



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

PIERRE LECOMPTE

Grievor

and

TREASURY BOARD  
(Health Canada)

Employer

**Before:** Evelyne Henry, Deputy Chairperson

**For the Grievor:** Himself

**For the Employer:** Stéphane Arcelin, counsel



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Heard at Montreal, Quebec,  
May 31, 1999



## DECISION

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### Facts

Mr. Lecompte worked at Health Canada from May 30, 1994 in determinate positions. On October 16, 1996, Mr. Lecompte was offered an extension of his term in his substantive position, HWQMA-00009 (GS-ST5-03), from October 31, 1996 to March 28, 1997. The employer extended the acting appointment of the grievor on November 5, 1996 in the CSQR1-0007 position (CR-03) from October 31, 1996 to March 28, 1997. Mr. Lecompte was advised by the employer on March 14, 1997 that his term would be renewed from March 29, 1997 to April 5, 1997 in order to give him three weeks notice since the employer had no intention of re-appointing him in his position at the end of the term. In its letter, the employer explained the reasons why he thought Mr. Lecompte no longer met the personal suitability requirements of his job.

On February 24, 1997, Mr. Lecompte's supervisor had recommended that the grievor's term be renewed, but that recommendation was turned down by the Human Resources Directorate. Aside from the offer made on March 14, 1997, no other offer was written or presented to Mr. Lecompte with a view to extending his term.

Mr. Lecompte was the subject of two disciplinary actions, which are mentioned in the March 14, 1997 notice, and which form the basis of the employer's determination that Mr. Lecompte no longer met the requirements set out in the statement of qualifications for the Storeroom Clerk position (GS-ST5-03) and the Clerk, Mail and Archives position (CR-03).

Mr. Lecompte denied all implications in the incidents which led to the disciplinary actions. He did not grieve the first suspension. This grievance, dated May 5, 1997, read as follows:

[Translation]

...

*M-1 I think I have been terminated for no valid reasons, with the excuse that my contract was not extended following unjust disciplinary actions.*

...

The corrective action requested was:

[Translation]

...

*Reinstatement in my position, retroactive to the end of the contract and protection against abuse of authority by getting a permanent position.*

...

The employer replied to the grievance on January 15, 1998, and, on March 18, 1998, Mr. Lecompte referred his grievance to adjudication.

The Public Service Staff Relations Board (PSSRB) received a letter from the employer on November 16, 1998, where it raised an objection with respect to the PSSRB's jurisdiction to hear Mr. Lecompte's grievance. Mr. Lecompte sent his reply to the employer's objection on November 30, 1998.

The hearing was first scheduled from December 14 to 16, 1998. Due to one of the witnesses' illness, the hearing was postponed at the request of Mr. Lecompte. Mr. Lecompte was advised on March 17, 1999 of the new hearing dates, from May 31 to June 4, 1999. On April 23, 1999, a notice of hearing was sent to the parties indicating the date, the time and the location of the hearing. The notice also included the following paragraph:

...

*AND FURTHER TAKE NOTICE that if you fail to attend the hearing or any continuation thereof, the presiding member of the Board may dispose of the matter on the evidence and representations placed at the hearing without further notice to you.*

...

On May 26, 1999, at 11:53, Mr. Lecompte faxed to the PSSRB a request for postponement, for the following reasons:

[Translation]

...

*1- I started a new job three weeks ago and taking some time off to attend these proceedings could cause me to lose this job since the proceedings can go on for several days.*

2- I ask that the matter be heard in December since the offices of my new employer will be closed during two weeks for the Holidays, and I can be available from December 20 to December 31.

3- This delay will also allow me to retain a specialized lawyer who will take over with respect to the procedures to follow.

...

In a letter dated May 28, 1999, the employer opposed this request for postponement:

[Translation]

...

The employer is ready to proceed in this case and his witnesses have been prepared for the second time in order to put an end to this dispute. A second postponement, requested by the grievor, would cause prejudice to the employer. Additional costs will be incurred and the availability of the witnesses is dubious. The employer's various witnesses are available and prepared to take part in the settlement of this dispute at the scheduled hearing dates. At this time, we will make some comments which, we think, are in favour of the dismissal of this request for postponement. We will follow the order set out in the grievor's letter dated May 26, 1999.

