Date: 20081006

File: 166-34-34179

Citation: 2008 PSLRB 79

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

CHARLOTTE RHÉAUME

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Rhéaume v. Canada Revenue Agency

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

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Herself

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Montreal, Quebec,
September 8, 2008.
(PSLRB Translation)

I. Grievance referred to adjudication

[1] On January 21, 2002, Charlotte Rhéaume ("the grievor") filed a grievance against her employer, the Canada Customs and Revenue Agency (CCRA). The CCRA's revenue division is now the Canada Revenue Agency (CRA) ("the employer"). At the time she filed her grievance, the grievor held a position classified PM-02 and was a member of the Public Service Alliance of Canada (PSAC).

[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 ("the former *Act*").

[3] The hearing for the grievance was originally scheduled for November 2004. At the grievor's request, the hearing was postponed and rescheduled for September 2005. The grievor then requested a second postponement because she was awaiting the decision of the Federal Court on another case against the employer. That decision was not rendered until October 9, 2007.

[4] The grievor referred this grievance to adjudication three times: on March 16, 2004 under paragraph 92(1)(*c*) of the former *Act*, on March 16, 2004 under paragraph 92(1)(*b*) of the former *Act* and on March 23, 2004 under subsection 99(1) of the former *Act*. The bargaining agent did not approve any of the three references to adjudication. In section 15 of the form for the first reference to adjudication, the grievor added "[translation] work force adjustment," and in section 15 of the form for the second reference to adjudication, she added "[translation] constructive dismissal, demotion and work force adjustment."

[5] The grievor's grievance reads as follows:

> [Translation]
>
> *At the meeting with management representatives on December 13, 2001, the management representatives told me that I could not obtain priority for a position in the federal public service under the Work Force Adjustment Policy/Directive. The meeting attendees were Michel Gionet, Acting Director, OSB, in Montreal; Jack Triassi, Acting Manager, Medium-sized Enterprises and Excise; Ms. Hélène Garneau, Section Head, Office Audit; Ms.*

Catherine Hamel, Human Resources Advisor, Audit; Mr. Jacques Lafleur, 1st Vice-President, CEUDA; Ms. Lyne Landry, 2nd Vice-President, CEUDA; Mr. Daniel Paquette, Shop Steward, CEUDA; and me. The Work Force Adjustment Policy/Directive applies in my case, given all the circumstances of my transfer to Office Audit.

The December 13, 2001 meeting was held as a follow-up to a letter dated October 29, 2001 from Mr. Gionel [*sic*], *Assistant Director, Audit, to whom I replied on October 30, and to my meeting with him on November 15, 2001. In his letter, Mr. Gionet informed me that he could keep only one person in the technical interpretation position because there was not enough work.*

On October 29, 2001, I was still covered by a two-year employment guarantee that started on November 1, 1999, when I transferred from the Department of National Revenue to the Canadian Customs and Revenue Agency. In his letter dated October 29, 2001, Mr. Gionet asked me to move to the Office Audit section, under Ms. Hélène Garneau's supervision, on October 31, 2001. He also said that I would temporarily be assigned the tasks of an office review officer at the PM-02 level.

According to Mr. Gionet's October 29, 2001 letter and meetings with management (specifically, meetings with Mr. Moinuddin in his office on October 31, with Messrs. Triassi and Moinuddin and Ms. Hamel on October 30, and with Mr. Gionet on November 15), that arrangement was supposed to be in effect for a short time, while we waited for my job description to be classified. In any case, the Work Force Adjustment Policy/Directive applied to me from the moment I transferred from the Department of National Revenue to the Agency. Given that, according to the employer, technical interpretation officers were not required to perform GST-related tasks, and given the employer's investigations into the volume and complexity of work, the employer must apply the Work Force Adjustment Policy/Directive as it was before November 1, 1999.

