Date: 20131213

Files: 566-34-2704 and 2705

Citation: 2013 PSLRB 161

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

TONY CAMPIONE

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Campione v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Maeve Sullivan, Professional Institute of the Public Service of Canada

For the Employer: Magdalena Persoiu, counsel

Heard at Toronto, Ontario,
February 6 and 7, 2013.

I. Individual grievances referred to adjudication

[1] Tony Campione ("the grievor") is employed as an international tax auditor, classified AU-03, in the Foreign Accrual Property Income (FAPI) area of the International Tax group of the Audit Division in the Canada Revenue Agency (CRA or "the employer"). His workplace was located in the employer's Toronto Centre Tax Services Office. At all relevant times, he was covered by the collective agreement between the employer and the Professional Institute of the Public Service of Canada ("the union") for the Audit, Financial and Scientific group; expiry date, December 21, 2007 ("the collective agreement").

[2] On October 4, 2006, the grievor filed a grievance (PSLRB File No. 566-34-2704), alleging a violation of clause 46.01 of the collective agreement. The grievance contested the employer's order, dated September 15, 2006, that he cease operating two businesses (RCT Consulting and Campione and Associates). The grievance stated that the employer's determination that operating those businesses constituted a conflict of interest was unreasonable, financially punitive and unfair and that it prevented the grievor from exercising his professional knowledge and expertise.

[3] As corrective action, the grievor asked that the order to cease operating his businesses be rescinded and that he be reimbursed on a pro-rata basis for the loss of income he incurred as a result of the employer's order, including interest, along with any other action that would make him whole or that is agreed to by the parties.

[4] That grievance was heard and denied at the first, third and final levels of the grievance process and was referred to adjudication on January 16, 2009.

[5] On December 18, 2007, the grievor filed a grievance (PSLRB File No. 566-34-2705), alleging a violation of clause 18.03 of the collective agreement. The grievance challenged the employer's refusal of his request to attend a FAPI conference scheduled for January 14 and 15, 2008, in Toronto. In his grievance statement, the grievor noted that attending the conference had formed part of his individual learning plan for two years, that the cost of attending would have been minimal and that attending would not have required travel. He alleged that the denial of his request to attend the conference was unfair and unreasonable.

[6] That grievance was heard and denied at the first, third and final levels of the grievance process and was referred to adjudication on January 16, 2009.

[7] On November 16, 2012, the employer filed an objection to jurisdiction in relation to PSLRB File No. 566-34-2704 on the grounds that a Public Service Labour Relations Board (PSLRB) adjudicator cannot review the employer's determination that a conflict of interest existed under its conflict of interest policy. The employer argued that a PSLRB adjudicator is limited by the language of clause 46.01 of the collective agreement to determining whether the employer had "otherwise specified" that the proposed outside employment could constitute a conflict of interest.

[8] The union responded in writing to the employer's objection to jurisdiction on January 21, 2013, and argued that the outside employment proposed by the grievor was not "otherwise specified" in the employer's conflict of interest policy. The union also argued that a PSLRB adjudicator has the jurisdiction to determine whether the employer's conclusion that a real or perceived conflict of interest existed was reasonable.

[9] It was determined that any questions relating to jurisdiction or limitations on jurisdiction would be raised at the hearing in the closing arguments.

II. Summary of the evidence

[10] The grievor testified and introduced nine documents into evidence. The employer called Jack Dempsey, Bruce Allen and Jeff Sadrian as witnesses and introduced nine documents into evidence. Aside from some background information, the evidence relating to the specifics of the two grievances before me is summarized separately for ease of reference.

A. Background

[11] The grievor testified that he is a chartered accountant and chartered business valuator. Before he worked for the employer, he worked in a chartered accounting firm. He began working for the employer in 1992 in the area of tax avoidance. In 1999, he left the employer to work for an outside firm in business valuations but returned to the employer in 2002.

[12] When the grievor resumed working for the employer in 2002, he worked in the Business Equity Valuations area. He explained that his work in that section involved determining the fair market value of the shares of companies, partnerships, businesses

and intangible assets. He testified that business valuators are classified as auditors but are, in fact, valuators. Not all valuators are chartered accountants.

[13] In April 2006, the grievor moved to the FAPI area of the International Audit group. Mr. Allen explained that the International Audit group fell within the audit branch, which also housed the groups auditing large file cases, small and medium enterprise audits, tax avoidance, specialty audits, business equity valuations, and electronic and commerce audits.

B. PSLRB File No. 566-34-2704

[14] The grievor testified that, while he was in the Business Equity Valuations section, he received a phone call from a former associate, who asked him if he would perform a valuation for a matrimonial dispute. Interested in the request, the grievor sought permission from his supervisor to provide management consulting and litigation support services outside of his employment. In August 2005, he received a letter from Mr. Allen, Director of the Toronto Centre Tax Services Office, which advised him that his request was denied on the grounds that he worked in a specialized area and that his proposed business could be a conflict of interest (Exhibit G-3).

[15] After he received the letter from Mr. Allen, the grievor requested a transfer into the International Audit group because the work in that area had nothing to do with valuations for outside clients. Following his transfer into the FAPI section in April 2006, the grievor made a second request for permission to perform outside work (Exhibit G-4).

[16] The grievor testified that the outside work that he proposed was not in any way similar to the work that he performed in the FAPI section. The business that he wished to start was to be related to the valuation of domestic businesses. In particular, he testified that the business he proposed was to provide business and marketing planning and feasibility studies; management consulting, including the preparation of business plans; financial advisory services, including business valuations, corporate finance and damage quantification; litigation support, including damage quantification; and mergers and acquisitions services, including business valuations.

