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Public Service Labour Relations Act

Before the Chairperson and an adjudicator

BETWEEN

KENT DANIEL GLOWINSKI

Applicant and Grievor

and

TREASURY BOARD
(Department of Industry)

Respondent and Employer

Indexed as
Glowinski v. Treasury Board (Department of Industry)

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* and in the matter of a grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson and adjudicator

For the Applicant and Grievor: Crystal Stewart, Professional Institute of the Public Service of Canada

For the Respondent and Employer: John G. Jaworski, counsel

Heard at Toronto, Ontario,
April 12, 2007.

I. Application before the Chairperson and grievance referred to adjudication

[1] Kent Daniel Glowinski has grieved his employer's failure to negotiate or offer a salary higher than the minimum on his initial appointment to a position classified at the CO-01 group and level. The employer has objected to the referral of this grievance to adjudication based on timeliness and jurisdiction. Mr. Glowinski's representative, an employment relations officer with his bargaining agent, the Professional Institute of the Public Service of Canada ("the PIPSC"), does not agree that the grievance is untimely, but in the alternative has asked for an extension of time to file a grievance.

[2] On April 1, 2005, the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. The events grieved occurred prior to April 1, 2005. An issue has arisen as to whether the *Public Service Staff Relations Act* ("the former *Act*"), R.S.C., 1985, ch. P-35, or the new *Act* applies. That issue is discussed below.

[3] Pursuant to section 45 of the new *Act*, the Chairman has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") to hear and decide any matter relating to extensions of time. I have also been assigned to hear this case as an adjudicator, as the case may be.

[4] This decision relates to five preliminary issues:

- Which statute applies to the grievance: the former *Act* or the new *Act*?
- Is the grievance timely and, if it is not, has the employer waived its right to object to the timeliness of the grievance?
- If the grievance is untimely, should the application for an extension of time be granted?
- What is the effect of Mr. Glowinski's employment status at the time he filed his grievance?
- Is the subject matter of the grievance referable to adjudication?

II. Summary of the evidence

[5] The parties provided an "Agreed Statement of Facts" and agreed exhibits. Mr. Glowinski testified.

A. "Agreed Statement of Facts"

[6] The "Agreed Statement of Facts" reads as follows:

. . .

1. *The Grievor, Kent Glowinski, was accepted for a co-op placement at Industry Canada in Ottawa, as part of a co-op program at the law school he was attending. His term of placement was from May 3, 2004 to September 3, 2004. The contract for the co-op work stipulated that he would be paid $16.00/hr and would work 37.5 hours per week. The Grievor, as well as any other co-op student in his position, had no opportunity to negotiate this hourly rate. He was not entitled to any employment benefits, nor was he eligible for closed staffing competitions within the Public Service.*

2. *The Grievor wanted to continue to work for the Department and was advised that the only way to do so was to work on Federal Student Work Experience Program (FSWEP) contract. The offer of the FSWEP position was made by letter dated August 17, 2004. The Grievor accepted the position and began to work as an FSWEP student on September 7, 2004. This contract was to continue until May 6, 2005. The Grievor was to be working part-time hours at an hourly rate of $17.13. Again, he, like others on FSWEP contracts, had no opportunity to negotiate his hourly rate. Similar terms also applied to this contract, such as the fact that no employment benefits were provided, the Grievor was not able to access intranet/internet databases for employees and was not eligible for closed competitions.*

3. *During the term of this placement, in August 2004, a determinate CO-01 position was posted. The position was as an Arrangements and Exemptions Officer. The Grievor applied for this position on September 8, 2004.*

4. *On January 13, 2005, the Grievor was informed that he was successful in the CO-01 competition, placing first on the Eligibility List, and he was offered the position. The Director, Cheryl Ringor, indicated that he would not be able to negotiate his salary and as such, he would be paid the minimum salary upon appointment to the position. The salary range at the time was $41,321.00 to $54,975.00.*

5. *At the time, the Grievor was:*

- *nearing the completion of his LL.B*
- *had an undergraduate degree in Political Science from McGill University*

- *had eight months of experience working for the Department*
- *had private sector work experience*
- *had a triple C bilingual rating*

2. *The Grievor disagreed with the decision to pay him the minimum of the pay scale. Ms. Ringor indicated that the offer would remain open for four business days from the date of the offer and that he had to accept or decline the offer based on the terms as offered. The Grievor attempted to seek further information and clarification on the matter, within the Department. He also spoke to someone from his bargaining agent.*

