Date: 20101220

File: 566-02-3334

Citation: 2010 PSLRB 133

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

MICHEL CHOUINARD

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Chouinard v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: France St-Laurent, counsel

For the Respondent: Nadia Hudon, counsel

Heard at Montréal, Quebec,
November 22, 2010.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] The grievor, Michel Chouinard, was an employee of the Department of National Defence ("the department" or "the employer," depending on the context). When he was terminated, he held an electronics technologist position, classified EL-04. He is a member of the International Brotherhood of Electrical Workers, Local 2228 ("the union").

[2] On February 28, 2008, the grievor received a letter informing him that his term employment would end on March 31, 2008 and that his contract would not be renewed. On April 2, 2008, the grievor filed one grievance alleging disguised dismissal and another about his performance evaluation.

[3] On July 3, 2008, without a hearing, the grievor's supervisor, Mario Lechasseur, responded to the grievance at the first level of the grievance process and allowed it in part. Mr. Lechasseur found that the grievor's evaluation was justified and that the decision not to renew his contract was made because of his difficult interpersonal relations with his colleagues and the support team. As part of a work reorganization, the grievor's functions had been reassigned within the team. However, Mr. Lechasseur provided the grievor with a glowing letter of reference covering the periods from January 16, 2007 to March 24, 2007 and from July 20, 2007 to March 31, 2008.

[4] On September 15, 2008, following a hearing, the commanding officer, Colonel N. Eldaoud, responded at the second level of the grievance process and allowed the grievance contesting the grievor's evaluation. He admitted that the performance evaluation did not reflect all the grievor's competencies and ordered that it be withdrawn from his personnel record and replaced with Mr. Lechasseur's letter of reference. However, Colonel Eldaoud found that it was not a disguised dismissal but rather a term contract that was not renewed for financial reasons, specifically to reduce the budget by not renewing certain term-employment contracts and by reassigning tasks within the teams.

[5] On December 10, 2008, Susan Harrison, Acting Director General, Labour Relations and Compensation, responded to the grievance at the final level of the grievance process on behalf of the deputy minister. Ms. Harrison dismissed the grievance and reiterated that the grievor's contract had not been renewed due to financial considerations and not because of his conduct.

[6] On December 21, 2008, the grievor referred his termination grievance to adjudication. On January 26, 2009, the union assumed responsibility for the file.

[7] On January 12, 2010, the employer informed the Public Service Labour Relations Board's registry that it objected to the jurisdiction of an adjudicator to hear the grievance because the grievor had been hired on an offer of term employment and section 25 of the *Public Service Employment Act* (*PSEA*) stipulates that, at the expiration of a specified term, the employee ceases to be an employee. (It must be pointed out that the new *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13, which came into force in 2005, contains that section, but it is now subsection 58(1). Subsequent references to the *PSEA* are to the new *Act*.) The employer argued that not renewing the contract of an individual appointed for a fixed term does not constitute termination within the meaning of section 209 of the *Public Service Labour Relations Act* (*PSLRA*).

[8] On February 11, 2010, the union responded to the employer's objection and claimed that its examination of the file revealed the following facts. At the request of Lieutenant Colonel St-Pierre on February 26, 2008, the grievor's position was converted to indeterminate as of February 28, 2008, which was before the grievor's contract expired on March 31, 2008. Furthermore, on April 18, 2008, at the request of Patricia Ledoux, the position was apparently set to be converted back to a term position effective April 21, 2008. The union asked the adjudicator to consider not only the employer's objection but also the merits of the grievance, to avoid dividing the adjudicator's jurisdiction. The union pointed out that, if the adjudicator ruled on the objection without hearing the relevant evidence, he or she would risk rendering a decision on only a small part of the evidence.

II. The hearing

[9] At the beginning of the hearing, the representatives of the parties asked that I rule only on the preliminary objection raised by the employer, that is, on my jurisdiction to hear the grievance under section 209 of the *PSLRA*, before ruling on its merits. The representatives presented an agreed statement of facts, subject to its relevance and their arguments, along with 13 supporting exhibits. They submitted that the admissions covered the essential elements of the facts that would be provided through testimony and that they were sufficient for a preliminary decision. The agreed statement of facts reads as follows:

[Translation]

. . .

