep me out of the office and assign me to a task in which my reputation could suffer because of my complete lack of background in the area. I do ask you to reconsider this decision. . . .*

. . .

[42] Ms. Lockett replied that she agreed to reconsider the proposed assignment (Exhibit G-7). Mr. Synowski replied:

> *To clarify my position on this potential assignment: I perceive that you are keeping me out of the office and I would like to know why. Assigning me to a temporary position . . . is punitive in that I am being set up for failure because I have no experience in the area of legislative renewal and by the time I get familiar with the file I would be back in ORIA. . . .*
>
> *Is there any reason for keeping me out of ORIA that I need to be appraised* [*sic*] *of? . . .*

. . .

[43] Ms. Lockett wrote to Mr. Synowski on June 27, 2003, and indicated that she was no longer pursuing the option of the assignment in the Legislative Renewal Secretariat because he had persuaded her by his "expressed lack of comfort" with the assignment (Exhibit G-8). She decided that, instead, she would assign him to a set of duties within the ORIA related to international files. In the email she noted:

. . .

> *During this time, you will report directly to me. You will retain your current salary, as well as your substantive level and position title. Your place of work will be your office in ORIA, as it was previously.*

. . .

[44] Ms. Lockett prepared a detailed list of duties (Exhibit E-2) composed of the six tasks that follow:

- *Summary of International Work by Country*
- *Analysis of Potential Contribution to the Objectives of TAS* [Therapeutic Access Strategy] *from our work with TGA, EMEA and the FDA*

- *Links between the PM's Stated Health Priorities and the Branch's International Regulatory Work*
- *Links Between International Work and Legislative Renewal*
- *International Bodies/Linkages*
- *Communication in and out of ORIA*

[45] Ms. Lockett testified that the assigned duties were "very much a blue-sky piece" and involved looking at how to blend the operational and strategic approaches for the ORIA. She regarded it as an excellent assignment for Mr. Synowski.

[46] On June 14, 2003, Ms. Lockett met with Mr. Synowski to discuss an action plan for the assigned tasks. Mr. Synowski did not have a plan developed. Ms. Lockett summarized her concerns about the delays in an email dated June 16, 2003 (Exhibit G-13). Mr. Synowski responded that it was taking time to become familiar with new initiatives. He continued:

. . .

> . . . *As well, there has been a fair amount of effort and activity in attempting to resolve my harassment complaints and some of the issues that I presently have with your office. I realize that these issues are a secondary concern, but again must be dealt with now because they involve the DGO* [Director General's office] *and your recent activities.*

. . .

Mr. Synowski also wrote in his email that his lack of access to staff was hampering his progress on the work, that some of the work was work that should be done by an employee at a lower level, and that some of the tasks were a duplication of work being done by a consultant. Mr. Synowski testified in cross-examination that the duties were "constructed for failure" and in order to keep him busy.

[47] At the hearing, Ms. Lockett reviewed the list of duties that she had prepared for Mr. Synowski and compared it to the work description for his substantive position (Exhibit E-7). She identified where she thought that the list of duties fit with his work description.

IV. Summary of the arguments

A. For the grievor

[48] Mr. Synowski submitted that his grievance arose out of the actions of Ms. Lockett, which were in retaliation for a harassment investigation that had found in his favour. The employer demonstrated its bias against him through constructive dismissal and disguised discipline. The fact that he submitted a harassment complaint resulted in the employer deciding that it was going to get rid of him. The actions of the employer in unilaterally changing his duties without consent had the effect of changing his contract of employment.

[49] Mr. Synowski argued that the letter requesting the fitness-for-work assessment (Exhibit G-4) defamed him and proved the animosity of Ms. Lockett.

[50] Mr. Synowski submitted that the reassignment of duties was forced upon him and diminished his responsibilities. He also submitted that the new duties were such that he would never be able to fulfill the requirements of Ms. Lockett. Some of the tasks were for a lower classification level and were completed by a lower classification employee. Other tasks were accomplished but were rejected by Ms. Lockett. He developed a work plan, which was also rejected. He submitted that no matter what he would have done, it would have been rejected by Ms. Lockett.