[17] The grievor received a letter from Mr. Allen dated September 15, 2006, (Exhibit G-5) in response to his second request for permission to engage in outside

work. His request was again denied on the grounds that the proposed outside work constituted a potential conflict of interest, pursuant to subparagraphs 3(a), (c) and (e) of Section B of the *Conflict of Interest Code and Guidelines* ("the *Code*"). Mr. Allen also told the grievor that he was to cease operating a management consulting business that had been approved in 1993 by a former director, on the grounds that the approval was no longer valid. Mr. Allen further noted that the grievor had not disclosed this business when he filed the confidential report required by the *Code* and further that he had indicated in his "Employee Certification Document" that he was not involved in any outside activities that were subject to a confidential report.

[18] Mr. Allen testified that he sought the opinions and advice of others before he prepared the letter of September 15, 2006 (Exhibit G-5). In particular, he sent the grievor's request to the human resources section at the employer's Headquarters and he consulted Mr. Sadrian, who was Acting Assistant Director of the Audit Division. Mr. Allen explained that he went to Mr. Sadrian because he was worried that his own opinion was becoming entrenched, and he wanted another opinion on whether there was a conflict, even though Mr. Sadrian was not delegated to give advice on conflict of interest and had no management relationship with the grievor.

[19] Mr. Sadrian testified that when asked to consider such requests, he normally reviewed the employee's job description, the proposed outside employment and the *Code*. He explained that some outside activities might be sanctioned and that he did not want to randomly refuse requests. In this case, he examined the grievor's job description (Exhibit E-7) and his request (Exhibit G-4) before preparing a memorandum for Mr. Allen (Exhibit G-6).

[20] Mr. Sadrian believed that the grievor's proposed business constituted a potential conflict of interest, if not a real one, and he so advised Mr. Allen. He believed that the name for the business proposed by the grievor, "RCT Consulting," looked like it referred to "Revenue Canada Taxation," which could have given rise to a misconception. He was concerned that the grievor's proposed management consulting services also gave rise to a potential conflict. He testified that all business transactions take into account tax consequences, and he thought that situations could have arisen that would have called into question the grievor's impartiality and objectivity. He noted that the grievor's potential clientele were the same people who were in disputes with the CRA, and it would be hard to imagine how he could preserve his impartiality.

He thought that the grievor could not have helped but advise clients based on his particular knowledge, acquired through his work with the employer. Mr. Sadrian also believed that the litigation support work proposed by the grievor could have brought him into conflict with the employer as he might have ended up playing for both sides. In his opinion, mergers and acquisitions are all about tax implications. Furthermore, the business valuation services that the grievor proposed to provide were a direct conflict with his former position and could have involved his current position.

[21] In cross-examination, Mr. Sadrian acknowledged that he did not know the grievor, did not speak to him about his proposal and based his opinion entirely upon the letter from the grievor (Exhibit G-4), the job description (Exhibit E-7) and the *Code.* He also confirmed that he did not make the decision about whether the grievor would be permitted to engage in outside employment. Mr. Allen made that decision.

[22] Mr. Allen testified that he made his decision about the grievor's proposal based on his review of Mr. Sadrian's memo, the advice he received from the human resources section at the employer's Headquarters and his own review of the *Code.* He stated that he had no indication that the grievor was in a real conflict of interest but that there was a potential or apparent conflict. He testified that while he recognized that the grievor stated that he did not intend to give tax advice, individuals could have used his valuations for their own purposes, and he noted that the grievor could not control how his work would be used. As an example, he noted that in shareholder and business buyouts, the valuation of shares would have tax consequences if the shares were sold. He thought that the grievor's clients might have perceived an advantage because he was a CRA employee, even though there might not have been a real advantage.

[23] The grievor testified that he received a copy of Mr. Sadrian's memo (Exhibit G-6) and that he did not agree with it. He was of the opinion that Mr. Sadrian did not understand what a business valuator does and did not understand litigation support. He testified that he had no intention of providing financial accounting or business reorganization advice. Rather, he intended to provide business and marketing planning and feasibility studies, which would have had no impact on income or taxation. Further, the information that he would have used was in the public domain and would not have been acquired through his work with the employer. He noted that the taxpayer information in the employer's possession was not relevant to his business proposal and that it would be unethical and irrelevant for him to use the employer's

corporate tax information. He explained that the valuation of a business is specific to that business and that it is necessary to use publicly available information so that it can be verified.

[24] The grievor said that contrary to the opinion Mr. Sadrian provided to Mr. Allen (Exhibit G-6), he had not been planning to offer accounting, business reorganization or capital reorganization services and that preparing a business plan did not have any impact on income or taxation. His use of the term "financial advisory services" reflected the use by chartered accounting firms to include business valuations, corporate finance and damage quantification. That activity differs from providing financial advice and is very specific. His proposal did not include anything related to accounting, business reorganization or capital reorganization. The grievor testified that Mr. Sadrian also did not understand what he meant by litigation support and that he seemed to have confused it with being in litigation with taxpayers. In fact, it was simply providing damage quantification services.

