File: 166-2-27886

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

D. LEONARDUZZI

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: P. Chodos, Vice-Chairperson

For the Grievor: Vonnie Rochester, Counsel

For the Employer: Robert Jaworski, Counsel

Heard at Toronto, Ontario,
May 31 and June 1, 1999.

On August 9, 1996 Mr. Leonarduzzi filed a grievance in which he alleged the following:

> *I have been improperly dismissed and terminated. This was done in bad faith and contrary to the employer's policies and practices.*

On May 30, 1997 the grievor submitted his grievance to the Board by means of a Reference to Adjudication (Form 14). This matter was scheduled for a hearing on several occasions, and on each occasion was postponed at the request of the grievor. The parties met to present their case before the undersigned on May 31, 1999. At the outset of this hearing, two documents were submitted by the grievor with the consent of the employer: the first document is a letter from the employer to Mr. Leonarduzzi dated February 9, 1996 offering him

> […] *an indeterminate appointment to the above-noted position effective February 19, 1996. This offer is subject to successful completion of the Basic Training Program at TCTI, Cornwall.*
>
> […]
>
> *Since you have been appointed from outside the Public Service you are subject to a probationary period for the full duration of training. As such, you are expected to meet the requirements of the Unit Qualification Training Program (UQTP) while at the Regional Training Unit (RTU) and in on-the-job training (OJT). Failure to meet requirements will result in your being rejected while on probation.*
>
> […]

The other document (which is the only other evidence put before me in this proceeding) was a letter dated July 10, 1996 from the employer to Mr. Leonarduzzi, the subject of which is "Rejection on Probation"; it should be noted that counsel for the grievor advised that she was submitting this document in evidence for the sole purpose of demonstrating that the employer had terminated the employment of the grievor.

The text of this letter reads as follows:

> *As a result of your failure to meet the required standards for the Air Traffic Control Training Program, a recommendation was made that your training be ceased. I have reviewed the*

> *pertinent documentation and, based on the information contained therein, concur with the recommendation.*
>
> *You are hereby rejected on probation. Your last day as an employee with Transport Canada is two weeks from your receipt of this letter. That date is expected to be on or about July 30/96.*
>
> *I would like to take this opportunity to thank you for your time and effort during the training and wish you well in your future endeavours.*

Counsel for the parties were invited to make submissions respecting the burden of proof and the order of proceeding at this hearing. The submissions were taken under advisement and the following day I made my ruling on these issues which, in essence, directed the employer to provide some evidence as to the reasons for the purported rejection on probation (the reasons for decision are set out below). The employer objected to this ruling and requested that it be issued in writing, and that the hearing be adjourned in order to facilitate an application for review to the Federal Court. Counsel for the grievor indicated that she had no objection to the adjournment and to the issuance of a preliminary decision. Accordingly, the hearing was adjourned *sine die*, and I undertook to issue this decision.

The parties made the following submissions in respect of these issues. Counsel for the grievor noted that in accordance with subsection 92(3) of the *Public Service Staff Relations Act (PSSRA)* and subsection 28(3) of the *Public Service Employment Act (PSEA)*, a rejection on probation for cause cannot be referred to adjudication. However, before concluding that he/she has no jurisdiction the adjudicator must first determine whether Mr. Leonarduzzi was terminated pursuant to the *PSEA*. That is, the employer has to show that all the conditions required under section 28 of the *PSEA* have been met. Ms. Rochester maintained that there are three conditions set out in that provision: (1) the employee must be on probation; (2) the termination must take place during the probationary period; finally, (3) the termination must be for cause. In Ms. Rochester's submissions, "cause" means "just cause" that is, the employer must make a *prima facie* case that the grievor's termination was justified. Counsel for the grievor maintained that the question of good or bad faith is only relevant once the employer has demonstrated "cause" in accordance with section 28 of the *PSEA*. According to the grievor's counsel, this distinguishes this case from the *Rinaldi*

decision (Board files 166-2-26927 and 26928) where the only applicable condition was whether or not there had been a reorganization. As that fact had been admitted by the grievor, Mr. Rinaldi was obliged to prove that the employer had acted in bad faith. However, in the instant case, the employer has provided no proof respecting the "cause" for the grievor's termination. The grievor has a right to know with some specificity the reasons for his termination. Ms. Rochester maintained that this principle is consistent with the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 430. She further maintained that there is no reason to find that a probationary public servant has fewer rights than probationary employees in the private sector where, although the standard of proof is less rigid, the employer is obliged to show just cause. In support of this contention counsel referred to chapter five of the text *Just Cause, The Law of Summary Dismissal in Canada* by Randall Echlin and Matthew Ceriosimo, (1999) Canada Law Book. Ms. Rochester also cited the decision of the Federal Court, Trial Division in *Canada (Attorney General) v. Matthews* (1997), 139 F.T.R. 287 where the employee was purportedly laid off under the *PSEA*; the court in effect concluded that the notion of good or bad faith is superimposed upon the requirement to establish the applicable conditions for a lay-off under the *PSEA*.