- 1- The grievor had a duty to advise the Public Service Staff Relations Board (hereafter the Board) and the employer of his constraints, within a reasonable time frame. If the grievor had been assiduous, he would have advised the parties involved when he learned that he was starting a new job (before actually starting the new job). This negligent action should not cause prejudice to the employer.
- 2- Furthermore, with respect to the request for postponement between December 20 and December 31, 1999, the employer was very surprised that Mr. Lecompte, who had sent nine summons to former work colleagues, had requested that the hearing be held during the Holidays... The fact that the grievor had specifically stated, in his letter dated December 8, 1998, that a postponement was crucial to allow the attendance of Mrs. Lalande "an important witness in this case" makes the situation even more bizarre. If the Board sat during that period, it would be realistic to presume that a crucial witness might have some serious constraints with the

*proposed dates, considering the federal requirements with respect to the Y2K problems.*

- 3- *Concerning the third allegation in the request for postponement, I would like to draw the Board's attention to the fact that the grievor had ample time to find a "specialized lawyer". The case was referred to adjudication on March 10, 1998. Also, it is noteworthy that, on November 16, 1998, the employer raised a preliminary objection with respect to the Board's jurisdiction. As detailed in the grievor's reply to the preliminary objection (dated November 30, 1998), he alleged that the employer had undertaken administrative steps to renew his contract for a specified term, beyond the expected end date. However, it seems that it was a purely administrative and preliminary step in the staffing process for employees whose determinate appointment is expiring. No official employment offer was made to Mr. Lecompte at that time. On the other hand, the employer had to review the merits of that extension pursuant to the relevant legislation.*

*Further to another incident involving Mr. Lecompte, the bond of trust has been broken irreparably. Accordingly, based on the grievor's entire file, the employer has decided not to extend the determinate contract of the grievor.*

*Further to that clarification, we reiterate our preliminary objection of November 16, 1998. We respectfully request that the Board dismiss this case for lack of jurisdiction. Alternatively, the employer asks that Mr. Lecompte state explicitly in writing why he thinks his case should be heard. Given this last option and considering what precedes, the employer respectfully requests that the Board proceed with this case on May 31, as scheduled.*

*Finally, it is noteworthy that the employer is prepared to proceed on Tuesday, June 1, 1999, should the Board deem it appropriate.*

...

On May 28, 1999, Mr. Lecompte was informed that his request for postponement was denied and the hearing would proceed as scheduled. However, the hearing would only deal with the preliminary issue on jurisdiction.

On May 31, 1999, without informing the PSSRB beforehand, Mr. Lecompte did not show up at the hearing which was scheduled to start at 1:30 p.m. At 2:00 p.m., the Assistant Secretary of the PSSRB called Mr. Lecompte to advise him that the

adjudicator was ready to proceed; Mr. Lecompte replied that he would not attend the hearing because he was afraid of losing his new job.

The employer objected to the postponement of the hearing by the Adjudicator due to Mr. Lecompte's absence. The employer viewed the grievor's actions as a stalling tactic and asked that the grievance be dismissed forthwith.

I decided to proceed without Mr. Lecompte and asked Mr. Arcelin to submit his evidence with respect to the preliminary objection. The employer submitted the following documents:

- Exhibit E1 Letter from Guy Aucoin to Pierre Lecompte, dated March 14, 1997, not renewing his term;
- Exhibit E2 Statement of Qualifications for the Storeroom Clerk position (GS-ST5-03);
- Exhibit E3 Statement of Qualifications for the Clerk, Mail and Archives position (CR-03);
- Exhibit E4 Letter from Guy Aucoin to Pierre Lecompte, dated October 16, 1996, extending his appointment to the Storeroom Clerk position (GS-ST5-03) from October 31, 1996 to March 28, 1997;
- Exhibit E5 Letter from Guy Aucoin to Pierre Lecompte, dated November 5, 1996, extending his acting appointment to the Clerk, Mail and Archives position (CR-03) from October 31, 1996 to March 28, 1997;
- Exhibit E6 Employment History of Mr. Lecompte at Health Canada;
- Exhibit E7 Letter from Guy Aucoin to Pierre Lecompte, dated April 22, 1996, extending his appointment to the Storeroom Clerk position (GS-ST5-03) from June 28, 1996 to October 31, 1996;
- Exhibit E8 Letter from Guy Aucoin to Pierre Lecompte, dated April 22, 1996, extending his acting appointment to the Clerk, Mail and Archives position (CR-03) from April 26, 1996 to October 31, 1996;
- Exhibit E9 Letter from the Public Service Commission to the Chief, Staffing Services, dated December 21, 1992, the subject being: Appointment Certificate: Conditions of Application of the ROST and Offers.

