



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MARIO RINALDI

Grievor

and

TREASURY BOARD
(Canadian Space Agency)

Employer

Before: Marguerite-Marie Galipeau, Board Member

For the Grievor: Paul Lesage, Counsel

For the Employer: Raymond Piché, Counsel



Heard at Montreal, Quebec,
April 1 and 2, 1996.

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DECISION

The grievor, Mario Rinaldi, is employed at the Canadian Space Agency at Saint-Hubert, Quebec. At the time of the events he held the position of Vice-President (EX-03), Corporate Services.

Mario Rinaldi referred two grievances to adjudication. In the first grievance (Board File 166-2-26927), he alleged that the employer had taken disciplinary measures against him by reprimanding him in writing, removing him from his position and, finally, eliminating his position of Vice-President, Corporate Services. He is asking to be reinstated to his position or to another similar position. He is also claiming damages.

In the second grievance (Board File 166-2-26928), he is grieving the fact that his employer terminated his employment. As redress, he is again asking to be reinstated in his position or to a similar position. Again, he is also claiming damages.

At the start of the hearing, counsel for the employer raised a number of preliminary objections, the most important of which concerned the adjudicator's jurisdiction to render a decision in this case. I heard the parties on these objections and subsequently rendered an oral decision in the late afternoon. When the hearing resumed the next morning, counsel for the employer advised me of his client's intention to obtain a writ of prohibition from the Federal Court against my decision. At his request, and in order to provide an opportunity for the Federal Court to hear the case, I adjourned the hearing of both grievances. I also agreed to prepare a written version of the oral decision rendered at the hearing, which appears at the end of this document. The grounds for the decision do not appear, since I had intended to file them after hearing the grievor's evidence (his counsel had announced about 14 witnesses) on the facts which could confirm my jurisdiction and the parties' evidence with respect to the merits.

Employer's preliminary objections

Summarized below are the employer's preliminary objections.

With respect to the first grievance (Board File 166-2-26927), counsel for the employer stated that the grievance had not been filed on time, since Mario Rinaldi had been reprimanded and removed from his position on May 18, 1995 and had been advised on November 6, 1995 that his position was being eliminated. However, the grievance was filed on November 6, 1995, that is, after the 25-day period set out in subsection 71(3) of the *PSSRB Regulations and Rules of Procedure (1993)* SOR/93-348. In addition, the grievor did not file an application for an extension of time.

In relation to this first grievance (Board File 166-2-26927), counsel for the employer stated also that an adjudicator did not have jurisdiction to dispose of this case since a letter of reprimand, the removal of an employee from his position and the elimination of his position are not adjudicable matters and since the employee did not allege either in his grievance that these measures constituted disciplinary measures which resulted in his suspension or in financial loss. It was counsel's view that it was too late at this point in the adjudication process to amend a grievance and to allege that these were disciplinary measures (James Francis Burchill v. Attorney General of Canada, [1981] 1 F.C. 109).

With respect to the second grievance (Board File 166-2-26928), counsel acknowledged that it had been filed within the established time frame. The grievance could even be considered premature, since the layoff would not become fully effective until May 7, 1996. However, for practical reasons, counsel for the employer stated that it was not filing any objections concerning this point, since the layoff would become effective within a few weeks and the employee would be losing his position. However, it was his view that an adjudicator did not have jurisdiction to dispose of this case, for the following reasons.

First, the grievance does not state that the layoff was in fact a disciplinary measure in disguise. Moreover, the grievance does not indicate "pursuant to paragraph 11(2)(f) or (g) of the *Financial Administration Act*", as stated in paragraph 92(1)(b) of the *Public Service Staff Relations Act*, therefore, the type of termination of employment addressed by the grievance has not been specified.

Moreover, the employee's layoff was carried out under the authority of the *Public Service Employment Act* and this type of termination of employment cannot be referred to adjudication through a grievance. Subsection 92(3) of the *Public Service Staff Relations Act* is clear on this point.

Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.

This provision of the *Act* was introduced only recently and, for all practical purposes, cancels the effect of Attorney General of Canada v. Judith L. Penner, [1989] 3 F.C. 429. Since this decision, there has been a tendency in adjudication to consider that referrals may be made to an adjudicator when the employer has not acted in good faith.

Michel Perreault v Treasury Board (Board File 166-2-26094), rendered by the Vice-Chairperson of the Board and adjudicator Louis Tenace, puts an end to the discussion and confirms that an adjudicator does not have jurisdiction to dispose of this type of case. If the termination of employment had been carried out in bad faith, this would have meant that an administrative decision had been made in bad faith and could therefore be reviewed by the Federal Court under section 18 of its original act.

