File: 166-20-26759

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JANE SEABROOKE

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: Michael D. Segal, Counsel

For the Employer: Barbara A. Mercier, Counsel

Heard at Ottawa, Ontario,
January 30 to February 2 and April 16 to 19, 1996.

At the commencement of the hearing, an order for the exclusion of witnesses was requested and granted.

Jane Seabrooke was a computer technician with the Canadian Security Intelligence Service (CSIS). In May 1995, she submitted a grievance alleging that she had been offered a "buyout" of six month's salary which was subsequently refused to her. Her grievance reads as follows:

> *This grievance relates to the offer and the subsequent refusal of a buyout package for myself. The Service through my immediate supervisor asked early April/94 if I would be willing to accept a buyout. He reported that all employees were being solicited for a general idea as to who would be interested in an offer should one become available. This offer was being made due to cuts which were to take place within our department during the upcoming year. The buyout was to include a severance package along with 6 months salary. My answer was "YES" I would accept the offer and resign my position.*
>
> *Roughly two weeks later I met with my DDG, John Penny to inquire as to the status of the buyout and to reaffirm my interest. His response was that the question was for survey purposes and that I would not be considered. He stated that the intention was not to encourage "Valuable employees" to leave. I remarked that it did not seem reasonable to expect those without "marketable skills" to volunteer to leave the Service. I further mentioned that it was my intention to leave anyways and pointed out that this would free up a position for elimination. This conversation continued with Mr. Penny's assertion that I was too valuable for the Service to let go. Why then were all employees in ITD asked about interest in a buyout instead of going out and eliminating those who were no longer required? It was clear that I was definitely leaving the Service but this generous buyout package was only for those employees who were considered "DEADWOOD". Someone who has given as many years of dedicated service as I have, deserves some type of reward. Instead the message being sent out appears to say "The less you do, the more you get". Upon asking Mr. Penny where I could obtain more information relating to the buyout offers, he said he wasn't sure if there was any additional information available.*
>
> *I decided to pursue this matter at a higher level and sent a copy of the attached message (#1) to my DG - Mr. Eric Brick.*

Requests for buyout calculations for myself were also sent out and received. Copies of these requests are attached and numbered 2 through 5.

During this time I met with Donna McDonald, my Employee association representative for advice as to how I can proceed with the buyout inquiries. She suggested that I should send Mr. Brick another message asking for a response from my previous message as I had not heard anything in over a week. Refer to attached message #6.

Within two days Mr. Brick responded with the same answer I had received from Mr. Penny. See attached message #7. This had not changed my view that if Management only wanted certain individuals to leave why were all employees in IT asked. I had made it clear I wanted the buyout package. Two others in SIM have received it so far.

I forwarded a copy of Mr. Brick's response to Donna McDonald and told her I wished to pursue this matter. Donna asked if it was alright if she talked to Mr. Brick first. She then sent me a brief explanation as to how the conversation went. See attached message #8. I want to mention that up until this point no-one told me that Pat Tierney was handling buyout inquiries even though it was well known of my interest in a buyout package. One month has passed since I initiated this correspondence.

On May 4, 1995 I met with Pat Tierney. She affirmed there were various positions to be cut in IT as well as three types of buyout packages. The straight buyout package included 6 months pay plus a severance package. If I were to be bought out, then any position, not necessarily mine could be eliminated. This solved the problem of having my "valuable position" cut. Following this conversation Mr. Brick joined in with Pat and myself and I asked him for the buyout. He told me again if I wanted to resign I would not receive a buyout and wished me well. His explanation was even though a position would be freed up, he didn't feel right about paying GOOD employees to leave.

Although I understand Mr. Brick's concern about his best employees leaving, I stated that I would be leaving anyways, could free up a position now and have put in 18 dedicated years of service. Why should those with less service and productivity receive the bonuses.

<u>Corrective Action Requested</u>

To be considered for or offered a buyout package.

Evidence

These facts are essentially not in dispute. At one stage, those working with computer technology at CSIS were divided into two camps: those who promoted the maintenance of mainframe technology and those who supported the Local Area Network (LAN). A small group under a Mr. Madigan, four or five people including the grievor, were authorized to forge ahead with LAN. They did so. The individuals in this small group worked well together, were like a family, and were given a lot of freedom "to get the job done". They could learn as quickly as they wished. By all accounts, Jane Seabrooke worked hard, learned quickly and moved swiftly along, earning herself the nickname of "Super Jane". In the meantime, the vast majority of employees of CSIS who were working in the computer area were not part of the process. There was animosity between the two groups.

There was a management shuffle. Mr. Madigan was moved and Mr. Eric Brick was appointed Director General of the Information Technology (IT) Division and IT was given responsibility for the development of LAN technology as well as continuing the mainframe functions.

Dan Faulkner, Scientific and Technical Services Branch, testified. He holds an engineering degree and an MBA. He joined the Systems Information Management (SIM) Branch of CSIS in 1990. He was part of Information Technology (IT) which was responsible for, among other things, mainframe maintenance and applications development. There was a reorganization and as part of this he went to the Network Services Division (NSD) to be a part of introducing the new LAN technology. This re-alignment represented a move away from mainframe philosophy and towards a new emphasis on local area networks. The people within the organization who were involved in this new group were Messrs. Madigan, Gareau, Tardif, O'Neil and himself. Hazel Fugard and Jane Seabrooke were also involved. The witness stated that he had recruited Jane Seabrooke himself; he arranged to make her part of this small group and sent her on training to become a Certified Network Engineer (CNE). He found her to be a responsible, conscientious employee.

Yvan Tardif, during the launch of the LAN technology, worked in NSD as part of the original team, helping to get it going. LAN caught on like wildfire. It provided more flexibility and instantaneous solutions. In the space of one year, it was well accepted.

