

Date: 20081016

File: 166-02-37598

Citation: 2008 PSLRB 83



*Public Service  
Staff Relations Act*

Before an adjudicator

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BETWEEN

AHMED DUNGAS RABAH

Grievor

and

TREASURY BOARD (DEPARTMENT OF NATIONAL DEFENCE)

Employer

Indexed as

*Rabah v. Treasury Board (Department of National Defence)*

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:*** Himself

***For the Employer:*** Adrian Bieniasiewicz, counsel

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Heard at Toronto, Ontario,  
September 30, 2008.

## REASONS FOR DECISION

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### **Grievance referred to adjudication**

[1] Ahmed Dungas Rabah (“the grievor”) was rejected on probation from his position as a storesperson with the Department of National Defence (“the employer”) on August 2, 2004. He was subject to the collective agreement between the Public Service Alliance of Canada and the Treasury Board for the Operational Services Group (expiry date: August 4, 2003).

[2] The grievor applied to the Public Service Labour Relations Board (“the Board”) for an extension of time to file a grievance against his rejection on probation on January 31, 2006. The Board granted the extension in: *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101. The grievor filed his grievance within 25 days of the Board’s decision. The grievance was referred to adjudication on October 31, 2007.

[3] 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”), considering that the grievance should have been filed in August or September 2004.

[4] The grievor grieved that the employer failed to advise him of his right to union representation and that the rejection on probation was unrelated to his ability to carry out the functions of his position. As corrective action, the grievor asked to be reinstated and compensated for the loss of time.

### **Summary of the evidence**

[5] The employer hired the grievor as a storesperson, classified at the GS/STS-03 group and level, for a one-year determinate (term) position commencing on November 24, 2003. The letter of offer stated that he would be on probation for a period of 12 months (the entire period of his appointment). The grievor received a positive mid-term evaluation describing him as a “devoted member” of the clothing stores team.

[6] On June 21, 2004, the grievor was stopped by police on his way home from work. He was arrested for allegedly trafficking drugs. However, the Crown later withdrew the charge against him.

[7] On June 22, 2004, the grievor was suspended without pay pending an investigation into his off-duty conduct. On July 16, 2004, the employer advised the grievor of its decision to reject him on probation. The decision was based on the employer's investigation, which found that the grievor's misconduct had impaired his ability to perform the duties of his position since it breached the trust in the employer-employee relationship. The rejection was effective August 2, 2004, considering that the employer paid the grievor two week's notice (July 16 to August 2, 2004).

[8] On September 15, 2004, the employer hired a replacement in the position previously occupied by the grievor. The evidence presented by the grievor shows that the position was funded or staffed up to March 31, 2006.

### **Summary of the arguments**

[9] At the beginning of the hearing, the employer partly conceded the grievance, except for the corrective action requested by the grievor.

[10] The employer recognized that it should pay the grievor the wages lost between June 22, 2004 and November 24, 2004, less the two weeks already paid in July 2004. However, the employer argued that the grievor was not entitled to be reinstated considering that he was a term employee and that his contract was to end on November 24, 2004.

[11] The employer argued that an adjudicator of the Board does not have the authority under the former *Act* to order reinstatement of the grievor. The grievor was a term employee. According to section 25 of the former *Public Service Employment Act*, R.S.C. 1985, C. P-33 ("the *PSEA*") which was still in force in 2004, a term employee ceases to be an employee at the expiration of his or her contract.

[12] In support of its argument, the employer referred me to *Monteiro v. Treasury Board (Canada Space Agency)*, 2005 PSSRB 27, *Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73, and *Laird v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-19981 (19901207).

[13] The grievor argued that he should be paid by the employer up to March 31, 2006, since the employer hired another employee to replace him from September 15, 2004 to March 31, 2006. If the grievor had not been rejected on probation, his term would have been renewed, and he would have occupied his former position at least until March 31, 2006.

[14] In support of his argument, the grievor referred me to *Tobin v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 26.

### **Reasons**

[15] The employer has conceded the grievance with the exception of the remedy. The grievor also grieved that his right to union representation was denied. That issue is now moot since the grievor was allowed union representation in the internal grievance procedure. The only question that still needs to be addressed is the reinstatement of the grievor.

[16] I must examine the following sections of the *PSEA* to establish if I have jurisdiction on reinstatement:

*5. The Commission shall*

*(a) appoint or provide for the appointment of qualified persons to or from within the Public Service in accordance with the provisions and principles of this Act.*

...

*8. Except as provided in this Act, the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament.*

...

*25. An employee who is appointed for a specified period ceases to be an employee at the expiration of that period.*

...

[17] Those provisions of the *PSEA* clearly support the conclusion that I do not have jurisdiction to reinstate the grievor. Section 25 of the *PSEA* specifies that a term employee ceases to be an employee at the end of his or her term. For me to order reinstatement would equate to making a new appointment. I am prevented from

making such an order because the Public Service Commission has the exclusive right and authority to make appointments.

[18] This interpretation is also supported by the decisions presented to me by the employer. Furthermore, I could not find any decision that would support a different interpretation. Lastly, the decision in *Tobin* submitted by the grievor is not entirely relevant, and it has been set aside by the Federal Court (*Attorney General of Canada v. Tobin*, 2008 FC 740.)

[19] I sympathize with the grievor's argument that his employment contract would have been renewed after November 24, 2004 had he successfully completed his probation. The grievor may be correct. However, there is nothing that an adjudicator can do to correct the harm caused to the grievor other than what I have ordered.

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

*(The Order appears on the next page)*

**Order**

[21] The grievance is allowed in part.

[22] The employer must pay the grievor the salary and benefits lost from June 22, 2004 to November 24, 2004, less the two weeks already paid.

October 16, 2008.

**Renaud Paquet,  
adjudicator**