File: 166-2-27631

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ANDREW FRÈVE

Grievor

and

TREASURY BOARD
(Agriculture and Agri-Food Canada)

Employer

Before: Guy Giguère, Board Member

For the Grievor: Pierrette Gosselin, Counsel, Professional Institute of the Public Service of Canada

For the Employer: Marie-Claude Couture, Counsel

Heard in Montréal, Quebec,
August 24 to 28, 1998
Written arguments submitted on October 19, November 9 and December 1, 1998
Additional submissions on June 10, 1999.

On March 26, 1996, during a meeting with Dr. Demars, Director, Saint-Jean-sur-Richelieu Horticulture Research and Development Centre (hereafter referred to as the HRDC), Andrew Frève was informed that, as a result of budget cutbacks, his position had been declared surplus. At that meeting, Dr. Demars read a letter that he subsequently gave to Mr. Frève, in which he explained the reasons that led him to declare the position surplus. In that letter of March 26, 1996 (Exhibit G-1), he stated specifically:

> [Translation]
>
> . . .
>
> *In light of ever-increasing budget constraints and the fact that the program for the genetic improvement of crucifers you are involved in is not a priority and could lead to significant potential costs in the future, we have decided not to pursue this program.*
>
> *For all of these reasons and because of the events that preceded them, your position has been declared surplus to our organization. The paid surplus period applicable to you will begin on April 1, 1996 and end on September 30, 1996.*
>
> *The federal government has put in place several new options for employees whose positions have been declared surplus. I would like to introduce them to you for your consideration. Further information on the following options is attached:*
>
> - *Early Departure Incentive (EDI)*
> - *Lump sum payment(s) under the Work Force Adjustment Directive (WFAD)*
> - *Priority for appointment within the Public Service.*
>
> . . .

On April 4, 1996, following his layoff, Mr. Frève filed the grievance which is the subject of this decision. Mr. Frève gave the following reasons for his grievance:

[Translation]

The employer is contravening the purpose as well as the provisions of the WorkForce Adjustment Directive by abolishing my position. This decision is simply an excuse to justify my dismissal because I filed complaints of harassment.

Mr. Frève requested the following corrective action in his grievance:

[Translation]

(1) that the "surplus" designation be rescinded;

(2) that I be assigned an appropriate project and budget;

(3) that I suffer no loss of pay or benefits, as applicable.

On December 27, 1996, Mr. Frève's grievance was dismissed at the final level of the departmental grievance procedure. Jane Roszell, Human Resources Branch, Agriculture and Agri-Food Canada (AAC), gave the following reason:

[Translation]

. . .

Based on all of the information received, I believe that Dr. Demars acted in good faith. Consequently, the declaration of your position as surplus does not contravene the Work Force Adjustment Directive and does not constitute a dismissal in disguise.

. . .

At the request of the parties, a mediation session was held on December 19, 1997 regarding this grievance and another complaint by Mr. Frève, but no settlement was reached. The grievance hearing was set for February 23 to 27, 1998, but, in response to the employer's request for a postponement, the hearing was finally set and took place on August 24 to 28, 1998.

In a letter dated August 10, 1998, Ms. Couture informed the Public Service Staff Relations Board, as well as Ms. Gosselin, that she intended to object to the adjudicator's jurisdiction to hear the grievance at the outset of the hearing. She stated in that letter that the grievance could not be adjudicated for the following reasons:

[Translation]

. . .

The employer argues that this grievance cannot be adjudicated because, since the decision to declare the grievor's position surplus was made under the terms of the Public Sector Compensation Act, *it cannot be referred to adjudication pursuant to subsection 92(1) of the* Public Service Staff Relations Act. *It is an administrative decision, made in good faith. It is not in any way a disciplinary decision or a decision made pursuant to paragraphs 11(2)(f) or (g) of the* Financial Administration Act.

. . .

On August 12, 1998, Ms. Gosselin addressed her reply to the Board, stating:

[Translation]

. . .

Recent case law gives the grievance adjudicator full jurisdiction to hear the facts of such a case, that is, a laid-off employee who alleges constructive dismissal.

We intend to submit evidence to that effect and we will be glad to file further arguments at the hearing on August 24, 1998, if necessary.

. . .

At the start of the hearing on August 24, 1998, Ms. Couture raised an objection with respect to the adjudicator's jurisdiction to hear the grievance. In support of her objection, Ms. Couture referred to the decision of Noël J. of the Federal Court in *Canada (Treasury Board) v. Rinaldi*, 127 F.T.R. 60 (Court file no. T-761-96). For her part, Ms. Gosselin argued that the adjudicator had jurisdiction to hear the evidence and, in support of her position, referred to the decision of Adjudicator Cloutier in *Marilla Lo* (Board file 166-2-27825). Ms. Gosselin also stated that the decision of Noël J. in *Rinaldi* stipulated that the adjudicator had full jurisdiction to hear a grievance where the employer had used the abolishment of a position under the *Public Service Employment Act* (*PSEA*) as the reason for layoff.

After hearing the arguments of the parties, I informed them that I had taken note of Ms. Couture's objection but that I would have to hear all of the evidence regarding the merits of the grievance in order to render a decision on my jurisdiction to decide this matter. I also informed the parties that the burden to prove that the layoff was a disguised disciplinary action rested with Mr. Frève's representative. Ms. Gosselin requested the exclusion of witnesses. Ms. Couture agreed to the request, although she indicated that she needed Dr. Demars and Martin Koskinene to assist her during the hearing. Ms. Gosselin objected to Dr. Demars' presence during the witnesses' testimony because it would tarnish the credibility of his own testimony and could prejudice the testimony of Dr. Demars' employees.

I indicated to Ms. Couture that, in my view, the presence of one person to assist her during the course of the hearing was sufficient and that it was advisable that this person be Mr. Koskinene, which addressed the objection to Dr. Demars' presence. Ms. Couture replied that she preferred Dr. Demars' assistance, who was very familiar with the file, rather than that of Martin Koskinene, who is a staff relations employee at ACC in Ottawa. After hearing the arguments of the parties, I informed them that I would uphold Ms. Gosselin's objection to Dr. Demars' presence[1] since his presence might hinder the unfettered testimony of Dr. Demars employees during the hearing, that the credibility of his testimony would not be tarnished and should Ms. Couture require breaks to consult with Dr. Demars on issues of a technical nature regarding the HRDC, I would give her that opportunity. Ms. Couture stated that her Code of Ethics prevented her from consulting a witness, but Ms. Gosselin indicated that she would not raise it.

The parties began their opening statements. Ms. Gosselin stated that the employer used the budget cutbacks to declare Andrew Frève's position surplus, when in fact it was a constructive dismissal.

Ms. Gosselin stated that she planned to show that, first, Andrew Frève is a phytopathologist and not a geneticist, and that his expertise, training and publications

[1] See in this regard, *Canadian Labour Arbitration*, 3rd Edition, Brown & Beatty, Canada Law Books, 3:2630.

lie mainly in the field of plant pathology (vegetables and fruits) and not genetics; second, the 1995-1996 to 1997-1998 program review did not include cuts or abatement to the vegetable production program to which he had been assigned since his arrival at the HRDC; and third, the termination of the genetic mapping research program did not justify declaring the employee surplus since his involvement in the project on the genetic breeding of crucifers represented only 20% of his time. Furthermore, another HRDC researcher, Dr. Benoit Landry, received preferential treatment in the context of the cuts compared to Andrew Frève.

After hearing Ms. Gosselin's argument, I pointed out to her that, in her opening statement, she had not mentioned anything about a disciplinary action that had led to Mr. Frève's termination of employment and, in order to reply to Ms. Couture's objection, she was required to show such disciplinary action. Ms. Gosselin stated that she would actually show that a disciplinary action had led to Mr. Frève's layoff and, in fact, it was a disguised dismissal.

Ms. Couture indicated that, for the adjudicator to have jurisdiction, the grievor had to do more than simply show bad faith on the part of the employer: he has to prove that the layoff was not a genuine layoff under the provisions of section 29 of the *PSEA*. Further, the budget cuts announced in 1995 forced the employer to terminate the crucifers genetic breeding program since the program was at the bottom of the priority list. Thus, the employer intended to show that, first, the grievor was hired as a breeder by the HRDC, although he also had knowledge in the field of pathology; second, due to budget cuts and the low priority given to the development of new varieties of crucifers, the employer decided to declare surplus the position held by Mr. Frève and that decision was in no way related to the complaints of harassment filed by the grievor; and third, the employer intended to prove that it showed good faith after the grievor's position was declared surplus in March 1996 and that, in fact, Mr. Frève has not been replaced.

Thirteen witnesses were heard, seven on behalf of Mr. Frève and six for the employer. Forty-seven exhibits were filed in evidence by the employer and forty-five by the grievor. The hearing lasted five days and, given the nature of the case and the time

elapsed, I asked the parties to submit their arguments in writing. Ms. Gosselin's arguments were submitted on October 19, 1998, those of Ms. Couture on November 9, 1998, and Ms. Gosselin's reply on December 1, 1998. As a result of a new fact coming to light after the hearing of the grievance, Ms. Couture filed additional arguments on June 10, 1999. Ms. Gosselin had until July 2, 1999 to comment on them but declined to do so.

Request for Transfer to the HRDC

After completing a Bachelor's degree in bio-agronomy (phytology) at Laval University in 1975, Mr. Frève was hired by AAC in 1977 at La Pocatière Research Farm. He continued his Master's studies and received his degree in plant biology (pathology) in 1980. Since 1977, Mr. Frève's work at La Pocatière Farm has been in the fields of genetic breeding and pathology of the potato (Exhibits G-8 and G-14). In 1987, Mr. Frève learned that the potato breeding program at La Pocatière was not a priority and that it would be closed down in a few years. As a matter of fact, at that time, La Pocatière Research Farm had been given the mandate to become the country's Eastern Research Centre for sheep production and the Fredericton Research Centre in New Brunswick was awarded the national mandate for potato breeding.

On June 1, 1990, Mr. Frève submitted a request for transfer, which was brought to the attention of Dr. Yvon Martel (Exhibit G-13), Director General, Eastern Region, Research Branch at AAC on June 8, 1990. Two years later on April 13, 1992, having been unsuccessful with his transfer request, Mr. Frève wrote to Dr. Brian Morrissey, then Chief of the AAC Research Branch to ask his assistance (Exhibit G-14). Mr. Frève knew Dr. Morrissey from a case that had involved AAC and Dr. Morrissey had later written to him expressing his appreciation. In his letter of April 13, 1992, Mr. Frève informed Dr. Morrissey that the potato program would be closing down in 1993-1994, that the responses to his requests for transfer had been evasive and that it had even been suggested that he shift to sheep production. Furthermore, Mr. Frève emphasized that his family situation was being negatively affected by the uncertainty of his future and that he was interested in a transfer to L'Assomption Farm or the HRDC. He also mentioned that he had been interested in a pathologist position in St-Jean, available in 1991, but as he did not have a Ph.D. he could not obtain that position.

