File: 166-2-29015

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

FRANK FLYNN

Grievor

and

TREASURY BOARD
(National Defence)

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: James Bart, The Professional Institute of the Public Service of Canada

For the Employer: Carole Bidal, Counsel

Heard at Edmonton, Alberta,
October 13 and 14, 1999.

On April 9, 1998, Mr. Frank Flynn, a computer systems (CS) level 2 employee, submitted a grievance alleging that the declaration of his position as surplus was, in reality, a disguised form of discipline leading to termination. The matter was set down for hearing, in Edmonton, from October 13 to 15, 1999.

On October 6, 1999, counsel for the employer wrote to the Public Service Staff Relations Board (the Board) and filed objections on two grounds. Firstly, the employer stated that the grievance was untimely in that it had been filed after the time limits specified in the CS collective agreement. Secondly, the grievor resigned from the Public Service and resignation is covered by section 26 of the *Public Service Employment Act* (*PSEA*) and is not adjudicable pursuant to section 92 of the *Public Service Staff Relations Act* (*PSSRA*).

The Board responded to this letter on October 7 stating that the matter should be raised at the commencement of the hearing.

Preliminary Issues

Ms. Bidal, counsel for the employer, reiterated her objection to the timeliness of the grievance when the hearing began.

She pointed out that clause 33.09 of the CS collective agreement states:

ARTICLE 33

GRIEVANCE PROCEDURE

> …
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> ***33.09*** *An employee may present a grievance to the first step of the procedure in the manner prescribed in clause 33.03, not later than the twenty-fifth (25th) day after the date on which he is notified orally or in writing or on which he first becomes aware of the action or circumstances giving rise to* [the] *grievance.*
>
> …

On November 7, 1997, the grievor was notified that his position would be declared surplus effective January 6, 1998 (see Exhibit E-2). In fact, it was January 8, 1998 (see Exhibit E-3) when the grievor received a letter informing him his position was declared surplus. He would have what is known as paid surplus status

for six months, which would expire July 7, 1998, followed by 12 months of unpaid surplus status. The letter also stated:

> …
>
> *As a surplus employee, you are eligible to opt for the Early Departure Incentive (EDI) within the next 60 calendar days….*
>
> …
>
> *If you decide to accept the EDI, you must complete and sign the enclosed EDI Election Form and submit it to Mr. Garry Dunn no later than 9 March 1998….*
>
> …

Ms. Bidal argued that the grievor knew his position was declared surplus on January 8, 1998, yet he did not grieve until April 9, and that is outside the 25-day time limit specified in the collective agreement.

Furthermore, she argued that the grievance reply stated that the grievance was untimely; therefore, the grievor had been put on notice during the grievance procedure (see Exhibit E-5, paragraph 2, and Exhibit E-7, page 2, paragraph 2).

In response to this, Mr. Bart, the representative for the grievor, tabled an exhibit book with some 27 tabbed exhibits.

The grievor's termination date after electing for the Early Departure Incentive (EDI) option, was March 9, 1998 (see tab 27), which was in accordance with the employer's instructions set out in its January 8, 1998 letter. The grievance was filed April 9, and, Mr. Bart argued, that is within the 25-day time limit from March 9. The grievance could not have been filed until the actual termination took place; otherwise it would have been a prospective grievance and may well have been deemed premature. Therefore, according to Mr. Bart, there was no option but to wait until the termination date before contemplating whether or not a grievance should be filed.

Furthermore, the case involved a requirement to offer the grievor a reasonable job offer, and this could have occurred right up to March 9, 1998. The grievor was told if he wanted to accept the EDI he had to do so on or before March 9 and he waited until the last possible moment to do so, hoping that a reasonable job offer would be

forthcoming. It was only when he realized another job offer would not be made that he had to act on the EDI offer.

Mr. Bart suggested that the grievance should be considered timely. I was referred to the following case law: *Re Beachvilime Ltd. and Energy & Chemical Workers Union, Local 3264* (1989), 7 L.A.C. (4th) 409; *Spence* (Board file 166-2-16809); and *Vaughan* (Board file 166-2-28296).

I reserved my decision on this matter.

The employer's second objection questioned my jurisdiction to hear the grievance and was centered on the fact that Mr. Flynn resigned from the Public Service. The employer argued this resignation was done in accordance with section 26 of the *PSEA*, which states:

> *26. An employee may resign from the Public Service by giving the deputy head notice in writing of the intention to resign and the employee ceases to be an employee on the day as of which the deputy head accepts in writing the resignation.*

Paragraph 92(1)(*b*) of the *PSSRA* provides the jurisdiction for an adjudicator to hear certain matters, and it states:

> *92.(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *…*
>
> *(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*
>
> *…*
>
> *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.*

As such, Ms. Bidal argued that paragraph 92(1)(*b*) of the *PSSRA* does not provide an adjudicator with the jurisdiction to hear an issue involving a resignation.