[51] Mr. Synowski argued that disguised discipline arises when a manager, known to have animosity toward an employee, is asked to participate in a decision affecting that employee. He submitted that animosity was shown by the letter requesting his fitness-for-work assessment. He referred me to the following decisions: *Laird v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-19981 (19901207), and *Mallett v. Treasury Board (Indian and Northern Affairs)*, PSSRB File Nos. 166-02-15344 and 15623 (19860711). In conclusion, he stated that the actions of the employer constituted constructive dismissal.

B. For the employer

[52] The employer argued that in an allegation of disguised discipline the burden of proof rests with the grievor, and that he had not met his burden. There was no evidence that the decision of management to assign duties to Mr. Synowski was a

disciplinary action. There was no evidence that the employer was attempting to correct or punish Mr. Synowski.

[53] The employer submitted that it has an absolute right to assign duties under section 7 of the *PSSRA*. There is no requirement for the consent of the employee. Ms. Lockett was a credible witness and there was no reason to doubt her testimony. There was no evidence of malicious intent or bad faith on her part. The duties that were assigned to Mr. Synowski fell within his work description. The evidence was clear that Ms. Lockett had a mandate to restructure the ORIA. There was no evidence to suggest that the reorganization was a sham or had no real merit. No employee has the right to demand that things go back to the way they were; employees must perform their duties as assigned.

[54] The employer argued that in order to find disguised discipline an adjudicator must find that the employer was responding to some kind of misconduct (*Robertson v. Treasury Board (Department of National Revenue*), PSSRB File No. 166-02-454 (19710628)). There was no evidence of this. Mr. Synowski did not prove his allegations and no one testified in support of those allegations.

[55] The employer submitted that the harassment investigation report (Exhibit G-9) was of no real value in the present grievance. The only issue was whether Ms. Lockett relied on the investigation report in making her decision. Mr. Synowski asked her no questions on the investigation report in cross-examination. Ms. Lockett had no involvement in the investigation report.

[56] The employer argued that there was no evidence of any financial penalty suffered by Mr. Synowski. He remained paid at the ES-06 group and level. He had clearly not been dismissed. In *Browne et al. v. Treasury Board (Revenue Canada – Customs, Excise and Taxation)*, PSSRB File Nos. 166-02-27650 to 27661 (19971201), an adjudicator examined a reorganization of work duties and concluded that he had no jurisdiction, partly on the basis that the grievors' classification remained the same and consequently there was no financial penalty. In Mr. Synowski's case the issue was ultimately about the assignment of duties and whether he agreed with his new duties or not does not make it disciplinary. Mr. Synowski's assigned duties on his return to work were demonstrated to fall within his work description.

[57] With regard to the fitness-for-work assessment, the employer submitted that it had a duty to ensure that Mr. Synowski was medically fit to return to work, given that stress was identified as the very reason for his sick leave.

[58] The employer submitted that there was no evidence of animosity on the part of Ms. Lockett or that she had made up her mind to get rid of Mr. Synowski. Accordingly, the decision in *Laird* is not relevant to the present grievance.

C. Grievor's rebuttal

[59] Mr. Synowski submitted that the cases on which the employer relies do not apply to the facts in this case. He submitted that the evidence had shown animosity on the part of the employer. The assignment of duties by the employer is not an absolute right. Ms. Lockett was not a credible witness and her patterns of behaviour connote a malicious intent on her part.

[60] It was not true that the assigned duties fell within his work description, Mr. Synowski submitted. Two of the tasks required content knowledge and experience in Therapeutic Access Strategy and Legislative Renewal Initiative, which he did not have. To develop the necessary background would require months of research.

[61] Mr. Synowski submitted that the harassment investigation report did implicate the ADM, and Ms. Lockett's actions reflected those of the ADM. He also submitted that the covering letter for the fitness-for-work assessment was extremely inappropriate, and that the doctor who conducted the examination had also made this observation.

