File: 166-20-27336

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN MATTHEWS

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Shawn Minnis, Counsel

For the Employer: Gérard Normand, Counsel

Heard at Ottawa, Ontario,
December 10 to 14, 1998.

John Matthews was employed by the Canadian Security Intelligence Service (CSIS) as a Senior Officer (level 8 classification), Administration and Finance Unit, Policy and Systems Branch until his purported lay-off effective April 1, 1996. His initial grievance regarding the termination of his employment with the CSIS was heard by me at adjudication in November and December 1996. In my decision issued on March 5, 1997 I concluded that, even though the CSIS acted in bad faith when it terminated the grievor's employment, Mr. Matthews should be awarded damages rather than reinstatement. I awarded him $70,000. Mr. Matthews applied for judicial review of my decision; Richard J., Federal Court Trial Division, (Court file T-623-97), ordered the following on December 8, 1997:

> *That part of the adjudicator's decision which fixes the amount of the damages awarded to the applicant is set aside and the adjudicator is directed to redetermine the amount of the damages after providing both the applicant and the respondent with an opportunity to make submissions and give evidence to the adjudicator on this specific issue.*

The following is the result of the subsequent hearing on the issue of the quantum of damages to be awarded to Mr. Matthews.

Summary of Evidence

1. Mr. Matthews who was born on April 18, 1948, is married with two sons. In 1973 he joined the federal Department of Consumer and Corporate Affairs (CCA), Accounting Section. In March 1989, he was laid off after 16 years with the Department. On October 30, 1989, he began to work for the CSIS.

Mr. Matthews said the Early Retirement Incentive (ERI) Program was an incentive offered to employees to leave the federal Public Service at age 50 without suffering a pension penalty. He was aware in 1995 that the ERI was being offered for a three-year period. When he turned 50 in April 1998 he would have taken it. He added he must now wait until age 60 to receive an unreduced pension. The grievor's annual salary at termination was $62,552.

Mr. Matthews, an avid golfer, added that a benefit he had while at CSIS was through something called the Buffalo Golf Club, apparently a carry-over to CSIS from RCMP days, that allowed him to play golf at various golf courses within the National

Capital Region at considerably reduced rates. He said one could save sometimes $40 to $45 per round of golf.

The grievor said after the termination of his employment, he pursued a rigid routine searching for new employment. It was hard to get work because of his age and his many years of employment in the Public Service. He sent out approximately 75 applications, while collecting employment insurance for 40 weeks, totalling around $18,000.

The grievor testified, since he lost dental benefits to which he was entitled while employed by CSIS, he piggybacked on his wife's program that cost him around $57. She works as a nurse for the Ontario government. He also purchased a group term rate of $100,000 for life insurance from the Canadian Automobile Association (CAA) that cost him approximately $1,500. He added the rate doubled when he turned 50. The grievor's out-of-pocket dental and life insurance costs are shown on Exhibit G-3.

In December 1997, Mr. Matthews began to work as a six-month term employee at Agriculture and Agri-Food Canada in the accounting office as an FI-2 at $49,500. His contract has been extended to March 31, 1999 at $51,000. As a term employee he has reduced benefits, no dental or health plans, but must pay into the superannuation plan.

The grievor identified his legal costs up to the beginning of this hearing, all of which have been paid by him, as Exhibit G-1, total $36,093.17. Mr. Minnis advised me at the end of the hearing that the total would likely reach $45,000.

Mr. Matthews read an impact statement describing how the loss of his job affected him, his family, his friends, his financial situation, and the impact on his future employment. He added that four of his former CSIS colleagues received ERI packages, but he did not. The grievor identified an analysis of his loss of pension benefits, prepared by an actuary, Guy Martel, from the firm Welton, Beauchamps, Parent Inc. (Exhibit G-2).

During cross-examination, Mr. Matthews said when he was laid off in 1989, he could have taken an out placement option with a six-month financial package of pay and benefits in lieu of notice, or worked in another department in a non-audit role. He took the package. At the time, he placed his pension into a self-administered RRSP and

rolled these funds over to the CSIS pension in October 1989. When he left CSIS, Mr. Matthews said he received $7,193.19 in severance pay and $4,258.37 in vacation pay (see Exhibit E-1). He believed the CSIS dental plan covered 90% of expenses when he began work there and 80% when he left, and he paid around $500 annually for CSIS life, disability and dismemberment insurance. He is now covered under his wife's family plan from her workplace, since as a term employee at Agriculture Canada he is not eligible for certain benefits.

Mr. Matthews believed the CSIS Buffalo Golf Club membership was $100 per year. Eventually he had to abandon two private golf club memberships for him and his wife in the Kanata Lakes Golf Club.

After the termination of his employment, the grievor could only apply to Public Service positions that were open to the public. Now as a term employee he can apply for positions open to employees inside the Public Service. Mr. Matthews said from the 75 applications he sent out, he has had two or three interviews.

During re-examination, the grievor said when he left CCA, he received six months' salary, sixteen weeks of severance pay, and rolled over approximately $70,000 into a private RRSP. When he joined the CSIS, he bought back his pensionable years of service into the CSIS pension plan. This cost him in the range of $75,000 to $80,000.

He added that while at CSIS, he could bridge the difference between his dental plan and his wife's plan. He would take advantage of the CSIS Buffalo Golf plan 12 to 15 times per year. He believed the allowable limit was 20 times per year.

Mr. Normand entered Exhibit E-1, pension and benefits calculations for Mr. Matthews prepared on December 11, 1998 by Ms. Ginette Garneau, CSIS Pay Section. Mr. Minnis objected to the unfairness of this exhibit for two reasons: one, this was the first time he had seen it, and two, Mr. Normand had had the grievor's pension benefits analysis (Exhibit G-2) since June 1998. Before agreeing to Exhibit E-1, Mr. Minnis requested that Mr. Normand agree to the following:

(1) that Ms. Garneau is not an actuary;

(2) that the numbers provided deal only with pension amounts on an unreduced and reduced pension basis at a point in time;

(3) that the numbers calculated are according to the superannuation rules as of December 1998.

Mr. Normand agreed.

The parties spent the afternoon of the first hearing day trying to reach a settlement in the matter before me. They were unsuccessful.

Mr. Normand also entered a Treasury Board document regarding Central Recording of Downsizing Liability for the Fiscal Year Ended March 31, 1997 dated March 27, 1997 (Exhibit E-2) and a Special Bulletin regarding the End of the ERI Program dated June 10, 1997 (Exhibit E-3).