In effect, the lack of work to which Mr. Gionet refers in his letter of October 29, 2001 had existed since 1999, according to the employer's logic. Under that line of reasoning, I should have been declared surplus as of November 1, 1999, when I transferred from the Department of National Revenue to the Agency.

Moreover, the employer also transferred the GST work in Technical Interpretation Services from Montreal to Ottawa on June 8, 2001. If the employer does not apply the Work Force Adjustment Policy/Directive retroactively to

November 1, 1999, I request that the GST tasks that I performed in Montreal be assigned to me again.

During the week of November 12, 2001, my new supervisor, Ms. Hélène Garneau, assigned me PM-01 tasks, saying that it was easier to start with them and that PM-01 tasks require little or no training. I told her that I had no training in taxation and that I thought that piecemeal work without technical training beforehand would gain me nothing, limit my opportunities for advancement and hinder my personal achievements in the area of taxation. Ms. Garneau said that she did not require my services as a PM-02 and that she would inform Mr. Asif Moinuddin.

Currently, I am still working on PM-01 tasks in Ms. Hélène Garneau's section and have received no training in taxation. The employer assigns me general tasks. However, the employer knows very well that I have been qualified for an AU-group auditor position in the Excise division since 1991 (memorandum dated March 27, 1991, from Mr. Charbonneau, Head, Excise Audit Programs, to the Director of Excise Audit). The employer is making me look bad in front of my colleagues, other managers and clients of my employer. By assigning me PM-01 tasks and refusing to send me to taxation courses, the employer is violating my dignity.

At the November 15, 2001 meeting, Mr. Gionet told me that he wanted to resolve matters once and for all while taking my interests into account. He said that he needed to look into certain options, specifically the option of priority regarding an environmental coordinator position for which I was competing in a department, and that he also had to verify employment opportunities in the science division of CCRA Research and Development.

In late November 2001, I found out from Ms. Garneau that my case would not be resolved before the end of December 2001. At the meeting on December 13, 2001, the CCRA managers told me that they would make me a reasonable offer at the PM-02 group and level and that, therefore, I was not eligible for the Options listed in the Work Force Adjustment Policy/Directive.

My superiors determined that I was surplus to Technical Interpretation without using a merit assessment. The choice of the surplus employee in Technical Interpretation was not made according to merit but according to the current level of the two positions. The employer has no criteria to identify and distinguish between complexity levels of positions in Technical Interpretation. In its investigation, the employer determined neither the volume nor the complexity referred

> *to in Mr. Gionet's letter of October 29, 2001. My transfer was made arbitrarily.*
>
> *Moreover, in the meeting on October 9, 2001, my employer told me that the review of the volume and complexity of our work was not yet complete, that the summer months were not representative and that it could not yet say which of the two interpretation positions would be retained. My transfer to Office Audit was premature.*
>
> *I hold a DCS in Chemistry-Biology, a Bachelor of Business Administration and a 60-credit certificate and master's degree in Environmental Science. In 1991, the Department of National Revenue qualified me for an AU-group auditor position in Excise, as mentioned above. I passed the FI 360 test for finance positions in the FI group. I have varied experience in the administrative and scientific fields, including 14 years in Excise and 8½ years in technical interpretation. I also have supervisory experience.*
>
> *I believe that the employer:*
>
> - *has transferred me prematurely;*
> - *has violated the* Employment Equity Act;
> - *is limiting my opportunities for advancement by ignoring my qualifications, experience and interests;*
> - *is not providing me with access to relevant and necessary training;*
> - *is assigning me non-professional tasks at the lower level of PM-01 and is violating my dignity;*
> - *is tarnishing my professional image;*
> - *is limiting access to assignments in the scientific field, for which I have a master's degree and experience;*
> - *is contravening section 11 of the Canadian Charter and the* Employment Equity Act *and its related regulations*;
> - *has violated the* Public Service Employment Act *and* Regulations*; and*
> - *has failed to comply with the* Canada Customs and Revenue Agency Act.
>
> [Emphasis in the original]

[6] As correctives measures, the grievor requests that the employer assign work appropriate for her group and level, provide adequate technical training, and comply with the various *Acts* and the *Work Force Adjustment* policy. The grievor also requests priority access to specialized positions or to a position at her level. Alternatively, the grievor requests that the employer assign her the tasks related to the Goods and Services Tax (GST) that she used to perform in Montreal.

