Date: 20090415

File: 566-02-841

Citation: **2009 PSLRB 47**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARCELINE NEMOURS

Grievor

and

DEPUTY HEAD
(Department of Veterans Affairs)

Respondent

Indexed as
Nemours v. Deputy Head (Department of Veterans Affairs)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Pierrette Gosselin, counsel

For the Other party to the grievance: Adrian Bieniasiewicz, counsel

Heard at Montreal, Quebec,
June 3 to 5, 2008.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] Marceline Nemours worked as a nurse/team leader at Sainte-Anne's Hospital, Sainte-Anne-de-Bellevue ("Sainte Anne's Hospital"), beginning in 1992. She was employed by the Department of Veterans Affairs and was classified NU-HOS-02. The collective agreement applicable to nurses is the one concluded between the Treasury Board and the Professional Institute of the Public Service of Canada on May 31, 2005 for the Health Services Group bargaining unit ("the collective agreement").

[2] On November 17, 2005, Ms. Nemours was dismissed. On December 23, 2005, she filed a grievance opposing her dismissal.

[3] At the time of her dismissal, Ms. Nemours was referred to as an "on call" employee. Her letter of offer states that her period of employment was to be from November 1, 2005 to January 30, 2006. The letter specifies that she was not ordinarily be required to work more than one-third of the normal hours of work and that, consequently, she would not be covered by the *Public Service Employment Act* ("the new *PSEA*"), enacted by sections 12 and 13 of the *Public Service Modernization Act*, S.C. 2003, c. 22.

[4] At the first level of the grievance process, the deputy head replied that Ms. Nemours was not an employee within the meaning of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, and that, consequently, she was not able to use the grievance process. At the second level, the deputy head decided that Ms. Nemours had the status of an "on call" employee and that she was not ordinarily required to work more than one-third of the normal hours for persons performing similar work. The deputy head invoked subsections 208(1) and 2(1) of the *PSLRA* in support of its decision. At the third level, the deputy head confirmed its decision that the grievance was inadmissible because Ms. Nemours was not an employee within the meaning of the *PSLRA*.

[5] In this referral to adjudication, Ms. Nemours alleged that the deputy head imposed a disciplinary measure on her that led to her dismissal. The deputy head again raised its objection to the admissibility of the grievance and to an adjudicator's jurisdiction to hear it. Since that is a fundamental question with respect to exercising my jurisdiction, it is the only matter addressed in this decision.

[6] (Translation note: In the context of the French language version of this decision,

all general references to "nurses" also include the masculine gender.)

II. Summary of the evidence

[7] The facts that gave rise to this dispute were not contested. Rather, the dispute between Ms. Nemours and the deputy head involves the interpretation of those facts. The facts are therefore presented without reference to witnesses, except for Ms. Nemours' testimony.

[8] After an external competition, Ms. Nemours was hired at Sainte Anne's Hospital on May 25, 1992 as a nursing candidate for a three-month term on a full-time basis ending September 6, 1992. On September 7, 1992, she began working part-time on a term basis. She never again worked full-time at Sainte Anne's Hospital.

[9] Since beginning work at Sainte Anne's Hospital, Ms. Nemours' career has been somewhat complex. Although she has worked continuously since 1992, her employment has consisted of a series of successive terms, as shown by the table below:

Period	Competition no.	Position no.	Classification	Status	Date of document
25-05-92 to 06-09-92	92-DVA-SA-OC-06	866315-0763	NU-HOS-00 (Nursing candidate)	Full-time	25-05-92
07-09-92 to 24-10-92	92-DVA-SA-OC-06	866315-0763	NU-HOS-00 (Nursing candidate)	Part-time	21-09-92
25-10-92 to 14-11-92	92-DVA-SA-WC-PI-06	866315-0763	NU-HOS-01 (Nurse)	Term, part-time	02-11-92
15-11-92 to 31-03-93	92-DVA-SA-OC-06	866315-0755	NU-HOS-03 (Assistant Head Nurse)	"On call"	12-11-92
01-04-93 to 25-02-99		866315-0755	NU-HOS-03	"On call"	No document

26-02-99 to 04-04-99	99-DVA-SA-WC-010	86631 5-0751	NU-HOS-03 (Assistant Head Nurse)	Term, part-time, 30 hrs/2 weeks, rotation	08-03-99
05-04-99 to 16-05-99	99-DVA-SA-WC-030	86631 5-0751	NU-HOS-03 (Assistant Head Nurse)	Term, part-time, 30 hrs/2 weeks, rotation	12-04-99
17-05-99 to 30-05-99		86631 5-0751	NU-HOS-03		no document
31-05-99 to 29-08-99	99-DVA-SA-WC-044	86631 5-0751	NU-HOS-03 (Assistant Head Nurse)	Term, part-time, 30 hrs/2 weeks and 7 shifts/2 weeks, rotation	28-06-99
30-08-99 to 31-10-99	99-DVA-SA-WC-044	86631 5-0751	NU-HOS-03 (Assistant Head Nurse)	"On call"	08-07-99
01-11-99 to 31-10-00	99-DVA-SA-WC-141	86631 5-0751 (4290)	NU-HOS-03 (Assistant Head Nurse)	"On call"	29-10-99
01-11-00 to 08-07-01	00-DVA-SA-WC-169	5012	NU-HOS-02 (General-duty Nurse)	"On call"	20-11-00
09-07-01 to 17-09-01	01-DVA-SA-WC-128	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, day	31-07-01
18-09-01 to 31-10-01			NU-HOS-02 (Head Nurse)	"On call"	02-08-01
01-11-01 to 03-02-02	01-DVA-SA-WC-184	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	07-11-01
04-02-02 to 31-03-02	02-DVA-SA-WC-036	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, rotation	01-03-02
01-04-02 to 30-06-07			NU-HOS-02 (Head Nurse)	"On call"	11-03-02
01-07-02 to 01-09-02	02-DVA-SA-WC-139	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, days	10-07-02
02-09-02 to 31-10-02			NU-HOS-02 (Head Nurse)	"On call"	15-07-02
01-11-02 to 05-01-03	02-DVA-SA-WC-186	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	23-09-02
06-01-03 to 31-03-03	02-DVA-SA-WC-228	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, days	12-12-02
01-04-03 to 20-07-03			NU-HOS-02 (Head Nurse)	"On call"	29-11-02