Mr. Minnis entered a document the grievor received from a Ron Easey, Coordinator, Job Help Resource Centre, Public Service Commission, with questions and answers about the ERI Program (Exhibit G-4). He also confirmed with Mr. Normand the fact that four of the grievor's former colleagues, Messrs. Gagnon, Klein, Lapointe and Bussière, all took the ERI since 1995.

Mr. Normand agreed that if Mr. Matthews had continued to work at the CSIS, he would have been eligible for the ERI Program if it was offered to him since he had accumulated more than 10 years' of public service. This was crucial to Mr. Minnis' argument since it is mentioned in the Martel actuarial report (Exhibit G-2).

Mr. Normand also agreed the grievor was the sole payer for his life insurance premiums while at CSIS, and that if he had continued to work at CSIS, his premiums would have been less than what he paid privately as shown in Exhibit G-3, since CSIS offered a reduced group rate.

Argument for the Grievor

Mr. Minnis presented a book of authorities with 23 tabs. Mr. Minnis argued that under subsection 97(4) of the *Public Service Staff Relations Act* (PSSRA) I have an "open ended power to award any action to the grievor". Subsection 97(4) reads:

> *(4) Where a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take that action.*

To substantiate his opinion, Mr. Minnis referred me to Tab 15, the 1970 Board decision in *Public Service Alliance of Canada and Canada (Treasury Board) (Engineering and Scientific Support Group – Technical Category)* (Board file 166-2-24) on a complaint alleging a failure on the part of the employer to implement a collective agreement within the time specified in section 56 (now section 57) of the PSSRA. In so doing, the Board considered the scope of subsection 96(4) (now subsection 97(4)) of the PSSRA at page 13:

> *... There is nothing in section 96(4)* [now 97(4)] *that limits the type of remedial action an adjudicator may prescribe ...*

He also referred me to Tab 17, a decision wherein the Supreme Court of Canada considered the scope of an adjudicator's remedial authority under subsection 61.5(9) of the Canada Labour Code (the Code). In *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038 Lamer J. stated at page 1072:

> *... Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. Section 61.5 is clearly a remedial provision and must accordingly be given a broad interpretation. ...*

[Adjudicator's note: Subsection 61.5(9) of the Code is now Division XIV, Unjust Dismissal, subsection 242(4)]

Mr. Minnis argued that subsection 97(4) of the PSSRA is similar to subsection 242(4) of the Code that gives an adjudicator the power to make a grievor whole again. Subsection 242(4) of the Code reads:

> *(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to*
>
> *(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;*
>
> *(b) reinstate the person in his employ; and*
>
> *(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.*

Mr. Minnis submitted that as an adjudicator appointed under the PSSRA I have broad powers to make the grievor whole again with a substantial award as is indicated in Tab 20, a decision of an adjudicator appointed under the Code in the matter of *George Willberg and Jo-Ann Trucking Ltd.*, Brooks, Alberta, (1982), that reads in part at pages 22 and 23:

. . .

> *The starting point is to recognize the "make whole" philosophy which underpins the section. The section should be applied in order to counteract the mischief at which it was aimed, namely the perceived inadequacies of the measure of damages in a common law wrongful dismissal action. At common law the philosophies underlying the assessment of damages are, first, to put the employee in the same position as if the contract had been performed and, second, the assumption that the employer would have performed his obligations in the manner least disadvantageous to himself. These philosophies are reflected in the fundamental principle that the employee can only recover employment benefits to which he is contractually entitled for the period of the lawful notice to terminate the contract. Consequently, compensation is not awarded for reasonable expectancies not based in the contract, nor for losses which accrue after the notice period, notwithstanding that such losses are attributable to the wrongful dismissal. The common law position is described critically in G. England, "Recent developments in wrongful dismissal laws and some pointers for reform" (1978), 16 Alta. L. Rev. 470, pp. 491-495. In order*

> *to cure that mischief, section 61.5(9)(c) should be applied so as to "make whole" the consequences of the dismissal, i.e. to compensate the employee for the real losses sustained as a result of the unlawful dismissal. This "make whole" philosophy, though sometimes not explicitly acknowledged, clearly underlies the remedial awards of most adjudicators.*
>
> . . .

Regarding my choice of remedy, Mr. Minnis asked me to review my earlier decision in this matter as to why I found the CSIS responsible for what Mr. Minnis called "bad faith by the employer" when it terminated Mr. Matthews' employment, particularly since I decided not to reinstate him. He referred me to an Ontario arbitration decision at Tab 18, *Re: Tenant Hotline and Peters and Gittens* (1983), 10 L.A.C. (3d) 130 at page 139, that reads in part:

> . . .
>
> *The point is that the right to continued employment is normally a much more tangible and valuable legal claim under a collective agreement than it ever was under an individual contract of employment, and, as a result, the discharge of an employee (especially one who has performed satisfactorily in the past) is a qualitatively more serious and detrimental event than it would be under the common law. That is why, from the earliest days of labour arbitration, arbitrators routinely directed reinstatement as well as compensation. The "just cause" clause provided employees with the kind of job security they lacked at common law. Today this response is so well entrenched that the British Columbia Labour Relations Board has recently suggested that (except in the most unusual and exceptional of circumstances) it would be inconsistent with the labour law principles embodied in the Labour Code, R.S.B.C. 1979, c. 212, if an employee unjustly discharged were not reinstated.*
>
> . . .

Counsel reminded me if I had reinstated Mr. Matthews, the grievor could have left CSIS this year after he turned 50 under the ERI Program.

With respect to compensation or damages, Mr. Minnis referred me to four decisions of adjudicators appointed under the PSSRA at Tabs 2, 6, 7 and 14 that awarded compensation ranging from six to 12 months' pay for employees with ranges

of one to 17 years of service. He considered this a broad range and asked me also to award appropriate compensation to Mr. Matthews.

In making my determination, Mr. Minnis argued I should be guided by the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers* [1997] 3 S.C.R. 701, Tab 19, and the five principles that are generally applied in the determination of a reasonable notice period referred to on page 737 of the decision as follows:

. . .

> *In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145:*
>
> *There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.*

Counsel added Mr. Wallace was 59 at the time and had 17 years' experience. Mr. Minnis argued that the bad faith conduct by CSIS in this case is an additional factor for me to weigh, as well as the vulnerability of Mr. Matthews, also referred to in *Wallace* (supra), pages 741 and 742 that read in part:

. . .

