



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

HÉLÈNE BEAULIEU

Grievor

and

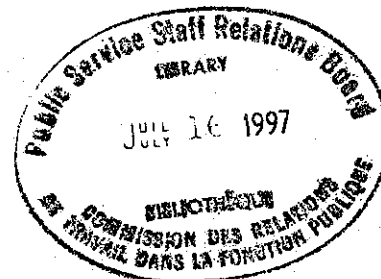
**TREASURY BOARD
(Justice Canada)**

Employer

Before: Yvon Tarte, Chairperson

For the Grievor: Ionnis Mavrikakis

For the Employer: Carole Bureau, Counsel



Heard at Montreal, Quebec,
October 7, 1996

DECISION

On June 5, 1996, H el ene Beaulieu requested that the Board refer to adjudication the grievance she had sent the Assistant Deputy Minister on February 8, 1996:

(Translation)

I have the honour of submitting the following facts:

On December 4, 1995, the Federal Office of Regional Development - Quebec requested a legal opinion and comments on the situation of La Ferme du Tr efle d'Or Inc., File no. 276 440 514.

On December 7 of the same year I gave Mr. Serge P epin and the client my response. Before contacting the client I discussed the matter, as usual, with Mr. P epin, who told me everything was in order and to send the opinion to the client.

A few days later I informed Mr. P epin that the client wished to discuss the matter further, and was told that it was my case, that Mr. P epin was still in agreement with the position I had taken on December 7, and that he would send the client to me if the latter called.

On December 19, 1995 the client sent a letter to Mr. P epin in which he referred to the conversation of December 18 and insisted that the \$14,250.00 payment was justifiable.

On December 29 Mr. P epin replied, saying that "in his opinion, the circumstances justified the disbursement", thus contradicting my opinion of December 7.

Needless to say, regardless of legal opinion, which is merely an analysis of the facts brought to our attention, the client has the final word about what action to take.

However, this case was totally different: the client did not want to make the final decision; he wanted a legal opinion to cover himself. I told Mr. P epin I felt betrayed, since he had approved the opinion I issued on December 7.

Mr. P epin could have explained the reasons behind his decision to recommend the disbursement instead of issuing a new opinion that ran counter to the one I had already delivered and that he, I repeat, had already approved.

Under the circumstances I consider this a lack of professional ethics, and I am hereby lodging a complaint against Mr. Serge P epin.

Thanking you in advance for your attention in this matter, and hoping to hear from you soon, I remain

Yours sincerely,

The Conflict of Interest Issue

At the outset of the hearing Mr. Mavrikakis raised the issue of conflict of interest in relation to Ms. Carole Bureau of the Department of Justice. The Grievor's representative stated that Ms. Bureau was involved as applicant in a case similar to that presented in file 166-2-27316 dealing with a salary issue and the enforcement of certain legislation governing compensation for government employees. In support of his thesis the Grievor's representative referred me to the following texts and decisions: *Code of Ethics for Legal Counsel* (R.S.Q. 1981, c. B-1, T. 1), *Guide sur les conflits d'intérêts* (Service de recherche et de législation, Barreau du Québec), *MacDonald Estate v. Martin*, [1990] S.C.R. 1235, 2527-7195 *Québec Inc. v. 161442 Canada Inc.* (S.C., District of Montréal n°: 500-05-000372-894), *Donald D. Thomson et al. v. Smith Mechanical Inc. et al.*, [1985] S.C. 782, *APV Pavailles Inc. v. Alain Bonischot and John A. Swift* (Court of Appeal, Montreal Office, no. 500-09-000999-912) and *Claude Pageau v. Dame Blanche Vanasse Aubry* (S.C., District of Montreal, no. 500-14-002503-910).

Mr. Mavrikakis therefore requested, *inter alia*, that Ms. Bureau be declared unqualified to represent the Department of Justice in this case, and that new counsel be appointed within the prescribed deadlines.

In reply to the questions raised by the Grievor's representative, the Department representative stated that the possibility of a conflict of interest could be raised with respect to file 166-2-27316 only as regards the salary issue, and that in any event, should the case be heard on its merits, she and Mr. Piché were prepared to withdraw.

Decision on the Conflict of Interest Issue

Given the fact that the Employer's representatives had undertaken to withdraw from file 166-2-27316 if the case were heard on its merits, I ruled that Ms. Bureau and Mr. Piché could submit their preliminary objection to jurisdiction with respect to Ms. Beaulieu's six referrals: i.e., Board files 166-2-27313 to 27316, 27289 and 27335. By limiting their intervention to questions of jurisdiction, counsel for the Department of Justice would not be in a conflict of interest situation, either real or apparent.