21-07-03 to 31-08-03	03-DVA-SA-WC-133	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, days	21-07-03
01-09-03 to 31-10-03	02-DVA-SA-WC-186	5012	NU-HOS-02 (Head Nurse)	"On call"	23-09-02
01-11-03 to 31-03-04	03-DVA-SA-WC-170	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	27-10-03
01-04-04 to 31-05-04	04-DVA-SA-WC-020	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	18-03-04
01-06-04 to 27-06-04	04-DVA-SA-WC-094	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	18-05-04
28-06-04 to 05-09-04	04-DVA-SA-WC -094	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, days	19-05-04
06-09-04 to 31-10-04	04-DVA-SA-WC SA-175	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	26-08-04
01-11-04 to 29-12-04	04-DVA-SA-WC SA-246	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	22-10-04
30-12-04 to 27-03-05	05-DVA-SA-WC -035	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, days	10-02-05
28-03-05 to 19-06-05			NU-HOS-02 (Head Nurse)	"On call"	28-01-05
20-06-05 to 11-09-05	05-DVA-SA-WC -211	5012	NU-HOS-02 (Nurse/Team Leader)	Term, part-time, 30 hrs/2 weeks, days	21-06-05
12-09-05 to 31-10-05			NU-HOS-02 (Nurse/Team Leader)	"On call"	30-05-05
01-11-05 to 30-01-06	04-DVA-SA-WCSA -246	5012	NU-HOS-02 (Nurse/Team Leader)	"On call"	09-11-05

[10] The deputy head's witnesses explained that nurses working less than one-third of the time (termed "on call") are employees excluded from the Health Services Group bargaining unit. They are not covered by the collective agreement, but they accumulate benefits, such as annual leave and sick leave, in a manner similar to nurses covered by the collective agreement, who are employees within the meaning of the *PSLRA*. However, "on call" nurses cannot take those leaves unless they change status and

become part-time employees within the meaning of the *PSLRA*. Nevertheless, "on call" nurses receive an allowance for statutory holidays. As employees within the meaning of the *PSLRA* covered by the collective agreement, nurses employed part-time on a term basis pay union dues and obtain the benefits of the collective agreement. In Ms. Nemours' case, she was sometimes an employee within the meaning of the *PSLRA*, as when she worked part-time on a term basis, and sometimes a non-represented employee, as when she only worked "on call." She contributed to the pension fund when she was a part-time term employee within the meaning of the *PSLRA* but did not contribute when she was an "on call" employee. According to those witnesses, an "on call" nurse is not a casual employee; that nurse has the status of an employee who responds to the moment-to-moment needs of Sainte Anne's Hospital.

[11] Part-time and "on call" nurses have a probationary period that corresponds to the length of their employment and that is renewed each time they are hired. The deputy head only counted hours worked "on call." The deputy head did not count hours worked part-time during a term, specifically 30 hours over two weeks, because the deputy head had given Ms. Nemours a guarantee of employment for at least 30 hours every two weeks for the period in question. Ms. Nemours often held several statuses during the same year. Thus, the deputy head accounted separately for the hours that Ms. Nemours worked "on call." That accounting did not include all hours worked over all statuses for the given period.

[12] Full-time employees within the meaning of the *PSLRA* work 260.88 days per year. One-third of the days normally worked in a year is about 90 (86.96). For nurses, the deputy head uses an hourly method equivalent to days worked for its calculations. For example, 4 hours worked one day and 3.5 hours worked another day is equivalent to one full day of work of 7.5 hours.

[13] In addition to the documents included in the above table, the following exhibits cited in evidence are also relevant:

- the reports of the hours that Ms. Nemours worked since her date of hiring;
- the hours that Ms. Nemours worked as an agency employee since October 1999 (the only ones available);
- four attestations of the average annual hours paid to Ms. Nemours for the following periods: 1998-1999, 2002-2003, 2003-2004 and 2004-2005;
- Ms. Nemours' payroll journal for the period from December 16, 2004 to

November 16, 2005;
- Ms. Nemours' last pay period, which includes hours worked "on call" and part-time on a term basis;
- the monthly total of hours recorded on Ms. Nemours' schedule for 1999 to 2005 inclusive;
- two attestations from a representative of the deputy head stating that Ms. Nemours is a part-time employee on an annual basis and that she receives an allowance for statutory holidays;
- Ms. Nemours' pay stubs; and
- a "correction report" dated January 6, 2000.