> *This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, Dickson C.J., writing for the majority of the Court, had occasion to comment on the nature of this relationship. At pp. 1051-52 he quoted with approval from P. Davies and M. Freedland, Kahn-Freund's Labour and the Law (3rd ed. 1983), at p. 18:*
>
> *[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination....*

> *This unequal balance of power led the majority of the Court in Slaight Communications, supra, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at p. 368:*
>
> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*
>
> *Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In "Aggravated Damages and the Employment Contract", supra, Schai noted at p. 346 that, "[w]hen this change is involuntary, the extent of our 'personal dislocation' is even greater".*
>
> *The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In Machtinger, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.*

Counsel said in 1997, the Supreme Court of Canada upheld the 24 months' notice period for Mr. Wallace as a ceiling.

Counsel then referred me to the decision of Wilkins J. of the Ontario Court (General Division) in *Kilpatrick v. Peterborough Civic Hospital* (1998), 38 O.R. (3d) 298 where the notice period ceiling was extended to 30 months. Mr. Kilpatrick was 53 years old with six years of service at the Peterborough Civic Hospital and had been induced to leave his place of employment to go to Peterborough. Mr. Minnis argued

since Mr. Matthews was almost 48 in 1996, and had close to seven years' service, he should get more notice, especially in light of my bad faith finding on the part of the CSIS.

Mr. Minnis referred back to the five principles in *Wallace* (supra) as they applied to Mr. Matthews as follows: (1) character of employment: Mr. Matthews is a professional who worked in the audit section; (2) length of service: Mr. Minnis asked me to consider all the years of employment in the Public Service by the grievor, that is, his time spent at CCA from 1973 to 1989, as well as his years at CSIS from October 1989 until April 1996. He noted that the grievor was allowed to buy back his earlier years of pensionable service when he joined CSIS, even though Mr. Matthews experienced a six month period of no employment in the Public Service in 1989; (3) age: Mr. Matthews was almost 48 when his employment status ended at CSIS in April 1996; (4) similar employment: It was a hard job market for the grievor to re-enter in 1995/96 and it took him 1½ years to get work at Agriculture and Agri-Food Canada as a term employee in spite of strong efforts to seek new employment; (5) training and qualifications: Mr. Matthews has a business diploma and part of his Certified General Account (CGA) designation, has lots of experience, and is bilingual.

Mr. Minnis concluded Mr. Matthews should have had seven to 10 months' notice, or 16 to 24 months' notice, depending on my determination of his length of employment in the Public Service. He referred me to Tab 23 as a guide in my determination of notice and argued I should use 22 years of service (16 at CCA and six at CSIS) for Mr. Matthews and award him 16 to 24 months' notice. He argued the cases cited at Tab 23 were all determined before the Supreme Court of Canada decision in *Wallace* (supra) and before the *Kilpatrick* (supra) decision.

Mr. Minnis added that the employer must be candid, truthful, and act in good faith, but did none of these things with Mr. Matthews. After reviewing part of my original determination, and in light of *Wallace* and *Kilpatrick* decisions (supra), Mr. Minnis concluded that I could extend the notice ceiling to 30.5 months especially in light of bad faith by CSIS. He reminded me that whatever period I decide, any award will be subject to normal deductions as well as a reduction due to the severance pay of $7,193.19 the grievor received. Counsel argued that as of April 18, 1998, Mr. Matthews' 50th birthday, he could have received a generous severance and an

unreduced pension at 50 rather than at age 60 under an ERI package. He reminded me Mr. Matthews said he would have taken the ERI.

In terms of mitigation, Mr. Minnis reminded me that the grievor sought other employment after he left CSIS, and that I would have to take into account an overlap of an extended notice period with his new term position at Agriculture and Agri-Food Canada.

Regarding benefits, counsel argued the grievor is entitled to benefits during an extended notice period such as: Canada Pension Plan employer contribution, golf course privileges through the Buffalo Golf Club, insurance programs (life, dental).

Regarding pension losses, Mr. Minnis referred me to Exhibit G-2, originally prepared in June 1998 for what he thought was going to be a summer hearing, but should now be extended to the December 1998 hearing date. Counsel argued two scenarios: firstly, loss of ERI entitlement; and secondly, loss of pension without ERI. Mr. Minnis referred to Exhibit G-2, page 2 that calculated "the present value of future pension payments on June 16, 1998 is equal to $256,221" if the grievor took his unreduced pension at age 50. He added if Mr. Matthews did not get ERI at age 50, but planned to start collecting his pension at age 60, according to Exhibit G-2, he would need an award of $341,551. Under his current circumstances, Mr. Matthews cannot get his pension until age 60. Mr. Minnis argued that common law cases have allowed benefits an employee would have received during a notice period to be awarded, including pension benefits. Counsel referred me to Tab 8, the decision of Foisy J. of the Alberta Queen's Bench in *Harris v. Robert Simpson Company Ltd.,* [1985] 1 W.W.R., 319, that reads in the head note in part:

> *If the defendant had given notice as required by law, the plaintiff would have enjoyed all the benefits of his employment during the period of notice, including the right to exercise the early retirement option. ...*

Mr. Minnis went on to quote page 329 of the same decision:

> . . .
>
> *See also Christie, Employment Law in Canada (1980), at p. 385.*

> *If an employee who has been wrongfully dismissed is to be put in the same position as if the contract had been performed, in which case he would have been given a reasonable period of notice of the employer's intentions, then it seems reasonable that such an employee should be not prejudiced by that wrongful dismissal. If the employee could properly have sought his pension benefits under a more advantageous characterization during that period of notice, prima facie he should be able to do so where the employer has wrongfully failed to give the employee such notice.*
>
> . . .

He also referred to page 330:

> . . .
>
> *The plaintiff's contention that such a deemed application be found has some support, as well, from the academic writers in the field of wrongful dismissal. Harris in Wrongful Dismissal, at p. 82, stated:*
>
> *"A related issue, yet to be litigated, would involve the employee's right to damages resulting from his termination at a time when he may, at his option, elect the benefits of early retirement at a full or discounted pension. One may assert that had the plaintiff received notice he would have maintained the option to receive retirement benefits within that period and, furthermore, would have been quite likely to exercise same. Presumably, the damages suffered would be equal to those benefits of early retirement of which, as a terminated employee, he has been deprived.*
>
> . . .