I advised Mr. Arcelin that I thought Mr. Lecompte's letter dated November 30, 1998 stated the argument he would have submitted, had he been at the hearing, and marked it as Exhibit F-1. Mr. Arcelin objected to the contents of the letter, even though he did not oppose its admissibility. I reserved my decision with respect to that objection.

Arguments for the employer

Mr. Arcelin argued that Mr. Lecompte's employment was for a determinate period, based on the evidence that was introduced, and in particular the letters dated October 16, and November 5, 1996 (Exhibit E-4 and E-5), as well as the March 14, 1997 letter (Exhibit E-1). His term was not extended and he ceased to be an employee at the end of the period for which he had been appointed, as stipulated in section 25 of the *Public Service Employment Act (PSEA)*:

*25. An employee who is appointed for a specified period ceases to be an employee at the expiration of that period.*

Mr. Arcelin referred me to paragraph 92(3) of the *Public Service Staff Relations Act* which stipulates that:

*92.(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.*

Mr. Arcelin alleged that, in a case like this, the PSSRB does not have jurisdiction to hear the grievance.

Mr. Arcelin added that Mr. Lecompte had the burden to prove that it was a constructive dismissal, and not a non-renewal of his term, and that the employer had acted in bad faith. Exhibits E-2 and E-3, the statements of qualifications, showed the fundamental factors which are considered for the granting of a term. The employer came to the conclusion that Mr. Lecompte no longer met these criteria and, therefore, did not renew the grievor's term. It is clear that the employer acted in good faith. In order to comply with its own policies, the employer extended Mr. Lecompte's term for a week, until April 5, 1997, to give him advance notice of the termination of his employment.

Mr. Arcelin requested that I dismiss the grievance for lack of jurisdiction to grant the corrective action, since only the Public Service Commission had the authority to appoint employees.

Mr. Arcelin alleged that nothing in the evidence showed that the employer acted in bad faith or abused its authority, but, even with such evidence, the PSSRB's



jurisdiction would be limited. Mr. Arcelin dismissed the allegations in the November 30, 1998 letter (Exhibit F-1) and alleged that the employer made a legitimate decision with respect to Mr. Lecompte's qualifications. He was the subject of two disciplinary actions, which he did not grieve, and that are not before me. The behaviour which led to the disciplinary actions and the circumstances of Mr. Lecompte's absence at the hearing showed that he lacked judgment and was not trustworthy; two factors required in the statements of duties of his substantive position and acting position.

Mr. Arcelin submitted the case of *McMorrow* (Board File 166-2-23967) as an authority on the test to be met with respect to bad faith. He urged me to apply the same notions to assess the evidence and determine that the employer did not act in bad faith towards Mr. Lecompte.

Mr. Arcelin asked that the grievance be dismissed, for lack of jurisdiction.

Argument for the grievor

Mr. Lecompte did not attend the hearing and therefore did not submit any evidence. In a letter dated November 30, 1998 (Exhibit F-1), he replied to the preliminary objection raised by the employer in a letter dated November 16, 1998 which contained the same arguments advanced by Mr. Arcelin at the hearing. The November 30, 1998 letter read as follows:

[Translation]

...

