Files: 166-2-27880 to 27882

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DAVID SHAW

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs & Excise)

Employer

Before: Donald MacLean, Adjudicator and Board Member

For the Grievor: Michael Tynes, Public Service Alliance of Canada

For the Employer: Jock Climie, Counsel

Heard at Sydney, Nova Scotia,
May 6, 1998

DECISION

In this case, the parties asked me to rule on a question of my jurisdiction. They want me to decide whether I have the jurisdiction under section 91 of the ***Act*** to hear the 3 grievances and references to adjudication submitted by the grievor, David Shaw.

All 3 grievances date back to May 1995. They concern grievances filed by Mr. Shaw against the employer for perceived harassment.

The parties presented no viva voce evidence at the hearing. They relied on the statements in the grievances and in the employer's replies to the grievances.

Mr. Shaw filed the first of his grievances on May 5, 1995, because he believed that he was being "harassed, coerced, intimidated and interfered with because of my representations and activities as union Local president by the management at Revenue Canada". He felt that the employer was treating him differently because he was the president of the union local. He contended that management's actions were contrary to article M-16 of the master (collective) agreement.

In his second grievance on May 19, 1995, Mr. Shaw alleged that "Ray MacDonald and Ray Jeffrey are harassing me by filing their harassment complaints against me & using the harassment policy as a sword rather than a shield." He was upset that Mr. MacDonald and Mr. Jeffrey had filed harassment complaints against him. He wanted them to stop their harassment of him.

In his third grievance on May 26, 1995, Mr. Shaw alleged that "as a result of recent disciplinary actions against me that I have been experiencing ongoing discrimination and harassment contrary to the provisions of Article M-16 of the collective agreement". His concerns were that management had disciplined him. He equates the discipline to harassment under the collective agreement.

After the employer rejected the three grievances, Mr. Shaw referred all three to

adjudication in June 1997.

Summary of the Representations on behalf of the Parties

Argument for the employer

The employer contends that an adjudicator does not have the jurisdiction to adjudicate the three grievances brought by the grievor under section 91.

For a grievance to be properly grounded under subsection 91(1) it must refer to an allegation of wrongdoing by the employer in the interpretation or application of the terms and conditions of employment, or of a provision of a collective agreement. If a grievance is not so grounded, section 92 of the ***Act*** (when read with section 91) does not allow for its referral to adjudication. Consequently, in this instance, any of the grievances that Mr. Shaw intends to bring to adjudication must be founded on a provision of the collective agreement.

The May 5 grievance of Mr. Shaw is not adjudicable, because subsection 91(1) of the ***Act*** provides that a grievance is proper when "no administrative procedure for redress is provided in or under an Act of Parliament ". We must apply section 91 strictly, according to its plain language. If a grievance can be addressed in another forum, an adjudicator cannot hear it under section 92. According to the employer, there is another administrative procedure available to the grievor. It is in section 23 of the ***Act***.

Mr. Shaw claims that the employer has harassed, coerced, intimidated, and interfered with him because he is the president of the union local. The individuals named by him did occupy management positions. In effect, he says that the employer interfered in the affairs of the union. Accordingly, the Board should deal with the allegations as a section 23 complaint that the employer has violated the prohibitions in section 8, or 9 of the ***Act***. It is not possible to wiggle around the mandatory strictures of the ***Act***.

Mr. Shaw was also upset when Messrs. MacDonald and Jeffrey filed harassment complaints against him. Yet, that is not a ground to sustain his personal grievance. One cannot refer a grievance of personal harassment to adjudication.

The May 19 grievance does not refer to a violation of the collective agreement. Its

reference to adjudication does refer to article M-16, that is, the harassment provisions of the master agreement. Yet, there is no mention of any of the grounds enumerated in M-16. Consequently, since there are no grounds that are based on a provision of the collective agreement, the grievance of May 19 is not adjudicable. The employer has no way of knowing which are the grounds for the harassment.

The grievor and the bargaining agent cannot cite a specific ground at this stage. For them to do so now would constitute a fundamental change in the nature of the grievance. It is improper for the grievor to claim something through adjudication other than what went through the grievance process. An employee is entitled to be free of any harassment. Yet, an employee cannot refer every type of personal harassment to adjudication. Rather, it is the consequences that flow from the harassment that brings it within one of the enumerated grounds.