Preliminary Objection

On July 26, 1996 Ms. Bureau, on behalf of the Employer, submitted the following objection to jurisdiction.

(Translation)

I wish to inform you that the Employer objects to the appointment, by the Public Service Staff Relations Board of an adjudicator under paragraph 95(2)(c) of the Public Service Staff Relations Act (the Act) to hear the grievance in question on the following grounds:

Ms. Hélène Beaulieu occupied a "managerial or confidential position" as defined in section 2 of the Act, as she held the title of legal officer in the Department and was excluded from collective bargaining.

According to paragraph 92(1)(a) of the Act, Ms. Beaulieu cannot refer this grievance to adjudication because it does not involve the interpretation or application of a provision of a collective agreement or an arbitral award;

Second, Ms. Beaulieu's grievance, entitled "Complaint In Respect of Ethics," bears on her complaint of February 8, 1995 concerning a dissenting opinion issued by her supervisor on a matter for which she herself had delivered an opinion.

However, as this grievance does not involve a suspension or a financial penalty, or even disciplinary action resulting in termination of employment or suspension or a financial penalty, Ms. Beaulieu may not avail herself of subsection 92(b) of the Act to refer her grievance to adjudication.

This motion to dismiss is submitted in the interests of justice, as it is useless to burden the Board with cases over which an adjudicator obviously has no jurisdiction.

We would be prepared, on behalf of the Employer, to make oral representations if the Board deems it appropriate to hold a hearing on this issue.

Given the preceding, we believe it would be inappropriate for the Board to immediately set a hearing date for the case in question over the period from October 7 and 11, 1996.

Awaiting your decision, I remain

Yours truly,

During the hearing for the grievance held October 7, 1996, Ms. Bureau repeated her preliminary objection.

In response to the objections submitted by Ms. Bureau on July 26, 1996, Mr. Mavrikakis submitted the following arguments in a letter dated August 16, 1996 dealing with the various grievances referred to adjudication by Ms. Beaulieu.

*SUBJECT: Reference to Adjudication
(166-2-27289, 27313 to 316, 127335,
Hélène Beaulieu -
Justice Canada*

Dear Assistant Secretary,

I acknowledge receipt of the letters of Mrs. Carole Bureau, representing the Department in this matter, and I fail to understand the first three paragraphs that are repeated verbatim on the first page of each of the six letters.

On 11 June 1996, a grievance was brought before your Board by Mrs. Hélène Beaulieu. On 28 June, you informed the parties that a hearing on these matters would be held from 9 to 13 September 1996. Subsequently, we requested another date for the month of October, a request which the counsel for the employer, at that time Mr. Roger Lafrenière, accepted. Subsequently another solicitor was assigned for reasons familiar to you, and it was only on 26 July that the employer decided to object to the Board's hearing the grievances and complaints of Mrs. Hélène Beaulieu.

I wish to point out that in no case did the first counsel present this argument, and it was only 45 days after submission of the grievance that the employer, for reasons that remain obscure and that rely on rules enacted by the employer itself, objected to having the Board deal with Madame Beaulieu's case.

On this point, notwithstanding the Sections referred by Mrs. Bureau in her letter, and more particularly in the first three paragraphs of page one, we would remind the employer of the attachments and studies that the employer itself

submitted concerning the policy on harassment in the workplace. I refer here to the Treasury Board document of 3 January 1995, signed by Mr. R.J. Giroux, which states on page 2:

"Please put this revised policy into immediate effect".

And on page 13, in the "Grievance" paragraph:

"If an employee decides to submit a grievance....

and on the following page the sentence

"Pursuant to an agreement between the Treasury Board Secretariat and the Public Service Commission, the latter will hear complaints of harassment."

And in another document from the Department of Justice dealing with harassment in the workplace, harassment is defined in paragraph 2 of page 3, and page 4 states:

"harassment also relates to any abuse of power that involves the improper exercise of authority or power deriving from a position with a view to compromising the employment...."

And on page 15 and following of the guidelines, the Department of Justice defines the role of the Public Service Commission, in particular referring to:

a complaint to the Investigations Directorate of the Public Service (harassment unrelated to a reason included in the Canadian Human Rights Act).

which is the case at present, since it relates to an abuse of authority, among other things.