Mr. Minnis also referred to Tab 21, a decision of Robins J. of the Ontario High Court of Justice in *Zeggil v. Foundation Co. of Can.* (1980), 2 C.C.E.L. 164 wherein the head note reads:

> *... The plaintiff should also receive damages for the loss resulting from the early termination of his pension plan, particularly since, when terminated, he was within one year of qualifying as a fully-paid member of the plan. The loss represented the difference between the amount he was receiving and the amount he would have received, less the amount he would have contributed.*

Counsel reminded me if I find the notice period should be 30.5 months, Mr. Matthews would be 50, would have taken ERI and should be awarded $341,551

pension dollars under the authority of subsection 97(4) of the PSSRA. He added I can award less if I decide he should not get ERI. Mr. Minnis said I would have to accept certain assumptions under this scenario. A not unreasonable assumption, is that the grievor would have stayed at CSIS until age 50 and not have been terminated beforehand, and that he would have taken ERI as four others did from the audit section. He reminded me again that CSIS terminated Mr. Matthews contrary to its policies. Counsel argued that there was also a good chance, even if Mr. Matthews had been rated as an unsatisfactory employee, that he would have responded accordingly and improved his performance. He reminded me the CSIS never performed any performance reviews for Mr. Matthews. Counsel argued that in the end, I should give the grievor the benefit of the doubt on any or all assumptions, since he is the innocent injured party and the CSIS is to blame for this mess in the first place.

Counsel argued the reason he went to Federal Court on judicial review was to recover the $341,551 loss the grievor suffered by not getting ERI.

Mr. Minnis argued if I do not decide to award the ERI package to the grievor, he should at least receive a lump sum of $10,463 for loss of pension as a result of termination as is indicated in Mr. Martel's analysis on page 3 of Exhibit G-2.

With respect to non-pecuniary issues, Mr. Minnis requested; that I recommend Mr. Matthews be given an apology from the CSIS as was recommended in the *Low* decision (Board file 166-2-27825); that a letter of reference from the CSIS be written on behalf of the grievor; and that my initial decision be added to his personal file to show his vindication.

Regarding interest payments on monies owing, Mr. Minnis argued I should award interest on the monetary portion of my decision at the Federal Court rate from the date of my original decision, March 5, 1997. Counsel referred me to Tab 12, the decision of the Federal Court of Appeal in *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok* (1988) 22 C.C.E.L. 59 and argued I could award interest under subsection 97(4) of the PSSRA in order to make the grievor whole, especially in light of the CSIS treatment of Mr. Matthews. Mr. Justice Stone, on behalf of the Court, stated the following in relation to the scope of subsection 61.5(9) of the Code at page 74:

. . .

> *I take this to mean that it should have as its objective making a victim of unjust dismissal whole again in the way that an award of compensation or reinstatement, or both, would make him whole again in some circumstances. The adjudicator would seem entitled to resort to para. (c) to find something that, if ordered, would of itself, or in combination with either or both compensation and reinstatement, bring about that result. As I see it, compensation without interest thereon would fall short of that objective in the sense that the dismissal deprived the complainant of the use of the money withheld in consequence thereof. An award of interest would surely serve to remedy or, at very least, to counteract a consequence of the dismissal. I see no overriding reason for construing para. (c) so as to deny an adjudicator power to award interest in appropriate circumstances when its language does not require any such limitation.*
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> . . .

Regarding legal costs, Mr. Minnis referred me to two recent decisions of adjudicators appointed under the PSSRA, Tab 3, *Avey* (Board file 166-18-27611) and Tab 14, *McMorrow* (Board file 166-2-23967) that did not award legal costs but gave no reasons why legal costs were not awarded. Counsel disagreed with these decisions since he felt subsection 97(4) is wide open to interpretation, and since many other costs are awarded, he asked why cannot legal costs be one of them. He argued I should award legal costs especially since Mr. Matthews lost his job, was not reinstated by me and has had to pay all his own legal costs since he was not represented by a bargaining agent, something Mr. Minnis felt is discriminatory.

Counsel referred me to subsection 98(1) of the PSSRA to support his financial request for non-represented employees. Subsection 98(1) reads:

> ***98.*** *(1) Where an aggrieved employee is not represented in the adjudication by a bargaining agent, the costs of the adjudication shall be borne by the Board.*

Mr. Minnis argued if I accept the *Avey* and *McMorrow* (supra) reasoning, then there is no light at the end of the tunnel for Mr. Matthews regarding payment of legal costs. This would be discriminatory. He added that adjudicator Wilson in his decision in *Brady and C.B.C.*, a Canada Labour Code matter, File No. 84-6504, Tab 4, awarded legal costs. Mr. Wilson wrote in part on pages 12 and 13:

> *With regard to prejudgment interest and legal costs, the CBC argued only that a section 61.5 adjudicator has no*

> *jurisdiction to award legal costs. I disagree for two reasons: (1) the authority under the section is a broad remedial power having as its basic purpose to place the unjustly dismissed complainant in the position as close as possible to where he would have been but for the unjust dismissal. A court of law would be able to award prejudgment interest and costs in a wrongful dismissal case. To suggest that a section 61.5 adjudicator cannot provide the same remedies is to reduce the legislation to a shell and make ineffective this remedial procedure provided by the Parliament of Canada. Without costs and prejudgment interests the award would be virtually nullified; and, (2) other adjudicators have awarded costs.*

To strengthen his argument that I can and should award legal costs, Mr. Minnis referred me to Tab 16, a decision of adjudicator Beatty in *Re Cablecasting Ltd. - Graham Cable and Escott and O'Connor* (1984), 15 L.A.C. (3d) 245 that awarded legal costs. This decision reads in part at pages 246, 247 and 248:

> *... Indeed it should be noted with respect to the last decision that while the issue was not directly argued before the Federal Court of Appeal the latter did uphold the decision of the adjudicator in a judgment which explicitly took cognizance of that part of the adjudicator's award in which an order of costs was made [see 83 C.L.L.C. para. 14,009]*
>
> *On a simple review of these awards then, it seems beyond question that adjudicators have increasingly assumed the authority to award costs to complainants who are successful in securing relief under s. 61.5 of the Code. And, in my view, there is good reason both in the language of the statute and the policy behind it for their having done so. Thus, whether the language of s. 61.5(9)(c) is read literally or purposefully, it seems to me that the only interpretation it can reasonably bear is that Parliament did contemplate adjudicators exercising a discretion to order this kind of relief where it was appropriate to do so. That section is drafted in very broad language and permits adjudicators to require the employer: "To do any ... thing that it is equitable to require the employer to do in order to remedy ... any consequence of the dismissal". The operative words in that provision seem to me to be the empowering of adjudicators to do "any ... thing" to remedy "any ... consequence" (emphasis added). The range of relief authorized by that provision could not be broader and, in my view, easily extends to and embraces an award of costs. Equally, the reference to "any ... consequence" certainly is wide enough to include the substantial out-of-pocket expenses the complainants would otherwise be obliged to endure and which, as a matter of fact, follow directly from the employer's having failed to respect their rights under the Code.*