The third of Mr. Shaw's grievances, filed on May 26, 1995, again refers to article M-16. It also refers to discipline imposed on Mr. Shaw. However, since Mr. Shaw does not impute any grounds for the harassment, one must deduce that he was again referring to personal harassment, which is not provided for in M-16. Consequently, this particular grievance does not constitute a ground for adjudication. If the grievor has concerns about the discipline against him, then that should be dealt with in his own disciplinary grievances (Board files 166-2- 27272 and 27273)

There is a principle in law that where there is no remedy, there is no cause of action. There is nothing an adjudicator can give him that he does not already have. The ***Act*** is not intended to allow a forum in which to outline bad experiences in a person's career, for which there is no redress.

The only declaratory decision an adjudicator can make is that Mr. Shaw gets a harassment-free workplace. He could get no compensation, nor any apology. To solve things the employer is prepared to give him assurances that they will provide him with a harassment-free workplace.

A grievance under section 91, and its referral to adjudication under section 92, is entirely different from a complaint under 23. The adjudicator and the parties have a

responsibility to ensure that nothing goes to adjudication that should not be referred to adjudication. We are all duty bound to respect the law.

Counsel for the employer relied on the following cases:

1. ***Shiv Chopra*** **and** ***Treasury Board (Canada) (Department of National Health and Welfare)***, [1995] 3 F.C. 445 (Simpson J.).

2. ***Joan Mohammed*** **and** ***Treasury Board, Immigration and Refugee Board*** (1997), Board file 166-2-26179.

3. ***Charlotte Rhéaume*** **and** ***Treasury Board, Revenue Canada - Customs and Excise*** (1994), Files 166-2-21976 to 21979, 166-2-21151 to 21154, and 166-2-22356, (Tarte).

4. ***Walter G. Haslett*** **and** ***Treasury Board, National Defence*** (1991), File 166-2-20737 (Brown).

5. ***Lawson and Treasury Board*** (1992), File 166-2-25530 (Tenace).

Argument for the Grievor

Mr. Shaw submits that his three grievances should be referred to adjudication under article M-16 of the master agreement, (the "no discrimination" provision).

He acknowledges that he did not specifically mention in every one of his grievances that he was being harassed because of his union activity. However, he contends that in the context of the three grievances and their interconnectedness, it was obvious that he was complaining of harassment based on his union activity. Consequently, all three grievances allude to harassment based on his union activity. In that context they refer to violations of article M-16.

Section 92 of the ***Act*** gives him the right to bring the alleged violations of article M-16 before an adjudicator.

If this adjudicator were to decline the jurisdiction to adjudicate these matters, the principal consequence would be a considerable delay, because the Board hears the very same grievances framed as section 23 complaints. The rejection of jurisdiction would merely be a

waste of time on nothing else than a technicality.

It is significant that the employer accepted all three grievances. They proceeded through the grievance procedure without raising objections to the jurisdiction under section 91.

For these reasons, Mr. Shaw maintains that this adjudicator should recognize his jurisdiction to adjudicate the grievances. Mr. Shaw wants a declaration that the harassment did occur.

A grievance under section 91, and its referral to adjudication under section 92, differs from a section 23 complaint only in the manner in which it is processed. Yet, how the Board deals with both of them remains essentially the same. The burden rests with the grievor to prove his allegations in either event.

Mr. Tynes requested that I reject the employer's objection to jurisdiction.

Collective Agreement

M-16.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability or membership or activity in the union.

Public Service Staff Relations Act (*the* ***"Act")***

91.(1) Where an employee feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award, or

(a) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

Conclusion and Reasons for Decision

I intend to review the relevant authorities cited by the employer and the principles noted in the cases. I will then consider how these propositions pertain to the instant case.

In determining the principles that apply to this case, the leading authority is the ***Chopra*** decision (*supra*) in Federal Court of Canada. ***Chopra*** supports the notion that when there is an administrative procedure available in an Act of Parliament, the bargaining agent and the employee cannot invoke the grievance procedure. Rather, they must follow the other administrative procedure. It is only when there is no (other) administrative procedure in an Act that an employee becomes entitled to present his grievance under 91(1).