[14] Ms. Nemours' pay stubs indicate that she began working at Sainte Anne's Hospital on May 25, 1992 and that she was "laid off" on November 17, 2005, which, in reality, terminated her employment. She was paid a severance allowance and her annual leave. A "correction report" states that there was no employment contract for the period from April 1, 1993 to February 25, 1999, despite the fact that Ms. Nemours worked "on call" during that period. There was no break in service during Ms. Nemours' entire period of employment, and the continuous service date for the purpose of annual leave and severance is May 25, 1992.

[15] The deputy head acknowledged that the competition files that would confirm Ms. Nemours' status go back only five years. Ms. Nemours did not sign the last letter of offer.

[16] Sainte Anne's Hospital regularly uses employment agencies to meet its needs for nursing personnel. Sainte Anne's Hospital contacts the agency if it is not satisfied with a nurse's work, and that nurse will not receive new assignments. The agencies bill Sainte Anne's Hospital for the nursing services and are then responsible for paying their employees. Agency nurses do not have probationary periods but must take part in an orientation day at the agency's expense. Those persons must also undergo a security check by the Department of Veterans Affairs.

[17] Ms. Nemours testified that, after becoming part of the nursing profession and at the time of her first full-time hiring, she asked someone at the Nursing Services Branch if she could work overtime. She was allegedly told to contact the agencies that provide replacement nursing services and was given a list of agencies to that end. Ms. Nemours registered with several of the agencies and subsequently began working

simultaneously at Sainte Anne's Hospital as an agency employee. She offered her services as a replacement nurse only at Sainte Anne's Hospital. She recalls working at Sainte Anne's Hospital every week, either on a term basis or through an agency. In each case, she performed the same work, and the same protocols and directives applied to her. She took all the professional development courses that Sainte Anne's Hospital offered on the days when she worked there as a part-time employee within the meaning of the *PSLRA*.

III. Summary of the arguments

A. For the deputy head

[18] The deputy head argued that Ms. Nemours was not an employee within the meaning of section 2 of the *PSLRA* and that, accordingly, her grievance is inadmissible. Under the principles of law, the party that claims to have a right has the burden to prove that that right exists. In this case, Ms. Nemours must show that she had employee status within the meaning of the *PSLRA*, which would give an adjudicator jurisdiction. The deputy head referred to the following cases: *Algonquin College v. Ontario Public Service Employees Union* (2001), 95 L.A.C. (4th) 52, and *Brown Brothers Ltd. v. Graphic Arts International Union, Local 28B* (1973), 2 L.A.C. (2nd) 347. Unlike a disciplinary case, where the deputy head has the burden of proof, in this case the deputy head does not have the burden of proving that Ms. Nemours was not an employee within the meaning of the *PSLRA*.

[19] The deputy head argued that I must not take into account the hours that Ms. Nemours worked through an agency when determining whether or not she was an employee within the meaning of the *PSLRA* and referred me to *Canada (Attorney General) v. PSAC*, [1989] 2 F.C. 633 (C.A.)("*Econosult* (F.C.A.)"). In *Econosult* (F.C.A.), the Federal Court of Appeal confirmed that hours worked through an agency are not a factor that can be used to determine whether persons are employees within the meaning of the *PSLRA*. Unlike the private sector, where the employer-employee relationship is a legal relationship associated with a fact situation, employee status within the meaning of the *PSLRA* cannot be simply inferred from a situation of fact but is subject to strict and rigid rules. In the federal public service, the Treasury Board has the exclusive power to create positions, and the Public Service Commission has the exclusive power to appoint persons to the positions thus created.

[20] In this case, no position was created, and the Public Service Commission never

appointed Ms. Nemours to a position. The hours worked part-time are the only relevant ones and exclude hours worked through an agency. Agencies are independent employers that have full authority over their employees.

[21] At the time of her dismissal, Ms. Nemours was an "on call" employee not ordinarily required to work more than one-third of the hours normally required of a full-time employee within the meaning of the *PSLRA*. Given the limited number of hours that she worked, she was not an employee within the meaning of the *PSLRA*. Under the circumstances, she did not have the status that would have enabled her to file a grievance contesting her dismissal. Although on three occasions Ms. Nemours worked more than the expected number of hours over a two-week period, that still does not make her an employee within the meaning of the *PSLRA*. As an "on call" employee, Ms. Nemours is a person covered by the exclusion order of the new *PSEA*. Moreover, at the time of her dismissal, Ms. Nemours was not paying union dues.

[22] The deputy head pointed out that it is not appropriate to total all the hours that Ms. Nemours worked, whether part-time or "on call," but rather to consider exclusively the definition of "employee" within the meaning of the *PSLRA* with respect to Ms. Nemours' status at the time of her dismissal. In *Canada (Attorney General) v. Marinos*, [2000] 4 F.C. 98 (C.A.) ("*Marinos* (F.C.A.)"), the Federal Court of Appeal decided that adding three periods of employment did not lead to the conclusion that an employee had become an employee within the meaning of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (*PSSRA*).

[23] The deputy head argued that, at the time of her dismissal, Ms. Nemours was not ordinarily required to work more than one-third of the hours normally worked by a full-time employee within the meaning of the *PSLRA* and that, accordingly, she was not an employee within the meaning of the *PSLRA*.

B. For Ms. Nemours

[24] For her part, Ms. Nemours argued that the deputy head did not take into account that she had been employed with no breaks in service since 1992, or for over 13 years, at the time of her dismissal. Ms. Nemours referred me to the payroll journal filed in evidence, which establishes that, for at least a year, she worked much more than one-third of the hours normally worked by a full-time employee within the meaning of the *PSLRA*. Moreover, if the hours worked through the agency are included,

she worked up to 45 hours per week. In any event, she argued that she greatly exceeded one-third of the normal hours even without including the hours worked through the agency.