As a result of this letter, Dr. Demars met with Mr. Frève on July 15, 1992. Dr. Demars subsequently sent a Memorandum to Dr. Yvon Martel, dated July 20, 1992 (Exhibit E-44), in which he discussed the possibility of Mr. Frève's integration;

> [Translation]
>
> . . .
>
> *I do not see the need for him to have a Ph.D.*
>
> . . .
>
> *Andrew is interested in genetic breeding, phytopathology or management or a combination of these fields. With the retirement of Dr. Chiang in crucifer genetic breeding, and given the presence of Benoit Landry in genetic mapping and the need of producers for vegetable cultivars designed for Quebec, consideration could be given to developing new varieties (e.g. lettuce, celery, crucifers) made for Northeast America (Canada and the United States). There is still a need to determine whether it would be possible to find or develop an entity for seed increase and marketing.*
>
> . . .

Mr. Frève testified that, throughout his career, he had indicated his interest in pursuing his doctoral studies at the employer's expense as several of his colleagues had done. Dr. Martel testified that the situation changed in the 80s and AAC was no longer paying for employees to continue their education, unless there was a need for it. In his testimony, Dr. Martel referred to Dr. Demars' letter of July 20, 1992 (Exhibit E-44) and indicated that a Ph.D. was not necessary for the position held by Mr. Frève at the HRDC.

On August 24, 1992, Dr. Martel wrote to Mr. Frève to confirm his transfer to the HRDC on April 1, 1993 (Exhibit G-12), and the conditions thereof:

[Translation]

. . .

It is agreed that you will spend the first year to wrap up your research work and prepare to begin active research. You will receive technical assistance as of April 1994. It is also agreed that your departure from La Pocatière will coincide with the end of your involvement in potato research.

. . .

Mr. Frève testified that, before he started working at the HRDC, he had a strained relationship with the Director of La Pocatière Farm, Dr. Julien Proulx, because the latter was involved in a relationship with a female colleague. Mr. Frève therefore requested to be transferred earlier to the HRDC, which was granted, and he began in January 1993. Mr. Frève also testified that, during this period, that is shortly before and after the transfer, he was experiencing personal problems and he and his wife separated in the summer of 1993, a few months after his transfer to the HRDC.

Crucifer Work at the HRDC (Prior to the 1995 Budget)

In the fall of 1993, Dr. Odile Carisse, who was preparing a project on crucifer black rot, asked Mr. Frève to cooperate on the project. The project was essentially conducted by Dr. Carisse and was to be submitted to the Conseil des recherches en pêche et en agro-alimentaire du Québec (CORPAQ) for funding. Unfortunately, the project never got off the ground, although it was pursued later in a different context.

On January 21, 1994, Dr. Demars informed Dr. Landry, Dr. Carisse and Mr. Frève that the Executive of the Association des Jardiniers Maraîchers du Québec (AJMQ) was coming to the HRDC on February 22, 1994 and enclosed an agenda (Exhibit E-3). On the agenda for the meeting, Dr. Demars indicated (under Item 6) that:

[Translation]

. . .

6. Possible areas of cooperation

- *Crucifer clubroot*
  - *genetic improvement /Landry*
  - *other solutions Frève/Carisse*
- *Fungicides Frève/Carisse*

. . .

On the same day, in a Memorandum to Dr. Landry (Exhibit E-9), copied to Mr. Frève, Dr. Demars stated that he wanted to present at the meeting what [Translation] "we could do working together in the area of genetic breeding of crucifers". In a Memorandum to Mr. Frève, copied to Dr. Carisse (Exhibit E-10), Dr. Demars asked Mr. Frève to work with Dr. Carisse to come up with some solutions to crucifer clubroot, other than "breeding", which he was assigning to Dr. Landry. After the meeting with the AJMQ, Dr. Demars asked Mr. Frève and Dr. Landry, on April 7, 1994 (Exhibit G-4), [Translation] "to work together as a team to review the genetic resources we have and propose new avenues of research".

Dr. Landry defined genetic breeding as improving a species' resistance towards various diseases. The breeder must be familiar with diseases, sources of resistance and, consequently, phytopathology. Mr. Frève's task was to familiarize himself with the documentation and to classify the genetic resources that had been developed by Dr. Chiang, an HRDC researcher, who had recently retired. As for the other steps, they involved making a primary selection and then assessing the resistance. Dr. Landry helped the breeder be more specific through the use of molecular markers that are now part of all genetic breeding. The work is long range, taking potentially more than 15 years to develop new species.

Andrew Frève submitted a research project entitled "Improvement of crucifer varieties" and on March 30, 1994, Mr. Chagnon, Assistant Director, HRDC, informed him that the committee in charge of assessing projects had rejected it. The committee

included Dr. Carisse, Dr. Landry and Mr. Chagnon, among others. Mr. Chagnon suggested that Mr. Frève re-submit the project after making some changes. On April 6, 1994, Mr. Frève submitted a new version of his project and on May 12, 1994, a committee comprised of Dr. Carisse, Dr. Landry, Dr. Demars, Mr. Chagnon and two other researchers, recommended that part of Mr. Frève's project be approved, subject to certain amendments. On May 30, 1994, Mr. Frève made changes to the project, which now bore the new title: "Improvement of crucifer varieties through cultivation practices, genetic mapping and the control of clubroot and black rot". The project included the genetic mapping and clubroot control components that had been part of the AJMQ project. Furthermore, Mr. Frève testified that the black rot component came from the project drafted by Dr. Carisse for the CORPAQ and which she had turned over to him. On June 29, 1994, Mr. Chagnon informed Mr. Frève (Exhibit G-47, bundled) that the experimental designs for black rot had not been approved, that Dr. Demars had approved his project for a one-year period, and that a review would be conducted in February 1995 on the progress achieved.

Work on the Potato at the HRDC (Prior to the 1995 Budget)

Mr. Frève testified that he was to devote his first year at the HRDC to completing his work on the potato and familiarizing himself with new projects. However, more than a year after his arrival at the HRDC, that is, on March 28, 1994, Mr. Frève wrote to Dr. Martel reporting very serious problems with the description of the potato strains and asking to continue working on that project (Exhibit E-28):

> [Translation]
>
> . . .
>
> *Therefore, I request that the material being assessed in Canada and elsewhere, and that which will come from this program be made my entire scientific responsibility. That I supervise and carry out plant description work and other work related to genetic breeding, such as roguing, licensing, and publication of descriptions in long established journals, as well as contacts with testing officials elsewhere in the country and abroad (AAC in country, Potatoes Canada, Exporbec). That I describe these varieties further to requests and funding from those making the requests. The APPPTEQ is prepared to make a financial contribution to this work and enquires about the annual cost: communications on this matter in 1992 were too fast, but in 1993 they are ready to invest funds.*

. . .

On May 10, 1994, Dr. Proulx discussed this letter over the telephone with Mr. Frève (Exhibit E-28) and, on May 16, 1994, wrote to him saying that he had always intended to acknowledge Mr. Frève's contribution when the varieties were licensed, but that Mr. Frève's involvement was to end with his departure from La Pocatière (Exhibit G-16). Dr. Proulx also stated that he had received help from Fredericton researchers in licensing Mr. Frève's best varieties and asked him to send some information in this regard.

[Translation]

. . .

To this end, I asked you to send us all the files, information and electronic records related to the breeding part of the program. We will likely need your assistance in accessing the electronic records and providing us with the necessary training to prepare the tables.

. . .

On November 8, 1994, Mr. Frève wrote to Dr. Martel again to point out that several events confirmed his slim chances of receiving the credit due to him for his work on the potato program at La Pocatière Farm from 1978 to 1994 (Exhibit E-29). On November 29, 1994, Dr. Martel replied to Mr. Frève [Translation] "that any communication you will have concerning potatoes will be done under the signature of your Director, if it is to go outside the Centre" (Exhibit E-30).

Mr. Frève testified that Dr. Demars was offended by his letters of March 28, 1994 (Exhibit E-30) and November 29, 1994 (Exhibit E-28) to Dr. Martel. [Translation] "He does not like it when I contact my superiors. He told me: I am your boss".

On November 18, 1994, Dr. Demars asked Mr. Frève to destroy a letter dealing with a confidential matter addressed to a colleague at La Pocatière (Exhibit E-27a). But on December 5, 1994, Mr. Frève replied that his professional ethics prevented him from destroying the letter and that, if the employer considered it necessary, it could destroy it itself, without his consent (Exhibit E-27b).

Performance Appraisal and the 1995 Budget

On December 21, 1994, Dr. Demars gave Mr. Frève his performance appraisal in which his work was rated as satisfactory (Exhibit E-32). However, after several meetings and discussions, the appraisal was amended. Mr. Frève finally signed his performance appraisal on May 10, 1995 with a fully satisfactory rating.

On February 27, 1995, Minister Paul Martin announced in his budget major cutbacks in the Public Service in the area of departmental spending. A document appended to the budget entitled, "Securing Our Future in Agriculture and Agri-Food", announced the closing down of La Pocatière and L'Assomption Farms, along with the fact that the HRDC would assume national responsibility for vegetables (ExhibitG-33). In a departmental document entitled "Research Branch Program Adjustments 95-96 to 97-98", it was stated that, as a result of the program review, the HRDC small fruits program and the small fruits and ornamental plants programs at L'Assomption Research Farm would be closed down (Exhibit E-4). However, Drs. Demars and Martel explained that, as a result of pressure from the ornamental industry, two researcher positions had been retained but would be relocated to the HRDC due to additional funds. Since Dr. Demars was in a relationship with one of the researchers, the position would report directly to Dr. Martel. In a document entitled, "Research Branch", it was reported that the staff cuts in the Branch would take place over a two-year period beginning on April 1, 1995 (Exhibit E-2, page 20).

From then on, a climate of uncertainty, if not panic, moved into the HRDC because, while L'Assomption Farm would be closed, the resulting savings were not enough to meet the cutbacks announced by the government.

Dr. Demars testified that, as a result of the 1995 Budget, he was required to cut $650,000 and the termination of the small fruits programs at L'Assomption only accounted for about $300,000; he was therefore required to make additional cuts of approximately $350,000 in other programs, such as the fruits and vegetable programs. To this end, Dr. Demars used the Early Retirement Incentive (ERI) and the Early Departure Incentive (EDI) to help him make these cuts, which were to take place over a two-year period.

In a letter dated March 7, 1995 to all staff, Dr. Demars stated that the ERI was intended for staff 50 years or older who, on a voluntary basis, wished to retire, which

might then open positions for those directly affected by the cutbacks who wanted to remain (Exhibit G-2). He also indicated that training would be provided to those interested in taking advantage of the incentive to go into business and that, in the near future, the terms of the EDI would be announced and might also create opportunities.

Ms. Couture submitted a book of documents from the employer, including three documents that explained the programs available to employees whose positions were declared surplus: the Order on the EDI Program, the Work Force Adjustment Directive (WFAD) and Unpaid Surplus Status. Ms. Gosselin submitted a series of documents explaining these programs (Exhibit E-2, bundled).

These documents show that an employee whose position was declared surplus would receive a letter informing him of that decision, that during a period of a maximum of six months he would have paid surplus status and that various options were available to him. These options were the EDI, the ERI, lump sum payments under the WFAD and priority rights to appointment within the Public Service. If the employee opted for the EDI or ERI, he had to inform the department within sixty days of the start of the paid surplus period.