Both Mr. Faulkner and Mr. Tardif testified about the roles they had played in pioneering the new LAN technology at CSIS under Mr. Madigan. The work was exciting. They were working in a new area with a small homogenous group. When Mr. Madigan left and IT took over the NSD operation, everything slowed down. People like Jane Seabrooke who had transferred in, returned to where they had come from. People in the LAN pioneering group were given more limited and less significant roles to play as they related to the new technology. They felt that there was a return to the more authoritarian, less flexible "mainframe philosophy" and that they had in effect been removed from the picture and were being targeted. Mr. Tardif in particular complained about being given an office in the basement and second rate equipment. He had to go to Mr. Brick to get the equipment he needed. Jane Seabrooke was training people. They were taking positions and her workload was diminishing. She was assigned to a significant project: the installation of regional servers.

Lucie Bariault testified that she is performing the functions of the position Jane Seabrooke held when she left CSIS as well as performing the duties of her own position. Ms. Seabrooke's position has not been filled.

Hazel Fugard resigned from CSIS and is now a network specialist with Pro-Term U.S. Connect Data Systems. Like Jane Seabrooke, she has a high school certificate and is a graduate of the CNE training provided to them by CSIS. Like Jane Seabrooke, she also was a primary player in setting up LAN services. She and Jane Seabrooke had been able to move ahead quickly in their careers during the initial phases of the LAN installations. When IT took charge of LAN, personnel from IT were moved in to take over the kind of work she had been doing. She testified that she had to show these individuals how to do the work and she was reduced to more menial tasks. She mentioned delivering mice and "pulling wires"; i.e. the installation of cabling in ceilings and under floors. She felt "used" and unappreciated. She decided to leave and she was able to obtain her present job outside CSIS. The LAN training that she received at CSIS was helpful to her.

Michel Gareau, Regional Director General of CSIS in the prairie region, testified. He brought in LAN to the prairie region. In 1993, Hazel Fugard and Jane Seabrooke set it all up, installed it and got it running. Mr. Gareau was very satisfied with their work.

Jane Seabrooke testified on her own behalf. She is now a Pro-Term U.S. Connect data specialist. She is a high school graduate and a CNE. She was able to complete the CNE training in less than seven months although she was allowed a year to do so. She was happy, enthusiastic about her work and learning a lot when she was working as part of the small group initially pushing through LAN.

After the IT Division was given responsibility for LAN, she was going to be returned to Software where she had worked before. She was given two members of IT to train. These people were classified at level 8 and she was classified at level 7 at the time. She had to talk them through all the problem-solving so that they could do the "hands on" work themselves. These people received a letter of commendation for their work but her name was not mentioned. She and Hazel Fugard had been promised another training course and she was disappointed that this did not materialize. She entered a competition for a position in Vancouver. When she was screened out, she was shocked and went to the Director General about it. She felt that she had much more knowledge than the person who got the job. Mr. Brick told her that she was screened out because she lacked a university degree.

Her name was not mentioned in reports; others were. When she complained, she was told: "Give someone else a chance". She was training others. They were doing the work and she was getting no credit. Before the takeover, she was given freedom and independence; if something was wrong she was just told to go in and fix it. After the takeover by IT, there was much more red tape. She was given restrictions, told not to touch the hardware, etc. She became upset, depressed and built a shell around herself.

She was asked by management if she was interested in a buyout. She thought, "I'm being offered a buyout", and said "yes". Her spirits rose. She approached her present company about a job. When she pursued the matter with CSIS, however, she was told that she had not been offered a buyout. Management had just been doing a

preliminary investigation, putting out feelers, and had approached everyone to see where they stood on the matter. Ms. Seabrooke insisted that she had received an offer which she had accepted and CSIS was bound to giver her a buyout as surely as if she "had entered into a government contract".

She said that she could not believe what was happening when she was told that no one had ever meant that she would receive a buyout. At this point, she said: "I'm out of here anyway". She went to the Director General, Eric Brick. He told her that he had directed that all employees be polled on the question of "buyout" and no offer was intended and that it did not make sense to give a valuable employee like her a buyout when the employer needed her services. He explained to her that a person she asked about who had received a buyout was in a different situation. Mr. Brick advised her not to resign and not to burn her bridges. If she was going to be doing consulting she might well want to return in a year or two. She testified that she never considered changing her mind about resigning. She filed a grievance because she "knew she was being wronged" although she was not sure why she was being wronged. She felt CSIS was not acting in good faith in the way they treated her.

She stated in cross-examination that, after the merger of IT and NSD, she received projects including the installation of LAN in the regions between January 1993 and the summer of 1993, then two weeks in the western region, a stint with "OST" project during 1994, an E-mail project of nine months duration in 1994, and a Network 4 Project. She also agreed that with LAN technology catching on like wildfire, there was definitely a need for more trained people. She stated, however, that she did not agree with the process used by management. She also stated that she had never developed applications during her time in the service of CSIS.

Eric Brick, Director General, Information Management, since 1992, testified. In his previous position as Director General of Security Screening, he had been one of the major clients of the Information Management Branch. He perceived a number of problems in the latter branch, including significant cost overruns and long delays in the ability to obtain security clearances. There was inadequate attention to client needs and an absence of project management skill sense. In 1992, the LAN system was in a very rudimentary phase. There was inadequate planning for the full delivery

of client services. When he became Director General in 1992, he began to address these problems.

He faced a division in the employees. There were 65 to 70 people in the "mainframe camp" and approximately four in the "LAN camp". It was determined that the branch would be going with LAN and he then had to develop strategic and operational planning and also to achieve the integration into the new system of the large group that had originally not been part of LAN.

Because of the appropriate planning that he was able to devise, the branch moved from a small group of people who were conceptually correct (the original LAN group) to involving a large number of other people in a much more complex network and infrastructure. The branch's target is that by the year 2000 they will be finished with the mainframe and they will be completely LAN based.