The Treasury Board, in its September 1994 study on harassment in the workplace, devoted long Sections to harassment in the workplace and in particular to the question of abuse.

I also refer to the grievances document, and more particularly to paragraph 9.2.1 General Provisions of

Volume 1 Chapter 13, Volume 7, chapter 5, chapter 6 and chapter 13, and to the Public Service Staff Relations Act (PSSRA, Sec. 91-101, Regulations and Rules of Procedure of the Public Service Staff Relations Board, Sec. 69-90), where paragraph "a" states:

"A grievance is a written complaint that an employee may submit concerning terms and conditions of employment".

The Assistant Deputy Minister, Jean-Claude Demers, considering as he himself states that harassment in the workplace is a very serious matter, issued a policy in a memorandum dated 27 January 1995, which refers on pages 13 and 14 to "grievance":

"Pursuant to an agreement between the Treasury Board Secretariat and the Public Service Commission, the latter will investigate complaints of harassment ..."

which show, among other things, that the Assistant Deputy Minister has adopted the same policy as the Treasury Board.

And in the Directive of the Deputy Minister of Justice, Mr. George Thomson, number 189SM of 16 February 1996, we find:

"I am very pleased to announce the new policy of the Department of Justice with respect to dispute settlement. This policy represents a further stage in the Department's commitment to provide high-quality legal services."

And in the "Goals" paragraph, the Deputy Minister adds:

"Consistent with government policy, the Department encourages the use of the various mechanisms for dispute settlement, in all appropriate circumstances.

and further on:

"Recourse to dispute settlement mechanisms is an affirmation of two principles in the Department's mission statement: "To assist the

Minister in the task of ensuring that Canada remains a just and law-abiding society”.

The Department issues laws, and publishes manuals on harassment, but when it comes to enforcing them, it seeks to escape its responsibilities, by failing to recognize that its objections were submitted late, and ignoring all the fine statements and speeches that it has made on the subject.

PSSRB: 166-2-27289

- (a) *Mrs. Bureau states that Mrs. Beaulieu was employed “in a managerial or confidential capacity”. There is no definition to my knowledge of “confidential capacity”, since all employees at all levels of Departments occupy, I should assume, a position of trust, even the Minister’s floor sweeper.*

Nevertheless, we must refer here to the Treasury Board’s definition of LA-1, Chap. 3-1, where LA-1 is dealt with in the description of salary levels on page C-1:

LA-1

“Legal advisers at this salary level perform legal work under general supervision”.

A reading of this paragraph does not suggest a Management position. Furthermore, in the description of Mrs. Beaulieu’s tasks, we read:

“Under the supervision of a more experienced legal adviser, to perform legal work of a kind such as to acquire the training and experience necessary to obtain employment at a higher level.”

As can be seen, there is nothing in her tasks that would allow Mrs. Bureau to connect Mrs. Beaulieu’s job to Section 2 of the Act.

- (b) *With reference to Mr. Marcel Gauvreau, and the notes are available to demonstrate this, Mrs. Bureau herself states in paragraph 2 of her letter:*

"The response at the last level must have been made without taking account of the questions that she had asked the investigator."

The case speaks for itself: a peremptory plea has been entered, despite her numerous appeals, as demonstrated in the record submitted to the deputy minister. In the face of repeated questions, the investigator, Mr. Baron, stated that he could no longer remember, he did not have his notes, and he was not in a position to reply to Mrs. Beaulieu's questions...

As to the fourth paragraph of Mrs. Bureau's letter, which states that the grievance does not relate to a suspension or financial penalty nor to any disciplinary action, it is appropriate to refer to complaint 166-2-27313 which is the result of this first grievance lodged by Mrs. Beaulieu against Mr. Marcel Gauvreau.

PSSRB: 166-2-27335

Mrs. Bureau states in paragraph 2

"These proceedings are not yet terminated; the report from the department's official counsel has not been completed".

The department's counsel forgets that Mr. Grosleau of the Staff Relations Branch has been trying in vain, since last December, to arrange a meeting with Mr. Mayrand, who seems to be very busy. In our letter of 4 June 1996, we indicated to Mr. Grosleau that more than ample time had passed, and that we were referring the whole affair to the Board.

The other reasons invoked are the same as those cited at the beginning of this letter. Consequently, there is no need for us to comment further.

PSSRB: 166-2-27314

The departmental counsel forgets that if it had not been for the complaints of abuse of authority and breach of ethics against Mr. Pépin, there would never have been a letter of dismissal, as mentioned in complaint no. 166-2-27313.