Admissions of the parties

THE PARTIES MAKE THE FOLLOWING ADMISSIONS, SUBJECT TO THEIR RELEVANCE AT THE PRELIMINARY ARGUMENTS' STAGE:

1. *The grievor, Michel Chouinard, was appointed to a term contract from July 20, 2007 to January 31, 2008 in position 296230, as confirmed by the letter of offer adduced as Exhibit* ***S-3****.*

2. *That contract was extended until March 31, 2008, as confirmed by the extension adduced as Exhibit* ***S-4****.*

3. *Were the grievor to testify, he would state that, in mid-February 2008, his immediate supervisor, Mr. Bolduc, told him that he would be renewed and that he would soon become permanent. He would also add that Mr. Bolduc explained to him that there would soon be openings in EL-05 positions and that he would recommend him.*

   For his part, Mr. Bolduc, the grievor's immediate supervisor, would testify that he mentioned in mid-February 2008 that he would do everything possible to have his contract renewed but that he did not have the authority to appoint him. He would also add that he mentioned to him that there would be position openings and that he would recommend him, subject to competitions.

4. *Were the grievor to testify, he would confirm that his immediate superior, Mr. Bolduc, told him at a meeting on February 26, 2008 that he had not been renewed and added that* "the human resource people are upset that you have not gotten along better with your colleagues."

   For his part, were Mr. Bolduc, the grievor's immediate superior, to testify, he would state that he had mentioned at a meeting on February 26, 2008 that the grievor needed to address his communication problems.

5. *On February 26, 2008, a letter informed the grievor that his period of employment would not be extended, the whole of which appears in Exhibit* ***S-5****. That letter was given to him on February 28.*

6. *On February 26, 2008, the Lt. Colonel sent a written request to Human Resources to have the statuses of certain positions, including the grievor's, changed from temporary to indeterminate, as shown in the correspondence adduced as Exhibit* ***S-6****.*

7. *On February 26, 2008, the status of the grievor's position 296230 was changed, as shown in such a change dated March 7, 2008 and adduced as Exhibit* ***S-7****.*

8. *On March 31, 2008, the grievor's last day of work, he was given a performance evaluation, the whole of which appears in the evaluation adduced as Exhibit* ***S-8****.*

9. *On April 1, 2008, the grievor filed two grievances. The first (08-7A-B-MNTL-01985-0207) contested the March 31, 2008 evaluation. The second (08-7A-B-MNTL-01985-0208) contested the "*disguised dismissal*" that took place on March 31, 2008 and was adduced as Exhibit* ***S-2****.*

10. *On April 18, 2008, Human Resources acted to change the statuses of certain positions, including position 296230, from indeterminate to temporary, the whole of which appears in an email adduced as Exhibit* ***S-9****;*

11. *On July 3, 2008, the employer provided its response at the first level of the grievance process, the whole of which appears in the response adduced as Exhibit* ***S-10.***

12. *On September 15, 2008, the employer provided its response at the second level, the whole of which appears in the response adduced as Exhibit* ***S-11****.*

13. *On December 10, 2009 [*sic*], the employer provided its response at the third level of the grievance process, the whole of which appears in the response adduced as Exhibit* ***S-12****.*

14. *Although the grievor is not the only employee with a term contract who did not have his contract contemporarily converted to an indeterminate contract, the employees whose names follow and who worked at depot 202 had their term contracts converted to indeterminate contracts:*

    - *Pierre Arcand;*
    - *Frank Eber;*
    - *Yannick Gauthier;*

- *Jean Lacombe;*
- *Raymond Lacoursière;*
- *Benoit Marcoux;*
- *Pier-Luc Ouimet;*
- *Alain Roberge;*
- *Carl Scott,*

the whole of which appears in the instruments of appointment adduced together as Exhibit ***S-13****.*

Despite the preceding, the merits of those appointments are not in question.

