LiB.

Files: 149-2-217
166-2-28643

Public Service Staff Relations Act

Before the Public Service Staff relations Board

BETWEEN

ANDREW FRÈVE

Applicant/Grievor

and

TREASURY BOARD
(Agriculture and Agri-Food Canada)

Employer

RE: Application for Extension of Time for Presentation of a Grievance

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Applicant/Grievor: Pierrette Gosselin, Counsel, Professional Institute of the Public Service of Canada

For the Employer: Marie-Claude Couture, Counsel

Heard in Montréal, Quebec,
August 31, 1999.

This decision relates to an application for extension of time filed by Andrew Frève pursuant to subsection 63(b) of the *P.S.S.R.B Regulations and Rules of Procedure 1993*, as well as an application for review, filed by the employer, pursuant to section 27 of the *Public Service Staff Relations Act*, of a decision of the Board to appoint an adjudicator to hear this grievance.

On August 24, 1998, Andrew Frève referred this grievance to adjudication (Board file 166-2-28643); this grievance deals with the interpretation or application of the *Work Force Adjustment Directive* incorporated in the master collective agreement signed between the Treasury Board and the Professional Institute of the Public Service of Canada on September 24, 1991. The grievance alleges [Translation] "non-compliance with the *Work Force Adjustment Directive*" and as corrective action seeks [Translation] "the retention of my indeterminate employment, the cancellation of my surplus status and an apology from management".

Andrew Frève held a position as a breeder/phytopathologist (BI-03) with the Department of Agriculture and Agri-Food. The day of the referral of this grievance (166-2-28643) Board Member Guy Giguère, as adjudicator, was proceeding with the hearing of another grievance (Board file 166-2-27631) previously referred to adjudication by Andrew Frève. In that earlier grievance, Mr. Frève alleged the following:

> [Translation]
>
> *The employer is contravening the purpose as well as the provisions of the Work Force Adjustment Directive by abolishing my position. This decision is simply an excuse to justify my dismissal because I filed complaints of harassment.*

Mr. Frève requested the following corrective action:

> [Translation]
>
> *(1) that the "surplus" designation be rescinded;*
>
> *(2) that I be assigned an appropriate project and budget;*
>
> *(3) that I suffer no loss of pay or benefits, as applicable.*

The hearing of the earlier grievance (Board file 166-2-27631) was held from August 24 to 28, 1998 and the adjudicator rendered his decision on August 25, 1999.

The earlier grievance is not referred to in the grievance which is the subject of this decision (Board file 166-2-28643). Counsel for the parties informed me that this grievance had been vaguely alluded before Adjudicator Giguère. Neither the adjudicator nor the Board consolidated the two grievances, nor did counsel for the parties request that they be consolidated.

Counsel for the employer argued that this grievance was presented on November 13, 1996, which was outside the 25-day time limit stipulated in the collective agreement, given that the decision to declare Mr. Frève's position surplus was sent to and received by Mr. Frève on March 26, 1996. She also argued that the burden to prove that the time limits should be extended rested on the grievor, Mr. Frève. She further stated that the essence of the two grievances is the same, that the remedy sought is the same and that, since Adjudicator Giguère had rendered his decision in the meantime (Board file 166-2-27631) on the earlier grievance, the employer objected to a second hearing, on this grievance, on the ground that it was a matter already decided and the principle of *res judicata* applied.

In reply to these objections, counsel for Mr. Frève argued, first, that the key element of this grievance is to verify whether the employer fulfilled its obligations under the *Work Force Adjustment Directive* and second, that the grievance was not presented outside the time limits because the employer had the ongoing obligation to make a reasonable job offer to Mr. Frève throughout the period of paid priority status and as long as there was an employment relationship between Mr. Frève and the employer. That period ran from April 1, 1996 to September 30, 1996 according to the letter informing Mr. Frève that his position had been declared surplus. According to Mr. Frève's counsel, the obligation to make a reasonable job offer to Mr. Frève existed at the time that he presented his grievance in November 1996. Further, she is of the opinion that the decision rendered by Adjudicator Giguère dealt essentially with the existence of a dismissal in disguise and not with the application of the *Work Force Adjustment Directive.*