[25] The grievor stated that he had never seen mergers and acquisitions done for tax purposes alone and that he had proposed to deal with non-tax-related business valuations and arm's-length transactions, using publicly available data. He testified that he never proposed to provide services relating to leveraged buyouts and that it was unlikely that he would ever be retained to provide such services. Further, he had not proposed to work on public buyouts. He stated that he would have prepared pricing analyses of private businesses that were intended to be sold, merged or acquired and that he would have assisted clients in obtaining financing from banks and in preparing business plans.

[26] The grievor acknowledged that as a CRA employee, he had a special obligation to report people he encountered whom he suspected of engaging in tax fraud. He stated that his ability to meet that obligation would not have been compromised by his outside employment. He stated that any person who retained his services would have to know in advance that he worked for the CRA and that he would have to report any tax fraud.

C. PSLRB File No. 566-34-2705

[27] The grievor stated that he identified his wish to attend the Foreign Affiliates conference, which was an external conference that dealt with the FAPI, in his individual

learning plan (Exhibit E-2). He stated that he spoke to his immediate supervisor, Derek Chibba, in August or September 2007 about his request to attend the conference and that he was told that he should submit it but that there was no guarantee that the request would be approved, as it was subject to operational requirements.

[28] The grievor explained that he wanted to attend the course because it provided the perspective of outside experts on the law. He was also required to have 20 hours of structured and verifiable training to maintain his professional designations, as well as 60 unstructured hours. He stated that he acquired most of the required training hours on his own time and acknowledged that his position with the employer did not require him to have a professional designation.

[29] The grievor testified that he had requested permission to attend conferences when he was in the Business Equity Valuations section between 2002 and 2006. Before 2004, he attended two or three conferences but did not attend any after that. In 2005, he filed a grievance when he was denied an opportunity to attend a conference of Canadian business valuators. The grievance was partially allowed at the third level in May 2007 (Exhibit G-1). The grievor put in his request to attend the Foreign Affiliates conference in the summer of 2007, after he received the grievance response.

[30] In cross-examination, the grievor acknowledged that he had been in the FAPI section only for just over a year when he made his request to attend the Foreign Affiliates conference. He acknowledged that he did not make any requests to attend conferences after making the request that is the subject of this grievance. He agreed that seven or eight other employees were identified on the organization chart for the section (Exhibit E-1) and that all were classified a level higher than he was. However, he testified that he was the only person who asked to attend the conference.

[31] The grievor testified that Mr. Chibba told him that his request would not be approved because of operational requirements. After Mr. Chibba told him that his request was refused, he requested a meeting with Mr. Dempsey, who was the manager of the International Audit group**.** Mr. Dempsey confirmed that the grievor's request to attend the conference would not be approved.

[32] Mr. Dempsey testified that someone told him about the FAPI conference and about the importance of sending someone to it. He did not remember who told him about it but remembered the conversation generally. He said that he decided not to

approve the grievor's request to attend the conference because he only had sufficient funds in his budget to send one person, and he thought that it was most appropriate to send Mr. Chibba, who was the team leader and the most senior and experienced person. He believed that it would be most effective to have Mr. Chibba attend the conference because he could pass the materials on to the rest of the team by making the conference materials available for review and by making a formal presentation to the staff. An email that he wrote on November 5, 2008 (Exhibit E-4), summarized what Mr. Chibba did after attending the conference.

[33] In cross-examination, Mr. Dempsey explained that the budget for staff training was at the divisional level and that he would have had to obtain permission to send people on training when opportunities arose. He said that training was almost entirely done internally, and for that reason, he would have sought permission from the assistant director of the Audit Branch to send someone to the FAPI conference. He could not remember with certainty the identity of that assistant director at the time at issue but thought that it might have been Paul Loo. He also could not remember with certainty whether he actually spoke to the assistant director, and he could not remember what he actually did, although he said that he could have sent someone to the conference only with the assistant director's approval.

[34] Mr. Dempsey testified that because sending employees to conferences was costly, the employer relied on internal training, such as the course described in Exhibit E-4. However, in cross-examination, he confirmed that the course described in that exhibit had not been delivered before his retirement in 2010. He said that the employer's general approach to sending people to conferences was outlined in Exhibits E-4, E-5 and E-6, which were emails he exchanged with Mr. Loo in November 2008.

[35] In those emails, Mr. Dempsey explained to Mr. Loo that Mr. Chibba attended the FAPI conference in question and brought the conference materials back to the workplace for staff to review. Mr. Chibba was also expected to give a formal presentation to the staff on the conference material but had not done so by November 2008. Technical difficulties caused the delay in making the CD-ROM that contained the conference presentations available to staff. Mr. Dempsey also explained to Mr. Loo that if he was to start sending staff to such conferences as the one requested by the grievor, he would start with the most experienced FAPI auditors and work down to the least experienced because experienced staff would get the most benefit from the

conference. In his view, Mr. Campione would not be eligible to attend such a conference for years. He noted that the conference provided "excellent training" but that it was "costly", so the employer resisted sending staff to it.

III. Summary of the arguments

A. For the grievor

1. PSLRB File No. 566-34-2704

[36] Citing *Bouthillette et al. v. Treasury Board (Revenue Canada - Customs, Excise and Taxation),* PSSRB File Nos. 166-2-28527 to 28533 (19990208), which considered a similar collective agreement provision to that at issue in this grievance, the grievor stated that an adjudicator's task is to determine whether the work proposed by an employee has been specified as being a conflict of interest. In *Bouthillette et al.*, a clear line could be drawn because the work proposed was clearly identified in the conflict of interest policy in place at that time. No such line can be drawn in this case.