He denied that there was any plan by management to target the LAN group. Mr. Madigan moved out of the branch, in accordance with the Director's decision, to Corporate Services and lately to Facility Management where he is responsible for the full management of the new headquarters facility. Mr. Tardif asked for a transfer to Mr. Madigan's area which Mr. Madigan arranged for him. Mr. Faulkner also asked to be moved out.

What Mr. Tardif described as being shunted to the basement was really his assignment to Phase I of the new CSIS complex which is built underground where all the new state of the art computer equipment is set up for security reasons. In that sense, everyone is moving into the basement. At the time Mr. Tardif came to him for assistance with his equipment, the ratio of computers to employees was very poor. In headquarters, there was one device for every four employees. Mr. Tardif had been using a more powerful computer in the old building and he wanted to bring over the software he was using. When he approached Mr. Brick and explained the situation, he was given a compatible PC for that software. His problem was addressed and resolved.

As for Jane Seabrooke being given what she considered to be work of lesser importance, Mr. Brick stated that from time to time and for short periods of time all of the staff might not be utilized to their full capacities and were expected to use their

time to help out in delivering the products to the clients. This meant that not only people at the working level but supervisors were also expected to lend a hand. Jane Seabrooke was a hardworking, competent, fully satisfactory employee who had earned the title "Super Jane". She had been trained and had a leg-up on other employees.

Mr. Brick testified that he needs people with CNE training and approved seven employees for CNE training at a cost of approximately $7,000. each last year and this year there will be seven or eight more. His expectation of Jane Seabrooke was that she would work with her colleagues to share her knowledge.

Mr. Brick testified that he had nothing to do with the screening process for the position in Vancouver that Ms. Seabrooke had applied for. This was the job of staffing officers. A background in applications development was essential. The fact that Ms. Seabrooke did not have a university degree was another factor. The people who were ultimately selected all had the kind of background in applications development that Ms. Seabrooke lacked.

Regarding the buyout process, Mr. Brick had asked his managers to approach informally their employees to determine if anyone would be interested in a buyout if such was offered. Many more employees expressed an interest than were required to reduce the workforce. No one with Jane Seabrooke's skills, training as a CNE, and her experience was bought out. Buyouts were predominantly given to employees in the administrative support category as many of these functions would be automated. Other buyouts were given for other reasons but he testified that he is not in the business of buying people out whose functions remain intact. (Her position was not eliminated.) The competition for Ms. Seabrooke's position has been held and a candidate is being selected. To implement workforce adjustment, he also met with management to get lists of employees compiled according to past performance.

Regarding Ms. Seabrooke's severance package, she received her entitlement under the government wide policy on resignation which amounts to one-half week's pay for each year of service. If she had been given workforce adjustment benefits, she would have received one full week's pay for each year of service.

Jim Winges testified for the employer. He has acted as a volunteer representative for the non-unionized employee organization. He has known Jane Seabrooke for 10 years. She worked in his unit and reported to him. He described her as hardworking, conscientious, and technically very bright. He had noted that Jane Seabrooke was not as happy towards the end of her service in CSIS. She expressed frustration which was more apparent after she was screened out of the Vancouver job competition. She was frustrated by the fact that she had a great deal of technical expertise; there were others in the branch who were technically less competent but were classified at higher levels and she was expected to train, teach and coach them along. He testified that Jane Seabrooke was well respected by her co-workers and by management and that he knew of no scheme to deny her opportunities.

Michel Gingras, president of the employee association, testified in general terms as to the amount of notice a Director General would have regarding cuts. However, he had no specific knowledge of when Mr. Brick became aware of the exact number of cuts he would have to make.

Donna McDonald, an employees' service representative, testified that she attended a meeting chaired by the Assistant Director, Human Resources, in which workforce adjustment policies were discussed. The subject of "self-identification" for workforce adjustment was discussed and set out as something to be encouraged wherever possible. By this process an employee who "self-identified" could be laid-off and replaced by someone with identical skills.

Arguments

For the Grievor

There are two separate issues here: the employee's entitlement to six month's pay, approximately $25,000, which would have been the amount of her buyout; approximately $9,000 in severance pay, the difference between the amount she received on resignation and the amount she should have received.

The Burchill case (Board file 166-2- 5298) was distinguished. The grievor was a "computer technician" without expert knowledge in framing a grievance. The wording of the grievance was her way of expressing an allegation of bad faith. She was "constructively dismissed" in that she was made to feel so uncomfortable in her position that she was forced to quit. As a result of her association with the group that pioneered the new technology, Ms. Seabrooke was victimized in the kind of assignments she was given.

In Ms. Seabrooke's mind, the discussion by management with her about the possibilities of buyout was definite and she saw it as an offer. She felt that if she left voluntarily and took a buyout of six month's salary, she could save someone else's job.

For the Employer

The employer objected to my jurisdiction by letter of September 20, 1995 which reads, in part, as follows:

> *You will note that Ms. Seabrooke, a non-unionized employee, is grieving the fact that she would not have been considered for, or offered, a buyout package. Please be advised that the employer objects to the jurisdiction of an adjudicator to deal with the merits of the grievance on the ground that the subject-matter of the grievance is not one that is adjudicable pursuant to section 92 of the Public Service Staff Relations Act.*

Ms. Seabrooke received all the severance pay that she was entitled to under government-wide severance policy when she resigned.

Counsel for the employer argued that paragraph 92(1)(b) of the *Public Service Staff Relations Act (PSSRA)* does not apply to Ms. Seabrooke as her employer is a separate employer. In addition, the restriction of the Burchill case applies. There was no disciplinary discharge. There was no misconduct on the part of Ms. Seabrooke and no action taken by the employer to punish her.

With the appointment of Mr. Brick as Director General, things had to be corrected. The training and the work had to be shared. It could no longer be confined to a small group. Ms. Seabrooke did, however, get quality work in 1993 and 1994.