[25] Ms. Nemours also submitted that the deputy head was incorrect in separately accounting for the hours that she worked part-time and "on call." She argued that I must take into account all the hours that she worked. In support of her argument, Ms. Nemours adduced a compilation of the hours she worked in 2005 based on the exhibits adduced that, she states, show that she regularly worked more than one-third of the normal hours. Ms. Nemours pointed out that, for the period from March 24 to April 6, 2005, she received compensation for hours worked "on call" and part-time on the same paycheque. The three pay periods when she did not work can be explained in part by the imposition of disciplinary measures that preceded her dismissal. Since the hearing deals only with the jurisdiction of an adjudicator to hear the dismissal grievance, Ms. Nemours argued that I should not take the disciplinary measures into account.

[26] Ms. Nemours contested the deputy head's argument that I should consider only the last period of employment before her dismissal. She never signed a letter of offer for that period. That exhibit was accepted under reserve when Ms. Nemours objected to the deputy head filing it during the hearing. According to Ms. Nemours, the document has no legal value and merely demonstrates the deputy head's bad faith.

[27] Ms. Nemours explained that she filed her grievance on December 23, 2005, after the *PSLRA* came into force, and argued that the definition of "employee" in the *PSSRA* was amended by subsection 2(1) of the *PSLRA*, which relies solely on the criterion of hours normally worked. Ms. Nemours argued that the most reliable yardstick is to take into account all the hours actually worked. The documentary evidence shows that she worked more than one-third of the time over the last five years. Moreover, her status as a part-time term employee within the meaning of the *PSLRA* was confirmed in a document signed by an authorized representative of the deputy head.

[28] Ms. Nemours pointed out that sections 2 and 50 of the new *PSEA* stipulate that casual employees may not work more than 90 days in a calendar year. That provision came into force after the *Marinos* (F.C.A.) decision. Ms. Nemours argued that subsection 2(4) of the *PSLRA* was adopted to reflect the provisions of the new *PSEA*.

[29] Ms. Nemours emphasized that three key facts must be taken into account that distinguish her status from that of the employees in the cited cases. All the term employment offers made to her were for three months or less. She worked continuously for the same employer for 14 years, not for 7 months as in *Marinos* (F.C.A.). Whether she was employed part-time on a term basis or as an "on call" employee, all the offers of employment required her to indicate her availability and her contact numbers so that Sainte Anne's Hospital could set her hours of work. Furthermore, all the training that she received at Sainte Anne's Hospital was as an employee within the meaning of the *PSLRA*. She did not receive any training through an agency.

[30] In support of her arguments, Ms. Nemours referred me to the following decisions: *Ling v. Treasury Board (Veterans Affairs Canada),* PSSRB File Nos. 166-02-27472 and 27975 (19990513); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 ("*Econosult* (S.C.C.)"); *Marinos* (F.C.A.); *Marinos v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-27446 (19971224); *Pointe-Claire (City) v. Quebec (Labour Court),* [1997] 1 S.C.R. 1015; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27 ("*BC Health Services"*); and *Royal Canadian Mint*, [2003] CIRB no. 229.

[31] According to Ms. Nemours, the Supreme Court of Canada's decision in *BC Health Services* definitively confers the right of association and, accordingly, the right to benefit from all the advantages of collective bargaining. The Health Services Group bargaining unit is represented by the Professional Institute of the Public Service of Canada. The fact that the deputy head deprived Ms. Nemours of the benefits of the collective agreement violated her most fundamental right to be represented by her bargaining agent. By its actions, the deputy head deprived Ms. Nemours of the benefits to which she should have been entitled for 14 years.

[32] Ms. Nemours registered with agencies to obtain overtime work with the encouragement of the deputy head, which provided her with the list of agencies. The hours obtained through the agencies were primarily on the evening and night shifts, for which a nurse's classification is higher, NU-03 rather than NU-02. Ms. Nemours deplores the fact that the deputy head destroyed the documents and invoices relating to her agency work for the period from 1992 to 1999, where she worked a third of the time, because those documents are the best evidence of all the hours she worked

during that period. Because she had to go through an agency, Ms. Nemours was paid less than the collective agreement rate. The deputy head was able to avoid paying the higher rate by using an agency to meet its personnel needs for the evening and night shifts. The preference for using agencies, which the deputy head did not deny (see Exhibit S-8), is a serious violation of the right of association.

[33] In *Pointe-Claire (City)*, the Supreme Court of Canada adopted a comprehensive approach toward the concept of employment, and Ms. Nemours urged me to do the same by considering all aspects of her employment relationship, including that Sainte Anne's Hospital first hired her and then relegated her, after six months, to sporadic schedules. She performed the same work with the same supervisory staff, regardless of her status — "on call" or part-time on a term basis or as an agency nurse. The decision in *Pointe-Claire (City)* must be given precedence because it is based on facts, while *Econosult* (S.C.C.) dealt with the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 ("the former *PSEA*").

[34] Subsidiarily, should I conclude that she is not an "employee" within the meaning of subsection 206(1) of the *PSLRA*, Ms. Nemours asked that I apply the legal principle of fairness and grant her that employee status for the purpose of referring her grievance to adjudication.