In ***Lawson*** the adjudicator ruled that he lacked jurisdiction because there was another redress procedure provided by an Act. ***Lawson*** emphasizes the principle that where there is another administrative procedure for redress, it must be used if it is available. Accordingly, if another option is available to the employee, he cannot submit a grievance under subsection 91(1).

In the ***Haslett*** case, *supra*, neither management, nor even the grievor, knew that the grievance would eventually be brought to adjudication for harassment based on national origin. In ***Haslett*** the matter was filed by the grievor as a personal harassment grievance. He never considered that the harassment might be motivated by national origin until after he received the employer's reply to the grievance at the final level. In the grievance process he did not mention any of the enumerated grounds under article M-16. The basis on which the grounds were argued in the grievance procedure was not the same issue as that under which the bargaining agent wanted to refer the case to adjudication. Consequently, the employer never had the opportunity to consider the grievance as a grievance of harassment motivated by national origin. Because it was a fundamental change in the nature of the grievance, it precluded the adjudicator from considering the issues as grievances under M-16. Adjudicator Brown found that he did not have the jurisdiction to hear the grievance. There was no valid foundation for a referral to adjudication. In support of his conclusion he referred to the decision in ***Burchill v. Attorney General of Canada***, [1981] 1 F.C. 109 (F.C.A.).

The ***Burchill*** case was among the authorities used to support the reasoning in the ***Mohammed*** decision, supra. In ***Mohammed*** the adjudicator, at pages 12 and 13, rejected submissions from the grievor that she could change the basis of the grievance after the final level in the grievance process. He went on to decide, in accord with the reasoning in ***Chopra***, that he had no jurisdiction to hear the case. It was one where the (at page 15) "allegations also constitute grounds for a complaint under the CHRA (Canadian Human Rights Act), which provides both a right of redress and a remedy in respect of these matters."

The bargaining agent applied for judicial review of the adjudicator's decision in the ***Mohammed*** case. The Federal Court decision, [(unreported) June 16, 1998, Cullen J., Court file T-1328-97 (T.D.)], at page 9, determines that as long as the applicant has "real redress" in another administrative procedure that could benefit her, she must opt for that procedure. It does not matter that the other procedure does not yield exactly the same, or identical, remedies as the grievance process would under the ***Act***.

The ***Rhéaume*** case, *supra*, outlines how to frame the basis for harassment grievances under M-16. It also rejects perceived harassment grievances that are only grounded in personality conflicts, and not based on one of the enumerated grounds, as follows (at page 34):

> *... only harassment or discrimination based on a ground prohibited by the provisions of this article can be the subject of a grievance and hence of a reference to adjudication. The simple questions of a work-related personality conflict are not therefore covered by article M-16.*

The analysis in the ***Chopra*** decision remains the most significant for my purposes. In that case, the court had to decide on the adjudicator's conclusion that he did not have jurisdiction to hear the grievance under subsection 91(1). The court decided that, since the grievance as filed was a matter of human rights, there was an administrative procedure available to the applicant through the Canadian Human Rights Commission (CHRC). Justice Simpson stated, at pages 455 and 456, that "as long as the CHRC has jurisdiction to deal meaningfully and effectively with the substance of the employee's grievance, then it can provide redress."

Other adjudicators have followed the ***Chopra*** principle on several occasions. In ***Lawson,*** the adjudicator decided that he lacked jurisdiction, because there was another redress

procedure in an Act. In ***Lawson***, it was the investigative process under the ***Public Service Employment Act***.

In the analysis in ***Mohammed***, the adjudicator also considered the impact of ***Chopra***, and, at page 15, he declined jurisdiction to hear the case as a grievance under article M-16 that "she was a victim of racial or religious discrimination." He decided that her "allegations also constitute grounds for a complaint" under the human rights legislation. Subsection 91(1) precluded him from considering the ***Mohammed*** grievance.

I note that the bargaining agent applied for judicial review of the adjudicator's decision in the ***Mohammed*** case. The Federal Court decision, [(unreported) June 16, 1998, Cullen J., Court file T-1328-97 (T.D.)], at page 9, determines that as long as the applicant has "real redress" in another administrative procedure that could benefit her, she must opt for that procedure. It does not matter that the other procedure does not yield exactly the same, or identical, remedies as the grievance process under the ***Act***. The question became whether there was some personal benefit to the applicant in the other procedure.