15. Position 296230, held by the grievor until March 31, 2008, has remained vacant ever since.

. . .

III. Summary of the arguments

A. For the employer

[10] The employer presents two arguments to support its claim that an adjudicator does not have jurisdiction to decide the grievance. The first is that the grievor was an employee appointed for a fixed term, and the contract ended. The second is that an adjudicator would not have jurisdiction to reinstate the grievor since the authority to appoint is held exclusively by the Public Service Commission ("the PSC") under section 29 of the *PSEA*.

[11] The employer argues that it had no obligation to offer the grievor a new contract, even if he was competent or if work remained. The employer may allocate its resources as it sees fit and has no obligation to renew an expired contract.

[12] The grievor was appointed for a fixed term. He worked the entire term. The term expired, and the contract was not renewed. The grievor no longer works for the employer because of the term's expiration and not the employer's desire to prematurely terminate his contract. Section 58 of the *PSEA* states that an employee appointed for a specified term ceases to be an employee when the term expires.

[13] The employer concedes that, had the grievor been terminated before the contract expired, an adjudicator might have had jurisdiction to decide whether the employer had acted in bad faith. However, an allegation of bad faith is not relevant at the end of a term, despite the fact that the grievor might have believed that his

contract would be renewed. Warning the grievor in writing that the contract would not be renewed was sufficient notice, and it absolves the employer of any liability.

[14] Nor is it relevant that certain positions, including the grievor's, were converted to indeterminate while he was still working. An employee can occupy an indeterminate position without being appointed to it. Occupying a position does not make an employee the incumbent of the position. In other words, the nature of a position has nothing to do with the person occupying it. For example, an employee appointed for a fixed term may occupy a permanent position made temporarily vacant by a maternity leave. Alternatively, an employee holding an indeterminate position may decide to accept a term position to take on a new challenge. The employer argues that its appointments of other employees to indeterminate periods are not relevant in any way to the grievor's situation. If the grievor was dissatisfied, he had the right to complain to the PSC, under section 77 of the *PSEA*.

[15] Since the grievor's employment ended solely because of the expiration of time, it was not a termination under section 209 of the *PSLRA*. No case law supports the principle that, at the end of a term, an employee is entitled to be offered a new contract because he or she is able to continue the work. Jurisdiction over the requested remedies is limited to the term of the contract. Since the grievor worked to the end of his term, an adjudicator has no authority to award damages.

[16] The employer concludes that I do not have jurisdiction and that the grievance cannot be referred to adjudication.

[17] In support of its position, the employer cites the following decisions: *Dansereau v. National Film Board et al.,* [1979] 1 F.C. 100 (C.A.); *Hanna v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-26983 (19960624); *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100; *Eskasoni School Board/Eskasoni Band Council v. MacIsaac,* [1986] F.C.J. No. 263 (C.A.) (QL); *Monteiro v. Treasury Board (Canadian Space Agency)*, 2005 PSLRB 27; and *Rabah v. Treasury Board (Department of National Defence)*, 2008 PSLRB 83.

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

[18] The grievor argues that an adjudicator has jurisdiction to decide the merits of the termination of a term employee under two exceptional situations. One is a violation of a right protected under the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), and the other is a decision made in bad faith by the employer to terminate the employee's contract. In this case, the second situation applies. Even though an adjudicator does not have the authority to order an employee's reinstatement, he or she has the authority to extend a contract.

[19] The grievor argues that the employer demonstrated bad faith in the contradictory reasons it provided for not renewing his contract, in the performance evaluation that it provided to him before his departure, in the responses given at each level of the grievance process and in the letter of reference that it gave simultaneously with its response at the first level of the grievance process. According to the union, the admissions constitute proof of the employer's bad faith toward the grievor.

[20] The grievor disputes the employer's position that bad faith cannot be argued if a contract has expired. On the contrary, the question of good or bad faith must be decided based on all the circumstances. In this case, the circumstances giving rise to the bad faith occurred on March 31, 2008, when the grievor's contract expired; thus, the allegation of disguised dismissal. The grievor argues that the trueness of the employer's conduct is a serious matter that the adjudicator must examine. In this case, the question at issue relates to whether there was bad faith.