C. Deputy head's rebuttal

[35] The deputy head responded that, during the last months before the end of her employment, Ms. Nemours worked considerably less than one-third of the hours normally required of a full-time employee within the meaning of the *PSLRA*. She worked 83 hours between November 8 and December 17, 2005, while a full-time employee would have worked 300 hours. While she worked part-time, Ms. Nemours worked more than one-third of the time, but at that time, she was a part-time term employee within the meaning of the *PSLRA*, a status different from that of an "on call" employee.

[36] The deputy head argued that the *PSSRA* and the *PSLRA* apply in the same way. The employment status to be applied is that indicated in the most recent letter of offer, which stipulates that Ms. Nemours is an "on call" employee and that she is not ordinarily required to work more than one-third of the normal hours. Ms. Nemours having exceeded those hours a few times is not enough to change her employment

status. She may not combine various periods of employment at her convenience. Even if I must consider all periods of employment since 1992, Ms. Nemours never regularly worked more than one-third of the hours normally required of a full-time employee within the meaning of the *PSLRA* while she was "on call." In short, there is no evidence that Ms. Nemours acquired status as an employee within the meaning of the *PSLRA* and that she is subject to the that *Act*.

IV. Reasons

[37] The preliminary question at issue concerns my jurisdiction, that is, whether Ms. Nemours is an employee within the meaning of the *PSLRA*. Should I determine that she is, in fact, an employee within the meaning of the *PSLRA*, I have jurisdiction to decide the grievance contesting her dismissal. Should I determine otherwise, I do not have jurisdiction to decide the matter.

[38] In contrast to the private sector, an adjudicator's jurisdiction with respect to federal employees is governed by the applicable enabling legislation, specifically the *PSLRA*. This is because federal employees are subject to a labour relations regime that is different from the private sector. In *Econosult* (S.C.C.), the Supreme Court of Canada clearly stated that federal employee status is not fact-based because such status is derived from three statutes that comprise a legal regime, those statutes being the *PSLRA*, the *Financial Administration Act*, R.S.C. 1985, c. F-11, and the *PSEA*.

[39] The *PSLRA* defines whether a person is an employee. The *Financial Administration Act* confers on the Treasury Board the exclusive power to create positions in the federal public service, to determine their classifications and to distribute them throughout the federal public service. The new *PSEA* confers on the Public Service Commission the exclusive power to appoint public service employees based on merit.

[40] The definition of "employee" is set out in subsection 206(1) of the *PSLRA* as follows:

. . .

> ***206.*** *(1) The following definitions apply in this Part.*
>
> *"employee" has the meaning that would be assigned by the definition "employee" in subsection 2(1) if that definition were read without reference to paragraphs* (e) *and* (j) *and*

> *without reference to the words "except in Part 2".*
>
> . . .
>
> ***2.*** *(1) The following definitions apply in this Act.*
>
> . . .
>
> *"employee", except in Part 2, means a person employed in the public service, other than*
>
> . . .
>
> c*) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;*
>
> . . .
>
> f*) a person employed on a casual basis;*
>
> g*) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;*
>
> . . .

The wording is very precise. A person not ordinarily required to work more than one-third of the normal hours for persons doing similar work is not an employee, nor is a person employed on a term basis for less than three months.

[41] Therefore, the issue in this case is whether I must decide Ms. Nemours' employment status based solely on her last period of employment (the deputy head's argument) or, instead, by considering all her continuous periods of employment since 1992 (Ms. Nemours' argument). In other words, the dispute concerns the application of a strict question of law (employee status within the meaning of the *PSLRA*) versus the employee's claim of an equitable right (fairness, recognizing Ms. Nemours' numerous years of service). To the extent that it is a strict question of law, my decision will be based on the legal qualification of the facts and the interpretation of the applicable rule of law. To the extent that I decide that there exists a right to fairness, I will have to decide whether I have jurisdiction to expand the definition of "employee" set out in the *PSLRA*.

[42] Before applying these principles, it is important to review the principles established by the courts.

[43] The first decision of interest is *Econosult* (F.C.A.). The facts in that case are as follows. At the time that the Correctional Service of Canada established training programs for inmates in federal penitentiaries, the teachers were employees within the meaning of the *PSSRA* belonging to the Education Group bargaining unit. Eventually, the Solicitor General chose to privatize the program and entered into a contract with a private firm to hire the program's teachers. Although the teachers reported to an employee of the private firm, the quality of their work was monitored by a Correctional Service employee. The bargaining agent applied to the Public Service Staff Relations Board to have the teachers employed by the private firm declared employees within the meaning of the *PSSRA* so that they could be part of the Education Group bargaining unit. The Board allowed the application and ruled that, in labour relations, it was necessary to rely on the "substance" of the employment relationship rather than its "form." The Federal Court of Appeal overturned the Board's decision on the grounds that the Board did not have jurisdiction to decide who was an employee of the public service, since the Board's authority extended only to employees recognized as such by the *PSSRA*.

[44] In *Econosult* (S.C.C.), the majority of the Supreme Court of Canada upheld the conclusion of the Federal Court of Appeal, stating that a pragmatic and functional analysis of the *PSSRA* revealed that Parliament did not intend to confer jurisdiction on the Public Service Staff Relations Board with respect to members of the public service who did not have the status of employee within the meaning of the *PSSRA*. The reasons for that decision are summarized as follows:

> (a) Parliament, in its definition of the word "employee" in the *PSSRA*, clearly limited the Board's jurisdiction to public servants. The Board's role is to decide if employees meet that definition:
>
> . . .
>
> *In my opinion the wording of s. 33 itself, aided by the definition of the word "employee" provided by s. 2, is practically decisive in this case. Section 33 is intended to enable the Board to resolve any question as to whether an employee or class of employees is or is not included in a bargaining unit. In the absence of a definition of "employee", it could be argued that the Board could determine who is an employee on the basis of tests that are generally employed in labour matters. These tests are customarily employed to resolve a dispute as to whether a person is an employee or*

> *an independent contractor. The express definition of "employee", however, shows a clear intention by Parliament that it has decided the category of employee over which the Board is to have jurisdiction. It is restricted to persons employed in the Public Service and who are not covered by the* Canada Labour Code*. The Board's function by the very words of s. 33 is not to determine who is an employee but rather whether employees who come within the definition provided, are included in a particular bargaining unit*
>
> . . .