Grievor's response to preliminary objections

The following representations were made by counsel for Mario Rinaldi.

Concerning the first grievance (Board File 166-2-26927), counsel admitted that neither the letter of reprimand nor the transfer of his client from one position to another was adjudicable. He also acknowledged that, in relation to these two matters, the grievance had not been filed within the established time frames.

On the other hand, he stated that the grievance had been filed within the established time frame with respect to its third part, that is, the termination of

employment resulting from the elimination of the position and the layoff of the employee, since the employee had been informed on November 2, 1995 (Exhibit A-6) that he would be declared surplus effective November 8, 1995 until his layoff on May 7, 1996.

Counsel for Mario Rinaldi added that his client could not be reproached for not having written the words "pursuant to paragraph 11(2)((f) or (g) of the *Financial Administration Act*" and that form should not take precedence over substance.

He argued that this part of the first grievance (Board File 166-2-26927) had been filed within the time frame set out in the regulations and asked that the grievance in relation to this third part be attached to the second grievance. He added that this first grievance addresses the termination of Mario Ronald's employment in the same way that the second grievance (Board File 166-2-26928) also addresses the termination of Mario Rinaldi's employment.

Concerning the second grievance (Board File 166-2-26928), counsel for Mario Rinaldi stated the following.

The elimination of Mario Rinaldi's position was not really an abolishment of his position. Before deciding, in my capacity as adjudicator, that I do not have jurisdiction, I must hear the evidence in order to be sure of the true nature of the decision that was made and to decide whether this case actually did involve the abolishment of a position or was, rather, a disciplinary measure in disguise.

The termination of the grievor's employment was not a legal decision made under the *Public Service Employment Act*. This termination resulted from an illegal decision made in bad faith for personal reasons based on vengeance against Mario Rinaldi.

Furthermore, by attacking in Federal Court the decision to terminate his employment, Mario Rinaldi could only obtain damages. However, the redress he is seeking, that is, being reinstated in his position, can be granted to him only by an adjudicator under the *Public Service Staff Relations Act*.

Counsel asked that I hear the evidence in order to decide whether the case involved the elimination of a position or an unjustified dismissal.

Finally, counsel for Mario Rinaldi noted that his client was not represented by a union but by a lawyer. Therefore, this case was costly to him and involved a major investment in terms of time and money. For these reasons, counsel insisted on knowing from the beginning whether I might be intending to state eventually that I did not have jurisdiction, despite the evidence of bad faith he intended to adduce. He asked me to assume that he would be adducing evidence of bad faith and to tell him if, on that basis, I could state whether or not I had jurisdiction.

Employer's reply

To the extent that the first grievance (Board File 166-2-26927) no longer addresses the elimination of Mario Rinaldi's position, the fact remains that it is not adjudicable because the elimination of the position in itself had no practical impact on the employee. Rather, it was the decision of November 2, 1995 to declare him surplus and to lay him off (Exhibit A-6) which had practical effects. However, that decision is the subject of the second grievance (Board File 166-2-26928). In short, the first grievance cannot be attached to the second grievance since it is statute-barred and is not adjudicable.

As to the second grievance (Board File 166-2-26928), it addresses a termination of employment provided for under the *Public Service Employment Act* and, as already noted, such cases cannot be referred to adjudication under subsection 92(3) of the *Public Service Staff Relations Act*. Paragraph 92(1)(b) of the *Public Service Staff Relations Act* provides that adjudicators have jurisdiction only when employment is terminated "pursuant to paragraph 11(2)(f) of (g) of the *Financial Administration Act*." If an employee has been laid off in bad faith, his or her recourse is before the Federal Court.

Preliminary decision

It should be noted that I have not yet rendered a decision in relation to the first grievance (Board File 166-2-26927). This decision will be rendered in light of the Federal Court's decision on the request that a writ of prohibition be issued.

Below is the text of the oral decision I rendered at the hearing after having considered the representations of the parties.

This decision concerns the second grievance (Board File 166-2-26928). In it, the grievor is grieving the termination of his employment. He writes: "*I grieve management's decision to terminate my employment*".

Decision

"If you establish that the termination of the employment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise, then I would be willing to say that subsection 92(3) of the Public Relations Staff Relations Act does not prevent me from having jurisdiction. I would therefore be willing to hear your witnesses."

**Marguerite-Marie Galipeau,
Board member**

OTTAWA, April 9, 1996.

Certified true translation

Serge Lareau