Chronology of Events (After the 1995 Budget)

On April 19, 1995, following a meeting held the day before in his office, Mr. Chagnon sent a Memorandum to Mr. Frève outlining certain problems in the presentation of his research paper (Exhibit G-47, bundled)

> [Translation]
>
> . . .
>
> *The study that you submitted last year was approved for one year. It was to be reviewed in February 1995 based on the progress made during the first year.*
>
> *In early October 1994, you were requested, as were the other researchers, to send me an annual progress report on your project for February 7. I also asked you to update your paper and to provide me with a revised copy.*
>
> *On February 1, I informed all researchers that the date for delivery of the reports was extended to February 21, 1995.*

To date, I have received neither your annual report nor the updated version of your paper.

A scientific assessment committee met yesterday morning to determine the value of approving the continuation of your study.

As a result of that meeting, the Director asked me to inform you of the following facts:

1. *Continuation of your study has not been approved.*

2. *You are to provide me with your annual progress report and a new project by April 28, 1995 at 1:00 p.m.*

3. *Your budget is frozen until the new project has been approved.*

4. *Dr. Benoît Landry will be responsible for communications with the Association des Jardiniers Maraîchers du Québec.*

I suggest that you set aside all activities and devote your efforts to producing the best possible documents.

. . .

The members of the project assessment committee for 1995 were Dr. Carisse, Dr. Côté, Dr. Landry, Dr. Demars and Mr. Chagnon and their comments were attached to Mr. Chagnon's Memorandum of April 19, 1995 (Exhibit G-47). Mr. Frève then submitted a new research project entitled "Control of Crucifer Clubroot" on April 28, 1995 (Exhibit E-19) in which he stated, in the third paragraph on page 2, that [Translation] "because of my training in phytopathology and my work in genetic breeding, I will be able to head this new program".

On May 10, 1995, Mr. Chagnon informed Mr. Frève by Memorandum that his revised project entitled "Control of Crucifer Clubroot" had been rejected by the committee and asked him at the same time for his comments. A request for an outside assessment was then made to two researchers who assessed the validity of Mr. Frève's research project. On June 1, 1995, Mr. Chagnon informed Mr. Frève that his research project, as revised, had again been refused. Mr. Chagnon gave the following reasons in his memo:

[Translation]

. . .

> *The information in your reply of May 18 and your letter of May 29 was not sufficient to enable the committee to change its decision. Like you, the members of the committee also consider crucifer clubroot to be a major problem and that research is needed to solve this problem. However, the project as you have described it, has serious shortcomings as explained in my Memorandum of May 10. The basic assumptions, experimental approach, implementation and experimental designs are not properly justified or described.*
>
> *All of these elements lead us to believe that you would not be able to complete such a project with satisfactory results. The committee is therefore unable to recommend approval of your paper. [. . .]*

. . .

The research agreement on crucifers with the AJMQ continued to evolve and, following a draft agreement submitted to the AJMQ by Dr. Demars, a meeting was held on May 12, 1995 with the General Manager of the AJMQ, Alain Gravel: Dr. Demars, Dr. Landry and Mr. Gravel attended the meeting. Dr. Demars did not invite Mr. Frève to the meeting and, afterwards, he asked Dr. Carisse and Dr. Tremblay, an HRDC researcher, to develop new components for the AJMQ project. Dr. Carisse was to look after the black rot component, which was similar to the project she had submitted to the CORPAQ in 1993 and which was initially included in Mr. Frève's research project, the experimental designs of which had not been approved by Dr. Demars in June 1994. Dr. Tremblay's component dealt with the impact of agricultural lime and green fertilizers on crucifer fertility and clubroot. On May 16, 1995, Dr. Tremblay informed Dr. Demars that he had obtained Mr. Frève's help on the clubroot component and identified the latter as a participant to his project (Exhibit G-38).

Dr. Landry subsequently called a meeting of the various researchers cooperating to the AJMQ research agreement, namely, Dr. Tremblay, Dr. Carisse, Dr. Landry and Mr. Frève. It was agreed that Mr. Frève would provide Dr. Landry with a document, several pages in length, on his component of the AJMQ agreement by Thursday morning, May 25, 1995. Mr. Frève's component in the AJMQ agreement was similar to his research project approved in June 1994, specifically, the control of clubroot by the soil’s PH level use of cultivated farm crops, such as rye. Mr. Frève testified that he did not turn in his component of the AJMQ project on time because he was wondering about the project's funding and he no longer trusted Dr. Carisse and Dr. Landry, who

were part of the committee that had rejected his research project. On May 26, 1995, Dr. Landry sent him a Memorandum submitted in evidence as Exhibit G-6:

> [Translation]
>
> . . .
>
> *It was agreed at the meeting on Tuesday, May 23, 1995 with N. Tremblay, O. Carisse, you and me that you would provide me with your completed (1-2 pages), amended and approved portion (after discussing it with Dr. N. Tremblay to include any necessary changes) of the joint project with the Association des Jardiniers Maraîchers no later than Thursday morning, May 25, 1995.*
>
> *I went to see you on Thursday morning, May 25, but you were not finished and assured me it would be ready at noon. At 1:30 p.m. I returned to your office to ask for your portion and it was not ready. I told you that it was crucial that I have your portion before the end of the day because the completed project had to be submitted to the Association by the end of the day Friday.*
>
> *This is now Friday morning and I still have not received your portion of the project and Dr. Tremblay has not even seen it in order to make the final revisions.*
>
> *In order not to jeopardize our relationship with the Association des Jardiniers Maraîchers and the project involving three other researchers from our Centre, I must respect the set deadlines. I must therefore remove your portion of the project to be submitted to the Association des Jardiniers Maraîchers. I am sorry.*
>
> . . .

This agreement was particularly important for the survival of the HRDC because it was part of the Matching Research Initiative (MRI) that Minister Martin had launched in his Budget. Under this program each dollar invested by a partner would be matched by the Department. On May 29, 1995, a few days after Dr. Landry's Memorandum, Mr. Frève filed an harassment complaint against Dr. Demars and on June 2, 1995, one against Dr. Julien Proulx. On June 27, 1995, AAC and AJMQ signed a joint three-year research agreement for $300,000, on crucifer clubroot and black rot (Exhibits E-35 and E-6).

Following the rejection of his research project and the removal of his component from the AJMQ research agreement, Mr. Frève still continued to work with Dr. Landry, Dr. Tremblay and Dr. Carisse on their component of the AJMQ research agreement.

Mr. Frève was also required to carry out some greenhouse experiments and to publish papers. He even provided Dr. Demars with a list, dated November 23, 1995, of the work to be done (Exhibit G-40).

Dr. Landry testified that he left the HRDC for the private sector because of the 1995 Budget. [Translation] "I thought it was terrible. In a completely non-discriminatory manner, researchers, whether good or bad, were being cut. I knew it was not going well, I felt I had to move to Saskatoon. It made no sense. I wanted to do my share". In response to Ms. Couture's question about the March 7, 1995 letter from Dr. Demars to all staff about the ERI (Exhibit G-2), Dr. Landry testified: [Translation] "I decided to leave; they can abolish me".

On October 13, 1995, Dr. Demars gave Dr. Landry a letter informing him that his position had been declared surplus (Exhibit G-32). In that letter, Dr. Landry was told of his six-month paid surplus period and the various options available to him as an employee whose position had been declared surplus. Those options were ERI, EDI, lump sum payments under the WFAD and priority rights to an appointment in the Public Service. Dr. Demars testified that he did not give the reasons why the position was declared surplus because he had discussed it with Dr. Landry. Dr. Landry resigned the same day and accepted the EDI. The following Monday, October 16, 1995, Dr. Landry was appointed Vice-President and CEO of DNA Landmarks Inc., which leased HRDC premises under an agreement with AAC from October 16, 1995 to October 15, 1996 for an amount of $19,167.67 plus GST and QST (Exhibit E-13). Dr. Landry explained that he was a minor shareholder in DNA Landmarks Inc., a subsidiary of the Svalof Weibull company, which he knew when he was an AAC employee. He stated that, nowadays, breeding is a long-term project which can be funded by multinational corporations like Monsento: [Translation] "it is the private sector that is doing the breeding now. You cannot compete with the private sector".

After he left the HRDC, Dr. Landry maintained his relationship with the AJMQ project and, under an agreement signed on March 20, 1996, he undertook to pursue his work and achieve certain set objectives in exchange for a total compensation of $25,000, to be paid in three installments, upon the submission of annual reports (Exhibit E-11). Dr. Landry testified that he carried out this project at minimal cost for

AAC, which he described as "at cost". Dr. Demars sent a Memorandum to Andrew Frève on November 2, 1995 telling him that Dr. Landry would continue to work on the AJMQ project (Exhibit G-7):

> [Translation]
>
> . . .
>
> *With respect to the project with the Association des Jardiniers Maraîchers, the portion involving B. Landry will be pursued even though he is no longer an employee of Agriculture and Agri-Food Canada.*
>
> *To enable him to continue working on his portion and to enable you to discuss the work, I have given him a copy of your report on the field, greenhouse and growth cabinet experiments.*
>
> . . .

Dr. Landry testified that this report from Mr. Frève was incomprehensible and that he was only given part of it. Dr. Carisse also testified that she had difficulty understanding the work done by Mr. Frève because he had coded his cultivar assessments with his own system. Dr. Carisse explained that, usually, with an electronic file, the decoding was very fast, about 10 minutes, but that Mr. Frève had changed the code for each test, which is contrary to established procedure. On February 12, 1996, Mr. Frève met with Dr. Carisse and Dr. Landry about the crucifer clubroot work at the request of Dr. Demars because Dr. Carisse could not understand his electronic database. Mr. Frève explained that he was, in fact, no longer part of the team at that time. [Translation] "I had already been excluded at the time of the meeting. I explained what I had done, the correlations. I did exactly what I was supposed to do". On February 14, 1996, Mr. Frève sent the minutes of the meeting to Dr. Carisse and Dr. Landry, with a copy to Dr. Demars (Exhibits G-21 and G-22). In a subsequent Memorandum, Dr. Demars blamed Mr. Frève for sending the report (Exhibit E-26):

[Translation]

. . .

Your colleagues have trouble understanding how a simple meeting could become an inquisition and that they would have to sign a document attesting to each word they said. This behaviour will certainly not encourage them to work with you.

Your were not asked on Friday to redo the work outlined in the progress report submitted to me on October 27, 1995. You were simply asked to provide the correlation between the numbers in the various reports so that it would be easier for the reader to understand.

. . .

On February 14, 1996, Mr. Frève wrote to Dr. Morrissey to complain of events following the harassment complaints he had filed against Dr. Demars and Dr. Proulx on May 29, 1995 and June 2, 1995 (Exhibit E-36, bundled). On February 20, 1996, Dr. Demars met with Mr. Frève and asked him to stop contacting Dr. Morrissey directly about these complaints. Following this meeting, Mr. Frève asked Dr. Demars to confirm this directive to him in writing (Exhibit E-31), which the latter did on February 21, 1996 (Exhibit E-36, bundled):

[Translation]

. . .

If you have correspondence about your harassment complaints, it should be sent to Marie-France Langlois, Director, Human Resources, Agriculture and Agri-Food Canada in Montreal.

All other correspondence should be routed through the normal hierarchical structure, that is, my office.

Dr. Jacques Daneau witnessed this verbal warning.

I must also inform you that, should you not comply with this directive, you could be subject to disciplinary action.

. . .

In his testimony, Mr. Frève described the state of mind he was in when he filed all of the harassment complaints: [Translation] "the way I chose to defend myself was to file complaints rather than to take a gun like the Fabrikant incident. I regret filing a complaint against Dr. Tarn, that is not a way to defend oneself". He also expressed his

regrets about the other complaints, namely, the one against Dr. Martel and the subsequent complaints he filed with the Order of Agrologists against his colleagues (Exhibits G-23 and G-24).