3. *The Grievor verbally accepted the job offer on January 14, 2005. The Grievor continued to seek clarification from Department officials with respect to the decision on his salary. He had numerous conversations with various Pay and Human Resources employees but the decision remained unchanged. The Grievor was aware that there was a thirty day time limit to file an Application for Judicial Review.*

4. *The Grievor did work in the determinate position beginning on January 31, 2005 at the yearly salary rate of $41,321. The term was to end on August 31, 2005. The Grievor worked 37.5 hrs per week from January 31, 2005 to approximately May 1, 2005 when he went on to part time hours, which varied depending on his bar and schedule. He returned to full time hours as of July 2, 2005 until the end of the term.*

5. *On February 10, 2005, the Grievor made an Application to the Federal Court seeking judicial review of the Department's decision regarding his pay.*

6. *The Grievor ceased to be an employee of the Department on August 31, 2005, when his determinate position came to an end.*

7. *On January 26, 2006, the Court issued their decision on the Application, denying it on the basis that the Grievor, as an employee, "had the right to present a grievance under subsection 91(1) of the PSSRA, since the impugned decision of the Treasury Board or Industry Canada related to the interpretation or application of a policy direction made by the employer." The Court declined jurisdiction because in their view, the Grievor failed to exhaust the available and alternate remedy of grieving the decision of the Employer to the final level of the*

grievance procedure prior to making application for judicial review.

8. *The Grievor did not appeal the Court's decision. Instead, on February 1, 2006, the Grievor filed the grievance at hand, alleging that the Employer should have negotiated an appropriate salary with him and seeking a retroactive adjustment to his salary during that term of employment.*

9. *On February 17, 2006, a Senior Staff Relations Advisor with the Department telephoned the Grievor, in response to a message he had left for her. A discussion was initiated by the Grievor as to whether it was appropriate for Ms. Ringor or her superior, Mr. Shaw (Director General) to decide the grievance at the first and second levels, as they had been part of the decision in question. No agreement was reached on this issue and the Grievor was advised that he would be contacted the following week.*

10. *Also on February 17th, the Grievor transmitted his grievance to the second level.*

11. *A grievance hearing at the second level was heard on March 13, 2006. The Department issued their response on March 30, 2006 claiming that the grievance was untimely and that no satisfactory explanation for the delay in filing the grievance was provided. The Department also argued that the grievance was not receivable because the grievance process is only open to employees as defined in the PSLRA. Nevertheless, the Department concluded that the Grievor was paid appropriately and in accordance with applicable policies.*

12. *On April 13, 2006, the Grievor filed an Action in the Small Claims Court against the Employer as well as Ms. Ringor and Mr. Shaw, personally. This Action is still outstanding.*

13. *A virtually identical response to first level response was provided at the final level of the grievance process, via letter dated May 8, 2006.*

[Sic throughout]

B. <u>Additional evidence</u>

[7] Mr. Glowinski testified that Cheryl Ringor, Director, Policy and Compliance Branch, Corporations Canada, had told him on a number of occasions that she would consider negotiating a higher starting salary. In cross-examination, Mr. Glowinski

admitted that there was only one such discussion and that the other occasions were joking references in the hallway at work. He testified that in the discussion, Ms. Ringor told him about a recent case where a new employee had negotiated a higher starting salary. Mr. Glowinski also testified that another candidate on the eligibility list for the competition had been hired at a rate higher than the minimum.

[8] Mr. Glowinski introduced a copy of the eligibility list for the job competition (Exhibit G-2). There was no legend for the codes used for the listed criteria, but Mr. Glowinski argued that the list showed that he was considered by the employer to have applied from outside the public service.

[9] During the judicial review of the employer's decision, Mr. Glowinski filed an application for an extension of time to file his record with the Federal Court. The employer consented to this request, and on July 8, 2005, the Court granted an extension until August 2, 2005 (Exhibit E-5).

[10] In *Glowinski v. Canada (Treasury Board)*, 2006 FC 78, the Federal Court found that Mr. Glowinski should have filed a grievance instead of a judicial review application:

. . .