Counsel for the employer submitted that the adjudicator must accept on its face that this is a rejection on probation in accordance with the *PSEA*, a matter over which an adjudicator appointed under the *PSSRA* has no jurisdiction. Accordingly, the burden of proof lies with the grievor to demonstrate bad faith. Mr. Jaworski noted that the letter of rejection on probation (supra) speaks of *"failure to meet the required standards";* this letter alone is sufficient to bar any reference to adjudication, and to establish the presumption that the employer has acted in good faith. Mr. Jaworski noted that under subsection 92(3) of the *PSSRA* there is an express prohibition against an adjudicator taking jurisdiction in respect of a matter under the *PSEA*. In support of his submission Mr. Jaworski cited the decision of the Federal Court, Trial Division, in *Her Majesty the Queen and Rinaldi* (1997), 127 F.T.R. 60 as well as the adjudication decisions in *Earle* (Board file 166-2-27346) and *Perreault* (Board file 166-2-26094).

Reasons for Decision

The question as to an adjudicator's jurisdiction in the face of a purported rejection on probation under the *PSEA* has a long and complex history; in fact, in the very first adjudication decision under the *PSSRA* (*Caron (1967) PSSR Report M 1*) Professor Harry Arthurs, then Chief Adjudicator, took jurisdiction in respect of an employee who had been rejected on probation. The leading case on this issue, the Supreme Court of Canada judgment in *Jacmain v. Attorney General of Canada and Public Service Staff Relations Board*, [1978] 2 S.C.R. 15; 81 D.L.R. (3d) 1; 18 N.R. 361; 78 CLLC 14,117, is now over twenty years old. This decision, which concerned the rights of probationary employees under the *PSSRA* and *PSEA* prior to the 1993 amendments, encompassed three separate judgments from members of the Supreme Court; this circumstance generated some degree of confusion. However, clarification was forthcoming when the issue was addressed by the Federal Court of Appeal in 1989 in the case of *Canada (Attorney General) v. Penner* [1989] 3 F.C. 429. Marceau J.A. reviewed in detail the *Jacmain* decision, as well as the relevant provisions of the *PSSRA* and the *PSEA*. The provisions of subsection 92(1) of the *PSSRA* and section 28 of the *PSEA* which were operative at the time read as follows:

> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> > *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award, or*
> >
> > *(b) disciplinary action resulting in discharge, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> *28. (1) An employee shall be considered to be on probation from the date of his appointment until the end of such period as the Commission may establish for any employee or class of employees.*
>
> *(2) Where an appointment is made from within the Public Service, the deputy head may, if the deputy head considers it*

> *appropriate in any case, reduce or waive the probationary period.*
>
> *(3) The deputy head may, at any time during the probationary period of an employee, give notice to the employee and to the Commission that he intends to reject the employee for cause at the end of such notice period as the Commission may establish for any employee or class of employees and, unless the Commission appoints the employee to another position in the Public Service before the end of the notice period applicable to the employee, the employee ceases to be an employee at the end of that period.*
>
> *(4) Where a deputy head gives notice that he intends to reject an employee for cause pursuant to subsection (3), he shall furnish the Commission with his reasons therefor.*
>
> *(5) Notwithstanding anything in this Act, a person who ceases to be an employee pursuant to subsection (3) shall, if the appointment held by the person was made from within the Public Service, and may, in any other case, be placed by the Commission on such eligibility list and in such place thereon as in the opinion of the Commission is commensurate with the qualifications of the person.*

In his decision, Mr. Justice Marceau analyzed in detail the judgments in the *Jacmain* decision and reviewed the conflicting adjudication decisions which were issued subsequent to that case. In that context his Lordship made the following observation at pages 438 and 439:

> *Other adjudicators have adopted quite a different attitude and accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy themselves that indeed the decision was founded on a real cause for rejection, that is to say a bona fide dissatisfaction as to suitability. In Smith (Board file 166-2-3017), adjudicator Norman is straightforward:*
>
> > *In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer.*
>
> *In my opinion, the latter view is the only one that the Jacmain judgment authorizes and the only one that the legislation really supports.*

Mr. Justice Marceau then concluded as follows at page 441:

> *The basic conclusion of the Jacmain judgment, as I read it, is that an adjudicator appointed under the P.S.S.R. Act is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on the ground that they were dissatisfied with the suitability of the employee for the position. And, to me, this conclusion follows inexorably from the legislation as it is.*

As noted above, both the *PSSRA* and the *PSEA* were amended in 1993, including the provisions respecting adjudication and rejection on probation. Section 92 of the *PSSRA* now reads as follows:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) 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, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> *(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the*

> *reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.*
>
> *(3) 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.*
>
> *(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(b) any portion of the public service of Canada specified in Part II of Schedule I.*

Paragraphs 11(2)(f) and (g), and subsection 11(4) of the *Financial Administration Act* state:

> *(2) Subject to the provision of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> > *(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;*
> >
> > *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;*
>
> *(4) Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph 2(f) or (g) shall be for cause.*

Section 28 of the *PSEA* now provides:

> *28.(1) An employee who is appointed from outside the Public Service shall be considered to be on probation from the date of the appointment until the end of such period as the*

> *Commission shall establish by regulation for that employee or any class of employees of which the employee is a member.*
>
> *(1.1) A probationary period established pursuant to subsection (1) is not terminated by any appointment or deployment of the employee made during the period.*
>
> *(2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member and the employee ceases to be an employee at the end of that period.*

One of the more significant changes to section 92 of the *PSSRA* was the addition of subsection 92(3); as was noted by the adjudicator in the *Perreault* case (Board file 166-2-26094) this provision "states emphatically and unequivocally that any termination of employment made under the Public Service Employment Act may not be referred to adjudication." (at page 20). This, however, begs the question. When a grievance has been referred to adjudication, and the employer submits that the adjudicator is deprived of jurisdiction because the grievor's termination of employment is pursuant to the *PSEA,* what inquiry can or should the adjudicator make in response to this submission? This question arose in the decision of the Federal Court, Trial Division, in *Her Majesty The Queen v. Rinaldi* (1997), 127 F.T.R. 60. In that case the grievor had filed a grievance challenging the employer's decision to terminate his employment; Mr. Rinaldi had been purportedly laid off as a result of a reorganization of his agency. At the outset of the adjudication hearing, counsel for the employer objected to the adjudicator assuming jurisdiction in this matter, on the ground that, pursuant to subsection 92(3) of the *PSSRA* the adjudicator has no jurisdiction, as a lay-off is a matter under the *PSEA*. In addressing this issue, Mr. Justice Noël made the following observations and conclusions at pages 67 and 68:

> *Bearing this statutory context in mind, the applicant submits that the case at bar raises two questions of law: whether the respondent could alter his grievance once it was before the Adjudicator and whether an adjudicator has jurisdiction to hear a grievance when the employer relies on the abolishment of a position under section 29 of the Public Service Employment Act as the reason for termination.*
>
> *This second question can be answered easily. In my view, there is no question that, according to the hypothesis on which the Adjudicator based her decision, she was perfectly right to find that she has jurisdiction to hear and*

> *decide the grievance. As Marceau J.A. said in Attorney General of Canada v. Penner:*
>
> > *A camouflage to deprive a person of a protection given by statute is hardly tolerable.*
> >
> > *Contrary to the applicant's submission, no statutory amendment has limited this principle. The addition to the Public Service Staff Relations Act of subsection 92(3), which bars the adjudication of a grievance with respect to a termination of employment under the Public Service Employment Act, does not remove jurisdiction from the Adjudicator solely because such a termination of employment is relied on by the employer. Subsection 92(3) clearly bars a referral to adjudication only where there was in fact a termination of employment under that Act. 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.*

As a result of the court's decision, Mr. Rinaldi's grievance was referred back to the adjudicator for a hearing. It should be noted that a similar conclusion was reached by Richard J. in *Attorney General of Canada v. John Matthews* (1997), 139 F.T.R. 287 which also involved a grievor who had purportedly been laid off pursuant to the employer's policies. In that case, the court concluded that the adjudicator was within his jurisdiction to inquire into whether the lay-off was a *bona fide* exercise of management's authority.