(b) Parliament created an employment regime for public servants that excludes the creation of a category of employees who do not meet the definition in the *PSSRA*. That regime is distinct from the one created by the *Canada Labour Code*, R.S.C. 1985, c. L-2, for private-sector employees:

> . . .
>
> *There is no provision in s. 33 or indeed in this statute that gives the Board exclusive jurisdiction to determine who is an employee on the basis of the Board's expertise. Such provisions are not uncommon in labour statutes when it is intended that the Board have the final word as to whether persons employed by the same employer are employees or independent contractors. One example of such a provision is s. 106(2) of the Ontario* Labour Relations Act*, R.S.O. 1980, c. 228. This exclusive power to determine who is an employee has been exercised to prevent an employer from contracting out work in breach of the collective agreement. This jurisdiction is usually exercised in the context of an unfair labour practice based on anti-union animus. . . .*
>
> . . .
>
> *Typical of the wording is s. 16 of the* Canada Labour Code *. . .*
>
> . . .
>
> *The three statutes referred to above when read with the* Canada Labour Code *reveal a scheme to create two separate and distinct labour regimes for two categories of federal employees. The legislation treats each category as mutually exclusive. Thus s. 3 of the* Staff Relations Act *limits the application of the Act to the Public Service. . . Public servants are a special category of employee whose particular status is incompatible with inclusion in a bargaining unit with non-public servants. The positions in the Public Service are determined by Treasury Board and appointments to the public service are within the exclusive right and authority of*

> *the Public Service Commission. . . .*
>
> . . .
>
> *In the scheme of labour relations which I have outlined above there is just no place for a species of* de facto *public servant who is neither fish nor fowl. . . .*
>
> . . .

(c) In contrast to the provisions in other labour statutes, by providing a clear definition of the concept of employee, Parliament chose not to rely on the Board's labour relations expertise to extend that definition:

> . . .
>
> *In providing a clear definition of the employees and the employer who are subject to the Board's jurisdiction, it was not the intention of Parliament to rely on the expertise of the Board to extend the reach of this definition. Indeed, the source of the Board's error is its reliance on its general labour expertise which led it to rely on criteria developed under other different labour legislation when it ought to have applied the clear definition of "employee" provided by Parliament.*
>
> . . .

[45] Another decision of interest is *Marinos* (F.C.A.). Ms. Marinos had signed three consecutive contracts of employment not exceeding 90 days; each stipulated that the work was temporary employment and that it was not subject to the provisions of the former *PSEA*. Ms. Marinos filed a grievance contesting her dismissal for disciplinary reasons. The employer responded to the grievance by pointing out that she was not an employee within the meaning of the *PSSRA* and thus did not have the right to grieve. The adjudicator allowed the grievance, taking into consideration the constant and ongoing nature of the employment, and ruled that Ms. Marinos was able to file a dismissal grievance. The Federal Court of Appeal set aside the adjudicator's decision and that of the Federal Court (Trial Division) and argued that the adjudicator was required to apply legal standards by relying on the applicable labour statutes, if necessary. Persons hired on a casual basis were not employees under the former *PSEA* and could not be assigned some other status before an adjudicator.

[46] Ms. Nemours also cited *Pointe-Claire (City)* in support of the argument that she

should be considered an employee within the meaning of the *PSLRA*. That case involved a temporary employee hired by the City of Pointe-Claire through an employment agency. Although the agency recruited, evaluated, disciplined and paid the temporary employee, the City in fact had control over the employee's working conditions and the performance of her work when she was at work. The union sought the employee's inclusion in the bargaining unit. The Quebec Labour Court allowed the union's application, and that decision was confirmed by higher courts. In its review of the case, the Supreme Court of Canada ruled that identifying the real employer requires a comprehensive approach to determine who has the most control over all aspects of the employee's work, rather than relying on the sole criterion of legal subordination. The Court upheld the approach of the Labour Court. That Court had considered other factors that define the relationship of subordination, including the purpose of the Quebec *Labour Code*, R.S.Q., c. C-27, which is to promote the negotiation of employees' working conditions.

[47] *BC Health Services*, also cited by Ms. Nemours, can be summarized as follows. To address the challenges of providing health services arising from the steep rise in costs over several years, the Government of British Columbia, without any meaningful consultation with the unions, passed legislation that changed the rights of employees in the health sector, knowing that the unions vigorously opposed the changes. That statute gave employers greater flexibility to manage their relations with their employees as they saw fit and, in some instances, to forego collective agreements without consulting the interested parties. Among the provisions restricting the bargaining rights of unions, the legislation invalidated important provisions of collective agreements in effect at that time and prohibited collective bargaining on certain issues. Even though some of the amendments were merely administrative changes, others had a profound impact on employees and their ability to bargain collectively. The unions representing some subsectors of the health care sector affected by the legislation challenged the constitutionality of Part 2 of the statute on the grounds that it violated guarantees of freedom of association and equality under the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), enacted as Schedule B to the *Canada Act*, 1982, c. 11 (U.K.).

