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Citation: 2009 PSLRB 108



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**JAMES MORRIS ROBERTS**

Grievor

and

**DEPUTY HEAD  
(Department of Human Resources and Skills Development)**

Respondent

Indexed as  
*Roberts v. Deputy Head (Department of Human Resources and  
Skills Development)*

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** Ian R. Mackenzie, adjudicator

***For the Grievor:*** Jacque de Aguayo and Rima Zamat, Public Service Alliance of  
Canada

***For the Respondent:*** Jeff Laviolette, Treasury Board Secretariat

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Heard at Vancouver, British Columbia,  
May 5 to 8, 2009.

**I. Individual grievances referred to adjudication**

[1] James Morris Roberts (“the grievor”) was a term employee with the Department of Human Resources and Skills Development (HRSDC). He was suspended without pay pending investigation on May 9, 2007. His employment was terminated for disciplinary reasons on June 12, 2007, retroactive to May 9, 2007. On June 19, 2007, his reliability status was revoked.

[2] The deputy head has made two preliminary objections, which are the subject of this decision. First, the deputy head argues that the suspension grievance is now moot because the date of the grievor’s termination of employment is retroactive to the date of the suspension. Second, the deputy head argues that the revocation of reliability status is an administrative decision and that an adjudicator has no jurisdiction to hear a grievance against it.

**II. Summary of the evidence**

[3] The parties submitted an agreed statement of facts and an agreed book of documents (Exhibit J-1). I have summarized those agreed facts below. Documents relating to a Health Canada assessment of the grievor’s fitness to work have been sealed (Exhibit J-1, tab 7).

[4] The grievor was granted reliability status on May 10, 2005, and started his employment in the federal public service on June 13, 2005. He was employed on a term with the HRSDC. His last letter of offer was for a term from March 30, 2007 to September 28, 2007 (Exhibit J-1, tab 2).

[5] The grievor was a medical adjudicator in the Income Security Program of the HRSDC, at the PM-04 group and level. He worked at the CPP/OAS Processing Centre in Victoria, British Columbia, which is jointly run by the HRSDC and Service Canada.

[6] On April 19, 2007, HRSDC was made aware of allegations of threats in the workplace. There is no agreement between the parties on those incidents.

[7] On April 23, 2007, the grievor was placed on leave with pay and consented to a fitness-to-work assessment requested by the HRSDC. Health Canada conducted the assessment and concluded that the grievor was fit to work. The grievor was advised by HRSDC that he was not to return to work and that a disciplinary hearing was

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scheduled for May 3, 2007. On May 2, 2007, the grievor was arrested and charged with criminal harassment and uttering threats. As a result, he was not able to attend his disciplinary hearing. He was released from custody on May 8, 2007.

[8] The grievor was suspended without pay on May 9, 2007, “. . . pending an investigation.” The investigation was ordered because of “. . . adverse information provided to management regarding misconduct in the workplace . . .” and criminal charges that had been laid against the grievor (Exhibit J-1, tab 3). According to the suspension letter, the suspension was in accordance with the disciplinary provisions in paragraph 12(1)(c) of the *Financial Administration Act* (“the *FAA*”). The disciplinary hearing was scheduled for May 14, 2007.

[9] On May 16, 2007, the grievor was advised that a review of his reliability status was being conducted due to “adverse information” received by the HRSDC (Exhibit J-1, tab 5). The investigation was conducted by representatives of the Special Investigations Unit and the Corporate Security section of Service Canada.

[10] On June 12, 2007, the grievor’s employment was terminated for disciplinary reasons based on the findings of a disciplinary investigation (Exhibit J-1, tab 4). The termination of employment was retroactive to May 9, 2007.

[11] On June 19, 2007, the grievor’s reliability status was revoked, with an effective date of June 19, 2007 (Exhibit J-1, tab 5). The decision to revoke was based on an investigation report of the grievor’s reliability status reassessment conducted by the Special Investigations Unit and Corporate Security section of Service Canada. The letter revoking the reliability status (Exhibit J-1, tab 5) states the following:

. . .

*The report of June 13, 2007, clearly indicates that M. Roberts’ comments, conduct, actions and his disregard for the Value and Ethics Code for public service employees . . . pose a serious risk to the Department, his supervisors as well as his colleagues.*

[12] In a letter dated June 28, 2007, the grievor was advised of the decision to revoke his reliability status (Exhibit J-1, tab 5). He was also advised of his right to grieve.