In his testimony, Dr. Demars stated that, toward the end of February 1996, Marie-France Langlois called him to tell him that the report on the harassment complaints filed by Mr. Frève against him found that there had been no harassment. Dr. Demars added that he received the report on or about March 20, 1996 (Exhibits G-27 and G-28) and Ms. Couture wanted to enter the investigation report as evidence. Ms. Gosselin objected on the grounds that it was hearsay. This objection was sustained because producing a report is not in itself proof of its contents. As a result, only the report's covering page was admitted in evidence to establish that Dr. Demars had received an investigation report.[2]

On February 20, 1996, Dr. Demars sent a Memorandum to Mr. Frève requesting the missing information on potato strains (Exhibit G-19):

> [Translation]
>
> . . .
>
> *Appended is a list of the strains for which we are missing lineage information in order to complete the material you provided earlier.*
>
> *Please send me this information by Friday, February 23, 1996. Do not send this information directly to Dr. Tarn as you did last time.*
>
> . . .

On February 23, 1996, Mr. Frève replied in writing to Dr. Demars stating that Dr. Richard Tarn of Fredericton had already been provided with the list of potato strains (PV) on December 22, 1995 (Exhibit G-20):

[2] See to this effect *Collective Agreement Arbitration in Canada*, 3rd Edition, Palmer & Palmer, pages 84 to 86; *Re United Automobile Workers, Local 27 and Northern Electric Co. Ltd.* (1971), 22 L.A.C. 163 (Weatherhill).

[Translation]

. . .

(. . .) *The mandatory coding used was for the purposes specified in the letter attached to the list. In December, I was told that the lineage would be used for selection purposes. This coding made the selection possible. As for the other information, please refer to the letter of December 22, 1995.*

Your request concerning the lineage of the PV strains and the request that you personally be provided with this information today, the 23rd, forces me to take action against Dr. Richard Tarn. The comments in the letter of December 22, 1995 were very clear and as a breeder and a geneticist, Dr. Richard Tarn knew the implications of his interference on my career.(. . .)

. . .

Further to this letter, Mr. Frève filed a harassment complaint with Dr. Morrissey against Dr. Richard Tarn on February 28, 1996 (Exhibit G-18, bundled). In that letter, Mr. Frève complained that Dr. Tarn took credit for Mr. Frève's work on potato strains. He also stated that he had sent all of the information requested to Dr. Tarn on December 22, 1995 and that he had explained to him the reason for the coding and a number of new elements.

[Translation]

. . .

(. . .) *He knew that he had less than 50% of the information needed to make the selection and he did it anyway. His selection was incomplete and resulted in the elimination of potentially interesting strains. He was not familiar with the test sites, the climate, the edaphic conditions and the behaviour during the other years of selection.*

> *Lastly, in February 1996, Dr. Richard Tarn requested to be provided with the correlation between the lineages he had selected and the codes I had used. However, in December 1995, I had been very clear in explaining the reasons for the coding and my observations. Dr. Richard Tarn knew that by taking such action he was interfering with my career, taking part of my credit, and affecting my reputation; he might even be able to earn monetary benefits for his research or for himself personally (fees).*
>
> . . .

On February 29, 1996, Mr. Frève wrote again to Dr. Morrissey, this time to file a complaint of harassment against Dr. Martel concerning the way in which the latter had dealt with the previous complaints, including the ones against Dr. Demars and Dr. Proulx (Exhibit G-18, bundled).

Dr. Demars testified that he called Mr. Frève to a meeting on March 13, 1996 to obtain information on the PV strains. Mr. Chagnon was also present and before the meeting started, Mr. Frève asked to tape record the discussion, which Dr. Demars refused to do. According to minutes prepared by Mr. Frève (Exhibit E-25), Dr. Demars asked Mr. Frève to decode the lineage of the PV strains sent to Dr. Tarn and Dr. Demars did not understand the reason for the coding. Dr. Demars told Mr. Frève that his refusal to provide this information could lead to disciplinary action. In the minutes, Mr. Frève admitted that he had coded the material and gave his reason for refusing to decode it: [Translation] "Personally, I have enough correspondence to justify the reasons for not decoding this material and to want to protect the employer".

Mr. Frève testified that during the meeting [Translation] "Dr. Demars was red and aggressive, he swore at me". Dr. Demars testified that he got red in the face, that he raised his voice and that he also swore, but it was not directed at Mr. Frève: [Translation] "(. . .) but I did swear, (. . .) I was impatient, it was vital to the employer and it was in his own interest, I did not understand why he refused to provide the information".

During that meeting, Dr. Demars also mentioned the harassment complaint that Mr. Frève had filed against him. Mr. Frève pointed out that the door was open and that the complaint was confidential; Dr. Demars answered affirmatively and Mr. Frève closed the door. Dr. Demars reported that Dr. Martel should be replying to Mr. Frève in the near future concerning the complaint; Mr. Frève testified that Dr. Demars gave the

impression that he knew more than he was saying. Mr. Frève testified that the report on the harassment complaint had been submitted to the AAC Human Resources office in Montreal on February 22, 1996, but that he had not received a copy until March 29, 1996.

The report of this meeting (Exhibit E-25), states at page 8 that Dr. Demars told Mr. Frève that the greenhouse that he was using would be emptied by no later than May 1, 1996. The report also reveals that Mr. Frève indicated that Dr. Demars was accusing him of carrying out experiments that the research committee had rejected, which he denied:

> [Translation]
>
> . . .
>
> - *Dr. Demars confirmed that I will have nothing to work with in 1996.*
> - *I added that such had been the case since April 19, 1995.*
> - *In 1996, you will do nothing except publish your work. We will meet later to discuss this.*
>
> . . .

On March 18, 1996, Dr. Demars called Mr. Frève to another meeting (which took place on March 26, 1996) indicating that he wanted to discuss Mr. Frève's future at the HRDC and the status of his current position (Exhibits E-37 and E-38).

Dr. Demars explained that, in or about September 1995, he had decided to terminate the crucifer genetic breeding program and to declare Mr. Frève's position surplus. That decision coincided with the end of Dr. Landry's genetic markers program but, unlike what was done with Dr. Landry's position, which was declared surplus in October 1995, Dr. Demars preferred to wait to declare Mr. Frève's position surplus. [Translation] "Because of the harassment complaint, I did not want to inform him of the termination of the program, which threatened his position; I decided to await the results of the investigation report".

Dr. Demars explained that, with the termination of the small fruits program, he still had to cut $350,000 in other HRDC programs and that a total of 17 positions were

declared surplus at the HRDC. Seven people were able to be relocated and 10 positions were in fact cut from the payroll. Dr. Demars testified that consideration was given to relocating Mr. Frève to another position but that "substitution" proved impossible. Exhibit G-41 was tendered as evidence: it consists of a table of the positions abolished due to the HRDC budget cuts. Of the 10 positions actually cut from the payroll, there were three researcher positions and three technician positions in the vegetable program. The payroll savings amounted to $594,471 over a period of three years depending on the departure date of the staff, which ranged from September 30, 1995 to January 8, 1998.

Mr. Frève described the March 26, 1996 meeting stating that he was not comfortable. Dr. Demars read the letter to him announcing his surplus status (Exhibit G-1). [Translation] "I am declaring your position surplus, here is your letter. He read the whole thing to me. I told him that I did not understand, I was working in vegetables". After the March 26, 1996 meeting, Mr. Frève wrote to Dr. Demars on March 29, 1996 to give him the report of the meeting and his comments (Exhibit E-40).

The report prepared by Mr. Frève (Exhibit E-40) mentions at page 6 an event on which he also testified. After reading the letter, [Translation] "Dr. Demars was all red and seemed upset by the situation but he still smiled". Mr. Frève said to the others: [Translation] "See! He is laughing while telling me that I am laid off. That is unacceptable, he is kicking me out and he is laughing".

Dr. Demars testified that the meeting with Mr. Frève had been very difficult, that he had to bite his lips during the meeting and that he did not laugh. At the end of the meeting, he did smile when he was at the door saying goodbye to Mr. Frève. However, he explained and showed that he blushes very easily, it is a personal trait, and it did not mean that he was losing his temper or that he was angry with Mr. Frève.

In his report (Exhibit E-40), Mr. Frève described the decision to lay him off as a reprisal, and the reasons did not make sense. He also stated that the other members of the HRDC who were laid off had been forewarned verbally. Dr. Demars explained the reasons to him as follows: [Translation] "I knew that in your case you would not agree to leave voluntarily. That is why, in your case, we now find ourselves in this situation".

Dr. Demars testified that 17 employees in total were declared surplus at the HRDC: seven were able to be relocated in other positions, but 10 were in fact cut from the payroll. Table G-41 was submitted in evidence and shows that, in both the small fruits and fruits programs, one technician and one researcher left the HRDC. Furthermore, most of the staff who left the HRDC came from the vegetable program, specifically, three technicians and three researchers. The departure dates for the employees ranged from September 1995 to January 1998. In the vegetable program, one researcher left the HRDC on December 27, 1996, a few days before Mr. Frève's departure date, which was January 3, 1997. Two technicians from the vegetable program left in May 1997. In the letter given to Mr. Frève, like the one to all employees whose positions were declared surplus, it was stated that the employee had to indicate within 60 days whether he was opting for the EDI.

On May 27, 1996, Dr. Demars met with Mr. Frève to find out if he had decided to accept the EDI, because he felt that it was the best solution for Mr. Frève; there were few employment opportunities at the HRDC or AAC due to the cuts. Dr. Demars testified that Mr. Frève was the only HRDC employee who opted for the layoff and Dr. Martel testified that only four employees in the Branch, Eastern Region chose to be laid off. Table G-41 shows that, of the 10 employees who left the HRDC, two opted for the EDI and seven chose the ERI. Under cross-examination, Dr. Demars admitted that, during his meeting on May 27, 1996, he had mentioned the case of Luce Bérard, who was dismissed for incompetence. Dr. Demars mentioned her as an example (an employee who rejected $100,000 and who ultimately ended up with nothing) in an effort to convince Mr. Frève to accept the EDI.

Subsequently, Dr. Demars met with Mr. Frève every Monday morning to keep in touch and, when he found that Mr. Frève was not making enough effort to find a job, he gave him one day a week to look for a new position. During one of these weekly meetings, specifically, on July 2, 1996, Dr. Demars mentioned to Mr. Frève that Dr. Carisse was going to redo part of the work on crucifer clubroot he had done in the greenhouse so that Dr. Landry could complete his portion of the work on genetic markers pursuant to the AJMQ research agreement.

The next day, on July 3, Mr. Frève wrote to Dr. Carisse to ask for clarification on the nature of the work that she was doing on crucifer clubroot pursuant to the AJMQ agreement. On July 4, 1996, Dr. Demars replied as follows to that letter. (Exhibit G-39):

> [Translation]
>
> . . .
>
> *In the fall of 1995, at my request, you submitted a progress report on the greenhouse and fieldwork done on the resistance or sensitivity to clubroot of several strains and varieties of crucifers.*
>
> *In light of the design used and the results obtained, specifically:*
>
> 1. *The lack of a known, constant sensitivity control for crucifer clubroot from one base (or parcel) to another;*
>
> 2. *The variation in the results for the same strains in the greenhouse and the field.*
>
> *I asked Ms. O. Carisse to redo part of the greenhouse work so that Dr. B. Landry would be able to complete his potion of the work and thus enable me to meet my commitments to AJMQ.*
>
> . . .