> *[17] As an employee, the applicant had the right to present a grievance under subsection 91(1) of the PSSRA, since the impugned decision of the Treasury Board or Industry Canada related to the interpretation or application of a policy direction made by the employer. Whether the applicant was entitled to negotiate a salary greater than the minimum rate of pay specified by the "Audit, Commerce and Purchasing Collective Agreement" is dependent on the interplay of the Treasury Board's "Public Service Terms and Conditions of Employment Regulations" policy, the "Pay Above The Minimum On Appointment From Outside The Public Service" policy, and other Treasury Board policies discussed below.*
>
> *[18] In the Court's view, the statutory grievance process would have been an adequate alternative remedy to judicial review in this case. There is no allegation that the grievance levels up to and including the final level are incapable of granting the applicant the relief sought. The Court should decline jurisdiction . . . by reason that the applicant failed to exhaust the available and alternate remedy of grieving the respondents' decision to the final level prior to commencing this application for judicial review.*

> *[19] The applicant submitted that he could not file a grievance because he was not an employee entitled to file a grievance until he accepted the offer of employment effective January 17, 2005. The applicant could have refused the CO-01 position because Industry Canada would not negotiate the salary above the minimum, and then the applicant could have brought this application for judicial review. However, the applicant accepted the CO-01 position. At that point, the applicant became an employee and was bound to follow the grievance process under section 91 of the PSSRA which is intended to deal with all employment-related issues including the application and interpretation of Treasury Board Policies.*
>
> . . .
>
> [Emphasis in the original]

The Court went on to determine the merits of the judicial review application, in the alternative. The Court determined that there were a number of inconsistent policies and concluded as follows:

> . . .
>
> *[42] The Court is of the view that it should not interpret or reconcile inconsistent and conflicting Treasury Board policies and should not give legal effect to a multitude of such policies. I agree with Justice Rouleau in* Girard, supra, *that if the Treasury Board intended these policies to have a legal effect the Treasury Board would have exercised its right to enact these policies by way of regulation under the applicable section of the* Financial Administration Act.
>
> *[43] Moreover, this dilemma of a multitude of inconsistent Treasury Board policies underlines the reason why an aggrieved employee, such as the applicant, should first proceed with a grievance under the dispute resolution process set out in section 91 of the PSSRA. This grievance process provides that an employee may grieve with respect to the interpretation or application of a "direction or other instrument" made or issued by the employer. This obviously would include the Treasury Board policy at play in this case. A Court of law should not give policies the force of law unless Parliament clearly intended such policies to be given the force of law and such policies are clear, and not inconsistent with other policies.*
>
> *[44] If I were to review the decision in this case on any of the three standards of review, I would conclude that the policies are inconsistent and the Court could not find the decision incorrect, unreasonable or patently unreasonable.*

> *Mandamus*
>
> *[45] The applicant seeks a writ of* mandamus *to compel the respondents to negotiate with the applicant, on a retroactive basis, a rate of pay above the minimum pay scale for the CO-01 position in accordance with the "Pay Above The Minimum On Appointment From Outside The Public Service" Treasury Board policy. The Court will not issue a writ of* mandamus *for the following two reasons:*
>
> *1. this policy does not have any legal force or effect and therefore does not create any legal duty on the respondents to act; and*
>
> *2. even if the policy had legal force, it is not mandatory. The salary negotiation is within the discretion of the employer. While the applicant submits that another employee for the same position was able to negotiate above the minimum pay scale, the employer states that that person was a lawyer called to the Bar, which the applicant was not, and that person had two years of legal experience.*
>
> *Duty to act fairly*
>
> *[46] The applicant submits that the respondents breached their duty to act fairly because they did not provide the applicant with the right to negotiate. The duty to act fairly applies to the applicant being provided with an opportunity of knowing the reasons for a decision being made against his interests, and an opportunity to respond. This duty was fulfilled in that the applicant was given four days, which the applicant chose not to accept, to explore and possibly change, the decision of the Human Resources Branch of Industry Canada that the Treasury Board policy precluded Industry Canada from negotiating with the applicant above the minimum pay scale for the CO-01 position.*
>
> . . .

[11] Mr. Glowinski identified three issues in his grievance. At the hearing, his representative stated that Mr. Glowinski was only intending to refer the following issue to adjudication:

> *Did Industry Canada misinterpret and/or unreasonably apply Treasury Board policies and regulations in deciding that the FSWEP students are "employees" or part of the "Public Service" when refusing to negotiate or offer a higher salary?*

As corrective action, Mr. Glowinski requested that:

> *Industry Canada be compelled to offer me, in good faith, a high*[er] *salary retroactively; or*
>
> *Industry Canada be compelled to negotiate, in good faith, a higher salary with me retroactively; and*
>
> *Payment of the difference between the new salary set off against salary already paid.*

[12] After having presented his grievance at the first level of the grievance process, Mr. Glowinski wrote an email to Richard Momy, a departmental labour relations officer (Exhibit G-3), asking what the next steps were. Mr. Glowinski testified that Mr. Momy did not reply.