[21] The facts set out in the admissions and exhibits raise some doubt. The grievor alleges that he was told that his contact would be renewed, while the superior alleges having said that he would do everything possible to have the contract renewed. Two weeks later, the superior refused to renew the contract on the ground that the grievor had communication problems, which amounted to a disciplinary sanction. That position was confirmed by the decision at the first level of the grievance process. The supervisor subsequently provided a letter of reference that is very different from the performance evaluation given as the reason for not renewing the contract. In the meantime, the grievor's colleagues were appointed for an indeterminate period. In the responses at the second and third levels of the grievance process, the employer stated that the fundamental reason for ending the term contract was not the grievor's conduct but instead the financial situation.

[22] Shortly before the grievor's contract was terminated, requests were made to convert term positions to indeterminate, including that of the grievor. Appointment notices were sent to other employees in the same section in May and June 2008. Although the grievor does not argue that converting a position is the relevant fact, he argues that this evidence is part of the facts that influenced the decision not to renew or extend the contract. Given those facts, this case appears to involve disciplinary action rather than an administrative measure.

[23] Although good faith can be presumed, the facts raise doubt about the employer's good faith in its decision to not renew the grievor's contract. The grievor admits that, under section 29 of the *PSEA*, the PSC appoints employees. Nevertheless, case law in recent years has clearly broadly and liberally interpreted the power of adjudicators to award proper remedies. Were I to decide that the employer acted in bad faith, I would have jurisdiction to decide appropriate remedies.

[24] The grievor vigorously disputes the employer's argument that an adjudicator does not have jurisdiction to evaluate bad faith at the end of a contract unless the *Charter* was breached. On the contrary, good faith is a fundamental requirement of our legal regime and is a principle as important as the guarantees under the *Charter*. Even though the grievor did not explicitly request it, he is entitled to a remedy based on the merits of the grievance.

[25] In support of his position, the grievor cites the following decisions: *Attorney General of Canada v. Penner,* [1989] 3 F.C. 429 (C.A.); *Jacmain v. Attorney General of Canada et al.*, [1978] 2 S.C.R. 15; *Laird v. Treasury Board (Employment & Immigration)*, PSSRB File No. 166-02-19981 (19901207); *Chénier v. Treasury Board (Solicitor General Canada -Correctional Service)*, 2003 PSSRB 27; *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2008 PSLRB 61; *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 83; *CEGEP de Valleyfield v. Gauthier-Cashman*, [1984] C.A. 633 (C.A.Q.); and *Syndicat des professeurs du collège de Lévis-Lauzon et al. v. CEGEP (Lévis-Lauzon) et al.*, [1985] 1 S.C.R. 596.

C. <u>Employer's reply</u>

[26] The employer replies that, for a term contract, bad faith should be analyzed with the context in mind. The case law cited by the grievor deals with termination during the term of a contract and not at the end, which is a distinct situation. A

remedy awarded to an employee laid off before the end of his or her term usually reflects the portion of the contract not completed. The grievor did not experience any prejudice because he was not entitled to an indeterminate position or to an extension of his contract.

[27] When an employee is terminated before the end of his or her contract, case law allows an adjudicator to examine the employer's reasons to determine whether a camouflage occurred. The very nature of a contract is that there is no obligation to renew it once it has expired. The only factor that falls within the adjudicator's jurisdiction is discrimination, which is absent from this case. To decide otherwise would overturn a well-established legislative framework. The end of a term severs the relationship and extinguishes all the employer's obligations.

IV. Reasons

A. Legislative framework

[28] This grievance is governed by the following two statutes: the *PSEA* and the *PSLRA*. The *PSEA* sets out the PSC's authority to appoint as follows:

> . . .
>
> ***11****. The mandate of the Commission is*
>
> *(*a*) to appoint, or provide for the appointment of, persons to or from within the public service in accordance with this Act;*
>
> . . .
>
> ***29.*** *(1) Except as provided in this Act, the Commission has the exclusive 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.*
>
> . . .
>
> ***58.*** *(1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extension made under subsection (2).*
>
> . . .

