File: 166-2-27258

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN QUIGLEY

Grievor

and

TREASURY BOARD
(Citizenship and Immigration Canada)

Employer

Before: P. Chodos, Deputy Chairperson

For the Grievor: Himself

For the Employer: Roger Lafrenière, Counsel

Heard at Toronto, Ontario,
September 9 and 10, 1996.

Mr. Quigley purported to file a grievance dated April 2, 1996, which noted the following:

> *I grieve management's decision not to deal with or resolve any and all issues that were to be addressed before the Federal Court of Canada; File 1007/85, as agreed through submissions of the Treasury Board to the Federal Court.*

As corrective action Mr. Quigley requests:

> *That all damages including interest be paid to me*
> *that all other issues be resolved in my favour*
> *that I be present at the Final Level.*

The employer responded to Mr. Quigley that it did not consider the grievance to be valid, among other reasons because it was outside the time frames stipulated in the relevant collective agreement. Mr. M.J. Molloy, the person authorized to reply to this grievance at the second level, advised Mr. Quigley by letter dated May 10, 1996 that his grievance would be considered as a complaint, rather than a valid grievance. Mr. Molloy noted in his letter that "... it concerns matters which occurred in 1982 and 1983 in which you already lodged a grievance (On-83-880) with respect to damages arising out of your 1982 termination. This grievance was denied at the final level and never referred to adjudication." On May 6, 1996, prior to receipt of Mr. Molloy's letter, Mr. Quigley submitted to the Board a Form 14 Reference to Adjudication in respect of his grievance. The employer advised the Board that it objects to the Board assuming jurisdiction in this matter, a position which it reiterated at this hearing. The undersigned adjudicator agreed to hear evidence and argument relating to the objection to jurisdiction and to issue a ruling on that matter prior to addressing the grievance on its merits, if necessary.

The facts concerning the question of jurisdiction are not in dispute, and the parties were content to rely entirely on documentary evidence. The relevant history goes back some 14 years. In 1982 the grievor was terminated by his department allegedly for reasons of misconduct. Mr. Quigley filed a grievance in respect of his termination, in addition, he sought a *Writ of Certiorari* from the Federal Court. In a decision dated February 22, 1983 Mr. Justice Mahoney of the Federal Court quashed the Deputy Minister's decision to terminate Mr. Quigley's employment. Following his reinstatement as a result of the Federal Court decision, Mr. Quigley submitted two

grievances (On-83-879, 880) in which he claimed a number of heads of damages arising out of his discharge, as well as reimbursement of his legal costs (see Exhibit E-3). The employer responded to the grievances, including up to the final level, rejecting his claim for additional compensation. Mr. Quigley did not pursue these grievances any further, but rather, in 1985 filed a Statement of Claim (Exhibit E-10) with the Federal Court seeking damages for losses he allegedly incurred as a result of his termination. This matter came before Madame Justice Tremblay-Lamer in October 1994. Prior to the hearing Her Ladyship advised the parties as to concerns she had respecting the Court's jurisdiction to adjudicate a claim for damages in the circumstances of that case. The parties were asked to address the issue of the Court's jurisdiction, and did so on October 18, 1994. In the course of that proceeding counsel for the employer made the following submissions, which Mr. Quigley is relying on in support of his current claim (Exhibit E-12, Transcript of Proceedings, at page 9):

> *Mr. Quigley was discharged. There was a decision to discharge him. There were consequences that flowed from that decision, including the loss of pay, the loss of overtime and other consequences which he alleges.*
>
> *He then, at that point, had a choice: To grieve it and take it to adjudication. At an adjudication, he could have been reinstated, could have been granted his overtime, if it was at the third level already in December and very close to hearing, his other losses would have been uniform and he would not have had legal fees, because he would have had minimal representation.*
>
> *Instead, he chose his remedy in Federal Court to quash that decision. So if we cut off the decision that has caused those consequences, the decision is not there, but the consequences are still there, and that seems to be the way his action is framed, but the cause of action is still the discharge, the unlawful termination of his employment.*
>
> *It would be our position that those consequences can still be dealt with through the adjudication process, and I think that the wording of the statute, the Public Service Staff Relations Act, section 91, is broad enough to encompass any claim that he would have to deal with those different issues.*
>
> *The loss of overtime, certainly, I mean is a direct consequence of his discharge and he could have taken that to grievance and to adjudication.*

> *Certainly, even something like damages for mental distress which was a part of the claim in de Mercado, the decision was that that should have been taken, as well, through the adjudication process and it was certainly open to Mr. Quigley to bring that portion of his claim into the grievance and adjudication stream, as well.*
>
> *Based on that reasoning, then, I would agree with Your Honour's question, that there is no jurisdiction in this Court to consider the matter. Mr. Quigley should have exhausted his remedies elsewhere.*