[13] Mr. Glowinski testified that when he discussed his grievance with a departmental official on February 17, 2006, there was no mention that the employer considered his grievance to be untimely. The grievance as submitted did not have the signed authorization of a PIPSC's representative. Mr. Glowinski testified that he had received the PIPSC's authorization to file the grievance in an email from Dan Rafferty, a PIPSC's representative. The transmittal form by which the grievance was presented at the second level of the grievance process bears the signature of a PIPSC'S representative.

[14] The collective agreement (Exhibit G-1) provides for transmittal of a grievance to the next level of the grievance process under the following conditions:

. . .

> ***34.12*** *An employee may present a grievance at each succeeding level in the grievance procedure beyond the first (1st) level either:*
>
> *(a) where the decision or settlement is not satisfactory to the employee, within ten (10) days after that decision or settlement has been conveyed in writing to the employee by the Employer,*
>
> *or*
>
> *(b) where the Employer has not conveyed a decision to the employee within the time prescribed in clause 34.11, within fifteen (15) days after the employee presented the grievance at the previous level.*

. . .

[15] Mr. Glowinski received a final-level response to his grievance on May 11, 2006. Guy Bujold, Assistant Deputy Minister, Operations Sector, found the grievance untimely. In addition, he indicated that the grievance was not receivable since Mr. Glowinski was no longer an employee. Mr. Bujold then addressed the grievance's merits and concluded that the employer had followed the policies governing Mr. Glowinski's employment situation.

[16] Mr. Glowinski filed a statement of claim against the employer and against Ms. Ringor and Richard G. Shaw, Director General, Corporations Canada, personally on April 13, 2006. He claimed damages of $12,120.00 on the basis of negligent misrepresentation, loss of opportunity, misfeasance in public office and emotional distress (Exhibit J-8). The allegations in the statement of claim relate to discussions on Mr. Glowinski's starting salary as well as matters concerning his initial appointment under the Federal Student Work Experience Program (FSWEP).

[17] Mr. Glowinski testified that he had also filed a complaint with the Public Service Commission (PSC) alleging that he should not have been included in the FSWEP. He has also made requests under the *Access to Information Act*, R.S.C., 1985, c. A-1, for travel claims made by his former supervisor, Ms. Ringor. In cross-examination, he testified that he had passed on the information that he had received to the Canadian Taxpayers Federation. He testified that he was not aware that the information had been posted on a website.

III. Summary of the arguments

[18] Prior to the hearing, both parties had filed written submissions with respect to the timeliness issue and the grievance's adjudicability. Those written submissions are on file. Both parties also made oral submissions at the hearing. I have incorporated both written and oral submissions in the summary below.

[19] The parties agreed that the applicable statute is the new *Act*, on the basis that the grievance was filed after the new *Act* came into force.

A. For Mr. Glowinski

[20] Mr. Glowinski's representative submitted that the employer had waived its right to raise an objection on the basis of timeliness. The grievance was untimely when it was initially filed, and the employer did not raise timeliness at the first level of the

grievance process. The collective agreement provides for the transmittal of a grievance to the next higher level within certain timeframes. Mr. Glowinski respected those timeframes when he referred his grievance to the second level. Although there was a discussion with the departmental representative about whether it was appropriate for the grievance to be heard at the first level, nothing was said about the grievance being untimely. The employer waived its right to raise this objection because it was not raised at the earliest opportunity.

[21] In the alternative, Mr. Glowinski's representative argued that the application for an extension of time should be granted. She submitted an argument in writing on that application on April 26, 2006:

. . .