[29] The *PSLRA* sets out an adjudicator's jurisdiction over termination as follows:

. . .

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> . . .

B. Jurisdictional framework

[30] In *Jacmain*, the question was whether the adjudicator had jurisdiction to rescind the employer's decision to reject an employee during the probationary period, which the employee alleged had not been made in good faith. The Supreme Court of Canada ruled that, under the *PSEA*, if the employer has an employment-related reason, the adjudicator ceases to have jurisdiction. A failure to adjust to his work environment was a valid reason not to appoint the employee to indeterminate employment in the public service, and the adjudicator did not have jurisdiction to decide otherwise.

[31] In *Penner*, the Federal Court of Appeal considered the question of whether a rejection on probation was based on disciplinary grounds. In that case, the adjudicator confirmed his jurisdiction to decide the grievance and substituted a 15-day suspension for the rejection. Under judicial review, the Court upheld the principle set out in *Jacmain* that an adjudicator hearing a grievance about a rejection on probation may examine the circumstances and applied the principle that form must not take precedence over substance. However, the Court found that adjudicators are without jurisdiction with respect to a rejection on probation when the evidence adduced satisfies them of the employer's good faith.

[32] In *Laird*, the question at issue was the employer's good faith in terminating an employee before the end of his contract. The adjudicator determined that he had jurisdiction to decide the matter because the facts established that the employer had acted in bad faith. However, he limited the remedy to full pay and other benefits to the end of the contract.

[33] In *Chénier*, the issue was whether an adjudicator had jurisdiction to award

damages. The adjudicator concluded that he had broad powers of remedy arising from a breach of the collective agreement or a termination but, because the grievor failed to demonstrate cause, he decided not to exercise them.

[34] In *Lâm*, the adjudicator addressed the broad powers of remedy available to her in the case of an unjustified termination, while in *Tipple*, the adjudicator awarded significant remedy following an unjustified layoff during the term of a contract.

[35] In contrast, in *Dansereau*, the Federal Court of Appeal specifically addressed the question of a term contract not being renewed and found that not renewing a contract did not in that case constitute a breach of the collective agreement. Making a distinction between dismissal (termination during the term of a contract) and the consequences of the expiration of a contract, Pratte J. stated as follows:

. . .

> *An employee hired for a specific term is not laid off when this term expires, since the termination of his employment at that time is not due to lack of a work but to the terms of the contract under which the employee was hired. Such an employee therefore has no rights under article 13.03* [of the collective agreement] *once the term for which he was hired comes to an end. In other words, the contract of employment for a specific term cannot be said to contravene article 13.03 of the agreement.*

. . .

[36] Pratte J. also rejected as follows the employee's argument that the employer had hired other freelancers:

. . .

> *. . . It is clear that in this case freelancers were not hired to "circumvent the provisions of this agreement", since nothing in the agreement gave applicant the right to a renewal or extension of her employment.*

. . .

At adjudication, the adjudicator found no causal relationship between hiring freelancers and terminating the employee's employment.

[37] In *Hanna*, the adjudicator determined that the expiry of a contract does not equate with termination and that a contract that ends under the operation of its terms

is not a decision by the employer about its terms.

[38] In *Pieters*, the adjudicator concluded that, since *Dansereau*, it is now well established that adjudicators do not have jurisdiction to hear a grievance contesting an employer's failure to renew an employment contract. Furthermore, if an employee is laid off before the end of his or her contract, the only redress is to compensate the employee for the remainder of the period of the term appointment.

[39] In *Eskasoni*, this time under the *Canada Labour Code*, the Federal Court of Appeal examined the concept of what constitutes a "dismissal." In the absence of a definition in the *Code*, Pratte J. stated the following:

. . .