Madame Justice Tremblay-Lamer concluded that the Federal Court had no jurisdiction to address Mr. Quigley's action in damages and accordingly dismissed the claim (ref. Judgment dated October 19, 1994, Court File T-1007-85). On August 7, 1995 Mr. Thomas Kelsey, a lawyer for Mr. Quigley, wrote to the Department of Justice inquiring whether, in light of the submissions made to the Federal Court, the employer "... would be willing to send the entire matter back for an adjudication?". It would appear that there was no response to this letter, and this lack of response eventually precipitated the current grievance.

It should be noted that for reasons unrelated to his termination in 1982 Mr. Quigley was again discharged from the Public Service effective August 10, 1988. This termination was the subject of an adjudication decision rendered by the undersigned on March 28, 1989 (Board file no. 166-2-18034); that adjudication decision dismissed Mr. Quigley's grievance; accordingly, Mr. Quigley has not been employed with the Public Service of Canada since 1988.

Argument

Counsel for the employer submitted a Memorandum of Fact and Law; at page 6 of this document is a succinct summary of the employer's argument:

> ***A) Whether the grievor is an employee***
>
> *18. Section 2 of the Public Service Staff Relations Act defines an employee as meaning a person employed in the Public Service. The right to present a grievance under section 91 and to refer the matter to adjudication under section 92 is given to an employee. At the time that the grievor presented the within grievance (April 2, 1996), he had ceased to be a public servant for almost eight years and was*

therefore not entitled to either present the grievance or refer it to adjudication.

B) Compliance with the grievance procedure

19. Both the collective agreement and sections 91 and 92 of the Public Service Staff Relations Act require an employee to exhaust the grievance process before referring the matter to adjudication. There is no evidence that the grievor complied with the grievance process. The Reference to Adjudication (Form 14) filed by the grievor suggests that his grievance was submitted at the first level of the grievance process on April 2, 1996. There is also a suggestion that the grievance was presented at the final level of the grievance process on that same day. This form is prima facie evidence that the grievor has failed to comply with the grievance procedure.

C) Bargaining agent approval

20. The grievance raises issues of damages as set out in the Federal Court action. The relief claimed includes lost overtime which is a collective agreement issue. Subsections 91(2) and 92(2) of the Public Service Staff Relations Act require that grievances dealing with the collective agreement must have the approval of the bargaining agent concerned and the bargaining agent must express its willingness to represent the employee at adjudication. Neither of these conditions have been met by the grievor.

D) Timeliness

21. Both collective agreements and the P.S.S.R.B. Regulations and Rules of Procedure have fixed time-limits within which a grievance is to be filed and within which the various steps established by the grievance procedure must be taken. Generally, a grievance must be presented at the first level of the grievance procedure not later than the twenty-fifth (25th) day after the date on which an employee is notified orally or in writing or on which he first becomes aware of the action or circumstances giving rise to grievance. The within grievance is clearly untimely since the employer communicated its decision in writing on July 14, 1983.

22. Section 63 of the P.S.S.R.B. Regulations and Rules of Procedure provides for relief against non-compliance with the time-limits set by contract or by law. The Board is thereby vested with the authority to extend the time to present a grievance. The grievor has failed to seek an extension of time notwithstanding the fact that the employer raised the issue of

> *timeliness in a letter to the grievor dated May 10, 1996 and a letter to the Board dated May 27, 1996.*
>
> ***E) Abandonment***
>
> *23. An abandonment of grievance occurs when there has been total inaction in processing it with the intention of not proceeding further. The abandonment of a grievance is a bar to the adjudication of a second grievance which deals with the same subject-matter. In 1983, the grievor failed to refer his grievance claiming damages to adjudication. It is no longer open to him to revive or resubmit this identical claim.*

In response to the employer's arguments Mr. Quigley made the following submissions. He maintained that he was in fact an employee when he was discharged in 1982, and when he grieved that discharge as well as the question of damages and compensation for his legal costs. He noted that he was not relying on the representations from Department of Justice counsel but rather on the matters arising out of his dismissal in 1982; however, he did view the representations made to the Federal Court in 1994 as a *bona fide* offer to allow the issues raised in his action for damages to go before the Public Service Staff Relations Board.