> ***Argument for Extension to Time Limits***
>
> *The Grievor's decision to file the judicial review application in February 2005, was made based on the fact that at the time that management refused to negotiate with him, he was not yet an employee under the PSSRA (nor was he an "employee" of the public service in any respect). Given that fact, he understood that his only option was to seek redress in Court. The Court clearly disagreed with this position and found that the Board would have jurisdiction over the matter, given that it could have been filed when the Grievor was an employee under the PSSRA (after he had accepted the CO-01 position) and had access to the grievance procedure under the legislation. Given this ruling, the Grievor has pursued this matter as a grievance. It is submitted that the Grievor's actions in seeking judicial review of the Department's refusal to negotiate with him, were reasonable.*
>
> *The Board has held that the decision whether to grant an extension to the time limits, will be made based on a balancing of the potential injustice to the applicant should their application be denied with the potential prejudice to the employer should the application be granted* (Dunham v. Treasury Board – *PSSRB File: 149-2-39). More specifically, the following factors will be considered in examining a request for an extension of time:*
>
> - *Whether the grievor acted diligently*
> - *Whether the length of the delay was reasonable*
> - *Whether the grievor will be prejudiced by the denial of the application*

- *The absence of difficulty or prejudice to the employer if the extension was permitted, ie; intact evidence, readily available witnesses*

(Rinke v. Canadian Food Inspection Agency – *PSLRB File: 149-32-256)*

The Grievor did not sit on his rights – he has in fact been very diligent in pursuing them. He immediately attempted to enforce his rights through the Courts, which, based on the timing of the occurrence, he reasonably thought was his only position. There was no delay in the filing of the judicial, review application and then, no delay in the filing of the grievance.

If the extension of time is not permitted, the Grievor will be prejudiced in that he will be left without any options to seek redress for the Department's breach. He will be in the position of having a right without a remedy. The grievor will not be able to compel the Department to provide the corrective action sought in the grievance. His wage loss due to the failure to negotiate, will be unremedied.

The Department is not prejudiced as it had notice from the outset that the Grievor was challenging their decision. Also from the outset, they have disputed the challenge and have presented their arguments on this matter to the Court. The Department is not in the position of having been surprised by the late filed grievance, as the grievance relates to the same issue that formed the basis of the judicial review. The Department's evidence is intact and the witnesses are readily available.

Finally, the Grievor's issue is an important and valid question. Despite his efforts, the Grievor has been unable to resolve this dispute. The determination of this matter should not be prevented on the basis of a procedural, technical defense. The Grievor reasonably pursued his rights in court based on the timing of the occurrence. The Court did not agree with this approach and the Grievor has accepted the Court's reasoning and has pursued his matter as directed, through the grievance process. The Department is raising the time limit to file a grievance, as a bar to this grievance being considered. We are requesting that the Board grant an extension to the time limit to permit this grievance to move forward through the grievance process, and if necessary, on to adjudication before the Board.

. . .

[Sic throughout]

[22] At the hearing, Mr. Glowinski's representative submitted that the threshold for assessing the chances of the grievance's success was a low one. There are a number of disputes about the evidence. The grievance cannot be said to be without merit — it is a difficult case, but an arguable one. She also referred me to *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101, and *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96.

[23] Mr. Glowinski's representative noted that Mr. Glowinski was no longer an employee at the time that he filed his grievance. However, the matter that he was grieving had occurred when he was an employee. In *Canada (Treasury Board) v. Lavoie*, [1978] 1 F.C. 778 (C.A.), the Federal Court of Appeal held that the introductory words of section 91 of the former *Act* must be read as including any person who feels aggrieved as an employee. The new *Act* is not significantly different from the former *Act* in this regard.

[24] Mr. Glowinski's representative argued that the grievance is adjudicable. The pay administration clause of the collective agreement (clause 45.01) incorporates the employer's pay policies. She referred me to *Broekaert et al. v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 90, *Adamson v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB File No. 166-02-16207 (19880211), and *Canada (Attorney General) v. Jones*, [1978] 2 F.C. 39 (C.A.). Mr. Glowinski is arguing that the employer incorrectly interpreted the applicable policies on pay when it failed to negotiate a salary above the minimum. His representative submitted that without access to adjudication, Mr. Glowinski would have a right without remedy.

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

[25] Counsel for the employer argued that not everything that is grievable is adjudicable: *Vaughan v. Canada*, 2005 SCC 11.

[26] Counsel for the employer noted that Mr. Glowinski signed and thereby accepted an offer of employment that clearly set out the starting salary for the position. Counsel then reviewed the policies that he viewed as relevant and concluded that Mr. Glowinski had not met the conditions set out in the policy on initial appointment (Exhibit J-9) for a salary higher than the minimum:

. . .

- *there is a shortage of skilled labour in the field involved, as evidenced by local or regional labour market surveys from recognized institutions;*

- *there are unusual difficulties in filling the position with properly qualified candidates (e.g., the minimum rate of pay is not competitive with the rates offered by local or regional employers for similar duties);*

- *operational conditions require the presence of a highly skilled or experienced employee who can assume the full duties of the position immediately upon taking employment (e.g., no alternative left but to pay above the minimum as training a novice employee would impose an unacceptable burden on the employing department).*

. . .