*Further to the request of the employer's representative, Stéphane Arcelin, with respect to the preliminary objection in the above-noted case, I respectfully request that the objection be dismissed for the following reasons:*

*Yes, I think I have been terminated for no valid reasons, with the excuse that my contract was not extended following unwarranted disciplinary actions. I am able to prove this statement through numerous testimonies.*

*Yes, it is true that my contract came to an end on March 29, 1997 at 00:00 h, pursuant to section 25 of the Public Service Employment Act. I am also able to prove, with supporting documents, that my immediate supervisor had presented a request for renewal to the human resources office of Health Canada. Furthermore, that request could*

*not have been made without the employer's prior authorization. But that same employer changed its mind after certain events in which I was not involved directly.*

*I cannot conceive that the Board's jurisdiction will not allow it to hear a case where allegations of constructive dismissal could be proven. It is suprising that the employer's representative referred to the same section of the Act as the employer for his request, since my request is based on that same issue.*

*With respect to the corrective action requested, I understand it does not fall within the Board's jurisdiction, but I intend to prove that a request for renewal was made and that I should have been in the job for at least three months, if the employer had not abused its authority. I demand to be compensated for that loss and that does fall within the Board's jurisdiction.*

*I also intend to submit as evidence obvious contradictions with respect to the reasons used in different official documents relating to my termination.*

*For all the reasons mentioned above, I reiterate my request that the employer's objection be dismissed and that the case be heard at the scheduled dates and times.*

...

### Reasons for Decision

A few questions come to mind with respect to Mr. Lecompte's decision not to attend the hearing: first, the request for postponement; second, the admissibility of the November 30, 1998 letter (Exhibit F-1); and, last, the PSSRB's jurisdiction to hear the grievance.

First, the postponement. Mr. Lecompte had long known the hearing dates, which he had suggested himself, when he requested a postponement of the hearing scheduled for December, 1998. From March 17, 1997, he had ample time to retain a lawyer; even between May 26 and May 31, he still had time to hire someone. It would have been difficult not to grant a request for postponement to a new lawyer in this matter. In the circumstances, the request to postpone the hearing over six months is totally absurd. Mr. Lecompte had a duty to attend and explain the steps he had taken to retain a specialized lawyer, if such was really his intention. When he was advised that his request for postponement had been turned down, Mr. Lecompte never

indicated to the PSSRB that he would not attend, nor that he would have no representative. Therefore, we can assume that Mr. Lecompte knew that, as per the notice of hearing, I could make a determination on the issue in light of the evidence and submissions made at the hearing, in his absence.

In his telephone conversation with the Assistant Secretary of the Board, Mr. Lecompte indicated that he would not attend the hearing because he was afraid of losing his new job. This is probably the only real reason for Mr. Lecompte's absence, and he had known it for three weeks, but had waited until the last minute to raise it, thus causing prejudice to the other side and limiting the other options which the Board could have considered. Mr. Lecompte suggested a two-week period during the Christmas Holidays as potential hearing dates. Those dates are seldom used by the PSSRB because they raise a number of difficulties for the witness's appearance and are usually discarded by the parties. Mr. Lecompte did not indicate that his fear to lose his job could disappear within a reasonable time frame, nor that it had any objective basis. To the contrary, he merely requested a postponement, and when it was turned down, he did not show up at the hearing nor did he advise anyone, until the Assistant Secretary of the PSSRB called him half an hour after the hearing was scheduled to start. I come to the conclusion that Mr. Lecompte gave priority to his personal affairs over his grievance and chose to let the PSSRB make a determination with respect to its jurisdiction, in his absence.

It would not be in the public's or the parties' interest to further delay a decision on the issue of jurisdiction in this case. Therefore, I decided to continue with the hearing and demanded that the employer argue his objection. The evidence was mostly documentary.

I decided to use Mr. Lecompte's letter dated November 30, 1998 (Exhibit F-1) as a basis for his position. Mr. Arcelin did not object to my using F-1 as Mr. Lecompte's argument, but objected to the allegations of bad faith and abuse of authority. Mr. Arcelin admitted that the supervisor had recommended the extension of Mr. Lecompte's term, but denied that disciplinary actions were unwarranted. He further indicated that the first one, which was a suspension, could have been grieved and adjudicated, but that it was not challenged by the grievor.

In light of the circumstances of this case and my decision with respect to the PSSRB's jurisdiction to hear this grievance, I will not have to make a determination on Mr. Arcelin's objection.

The issue to be determined is whether I have jurisdiction to hear a grievance relating to the non-renewal of a term, if a constructive dismissal is alleged, and the remedy I could fashion.