[37] The Federal Court of Appeal's decision in *Threader v. Canada (Treasury Board),* [1987] 1 F.C. 41 (C.A.), set out the proper test to determine if there is a conflict of interest. The Court asked whether an informed person, having considered the matter realistically, would conclude that a public service employee would be influenced in the performance of his or her duties by considerations arising from personal interests. The determination of a conflict of interest must be made on a rational, informed and objective basis. In this case, the employer conceded that there was no actual or real conflict of interest. Instead, it based its determination on a potential conflict or an appearance of a conflict.

[38] The employer's assessment that the grievor's proposed outside business constituted a conflict of interest had numerous problems. For example, Mr. Sadrian's memo referred to activities that the grievor testified he had no intention of doing. The employer's concern about the grievor's access to information in the course of his duties demonstrated that it was inclined to believe that employees will engage in wrongdoing. However, the grievor testified that although he had access to a great deal of information in the course of his duties, not much of it would be useful outside his regular duties. He also testified that he went to great lengths to avoid any conflict of

interest. There was no overlap between the nature of the work that he performed for the employer and his private business.

[39] The grievor argued that the employer took a very rigid approach to conflict of interest and that, in essence, it was denying all auditors the opportunity to use their skills outside the workplace. Aside from the fact that the work proposed by the grievor was not specified in the *Code,* the employer was also required to make its assessment in a reasonable manner. By assuming that the grievor was going to use improper methods or by assessing duties that the grievor had no intention of performing in his outside employment, the employer's assessment was not reasonable.

[40] The grievor stated that even if one were to assume that the employer could specify that the proposed work constituted a conflict of interest by some other method than the *Code,* it must still act in a reasonable manner. Citing *Dubé and Piton v. Treasury Board (Department of National Defence),* 2007 PSLRB 77, the grievor stated that a decision that is based on wrong information or that is based on an incorrect presumption is arbitrary and unreasonable.

[41] The grievor stated that he had no intention of engaging in any wrongdoing and that the reports he produced in the course of his private business would rely on publicly available information.

[42] The grievor asked that his grievance be allowed and asked for damages, citing *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service),* 2003 PSSRB 27.

2. PSLRB File No. 566-34-2705

[43] The grievor argued that the heading of clause 18.03 of the collective agreement is permissive and is meant to suggest that attending conferences is encouraged. Citing *Regional Municipality of Hamilton-Wentworth Police Services Board v. Hamilton-Wentworth Police Association* (2002), 105 L.A.C. (4th) 139, the grievor contended that the use of the word "shall" in clause 18.03(b) indicated that it was an imperative right and that the employer was obligated to ensure that employees had the opportunity to attend conferences. By failing to provide the grievor with the opportunity to attend the FAPI conference that he asked to attend, the employer violated clause 18.03(b).

[44] Although an employee's right to attend conferences is subject to operational requirements, there was no evidence that the employer considered operational constraints. Mr. Dempsey testified that he based his decision to send the team leader to the conference instead of the grievor on seniority and on the fact that the team leader could share the information from the conference with the whole section.

[45] The issue in this grievance is not whether there are alternatives to sending an employee to a conference but is, rather, whether an employee should be granted an opportunity to attend a conference. There was no evidence that Mr. Dempsey considered any requests from other employees who wanted to attend the same conference or who had identified the conference in their learning plans. Operational constraints were never raised as an issue, and budget constraints were raised only in November 2008, after the grievor's request was denied. Furthermore, the employer's position on budget constraints failed to recognize that it had an obligation to consider employee requests to attend conferences.

[46] The employer's refusal to grant the grievor's request to attend the conference was particularly egregious because he had filed a grievance on the same issue several years earlier, which was partially allowed. The employer agreed to consider future opportunities following that grievance and, therefore, had a special obligation to consider the grievor's request. Despite that earlier grievance, the grievor did not attend a conference in eight years, demonstrating that the employer has not provided him with an opportunity to attend conferences, in violation of clause 18.03 of the collective agreement.

[47] The grievor asked that this grievance be allowed and that the employer be ordered to approve his attendance at the next FAPI conference.

B. For the employer

1. PSLRB File No. 566-34-2704

[48] Citing *Spencer v. Deputy Head (Department of the Environment),* 2007 PSLRB 123, upheld in 2008 FC 1395, and *Canada (Attorney General) v. Assh,* 2005 FC 734, which overturned *Assh v. Treasury Board (Veterans Affairs),* 2004 PSSRB 111, the employer argued that the jurisdiction of a PSLRB adjudicator is limited by subsection 209(1) of the *Public Service Labour Relations Act* and in

particular, given the circumstances of this grievance, by paragraph 209(1)(*a*), which provides that an employee may refer to adjudication a grievance relating to the interpretation or application of a provision of a collective agreement. Because section 229 prohibits a PSLRB adjudicator from amending a collective agreement, he or she is limited by the language of the collective agreement.

[49] Article 46 of the collective agreement is clear and unambiguous. It is broadly worded and makes no restriction on how the employer can specify that outside employment is a conflict of interest. It makes no reference to the *Code* or to a policy. Therefore, an adjudicator's jurisdiction is limited to determining whether the employer has "otherwise specified" that the outside employment is in an area that could represent a conflict of interest, as required by the collective agreement. The *Code* is not included in the collective agreement, and therefore, there is no jurisdiction to find that it was breached. The employer cited the definition of "specify" in the *Shorter Oxford English Dictionary* (3rd ed.), in addition to *Spacek v. Canada Revenue Agency,* 2007 PSLRB 115, and *Perras v. Treasury Board (National Revenue - Customs and Excise)*, PSSRB File No. 166-2-16335 (19890516). The employer noted that *Perras*, *Bouthillette et al.* and *Fraser and Skinner v. Treasury Board (Revenue Canada - Taxation),* PSSRB File Nos. 166-2-25464 and 25465 (19960628), which considered the jurisdiction of a Public Service Staff Relations Board adjudicator to consider policies or guidelines, arose under the former legislation and are not applicable.