[48] The British Columbia Supreme Court and the British Columbia Court of Appeal both upheld the position of the Government of British Columbia and rejected the freedom-of-association argument. However, the Supreme Court of Canada allowed the

appeal in part and ruled that the provisions of the statute allowing employers recourse to contracting out, layoffs and supplanting the applicable collective agreement without consultation with the affected union constituted " . . . a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation." Accordingly, those provisions infringed the freedom of association guaranteed by the *Charter*, and it was not shown that that infringement was justified within the meaning of section 1.

[49] Let us now see how the legislative provisions and case law just reviewed apply to this case.

[50] Ms. Nemours was an employee with 15 1/2 years of service when the deputy head dismissed her. Except for the first six months of her career, she worked either part-time or "on call" (her status as an agency employee will be dealt with later). Her periods of employment were consecutive. No irregularity in the employment documents was alleged. Ms. Nemours always accepted the offers of employment made to her, even though she sometimes was late in signing them. She never claimed status as an employee, even after the new *PSEA* was enacted, and that legislation offered her an opportunity to do so. At the time of her dismissal, Ms. Nemours was not ordinarily required to work more than one-third of the normal period for persons doing similar work. The fact that, at certain times of the year preceding her dismissal, Ms. Nemours worked more than one-third of the normal period for persons doing similar work is not relevant here because those hours were not worked during the period of employment immediately preceding her dismissal. Therefore, I find that Ms. Nemours is not an employee within the meaning of the *PSLRA*.

[51] It is my view that I must consider Ms. Nemours' status at the precise moment that she was dismissed because the time of dismissal is the time relevant to the matter before me. At the time she was dismissed, Ms. Nemours was an "on call" employee and, consequently, was not ordinarily required to work more than one-third of the normal period for persons doing similar work. Based on that employment status, very clearly prescribed as excluded by the definition of employee in subsection 206(1) of the *PSLRA*, I must determine that Ms. Nemours was not an employee within the meaning of the *PSLRA* at the time of her dismissal.

[52] The next question is whether the adjudicator can change the scope of the definition of subsection 206(1) of the *PSLRA* by applying powers of remedy based on the legal principle of fairness.

[53] To decide whether the adjudicator may provide a remedy based on fairness, it is necessary to consider the principles that apply to the interpretation of statutes, including coherence. Coherence is an essential value of the legal system that makes it possible to ensure, among other things, authority and accessibility (see Côté, *Interprétation des lois*, 3rd edition, 1999, at 387). Thus, there is an expectation that, among various statutes adopted by a single legislator, there will be the same harmony as among the elements of a single statute. Accordingly, a body of legislation, especially on the same subject, is expected to form a coherent whole. In that sense, statutes must be interpreted in such a way as to favour harmonization rather than contradiction. Harmonization means that I must favour coherence both in the wording of texts and in the policies to which the texts give rise (see Côté, at page 434).

[54] The presumption of coherence within the statutes of a single legislator is based on the premise that, when developing a statute, the legislator takes into account existing statutes, in particular those dealing with the same subject matter, and ensures that the new statute works together with existing statutes in terms of form and substance. The harmonization of statutes also makes it possible to interpret a statute in the legal context of which it is a part and to clarify its meaning.

[55] In practice, the consideration of related statutes helps to determine the meaning of a word or to clarify the purpose of the statute because the legislator is presumed to have maintained uniformity within a body of legislation and uniformity of expression. This is not an absolute rule because the meaning of a word or a principle must also be interpreted in its context. Indeed, it is also possible to invoke the wording of a related statute to serve as rationale that, *a contrario*, the different wording among statutes on the same subject implies that the legislator either wanted to give a different meaning to the provisions of that statute or wanted to limit its scope. In short, coherence and harmony within a body of legislation are deemed to reflect a rational intent by the legislator, who is presumed to have offered similar solutions to similar problems with respect to a body of legislation on the same subject.

[56] The principle of harmony and coherence within a body of legislation is described as follows in *Sullivan on the Construction of Statutes*, 5th edition, 2008, at 223 to 225:

> *It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a*

> *functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. This presumption is the basis for analyzing legislative schemes, which is often the most persuasive form of analysis. The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. . . .*
>
> . . .
>
> *The presumption of coherence applies not only to single statutes but to the statue book as a whole. . . .*
>
> *The presumption of coherence is strong and virtually impossible to rebut. It is unthinkable that a legislature would impose contradictory rules on its subjects. . . .*
>
> . . .

[57] In terms of federal labour relations statutes, there are two possible comparisons, the *PSLRA* and the *Canada Labour Code*. Moreover, those two statutes have been compared most often by the courts in the cases cited in this decision. Analyzing those statutes provides a means of comparing the scope of the powers of remedy of an adjudicator appointed under the *PSLRA* and those of arbitrators and decision makers appointed under the *Canada Labour Code*. Subsection 228(2) of the *PSLRA* sets out an adjudicator's powers of remedy as follows:

> ***228.****(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate . . . .*
>
> . . .

