**Date:** 20100514

**File:** 566-02-2789

**Citation: 2010 PSLRB 62**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**MARGARET LAUGHLIN WALKER**

Grievor

and

**TREASURY BOARD**
**(Department of Fisheries and Oceans)**

Employer

Indexed as
*Laughlin Walker v. Treasury Board (Department of Fisheries and Oceans)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** George Filliter, adjudicator

***For the Grievor:*** Herself

***For the Employer:*** Anne-Marie Duquette, counsel

Heard at Ottawa, Ontario,
April 7 and 8, 2010.

## I. Grievance referred to adjudication

[1] Margaret Laughlin Walker ("the grievor") is employed by the Department of Fisheries and Oceans ("the employer"). The grievor filed a grievance on February 22, 2008, requesting the following corrective action: "Acting Pay as a PE-03 retroactive to at least Feb 2002 as per the attached." On February 2, 2009, the employer denied the grievance at the final level of the grievance process.

[2] On March 18, 2009, the grievor referred the grievance to adjudication. In completing the requisite form, she chose to refer it under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* (*PSLRA*). The form clearly states "[d]isciplinary action resulting in termination, demotion, suspension or financial penalty."

[3] Throughout the grievance process, the employer raised the issue that the grievance was out of time but withdrew the objection before the hearing. That said, the employer did raise an objection to my jurisdiction and requested that it be dealt with before the hearing. I concluded that the best way to deal with the employer's objections was to set aside the first day of the hearing for that purpose.

[4] On the second day, I reconvened the hearing and indicated that I did not have the jurisdiction to deal with this matter. I advised the parties that I had reached that conclusion after carefully considering their submissions. The following are the reasons for my decision.

## II. Issues to be decided

[5] Why do I not have the jurisdiction to hear this grievance? The objections of the employer are somewhat intertwined. However, they consist of two major points.

[6] First, the employer submitted that the grievance itself and the grievor's submissions throughout the grievance process related to a classification grievance. On that point, the employer submitted that the grievor did not suggest that the grievance was about discipline until she referred it to adjudication. As such, the employer argued that the case law is clear that the grievor cannot alter the subject of the grievance at such a late point. So, the issue I must decide is whether the grievor could refer her grievance to adjudication under the disciplinary section of the *PSLRA*.

[7] Second, the employer submitted that, even if I rejected the first argument, regardless of how one categorizes what occurred to the grievor, it was not disciplinary in nature and that the grievor did not suffer a financial penalty. Therefore, I must determine whether the grievor was disciplined and whether, as a result, she suffered a financial penalty.

## III. Positions of the parties

### A. The employer

[8] The employer took the position that, until the grievance was referred to adjudication, the grievor made no allegations that the issue was of a disciplinary nature. In support of its position, the employer adduced in evidence four documents, with the grievor's consent (Exhibit 1 - the grievance and the three replies; Exhibit 2 - the grievor's referral to adjudication; Exhibit 3 - correspondence dated May 7, 2009, from the grievor to staff of the Public Service Labour Relations Board (PSLRB); and Exhibit 4 - an email dated May 19, 2009, again from the grievor to PSLRB staff).

[9] The employer submitted that the grievor was in reality grieving that she had not been treated in a fair and equitable manner during a reclassification process involving her position. On that point, the grievor referred to the fact that she had been promised reclassification to a higher position, and that promise was not fulfilled. The employer referred me to a document prepared by the grievor and entitled: "Third Level Grievance Presentation – December 3, 2008," which was attached to Exhibit 3. Counsel for the employer submitted that it is clear on the face of that document that the grievor was not alleging that she had been disciplined but rather that she had been treated unfairly during the reclassification process.

[10] The employer submitted that, since the grievor did not raise the issue of discipline at any time during the grievance process, she was prohibited from doing so in her referral to adjudication. In support of its position, the employer referred me to the following authorities: *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), *Johnston v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 53, and *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5.

[11] Counsel for the employer noted that in reality the grievor was frustrated and disappointed with the results of the reclassification process, which she categorized as unfair. Counsel for the employer submitted that the grievor had had the opportunity

to seek a judicial review of the decision rendered in the reclassification process under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, but she chose not to.

[12] In addition, the employer submitted that, even if I am not convinced that the grievor was prohibited from referring her grievance as a disciplinary matter, she cannot prove that she was disciplined. The employer referred me to paragraph 209(1)(*b*) of the *PSLRA* and argued that the grievor must prove both that she was disciplined and that she suffered a financial penalty.

[13] The grievor suggested that the employer's actions were in effect disguised discipline. In response, the employer submitted that mere speculation by the grievor that its actions were disciplinary in nature is insufficient (see *Sharaf v. Deputy Head (Public Health Agency of Canada)*, 2010 PSLRB 34).

[14] Furthermore, the employer submitted that the grievor must establish that, if its actions were disciplinary in nature, they must have been in response to an alleged breach of discipline or misconduct (see *Synowski v. Treasury Board (Department of Health)*, 2007 PSLRB 6).

[15] The employer submitted that the grievor cannot establish that its actions were disciplinary because it considered and still considers the grievor a valuable and respected employee. In other words, the employer submitted that the griever has committed no voluntary malfeasance, breach of discipline or misconduct.