> *Moreover, beyond the broad terms used in s. 61.5(9)(c), it seems to me that the purpose and policy underlying the recognition of the job security rights which are protected by s. 61.5 of the Code, argue strongly that the interpretation which I have given to the literal words of that provision is the only one which the words can reasonably bear. Quite simply, were it otherwise, and were the complainants obliged to bear the legal costs associated with resisting their employer's violation of their rights under s. 61.5, they would not be fully compensated for the transgression of those rights and employers, correspondingly, would not be faced with the full incentives of respecting the entitlements of employees which the Parliament of Canada has determined they should have. Employees such as the complainants would, as a "consequence" of the employer's violation of their rights, be obliged to suffer a loss for which no relief would be given. They would be obliged to bear a substantial adverse financial consequence simply because they attempted to resist their employer's violation of their rights and insisted on their being reinstated with compensation. Such a consequence would be, in my view, demonstrably "inequitable" and would, as a corollary, permit the employer to flaunt the policy behind s. 61.5 without bearing the full costs associated with its unlawful behaviour. Put positively, requiring the employer to bear the legal costs associated with a complainant's enforcement of his or her rights under s. 61.5 acts as a further deterrent against the employer violating the rights of its employees set out in this section and of encouraging it to respect the policies and purposes of job security which it promotes.*
>
> *In the result, I am satisfied that read either literally or purposefully s. 61.5(9)(c) does permit an adjudicator to award legal costs where it is equitable to do so.*

Mr. Minnis reminded me again that it is within my discretion to award costs under the broad language of subsection 97(4) of the PSSRA that would create a deterrent regarding future employer actions, and would be similar to adjudicators who have awarded costs under the Code.

Counsel said in doing so, I will highlight the bad conduct by the CSIS toward Mr. Matthews, as well as the delays and disclosure problems caused by the CSIS not only in this hearing but in the original one, all of which led to increased legal costs for Mr. Matthews.

Mr. Minnis asked me to remain seized of any award that I make.

At this point, Mr. Normand asked to adjourn for the day since he could not finish his complete argument before having to leave for a personal reason.

Mr. Minnis objected and argued that this request was typical of another delay by the CSIS that would cost Mr. Matthews even more legal fees.

I granted the adjournment.

Argument for the Employer

Mr. Normand argued that in March 1989 when Mr. Matthews was laid off from CCA, he took a package, put his pension into an RRSP, and was no longer a public servant. He added that in October 1989, the grievor joined the CSIS and in a September 1995 major downsizing exercise, was laid off again following a reverse order of merit decision that Mr. Matthews did not contest. Mr. Normand added I ruled in March 1997, that the grievor's dismissal was unjust, not unlawful or illegal.

Regarding a remedy for loss of employment, Mr. Normand referred me to the decision of Darichuk J. of the Manitoba Court of Queen's Bench in *Graceffo v. Alitalia* [1995] 2 W.W.R. 351, who refers in paragraph 6 to payment offered by the employer for a six-month notice period from the date of termination; he refers in paragraph 12 to an entitlement to reasonable notice, and in paragraph 13, to an entitlement "in the alternative in the absence of due notice to payment of remuneration for the notice period." He noted that in this case, compensation equivalent to a 24-month notice period was awarded that began in January 1992, the month Mr. Graceffo was advised he would be terminated, that is Mr. Graceffo got six months' notice initially from his employer but was awarded an additional 18 months by the court. Mr. Normand argued therefore, any notice period I award, will have to take into consideration the six months Mr. Matthews was already awarded.

Mr. Normand argued that I should also look at the accompanying benefits of employment during the notice period and consider "pecuniary losses" only as is referred to in *Graceffo v. Alitalia* (supra), paragraph 17 and not personal expenses by Mr. Matthews. In doing so, I should be guided by Tab 20, the decision of the adjudicator in *Willberg and Jo-Ann Trucking Ltd.* (supra), issued on October 10, 1982

pursuant to section 61.5 of the *Canada Labour Code* that limits what I can examine. The adjudicator states at page 23:

> *... These philosophies are reflected in the fundamental principle that the employee can only recover employment benefits to which he is contractually entitled for the period of the lawful notice to terminate the contract. Consequently, compensation is not awarded for reasonable expectancies not based in the contract, nor for losses which accrue after the due notice period, notwithstanding that such losses are attributable to the wrongful dismissal.*
>
> . . .

Regarding the determination of a notice period, Mr. Normand argued the test for reasonable notice is "an objective one" as referred to in the decision of Nemetz C.J.B.C. of the British Columbia Supreme Court in *Steinicke v. Manning Press Ltd.* [1983] B.C.J. No. 282, with the applicable criteria to determine reasonable notice set forth in *Bardal v. Globe & Mail Ltd.* (supra). and also referred to in the *Wallace v. United Grain Growers Limited* (supra), Tab 19 by Mr. Minnis.

With respect to these criteria, Mr. Normand argued: Mr. Matthews had limited management experience (he only acted once for a Mr. Gagnon in 1993), and had no specific training for what he did; that I can only consider six years as his length of service since in 1989 when he left CCA, his career as a public servant ended and he was not asked to return by his former employer. Counsel referred me to the decision of Lowry J. of the British Columbia Supreme Court in *Swamy v. O'Bryan Hotels Ltd.* [1997] B.C.J. No. 2114, to substantiate his argument. Mr. Normand argued the fact that, when Mr. Matthews joined the CSIS six months after leaving CCA, and his pension plan was allowed to continue through a buy-back service, this is no indication that no interruption of employment in the federal Public Service occurred.

Counsel reminded me that Mr. Matthews was almost 48 at the time of his termination in April 1996.

Regarding the fourth criterion, that is the availability of similar employment, Mr. Normand argued the grievor was not specialized in any way, that there were jobs in the CSIS he could have qualified for in 1996, and that Mr. Matthews applied to numerous other places for work. Mr. Normand argued unlike *Kilpatrick* (supra), who

held “a position at the highest level of senior management”, Mr. Matthews did not hold such a position.

