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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

ANDREW LESLEY BLACKMAN

Grievor

and

TREASURY BOARD
(National Defence)

Employer

Before: Yvon Tarte, Acting Chairperson

For the Grievor: Andrew Lesley Blackman

For the Employer: Ronald Snyder, Counsel

Decided without an oral hearing.

On October 13, 1995, Andrew Lesley Blackman submitted the following grievance to the employer (Board file 166-2-27134):

> *I began working for the Department of National Defense, Ship Repair as an Electronics Apprentice in October 1991. My term of employment as an apprentice is until 13 October 1995. Prior to commencing my apprenticeship I obtained my Technologist Diploma.*
>
> *I recall that at the time of my interview it was promised that I would receive at least eight weeks of paid day schooling at B.C.I.T. for each and every year of the apprenticeship program.*
>
> *Some time after I commenced my apprenticeship, the Ship Repair Unit was advised by the Provincial Apprenticeship Branch that individuals who possessed a Technologist Diploma did not require schooling. I was told that my diploma exceeded the minimum requirements of the province and that I was deemed to have met the 'schooling aspects' of the apprenticeship program. I am aware that the Ship Repair Unit did not fully implement this policy because other apprentices who also possessed a Technologist Diploma received schooling until the end of their apprenticeship program.*
>
> *In order for me to obtain my diploma I must continue to receive schooling on a regular basis, however, I have not received any schooling associated with the apprenticeship program, even though I continued to be employed as an apprentice and the Ship Repair Unit continued to promise alternate schooling. I have explained my dilemma to management. However, they insist that they are not required to provide any schooling beyond the requirements of the apprenticeship program, despite what was promised during my interview and later during my apprenticeship; and despite what was written in my apprenticeship contracts.*
>
> *I allege that management through their refusal to either provide schooling or to acknowledge that my work has been at the journeyman level are effecting my economic livelihood and are detrimentally effecting my career.*

He sought the following corrective action:

> *I would like compensation for any damages I have suffered as a result of this lack of the promised schooling.*

On October 12, 1995, Mr. Blackman grieved the following (Board file 166-2-27139):

> *I am grieving the procedure that led to the production of the suitability list (attached to this grievance) on which I am ranked last. This list was produced by the acting foreman Mr. G. Edge. This list was compiled without my knowledge, and contains a number of errors. As the preamble to the list explains there is a requirement for a person in shop 27. In May of this year, a decision was made for me to spend my last six months as an apprentice in CANTASS. I had previously spent three months in CANTASS. At the time the suitability list was compiled, I had nine months experience in CANTASS - more experience than any one else on the list. It has always been the practice that an apprentice who has spent his last six months in a shop will get a position with that shop if there is a vacancy in that shop.*
>
> *I do not believe that it is fair to use the PER's as the sole justification for the suitability list for the following reasons:*
>
> 1) *PER's done for apprentices in the electronics shops have not all been done accurately.*
>
> 2) *PER's used for the suitability list did not come from the official personnel files as they should have and as a result some PER's missing from Mr. Edges files were simply excluded from the calculation.*
>
> 3) *Not all scores on the PER's were used. Not all categories were included.*
>
> 4) *PER's may have included periods where apprentices were not even working at the dockyard.*
>
> 5) *As mentioned above, factors such as experience are not included.*
>
> *In addition, Mr. Edge told me that all apprentices had been given equal ratings on seniority. In fact, some of the apprentices should have received higher scores for seniority as we were not absent from work during B.C.I.T. schooling periods. Although the preamble (to the suitability list) does mention accountability, there does not seem to be any actual score given.*
>
> *The use of PER's in this fashion makes it difficult to determine if the process has been fair, especially since the personnel department was not involved in the process.*

not covered by the relevant collective agreement. Indeed the grievor did not allege that it was. Neither was the grievor terminated for cause. Rather his term appointment came to an end and he ceased to be an employee. In support of this argument, counsel referred to my decision in *Hanna* (Board file 166-2-26983) where I stated at page 7:

> *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.).*

Furthermore, counsel argued that the grievor's attempt to characterize the grievance at this late stage as a termination for cause was to change fundamentally the nature of the grievance which is not permissible in light of the decision of the Federal Court of Appeal in *Burchill v. Attorney General of Canada* [1981] 1 F.C. 109.

Reasons for Decision

The jurisdiction of an adjudicator appointed under the *PSSRA* to consider an employee's grievance is found in section 92 thereof which provides:

> *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.*
>
> *(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.*

I note that the grievor's first grievance is founded on an alleged violation of the collective agreement. However, such a grievance requires the support of the bargaining agent pursuant to subsection 92(2) of the *PSSRA*. As the grievor is representing his own interests on the reference of this grievance to adjudication, he clearly does not meet the requirements of subsection 92(2). With reference to the decision of the Supreme Court of Canada in *Queen v. Cognos Incorporated (supra)*, I would like to point out that that decision relates not to contract but to the tort of negligent misrepresentation. An adjudicator appointed under the PSSRA has no jurisdiction to deal with such a cause of action.

In relation to his second grievance, I agree with the submission of counsel for the employer that the grievor did not raise the issue of an alleged disciplinary termination until after the reference to adjudication of the grievance. In light of the rationale of the Federal Court of Appeal in the *Burchill* decision (supra), I cannot entertain what is in reality a different grievance from the one which was submitted to the employer during the grievance procedure. Furthermore, as was the case in *Hanna* (supra), the grievor's employment was not terminated by the employer within the meaning of subsection 92(1) of the *PSSRA*. Rather his appointment was for a four year term and that term came to an end. Pursuant to section 25 of the *Public Service Employment Act* (*PSEA*), the grievor ceased to be an employee upon the expiration of that term. In addition, the fact that he was an unsuccessful candidate for the two term positions can only be challenged under the *PSEA*.

For all these reasons, I dismiss the grievances for want of jurisdiction.

Yvon Tarte,
Acting Chairperson

OTTAWA, October 22, 1996.