On July 16, 1996, Dr. Martel informed Mr. Frève that he had found his February 28, 1996 complaint of harassment against Dr. Richard Tarn to be unfounded. On July 26, 1996, in a letter to Dr. Demars (Exhibit G-11), Mr. Frève indicated that he would like to take advantage of the retraining program under the WFAD to complete a Ph.D. In a reply Memorandum dated September 3, 1996 (Exhibit G-10), Dr. Demars explained to Mr. Frève that the WFAD states that the employer shall support the retraining of an employee for a position for which he is qualified or would be qualified, if he obtained training. Dr. Demars stated that he would be prepared to discuss this with Mr. Frève's future supervisor.

Dr. Demars also indicated in his Memorandum of September 3, 1996 that he had asked Dr. Martel for additional resources to increase the number of researchers to 20, but Dr. Martel had refused such a request. Dr. Demars explained to Mr. Frève that, if new researcher positions were created at the HRDC, it would be through the partnership program with the private sector (MRI).

Mr. Frève testified that he was away on sick leave from the end of the summer to the beginning of 1997. This was a very difficult period: he was depressed, his wife became ill and asked him to leave the family home to sort out his problems. Mr. Frève stated that he only collected unemployment insurance benefits for 12 to 15 weeks and that, since then, with no source of income, he has had to live off of his line of credit and savings. Mr. Frève testified that he suffers from chronic digestive problems, he has lost his self-confidence and sight of all of his professional accomplishments. He has applied unsuccessfully for several Public Service jobs and he was not even contacted by the HRDC for a technician position working in the butterfly field (EG-1).

On October 22, 1996, there was a union-employer meeting at the HRDC, where Mr. Frève's case was discussed. The minutes of the meeting prepared by the union were adduced as evidence and Drs. Charles Vincent and Diane Lyse Benoit, who were part of the Executive of the Professional Institute of the Public Service of Canada local at the HRDC, testified regarding this incident. The following extract regarding Mr. Frève (Exhibit E-5) is shown at page 3:

> [Translation]
>
> . . .
>
> *There was a discussion on how he came up with 18 researchers. D. Demars listed the researchers including A. Frève and contract researchers.*
>
> *It was at that point that D. Demars candidly (that is, voluntarily) stated that, after Andrew Frève left, a new plant pathologist would have to be hired because there was a need in that area.*
>
> . . .

Dr. Vincent confirmed in his testimony that Dr. Demars had spoken of a pathologist, but, under cross-examination, he clarified that Dr. Demars used both expressions to refer to contract researchers and permanent researchers at the HRDC. Dr. Benoit also testified that Dr. Demars had said that [Translation] "when Andrew Frève leaves, we will have to hire a plant pathologist". However, under cross-examination, Dr. Benoit testified that Mr. Frève was not replaced with a pathologist or any other researcher at the HRDC.

The minutes of the meeting, prepared by the employer, were filed as evidence (Exhibit G-3) and did not refer to names, but the reference to the event concerning Mr. Frève appears on page 2:

> [Translation]
>
> "management mentioned that there are 18 researchers on the A base payroll and 1 being funded by the MRI (Matching Research Initiative). A new researcher position in physiology will eventually be created under the MRI."

Dr. Demars and Ms. Joncas, an administrative officer at the HRDC, testified concerning the employer's minutes. Dr. Demars stated that, during the meeting, he had named the researchers, including Andrew Frève, because they were still on the HRDC payroll and he also stated that a pathologist-physiologist position would be created under the MRI or otherwise to maintain a basic staff at the HRDC. Ms. Joncas testified that she was present at the meeting and that she had understood that there were 18 researchers at the HRDC and that Dr. Demars had said that a physiology position would be created under the MRI.

Dr. Vincent testified that the HRDC has changed since half of its funding now comes from the private sector and that hiring is now done strictly on a contract basis under the MRI. Dr. Demars testified that, since the 1995-1996 cuts, 40 agreements have been signed under the MRI, representing a total of $3.7 million. Ms. Joncas explained that, since the cutbacks, staffing has been frozen at the HRDC, but that there is an exclusion order that allows hiring under the MRI. After checking the list of priorities of the department, and since the MRI positions are term contracts, training is impossible. Ms. Joncas testified that Mr. Frève was considered only for EG-02 positions and above, based on his request to the Public Service Commission (Exhibit G-41), which did not refer him for other positions.

Arguments

Rather than summarize the written arguments of the representatives in this case, I have reproduced extracts below. However, written arguments, in their entirety, considered for this decision.

Ms. Gosselin, for the grievor

[Translation]

. . .

We believe that we have shown:

That Andrew Frève is a phytopathologist and that the Director of the St-Jean HRDC, Dr. Demars, indicated in the presence of at least three other researchers at a union-employer meeting held on October 22, 1996, that he intended to replace him after his departure because the HRDC needed one. Therefore, he never proved that there was no longer work for him or that his duties had been eliminated.

That even though his career in the potato field at La Pocatière led him to breeding, Mr. Frève's involvement in that area at the St-Jean HRDC was marginal (20% of his time, according to him, see Exhibit 33, performance appraisal).

That the crucifer genetic breeding program, if one exists, was the responsibility of Dr. Benoît Landry, phytogeneticist. He was responsible for the "genetic breeding" aspect of the crucifer research program that he conducted jointly with Andrew Frève. Even the letter that informed Dr. Landry that his position had been declared surplus in October 1995 does not mention the cancellation of this program. The letter refers to the discontinuance of his duties.

That the essence of Andrew Frève's project on crucifers (project 9404 and 9505) is found in the project conducted in partnership with the AJMQ, the responsibility for which was assigned to other researchers, specifically, Dr. Carisse and Dr. Tremblay.

That Andrew Frève was assigned to the vegetable program on his arrival in St-Jean in 1993 and that the program review of 1995-96 to 1997-98 strengthened this program, which became the HRDC's specialization.

That the Director, Dr. Denis Demars, referred to the abolishment of the crucifer genetic breeding program to justify declaring Andrew Frève's position surplus for the sole purpose of getting rid of him and dismissing him:

- *The program as such does not appear anywhere in the documentation tabled;*

- *None of the researchers questioned were able to say when and how the program had been terminated;*

- *The letter announcing the layoff of Dr. Benoît Landry, the leader of the so-called program, does not even mention it;*

- *Andrew Frève is the only employee to have been declared surplus in 1996. The AAC workforce reduction had been completed long before then;*

- *The departmental policies contained in the documents tendered in evidence on how to deal with workforce reduction were not followed, notably with respect to training;*

- *Andrew Frève is the only AAC employee to have been declared surplus against his will, given that a high percentage was affected;*

That the real reasons for declaring Andrew Frève's position surplus are disciplinary in nature and are related to the fact that he filed harassment complaints against Dr. Demars in June 1995:

- *Dr. Denis Demars threatened Andrew Frève with disciplinary action on three occasions during a meeting on March 13, 1996, a few days before he was informed that his position was declared surplus. Dr. Demars claimed at that meeting that Andrew Frève refused to follow his orders or reply to his requests;*

- *Dr. Demars had already given Andrew Frève a verbal warning because he had contacted Dr. Bryan Morrissey, Assistant Deputy Minister, Research, about harassment complaints he had filed against Dr. Demars in June 1995;*

- *Dr. Demars waited until the investigation report on the harassment complaints had been submitted before making the so-called decision to abolish the genetic breeding program and to inform Andrew Frève that his position had been declared surplus. That decision is intrinsically linked to the harassment complaints, as stated by Mr. Frève in his grievance;*

- *Dr. Demars smiled at Andrew Frève when he finished reading the letter informing him that his position had been declared surplus and gave him a week of leave while asking him to hand over all his files;*

- *At the time that he declared Andrew Frève's position surplus, Dr. Demars was in a obvious conflict of interest because he was in a relationship with a female researcher whose position should have been abolished since the program in which she was*

> *working (ornamental trees) had been closed down. That employee received preferential treatment compared to Andrew Frève. Dr. Landry was also treated more favourably than Andrew Frève when he left.*

Therefore, we ask the chairperson of this tribunal to declare Mr. Frève's layoff illegal and to find, on the basis of the evidence adduced that it constituted constructive dismissal made in bad faith.

We ask that the tribunal order the immediate reinstatement of Andrew Frève at the St-Jean Research Centre with full compensation for lost wages and benefits since his layoff.

We also ask that AAC immediately provide Andrew Frève with the opportunity to complete his Ph.D. as other researchers at the Centre were able to do.

Given his age (48 years) and expertise, the chances of Mr. Frève finding employment in this field are non-existent. That is why there is no way he will waive his right to an employment relationship, which is priceless.

[Underlining in the original]

Ms. Couture, for the employer

[Translation]

. . .

The employer argues that the adjudicator does not have jurisdiction to deal with this grievance. The grievor was declared surplus under the combined effect of the Public Sector Compensation Act, *section 29 of the* Public Service Employment Act *and sections 34 et seq of the Public Service Employment Regulations. The decision to declare Mr. Frève's position surplus is a decision based on a program review resulting from the announcement of the February 1995 Budget. Therefore, the employer's decision cannot be referred to adjudication under the terms of subsection 92(3) of the* Public Service Staff Relations Act.

. . .

In Rinaldi,[3] *the Honourable Justice Noël set out the principle to be applied in determining the adjudicator's jurisdiction:*

> "*... in so far as the action or termination of employment occurred under section 29, a simple demonstration of bad faith or malicious intent on the employer's part (such as proof of an obvious desire to get rid of the employee at the first opportunity)*

[3] Federal Court decision in file number T-761-96 rendered on February 25, 1997.

> *would not confer jurisdiction on the Adjudicator since, whether or not there was bad faith, the grievance would still be a grievance in respect to a termination of employment under the* Public Service Employment Act, *which subsection 92(3) of* the Public Service Staff Relations Act *excludes from the Adjudicator's jurisdiction. When the employer argues that the employment was terminated under the* Public Service Employment Act, *the only way to show that it was not would be to prove that the conditions required to apply it were not present at the relevant time and that the employment cannot therefore have been terminated under that Act".*

To determine whether an adjudicator has jurisdiction to hear a grievance resulting from dismissal made under section 29 of the Public Service Employment Act, *it is important to ask the following question:*

"Has the grievor shown that in fact the conditions required to dismiss him/her under section 29 of the Public Service Employment Act *did not exist at the relevant time?"*

In this regard, Noël J. states:

> *"The respondent's assertion that he can prove his employment was not terminated under the* Public Service Employment Act *when the employer is relying on section 29 of that Act is far from obvious. A reorganization under subsection 29(1) takes place when restraint measures (which are easily proven) result in the abolishment of positions (which are once again easily proven). If the reorganization that results in the abolishment is not challenged and/or a de facto abolishment of position occurs, it is hard to imagine how the resulting layoffs can have been effected otherwise than as a result of the discontinuance of functions within the meaning of section 29.*
>
> *This is just as true if the respondent can prove a turbulent employment relationship".*(*...*)
>
> . . .

The grievor did not show that his position and his duties were not eliminated.