Although she may have considered the work she was assigned to be beneath her, CSIS needed more people with CNE training. CSIS, in fact, had a large investment in her training and did not want to lose her. There was no way that they could justify paying her a half-year's salary as a buyout. CSIS needed her and more like her.

Subsequently the parties submitted written arguments.

By letter of January 31, 1996, counsel for the grievor wrote as follows:

> *Pursuant to the request of Rose-Marie (sic) Simpson to provide yourself with a written argument with regard to the Grievor's assertion that Section 92(1)(b)(ii) of the Public Service Staff Relations Act would apply to her grievance, set forth below please find the following argument.*
>
> *Section 2 of the Public Service Staff Relations Act defines "employee" as*
>
> > *"a person employed in the Public Service, other than ...(f) a person employed in the Canada Security Intelligence Service who does not perform duties of clerical or secretarial nature...".*
>
> *Part IV of the said Act deals with grievances from Sections 91 through to Section 100. Section 92(1) of said Act reads as follows:*
>
> > *"Where an employee has presented a grievance up to and including the final level in the grievance process, with respect to*
> >
> > *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
> >
> > *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
> >
> > *(i) disciplinary action resulting in suspension or a financial penalty, or*
> >
> > *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*

> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication."*

I draw your specific attention to Section 92(1)(b)(ii) with reference to termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act. This reference is the only reference to those sections of the Financial Administration Act that occur in Part IV, the grievance section, of the Public Service Staff Relations Act. Section 11(2)(g) of the Financial Administration Act reads

> *"provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of person employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;"*

Prior to the passing of the Public Service Reform Act, which received royal assent on December 17, 1992, Section 92(1)(b) of the Public Service Staff Relations Act was restricted to those employees who fell under Part I of Schedule I of said Act.

It is clear that prior to the passing of the Public Service Reform Act Section 92(1)(b) of the Public Service Staff Relations Act did not apply to those employees with separate employers as set forth in Schedule I, Part II of said Act.

As part of the Public Service Reform Act, the definition of grievance, as set forth in Section 2 of the Public Service Staff Relations Act was amended and now reads

> *"means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees, except that*

> *(a) for the purpose of any of the provisions of this Act respecting grievances,* ***a reference to an "employee" includes a person who would be an employee but for the fact that the person is a person described in paragraph (f) or (j) of the definition of "employee"****, and*
>
> *(b) for the purposes of any of the provisions of this Act* ***respecting grievances with respect to termination of employment pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act or disciplinary action resulting in suspension, a reference to an "employee" includes a former employee or a person who would be a former employee but for the fact that at the time of termination of employment or suspension that person was a person described in paragraph (f) or (j) of the definition of "employee"****; "(emphasis added mine).*

I submit that the purpose of the amendment, as passed by Parliament, was to designate those employees referred to in subparagraph (f) of the definition of employee and now bring them within the jurisdiction of the Public Service Staff Relations Board. In other words, CSIS employees, who are identified in Schedule I, Part II of the Public Service Staff Relations Act, now fall under the Board's jurisdiction notwithstanding the fact that CSIS is a separate employer.

In support of this argument, I refer you to several authors dealing with the construction of statutes commencing with the Interpretation of Legislation in Canada, 2nd Edition, by Pierre-Andre Cote. Mr. Cote states on page 241 under the heading "IF THE TEXT IS CLEAR, LOOK NO FURTHER"

> *"According to this formulation of the Literal Rule, the judge should start by reading the provision. If he finds a plain answer to the questions before him, his research stops and he must simply apply the provision."*

Paragraph (a) of the amended definition of grievance, set out in Section 2 of the Public Service Staff Relations Act, clearly states that those employees that were excluded as employees are now included for the purposes of grievances. In other words, section 92(1)(b)(i) and (ii) of the Public Service Staff Relations Act would apply because they are now employees notwithstanding that their employer is still listed in Schedule I, Part II. This is further emphasized by the fact

that paragraph (b) of the amended definition of grievance, in Section 2 of the Act has been amended to include CSIS employees in relation to the Financial Administration Act Sections 11(2)(f) and (g). As stated earlier, the only time these sections are referred to in relation to grievances is set out in Section 92(1)(b) of the Public Service Staff Relations Act and therefore cannot be applied anywhere else in the Act.

Therefore, in this particular instance, the only possible interpretation to the amendment must be the applicability of Section 92(1)(b)(ii) of the Public Service Staff Relations Act, which had been previously denied to those employees of CSIS. Parliament, in its wisdom has now granted the Public Service Staff Relations Board jurisdiction to deal with non-unionized CSIS employees in matters relating to section 92(1)(b)(i), disciplinary action resulting in suspension or a financial penalty and section 92(1)(b)(ii) termination of employment either as a result of discipline (Section 11(2)(f) of the Financial Administration Act) or non-disciplinary termination (Section 11(2)(g) of the Financial Administration Act).

As stated above, I submit the amendment is clear in its meaning and requires no further rules of construction. However, should the Chair find there is any contradiction as a result of the amendment, I refer you to Mr. Cote on page 301 who, in dealing with the situation where a new section of a statute appears to contradict an existing section of a statute states

> *"Giving priority to the more recent statute is almost self-explanatory. In adopting a statute, the legislator is presumed aware of the content of existing legislation. If the new enactment is inconsistent with a prior one, then Parliament is deemed to have intended modification. The more recent expression of the will of the legislator should be retained."*

He then cites Brodeur J. in the Supreme Court of Canada decision Pouliot v. Town of Fraserville. In other words, any contradiction with the new definition of grievance, which now extends to employees of CSIS, must be resolved in favour of the new definition of grievance and not the former sections which precluded non-unionized CSIS employees.