[16] In addition, the employer submitted that the grievor did not suffer a financial penalty, which is the second matter that must be established for a proper referral of a grievance to adjudication under paragraph 209(1)(*b*) of the *PSLRA*. The employer noted that the grievor was not demoted; in fact, she still holds the same position that she has held for some time.

[17] The employer submitted that a loss of potential earning power has been held to be not a financial penalty (see *Savage v. House of Commons*, PSSRB File No. 467-H-140 (19930615)). Furthermore, it is submitted that a financial penalty must be linked to a disciplinary action (see *Andrews v. Brent et al.,* [1981] 1 F.C. 181 (C.A.)).

**B. The grievor**

[18] The grievor, on the other hand, submitted that she did not pursue judicial review of the classification decision because, according to her, it would have been prohibitively expensive for a single mother of two children.

[19] The grievor stated that she felt that she was the subject of discipline and that the failure to reclassify her position was, in effect, disguised discipline.

[20] Her story begins in 2002. According to her submission, she was offered a job in another department at a higher classification, but she stayed with the employer because she was advised that her position would be reclassified. The reclassification never occurred.

[21] Additionally, in 2002, during collective bargaining, she provided advice about "exclusions" that was not appreciated by a certain director, to whom the grievor did not report. The grievor did not react to what she described as pressure from him, but instead, she involved a program manager, and the exclusion issue was eventually resolved without dispute. According to the grievor, the Director issued a memo outlining that he was not appreciative of the lack of support from the grievor in 2002. The memo was not introduced into evidence.

[22] The grievor stated that she became aware in 2004 that her newly appointed supervisor had read the memo and may have been influenced by it. In her submission, she stated that she felt that she was treated differently after that.

[23] She submitted that, in 2004, her position was considered for reclassification. At that time, she was again involved in issues of exclusions during another round of collective bargaining. On July 1, 2004, her request for reclassification was rejected despite support from her director general of human resources. That said, the grievor was not notified of the decision until October 2004. When she investigated the matter, she noted what she described as a number of discrepancies, including missing elements in her job description.

[24] The grievor indicated that she filed a grievance about the reclassification process in November 2004. In 2006, a final answer was issued, dismissing her grievance. After that decision, the grievor attempted to deal internally with what she described as the inaccuracies and unfairness of the process, but to no avail. After a

discussion with her supervisor in January 2008 in which she was advised that the decision would stand, the grievor filed the grievance that is the subject of this adjudication.

[25] Finally, the grievor stated that, in 2007, certain duties were removed from her and that her supervisor once informed her that she was not to be involved in those duties whatsoever. The duties were eventually reinstated in 2009. The grievor submitted that she felt that this was further disguised discipline.

[26] The grievor referred me to the following decision in support of her submissions: *Stevenson v. Canada Revenue Agency*, 2007 PSLRB 43.

**IV. Analysis**

[27] First, I am of the view that this grievance is about the grievor's disappointment with the result of the reclassification process. As I reviewed the exhibits, I was convinced that at no time during the grievance process did either party treat this grievance as a disciplinary matter. Most telling to me was the document drafted by the grievor herself and entitled: "Third Level Grievance Presentation – December 3, 2008," which is part of Exhibit 3. The seven-page document deals in depth with the grievor's frustration with the reclassification process and its unfairness and with the volume and type of work that she performed. But nowhere does it refer to discipline, disguised or otherwise.

[28] I believe that the law is clear with respect to referring grievances to adjudication. The case law is clear that only the subject matter set forth in the grievance can be referred (see *Burchill* and *Lee*). There are good policy reasons for that approach, as it makes good labour relations sense to ensure that the employer knows the specifics of the grievor's grievance so that it may properly address them.

[29] In this case, the specifics of the grievance were the reclassification process and the inherent flaws alleged by the grievor. In her submission to adjudication, she altered the basis of her grievance to a disciplinary grievance. In my view, that cannot be allowed.

[30] On that basis alone, I conclude that I have no jurisdiction.

[31] It is noteworthy that the grievor did not address that point other than to simply state that *Burchill* could be distinguished. In my opinion, while the facts may not be the same, the principle in *Burchill* is applicable. I have reviewed the facts in *Lee*, and again, although they are not identical, I find them to be comparable to the facts before me.

[32] In case I may be mistaken, I will analyze the remainder of the employer's submission. On the second day of the hearing, I advised the parties that, for the purposes of this part of the analysis, I would accept that any of the assertions of fact raised by the grievor could be proven by credible and relevant evidence.

[33] With that in mind, even had I concluded that I had jurisdiction, I would still have been unable to conclude that the grievor was the subject of discipline or indeed that she suffered a financial penalty.

[34] The grievor submitted that she felt that her new supervisor in 2004 might have been influenced after reading a report written by the Director who took issue with the grievor's advice on exclusions in 2002. When asked, the grievor admitted that she was speculating and that she had no actual proof that the report influenced her supervisor in any way.

[35] Furthermore, the grievor was forthright in her admission that she was unable to link what she referred to as the discrepancies, inaccuracies and overall unfairness in the classification process to the perceived discipline to which she felt subjected.

[36] For all of the reasons stated above, I conclude that I have no jurisdiction to hear this matter.

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

*(The Order appears on the next page)*

## V. Order

[38] The grievance is dismissed.

May 14, 2010.

**George Filliter,**
**adjudicator**