With respect to the bad faith reference in *Wallace* (supra) page 740, as being “another factor that is properly compensated for by an addition to the notice period”, and “inducement” (page 739) as a factor “to award damages at the high end of the scale”, Mr. Normand agreed that all of these factors amounted to reprehensible conduct by the employer, therefore Mr. Wallace was awarded 24 months' compensation in lieu of notice. He also agreed that the fact that Mr. Kilpatrick was aggressively recruited to go to another hospital but was eventually let go, was in the eyes of an Ontario judge, an “injustice in the extreme”.

However, Mr. Normand concluded the circumstances surrounding Mr. Matthews cannot be compared to those surrounding Mr. Wallace or Mr. Kilpatrick, and Mr. Minnis’ claim of bad faith by the CSIS is not applicable or comparable either. Counsel asked me to review my findings with respect to Mr. Matthews shortcomings from my original decision on pages 52, 53, 54 and 55, none of which were disputed by the grievor. Mr. Normand concluded that bad faith by the CSIS for not following its policies or to put Mr. Matthews on proper notice or using the Reverse Order of Merit (ROM) process to get him out, is a long way from allowing me to use bad faith by the CSIS to alter his notice period.

Mr. Normand did agree that, if anything, I could possibly add one to four months more to the grievor’s notice period based on six years of service. Mr. Normand argued if I decide the notice period should be based on 22 years of service (16 at CCA and six at CSIS) considering that Mr. Matthews was not a manager and was not over 50, I should award him a maximum of 12 months' notice. Counsel reminded me of the *Graceffo v. Alitalia* decision (supra), where Mr. Graceffo was 61, had 31 years with his employer, had supervisory duties, was a well respected, esteemed employee who was awarded 24 months' notice. Mr. Normand argued such was not the case with Mr. Matthews. He reminded me that Mr. Wallace who was 59, had 14 years with his employer and 25 years at a competitor also got 24 months' notice, and that Mr. Kilpatrick was in a senior management position unlike Mr. Matthews.

Mr. Normand outlined what he thought the grievor is entitled to as follows: dental benefits, only the difference between the CSIS plan and the grievor's wife's plan for whatever additional notice period I may award; life insurance is similar to dental, that is the difference that he would have paid at CSIS from what he paid privately for a possible extended notice period (see Exhibit G-3 as a guide); pension benefits also depend on a notice period extension.

Mr. Normand argued the $341,551 award reference in Exhibit G-2 is predicated on a notice extension to 30.5 months to cover a period of time up to the grievor's 50th birthday in April 1998 and the presumption that ERI would have been available at that time to Mr. Matthews who would also need to have had 10 years of employment in the Public Service. There is also no evidence that even if all of the above had fallen into place, or is deemed to have been in place by me, that the grievor's position would have been terminated in order to allow him to qualify for the ERI program in the first place.

Mr. Normand added that I cannot base my decision on "ifs", i.e. if Mr. Matthews had been disciplined, he might have behaved differently, but only on the "facts" before me. Counsel added that even if I award a further six months of notice, there is now no evidence before me what that amount should be.

Mr. Normand referred to Tab 21, the *Zeggil v. Foundation Co. of Can.* decision (supra) and noted that Mr. Zeggil was 64 at his termination of employment and got a notice period of one year to coincide with the arrival of his pension at age 65. Such is not the case for Mr. Matthews.

With respect to an interest award, Mr. Normand argued there is no jurisprudence on this under the PSSRA, and I would therefore be setting a precedent if I award interest. He argued that a similar situation applies if I award legal costs as requested.

In summary, Mr. Normand argued Mr. Matthews had serious shortcomings for which he was not disciplined "as maybe he should have been" and that he was awarded approximately $100,000 if my initial award of $70,000 is factored into the six months' notice plus severance he received for six years of CSIS service. Counsel felt my award was "a bit generous" and that I should now only award one to four months' additional compensation in lieu of notice. Regarding an apology, Mr. Normand referred to the decision in *Lo and Treasury Board,* (Board file 166-2-27825) that only recommended an

apology; he argued that a letter of recommendation in light of my earlier findings of the grievor's behaviour would be almost impossible to do; and finally, there is nothing that shows wrongdoing in the grievor's personnel file except my earlier decision.

Rebuttal Argument for the Grievor

Mr. Minnis argued that according to Tab 9, the decision of the Ontario Court of Appeal in *Helbig v. Oxford Warehousing Ltd.* (1985), 51 O.R. (2d) 421, the work performance of Mr. Matthews has no relevance to the calculation of notice period. He referred to page 431 that reads in part:

> *This Court has already stated in Harold Johnson v. General Tire Canada Ltd. (unreported, released April 22, 1985) that conduct of an employee, which is not sufficient to justify discharge, cannot be weighted against him in determining an appropriate severance time. Similarly, as here, the fact that the employee had made a significant contribution to the company is equally irrelevant because he was hired and paid to make a significant contribution.*

He also argued the onus had been on the employer to have made job offers to Mr. Matthews during his notice period. Counsel reminded me that, yes the grievor had an employment break between CCA and CSIS, but he did not leave CCA voluntarily.

Mr. Minnis also argued that a notice period should begin on April 1, 1996 and I should deem Mr. Matthews to have been an employee up to April 1, 1996 as his surplus letter from the original hearing, Exhibit G-1, Tab 35, dated September 19, 1995 referred.

Counsel reminded me my original award in March 1997 of $70,000 has never been received, and that the grievor's salary level was equivalent to a Chief which should be considered a management capacity. Mr. Minnis also argued that Mr. Matthews' unjust dismissal, as I determined earlier, is unlawful and therefore illegal since it contravenes the PSSRA.

Regarding pension benefits and loss calculations by the employer in Exhibit E-1, counsel reminded me that Ms. Garneau, the woman who prepared Exhibit E-1, is not an actuary and is therefore not entirely reliable. Mr. Minnis reminded me the ERI was available until March 1998, eighteen days before Mr. Matthews turned 50 and that four

of the grievor's colleagues took the ERI. It is reasonable to assume therefore that the CSIS would have asked Mr. Matthews to take it if he had still been there. Counsel agreed that as far as this is concerned, yes it is an assumption that I can accept or reject.