[50] The employer stated that the evidence demonstrated that it had seriously considered the grievor's request. Mr. Allen testified that he understood the requirements of the grievor's position in the FAPI and that he weighed those requirements against the grievor's proposal. There was no dispute that the employer thoroughly considered the *Code* and that it specified those areas that it considered constituted an apparent conflict of interest.

[51] The employer argued that the case before me does not involve discipline. Instead, the grievor wanted a review of management's decision, made pursuant to the *Code*, and he wanted a detailed analysis made of the *Code* because he disagreed with management's decision. *Duske v. Canadian Food Inspection Agency,* 2007 PSLRB 94, established that the Federal Court is the venue to challenge a decision arising out of a policy like the *Code*. The employer also cited *Spencer, Assh* and *Spacek* for the

proposition that employer policies cannot form the subject matter of grievances that can be referred to adjudication.

[52] The employer stated that it examined the *Code* and then specified in a letter to the grievor that his intended activity might create an apparent conflict of interest. That letter was within the scope of the collective agreement, as it specified an area that might result in a conflict of interest. Accordingly, the employer requested that the grievance be denied.

2. PSLRB File No. 566-34-2705

[53] The employer argued that the language of the collective agreement is clear and unambiguous. Opportunities to attend conferences are subject to operational constraints, which include budgetary constraints. The grievor's request to attend the conference was denied because of constraints that were both budgetary and operational.

[54] Although the grievor testified that he had made many requests to attend conferences in the past, in fact he had been in the FAPI section for only one year before requesting to attend the FAPI conference. In his former section, he had attended two or three conferences. The employer contended that, in fact, he had attended about two out of three possible conferences while in his former position. Furthermore, the request that is the subject matter of this grievance was the only request to attend a conference that he made while in the FAPI section.

[55] The employer argued that clause 18.03(b) of the collective agreement provides simply that an employee shall be given the opportunity to attend conferences "on occasion" and "subject to operational constraints." It is clear that the employer can take into account both budgetary and operational constraints and that, therefore, the obligation is discretionary.

[56] Furthermore, the employer has no special obligation to the grievor because of his prior grievance. That grievance arose when he was in a different job and in a different work group. It is not relevant to the matter at issue in this grievance.

[57] Mr. Dempsey's evidence established that his decision to send the team leader to the conference as opposed to the grievor was based on the fact that the grievor was new to the section and, therefore, had a lower level of understanding of the issues than

the team leader. He was also influenced by budgetary concerns. Although Mr. Dempsey's email explaining his rationale came only after the fact, he testified that those were the reasons he denied the grievor's request.

[58] The employer stated that the grievor had not established a breach of the collective agreement and, therefore, had not met his burden. For those reasons, the grievance should be denied.

C. Grievor's rebuttal

[59] The grievor argued that the cases and analysis presented by the employer with respect to PSLRB File No. 566-34-2704 can be distinguished. In particular, the grievor noted that the facts in the original *Assh* grievance differed from those in this grievance because in that case the grievor argued that the refusal to allow him to keep the bequest from his client was disciplinary. In this grievance, the grievor alleged a breach of the collective agreement, so the test is different. The grievor also noted that the Federal Court expressed some concern in *Assh* about the employer unilaterally determining a breach of contract without independent review.

[60] The grievor contended that the *Spacek* decision is not binding and that it should not be followed. The guidelines in question in that case were not incorporated into the collective agreement, and the subject matter of the grievance was not one that could be referred to adjudication, in contrast to this grievance, which specifically speaks to a violation of the collective agreement.

[61] The grievor stated that there was no issue in the *Duske* decision that the PSLRB has jurisdiction to consider the application of a conflict of interest policy, as the grievance in that case concerned discipline for insubordination. Similarly, in *Spencer*, the pith and substance of the case was a policy that fell outside the collective agreement. There was no connection between the provision of the collective agreement identified in the grievance and the policy that was at issue in that case. There was also a question as to whether the grievor in that case was even subject to the terms of the collective agreement.

[62] The grievor argued that the employer's objection to jurisdiction should be dismissed because otherwise the employer could enact any policy and then challenge the PSLRB's jurisdiction on grievances relating to the application of the policy.

IV. Reasons

A. PSLRB File No. 566-34-2704

[63] The grievor alleged that the employer's direction to him to close his outside businesses was "unreasonable and unfair and financially punitive." He contended that that direction was a violation of clause 46.01 of the collective agreement, which provides as follows:

> *46.01 Unless otherwise specified by the Employer as being in an area that could represent a conflict of interest, employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer.*

[64] The grievor argued that the *Code* did not specifically identify that the outside work he proposed could represent a conflict of interest. Therefore, the employer had not "otherwise specified" that his proposed work was in an area that could represent a conflict of interest, as required by the collective agreement in order to restrict his ability to engage in outside employment.