[7] The evidence showed that the grievor never stopped receiving her PM-02 salary, even though she performed PM-01 tasks for a few months in 2002. On June 12, 2002, the grievor was permanently transferred to a senior examiner position in the Montreal office. That position is classified PM-02.

[8] On October 25, 2004, the employer raised some objections to an adjudicator's jurisdiction with respect to these references to adjudication. The parties then filed written arguments. The hearing dealt with the employer's objections and the grievor's reply. The parties' written arguments were reiterated and expounded. This decision deals only with those objections.

II. For the employer

[9] The essence of the grievor's grievance relates to the application of the *Work Force Adjustment* policy. That policy is an integral part of the collective agreement between the CCRA and the PSAC for the Program Delivery and Administrative Services Group. The version of the collective agreement in effect at the time of the grievance expired on October 31, 2000 and was renewed on March 21, 2002 ("the collective agreement").

[10] The first reference to adjudication, dated March 16, 2004, was filed under paragraph 92(1)(*c*) of the former *Act.* That paragraph deals with referrals to adjudication that concern disciplinary action resulting in the termination of employment, a suspension or a financial penalty. However, nothing in the grievance relates to direct or disguised disciplinary action, termination of employment, a suspension or a financial penalty. Therefore, the grievance cannot be referred to adjudication under paragraph 92(1)(*c*) of the former *Act*.

[11] Rather, the grievance relates to the *Work Force Adjustment* policy, which is part of the collective agreement. Therefore, the grievance should have been referred to adjudication under paragraph 92(1)(*a*) of the former *Act.* For such a reference, the grievor must obtain prior approval from the bargaining agent, as set out in subsection 92(2) of the former *Act.* However, the grievor acknowledged that she had not obtained that approval. Therefore, if the grievance relates to the *Work Force Adjustment* policy, that is, the collective agreement, the adjudicator cannot hear the grievance since the bargaining agent has not given its approval.

[12] The second reference to adjudication, dated March 16, 2004, was filed under paragraph 92(1)(*b*) of the former *Act*. That paragraph deals with referrals to adjudication that concern disciplinary action resulting in the termination of employment, a suspension, a financial penalty or a demotion. However, that paragraph applies only to public servants in the federal public administration specified in Part I of Schedule I to the former *Act*. The CCRA and the CRA did not and do not appear in that Schedule. Therefore, paragraph 92(1)(*b*) of the former *Act* does not apply to the grievor. She cannot refer a grievance to adjudication under that paragraph.

[13] In the second reference to adjudication, dated March 16, 2004, the grievor added "[translation] constructive dismissal, demotion and work force adjustment" to section 15 of the referral form. None of those topics are discussed in the grievance. Therefore, none of those topics can be raised during adjudication. By raising them, the grievor has in fact submitted a new grievance or significantly altered the grievance already filed. In accordance with the principles set out in *Burchill v. Attorney General of Canada,* [1981] 1 F.C. 109 (C.A.), the adjudicator must deal with the grievance as originally filed and cannot consider a grievance the essence of which has been changed.

[14] The third reference to adjudication, dated March 23, 2004, was filed under subsection 99(1) of the former *Act*. That subsection provides for references to adjudication by employers and bargaining agents and cannot be used by an individual employee. Since the grievor rather than the bargaining agent referred the grievance to adjudication, the reference is invalid.

III. <u>For the grievor</u>

[15] The grievor acknowledged that the bargaining agent did not sign the references to adjudication for her grievance. However, she states that the bargaining agent's steward signed the grievance when he filed it. Moreover, bargaining agent representatives had represented her at all levels of the internal grievance process. Therefore, the grievance was approved by the bargaining agent.