The uncontradicted evidence presented at the hearing shows that Mr. Frève's position no longer exists. The crucifer genetic breeding program in which Mr. Frève was involved no longer exists.

The uncontradicted evidence, shows that several genetic breeding programs have been discontinued or consolidated in the Research Branch in recent years. The crucifer genetic breeding program is no exception.

Dr. Martel and Dr. Demars testified under oath that the decision to declare Mr. Frève's position surplus was based on the review of the research programs resulting from the announcement of budget cutbacks in February 1995.

Dr. Martel and Dr. Demars testified under oath that the crucifer genetic breeding program in which Mr. Frève was involved was not a priority for the government. Due to cutbacks, discontinuation of the program was fully justified. The program was not a priority because of the government's new role and the costs of such a program.[4]

No one could contradict the fact that the private sector is increasingly involved in genetic breeding. Dr. Landry testified that private companies like Mosento, Norseco and Semico are extensively involved in genetic breeding. It is important to note that Mr. Frève did not contradict this evidence.

In any event, the grievor did not contest that cutbacks had to be made at the St-Jean-sur-Richelieu HRDC. He admitted that no position was safe from the cuts following the announcement of the February 1995 Budget. He did not prove that his position still existed at the HRDC. Indeed, the evidence is to the contrary. Moreover, the grievor does not ask to be reinstated in his position. That request constitutes an implicit recognition of the true abolishment of his position. It would be impossible to reinstate him in his position because it no longer exists.[5]

Further, uncontradicted evidence shows that Mr. Frève was not the only one affected by the cutbacks. It appears that 17 people at the St-Jean HRDC were affected by the cuts and 907 in the Department as a whole.

What is more, the uncontradicted evidence shows that all of the researchers, including the most experienced, those recognized internationally, who had several research projects ongoing, were crying and afraid for their positions and were in a state of panic following the announcement of the cutbacks. How can the grievor claim that he was the only one not afraid of the cutbacks? Did he think he was immunized against the workforce reductions and the abolishment of his own position?

[4] It is important to quote the words of Justice Cattanach of the Federal Court of Canada in *Coulombe*, T-390-84: "An employee of the Crown does not have a vested legal right in a particular position or office. The tenure of employment is, during the pleasure of Her Majesty, in the public service rather than to an office in that service and it is the right of Her Majesty to allocate manpower to most effectively utilize that resource as She considers best to accomplish that end and it is the responsibility of a deputy head to best manage and direct the department which is his responsibility to administer. There is therefore no impediment to a department being reorganized in the manner the responsible head considers best (. . .)".

[5] As defined by the Supreme Court in *Flieger v. New Brunswick*, [1993] 2 S.C.R. 651, at page 664: "(. . .) a 'discontinuation of a function' will occur when that set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith". In this instance, this definition is met since the uncontradicted evidence shows that the functions of the position held by Mr. Frève are no longer performed.

The employer argues that a complaint of harassment or even conduct likely to result in disciplinary action does not protect an employee from cutbacks. If that were the case, it would be unfair for the hundreds of other employees who had no choice but to accept an EDI.

The employer further argues that massive workforce reductions or even restructuring do not deprive it of its right to discipline in the meantime. If that were the case, it would be even more difficult than it is now to manage such situations.

Therefore, the employer makes its own the comments made in Messier v. Treasury Board, *1987 PSSRB no. 74, to the effect that "An employee could not 'immunize himself' against section 27 (in this instance 29) of the* Public Service Employment Act *by being 'detestable'". Similarly, in* Nablow *(Board file 166-20-24982), the adjudicator found that a previous disciplinary action did not protect an employee from being laid off.*

The employer argues that the same reasoning applies to a turbulent working relationship to use the expression of the Federal Court in Rinaldi. *No one is safe, in these times, from organizational changes and workforce reductions.*

Thus, Mr. Frève cannot make us believe that he was the only one not afraid of losing his job the day after the February 1995 Budget. Nor can he make us believe that he was the only employee at the HRDC who was indifferent to the cutbacks announcement. Did he have a scheme to protect himself from the cutbacks? Did he think that his position was not vulnerable because he was indispensable to his employer? Did he think he was protecting his position by refusing to hand over the scientific data his employer had been asking for since 1992? Did he think he was protecting his position by using admitedly his own coding system on the scientific data so that only he could read it? It is hard to believe that his only purpose in acting this way was to protect his scientific credits. Indeed, the evidence shows unequivocally that the Department always intended to give him the scientific credit earned. In reality, the grievor thought he was shielding his position. Further, by the grievor's own admission, he wanted to protect himself.

It is the employer's position that the grievor's case is similar to that of Lévesque *(Board file 166-3-26115),* Marshall *(Board file 166-2-16266),* Mazur *(Board file 166-2-17450),* Robichaud *(Board file 166-2-16451) and* Vogan *(Board file 166-2-26900) where it was shown that it was the employer's obligation to cut expenses that led it to abolish positions.*

This case is also similar to Rinaldi *(Board file 166-2-26927, and more specifically, pages 105 to the end) rendered on October 5, 1998, following the decision of the Federal Court in*

Rinaldi *mentioned earlier. In the Board case in question, the employer showed that the grievor had built a case against the employer in order to protect his position and not the opposite. As in this instance, the employer makes its own the words of the adjudicator to the effect that program reviews and administrative decisions made in the course of cutbacks are not invalidated because other events, likely to result in disciplinary action, occur at the same time. The adjudicator commented accordingly at page 120 of her decision:*

> *"The fact that, as is the case here, an employee has received a letter of reprimand and been relieved of his duties, and then been assigned a special project in the months preceding the abolition of his position, does not constitute absolute protection against the abolition of his position nor an irrefutable presumption that the abolition of his position was actually a disguised disciplinary dismissal".*

Although it is clear from Rinaldi *of the Federal Court that good or bad faith does not affect the jurisdiction of the adjudicator, some adjudicators are of the opinion that they must consider this issue.*

Therefore, if we consider this issue, it is obvious that the employer made a decision in good faith in declaring Mr. Frève's position surplus. If there was bad faith in this case, it was on the part of the grievor who admitted to playing "cat and mouse" with the employer and also admitted to having coded the scientific information belonging to his employer so that it could not be accessed.

Furthermore, at no time did the employer act in a disloyal, underhanded, duplicitous, false, treacherous, precipitous or dishonest manner.[6] *If it had wanted to get rid of Mr. Frève, why would it have waited until March 1996 when it had the perfect excuse to declare his position surplus the day after the budget. Instead, the employer phased in the cutbacks. It began by informing employees in the small fruits sector, a sector clearly targeted by cutbacks. Realizing that reductions in this sector would not meet the $653,000 objective, it reviewed the research program as ordered by Minister Martin to identify the program with the lowest priority. This was the context that led to Mr. Frève's position being declared surplus; a position that was part of the crucifer genetic breeding program. His position was declared surplus after a thorough program review. There was no "diffusion effects" used in this process. If Mr. Frève now wants to claim, despite evidence to the contrary, that he was not working in the field of crucifer genetic breeding, the employer has only one comment to make: it did not hire the right person in accepting Mr. Frève's transfer in 1993!*

[6] These words refer to the definition of bad faith contained in various dictionaries, the main extracts from which are appended hereto.

However, no one would believe that the employer could have been so naive.

The grievor also tried to show evidence during the hearing that the employer allegedly abolished a program, unrelated to what he was working on, in order to get rid of him. What would have been the benefit for the employer to discontinue a program that did not exist? What would have been the advantage for the employer to abolish a program, in which Mr. Frève was clearly not involved, in order to give the impression that his services were no longer required? There is a disconcerting lack of logic in this argument.

Mr. Frève also tried to show that he was not a breeder. Subsidiarily, he tried to show that he was a breeder 20% of the time. The evidence is to the effect that Mr. Frève was a breeder,[7] *relocated to the St-Jean HRDC because of that expertise and even submitted a project on crucifer genetic breeding.*

In an effort to convince the adjudicator, Mr. Frève tried to bog us down in a scientific debate to determine the percentage of genetic breeding included in his project or even the percentage of breeding vs phytopathology in his mandate at the HRDC. It is enough to say that a researcher in genetic breeding must have knowledge of phytopathology. It is enough to say that Mr. Frève did not stop being a breeder when he was studying the disease for which he developed a new variety, did cross-breeding, made selections or even determined classifications. This example clearly shows that figures cannot be switched around like that. What is important is to answer the following question: what mandate was given to Mr. Frève at the St-Jean-sur-Richelieu HRDC? The answer is obvious: team up with Dr. Landry in the field of crucifer genetic breeding.

The grievor also tried to use his 1994 performance appraisal to show that he was not a researcher in crucifer genetic breeding. Needless to say, the objectives stated in that appraisal were developed in 1993. Thus, in 1993, it was agreed that Mr. Frève was to complete his writing in the field of potato genetic breeding and familiarize himself with crucifers. The purpose of that objective was clearly to prepare him to team up with Dr. Landry in the field of crucifer genetic breeding. To this end, it is interesting to note in paragraph 7 of the appraisal submitted in evidence that Mr. Frève attended the Ninth Worksop on Crucifer Genetics in Portugal. It is obvious from this achievement that the goal was for him to work in this field. If not, why would the employer have paid for the trip? What is more, section F of the appraisal shows that the genetic breeding project was Mr. Frève's main objective for the coming year, that is, 1995.

. . .

[7] The employer refers in particular to all the elements of evidence listed in its opening statement submitted at the hearing.

Lastly, the grievor did not prove that the employer threatened him with dismissal. On the contrary, the evidence shows that the employer was very flexible, fair and patient with Mr. Frève.

. . .

As for the grievor's evidence, the employer notes that none of the witnesses corroborated Mr. Frève's statements and that the evidence is limited to perceptions or was intended solely to cloud the facts by arguing semantics (the employer is referring in this instance to the following definitions: program, section, breeder, geneticist).

. . .

Employer's response to the argument of the grievor's representative

. . .

Lo v. Treasury Board*: Although this decision was not referred to in the arguments of the grievor's representative, it was raised during the hearing of this grievance. For that reason, the employer considers it relevant to discuss it.* Lo *is easily distinguished from the instant case:*

1. *Unlike* Lo, *the evidence shows that implementation of the cutbacks had not been completed by the time Mr. Frève was declared surplus. The HRDC had two years to implement cuts of approximately $653,000. The grievor was declared surplus within that period. Further, other employees were declared surplus during the same period -- some before him and others after him.*

2. *Unlike* Lo, *the employer conducted an investigation following the filing of the harassment complaint by Mr. Frève and always took his requests into consideration.*

3. *Unlike* Lo, *the grievor was not treated differently than other employees declared surplus. The evidence shows that no positions were safe from the cutbacks. He was informed in the same fashion as other employees that his position had been declared surplus. The only difference was that employees in the small fruits program were called to a meeting by the Director because it was obvious the day after the Martin Budget that that sector would be cut. However, further cuts were subsequently required and all employees were aware of them, which led to panic at the HRDC. Moreover, it is difficult to believe that, with the departure of Dr. Landry, Mr. Frève would not wonder if there would be less of a need for his position. As with all employees, the possibility of a substitution was considered in Mr. Frève's*

case. Like other employees, Mr. Frève attended training sessions. Mr. Frève also had the opportunity to opt for an EDI. Like all other surplus employees, Mr. Frève could also have used the facilities available at the HRDC, at market price. The grievor might have been able to continue the agreement with the AJMQ, if he had chosen that option. Indeed, the only reason that Mr. Frève's case is different from that of other employees whose positions were declared surplus is that he preferred to be laid off, despite a lack of available positions. There could one of two reasons for this: Mr. Frève was unaware of the extent of the cutbacks or he was ill-advised. He probably believed he would be relocated as in 1992. However, he should have remembered how hard it had been for him to find another position because of his area of expertise in potato genetic breeding. Only Dr. Demars had shown an interest in that expertise.