[65] The employer took the position that the collective agreement did not require it to identify every potential conflict of interest in the *Code*. In fact, the collective agreement did not refer to the *Code*. According to the employer, the collective agreement simply required the employer to "otherwise" specify to an employee that proposed outside employment was in an area that could represent a conflict of interest. The employer contended that a PSLRB adjudicator's jurisdiction is limited to determining only whether the employer has "otherwise specified" that there is a potential conflict of interest.

[66] It seems to me that neither interpretation is fully consistent with the language of the collective agreement. The primary purpose of clause 46.01 is stated in the main clause of the provision, as follows: ". . . employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer." The remainder of the provision is an exception to the right to engage in outside employment. The clause does not identify how the employer might otherwise specify that the proposed outside employment could constitute an actual or potential conflict of interest. Therefore, the fact that the proposed work is not specifically listed in the *Code* is not determinative of the issue.

[67] However, I do not think that the simple specification that there is a conflict of interest or a potential conflict removes from an adjudicator the jurisdiction to determine whether the right to engage in outside employment accorded by clause 46.01 of the collective agreement has been breached. In my opinion, it is not enough to simply specify by some means that the proposed outside employment is in an area that could represent a conflict of interest. There must actually be a conflict of interest, as that phrase is understood by the employer. I believe that an adjudicator must have the jurisdiction to examine whether the employer has "otherwise specified" its determination by some means and whether that determination was bona fide and reasonably related to a concern that the proposed work could constitute a conflict of interest, because both elements are necessary to establish the exception to the right granted in the collective agreement.

[68] In this case, the employer specified, in a letter Mr. Allen sent to the grievor dated September 15, 2006 (Exhibit G-5), its concern that the grievor's proposed outside employment could constitute a conflict of interest. Mr. Allen stated the following:

. . .

> *Your submission has now been reviewed by senior advisors in the organization and I concur with their determination, which finds that your involvement in your outside activity also has the potential for placing demands which could be inconsistent with your official duties or responsibilities, or could call into question your capacity to perform your official duties and responsibilities in an objective manner.*
>
> *Specifically, I consider that there is potential for a conflict to occur pursuant to Section B, Conflict of Interest Guidelines, subparagraphs 3(a), (c) and (e). . . .*

[69] I believe that Mr. Allen's letter to the grievor satisfies the requirement that the employer otherwise specify that the proposed outside work is in an area that could represent a conflict of interest. The question that remains is whether the employer's determination was bona fide and reasonable in the circumstances. For the reasons that follow, I believe that it was.

[70] The employer defines conflict of interest in the *Code* (Exhibit G-7) as follows:

> *. . . situations where an employee's personal assets, affairs or interests are in a real, potential or apparent conflict with his or her public duties and responsibilities, or situations that*

> *could affect the employee's judgement to act in the best interest of CRA.*

[71] The *Code* enshrines as one of its principles the requirement that employees arrange their personal affairs in such a manner that ". . . public confidence and trust in the integrity, objectivity and impartiality of government and the CRA are conserved and enhanced . . . ." When a clash occurs between an employee's private interests and his or her official duties and responsibilities, the *Code* provides that the public interest prevails over the employee's personal interests. Although outside activities and outside employment are not prohibited, the *Code* makes it clear that those activities cannot place employees in situations where there might be a real, potential or apparent conflict of interest.

[72] The *Code* does not identify with any specificity the kinds of situations that might give rise to a conflict of interest. The grievor argued that because the *Code* did not specifically prohibit the kind of outside employment he had proposed, it was not prohibited. However, as the Federal Court of Appeal noted as follows in *Canada (Attorney General) v. Assh*, 2006 FCA 358:

> *[84] . . . Codes of conduct are inevitably non-exhaustive works in progress, emphasizing broad principles (including, in this case, a prohibition of the transfer of economic benefits of more than nominal value), and responding primarily to problems already encountered. They should be interpreted and applied accordingly.*

[73] In this case, the employer pointed particularly to three broad principles identified in the *Code* that it considered relevant to the circumstances, subparagraphs 3(a), (c) and (e) in Section B, which provided as follows:

> ***Before engaging in any outside activity. . .***
>
> *3. Even though you are a CRA employee, you can still participate in a wide range of outside employment or activity. Before engaging in any outside activity, you must ensure that the outside activity:*
>
> *(a) does not place you in a situation where there may be a real, potential, or apparent conflict between your private interests and your official duties and responsibilities;*
>
> *. . .*

> *(c) will not result in a situation where someone could reasonably perceive that your access to privileged information was to your advantage;*
>
> . . .
>
> *(e) will not raise a reasonable doubt, in the mind of an informed person who has thought the matter through, that the performance of such activity could influence your objectivity in your official duties . . . .*

[74] The grievor proposed, as set out in his letter of June 19, 2006 (Exhibit G-4), to establish an outside business that would provide management consulting and financial advisory services, litigation support services, mergers and acquisition advisory services, and business valuations. His proposal was reviewed by Mr. Allen, by corporate labour relations advisors and by Mr. Sadrian, who provided a written analysis of the proposal (Exhibit G-6).

[75] Mr. Sadrian's analysis of the grievor's proposal concluded that there were potential conflicts of interest in a number of areas. In particular, he noted that the grievor's proposed management consulting business could include such services as providing advice on financial issues, accounting issues, business reorganizations, and the preparation of business and marketing plans and valuations. He felt that those services could give rise to potential conflicts because they could involve determining the impact of income and other taxes and because the grievor had access to a great deal of business and other information on Canadian and international taxpayers. He was concerned that the grievor's proposed litigation support services could give rise to a conflict because there was simply no guarantee that none of the grievor's clients would find themselves in litigation against the CRA.