V. Reasons

[62] The right to refer a grievance to adjudication under the *PSSRA* is set out in subsection 92(1) as follows:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*

> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)*(f) *or* (g) *of the* Financial Administration Act,
>
> . . .
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> . . .

[63] Mr. Synowski is alleging disguised discipline and constructive dismissal. The events grieved predate Mr. Synowski's eventual termination (the subject of another grievance not before me). In accordance with the *PSSRA*, Mr. Synowski must demonstrate that the reassignment of duties by the employer was a disciplinary action resulting in suspension or a financial penalty. He must not only prove, on a balance of probabilities, that the actions of the employer were disciplinary, he must also show that he suffered a suspension or a financial penalty as a result of this action.

A. <u>Disguised disciplinary action</u>

[64] Disguised disciplinary action has been discussed in *Robertson*. In that case, the adjudicator concluded that:

> . . .
>
> *. . . both the* [*Financial Administration Act*] *and Section 106* [of the *Terms and Conditions of Employment Regulations*] *expressly refer to <u>penalties for breaches of discipline or misconduct</u>. Those words embody the concept of fault, that is to say: either willful wrong-doing or culpable negligence, either of which can have penal consequences. I think the words do <u>not</u> include such failings or deficiencies as involuntary incompetence or incapacity (or infancy or old age) which clearly lack the element of voluntary malfeasance.*
>
> *My view is that the "disciplinary action" referred to in Section 91(1)(b) of the Public Service Staff Relations Act is such action as is taken in response to alleged "breaches of discipline or misconduct" - - - in other words, in response to what the Employer considers to be some kind of <u>voluntary malfeasance</u>, by whatever name it may be called in an office file.*

. . .

[Emphasis in the original]

[65] The grievor is required to demonstrate that the employer's decision constitutes a form of disguised discipline that was taken in response to alleged breaches of discipline or misconduct. Mr. Synowski alleges that a harassment complaint that was decided in his favour was a motivation on the part of the employer to discipline him. The evidence did not show any connection between the harassment investigation report and the actions of the employer in re-assigning duties or requesting a fitness-for-work assessment. Ms. Lockett was not cross-examined on this alleged connection. Her evidence on the reasons for the reassignment of duties was credible and it was within her rights as a manager to assign duties in the workplace. The harassment investigation report (Exhibit G-9), by itself, is not proof of any disguised disciplinary action.

[66] Mr. Synowski also alleged that the letter requesting a fitness-for-work assessment (Exhibit G-4) damaged his reputation. In his grievance he refers to that letter in this way: ". . . official but unsubstantiated statements having negative impacts identifying me as a problem in the workplace. . . ." The negative comments in that letter did not appear to have any impact on the fitness-for-work assessment, since Mr. Synowski was found to be fit to return to work. That letter also had limited distribution. I find that that letter was not disciplinary in nature.

[67] Mr. Synowski submitted that the assignment of special duties constituted constructive dismissal and disguised discipline. The *PSSRA* clearly recognizes at section 7 that the employer has the authority to assign duties. After reviewing the assigned duties and the work description for his substantive position, I am satisfied that those newly assigned duties were within the duties set out in his work description.

[68] The decisions on which Mr. Synowski relied (*Laird* and *Mallett*) have different factual situations from the case at hand, and are not relevant to the present grievance.

B. <u>Suspension or financial penalty</u>

[69] As Mr. Synowski did not allege that he was the subject of a suspension, I need not address this issue.

[70] Mr. Synowski did not provide evidence to show that he suffered any financial penalty as a result of the re-assignment of duties. He remained paid at the ES-06 group and level. In the absence of any financial penalty, his grievance alleging a disciplinary action cannot be referred to adjudication. Accordingly, had Mr. Synowski been otherwise able to demonstrate disguised discipline I would be without jurisdiction to hear the grievance.

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

(The Order appears on the next page)

VI. Order

[72] The grievance is dismissed.

January 11, 2007.

Ian R. Mackenzie,
adjudicator