As to the rest, we would refer you again to the comments set out above.

PSSRB: 166-2-27315

I think the employer's counsel must be taking Mrs. Beaulieu's letters in another context when she says her supervisor gave a "divergent opinion".

This is not the point at issue. Mrs. Beaulieu's letter speaks for itself, saying in substance that it was a legal opinion that Mrs. Beaulieu had given, and that it had been approved by "her supervisor" in consultation with him, and that, for reasons that are not clear, he had changed his mind a few days later and issued another one, without Mrs. Beaulieu's knowledge, indeed without consulting her or telling her of its contents.

As to the rest, we would refer you again to the comments set out above.

PSSRB: 166-2-27313

The departmental counsel mentions that Mrs. Beaulieu ceased to be an employee upon expiration of the period for which she was appointed.

There are three points here that have either been left out or ignored:

- (1) "The supervisor" did not have the required authority to declare her dismissed;*
- (2) The contract between FORD-Q and the Department of Justice, in paragraph 1 of the Agreement, provides that six months before expiry of said contract, FORD-Q must advise the Department of Justice of any change. Now, there is nothing on the file to show that any changes had been requested by FORD-Q.*
- (3) In the matter that concerns us, FORD-Q had the duty, initially, to advise the Department of Justice six months before any changes to the Agreement between the Departments. Subsequently, the Department of Justice was supposed to review the situation of its staff, according to the order of employment seniority of legal advisers for the years 1993, 1994, and 1995, and then to reclassify Mrs. Beaulieu.*

Mrs. Bureau, in her letter of 25 July to the Canadian Human Rights Commission regarding the questions raised by Mr. Jean-Guy Boissonneault, answers as follow on page 2, para. 4:

"With reference to the non-renewal of other employees of the Department for the years 1993, 1994 and 1995, the Department is now in the process of compiling this information, and I shall provide you with the appropriate comments as soon as they are available."

This stands in contradiction to the letter of 26 July which she wrote to you, since she still does not have this information.

PSSRB: 166-2-27316

With all due respect, we strongly deny the employer's contentions, and the contents of the employer's letter of 26 July. We maintain that, when it comes to interpretation or enforcement of a Treasury Board directive affecting Mrs. Beaulieu, the Board has the power to deal with the case, since Mrs. Beaulieu has suffered financial injury. It is not a question here of a higher salary than that provided for in her employment contract, but rather of suspending the system of performance pay for the applicant, under which the applicant is entitled to receive performance increases consistent with the performance ratings she has earned in her work.

Let us not forget that the same counsel is pleading in another Federal Court case against the Department, for the same reasons, where she is invoking totally different arguments that would be just as acceptable in the present, similar case. This leads us to wonder about the good faith of the employer...

For all these reasons, we believe that the objections contained in the letters sent by the employer's counsel are ill-founded and should be rejected, and that the dates of 7 to 11 October should be retained as those on which the parties may appear before the Board and submit their arguments to adjudication.

I thank you in advance for your consideration of this matter. We are at your disposal to give an oral presentation of the responses outlined above, as you deem fit.

In the meantime, I remain, yours sincerely etc...

Reasons for Decision on Preliminary Objection

The jurisdiction of an adjudicator within the context of the *Public Service Staff Relations Act* derives from Section 92 of the text of that Act:

Adjudication of Grievances

Reference to Adjudication

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; or*

(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 (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 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.

(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.

Ms. Beaulieu's grievance concerns a supposed lack of professional ethics on the part of Mr. Serge Pépin, who, in a case on which she had been asked to comment, voiced a legal opinion that, in the opinion of the Grievor, did not coincide with her own. This is not, therefore, a complaint with respect to disciplinary action that could be referred to adjudication in accordance with the terms of paragraphs 92(1)(b) and (c) of the Act. Furthermore, the fact that Ms. Beaulieu is a legal officer excluded from collective bargaining removes all possibility of referring to adjudication any grievance concerning the interpretation or application of a collective agreement or an arbitral award under paragraph 92(1)(a). Subsection 92(2) requires that the employee be covered by a collective agreement and represented by a bargaining agent in order to refer a grievance with respect to the interpretation of a collective agreement or an arbitral award to adjudication.

I must therefore conclude that I do not have the jurisdiction to hear Ms. Beaulieu's grievance.

**Yvon Tarte,
Chairperson**

OTTAWA, January 10, 1997

Certified true translation

Serge Lareau