[13] The Treasury Board's *Government Security Policy* (Exhibit E-1) states that, under the *Canada Labour Code* and Treasury Board policy, departments are responsible for the health and safety of employees at work. That responsibility extends to protecting employees from threats of violence.

### **III. Summary of the arguments**

#### **A. For the deputy head**

[14] The suspension grievance is now moot, as the grievor has redress available for the entire period. His termination of employment was backdated to the beginning of the suspension without pay. The Supreme Court of Canada, in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, stated that a court may decline to decide a case that raises "merely a hypothetical or abstract question" or if there is no longer a "live controversy" between the parties. In this case, the adjudicator should exercise his discretion not to hear the suspension grievance.

[15] At the hearing, the deputy head submitted that the suspension was administrative and not disciplinary.

[16] An adjudicator is without jurisdiction to hear a grievance against the revocation of reliability status. The revocation was not disciplinary but administrative in nature. The proper forum for this grievance, after a decision at the final level of the grievance process, was judicial review: see *Myers v. Canada (Attorney General)*, 2007 FC 947.

[17] The grievor's employment was not terminated as a result of the revocation of his reliability status. It is clear that an adjudicator has no authority to reinstate reliability status: see *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151, at paragraph 149. In *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 19, an adjudicator concluded that he had jurisdiction to review whether there had been a breach of procedural fairness. There is no allegation of a breach of procedural fairness in this case.

[18] In the alternative, the deputy head argued that an adjudicator could consider the revocation of reliability status only when ordering a remedy. It was the position of the deputy head that an adjudicator would be able to reinstate the grievor only up to the date of the revocation of his enhanced reliability status.

**B. For the grievor**

[19] The grievor submitted that I am being asked to dismiss the grievances without a hearing. Such a determination should not be made lightly.

[20] The grievor has a right to a hearing. Although an adjudicator has the discretion to dismiss a grievance on the basis of mootness, I ought not to exercise that discretion in this case: see *York Catholic District School Board v. Ontario English Catholic Teachers' Association* (1999), 58 C.L.A.S. 458. First, the grievor has a statutory right to refer a grievance to adjudication. Second, there is a live issue, as the deputy head did not have just cause to suspend the grievor's employment, as demonstrated by the Health Canada assessment (Exhibit J-1, tab 7). In addition, it was the position of the grievor that the criteria that needed to be taken into account in justifying a suspension were not established by the deputy head: see *Larson v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2002 PSSRB 9.

[21] There is a "live" legal issue on whether the deputy head can in fact backdate a termination of employment. It is the position of the grievor that the deputy head cannot retroactively change the employment status of an employee in that way. Also, the standard for just cause is different for suspension than it is for termination.

[22] The grievor submitted that an adjudicator has jurisdiction over the revocation of reliability status because that status is a condition of employment. The *FAA*, at subsection 12(1), provides for three ways to terminate employment. There is no other way under which the deputy head can terminate employment. I was referred to the following decisions: *Gannon v. Canada (Attorney General)*, 2004 FCA 417, and *Heustis v. N.B. Elect. Power Commis.*, [1979] 2 S.C.R. 768. The grievor has the right to challenge any decision of the deputy head in order to maintain his employment relationship.

[23] If the grievor is successful in his termination grievance, the decision would be a hollow pronouncement if he could not be reinstated past the date of the revocation of his reliability status. The rationale for the revocation is the same as the rationale for the termination of employment. I was referred to *Deering v. Treasury Board (National Defence)*, PSSRB File No. 166-02-26518 (19960208), where an adjudicator concluded that "... justice would be ill-served if the department could simply hide behind ..." its decision to recommend the revocation of a license. This is a similar situation. I was also referred to *O'Connell v. Treasury Board (Solicitor General Canada – Correctional*

*Service*), PSSRB File Nos. 166-02-27507, 27508 and 27519 (19970819), where an adjudicator clearly addressed the issue of reliability status. The grievor also submitted that the decision in *Gill* supports the submission that the adjudicator does have jurisdiction over this grievance. In *Hillis*, an adjudicator heard all the evidence on the revocation issue before dismissing the grievance.

[24] The decision of the Federal Court in *Myers* can be distinguished because it involved an employee of the Canada Revenue Agency, which is governed by the *Canada Revenue Agency Act*. Under that *Act* there is no statutory right to adjudication for matters not involving discipline.