A more recent decision of the Court in ***Boutilier***, [(unreported) November 13, 1998, McGillis J., Court file T-1450-97 (T.D.)], determined (at page 23) that the issues of discrimination in that case were the central and only issues of the grievance. They fell squarely and directly within the purview of the CHRA. The adjudicator had no jurisdiction to deal with it under the ***Act***.

In my opinion, the grievances filed by Mr. Shaw do have another procedure for redress. It is specifically provided by section 23 of the ***Act***. The relevant parts of section 23 read as follows:

> *23.(1) The Board shall examine and inquire into any complaint made to it that the employer, or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 8, 9 or 10 ...*

Sections 8 and 9 of the ***Act*** are as follows:

> *8.(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the*

formation or administration of an employee organization or the representation of employees by such an organization.

(2) Subject to subsection (3), no person shall

(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;

(b) impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or

(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or

(ii) to refrain from exercising any other right under this Act.

(3) No person shall be deemed to have contravened subsection (2) by reason of any act or thing done or omitted in relation to a person who occupies, or is proposed to occupy, a managerial or confidential position.

9.(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.

(2) Nothing in subsection (1) shall be construed to prevent a person who occupies a managerial or confidential position from receiving representations from, or holding discussions with, the representatives of any employee organization.

The substance of Mr. Shaw's grievances is certainly included in section 23. Essentially he alleges violations of section 8 and section 9.

In argument, the grievor acknowledged that all three grievances were inter-related. Their underlying premise protests harassment of Mr. Shaw because of his activities on behalf of the bargaining agent or its membership. He says that the employer learned of the basis for the grievances during the grievance procedure. They are within the parameters of M-16, since they object to harassment of the grievor because of his "membership or activity in the union."

Nevertheless, I agree with the employer submission that the substance of the grievor's grievances should have been framed as complaints under section 23 of the ***Act***, rather than as

grievances under subsection 91(1). The central issue of each of the grievances relates to his activities on behalf of the bargaining unit or its membership. The Board can review them as section 23 complaints, rather than as grievances under subsection 91(1). They are not valid as grievances under subsection 91(1).

Therefore, I find that, because of the provisions of subsection 91(1) I do not have jurisdiction over the substance of the grievances filed by Mr. Shaw.

The grievor says that my rejection of jurisdiction under section 91 would simply delay the matter. Yet, Mr. Shaw and his bargaining agent must recognize that Parliament set up the scheme of things under the ***Act*** for specific purposes. In the terminology used in subsection 91(1) it is obvious that the legislators wanted to avoid a multiplicity of hearings on the same issue by using another section within this ***Act***, or by using another Act. In their wisdom they decided that issues dealing with interference in the operation of and representation by a bargaining agent should be reviewed as complaints under section 23. Because of the dictates of subsection 91(1), it is not open to this adjudicator to take into my jurisdiction matters, which the legislation specifically categorizes under section 23. (See the ***Chopra*** decision, *supra*, at pages 455 and 456, and the ***Boutilier*** decision, *supra*, at page 24.)

The grievor says that the employer did not object at the first opportunity to the characterization of the matters as grievances. That sort of argument may assist the grievor in overcoming perceived flaws within the grievance procedure under the collective agreement. However, it does not allow this adjudicator to overlook the legislation on questions of jurisdiction. The simple answer is that, because of subsection 91(1), I cannot assume jurisdiction over matters, which belong under another process. If there was ever any doubt about when someone can raise a question of the jurisdiction for an adjudicator, the ***Boutilier*** decision, *supra*, at page 24, adopts the reasoning in ***Byers v Kosanovich***, [1995] 3 F.C. 354 (C.A.), that limits to jurisdiction (at page 373, of ***Byers***) "cannot be ignored simply by being disregarded by the parties or the Adjudicator."

In the result I hereby dismiss these references to adjudication. I have no jurisdiction to

deal with them. They are not proper grievances under subsection 91(1) of the ***Act***.

Donald MacLean,
Adjudicator and Board Member

MONCTON, December 14, 1998.