First, let us look at section 92 of the *PSSRA* which gives jurisdiction to adjudicators. Section 92 gives adjudicators the right to hear evidence based on an allegation of real or constructive dismissal, but clearly prohibits the adjudication of a grievance with respect to any termination of employment under the *PSEA*.

Mr. Lecompte was an employee hired for a determinate period ending April 5, 1997. He submitted no evidence that another term had been offered to him, or that he had accepted it. The fact that his supervisor had recommended the renewal of his term cannot be considered as an employment offer. Therefore, there was no job to be dismissed from, since he ceased to be an employee at the expiration of the period for which he had been appointed.

Can the reasons for not renewing be the subject of a review by the Board in the context of an adjudication? Can allegations of bad faith and abuse of authority, in applying the *PSEA*, give jurisdiction to the PSSRB to hear a grievance? I do not believe so in this case.

Mr. Lecompte was employed for a specified period and he "ceased to be an employee at the expiration of that period". The case law submitted by Mr. Arcelin does not help much, because it deals with a termination on probation, which is different from a person appointed for a specified period.

The PSSRB's jurisprudence deals with terminations of employment at the expiration of a term in *Marinos* (Board File 166-2-27446), *Hanna* (Board File 166-2-26983), *Blackman* (Board File 166-2-27134) and *Dansereau v. National Film Board and Pierre-André Lachapelle* [1979] 1 F.C. 100 (F.C.A.). In these cases, as in Mr. Lecompte's case, it is clear that the grievances were challenging a termination of employment at

the expiration of a specified term. In *Blackman, supra*, at page 7, the Adjudicator indicated:

...

*Furthermore, as was the case in Hanna (supra), the grievor's employment was not terminated by the employer within the meaning of subsection 92(1) of the PSSRA. Rather his appointment was for a four year term and that term came to an end. Pursuant to section 25 of the Public Service Employment Act (PSEA), the grievor ceased to be an employee upon the expiration of that term. In addition, the fact that he was an unsuccessful candidate for the two term positions can only be challenged under the PSEA.*

...

With respect to the requested corrective action, it is clear that the PSSRB does not have the authority to grant it. Mr. Lecompte requested: [Translation] *"Reinstatement in my position, retroactive to the end of the contract and protection against abuse of authority by getting a permanent position."* Section 8 of the PSEA provides that: *"8. Except as provided in this Act, the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament."* In *Laird* (Board File 166-2-19981), where a notice of lay-off had been issued in bad faith and for disciplinary reasons, the Adjudicator concluded that he did not have jurisdiction to make appointments. At pages 33-34, he said:

...

*The decision of the Federal Court of Appeal in Dansereau v. National Film Board [1979] 1 F.C. 100 states at p. 101 that:*

*An employee hired for a specific term is not laid off when this term expires, since the termination of his employment at that time is not due to lack of work but to the terms of the contract under which the employee was hired.*

*Expiration of contractual employment is, therefore, something very different from the curtailment of employment by lay-off.*

*While, on the evidence before me, I believe that Ms. Laird was worthy of having her contract renewed in priority*

*to either Ms. Burningham or Ms. Banks, it is clear that I have no authority to declare this to be the case as this would be tantamount to making an appointment and, thus, beyond my jurisdiction. Although I am inclined to feel that Ms. Laird has a moral claim to compensation beyond 30 June 1989, possibly for as much as a year past that date, I make no order in this regard for want of authority to do so.*

...

In his letter dated November 30, 1998, Mr. Lecompte conceded his status as an employee for a specified period and the PSSRB's lack of jurisdiction to grant him the requested corrective action, but asked for compensation equivalent to three months on the basis that a request for renewal had been made. The evidence before me showed that the supervisor made a request for renewal, but that request was denied by the Human Resources Directorate after a review of Mr. Lecompte's file and in light of the requirements of that position. Mr. Lecompte was not offered a renewal because the employer determined that he no longer met the personal suitability requirements. Furthermore, there is nothing in the file which would persuade me that the employer acted in bad faith towards the grievor, and I lack jurisdiction to alter the employer's decision with respect to the assessment of Mr. Lecompte's personal suitability. For these reasons, the grievance is dismissed, for lack of jurisdiction.

**Evelyne Henry,  
Deputy Chairperson**

OTTAWA, July 21, 1999.

Certified true translation

Serge Lareau