

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

CECILIA HANNA

Grievor

and

TREASURY BOARD
(Citizenship and Immigration Canada)

Employer

Before: Yvon Tarte, Vice-Chairperson

For the Grievor: Herself

For the Employer: Robert Jaworski, Counsel

Heard at Toronto, Ontario,
May 30, 1996.

DECISION

Ms. Hanna has grieved her "dismissal from employment" as a term Operations Support Clerk at the Toronto Central Canada Immigration Centre.

On May 21, 1996, the employer objected to the reference of Ms. Hanna's grievance to adjudication in the following terms:

It is submitted that the Adjudicator lacks jurisdiction to hear this grievance by reason of subsections 91.(1) and 92.(3) of the Public Service Staff Relations Act. We respectfully request that this grievance be dismissed without the necessity of a hearing.

The Facts

I am advised, that Cecilia Hanna was hired as a support clerk with the Toronto Central Canada Immigration Centre on a term basis. Her last re-appointment expired on March 31, 1994. Attached to this letter, as Appendix "A", is a copy of her Specified Period Employment Agreement.

In March 1994, the employer assessed Ms. Hanna, together with twenty-six (26) other term employees, to determine which twelve (12) would be re-appointed from April through June, 1994. Ms. Hanna was not re-appointed.

Ms. Hanna appealed against the selections to the Appeals Directorate of the Public Service Commission of Canada pursuant to section 21 of the Public Service Employment Act. Attached to this letter, as Appendix "B", is a copy of the Appeal Directorate's decision of June 24, 1994, allowing her appeal.

Ms. Hanna's candidacy for re-appointment was re-assessed. Again, she was not successful. Again, she appealed against the selections pursuant to section 21 of the Public Service Employment Act. Attached to this letter, as Appendix "C", is a copy of the Appeal Directorate's decision of January 3, 1995, allowing her appeal.

Thereafter, the employer re-assessed Ms. Hanna's credentials for the general support clerk position. While Ms. Hanna's rating increased, she was still not considered to be qualified for the position.

Ms. Hanna appealed a third time against the selections for the general support clerk position pursuant to section 21 of the Public Service Employment Act. Attached to this letter, as Appendix "D", is a copy of the Appeal Directorate's decision of June 27, 1995, dismissing her appeal.

The Law

Section 21 of the Public Service Employment Act provides:

21. (1) *Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.*

(1.1) *Where a person is appointed or about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service by a process of personnel selection, other than a competition, any person who, at the time of the selection, meets the criteria established pursuant to subsection 13(1) for the process may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.*

(2) *Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision,*
(a) *if the appointment has been made, confirm or revoke the appointment; or*
(b) *if the appointment has not been made, make or not make the appointment.*

(2.1) *Where the appointment of a person is revoked pursuant to subsection (2), the Commission may appoint that person to a position within the Public Service that in the opinion of the Commission is commensurate with the qualifications of that person.*

(3) *Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.*

(4) *Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the*

measures so taken did not result in a selection for appointment according to merit.

R.S., 1985, c. P-33, s. 21; 1992, c. 54, s. 16.

Section 25 of the Public Service Employment Act provides:

25. An employee who is appointed for a specified period ceases to be an employee at the expiration of that period.

R.S., c. P-32, s. 25.

Section 91.(1) of the Public Service Staff Relations Act provides that:

91. (1) Where any employee feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award, or

(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament [emphasis mine], the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

Section 92 of the Public Service Staff Relations Act provides that:

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.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

(3) 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 [emphasis mine].

Argument

Ms. Hanna grieves her "dismissal" from employment at Toronto Central CIC. She seeks reinstatement without loss of pay and benefits.

Treasury Board submits that Ms. Hanna was not dismissed. Her contract of employment expired, and she simply ceased to be an employee of Toronto Central CIC as per section 25 of the Public Service Employment Act. These facts are evident from the decisions appended hereto. Therefore, this matter is not referable to adjudication by reason of subsection 92.(3) of the PSSRA.