In further support of my position I also turn your attention to the rule of construction that deals with the general principal of interpretation in favour of individual rights and freedoms. I submit that the purpose of the amendment to the definition of grievance is to expand the rights of certain individuals which did not previously exist, e.g. the employees of CSIS. I

direct your attention to page 391 of Mr. Cote's book where he writes

> *"Second, where there is genuine doubt as to the meaning or scope of a statute, the principle directs the Court to resolve the ambiguity in favour of individual rights and freedoms."*

In support he cites Supreme Court of Canada decision, Marcotte v. Deputy Attorney-General for Canada [1976] 1 S.C.R. 108. This point is also supported in Driedger on the Construction of Statutes, 3rd Edition, by Ruth Sullivan. She writes on page 371, dealing with rights of action,

> *"The presumption against interfering with rights applies to the right to bring an action or an appeal."*

In other words, it is the position of these authors that where legislation is giving individuals rights it is to be liberally construed in favour of the individual and the exercising of those rights. To further this point, Sullivan also writes on page 76 in dealing with promoting new remedies

> *"Where the purpose of legislation is to introduce a new remedy, the courts strive to ensure the efficacy of the remedy and to avoid any interpretation that would interfere with its operation."*

She cites the Supreme Court of Canada in Kelvin Energy Ltd. v. Lee [1992] 3 S.C.R. 235 in support. In other words, where the definition of grievance has been expanded to provide a new remedy to a certain class of employees, in this case those defined in Section 2(f) of the Public Service Staff Relations Act (employees of CSIS) then the courts should attempt to ensure that the new remedy is respected.

The final rule of construction I wish to point out is that which deals with remedial statutes. In this regard, I draw your attention to the Interpretation Act R.S., c. I-23 and Section 12 contained therein which reads

> *"Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."*

On page 413 of The Interpretation of Legislation in Canada, dealing with remedial statues, Mr. Cote writes

> *"It should be noted that the legislator has decreed, in the Interpretation Acts, that all statutes should be deemed remedial and, as such, receive a large and liberal interpretation."*

Further on page 414 he writes

> *"Statutes whose purpose is to protect individuals against abusive action by the State have also been considered as remedial and deserving of liberal interpretation."*

I would submit that the purpose of the amendment to the definition of grievance is to now encompass those employees who work for CSIS and, in effect, provide an opportunity for the said employees to have an outside review of their grievances in matters relating to discipline and termination and abuses relating to such termination which did not previously exist.

In conclusion, I submit to yourself that the amendment to the definition of grievance and, more particularly, who may grieve under the Public Service Staff Relations Act was a deliberate act of Parliament extending rights that did not previously exist to those particular employees previously not covered by the said Act. In this case that right has been extended to particular employees of a separate employer set out in Schedule I, Part II of the said Act.

The only contra argument that could be presented to rebut the presumptions set forth above, is the question of why did Parliament simply not move CSIS from Part II to Part I of Schedule I of the Public Service Staff Relations Act. In that regard, the answer is self-explanatory. CSIS is still considered a separate employer not only for all other sections of the Public Service Staff Relations Act but also for many other statutes that reference that schedule identifying CSIS as a separate employer. Therefore, the only method of accomplishing this narrow change would be to effect a change in the definition of grievance and who is entitled to grieve in Section 2 of the Public Service Staff Relations Act. An attempt to amend Section 92 of said Act would not be effective as there are approximately 40,000 employees who fall under Schedule I, Part II. Therefore, the legislators, in their wisdom, chose to amend the Act in the most appropriate manner to provide for new remedial rights to CSIS employees which did not previously exist.

> *As a result, it is my contention, on behalf of Ms. Seabrooke, the Grievor in this matter, that the Public Service Staff Relations Board has the full right to review the manner of her termination (I direct your attention to Black's Legal Dictionary definition of termination) and the policies CSIS employed in terminating Ms. Seabrooke, the same as if Ms. Seabrooke was an employee of the Treasury Board in accordance with Section 11(2)(g) of the Financial Administration Act.*
>
> *...*

By letter dated February 20, 1996, counsel for the employer submitted the following:

> *In response to the request of Madam Adjudicator Rosemary Vondette Simpson, I enclose the arguments of the employer, CSIS, on the application of section 92(1)(b) of the Public Service Staff Relations Act. These arguments are submitted in response to the arguments of Michael Segal, solicitor for the grievor, dated January 31, 1996.*
>
> 1. *Section 92(1)(b) of the Public Service Staff Relations Act (PSSRA) does not apply to the grievor because the employer, the Canadian Security Intelligence Service (CSIS), is a separate employer specified in Part II of Schedule I of the PSSRA.*
>
> 2. *It is false to say that prior to the passing of the Public Service Reform Act in 1992, section 92(1)(b) of the PSSRA was restricted to those employees who fell under Part I of Schedule I of the Act.*
>
>   *In fact, before the PSSRA was amended by the passage of two different statutes in 1992, section 92(1)(b) did apply to employees who fell under Part II of Schedule I of the Act. With respect to employees of CSIS, section 92(1)(b), like the rest of the PSSRA, only applied to employees within the occupational category described as administrative support. This is due to the exclusion of all other CSIS employees from the definition of "employee" in the Act.*
>
> 3. *The first statute to amend the PSSRA in 1992 was the Miscellaneous Statute Law Amendment Act, 1991, which received Royal Assent and come into force on February 28, 1992. That Act changed the definition of "grievance" in the PSSRA so that the grievance section of the PSSRA applied to CSIS employees outside of the*

occupational category described as administrative support. It did not change section 92 of the PSSRA.

4. *The second statute to amend the PSSRA in 1992 was the Public Service Reform Act which received Royal Assent on December 22, 1992 and came into force in part on April 1, 1993 and in part on June 1, 1993. That Act among other things amended the definition of grievance found in section 2 and amended section 92 of the PSSRA. Those amendments came into force on June 1, 1993.*

   The Public Service Reform Act also amended the Financial Administration Act (FAA), section 11. In section 11(2) paragraph (g) was added and the former paragraph (f) was amended. Subsection 11(4) was also added which introduced the notion of "termination for cause". The purpose of this amendment was to statutorily limit the Crown's authority, based on the "at pleasure doctrine", to terminate its servants without giving a reason.