Mr. Minnis argued that Mr. Martel's work (Exhibit G-2) was based on a predicted June 1998 hearing date but I should now make my decision based on the December 1998 date, and that Mr. Martel's sound actuarial calculations are the only proper evidence before me to consider.

Mr. Minnis reminded me that in October 1989, when Mr. Matthews joined the CSIS, he had to buy back both his portion and the employer's portion of the six months' pension buy-back period.

Referring to *Swamy v. O'Bryan Hotels Ltd.* (supra) Mr. Minnis argued paragraph 12 supports his claim that the six month period between CCA and the CSIS should have no bearing on the notice period calculation.

Paragraph 12 reads:

> *In my view, it is not necessary to resolve the conflicts in the evidence because I do not consider either interruption there may have been should have any bearing on the determination of the notice period.*

He added Mr. Matthews was laid off and did not quit as Mr. Swamy did.

Mr. Minnis also said that the *Steinicke v. Manning Press Ltd.* decision (supra), paragraph 8 is based on common law propositions and does not apply to the CLC or to an adjudicator appointed under the PSSRA, since under either of these statutes, reinstatement is a remedy, whereas under the common law reinstatement is not a remedy. He concluded the "absolute right" referred to in paragraph 8 refers only to common law and not the federal arena. Paragraph 8 reads in part:

> *While my sympathies are with the Plaintiff on a personal basis, the law is clear that subject to specific contractual terms of employment, an employer has an absolute right not to continue to employ an employee. The employees remedy for loss of employment is limited to reasonable notice or pay in lieu thereof.*

Counsel reminded me that the *Graceffo v. Alitalia* (1994) decision (supra) was decided before the *Wallace* (1997) and *Kilpatrick* (1998) decisions (supra), and that cases since have allowed a 24 month notice ceiling. He also argued that the employer has the onus of proving a failure to mitigate, especially with respect to the availability of employment. He reminded me that a wrong had been done to Mr. Matthews as I determined by the bogus ROM exercise, and that I as a statutory adjudicator have the power to reinstate, whereas the common law does not provide such a right.

Mr. Minnis argued regarding pension loss, that if I award a significant notice period up to a period whereby the grievor could get ERI, I can award him the ERI loss under common law, and if I do not extend the notice period to take in ERI, I can still award him that loss to make him whole since it is a loss as a result of his termination.

Mr. Minnis added that the true test and standard that is to be met in the case before me is stated in the *Wallace* decision (supra), page 743 as follows:

> *The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.*

Mr. Minnis argued that Mr. Normand's reference to the *Willberg* decision (supra), page 23 has to be read in the context of the common law that does not apply in all the circumstances before me.

Counsel agreed that inducement and bad faith do not go hand in hand, but if Mr. Kilpatrick can be awarded 30 months' notice for inducement, then Mr. Matthews can be awarded 30 months for bad faith, since this bad faith by CSIS deprived Mr. Matthews of the ERI, which was an "injustice in the extreme" according to Mr. Minnis.

Counsel reminded me that I can award interest and legal costs if I am courageous. Lastly, Mr. Minnis spoke of the deliberate pattern of delay by the CSIS at the original hearing and before me during this hearing. These delays have been costly for Mr. Matthews and by the time it is all over, the grievor's legal costs will be $45,000.

Counsel concluded I should compensate him accordingly by ordering the CSIS to pay all costs, especially since the CSIS caused the need for hearings in the first place.

At the end of the hearing, I asked both parties to provide me, within two days, with what I called their "best case/worst case scenarios" with respect to remedy options. This documentation was received and has been added to the file.

Decision

Richard J., Federal Court Trial Division, (Court file T-623-97), dated December 8, 1997, ordered the following:

> *That part of the adjudicator's decision which fixes the amount of the damages awarded to the applicant is set aside and the adjudicator is directed to redetermine the amount of the damages after providing both the applicant and the respondent with an opportunity to make submissions and give evidence to the adjudicator on this specific issue.*

In my initial decision issued on March 5, 1997, I concluded that a Reverse Order of Merit exercise was designed to get rid of Mr. Matthews under the Workforce Adjustment Policy (WFAP), and that CSIS managers never properly took the bull by the horns to implement various personnel policies to deal with Mr. Matthews' shortcomings. I concluded, at page 54 of my decision:

. . .

> *based on the whole of the evidence that the employer acted in bad faith in arbitrarily ridding itself of the grievor under the guise of lay off. In effect, the grievor was terminated for disciplinary reasons.*

. . .

Even though I found, on page 55 of my original decision, that "... Mr. Matthews' overall conduct did not warrant the ultimate penalty of termination ...", I did not reinstate him as is the general rule under such circumstances. I awarded him damages in the amount of $70,000 in lieu of reinstatement. This award was made without the benefit of specific evidence and argument that I subsequently received as a result of the decision of Richard J. (supra).

This decision now addresses Richard J.'s order after receiving extensive and thorough arguments from the parties regarding the amount of damages I should or should not award. It would be easy for me to take the approach that even after hearing reasoned arguments to the contrary, I should award the same remedy as I did in my original decision. I believe, however, that this approach would be wrong and irresponsible unless I am satisfied that my original award is still appropriate. I have, therefore, thoroughly reviewed the evidence and the arguments now before me in this matter.

When Mr. Matthews left the CCA in March 1989, he ceased to be an employee in the federal Public Service. When he was hired by the CSIS, a separate employer, in October 1989, he restarted his career in the Public Service, but he was working without bargaining agent representation and he had no collective agreement to protect his rights as an employee or to guide me in this matter. The years of service, therefore, that I shall consider for the purposes of this award, are those he spent with the CSIS only; that is six and one-half years, and not his cumulative years of employment in the Public Service if I were to include previous service with the CCA.

I also do not believe that Mr. Matthews should receive compensation for being deprived of the possibility of taking advantage of the ERI program that Mr. Minnis argued I should award based on a variety of assumptions and “ifs”. The possibility of the grievor’s being in a position to take advantage of the ERI Program if his employment had not been wrongfully terminated at CSIS on April 1, 1996, is entirely too speculative in my opinion to justify an award of damages.

With regard to Mr. Minnis’ arguments concerning 'notice period' or 'reasonable notice', this concept only applies to terminations of employment governed by the common law, and not to terminations of employment of employees governed by the PSSRA. The principle at common law is that an employer can always terminate an employee’s employment for any or no reason provided the employer has given the employee reasonable notice of its intention to do so. The employer can require the employee to work during that notice period. However, the cases which come before the courts usually relate to an employee whose employment was terminated with little or no notice. In such a case where the court determines that the termination lacked just cause, the court usually awards the employee a sum of money equivalent to what the

employee would have been paid during the notice period. As to what a reasonable period may be will depend on the circumstances of each case.