In reply, counsel for the employer pointed out that the obligation of making a reasonable job offer did not exist since July 1995 and had been suspended for three years after Mr. Martin's budget. Further, she argued that the issue of "a reasonable job offer" had not been raised by Andrew Frève at the hearing of the earlier grievance

(Mr. Frève's representative admitted to that) while the application of the *Work Force Adjustment Directive* had been argued by Mr. Frève's counsel and determined by Adjudicator Giguère, as shown by the arguments (pages 14, 18 and 23) of Andrew Frève's counsel and the decision of Adjudicator Giguère. She added that, while the obligation to make a reasonable job offer had been suspended, there was still a possibility of retraining Mr. Frève. However, Adjudicator Giguère had considered (pages 44-45 of his decision) the application of the retraining provision, but had found that, in this regard, the employer had not failed to meet its obligations arising from the *Directive*.

According to counsel for the employer, Mr. Frève is attempting to obtain a second hearing of his case because of Adjudicator Giguère's dismissal of the earlier grievance (166-2-27631) and is trying to supplement, to some degree, the evidence he could have presented at the hearing of the earlier grievance.

She argued that a simple comparison of the wording of the grievances shows that, in essence, the grievances deal with the same issue. They involve the same parties, the same redress and the same issues in dispute, except for the reasonable job offer, which was not raised at any time. Moreover, in this regard, she pointed out that, in her letter to the Board of March 3, 1999, even Mr. Frève's representative admitted, at least implicitly, that the grievance involved the same parties and the same redress. Counsel for the employer added that, in both grievances, Mr. Frève relies on the *Work Force Adjustment Directive* as the legal basis for his rights. She argued that, by attempting at this stage to deal with the existence of an obligation to make a reasonable job offer, Mr. Frève's counsel is amending this grievance, which is contrary to the decision in *Burchill* v. *Attorney General of Canada,* [1981] 1 F.C. 109 (F.C.A.), since the issue of a reasonable job offer was not discussed during the grievance procedure. It is her view that the grievor is attempting to supplement evidence he should have presented at the hearing of the earlier grievance.

She reiterated that the grievance was presented out of time, regardless of whether the starting point for calculating the time limits was March 26, 1996 (date that the grievor learned that he was surplus) or October 22, 1996 (date on which the grievor's supervisor allegedly made a comment open to interpretation and which, moreover, was interpreted by Adjudicator Giguère). Furthermore, the grievor's

representative did not indicate the date she felt should be used for calculating the time limits. The employer's counsel referred me to the following legal sources:

(1) *Budget Implementation Act, 1995;*
(2) *Public Sector Compensation Act;*
(3) *Public Service Employment Act;*
(4) *Public Service Terms and Conditions of Employment Regulations;*
(5) *PSSRB Regulations and Rules of Procedure (1993);*
(6) *Early Departure Incentive (P.C. 1995-1086) Program Order;*
(7) *Work Force Adjustment Directive (1991) (Treasury Board);*
(8) *Work Force Adjustment Directive (1996) (Treasury Board);*
(9) *Unpaid Surplus Status (Treasury Board);*
(10) *Canada (National Film Board)* v. *Coallier, [1983] F.C.J. No. 813 (Q.L.);*
(11) *Wilson (Board files 149-2-165 and 166-2-27330);*
(12) *Quigley (Board files 125-2-77 and 166-2-27258);*
(13) *Bentley (Board file 149-2-168);*
(14) *Re Main Ouvertes - Open Hands Inc. and O.P.S.E.U., Local 458 (1996), 54 L.A.C. (4th) 217;*
(15) *Re Pharma Plus Drugmarts Ltd and U.F.C.W., Local 175 (1991), 20 L.A.C. (4th) 251;*
(16) *Re Federated Co-Operatives and I.W.A.-Canada (1996), 59 L.A.C. (4th) 30;*
(17) *Re Canadian Union of Public Employees, Local 207 and City of Sudbury (1965), 15 L.A.C. 403;*
(18) *Burchill* v. *Attorney General of Canada, [1981] 1 F.C. 109 (F.C.A.);*
(19) *Haslett (Board file 166-2-20737);*
(20) *MacEwan (Board files 166-2-26729 to 26735);*
(21) *Bradley (Board files 166-2-17241 and 17242);*
(22) *Smith (Board file 166-2-19902);*
(23) *O'Neil (Board files 166-2-25361 to 25368; 166-2-25613 to 25615; and 172-2-827);*
(24) *Denike (Board file 166-2-14264).*