### **C. Deputy head's rebuttal**

[25] In reply, the deputy head submitted that if the adjudicator were to find just cause for termination, the deputy head would also have had just cause to suspend employment. If the adjudicator were to find no just cause, the grievor could be reinstated or a lesser penalty substituted. It is nonsensical to hear both matters since the decision on the termination would result in the same conclusion for the grievor.

[26] The jurisdiction of an adjudicator is limited to a disciplinary or collective agreement matter. In this case, the revocation of reliability status was administrative and did not result in the grievor's termination of employment. It may be that the deputy head would want to revisit the revocation of the grievor's reliability status if the termination grievance were successful; however, that does not change the fact that the adjudicator does not have jurisdiction.

### **D. Additional submissions**

[27] After hearing the submissions from the parties, I asked for further submissions on the fact that the grievor was no longer an employee at the time that the revocation decision was made. The deputy head submitted that, once an individual ceases to be an employee, he or she has no right to file a grievance. The grievor submitted that he had a vested right to grieve since, otherwise, he could lose the benefits of any reinstatement remedy.

## **IV. Reasons**

[28] There are two questions that arise from the deputy head's preliminary objections:

- a) Is the grievance against the suspension moot?
- b) Is the grievance against the revocation of reliability status within the jurisdiction of an adjudicator?

**A. Is the grievance against the suspension moot?**

[29] There is a two-step analysis required for addressing an objection on the basis of mootness: *Borowski*. The first step is to determine whether there is a live issue between the parties. If a live issue remains, then the dispute is not moot. If there is no live issue, the analysis moves on to an assessment of whether it is appropriate to exercise discretion to hear the dispute. For the reasons set out below, I have concluded that there is a live issue between the parties and that the suspension grievance is therefore not moot.

[30] The grievor's suspension was from May 9 to June 12, 2007. The fact that the deputy head dated the subsequent termination to May 9, 2007 does not change the fact that there was a suspension in place for just under one month. How the suspension will be treated by the adjudicator hearing the merits of the grievances against the suspension and termination will depend largely on what finding is made on the termination grievance. If the conclusion is that the deputy head did not have just cause to terminate the grievor's employment, the adjudicator would then be required to determine if the employer had just cause to suspend him, pending an investigation. If an adjudicator concludes that the employer only had just cause to terminate employment after the investigation was completed, he or she would then have to determine if the suspension was justified. In both of those situations, the suspension grievance cannot be considered moot.

[31] In addition, the grievor stated at the hearing that it would be his position in the hearing on the termination grievance that the deputy head could not "back date" his termination. I did not hear submissions on that position, and I express no views on its merits. It does illustrate that there is a live issue between the parties that touches directly on the suspension grievance. If the adjudicator hearing the termination grievance accepts the grievor's position, the termination of employment could be effective only as of the date that the decision to terminate was made (June 12, 2007). The suspension grievance would then not be moot because the suspension would remain in effect from the date of suspension until the date of termination.

[32] At the hearing, the deputy head raised, for the first time, its position that the suspension grievance was administrative and not disciplinary. I did not receive full submissions from the parties on this matter. This is an objection to jurisdiction that will have to be raised at the commencement of the hearing on the merits. In its letter suspending the grievor, the deputy head clearly stated that the suspension was disciplinary (Exhibit J-1, tab 4). Evidence will be required to determine whether the suspension was disciplinary or administrative in nature.

**B. Is the grievance against the revocation of reliability status within the jurisdiction of an adjudicator?**

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[33] Whether an adjudicator has jurisdiction over the grievance against the revocation of reliability status is dependent on both the outcome of the termination grievance and the evidence surrounding the revocation. If the termination grievance is dismissed, the adjudicator may conclude that the grievor has no standing to file a grievance since he was not an employee when the decision to revoke his reliability status was made. Alternatively, if the termination grievance is allowed, the revocation of reliability status may remain in issue.

[34] Therefore, it is too early to determine whether an adjudicator has jurisdiction to hear the grievance on the revocation of reliability status. Such a determination rests with the adjudicator after a hearing on the merits of all three grievances.

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

*(The Order appears on the next page)*



**V. Order**

[36] The objection that the grievance against the suspension (566-02-2535) is moot is dismissed.

[37] I direct the Registry to consult with the parties with a view to setting hearing dates to deal with the merits of the grievances.

September 10, 2009.

**Ian R. Mackenzie,  
adjudicator**