Counsel for the employer submitted that Mr. Glowinski has not provided any evidence that relates to any of these conditions.

[27] Counsel for the employer submitted that Mr. Glowinski was relying on a technical provision of the *Regulations* to argue that the employer had waived its right to object to the timeliness of the grievance. However, Mr. Glowinski did not meet the technical requirements of the *Regulations*. The grievance was not signed by the bargaining agent. The signature of a PIPSC's representative was never provided to the employer. This is in breach of section 69 of the *Regulations* and would make the grievance void *ab initio*. If section 69 is not to be applied, then the requirement in the *Regulations* for the employer to raise timeliness should not be applied. Counsel also argued that there was an issue as to who could or should hear the grievance at the first level. The same day that Mr. Glowinski raised this issue, he presented his grievance at the second level of the grievance process, making a reply at the first level redundant. The second level was the first opportunity for the employer to respond and to raise the issue of timeliness.

[28] With respect to the application for an extension of time, counsel for the employer referred me to *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. He submitted that Mr. Glowinski has not demonstrated "clear, cogent and compelling" reasons for his failure to file his grievance on time. Mr. Glowinski was completing law school at the time, and he

testified that he had read the former *Act* and the collective agreement. Mr. Glowinski chose to "put all his eggs in one basket." His reasons for failing to file a grievance ring hollow. He knew the employer's position on the filing of a grievance in September 2005 when he reviewed the employer's factum in the judicial review application. Mr. Glowinski was not diligent in pursuing his rights. He was not even diligent in pursuing his judicial review application, as he had to request an extension of time to file his record with the Federal Court.

[29] Counsel for the employer submitted that in making a determination on whether to grant an extension of time, the extent of the delay and the reason for it must be given significant weight, as well as the relative prejudice to the parties (*Rouleau v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSSRB 51). The length of the delay was 12 months — a significant delay. He also noted that in addition to filing a grievance, Mr. Glowinski is suing the employer. To suggest that the allegations in the court action are different from those in the grievance would be ludicrous.

[30] Counsel for the employer also submitted that there was no chance of success at adjudication because the policy is discretionary. Even if Mr. Glowinski was able to meet any of the criteria for negotiating a higher starting salary, the employer was not bound to negotiate. He noted that the Federal Court refused to order *mandamus*, since the policy did not create a legal duty on the part of the employer.

[31] Counsel for the employer also referred me to *Anthony v. Treasury Board (Fisheries and Oceans Canada),* PSSRB File No. 149-02-167 (19981214), and *Mbaegbu v. Treasury Board (Solicitor General Canada – Correctional Service),* 2003 PSSRB 9.

[32] Counsel for the employer submitted that Mr. Glowinski's argument, that without access to adjudication there was a right without a remedy, was false. There is still access to judicial review after the final-level grievance reply.

[33] Counsel for the employer argued that students are not covered by the collective agreement, and there can therefore be no finding of a breach of the collective agreement in these circumstances. If there is no alleged breach, the grievance cannot be referred to adjudication.

[34] Counsel for the employer submitted that Mr. Glowinski was clearly not an employee when he filed his grievance. The new *Act* requires that the grievor be an

employee when he or she files a grievance, unless that grievance is against a disciplinary action imposed by the employer.

[35] Counsel for the employer submitted that proceeding to adjudication would be a gross injustice. The employer is being forced to fight the same battle over and over again: the Federal Court judicial review application; the grievance; the small claims court action; complaints to the PSC; and the publication of travel claim information on a website. Furthermore, Mr. Glowinski's evidence has changed numerous times.

C. Mr. Glowinski's rebuttal

[36] Mr. Glowinski's representative argued that it was not necessary for Mr. Glowinski to establish the merits of his grievance at this stage — he simply had to present enough evidence to show that he had an arguable case. As the employer has admitted in the judicial review application that one employee was paid higher than the minimum on initial appointment, the conditions set out in the policy must have existed.

[37] Mr. Glowinski's representative submitted that there were no consequences associated with the failure to follow the requirements in section 69 of the *Regulations*. There were consequences spelled out for the employer's failure to raise timeliness at the first level of the grievance process. Section 241 of the new *Act* is clear that a grievance will not be invalid by reason only of a technical defect or irregularity.