4. *Unlike* Lo, *Mr. Frève was not treated like a problem employee. The only reason why the letter declaring his surplus status explicitly set out the reasons for the termination of the program was because of the difficult communications between Mr. Frève and management. In any event, the Work Force Adjustment Directive (section 1.1.6) states that the reasons for the decision should be included in the letter informing the employee that his position has been declared surplus.*

   Unlike Lo, *the decision-makers (Dr. Demars and Dr. Martel) explained the reasons for declaring Mr. Frève's position surplus and these reasons were strictly program review reasons. It was stated under oath that the decision to declare Mr. Frève's position surplus was not related to his harassment complaints or to any other reason that Mr. Frève might find.*

. . .

The employer maintains that Mr. Frève's suspicions as to management's motives for declaring his position surplus are unfounded given the evidence on the extent of the cutbacks. That evidence should lead the adjudicator to find that the declaration of the position as surplus was genuine and made in good faith. However, the employer maintains that the adjudicator does not have jurisdiction in this instance.

. . .

[The sections in bold are in the original]

Ms. Gosselin's reply

[Translation]

. . .

[. . .] *Ms. Couture is offering an interpretation of the facts by which the employer properly proceeded with a layoff in accordance with the rules of the game and specifically in accordance with section 29 of the* Public Service Employment Act. *She is defending her client's interests.*

It is our argument, on the contrary, that Dr. Demars, Director of the St-Jean-sur-Richelieu Research Centre, used the context of cutbacks to get rid of an employee considered to be unwanted and that he acted in a hostile and vindictive manner towards him.

We also argue that the conditions to lay off Mr. Frève under section 29 of the Public Service Employment Act *were not met. Indeed, the following facts:*

- *the lack of a definition of what a "program" is in the RB;*

- *the inability of all witnesses to provide any information whatsoever on the termination of the program in question;*

- *the fact that the only place which refers to the termination of this program is Andrew Frève's letter leads us to conclude that this is a fictitious termination made up to justify the dismissal.*

The cutbacks in 1995 sparked panic in the Research Branch. It brings to mind the fable about the animals and the plague and the ill that spreads fear: no one would die from it but everyone suffered. It was a gigantic problem.

Ultimately, solutions were found for everyone through the use of special programs like the EDI or ERI. Only one person was left out and abandoned to his fate: Andrew Frève. Only one person was forced to leave under awful circumstances: Andrew Frève. Only one person suffered threats and reprisals because of his refusal to leave voluntarily: Andrew Frève.

Reasons for Decision

The fundamental question in this case is to determine whether the decision to declare Mr. Frève's position surplus was made by applying the provisions of the *Public Service Employment Act* (*PSEA*) or if, in fact, it was a disguised disciplinary action.

After considering the whole of the evidence, case law and arguments of the representatives, I have come to the following findings.

The parameters of an adjudicator's jurisdiction are set out in the *Public Service Staff Relations Act* (*PSSRA*). Paragraph 92(1)(b) states that, where an employee has presented a grievance up to and including the final level of the grievance process, the grievance may be referred to adjudication if it deals with

> (...) *disciplinary action resulting in suspension or a financial penalty, or (ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the* Financial Administration Act*,*

However, it is stated in subsection 92(3) that nothing in subsection *(1)*:

> (…) *shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the* Public Service Employment Act*.*

The employer argued that subsection 92(3) of the *PSSRA* was applicable in Mr. Frève's case because his position was declared surplus under the workforce reductions provided for in subsection 29(1) of the *PSEA*, which reads as follows:

> *Where the services of an employee are no longer required by reason of lack of work, the discontinuance of a function or the transfer of work or a function outside the Public Service, otherwise than where the employment of the employee is terminated in the circumstances referred to in paragraph 11(2)(g.1) of the* Financial Administration Act*, the deputy head, in accordance with the regulations of the Commission, may layoff the employee.*

In response to the preliminary objection raised by Ms. Couture with respect to jurisdiction, I stated that I would have to hear the case on its merits to decide on my jurisdiction. The reasons for layoff set out in subsection 29(1) of the *PSEA* are economic in nature and cannot be reviewed by a PSSRB adjudicator under subsection 92(3) of the *PSSRA*. However, the adjudicator's jurisdiction cannot depend solely on the employer's definition of the reason for termination. The adjudicator must determine whether the employer's only use of a reason under subsection 29(1) of the *PSEA* does not disguise a disciplinary action. That is why the adjudicator has jurisdiction to review the merits of the termination and the employer's good faith in that decision. This principle was acknowledged by the Supreme Court in *Roland Jacmain and Attorney General of Canada and Public Service Staff Relations Board*, [1978] 2 S.C.R. 15.

Mr. Justice De Gandpré states therein that the adjudicator has jurisdiction to decide whether the cause for rejection is frivolous or is based on bad faith (pages 36 and 37):

. . .

> *The Court of Appeal held, when the case came before it, that the adjudicator did not have jurisdiction to weigh the cause of the rejection, once it was established that this cause was not frivolous and that the rejection was not for reasons based on anything other than good faith.* (. . .)
>
> . . .
>
> *I concur with these views of the Court of Appeal.*
>
> . . .

In *Attorney General of Canada v. Judith L. Penner*, [1989] 3 F.C. 429, Mr. Justice Marceau of the Federal Court of Appeal analyzes the Supreme Court decision in *Jacmain* and explains, at page 440, the nature of the review that an adjudicator seized with a grievance filed by an employee laid off under the *PSEA* (in *Penner*, it was a probationary period) must conduct to determine if the decision was made in good faith and to ensure that the layoff was actually what it seemed to be and not a disguised disciplinary action.

> (. . .) *That would be an application of the principle that form should not take precedence over substance. A camouflage to deprive a person of a protection given by statute is hardly tolerable. In fact, we there approach the most fundamental legal requirement for any form of activity to be defended at law, which is good faith.*

Although the *Jacmain* and *Penner* decisions predate the 1993 amendment to the *PSSRA*, which saw the addition of subsection 92(3), they are nonetheless relevant today. As Noël J. states in *Rinaldi, supra*, "no statutory amendment has limited" the principle expressed by Marceau J. in *Penner*.

In her argument, Ms. Couture alleges that bad faith would not confer jurisdiction on the adjudicator given the *obiter* comments of Noël J. in *Rinaldi, supra.* In *Rinaldi* (Board files 166-2-26927, 26928, 27383), Adjudicator Galipeau concludes as follows:

> *If you establish that the termination of the employment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise, then I would be willing to say that subsection 92(3) of the Public Relations Staff Relations Act does not prevent me from having jurisdiction. I would therefore be willing to hear your witnesses.*

In his decision, Noël J. states that he agrees with this interpretation and that Adjudicator Galipeau was absolutely right to conclude that she had jurisdiction to hear and decide the grievance. At page 6, Noël J. states:

> *The hypothesis on which the Adjudicator based her decision in fact concerns a situation in which an employer disguises an unlawful dismissal under cover of the abolishment of a position through a contrived reliance on that Act. Such a situation would clearly fall within the jurisdiction conferred on adjudicators by paragraph 92(1)(b) of the* Public Service Staff Relations Act.

Although Noël J. indicates that it would not be easy to prove, he states that he is bound by the hypothesis of the adjudicator, who was right in assuming jurisdiction, and he explains in *obiter* his reservations with respect to evidence of bad faith:

> *This is just as true if the respondent can prove a turbulent employment relationship. He would then also have to show that the employer's reliance on section 29 is contrived. While such evidence cannot be excluded at the conceptual level, it is hard to imagine how the respondent would be able to establish it. Nonetheless, since this is the hypothesis adopted by the Adjudicator for the purposes of her decision and since the possibility it confirms cannot be entirely ruled out, I consider myself bound by it for the purposes of this judicial review. I must therefore find that the Adjudicator was right to assume jurisdiction subject to the respondent's ability to prove his assertion.*

It must therefore be concluded that the essence of Justice Noël's decision in *Rinaldi, supra* was to acknowledge that, if it is established "that the termination of the employment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise", then the adjudicator has jurisdiction to hear the grievance under paragraph 92(1)(b) of the *PSSRA*.

Therefore, I must first consider whether the decision to declare Mr. Frève's position surplus was made under subsection 29(1) of the *PSEA* and secondly, whether,

in fact, the decision was made in bad faith and constituted disciplinary action in disguise.

The federal Budget of February 1995 imposed major cutbacks on AAC, which led to a 20% reduction in the HRDC budget ($653,000), in addition to the closing of L'Assomption Farm. The discontinuance of the small fruits program saved $350,000, but was insufficient to achieve the total reductions imposed on the HRDC. Therefore, additional cutbacks had to be made; of the 17 employees in positions declared surplus, 10 were in fact cut from the HRDC payroll. Table G-41, filed as evidence, illustrates this point. The 1995 Budget led to a re-assessment of the government's role compared to the private sector in the field of scientific research. The evidence before me reveals that the private sector was becoming increasingly involved in genetic breeding and that, as a result of the budget cuts, AAC withdrew from this field of activity. Dr. Demars testified that he had decided to eliminate the crucifer genetic breeding program in September 1995 when he declared Dr. Landry's position surplus.

Ms. Gosselin argued that Mr. Frève was the only AAC employee to be declared surplus against his will, considering that a high percentage of employees was affected. However, the evidence presented to me does not support this claim. Seventeen employees were declared surplus at the HRDC. The evidence before me shows that Dr. Landry agreed to his position being declared surplus, but I have no evidence that that was the case for the other 16 employees. Of the 10 surplus employees who left the HRDC, all of them, except for Mr. Frève, opted for the EDI or the ERI. Mr. Frève chose instead to be laid off with priority for appointment to a position in the Public Service. He was not the only one to make this choice and Dr. Martel testified that, within the Research Branch, Eastern Region, four employees chose to be laid off.

In her argument, Ms. Gosselin also concluded that Mr. Frève was the only employee to have been declared surplus in 1996 and that, by that time, the AAC workforce reduction had been completed for a long time. Based on the evidence submitted to me on this issue, specifically a question and answer document (Exhibit E-2, bundled), it appears that the cuts in the Research Branch began on April 1, 1995 and covered a two-year period. As for the HRDC, specifically, when reading Table G-41, it is obvious that, in the vegetable program, one researcher left at the end of December 1996 and two technicians left later in 1997. Since employees had 60 days

after their position was declared surplus to decide whether they would opt for the ERI or EDI, it would appear that employees who left the HRDC in 1996, 1997 and 1998 saw their positions declared surplus in 1996 or later.

Ms. Gosselin alleged in the conclusions of her argument that the departmental policies on how to handle workforce reductions were not followed, especially with respect to training. Mr. Frève wanted to pursue doctoral studies throughout his career and, following his layoff, he asked to be included in the retraining program in order to complete a Ph.D.