Counsel for Mr. Frève replied that she was of the opinion that a "reasonable job offer" should have been made to Mr. Frève. It was her view that no reasonable effort was even made to move Mr. Frève to another position within the Department or outside of it, and that the grievor's own efforts were [Translation] "boycotted" (term used by counsel) by the Department. She wanted to show how the *Work Force Adjustment Directive* was applied in Mr. Frève's case after March 26, 1996. She would like an opportunity to present evidence on all staffing operations and the action taken by the employer to relocate Mr. Frève. It is her position that the application of the *Work Force Adjustment Directive* was only dealt with subsidiarily by Adjudicator Giguère. She stated that she requested a postponement of the hearing of this grievance on February 18, 1999 because this grievance would have been moot, if Adjudicator

Giguère had upheld the earlier grievance. However, this grievance is still valid given the dismissal of the earlier grievance.

Counsel for the employer replied that, in his decision, Adjudicator Giguère dealt with the alleged "boycott" by the employer of the grievor's efforts to find a new position, he reviewed the period after March 26, 1996, including the meeting on October 22, 1996, he took into account the application of the *Work Force Adjustment Directive*, and furthermore, an adjudicator does not have jurisdiction in staffing matters.

Further to the hearing, at their request, counsel for the parties provided additional arguments on whether, at the time, there was an obligation on the part of the employer to make at least one reasonable job offer to the grievor.

To summarize, counsel for the employer argued that the Department of Agriculture and Agri-Food was one of the departments referred to in Annex II of the Order fixing the Terms and Conditions of the Early Departure Incentive Program issued by the Governor General in Council pursuant to subsection 7.2(1) of the *Public Sector Compensation Act* and which took effect on July 15, 1995. Through the combined effect of that Order and the *Public Sector Compensation Act*, the application of the *Work Force Adjustment Directive* was suspended for a three-year period. Since Mr. Frève was laid off in March 1996 and the *Directive* was amended by Order in July 1995, the grievor was not entitled to a guarantee of a reasonable job offer. At most, the Department was required to try to relocate the grievor through the possibility of retraining him. Adjudicator Giguère dealt with this issue in his decision (Board file 166-2-27631).

Counsel for the employer argued that, to avoid a repetition of the hearing which took place before Adjudicator Giguère, to ensure the finality of decisions and to prevent parties from splitting up their evidence and arguments, it is important not to allow a matter already decided to be heard again.

Reasons for Decision

The application for extension of time is denied for the following reasons.

The burden of proof rested on the grievor and, in my view, he did not discharge that burden. According to his counsel, this grievance deals with the application of the *Work Force Adjustment Directive* and, more specifically, with the existence of an obligation on the part of the employer to make a job offer to the grievor, an obligation that allegedly existed throughout the period where the grievor's position was declared surplus. The oral and written arguments of counsel for the grievor do not convince me that this obligation existed and, moreover, do not indicate at what point in time it would have applied in order to calculate the time limits.

To these reasons, I would add that the issue of the existence of the obligation to make a reasonable job offer should have been debated before Adjudicator Giguère, who addressed the application of the *Work Force Adjustment Directive*. The parties, the issues in dispute and the redress sought were the same as in this grievance. Since the legal source referred to was the *Directive* which was taken into account by Adjudicator Giguère (in addition to the issue of a disguised dismissal), it is my view that the grievor had every opportunity to raise any right to which he was entitled under the *Directive* and that he should have raised the issue of the existence of an obligation by the employer under the *Directive* to make a reasonable job offer, at the appropriate time, that is before Adjudicator Giguère. I share the opinion of counsel for the employer that the application of the *Work Force Adjustment Directive* falls under the principle of *res judicata* and that the failure to raise an issue related to that *Directive* (namely, the existence of an obligation to make a reasonable job offer) cannot constitute grounds to extend the time limits. Accordingly, the application for extension of time is denied and the file closed.

In light of this finding, there is no need to rule on the employer's application.

Marguerite-Marie Galipeau,
Deputy Chairperson

OTTAWA, October 6, 1999

Certified true translation

Serge Lareau