5. *The "for cause" termination clause found in 11(4) of the FAA for all terminations made pursuant to 11(2)(f) and (g) of the FAA was expressly not applied to employees of a separate employer unless the Governor in Council so orders pursuant to section 11(5) of the FAA.*

   This was deliberately done because, at the time of the passage of the Public Service Reform Act, some separate employers had already agreed to "termination for just cause" clauses, a higher standard, through their collective agreements with their employees. The legislators did not want to reduce this negotiated standard of termination through the amendments to the FAA. Section 11(5) was therefore added to the FAA.

6. *Paragraph (a) under the definition of grievance in section 2 of the PSSRA was only slightly changed by the Public Service Reform Act from how it had been under the Miscellaneous Statute Law Amendment Act.*

   Paragraph (b) to that definition, on the other hand, was changed to reflect the changes to the FAA. The grievance provision of the PSSRA were made to apply to employees who were terminated for cause by the Treasury Board pursuant to the new provisions added to section 11 of the FAA. Previous to this the Public

Service Staff Relations Board had no authority to adjudicate those grievances.

7. *A CSIS employee cannot be terminated by the Treasury Board pursuant to section 11(2)(f) or (g) of the FAA because it is the Director of the CSIS and not the Treasury Board who is the employer of CSIS employees.*

8. *Section 11(2) of the FAA begins with the words "Subject to the provisions of any enactment respecting and functions of a separate employer...". The CSIS Act, in section 8, gives the Director of the CSIS the exclusive authority to appoint employees and to perform the duties and functions of the Treasury Board relating to personnel management under the FAA.*

9. *The Director's exclusive power to appoint employees includes the exclusive power to terminate employees pursuant to section 24 of the Interpretation Act.*

   It is therefore only the Director of the CSIS who can terminate an employee of CSIS.

10. *There is no ambiguity in the text of section 92(1)(b) of the PSSRA, which provision came into force at the same time as paragraph (b) under the definition of grievance in section 2 of the PSSRA. Where there is no ambiguity, there is no need to resort to the principles of interpreting statutes. (Refer to arguments of Michael Segel (*sic*) dated January 31, 1996, top of page 4.) Section 92(1)(b) of the PSSRA clearly provides that it only addresses "an employee in a department or other portion of the Public Service of Canada <u>specified in Part I of Schedule I</u>..." The Grievor was not an employee in a department specified in Part I of Schedule I of the PSSRA.*

11. *The clear wording of 92(1)(b) is further reinforced by 92(4) of the PSSRA, a provision passed simultaneously with 92(1)(b), which gives the Governor in Council the option of making 92(1)(b) apply to any portion of the public service specified in Part II of Schedule I of the PSSRA (refer to TAB 1). If the Grievor's interpretation of the Act were correct, there would be no need for this subsection.*

12. *Section 92(1)(b) has never been interpreted by a Court or by this Board as applying to an employee of a separate employer.*

> *13. The Grievor in this case must therefore bring herself within section 92(1)(c) of the PSSRA, firstly by grieving a matter which relates to "disciplinary action resulting in termination of employment, suspension or a financial penalty", and secondly by presenting evidence of such a disciplinary matter. The Grievor has done neither which is the basis for the Employer's original objection to the Board's jurisdiction in this case.*

By letter of April 15, 1996, counsel for the grievor replied as follows:

> *This brief is being submitted in response to the brief received from the Canadian Security Intelligence Service as submitted by Barbara Mercier in point form.*
>
> *1. The first point raised by the Canadian Security Intelligence Service (CSIS) ignores the amendment to section 2 of the Public Service Staff Relations Act which would make the amendment to the Act meaningless if point 1 was correct and accurate.*
>
> *2. The employee before the board is a non-unionized, non-secretarial, non-administrative person and therefore the point raised in the original argument was directed to that type of employee.*
>
> *3. Point 3 is a contradiction in itself in that the wording of the amended section 2 refers to all grievance provision of which section 92 is one. For this point to be accurate again means that there was an act of Parliament which was intended to have no force or meaning which is inconsistent with the Interpretation Act and the legal authors on the interpretation of statutes as set forth in my original argument dated January 31, 1996.*
>
> *4. The second amendment referred to in point 4 of Barbara Mercier's argument was the inclusion of those employees under section (i) of the definition of employee of Section 1.*
>
> *5. The points raised in point 5 of Barbara Mercier's argument are totally inconsistent in themselves and they are inconsistent with the intent of the amendments for the following reasons:*
>
> *(a) The reference in section 92(1)(b) of the Public Service Staff Relations Act refers specifically to section 11(2)(f) or (g) of the Financial Administration Act. The section does not refer*

to either subsection 11(2) or section 11. In other words, there is a specific reference to two sub subparagraphs of a particular piece of legislation. By defining the sub subparagraphs so particularly, it is submitted that the other sections of section 11 of the FAA, pursuant to the Interpretation Act, should not be considered in giving meaning to the amendment to section 2 of the Public Service Staff Relations Act.

(b) Further and as an alternative argument, in the event that the whole of section 11 of the FAA should be considered in light of the amendment to section 2 of the Public Service Staff Relations Act, section 11(4) of the FAA clearly states that the issues that are to come before the Public Service Staff Relations Board are for termination for cause, however, employees of CSIS are appointed, as pointed out by Barbara Mercier, at the pleasure of the Director and their dismissal is not restricted to cause. As a result, if Ms. Mercier's argument is correct, section 11(4) and (5) of the FAA must be used to help interpret section 2 and 92 of the Public Service Staff Relations Act. The addition of section 11(5) by Parliament was to correct a problem which may arise since section 11(4) of the FAA states that the Board may only deal with termination for cause. Since employees of CSIS may be terminated without cause then the addition of section 11(5) of the FAA was thereby required to ensure that section 11(4) of the FAA would not negate any application before the Board since section 11(5) of the FAA merely states that section 11(4) does not apply to a separate employer unless an order in council dictates otherwise.