Mr. Quigley also submitted that he had in fact complied with the grievance procedure in 1983; however, he concluded at that time that the proper avenue for redress was an action in damages in the Federal Court. He noted that it was only with the 1994 judgment that the parties became aware that this was the wrong avenue of redress. Mr. Quigley cited the Supreme Court decision in Weber v. Ontario Hydro (1995), 95 CLLC 141,231 as support for the proposition that an employee in his circumstances should not be denied any redress, and should have access to adjudication in respect of disputes arising out of his employment. He noted that even the Department of Justice did not raise the question of jurisdiction in respect of the action in damages before the Federal Court.

With respect to the question of timeliness, Mr. Quigley submitted that he never indicated an intention to sideline these issues or to let them drop; rather, he chose a different forum, and what he then believed was a more appropriate remedy, by pursuing the matter in the courts rather than referring his grievances to adjudication. He observed as well that his filing of the grievances in 1983 were within the appropriate time frames, with the exception of the referral to adjudication.

Mr. Quigley stated that he wishes to seek an extension of time pursuant to section 63 of the Board's Regulations; in support of this request; he noted that although 14 years have passed since the filing of his grievance in 1982 the only person prejudiced by this delay was himself; this case does not depend on witnesses relying on memory, but rather can be addressed solely by means of documents which are readily available. Mr. Quigley also submitted that he does not need the concurrence of his bargaining agent as this matter involves a dismissal and not contract interpretation.

Mr. Quigley further observed that he had diligently sought, following the Court decision in 1994, to have the employer concur with referring this matter to the Public Service Staff Relations Board; it was only with the failure of the employer to respond to this request that he brought the matter back to the Board by means of the 1996 grievance. He noted that this matter is not a new grievance but a reference to adjudication of the original dispute in 1983, the grievance form he filed in 1996 was merely a means of bringing the matter to the Board's attention.

In reply to Mr. Quigley's submissions Mr. Lafrenière submitted that the transcripts of the court proceedings of 1994 (Exhibit E-12) at pages 6 and 7 indicate Mr. Quigley's intention to abandon the grievances filed in 1983; he made a conscious choice to pursue another avenue. Counsel also noted that since the 1994 decision there is no evidence as to why Mr. Quigley did not act on a timely basis. Mr. Lafrenière observed that this current grievance is an attempt to reactivate the grievance of 1983. It is not possible to reactivate one grievance by means of another; the appropriate remedy is to seek an application for extension of time. As early as the beginning of 1996 Mr. Quigley was well aware that the employer was of the view that his current grievance was out of time. Notwithstanding this, Mr. Quigley made no attempt to make an application to the Board for an extension of time. Furthermore there is no evidence put forward as to why there was a delay. Counsel for the employer maintained that the Weber decision (supra) does not create a retroactive right to proceed to adjudication. Mr. Quigley's realization that he made an error in 1983 in not proceeding to adjudication is not grounds for reviving that grievance. Counsel submitted that there has to be some finality to the grievance and adjudication process. In support of his submissions Mr. Lafrenière cited Brown and Beatty, Canadian Labour Arbitration, third edition, at paragraph 2:3230.

Reasons for Decision

In essence, it is Mr. Quigley's submission that the grievances which he filed in 1983 claiming damages and compensation for his legal costs should go forward to adjudication in light of the judgment of the Federal Court in 1994 that the Court had no jurisdiction to entertain his action for damages in respect of the same matters. There is no dispute that the subject-matter of the current grievance is exactly the same as the grievances which were filed in 1983; in fact, Mr. Quigley freely acknowledged that his only objective in filing the 1996 grievance, and submitting the form 14 Reference to Adjudication, was to bring the matters raised in the 1983 grievances before the Board.

Mr. Quigley is attempting to buttress his case by referring to the representations made before the Federal Court by the Department of Justice Counsel, to the effect that the matters before the Court are more properly within the purview of the Public Service Staff Relations Board. I do not view those submissions as an offer by the employer to retroactively submit these matters to the Board. Nor did Her Ladyship dismiss Mr. Quigley's claim on the understanding that the employer would deal with the claim for damages through the grievance process. In any event, the representations of counsel cannot be the basis of a new grievance separate and apart from the original grievances of 1983 when the facts giving rise to those grievances occurred. Accordingly, it must be determined whether the 1983 grievances can now be heard by an adjudicator under the Public Service Staff Relations Act. Mr. Quigley acknowledged that he chose not to pursue the adjudication process in respect of his grievance. Rather, he decided that the more appropriate or advantageous forum for pursuing his claim would be the Federal Court.