*Similarly, in *Chopra v. Treasury Board* (Court File No.: T-813-94, decision dated August 31, 1995), the Federal Court confirmed that where an applicant had redress under the Canadian Human Rights Act, an adjudicator was without jurisdiction to hear a grievance based on the master agreement between Treasury Board and the applicant's professional association by reason of section 91(1) of the PSSRA. Indeed, the Court acknowledged that the precursor to section 91(1) was intended to prevent duplicate proceedings under the PSSRA and the Public Service Employment Act.*

It is self-evident that Ms. Hanna had redress pursuant to section 21 of the Public Service Employment Act, and indeed, exercised the same on three occasions. Therefore, with

respect, the Adjudicator is without jurisdiction to hear this grievance by reason of section 91.(1) of the PSSRA.

For these reasons, and such further and other grounds as counsel may advise, and the adjudicator may except, it is submitted that this matter should be dismissed without the need for a hearing.

At the hearing the employer filed as Exhibit E-1 a Specified Period Employment Agreement signed by the grievor on 30 November 1993. That agreement clearly states that Ms. Hanna's employment was for a specified term which was to end on 31 March 1994.

The grievor did not contest the terms of her employment contract. She did however question the employer's fairness and impartiality in determining who, from among several employees, would be given a further term of employment after March 1994. Those issues were discussed at some length during three Public Service Commission Appeal Board hearings (See Appeal Board decisions: 94-EIC-04, 94-EIC-09 and 95-IMC-0413).

ARGUMENTS ON THE QUESTION OF JURISDICTION

For the employer:

Subsection 92(3) of the *Public Service Staff Relations Act* (PSSRA) states that nothing in the provisions dealing with the references of grievances to adjudication "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".

A termination of employment at the end of a specified term occurs because of the application of section 25 of the *Public Service Employment Act*. In keeping with the language of subsection 92(3) this matter cannot be referred to adjudication.

For the grievor:

Ms. Hanna indicated that she was not grieving her termination per se but rather the procedure used to eliminate her and her colleagues from further employment. The employer's decision not to renew her term was the result of a biased and partial process following several years of abuse and harassment.

Ms. Hanna argued that her grievance fell squarely within the parameters of subsection 91(1) of the *PSSRA* since it dealt with her terms and conditions of employment and she had been unable to secure proper redress under any other Act of Parliament.

REASONS FOR DECISION

Assuming for the purposes of this decision that the grievor met the requirements of subsection 91(1) for the presentation of a grievance, I am unable to see how such a grievance could be referred to adjudication under section 92 of the Act.

The jurisdiction of an adjudicator under section 92 is fairly limited and cannot be expanded even with the consent of the parties. The jurisdiction is limited to the interpretation or application of a collective agreement on the one hand, and termination of employment and disciplinary action on the other.

In her grievance document Ms. Hanna grieves her termination of employment and a violation of clause M-16 of the Master Agreement between the Treasury Board and the Public Service Alliance of Canada. Clause M-16 deals with discrimination in the workplace. In accordance with subsection 92(2) of the Act, an employee may only refer to adjudication a grievance concerning the interpretation and application of a collective agreement if the appropriate bargaining agent has given its approval to proceed. In this case the Public Service Alliance of Canada has not given its approval to refer any matter dealing with the Master Agreement. The portion of the grievance dealing with clause M-16 can therefore not be referred to adjudication.

The grievor's "dismissal" does not constitute a "termination" under section 92 of the Act. Her employment came to an end as a result of the operation of the terms of her contract of employment and not as a result of a decision of the employer independent of the terms of the contract. Accordingly, it cannot be said that what has occurred is a "termination" as that word is used in section 92.

At the hearing Ms. Hanna attempted to circumvent the wall presented by section 92 of the *PSSRA* by saying that she was not grieving her termination as such but rather the selection process used to eliminate her from further employment. Appeals against selection processes are matters for the Public Service Appeal Board under the *Public Service Employment Act*. They cannot be the subject matter of a reference to adjudication. If there is redress available for the grievor, it is certainly not pursuant to the *PSSRA*: In re: Public Service Staff Relations Act and Cooper, [1974] 2 F.C. 407 (C.A.).

I must conclude that I have no jurisdiction to hear this matter.

**Yvon Tarte,
Vice-Chairperson.**

OTTAWA, June 24, 1996.