In the alternative, the employer's counsel stated the matter dealt with a lay-off, and this was covered under section 29 of the *PSEA*. It states:

> *29.(1) 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 lay off the employee.*

Subsection 92(3) of the *PSSRA* states:

> *(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.*

Therefore, Ms. Bidal suggested that terminations under the *PSEA* are not adjudicable.

The grievor's representative stated that the matter was, in reality, a disguised discipline case, which would be supported by the evidence.

I reserved my decision on this matter pending receipt of the evidence.

A request was made, and granted, for the exclusion of witnesses. I heard from five witnesses in total; two for the grievor and three for the employer.

Evidence

Mr. Flynn joined the Public Service in 1990 and began his employment with the Department of National Defence (DND) in 1994 as a computer systems manager (see tab 10). In this position, all computers in the Land Force Western Region Headquarters (LFWR HQ) came under Mr. Flynn's direction, and he supervised both military and non-military personnel. His performance reports were all satisfactory (see tabs 12 and 13).

From June 1996 to April 1997, Mr. Flynn reported to Major M.G. Mussolum and Major Mussolum testified Mr. Flynn was an excellent employee. The witness testified he was aware that there were people under Mr. Flynn's authority who were not happy with Mr. Flynn's managerial style. However, in Major Mussolum's view, this unhappiness related to the fact these individuals did not receive the technical equipment they wanted, but Mr. Flynn's denial of this request was based on an approved plan. The witness testified the individuals were not happy with the fact Mr. Flynn was simply doing his job.

As a result of budget cuts in 1995, Major Mussolum received a letter on March 25, 1996 saying that restructuring would be required (Exhibit E-10). Another letter was received on June 27, 1996 saying that a fifty-percent cut in personnel would be made to LFWR HQ (Exhibit E-11). Major Mussolum stated the effect of this downsizing exercise was that 245 positions would be reduced to 85 military and 10 civilian positions. Major Mussolum wrote to Mr. Flynn on October 9, 1996 stating that restructuring was taking place but that Mr. Flynn's position was not affected (see tab 7). The witness testified that he felt Mr. Flynn's job was critical to the organization; therefore, it was not affected by the reduction.

In April 1997, Major Mussolum left for a posting to Bosnia, and Major R.F. Pucci replaced him as Mr. Flynn's supervisor.

On May 5, 1997, Mr. Flynn received a letter offering him an indeterminate deployment to Edmonton Garrison, which was about 8 kilometers away (see tab 14). Mr. Flynn testified he was told this was an administrative matter only and his work location and duties would not change.

Both Major Mussolum and Major Pucci testified this change was made because it followed a concept that all computer systems personnel would come under the control of the signals squadron at Garrison.

Major Pucci testified that, after he took over from Major Mussolum, a number of people came to him and complained about Mr. Flynn's managerial style. Major Pucci listened to the complaints and spoke to Mr. Flynn about them and concluded that Mr. Flynn had a hard time working with people, but nevertheless was a good technician.

Major Pucci testified that he observed a number of mood swings in Mr. Flynn. One minute Mr. Flynn would be "on top of the world" and the next minute, he would be "aggressive". At times, Major Pucci testified he felt threatened by Mr. Flynn. Major Pucci stated it was a turbulent time with Mr. Flynn.

On June 23, 1997, Mr. Flynn and one of his military subordinates got into a heated exchange concerning a computer upgrade that had been done and Mr. Flynn went to Major Pucci to inform him of this event. Two days later, Mr. Flynn was asked to go to Major Pucci's office and the grievor was handed a letter removing him from the workplace due to a number of complaints about Mr. Flynn's interpersonal actions (see tab 15). Mr. Flynn was escorted back to his desk by military personnel and allowed to collect some personal belongings before being escorted out of the building. The letter stated that Health and Welfare Canada would be asked to examine Mr. Flynn to determine his medical fitness to continue to work.

Mr. Flynn testified he saw his own doctor, who said Mr. Flynn was fit for work (see tab 16), as well as a Health and Welfare Canada doctor who wrote, on July 17, 1997, that he "…found no evidence of any health problem….", and that Mr. Flynn was "…fully fit to carry on with any work he is qualified to do." (see tab 17).

On August 1, 1997, Major Pucci wrote to Mr. Flynn and stated that Health and Welfare Canada "…have determined that your observed behaviour and performance are not the result of any treatable health problem…." (see tab 18). The letter further stated that an investigation into alleged acts of misconduct would commence, and Mr. Flynn was being reassigned to the Garrison Telecommunications and Information Services Organization. Mr. Flynn testified he was reassigned to a nearly-abandoned building and his tasks were to take apart and reassemble computers, which was very junior work (see tab 19).