[16] The grievor believes that the employer's various decisions on the organization of service delivery resulted in her position becoming surplus in late 2001. She believes that the employer did not consider merit in the analysis that led to that situation. The process was not carried out in accordance with the *Work Force Adjustment* policy.

[17] The grievor states that the employer assigned her PM-01 tasks after abolishing her position. She was then offered training. She was not given any PM-02 tasks until one year later. The grievor maintains that the employer threatened to discipline her if she did not accept the work offered. However, no disciplinary action was taken.

[18] In support of her arguments, the grievor submits the following: *Canada (Attorney General) v. PSAC,* [1993] 1 S.C.R. 941; *Canada (Treasury Board) v. Rinaldi,* [1997] F.C.J. No. 225 (QL); *Canada (Attorney General) v. Leonarduzzi,* [2001] F.C.J. No. 802 (QL); *Fortin v. Canada (Attorney General),* [2003] F.C.J. No. 120 (QL); and *Edwards v. Canada,* [2000] F.C.J. No. 146 (QL).

IV. Reasons

[19] The employer maintains that an adjudicator does not have jurisdiction to hear the references to adjudication of the grievor's grievance. To deal with that objection, the following provisions of the former *Act* must be considered:

. . .

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)*(f) *or* (g) *of the* Financial Administration Act, *or*
>
> *(*c*) in the case of an employee not described in paragraph* (b*), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *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.*

> *(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)*(a)*, the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.*
>
> . . .
>
> ***99.*** *(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*
>
> . . .

[20] The wording of subsection 99(1) of the former *Act* is clear: it is intended for the employer and bargaining agent and cannot be invoked by the grievor.

[21] The wording of paragraph 92(1)(*b*) is also clear: it applies only to employees employed in the portions of the federal public service specified in Part I of Schedule I to the former *Act.* However, the grievor was working at the CCRA when she filed her grievance. The CCRA was not listed in Schedule I when the grievance was filed or when it was referred to adjudication. The grievor therefore cannot refer her grievance to adjudication under paragraph 92(1)(*b*) of the former *Act.*

[22] The grievance deals broadly with the *Work Force Adjustment* policy. That policy is part of the collective agreement. Under section 92 of the former *Act*, the bargaining agent must grant prior approval for a reference to adjudication. The grievor cannot refer her grievance to adjudication on her own under paragraph 92(1)(*a*) of the former *Act.* Since the bargaining agent has not approved the reference to adjudication, I allow the employer's objection. It is true that the bargaining agent supported the grievance in the internal grievance process, but that is not sufficient. What matters is the approval of the reference to adjudication.

[23] The reference to adjudication under paragraph 92(1)(*c*) of the former *Act* also does not apply to the grievor's situation. That option is restricted to references to adjudication concerning disciplinary action resulting in the termination of employment, a suspension or a financial penalty. However, the grievor was not suspended, penalized financially or terminated. The grievor did write "[translation] constructive dismissal, demotion and work force adjustment" in the second reference to adjudication. However, from reading the grievance, I see no indication that it deals with constructive dismissal.

[24] By claiming that her grievance deals with disciplinary action, the grievor is altering the essence of the grievance since disciplinary action is not part of the grievance as originally filed. As established in *Burchill,* an adjudicator has jurisdiction to deal only with the original grievance and not with a different grievance or one the essence of which is no longer the same. The grievor's original grievance focuses primarily on the *Work Force Adjustment* policy and is in no way a disciplinary grievance. Therefore, I allow the employer's objection to that effect.

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

(The Order appears on the next page)

V. Order

[26] The preliminary objections raised by the employer are allowed.

[27] The grievance is dismissed since the adjudicator is without jurisdiction.

October 6, 2008.

PSLRB Translation

Renaud Paquet,
adjudicator