[76] Mr. Sadrian also believed that the grievor's proposed mergers and acquisitions services could bring him into conflict of interest because, as he explained (Exhibit G-6), it ". . . is very difficult to imagine transactions involved in mergers and acquisitions being entirely free from tax considerations." Further, given the grievor's access to CRA databases, there was an appearance of a conflict. Mr. Sadrian also was concerned that the business valuation services would also have tax implications and could give rise to the appearance of a conflict, given the grievor's access to information and databases through the course of his employment at the CRA.

[77] The grievor thought that Mr. Sadrian did not really understand what he was proposing. I do not agree. While it is possible that the grievor did not intend to provide all the services considered by Mr. Sadrian, Mr. Sadrian was clear that he was looking at the potential for conflicts of interest based on what could be included in the kind of business being proposed. It was clear from the evidence of both Mr. Sadrian and Mr. Allen, who was the decision maker, that they understood the nature of the grievor's proposal and its implications.

[78] Mr. Allen testified that he relied on Mr. Sadrian's opinion, as well as other advice, when he made his determination that the grievor's proposed businesses could give rise to a conflict of interest. He explained in his testimony that he was concerned that even though the grievor did not intend that his outside work would give rise to a conflict, he could not control how his clients used his work, and that there was, therefore, a potential for conflict. He testified that he had no reason to believe that the grievor was in an actual conflict of interest. His concern arose solely from the potential for a conflict and from a concern about public perception. In my opinion, that is a legitimate concern. The *Code* refers not only to just actual or real conflicts of interest but also to potential or apparent ones, as well as to the public perception of a conflict.

[79] The grievor argued that the employer's approach was too restrictive and that it was based on the assumption that he would make improper use of the information and the databases that he had access to through his employment at the CRA. He argued that his work for the employer was different from the kind of work that he was proposing to do.

[80] I believe that the *Duske* decision addresses a number of the issues raised by the grievor. In that case, the adjudicator found that an employee of the Canadian Food Inspection Agency (CFIA) violated the relevant conflict of interest code by working for an outside company that operated a muskox harvest that the CFIA regulated. Although the grievor's duties were not related to the work that he did for the outside company, the CFIA found that he was in a conflict of interest because he was working in an industry that it regulated. The adjudicator agreed, noting that it would be difficult to reconcile the grievor's employment with the CFIA with his involvement with a company it regulated in the event of media attention resulting from some activity of the outside company.

[81] The adjudicator held that the *Code* under consideration in that case had to be given a purposive interpretation. He stated that "[A] significant value explicit in the *Code* is the upholding of public confidence and trust in the integrity, objectivity and impartiality of government."

[82] In my opinion, similar issues are at play in this case. The grievor is an auditor with the CRA. The outside business he proposed included such activities as valuating businesses and assets. It is conceivable that his valuations could be used by his clients for tax purposes, even though that is not their intended use. It is also conceivable that his clients or others might perceive that his clients have an advantage because of his connection to the CRA.

[83] The grievor's role as an auditor in the CRA's Audit Division is difficult to reconcile with his proposal to provide services as a management and financial consultant who valuates businesses and assets and creates business plans and financing proposals, among other activities. I find that even though his proposed outside employment was not related to the specific duties of his position in the International Audit group, there was an apparent, if not an actual, conflict of interest. Given that conclusion, I do not find that the employer's determination that the grievor's proposed outside employment was in an area that could represent a conflict of interest was unreasonable or in violation of the collective agreement. Therefore, I must dismiss this grievance.

B. PSLRB File No. 566-34-2705

[84] On December 18, 2007, the grievor filed a grievance alleging a violation of clause 18.03 of the collective agreement because his request to attend the FAPI conference held in Toronto on January 14 and 15, 2008, was denied.

[85] For ease of reference, clause 18.03 of the collective agreement provides as follows:

> ***18.03 Attendance at Conferences and Conventions***
>
> *(a) The parties to this Agreement recognize that attendance or participation at conferences, conventions, symposia, workshops and other gatherings of a similar nature contributes to the maintenance of high professional standards.*

> *(b) In order to benefit from an exchange of knowledge and experience, an employee shall have the opportunity on occasion to attend conferences and conventions that are related to his field of specialization, subject to operational constraints.*
>
> *(c) The employer may grant leave with pay and reasonable expenses including registration fees to attend such gatherings, subject to budgetary and operational restraints.*
>
> *(d) An employee who attends a conference or convention at the request of the Employer to represent the interests of the Employer shall be deemed to be on duty and, as required, in travel status. The Employer shall pay the registration fees of the convention or conference the employee is required to attend.*
>
> *(e) An employee invited to participate in a conference or convention in an official capacity, such as to present a formal address or to give a course related to his field of employment, may be granted leave with pay for this purpose and may, in addition, be reimbursed for his payment of convention or conference registration fees and reasonable travel expenses.*
>
> *(f) An employee shall not be entitled to any compensation under Articles 9, Overtime, and 13, Travelling Time, in respect of hours the employee is in attendance at, or travelling to or from a conference or convention under the provisions of this clause, except as provided by paragraph (d).*

[86] The grievor argued that the use of the word "shall" in clause 18.03(b) of the collective agreement indicated that the right was imperative and that the employer had a positive obligation to ensure that employees had an opportunity to attend conferences and conventions. Although the grievor acknowledged that the right was subject to operational requirements, he argued that there was no evidence that the employer considered operational requirements when it made the decision to deny his request.