[58] The powers of remedy of the Canada Industrial Relations Board are based on ". . . the fulfilment of the objectives . . ." of the *Canada Labour Code*:

> . . .
>
> ***99****. (2) For the purpose of ensuring the fulfillment of the objectives of this Part, the Board <u>may</u>, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and <u>in addition to or in lieu of any other order that the Board is authorized to make under</u>*

> *that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfillment of those objectives.*
>
> . . .
>
> [Emphasis added]

[59] The powers of an arbitrator or arbitration board under the collective agreements concluded under Part I of the *Canada Labour Code* are described as follows:

> . . .
>
> ***60.*** *(1) An arbitrator or arbitration board has*
>
> . . .
>
> *(*a.*1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;*
>
> . . .
>
> [Emphasis added]

[60] The powers of an adjudicator under Part III of the *Canada Labour Code* with respect to a complaint of dismissal of a non-unionized employee are described, in part, as follows:

> . . .
>
> ***242.*** *(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to*
>
> . . .
>
> *(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.*
>
> . . .
>
> [Emphasis added]

[61] It appears that the provisions of the *PSLRA* and those of the *Canada Labour*

Code are not the same. So, how should the difference be reconciled? The *Canada Labour Code* came into force in 1999, the *PSLRA* in 2005. Given the objectives set out in the preamble to each statute and the decision-making powers found in them, it is clear that the *Canada Labour Code* served as inspiration for the *PSLRA*. In contrast, it is evident from the previously cited provisions that the powers of remedy are not the same. Given that the two statutes were enacted within a short time of each other, it must be concluded that the legislator consciously decided to not give the same powers to adjudicators appointed under the *PSLRA* as were given to arbitrators and decision makers appointed under the *Canada Labour Code*.

[62] Even though an adjudicator under the *PSLRA* has the power to decide a grievance and ". . . make the order that he or she considers appropriate . . .", I believe that that provision is restricted by the stipulation that an order must comply with the *PSLRA*. In other words, the decision of an adjudicator must reflect the specific provisions of the *PSLRA*.

[63] In contrast, the *Canada Labour Code* refers to ". . . by order, require . . . any thing that it is equitable to require . . ." (a principle of equity), to interpret, apply and ". . . give relief in accordance with a statute relating to employment matters . . ." and ". . . do any other like thing that it is equitable to require . . . ." That could not be clearer. The *Canada Labour Code* confers quite broad powers on arbitrators and decision makers. The *PSLRA* is less precise.

[64] The presumption of harmony and coherence leads me to conclude that, *a contrario*, because of the substantially different wording of the powers of remedy in the two statutes on the same subject, the legislator wanted to give a different meaning to the provisions of the *PSLRA* and to limit its scope. I am satisfied that the legislator decided not to give adjudicators the power to give a remedy based on the legal principle of fairness when such a remedy has the effect of changing a specific definition in the *PSLRA*. Consequently, I believe that I do not have jurisdiction to extend the scope of the definition set out in subsection 206(1) of the *PSLRA* with respect to what constitutes an employee.

[65] Consequently, the decision of the Supreme Court of Canada in *Econosult* (S.C.C.) remains valid: employees of the federal public service form a special category of employees whose positions are established by the Treasury Board and where the right to appoint them to the public service is the exclusive right of the Public Service

Commission. Since Ms. Nemours was not appointed to a position established by the Treasury Board and was not appointed by the Public Service Commission, she was not an employee within the meaning of the *PSLRA*. Although this result may appear unfair, the creation of a special category of employees to reflect her situation is incompatible with the purpose of the statutory provisions examined in a pragmatic and functional manner.

[66] This conclusion also relies on *Marinos* (F.C.A.), which found that an adjudicator must apply legal standards in relying on the applicable employment statutes. Accordingly, a person employed on a casual basis may be an employee within the meaning of the new *PSEA* without being an employee within the meaning of the *PSLRA*.

[67] I am also of the view that this case is different from the matters considered by the Supreme Court of Canada in *Pointe-Claire (City)*. Ms. Nemours' dismissal is not a situation in which an adjudicator must support unionization. The labour relations regime of the federal public service is well established, and all federal public servants are covered by collective agreements, which was not the case before the Quebec labour commissioner in *Pointe-Claire (City)*. In its decision, the Supreme Court of Canada took into consideration the fact that Quebec's *Labour Code* contained a number of deficiencies with which the Quebec Labour Court had to deal. For that reason, a comprehensive approach to the employer-employee relationship was not patently unreasonable in that case in light of the labour relations expertise of the tribunal. The Supreme Court of Canada recognized that a tribunal must, based on its expertise, often interpret deficient provisions of legislation and that it is the responsibility of the legislator to resolve such deficiencies.

[68] In this case, the *PSLRA* is clear and precise. The question of access to unionization does not arise. Ms. Nemours' contract of employment at the time she was dismissed was not ambiguous.

[69] The decision in *Royal Canadian Mint* that Ms. Nemours cited has no application to this matter. The *Canada Labour Code* assigns responsibility for defining employees for the purposes of certification to the Canada Industrial Relations Board. That is not the case under the *PSLRA*, which precisely defines the concept of employee.

[70] Finally, the conclusions in *BC Health Services* are not relevant to this case because there is no evidence that the decision of the deputy head to dismiss

Ms. Nemours interfered with freedom of association or the right to equality guaranteed by the *Charter*.

[71] In light of all these observations, and given the still-valid conclusions of *Econosult* (S.C.C.), I do not have jurisdiction to decide the grievance, and the question of the hours worked as an agency employee is therefore moot.

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

(The Order appears on the next page)

V. Order

[73] I do not have jurisdiction to decide the grievance.

[74] I order that PSLRB File No. 566-02-841 be closed.

April 15, 2009.

PSLRB Translation

Michele A. Pineau,
adjudicator