



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

BERNARD HUNT

Grievor

and

**TREASURY BOARD
(Transport Canada)**

Employer

Before: [Yvon Tarte, Chairperson](#)

Decided without an oral hearing

DECISION

On February 14, 1995, Bernard Hunt submitted three grievances to his employer. One of the grievances relates to the refusal of National Life Assurance Company of Canada to continue to pay him disability benefits after July 1994. The other two grievances relate to the interpretation or application with respect to the grievor of the Isolated Posts Directive and the Living Accommodation Charges Policy, both of which have been incorporated by reference into the Master Agreement between the Public Service Alliance of Canada and the Treasury Board by virtue of Article M-37 thereof. On April 17, 1996, Mr. Hunt referred these grievances to adjudication. Just prior to doing so and after he had received the employer's reply to his grievances, the grievor first raised with the employer the allegation that his grievances in reality arose out of a disguised disciplinary termination of his employment by the employer.

The basic facts out of which these grievances arise do not appear to be in dispute. The grievor, who was employed as a firefighter, has been unable to perform the duties of his position since October 1991. Apart from a three week period in March 1993 during which the grievor resumed work, he was on various forms of leave, both with and without pay, until March 25, 1994. He received Long Term Disability Benefits under the Public Service Management Insurance Plan through the insurer, National Life Assurance Company of Canada from June 15, 1992 to July 1994. The insurer refused to pay him any benefits beyond that date. The grievor was declared by Health Canada to be permanently unfit for any work on November 24, 1994. As a result, he applied for and was granted a medical retirement effective January 17, 1995. There was some initial confusion as to whether or not Mr. Hunt was an excluded employee. It would appear, however, that although the employer had intended to propose Mr. Hunt for exclusion from the bargaining unit it never actually did so, primarily because of his protracted absence from the workplace.

The employer objected to the jurisdiction of an adjudicator appointed under the *Public Service Staff Relations Act* (PSSRA) to entertain these grievances. The Board advised the parties that the jurisdictional objections would be dealt with on the basis of the written representations of the parties and without an oral hearing.

Submissions of the Parties

The employer alleged that, as a former employee at the time he submitted his grievances to the employer, the grievor does not fall within the definition of "employee" in the PSSRA; therefore the provisions of that statute do not apply to him. In addition, the employer pointed out that two of the grievances relate to the interpretation or application of the collective agreement with respect to the grievor. Pursuant to subsection 92(2) of the PSSRA they cannot be referred to adjudication without the support of the bargaining agent which the grievor does not have. Furthermore, there is no authority under section 92 of the PSSRA for an adjudicator to deal with the decision of the insurer which is referred to in the remaining grievance. Finally, the allegation of a disguised disciplinary termination was not raised by the grievor until after the grievor had received the employer's reply to his grievances; immediately thereafter he referred them to adjudication. The employer cited the decision of the Federal Court of Appeal in *Burchill v. Attorney General of Canada* [1981] 1 F.C. 109 as support for its position that an adjudicator would have no jurisdiction to deal with this allegation under the circumstances.

The position of the grievor is, essentially, that the insurer's refusal to pay him disability benefits after July 1994, was inconsistent with the assessment made by Health Canada on November 24, 1994 that he was permanently unfit for work. The result was that he received no income from either the employer or the insurer after July 1994 and this forced him to opt for a medical retirement. The grievor submits that this constitutes a disguised disciplinary termination. Accordingly, an adjudicator appointed under the PSSRA would have jurisdiction to entertain any grievances arising out of this situation in light of the provisions of subsection 92(1) of the PSSRA.

Determination

The submission of the employer that, as a former employee, the grievor cannot invoke the provisions of the PSSRA has no merit. The Federal Court of Appeal has ruled that the relevant provisions of the PSSRA apply to any person who feels himself to be aggrieved as an employee: *The Queen v. Lavoie* [1978] 1 F.C. 778; *Gloin v. Attorney General of Canada* [1978] 2 F.C. 307. Clearly the grievor's grievances arise out of his employment relationship.

However, pursuant to subsection 92(2) of the PSSRA the grievor, as a member of the bargaining unit, cannot refer a grievance to adjudication involving the interpretation or application of the collective agreement in relation to him without the consent of the bargaining agent. Two of the grievor's grievances relate to the interpretation of the collective agreement and the grievor does not have the support of the bargaining agent for their referral to adjudication. Accordingly, an adjudicator appointed under the PSSRA has no jurisdiction to entertain them. I would like to point out that the grievor would be no further ahead if he had been an excluded employee as such an employee is not covered by the collective agreement.

The jurisdiction of an adjudicator to entertain grievances is found in subsection 92(1) of the PSSRA. The grievor's grievance objecting to the refusal of the insurer to continue to pay him disability benefits does not fall under that subsection. Therefore the adjudicator cannot consider it. Neither is it open to the grievor, immediately prior to referring his grievance to adjudication, to attempt to alter its nature by claiming that in reality he is grieving a disguised disciplinary discharge: *Burchill v. Attorney General of Canada* [1981] 1 F.C. 109.

Accordingly, for all these reasons the three grievances are denied for want of jurisdiction.

**Yvon Tarte,
Chairperson**

OTTAWA, August 13, 1997.