[87] The employer took the position that the right to attend conferences and conventions was discretionary and subject to both operational and budgetary considerations. The employer stated that the grievor's request was denied for both considerations.

[88] The collective agreement, at clause 18.03, provides that employees "shall" have the right to attend conferences and conventions "on occasion," subject to operational and budgetary constraints. While the language of the whole provision certainly supports an argument that the opportunity to attend conferences and conventions is important to career development and the "maintenance of high professional standards," I do not agree with the grievor that it is imperative. The provision must be read as a whole. In this case, the grievor has focused on the word "shall" and has ignored the conditions attached to the right to attend conferences. As set out in the collective agreement, the right to attend conferences and conventions is, first, an occasional right, rather than one to be granted every time it is requested. It is also contingent on the conference or convention being related to the employee's field of specialization, and it is subject to operational and budgetary constraints.

[89] Nevertheless, the employer must give due consideration to an employee's request. The employer's exercise of its discretion must be reasonable and must be done in good faith because, otherwise, the right negotiated in the collective agreement would have little meaning. As held in *Ewen v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 113, the exercise of discretion must be genuine and individual, rather than based on the application of a rigid policy.

[90] The evidence about the employer's reasons for denying the grievor's request came exclusively from Mr. Dempsey, whose memory of events was less than clear. In fact, Mr. Dempsey could not identify with any certainty the assistant director who authorized attendance at conferences and conventions. However, Mr. Dempsey was clear that the authority to determine how many, if any, employees could attend the conference did not reside with him.

[91] There was no real evidence before me as to why only one employee could attend the conference. According to the conference prospectus (Exhibit E-3), the cost of sending an employee was $1725. The only evidence that addressed the issue of cost was an email from Mr. Loo to Tracey O'Brien (Exhibit E-6). Neither Mr. Loo nor Ms. O'Brien testified and the email was dated almost a year after the grievor filed the grievance challenging the decision to deny his request to attend the conference. In fact, I note that the email exchange between Mr. Dempsey, Mr. Loo and Ms. O'Brien (Exhibits E-4, E-5 and E-6) took place in November 2008, just before the employer responded to

the grievance at the final level. In those circumstances and in the absence of direct evidence, I do not find the email exchange helpful.

[92] The onus to establish budgetary or operational constraints falls on the employer. In this case, there is no evidence concerning the budgetary constraints, as the only witness to testify for the employer on this matter, Mr. Dempsey, was clear that he did not control the budget and that he did not make the decision as to how many people, if any, could attend the conference. Mr. Dempsey's evidence was simply that, since someone had decided that he could send only one person, he chose to send Mr. Chibba because he was the team leader, had more understanding of the issues than the grievor and could bring the information back to the others in the section.

[93] Had there been evidence that more than one employee in the section wished to attend the conference and that budgetary constraints permitted sending only one person, Mr. Dempsey's solution might well have been satisfactory. But that is not the situation in this case. The evidence was that the grievor was the only person in the section who asked to attend the conference. While I can understand that the employer might have wished to derive the greatest benefit for all by sending an experienced employee to the conference, I do not believe that such a consideration constitutes a genuine operational constraint when only one employee has indicated an interest in attending a particular conference. As a general observation, I note that the purpose of the provision in the collective agreement is to allow an employee to ". . . benefit from an exchange of knowledge and experience . . ." and that such a purpose would be defeated if only the most experienced employee were chosen to attend such conferences.

[94] I am not satisfied that the employer's explanation established genuine operational or budgetary constraints. However, the employer also argued that the collective agreement established a right to attend conference "on occasion". Because the grievor had only asked to attend this conference, he had not established a breach of an "occasional" right.

[95] I agree that words and phrases in collective agreement provisions have meaning. In this case, the phrase "on occasion" is a clear indication that, while employees may be granted the right to attend conferences and conventions, they cannot expect to attend every conference or convention they request. The evidence in this case established that the grievor had been in the FAPI section for only a year when he asked

to attend the conference that is the subject of this grievance and that it was the only conference that he had asked to attend while in the section. However, the employer's argument leads to the conclusion that because the grievor only asked to attend one conference, he had no grounds on which to challenge the employer's decision to refuse his request. One is led to ask how many times he would have to request and be refused the right to attend a conference before he could establish a breach of the collective agreement.

[96] In my view, in the absence of evidence justifying budgetary or operational constraints, the question of frequency would only become an issue to be resolved where there is evidence that the employee has had the opportunity to attend other conferences. That is not the case in this grievance. As the employer argued, the grievor was in a new section and what happened in his previous section is not relevant to his request to attend a conference relating to his work in the FAPI section. Accordingly, I find that clause 18.03 of the collective agreement was breached when the grievor's request to attend the FAPI conference was denied.

[97] For corrective action, the grievor asked that his request to attend the conference be granted. Given the passage of time, that is not possible. In my opinion, at this point in time a declaration is the only appropriate remedy.

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

(The Order appears on the next page)

V. Order

[99] The grievance in PSLRB File No. 566-34-2704 is dismissed.

[100] The grievance in PSLRB File No. 566-34-2705 is allowed. I declare that the employer breached clause 18.03 of the collective agreement when it denied the grievor the opportunity to attend the FAPI conference in January 2008.

December 13, 2013.

Kate Rogers,
adjudicator