6. The second paragraph of point 6 of Ms. Mercier's argument states that the addition of sub-paragraph (b) to section 2 of the PSSRA has some relationship to the new right of the PSSRA to apply to employees terminated for cause by Treasury Board. Firstly, I would submit that the addition to subparagraph (b) is much more simplistic in its intent, namely that it applies to terminated employees where subparagraph (a), as amended, deals with current employees. In other words, if an employee is terminated, the argument could have been made that the amendment to section 2 would not apply to a past employee. Section 2(b) merely corrects this potential problem.

In any event, the argument in point 6 of Ms. Mercier's brief appears to imply that subparagraph 2(b) was added to take into account the changes to the FAA which are only referenced in section 92 of the PSSRA. However, in point 3, Ms. Mercier stated that the amended section 2 did not apply to section 92 of the PSSRA. Again, applying the Interpretation Act, logically paragraph 2 was amended which by definition encompasses section 92 of the PSSRA which further encompasses section 11(2)(g) of the FAA and therefore the right to deal with former employees was required and subsequently amended by the addition of section 2(b).

7. *There is no dispute as to the statement in point 7 of Ms. Mercier's brief, however, I would submit that there is no relevance to this point. The reference to sections 11(2)(f) or (g) of the FAA deal with discipline and termination of a civil servant. It is the amendment to section 2 of the PSSRA that is relevant.*

8. *As stated earlier, under the Interpretation Act, it is only two subsections of section 11(2) of the FAA that are referred to and not section 11(2) of the FAA in its entirety. Ms. Mercier's argument would be quite correct if the reference was to section 11(2) rather than a reference to two particular subsections. It was never the intention of Parliament to usurp or alter the powers of the Director save and except for the treatment of the civil service working for him in relation to termination or discipline where there is a grievance in relation to the said termination or discipline. In other words, Parliament, through its amendment to the Act has now enabled disciplined or terminated employees of CSIS who grieve their discipline or termination access to the Public Service Staff Relations Board for review.*

9. *There is no dispute of the point raised in point 9 of Ms. Mercier's brief. It is not the ability to terminate that has been affected but the right to grieve such termination which has always been present but up until now on an internal basis only.*

10. *Point 10 of Ms. Mercier's argument is contradictory by the very fact that there are two positions being put forward before the board. This indicates that there is ambiguity in the text and hence the need to turn to the Interpretation Act for assistance as well as legal authors on the interpretation of statutes.*

> *11. Section 92(4) of the PSSRA is and always will be relevant to the civil service in that it allows for an order in council to allow for the PSSRA to apply to encompass those members of the civil service that do not presently fall under the act. However, 92(4) refers to an order in council which may be rescinded as easily as it is made whereas an Act of Parliament requires a much more detailed process to change. I therefore submit that Parliament, in its wisdom, chose to extend the right of grievance to employees of CSIS in a much more permanent fashion that an order of council. In effect, in order to take away the right to grieve outside of CSIS would, in the future, have to come before Parliament for full debate as opposed to an order in council rescinding such power. The entrenching of such rights in the Act, by amending section 2, does not alter or affect the right of the government of the day to pass subsequent orders in council extending such rights to other civil service members falling under Part II of Schedule I of the PSSRA.*
>
> *12. In reply to Ms. Mercier's point 12, the converse is also true. Since the amendment to Section 2 of the PSSRA no court or this Board has refused to apply section 92(1)(b) of the PSSRA to an employee of CSIS, being a separate employer. This would appear to be the first case brought since Parliament extended the right of CSIS employees to grieve outside of CSIS.*
>
> *13. I refer to the cases presented in my brief originally submitted to the Board on January 30, (*sic*) 1996 and the cases contained therein which define disciplinary action to be the equivalent of acting in bad faith. I would submit that it is clear on the evidence presented to the Board to date that CSIS has acted in bad faith in the treatment of Ms. Seabrooke and her employment with CSIS, firstly, in causing her to resign and secondly in withdrawing a buyout package after she was committed to leaving the service.*

Reasons for Decision

The relevant provisions of the *Public Service Staff Relations Act* (*PSSRA*) are:

> *2.(1) In this Act,*
>
> *...*
>
> *"employee" means a person employed in the Public Service, other than*

...

(f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature,

...

(j) a person who occupies a managerial or confidential position,

and, for the purposes of this definition, a person does not cease to be employed in the Public Service by reason only that the person ceases to work as a result of a strike or by reason only of the termination of employment of that person contrary to this Act or any other Act of Parliament;

...

"grievance" means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees, except that

(a) for the purposes of any of the provisions of this Act respecting grievances, a reference to an "employee" includes a person who would be an employee but for the fact that the person is a person described in paragraph (f) or (j) of the definition "employee", and

(b) for the purposes of any of the provisions of this Act respecting grievances with respect to termination of employment pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act or disciplinary action resulting in suspension, a reference to an "employee" includes a former employee or a person who would be a former employee but for the fact that at the time of the termination of employment or suspension of that person the person was a person described in paragraph (f) or (j) of the definition "employee".

92.(1) Where an employee has presented a grievance up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> *...*
>
> *(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(b) any portion of the public service of Canada specified in Part II of Schedule I.*

The relevant provisions of the *Financial Administration Act* are:

> *11.(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> *...*
>
> *(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;*
>
> *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures*

> *may be taken or may be varied or rescinded in whole or in part.*
>
> ...
>
> *(4) Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph (2)(f) or (g) shall be for cause.*
>
> *(5) Subsection (4) does not apply in respect of an employee of a separate employer unless the Governor in Council makes an order that the subsection applies in respect of that separate employer.*

The grievor's evidence was that at the time of the reorganization she was given much less challenging work, less recognition and had more restrictions placed on her. She became very unhappy. Her work was no longer a joy to her whereas before the changeover in regimes she had been elated with her job. She "did everything". The system in place under Mr. Madigan at that time allowed her to be free-ranging and work independently. She was known as "Super Jane". If people in the organization had a problem relating to computers, they called upon her.