When an employee is awarded compensation in lieu of reinstatement under the PSSRA, adjudicators look *by analogy* to the common law decisions for guidance regarding the appropriate amount. However, there is no question of there being a "notice period". That concept has no application under the PSSRA, nor it would appear under the *Canada Labour Code*. In this regard see the decision of the Federal Court of Appeal in *Alberta Wheat Pool and Konevsky* (1990) F.C.J. No. 877 to the effect that "the interpretation of paragraph 61.5(9) of the *Canada Labour Code* …. cannot be read down so as to limit the compensation that an adjudicator is empowered to award to an employee to the amount that could be claimed under the common law…" See also the decision of Nadon J. of the Federal Court, Trial Division in *Wolf Lake First Nation v. Young* (1997), 130 F.T.R. 115 wherein he states at page 130:

> *Subsection 242(4) of the* ***Code*** *is clear in its application; it is designed to fully compensate an employee who is unjustly dismissed. It is not limited to the amount of severance pay to which the employee is entitled. It is not calculated by determining the notice period which should have been given to the employee.*

These judicial pronouncements are founded on the specific wording of subsection 61.5(9) [now subsection 242(4)] of the *Canada Labour Code*, and there is no comparable language under the PSSRA. Mr. Minnis would have me believe that 'any action' under subsection 97(4) of the PSSRA, gives me carte blanche in an award, including the authority to award an amount for legal costs and interest. I do not agree since 'any action' can only be an action that is otherwise allowed by the PSSRA, which contains no provision which either specifically or by necessary implication authorizes an adjudicator appointed under the PSSRA to award either interest or legal costs when determining a grievance which has been referred to adjudication. If Parliament intended an adjudicator appointed under the PSSRA to have such broad authority, it would have said so.

With regard to interest and costs, no adjudicator appointed under the PSSRA has so far awarded them. Mr. Minnis would have me be 'courageous', to use his word, and award such costs. In assessing my courage, I am guided by statute, that is the PSSRA,

and by jurisprudence, in particular two key decisions of adjudicators appointed under the PSSRA. In 1984 then Deputy Chairperson Walter Nisbet determined that an adjudicator under the PSSRA had no authority to award interest to a successful grievor in the absence of a contractual or statutory provision granting him that authority: *Re Ogilvie and Treasury Board* 15 L.A.C. (3d) 405. In 1994, then Deputy Chairperson, Yvon Tarte, after reviewing the remedial authorities under the *Crown Liability Act*, the *Federal Court Act*, the PSSRA, and the *Ogilvie* decision (supra), reached a similar conclusion in *Puxley* (Board file 166-2-22284), page 11 that reads in part:

> *I have reached this conclusion even though it appears somewhat incongruous that a grievor may be forced to seek in another forum, the interest on an award by an adjudicator under the Public Service Staff Relations Act. Be that as it may, I must conclude that I have no authority to order the payment interest* (sic) *to Mr. Puxley.*

I agree with the conclusion reached by Messrs. Nisbet and Tarte.

Regarding costs, generally speaking when a person is awarded legal costs by a court or tribunal, he is reimbursed for only part of what he spent. In this regard, I refer to the decision of the Federal Court of Appeal in *Hallé v. Bell Canada* (1989), 99 N.R. 149 at page 156:

> *The applicant further contended that the adjudicator exceeded his jurisdiction by awarding the respondent the sum of $10,000 to partly reimburse her for her legal costs. This argument appears to me to be without basis. Since the judgment of this court in Banca Nationale del Lavora of Canada Limited v. Lee-Shanok ….., I think it is beyond question that under s. 61.5(9)(c) (now s. 242(4)(c)) of the Canada Labour Code, an adjudicator may direct an employer to pay an unjustly dismissed employee a reasonable amount to compensate the employee for part of the legal costs which she had to bear. (emphasis added)*

Counsel for the grievor referred to subsection 98(1) of the PSSRA presumably as support for his request for an award of costs. This subsection refers solely to exempting an unrepresented employee from the possibility of being required to pay a portion of the Board's costs as envisaged by subsection 98(2).

The Canada Gazette, Part II, February 18, 1998, Federal Court Rules outline what the Federal Court can award regarding costs. There are no such rules or statutory provisions governing adjudicators appointed under the PSSRA.

In my original *Matthews* decision I concluded the CSIS had not followed established policies, procedures and guidelines in dealing with Mr. Matthews properly, and in the end, acted in bad faith when his employment was terminated. As an unrepresented employee, Mr. Matthews hired private counsel to represent him and therefore incurred considerable personal expenses. This CSIS behaviour, the loss of pension and benefits, coupled with the need to hire private counsel, an expensive process at the best of times, amount to exceptional circumstances that Mr. Matthews has faced throughout his ordeal.

In light of all the evidence adduced and the submissions of the parties I have therefore decided to award Mr. Matthews an amount of $95,500 as compensation in lieu of reinstatement. He is to receive this amount in addition to any severance pay and other benefits which he may have received from CSIS upon the termination of his employment. In making this award, I have taken into consideration my original determination, the employer's bad faith as in *Wallace* (supra), and the principles articulated by McRuer C.J.H.C. in *Bardall v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at page 145. I have not been persuaded to increase the original amount more than this as Mr. Minnis argued relying on the decision in *Kilpatrick v Peterborough Civic Hospital (*supra*)*, because Mr. Matthews was never induced to leave one workplace for another in 1989. Nor was he a senior manager or an employee held in high regard. He also only had six and one-half years of service with the CSIS.

Regarding the grievor's request for non-pecuniary remedies, I do not believe that a letter of reference would be appropriate under all the circumstances and probably not helpful to Mr. Matthews at this point in time. Nor do I believe that an apology from the CSIS should be recommended. Regarding the request from Mr. Minnis to alter the grievor's file, there is no apparent need to order this since Mr. Normand said there is nothing that shows wrongdoing in the grievor's personnel file except for my earlier decision which is a matter of public record.

This award is not intended to be punitive, but fair and reasonable under the circumstances.

I shall remain seized with this decision pending any difficulties the parties may have in its implementation.

J. Barry Turner
Board Member

OTTAWA, February 18, 1999.