An investigation was conducted and a report was sent to Major Pucci on September 5, 1997 (see tab 21). It recommended that Mr. Flynn be returned to LFWR HQ and that he have no subordinates report to him for a period of three to six months; this would allow time for proper training to occur.

In spite of this, Major Pucci made a recommendation to Lieutenant-Colonel E. Parker, the Chief of Staff, that Mr. Flynn's position was no longer required and the environment in which he worked was tainted. Major Pucci testified he arrived at this conclusion because he had to look at all positions under his authority to determine if further savings could be obtained. Major Pucci felt he could adequately receive computer systems services from personnel at Garrison and therefore Mr. Flynn's position was surplus to his needs.

On October 22, 1997, Lieutenant-Colonel Parker wrote to Mr. Flynn saying the results of the investigation into alleged misconduct were now finalized and some allegations had been substantiated (see tab 20). A meeting was scheduled for October 23, 1997 to discuss Mr. Flynn's point of view.

The meeting was held as scheduled and, on November 4, 1997, Lieutenant-Colonel Parker wrote to Mr. Flynn saying a written reprimand was to be placed on his file and training in managerial, supervisory and communication skills was to occur (see tab 22). Following receipt of this letter, Mr. Flynn was instructed to return to his job in the Garrison Telecommunications and Information Services Organization and, on November 7, 1997, he received a letter saying his position would be declared surplus on January 6, 1998 (see tab 23). The options available to him were outlined in this letter, with the EDI being one. Another option was for priority rights for job placement, which included six months of paid surplus status, followed by 12 months of unpaid surplus status if no reasonable job offer was refused.

Following receipt of this letter, Mr. Flynn went on certified sick leave (see tab 25) and, on January 8, Mr. Flynn was formally notified his position was declared surplus. The six-month surplus period, during which he would be paid, was to run from January 8 to July 7, 1998. Mr. Flynn was also told in the letter he was eligible for the EDI which would be a lump-sum payment and he had up to March 9 to elect for this option. However, if a reasonable job offer was made before opting for the EDI, then Mr. Flynn could not avail himself of the EDI program.

Mr. Flynn spoke to the Manager of Civilian Personnel, Mr. Garry Dunn, about other possible positions being available. Mr. Dunn was the individual responsible for finding employment continuity for those individuals declared surplus and he spoke to Mr. Flynn about other possible positions.

On November 19, 1997, Mr. Dunn wrote to Mr. Flynn, stating, in part, (Exhibit E-14):

> …
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> *I advised you earlier this summer that your position was under review for possible deletion and you were informed of this fact at Reference B. I realize that this is a most difficult time for you. I am trying to respect your wishes for placement with another government department rather than DND. At present there are sections at the Garrison looking to staff indeterminate CS-01 positions which you may wish to consider with salary protection or on a temporary assignment, if approved. We can discuss in greater detail.*
>
> …

Mr. Dunn testified that, in many conversations he had with Mr. Flynn, Mr. Flynn asked to be placed outside DND, although CS positions were available within the Department. Consequently, Mr. Dunn looked outside the Department for available CS positions, as well as within DND outside Edmonton (see Exhibit E-16). A CS-02 position in Yellowknife was discussed between Mr. Dunn and Mr. Flynn, but Mr. Flynn advised he was not interested in it. Another potential CS-02 position in Calgary was mentioned and Mr. Flynn expressed interest in meeting the manager of this position. However, before this meeting could occur, Mr. Flynn formally resigned and accepted the offer of EDI.

Mr. Flynn testified he did so because he felt he had no other choice, and he waited until the last possible day before doing so. He hoped that a reasonable job offer would come along before he had to resign. However, he testified he was never formally offered another job and was never called for interviews.

Mr. Flynn acknowledged that all options were presented to him and he understood what they all meant, including the EDI. He recognized that if he refused a reasonable job offer, he would not be entitled to receive the EDI, and he made the decision himself to accept the EDI.

Arguments

For the Grievor

Mr. Bart argued that this case rests on three elements, namely:

1. The grievor was suspended in his job and knew his job was surplused.
2. The grievor was not offered a reasonable job offer.
3. The grievor was offered EDI and accepted it only in order to secure it.

With respect to the first element, Mr. Bart stated that the evidence showed Major Pucci to be unhappy with the behaviour of Mr. Flynn and there was a disciplinary motive behind the suspension. Even after the medical investigation was completed, Mr. Bart argued that the grievor remained suspended from his job. This situation he likened to the *Guay* case (Board file 166-2-24899).