[38] Mr. Glowinski's representation also submitted that the small claims court action was different than the grievance. In the small claims court action the grievor is seeking damages only. The complaint to the PSC relate to the FSWEP, and whether it was appropriate that Mr. Glowinski be on that program. Mr. Glowinski testified that he was not aware that information the he received through access to information had been posted on a website. The differences between Mr. Glowinski's testimony at this hearing and in other affidavits are not significant.

[39] Mr. Glowinski was diligent in pursuing his rights. The employer consented to the application for an extension of time to file his record with the Federal Court.

IV. Reasons

[40] There are a number of preliminary issues at play here. Some of those issues go to the core of an adjudicator's jurisdiction. A negative finding in any of those core issues will result in the grievance's dismissal. For the reasons set out below, I have determined that the grievance is untimely, that it is not appropriate to grant an extension of time and that the subject matter of the grievance cannot be referred to adjudication.

A. Which statute applies to the grievance?

[41] The new *Act* came into force on April 1, 2005. The grievance was presented on February 1, 2006, but relates to events that occurred prior to April 1, 2005. The application for an extension of time was made after April 1, 2005, and therefore the new *Act* applies to that application. The remaining question is whether the grievance itself falls under the new *Act* or the former *Act*. In light of my conclusions below — that the employer has not waived its right to raise timeliness as an objection and that an extension of time is not justified in the circumstances — I do not need to determine which statute would apply to this grievance. In any event, in this case there is no meaningful difference in the statutory provisions of the former *Act* and the new *Act* for collective agreement grievances.

B. What is the effect of Mr. Glowinski's employment status at the time he filed his grievance?

[42] At the time that he presented his grievance in February 2006, Mr. Glowinski was no longer an employee in the public service. Both the former *Act* and the new *Act* provide a right to grieve any employer policy or directive to "employees." Paragraph (*b*) of the definition of "grievance" at subsection 2(1) of the former *Act* specifies that:

. . .

> (b) *for the purposes of any of the provisions of this* Act *respecting grievances with respect to termination of employment pursuant to paragraph 11(2)*(f) *or* (g) *of the* Financial Administration Act *or disciplinary action resulting in suspension, a reference to an "employee" includes a former employee or a person who would be a former employee but for the fact that at the time of the termination of employment or suspension of that person the person was a person described in paragraph* (f) *or* (j) *of the definition "employee";*

. . .

Subsection 206(2) of the new *Act* distinguishes between employees and former employees. It states:

. . .

> ***206.*** *(2) Every reference in this Part to an "employee" includes a former employee for the purposes of any provisions of this Part respecting grievances with respect to*
>
> (a) *any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(1*)(c), (d) *or* (e) *of the* Financial Administration Act;

. . .

Both provisions suggest that a former employee who wishes to grieve something other than suspension or termination is barred from grieving even though the event grieved happened while he or she was an employee.

[43] This interpretation has been rejected in *Lavoie*, in which the Federal Court of Appeal concluded that the right of former employees to grieve is not limited by the statutory language. The former *Act*, applicable in *Lavoie*, contained language similar to that of subsection 206(2) of the new *Act*. The Federal Court of Appeal concluded as follows:

. . .

> *. . . In my view, the introductory words of section 90(1) of the Public Service Staff Relations Act must be read as including any person who feels himself to be aggrieved as an "employee". Otherwise a person who, while an "employee" had a grievance – e.g. in respect of classification or salary – would be deprived of the right to grieve by a termination of employment – e.g. by a lay-off. It would take very clear words to convince me that this result could have been intended.*

. . .

C. <u>Has the employer waived its right to object to the timeliness of the grievance?</u>

[44] Mr. Glowinski relies on the fact that the employer did not raise the timeliness of his grievance at the first level of the grievance process to argue that the employer has waived its right to object to timeliness.

[45] The employer had legitimate concerns about the initial grievance, since it did not bear the required bargaining agent's representative's signature. In addition, Mr. Glowinski raised an issue about whether it was appropriate for there to be a response at the first level, given that it was his former supervisor who would hear the grievance. The evidence shows that Mr. Glowinski did not expect a reply at the first level, given that he questioned the utility of having the grievance heard at that level. In fact, Mr. Glowinski's comments to the employer representative showed a desire to skip a level of the grievance process. In addition, the bargaining agent's representative signed the transmittal form (thereby showing its support for the grievance) at the second level. This demonstrates that the first level of the grievance process was skipped by the actions of the grievor and his bargaining agent. In these circumstances, I cannot conclude that the employer had a reasonable opportunity to raise timeliness prior to the second-level reply. The employer did, however, raise timeliness at the first reasonable opportunity, which was at the second level of the grievance process. As the employer raised timeliness at the second and each subsequent level of the grievance process, I conclude that it did not waive its right to object to the timeliness of the grievance.