Part 4 of the WFAD, entitled "Retraining", specifies in provision 4.1.1:

. . .

> (. . .) *to retrain* (. . .) *for existing vacancies, or anticipated vacancies identified by management.*

. . .

Further, there must not be any other available priority persons who qualify for the position, as stipulated in provision 4.2.1(b) of the WFAD.

There was no evidence submitted to show that such a vacant position, or one anticipated to become vacant, had been identified for Mr. Frève. In the context of budget cuts, it is understandable that there would not be any vacancies or that other priority persons might have had the necessary qualifications. Furthermore, the $7,000 allowance under the EDI program for training was not available to Mr. Frève because he did not choose that option.

Ms. Gosselin argued that Dr. Demars used the discontinuance of the crucifer genetic breeding program as the reason for declaring Mr. Frève's position surplus when the program itself does not appear anywhere in the litterature presented and no researcher could confirm the abolishment of that program. The employer did not contradict this argument and Dr. Demars confirmed that, at the HRDC, there was nothing on paper that specified that there was a crucifer genetic breeding program. However, Dr. Demars explained that the term "program" was used as soon as there were two projects and two researchers. Dr. Demars testified that, when he accepted Andrew Frève's transfer, he was interested in his expertise in genetic breeding because,

after the retirement of Dr. Chiang, an entire genetic bank of crucifers had been left at the HRDC. Given Dr. Landry's expertise in genetic mapping and the need of producers for new varieties, Dr. Demars wanted Mr. Frève to team up with Dr. Landry (Exhibit G-4). It is my view that on the balance of probabilities, Mr. Frève worked on a crucifer genetic breeding program at the HRDC. His research project and a portion of his work with the AJMQ were in this area. Furthermore, in his research project on the control of crucifer clubroot, reviewed in April 1995, Mr. Frève himself admitted that his training in phytopathology and his work in the area of genetic breeding made him suitable to head this new program.

Ms. Gosselin argued that the letter in which Dr. Landry's position was declared surplus did not mention the abolishment of the crucifer genetic breeding program and that, generally speaking, Dr. Landry was given preferential treatment compared to Mr. Frève. On October 13, 1995, Dr. Landry received a letter (Exhibit G-32) from Dr. Demars in which the latter told to him that his [Translation] "position had been declared surplus due to the discontinuance of your duties". In that letter, Dr. Demars offered Dr. Landry the benefits that he later offered to Mr. Frève, that is, the EDI, a lump sum payment under the WFAD and priority entitlement to an appointment within the Public Service. Unlike Dr. Landry's case, Dr. Demars explained in the letter declaring Mr. Frève's position surplus (Exhibit G-1) the reasons that led him to this decision. This procedure complied with the WFAD.

The evidence revealed the very strained relationship between Dr. Demars and Mr. Frève and I conclude that this was the reason that Dr. Demars acted differently with Mr. Frève in not forewarning him verbally. Dr. Demars testified that he had discussed with Dr. Landry the reasons for declaring his position surplus and that, for that reason, he did not include them in his letter to Dr. Landry. The evidence presented clearly shows that Dr. Demars drafted the letter to Mr. Frève in accordance with the requirements of the WFAD.

Ms. Gosselin argued that Dr. Demars was in conflict of interest because of his personal relationship with a female researcher whose position should have been declared surplus. Dr. Demars and Dr. Martel testified that, as a result of pressure from the ornamental industry, the decision was made to retain this researcher's position and

to have the individual report to Dr. Martel. The balance of probabilities leads me to reject Ms. Gosselin's allegation.

Another point raised by Ms. Gosselin was that Mr. Frève was not a geneticist (genetic breeder) but rather a phytopathologist. The evidence clearly shows that while Mr. Frève is not a geneticist, he is a breeder and a phytopathologist and he described himself as such in his resume and numerous exhibits introduced in evidence at the hearing of this grievance (Exhibits E-19, E-28, E-29, E-30, E-31, E-32, E-33, E-34, E-36, E-40, E-41, E-45, E-27b, as well as G-8, G-9, G-14, G-17, G-18, G-20, G-21, G-22, G-26, G-44, G-46 and G-40).

Ms. Gosselin claimed that only 20% of Mr. Frève's tasks involved crucifer genetic breeding. The evidence shows instead that a large portion of Mr. Frève's duties was related to genetic breeding and that a lesser portion was in pathology. Mr. Frève worked in a genetic breeding program; in addition, his research project and part of his work with the AJMQ were in genetic breeding. However, I note that the contents of Dr. Demars' letter to Mr. Frève in which he declared his job surplus do not include Mr. Frève’s tasks as a pathologist, but only those relating to genetic breeding and I wondered whether that had any impact on the validity of the layoff.

The three reasons provided for in subsection 29(1) of the *PSEA* are lack of work, the discontinuance of a function or the transfer of work or a function outside the Public Service. In his letter of March 26, 1996 to Mr. Frève (Exhibit G-1), Dr. Demars stated that the position was declared surplus as a result of budget cutbacks. Thus, Mr. Frève's position was not eliminated because of a lack of work but rather as a result of budget cuts. In his letter, Dr. Demars explains the reasons for his decision and one of those reasons was that the crucifer genetic breeding program was not a priority. He did not have to mention Mr. Frève's functions as a pathologist in his letter. The uncontradicted evidence shows that the function performed by Mr. Frève at the HRDC was indeed discontinued and that, subsequently, he was not replaced at the HRDC, regardless of the exact percentage of his time devoted to genetic breeding.

To reiterate the words of de Grandpré J. in *Jacmain, supra*, it was established that the reasons for declaring Mr. Frève's position surplus were not frivolous, and I have only to determine whether the reasons used by Dr. Demars were in bad faith.

Ms. Gosselin argued that Mr. Frève was declared surplus for disciplinary reasons because Dr. Demars had threatened him with disciplinary action on several occasions and he had waited for the filing of the investigation report on the harassment complaints by Mr. Frève to inform him that his position had been declared surplus. Ms. Gosselin definitely submitted evidence, uncontested by the employer, that there was a turbulent working relationship. However, as Noël J. states in *Rinaldi, supra*, I believe that is not in itself evidence of bad faith. When faced with massive workforce reductions for the reasons set out in subsection 29(1) of the *PSEA*, the employer must act in good faith, which includes making an objective selection of the employees to be laid off. It would be neither objective nor fair for an employee to be sheltered from his position being cut because of "turbulent" working relations with his employer. Thus, the fact that Mr. Frève filed harassment complaints does not constitute protection from the abolishment of his position and does not create a presumption of bad faith against Dr. Demars. The latter therefore did not have to wait for the submission of the report on the harassment complaints to declare Mr. Frève's position surplus and he should have been able to do so without it creating a presumption of bad faith. Accordingly, it cannot be claimed that Dr. Demars acted in bad faith because he waited for the report to be submitted. It is my view that his actions only show that he wanted to be careful so that these two events would not be linked together.

Ms. Gosselin alleged in her argument that there was evidence of Dr. Demars' bad faith during the union-management meeting of October 22, 1996. The main issue of the discussion was the ratio of cuts in administration and among researchers. Dr. Demars stated that, after the cuts, there would be 18 researchers at the HRDC. Discussion ensued on this point and Dr. Demars identified Mr. Frève as one of the 18 researchers. According to the union's minutes of this meeting (Exhibit E-5), Dr. Demars then said [Translation] "after Andrew Frève leaves, we will have to hire a new plant pathologist, because there is a need". Dr. Vincent and Dr. Benoit confirmed this in their testimony. According to the minutes of the meeting prepared by the employer (Exhibit G-3), it was a new researcher position in physiology that would eventually be created via the MRI and Ms. Joncas testified to that effect. Dr. Demars testified that he mentioned Mr. Frève's name because the latter was still part of the Centre and that a pathologist-physiologist position would be created under the MRI or otherwise to maintain a basic staff of researchers at the HRDC.

I accepted the testimony of Dr. Vincent and Dr. Benoit on this point and I find it more likely that, during the October 22, 1996 meeting, Dr. Demars stated that a new pathologist would be hired after Mr. Frève's departure. But I believe that Dr. Demars' response to the union representatives was ackward, but was made in an effort to explain the ratio of researcher to administration cuts. It is my view that, while Dr. Demars' comments were tactless, they do not prove bad faith.

Dr. Vincent confirmed during cross-examination that Dr. Demars made no distinction between determinate and indeterminate positions when talking about researcher positions. In his Memorandum of September 3, 1996 to Mr. Frève, Dr. Demars indicated that if new researcher positions were created at the HRDC, it would be under the MRI. The evidence shows that, since then, no researcher has been hired in an indeterminate position at the HRDC. The funds allocated to the payroll were cut following the 1995 Budget and now all hiring for determinate positions is done under the MRI, in cooperation with the industry. No evidence was submitted to show that Mr. Frève was qualified to hold any of the positions created under the MRI. The balance of probabilities is to the effect that, in October 1996, Dr. Demars could only hope for funds to hire a new pathologist under the MRI. This confirms that his comments during the October 22, 1996 meeting do not indicate bad faith.

Mr. Frève testified that he was treated differently from other employees, which shows that he was not laid off but dismissed for disciplinary reasons, and he referred to the meeting of March 26, 1996 to illustrate this point. Mr. Frève stated that other staff members at the HRDC who were laid off were forewarned verbally while, in his case, Dr. Demars read him a letter in which he explained his reasons and declared Mr. Frève's position surplus. As I explained earlier, under the WFAD, an employee whose position is declared surplus must be advised accordingly in writing. This was done. The employer is under no obligation to forewarn the employee verbally. Given the harassment complaint filed by Mr. Frève against Dr. Demars, the relationship was strained and that is why Dr. Demars acted differently with Mr. Frève. Therefore, I find that this action does not show that Mr. Frève was treated unfairly or in bad faith.

In his report of the meeting of March 26, 1996 (Exhibit E-40), Mr. Frève states that Dr. Demars [Translation] "was all red and seemed upset by the situation but he still smiled". That was when Mr. Frève said to the others, [Translation] "See! He is

laughing while telling me that I am being laid off. That is unacceptable, he is kicking me out and he is laughing".

Dr. Demars testified that he bit his lips throughout the meeting, he did not laugh and that, at the end of the meeting, when he was at the door, he smiled as he was saying goodbye to Mr. Frève. I find Dr. Demars' explanation that he smiled as he said goodbye to Mr. Frève quite plausible and it is this version that I accept.

I have looked to see if, other than the arguments presented by Mr. Frève and his representative, there was in the evidence elements showing bad faith on the part of the employer. Of the 17 employees whose positions were declared surplus, 10 were in fact cut from the HRDC payroll, but seven were able to be placed elsewhere. I wondered whether there was bad faith in the fact that no substitution was found for Mr. Frève as it had been the case for seven employees. However, uncontested evidence submitted on this point shows that substitution was considered for Mr. Frève but had not been possible.

Mr. Frève testified that this layoff had been traumatic for him and I do not doubt that for an instant, as it was for many employees whose positions were declared surplus. But there is nothing in the evidence before me to allow me to find that the decision to declare Mr. Frève's position surplus was disciplinary action in disguise or anything other than an administrative decision made in good faith. Accordingly, the decision being challenged by Mr. Frève falls outside my jurisdiction and, therefore, the grievance is dismissed.

Guy Giguère
Board Member

OTTAWA, August 25, 1999.

Certified true translation

Serge Lareau