When Mr. Brick became Director General, he moved to correct a situation which was causing deep divisions in the organization. The great majority of employees in IT had been excluded during the initial years of the transition from mainframe to LAN technology. Only a handful of people, including the grievor, had been trained and given the opportunities and experience of introducing the new technology. Because of the morale problems in the department which Eric Brick faced when he took over as Director General, it was necessary for him to act quickly to integrate the employees into the new system who had previously been excluded. They had to be trained. The grievor was one who was called upon to share her knowledge with them. Even though they were, initially at least, less well qualified than the grievor in working in the LAN environment, they had to be given opportunities to learn and expand their experience.

The cutback in the grievor's opportunities was part of a necessary correction to include these people and share the work with them. There was no bad faith on the part of the employer. Similarly, there was no bad faith involved in screening out the grievor from the Vancouver job competition that she felt herself to be more qualified for than the successful applicant. Despite Ms. Seabrooke's CNE training and abilities and experience, she lacked the academic background that a degree would have provided as well as the necessary experience in applications.

Even if I had the jurisdiction to look at the question, nothing in the facts indicates the employer had any obligation, contractual or otherwise, to give her a buyout of six month's salary. She certainly was not offered it. She was simply polled like all other employees to find out her level of interest.

Her feeling that as a good employee she was more entitled to it than "deadwood" shows a basic misunderstanding of workforce adjustment benefits which are intended to ease the transition into outside employment of employees whose jobs are declared redundant.

When she was refused a buyout, she resigned anyway and took a position in the private sector at a slightly higher salary.

In the Burchill case (supra), the adjudicator concluded that the action taken by the employer was not disciplinary and declined jurisdiction.

In upholding the adjudicator's decision in Burchill v. Attorney General of Canada [1981] 1 F.C. 109, the Federal Court of Appeal held, per Thurlow, C.J., at page 110:

> *In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the compliant upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under section 91(1) was not laid. Consequently, he had no such jurisdiction.*

The allegation of bad faith by the employer which was made before me is a different grievance from the one presented during the grievance process. I do not accept the argument of counsel that Ms. Seabrooke, as an unsophisticated grievor, was really saying: "I've been wronged. There is bad faith here". The wording of the

grievance, the issues she raised during the grievance process as well as her own evidence at the hearing point to the focus of her complaint against her former employer as being the fact that she did not receive a cash buyout.

At the hearing the grievor stated that, when she was polled regarding the buyout and she indicated that she wanted one, she considered that she had been given an offer, her acceptance of which constituted "a government contract just like another government contract".

Applying the reasoning of the Federal Court of Appeal in the Burchill case to this case, the grievance must fail. In addition, without a finding of bad faith or any disciplinary motive on the part of the employer, I cannot find that Ms. Seabrooke's departure from CSIS which took the form of a resignation was in fact a disguised disciplinary termination.

Having read the submissions on behalf of both the grievor and the employer on the question of the applicability, I have concluded that subsection 92(1)(b) of the *PSSRA* does not apply to the grievor for the following reasons.

The Canadian Security Intelligence Service (CSIS) is a separate employer specified in Part II of Schedule I of the *PSSRA.*

Despite Mr. Segal's well researched, imaginative and impressive argument, I do not accept that the changes to the legislation with the passing of the *Public Service Reform Act* made paragraph 92(1)(b) apply to employees of CSIS thereby making certain non-disciplinary terminations adjudicable.

The text of paragraph 92(1)(b) is straightforward and unambiguous as addressing "an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I...". The grievor as an employee of CSIS is not included.

Therefore the grievor's case must be dealt with under paragraph 92(1)(c) of the *PSSRA,* which refers to "disciplinary action resulting in termination of employment, suspension or a financial penalty". I find that I am without jurisdiction on two grounds: (1) Ms. Seabrooke did not grieve a matter relating to "disciplinary action resulting in termination of employment, suspension or a financial penalty", and

(2) she did not, despite having been given the opportunity in several days of hearing to do so, discharge the onus of proving that her termination of employment was in any way disciplinary in nature. Bad faith was not shown. Instead, the evidence shows that she had been well trained by her employer at some expense and had been one of a select few who had been given unusual opportunities to apply her knowledge on the job. With this knowledge, training and experience, she had no trouble finding herself a job outside CSIS in which she is happy and which pays more than the job she resigned from. Similarly, I have no jurisdiction to deal with the matter of the amount of severance pay that the grievor received upon resignation.

Finally, I cannot accept the argument of counsel for the grievor that the necessary effect of the definition of "grievance" in section 2 of the *PSSRA* is to bring persons employed by CSIS within the ambit of paragraph 92(1)(b) of the *PSSRA.* Clearly the purpose of paragraph (a) of the definition of "grievance" is, among other things, to allow persons employed by CSIS but excluded from the definition of “employee” nonetheless to file grievances, other than those relating to contract interpretation, under section 91 of the *PSSRA* and to refer them to adjudication under the relevant paragraph of subsection 92(1) of the *PSSRA.* On the other hand, I believe that paragraph (b) of the definition of “grievance” would only apply to persons employed by CSIS in a situation where the Governor in Council had designated CSIS pursuant to subsection 92(4) of the *PSSRA* for the purposes of paragraph 92(1)(b), a situation which has not occurred.

For all these reasons, I dismiss this grievance for want of jurisdiction.

Rosemary Vondette Simpson,
Board Member

OTTAWA, October 4, 1996.