D. Should the application for an extension of time be granted to present the grievance at the first level of the grievance process?

[46] There are five factors to consider in determining whether to grant an extension of time (see *Schenkman*):

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;
- balancing the injustice to the applicant against the prejudice to the respondent in granting an extension; and
- the chance of success of the grievance.

[47] Mr. Glowinski's dispute with his employer relates to his status prior to his appointment to the public service. Mr. Glowinski alleges that he should have been treated as coming from outside the public service for the purpose of setting his salary on appointment. The employer disagrees. Prior to the Federal Court decision (2006 FC 78), it

was not unreasonable to assume that the proper recourse for events that occur prior to appointment to the public service would be directly to the Federal Court by way of judicial review. Shortly after being set straight by the Federal Court, Mr. Glowinski filed his grievance. I find that, in these circumstances, there were clear, cogent and compelling reasons for the delay.

[48] The length of the delay is not excessive, considering the length of the judicial review process. Mr. Glowinski promptly filed a grievance after the Federal Court determined that the grievance process was the proper recourse.

[49] The actions of Mr. Glowinski showed due diligence. He raised the matter of his dispute with the employer soon after its occurrence, through a judicial review application. He then followed through the process of a judicial review application in a reasonable fashion. Although he did have to file an application for extension of time in his judicial review application, the employer did not raise any objections at the time.

[50] In balancing the injustice to Mr. Glowinski if an extension of time is denied against the prejudice to the employer if an extension is granted, I find that the prejudice to the employer outweighs the injustice to Mr. Glowinski. The Federal Court thoroughly canvassed the substantive issues between the parties and came to a conclusion. Although that conclusion was expressed as "in the alternative", this does not change the fact that the court put its mind to the dispute between the parties. To grant an extension in those circumstances would allow the grievor to relitigate most of what has already been litigated.

[51] In light of my conclusion below on the adjudicability of the grievance's subject matter, I conclude that this grievance has no chance of success.

[52] As a result of balancing those five factors, I find that it is not appropriate to grant an extension of time in the circumstances of this case.

E. Is the subject matter of the grievance referable to adjudication?

[53] The grounds of Mr. Glowinski's grievance that are before me (see ¶ 11) are that the employer has misinterpreted or unreasonably applied Treasury Board policies and regulations in deciding that FSWEP students are ''employees'' or part of the public service and therefore refusing to negotiate or offer a higher salary.

[54] The former *Act* specifies which grievances can be referred to adjudication:

. . .

> ***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,*
>
> . . .

[55] The new *Act* also states that the same types of grievances can be referred to adjudication:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> > (a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> . . .

[56] In this case, the policies that are at issue relate to an action that occurred prior to appointment to a bargaining unit position, i.e. refusal to negotiate Mr. Glowinski's starting salary. The negotiation of a salary on appointment occurs prior to the confirmation of that appointment. The applicable policies are outside the scope of the collective agreement and are not incorporated into that agreement.

[57] Pay policies can be incorporated into the collective agreement. The grievor has not, however, grieved a pay policy that is part of his collective agreement. He has grieved the employer's interpretation of the status of FSWEP participant and its failure to negotiate a higher staffing salary. No link to a pay policy contained in the collective agreement was established. The corrective action sought focuses on offering or negotiating a higher starting salary for Mr. Glowinski. The applicable policies are not incorporated into the collective agreement. Accordingly, I find that the grievance is not adjudicable and that I am without jurisdiction.

[58] Mr. Glowinski argued that a finding of no jurisdiction would deprive him of a right to recourse and to a remedy. The Supreme Court of Canada has clearly stated in *Vaughan* that Parliament's intent is clear from the statute and that the absence of recourse to independent adjudication is not ". . . of itself a sufficient reason for the courts to get involved." In a case such as this one, a final decision would normally be made within the grievance process and would be subject to judicial review proceedings before the Federal Court.

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

(The Order appears on the next page)

V. Order

[60] The application for an extension of time is denied.

[61] The grievance is dismissed.

August 21, 2007.

Ian R. Mackenzie,
Vice-Chairperson
and adjudicator