Undoubtedly one of the impediments that Mr. Quigley must overcome, in the circumstances of this case, is the question of timeliness. It is the height of understatement to observe that he has exceeded the time limits provided in the relevant collective agreement, and in the Board's Regulations. In the course of this hearing Mr. Quigley requested that the Board exercise its discretion under section 63 to provide relief from the effects of the time limits. Apart from any questions as to whether a Board Member sitting as adjudicator can address a request under section 63, and whether such an application can be heard without proper notice to the

employer, in my view there are no grounds for the Board exercising its authority under section 63 of the Regulations. It is expected that an employee pursuing a grievance will adhere to the time frames applicable to the grievance and adjudication process; section 63 allows the Board to relieve against the strict application of these time limits; however, were the Board to exercise this authority indiscriminately it would quickly render the time limits meaningless, to the ultimate detriment of the entire grievance and adjudication process. Accordingly, the Board, when faced with a request under section 63, must determine if there are special circumstances which warrant the Board's intervention. One important consideration is whether there was a reasonable degree of due diligence notwithstanding the failure to meet the time limits; obviously, the length of the delay weighs heavily in making that determination. In this instance the delay was of quite extraordinary duration. The only rationale given for the delay was Mr. Quigley's assumption that he could obtain redress elsewhere. Even accepting that this is a satisfactory basis for exercising the Board's discretion under section 63, there is no evidence of any sort that would explain, firstly, why the Statement of Claim was not filed until 1985, and secondly, why the action was not heard until 1994. In my view, Mr. Quigley as the applicant under section 63 has the onus of providing some explanation concerning these lengthy delays; none was forthcoming from him.

I believe the Board's decision in the Coleman case (Board file 149-2-26) is instructive and has some parallels with the instant matter. That case also concerned an application for extension of time under the Board's Regulations. In that case the applicant had been dismissed and was seeking to file a grievance eight months outside the stipulated time limits; the employer had acknowledged that it would not be prejudiced in presenting its case by reason of the delay in filing the grievance. In dismissing the application then Deputy Chairman Kates stated the following:

> *(p. 29) In examining the evidence the Board is of the view that the reasons advanced by Mr. Coleman for the delay in filing a grievance (assuming he acted with promptness between the period of July and October 1979) do not raise a credible and persuasive excuse for acceding to his request for an extension of the time limit under the collective agreement for the presentation of a grievance. The evidence indicates that Mr. Coleman did not fail to present a grievance as a result of ignorance or neglect on his part but because on or about January 16th he made a conscious, premeditated*

> *decision to forego the presentation of a grievance as prescribed by the grievance procedure. The Board is satisfied that Mr. Coleman had a legitimate cause for filing a grievance at that time and consciously and willingly resolved to sit on his rights by failing to exploit to his advantage the procedural vehicle available to him. It was only when the applicant learned of his acquittal of the criminal charges that he changed his mind. By that time, however, he had by his actions renounced any intention to challenge the employer's treatment of his status as an employee.*
> ...
>
> *In short, the grievor resolved as early as January 1979 to forego filing a grievance and as a result of this decision he ought to be precluded from reviving a right that he had in effect abandoned.*

See also the Board's decisions in Rattew (Board file 149 -2-107) and Miller (Board file 149-2-149).

Mr. Quigley maintains that he had never given up on his attempt to pursue his claim for damages; however, there is an important distinction between pursuing a claim on the one hand, and following an avenue of redress on the other. While he may not have abandoned his claim in damages, any reasonable person would conclude in the circumstances that he did abandon his grievances. He was well aware that the grievance and adjudication procedures were available to him. It is not at all uncommon for an employee to pursue a grievance up to the final level and then decide not to take the additional step of referring the matter to adjudication. When an employee chooses not to submit a grievance to adjudication in a timely manner, particularly when no intention to make a reference to adjudication is manifested for a period of 13 years, the employer has every right to assume that the grievor has abandoned his grievance. I agree with Mr. Lafrenière that it is in the best interest of labour relations that there be some finality in respect of the exercise of the right to grieve under the collective agreement and under the Act. If it cannot be concluded in these circumstances that the grievances have been abandoned, one is at a loss to envisage any circumstance where this would be so.

Undoubtedly, Mr. Quigley is disappointed that yet another avenue of potential redress has been closed to him; however, this is as a result of a choice which he himself made back in 1983. I do not believe that the Weber judgment (supra) is of any

assistance to Mr. Quigley. In essence the Supreme Court stated in that case that where a dispute arises out of an employment matter the proper forum for resolution of that dispute is by way of arbitration as provided in the appropriate collective agreement. In fact, this decision merely underlines and supports the conclusion reached by Madame Justice Tremblay-Lamer that the Court has no jurisdiction to entertain an action in damages in these circumstances. It does not however give licence to a grievor to revive a grievance which he chose not to pursue to adjudication some 13 years ago.

For the reasons noted above, this grievance is dismissed for want of jurisdiction.

P. Chodos,
Deputy Chairperson.

OTTAWA, October 1, 1996.