It is clear from the statutory provisions noted above as well as from the relevant jurisprudence that, firstly, a termination of employment under the *PSEA* is, *per se*, not adjudicable under the *PSSRA*. Secondly, where a grievance alleging a termination of employment is referred to adjudication, in the face of a jurisdictional objection, it is incumbent on the adjudicator to determine whether in reality there has been a termination of employment pursuant to the *PSEA*, as opposed to a subterfuge or "camouflage", (the term used by the Supreme Court in the *Jacmain* decision). What evidence is required in order for the adjudicator to make that initial determination depends on the nature of the purported termination. I agree with counsel for the grievor that, when the termination purports to be a rejection on probation for cause per section 28 of the *PSEA*, the adjudicator must determine whether the rejection on

probation was for "cause" as that term is used in section 28. It is interesting to note that the term "cause" is found both in section 28 and in the complementary legislation of section 11 of the *Financial Administration Act*. Clearly therefore, this is a term that has some meaning and importance in the context of the rights of employees in the federal Public Service.

In my view, in order to demonstrate that the adjudicator cannot address the employee's grievance, the employer must provide some evidence which would show that there is a real employment-related reason for the termination of the grievor's employment during the probationary period. In this instance, the employer has utterly failed to do this; despite being invited to do so, the employer has called no evidence, but rather is insistent that it needs to do nothing beyond establishing the existence of a letter purporting to reject the grievor on probation. I have no idea who is the author of the decision, what factors he considered in making that decision, what are the standards that are alluded to in the rejection on probation letter, and indeed whether such standards actually exist. Moreover, it would appear from the *Earle* and *Perreault (supra)* decisions that the language used in Mr. Leonarduzzi's rejection on probation letter is standard, boilerplate language with little or no variation (see p. 1 of the *Earle* decision and p. 1 of the *Perreault* decision). While I have some doubts as to whether the term "cause" as found in section 28 means "just cause" as urged by counsel for the grievor, I believe that there is a minimum threshold of evidence required from the employer, which would enable the adjudicator to make a reasonably informed decision as to whether he or she has jurisdiction to determine the grievance on the merits. I have no doubt that this does require the employer, through proper evidence, to demonstrate that there was indeed a "reason" for its actions.

Acceding to the employer's submissions would open the door to decisions which may be entirely arbitrary, based on irrelevant considerations, and possibly without a scintilla of legitimacy. It should be kept in mind that it is the employer who is uniquely in a position to know why it took the decision that it did; in the absence of providing at least minimal evidence and information, it puts the grievor in the invidious position of having to speculate as to the reasons behind the decision, and thereby assume an almost impossible burden in seeking to demonstrate bad faith. This is not mandated by the legislation in question, and flies in the face of simple fairness and common sense. At least since the Supreme Court decision in *Nicholson v.*

Haldimand-Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R. (3d) 671 (S.C.C.) it has generally been recognized that even probationary employees are entitled to a modicum of fairness when their livelihood is at stake. As Laskin C. J. C. stated: *In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than 18 months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily.* (at p. 680)

I would also like to address further the grievor's contention that the employer must demonstrate a *prima facie* case of "just cause". As I have indicated above, I believe that there is a requirement on the part of the employer to demonstrate before the adjudicator that section 28 of the *PSEA* applies, in which case the adjudicator is deprived of jurisdiction in accordance with subsection 92(3) of the *PSSRA*. However, this falls far short of requiring the employer to demonstrate "just cause" as that term is normally understood in a labour relations context. That is, I do not believe the employer has the burden of justifying its decision to terminate the employee, beyond providing a *bona fide* employment-related reason for doing so. It is required only to demonstrate that it is acting in accordance with the provisions of the *PSEA*. To hold otherwise, would be contrary to subsection 92(3) of the *PSSRA*.

To summarize, in my view it is incumbent upon the employer to demonstrate that section 28 of the *PSEA*, respecting rejection on probation for cause, has application. Upon discharging that initial burden, the burden of proof then shifts to the grievor to demonstrate that the employer's actions are in fact a sham or a camouflage, and therefore not in accordance with section 28 of the *PSEA*. It is only upon the discharge of that burden that the adjudicator can take jurisdiction under section 92 of the PSSRA and consider the grievance on its merits.

P. Chodos,
Vice-Chairperson.

OTTAWA, June 28, 1999.