> *The Labour Code does not contain any definition of the words "to dismiss" and "dismissal". However, the meaning of these words and of their French equivalents "congédier" and "congédiement" is reasonably clear: they all refer to an act or decision of an employer that has the effect of terminating a contract of employment. In the absence of a statutory provision extending the normal meaning of those expressions, I am unable to read them as embracing the failure of an employer to renew a contract for a fixed term of employment.*
>
> *That interpretation may have some regrettable consequences in that it does not give all employees the security of employment that they may well deserve to enjoy. However, it does not, in my view, contravene subsection 28(1). . . .*

. . .

Urie J. added the following:

. . .

> *The words "dismiss" and "dismissal" have, in the employer-employee relationship, a meaning so well understood that resort need not be had to dictionaries, or case law to substantiate that meaning. In my view, that well known meaning connotes the unilateral termination of the employment of an employee by the employer for whatever reason. There cannot be, in my view, the slightest connotation that their meaning embraces the bilateral agreement of an employer and the employee to terminate the employment relationship whether by the effluxion of time of a term contract of employment, or otherwise.*

. . .

[40] In *Monteiro*, the adjudicator once again examined the concept of not renewing a contract. Relying on *Dansereau* and *Eskasoni*, he concluded that an individual whose contract is not renewed is not laid off; his or her employment merely ceases, in accordance with the terms of the contract.

[41] In *Rabah*, the adjudicator explained that he did not have the authority to reinstate an employee whose contract had expired because it would have amounted to a new appointment, which is exclusively the PSC's jurisdiction.

[42] It is my view that *CEGEP de Valleyfield* and *Syndicat des professeurs du collège de Lévis-Lauzon et al.*, cited by the grievor, are not applicable because of the principles set out by the Federal Court of Appeal, which apply in this case. Therefore, I will not summarize them.

C. Applying the legislative and case law principles

[43] The grievor argued that I have jurisdiction to decide the grievance because he is able to demonstrate that the employer acted in bad faith. He objected to the employer's position that the concept of bad faith does not apply once the expired contract is not renewed.

[44] I note that the grievor's employment ended in accordance with the provisions of the contract that he signed and without a guarantee of employment for an indeterminate period or a right to renewal, as mentioned in the following offer of employment:

> [Translation]
>
> . . .
>
> *This offer is not to be considered as an offer of appointment for an indeterminate period or as a guarantee of employment in the public service. Your services may be needed for a shorter period than anticipated based on the workload and the need to continue to perform the tasks that you will be assigned.*
>
> . . .

[45] Based on *Dansereau* and *Eskasoni*, I am of the opinion that the Federal Court of Appeal decided once and for all that the employer's failure to renew the grievor's contract of employment is not a dismissal or layoff.

[46] An adjudicator has only those powers conferred by law. Those powers may not be expanded even with the consent of the parties. Section 58 of the *PSEA* is clear: an employee appointed for a specified term ceases to be an employee at the expiration of that term. The expiration of the term of a contract for a specified period is not a disciplinary action within the meaning of subsection 209(1) of the *PSLRA*. Therefore, an adjudicator does not have jurisdiction to decide such a grievance.

[47] I believe that the question of the employer's good faith is not relevant when the matter involves expired employment. Since the employer did nothing other than to allow the conditions of the contract to run out, its mindset is of no consequence. I also believe that the fact that the grievor's position was converted to indeterminate before the employment contract expired is not relevant to deciding the employer's good faith. The grievor's recourse with respect to an appointment does not fall within the jurisdiction of an adjudicator appointed under the *PSLRA*. Furthermore, the employer's contradictory responses at each level of the grievance process may not be used to otherwise attribute jurisdiction to the adjudicator because the proceeding before the adjudicator is a *de novo* proceeding.

[48] The decisions cited by the grievor in support of his position show that an adjudicator would have jurisdiction to decide the grievance and award a remedy only if the employer prematurely terminated the contract. It would then be possible to question the employer's reasons for acting in that manner. The facts in this case differ in substance from those of the cited decisions.

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

(The Order appears on the next page)

V. Order

[50] The grievance is dismissed for lack of jurisdiction.

December 20, 2010.

PSLRB Translation

Michele A. Pineau,
adjudicator