An investigation was conducted into the grievor's conduct and the employer concluded that Mr. Flynn's behaviour was not so severe as to warrant discharge, so the position was surplused. The reason, according to Major Pucci's evidence, was that there was no need for the job, but this is peculiar given the timing of the events. Major Mussolum had said Mr. Flynn's position was critical to the operation and his letter of October 9, 1996 said as much to the grievor. Then, a few months after Major Mussolum left, the grievor was told his position was surplus. Major Pucci said he did not want Mr. Flynn around because of his attitude and he accomplished this, justifying it after the fact. Mr. Bart likened this to the *Mallett* case (Board files 166-2-15344 and 166-2-15623).

Insofar as the second element is concerned, there was no reasonable job offer made, even though positions were available. The employer had a positive obligation to offer a position to the grievor and it did not do so. This is similar to the *Donald* (Board file 166-2-28605) and *Graham* (Board file 166-2-24158) cases. The fact that a reasonable job offer was never made is evidence of discipline. A correct business

decision would have been to offer the grievor an available position (see *Brownlee* (Board files 166-2-21975 and 166-2-21982)).

In *Lo* (Board file 166-2-27825), the grievor stated that her acceptance of the early retirement incentive was, in fact, motivated by discipline by the employer. At pages 44 and 45 of the decision, a review is made of factors that are present in findings of bad faith. In the instant case, at least four of these elements are present; therefore, a finding that this is disciplinary should be made.

The third element of this case involves the grievor's acceptance of the EDI package, and the corresponding resignation. The grievor was faced with a lay-off if he did not opt for the EDI; therefore, there was no real choice. I was referred to the *McIlroy* case (Board file 166-2-12359).

The resignation was not voluntary because this presumes the grievor had some choice and, although he had a choice, he also had fear. Some eight months earlier he had been escorted off the job by the military police. He was required to undergo a medical examination and, although cleared, he was not allowed to return to his work location. He was given a lesser job, subjected to an investigation and remained suspended. Then, three days after receiving a written reprimand, he received his surplus notice. He was not offered another job, yet he waited until the last possible moment before opting for the EDI. He, therefore, had no intention of resigning.

A voluntary resignation depends on two elements: the subjective intent and the objective element. Mr. Bart submitted that the latter is present here because the grievor signed the EDI Election Form. However, there was no subjective intent to resign. I was referred to *Re Thompson General Hospital and Thompson Nurses M.O.N.A., Local 6* (1990), 15 L.A.C. (4th) 257 and *Re Government of the Province of British Columbia and British Columbia Government and Service Employees' Union* (1997), 66 L.A.C. (4th) 335.

Finally, Mr. Bart argued that the payment of the EDI should not act as a bar to determine that discipline had, in fact, been present. In *Lo* (*supra*), the grievor accepted an early retirement incentive but discipline was found to be present. Ms. Lo was required to reimburse all monies, but she was reinstated. A similar finding should be made here.

For the Employer

The grievance alleges a disguised discipline leading to discharge. The burden is clear, and the grievor has not been able to show that the termination of his employment was anything but a resignation. Resignations are made pursuant to section 26 of the *PSEA*, which says:

> *26. An employee may resign from the Public Service by giving the deputy head notice in writing of the intention to resign….*

Section 92 of the *PSSRA* prohibits these types of cases from going forward to adjudication; therefore, Mr. Flynn's grievance is not within the Board's jurisdiction. Mr. Flynn complied with the legal framework set up to resign, and the EDI Election Form he submitted shows he did so as of March 9, 1998. I was referred to *McNab* (Board file 166-2-14343).

The employer had no disciplinary motive for accepting the resignation as the only discipline issued was a reprimand, and the notice also said training would be provided. The employer would not offer training if discharge were on its mind. The grievor has not shown a motive in this situation.

With respect to the voluntary aspect, the employer notified the grievor of his surplus status and provided options. The grievor could have elected to go on a priority list for some 18 months but elected to resign instead.

Insofar as other job offers are concerned, the employer tried to find other jobs but the grievor did not want to return to DND. There were CS-01 jobs at DND that could have been offered to the grievor, with salary protection, and Exhibit E-14 illustrates this. Also, a position in Calgary was being discussed when the grievor submitted his resignation.

Mr. Flynn knew that if a reasonable job offer was made to him, he would lose the EDI package. The employer's counsel submitted that Mr. Flynn's acceptance of the package was well thought out and had been done only after weighing the pros and cons. I was referred to *Re Thompson General Hospital* (*supra*).

In *Arsenault* (Board file 166-2-23957), the grievor faced discharge and chose to resign instead. The resignation was not made under duress, according to the findings of the adjudicator, and a like determination should be made here. The choice for Mr. Flynn was not one of EDI versus lay-off, but rather EDI versus surplus status. He selected EDI, and this decision cannot be grieved.

Ms. Bidal argued, in the alternative, that the termination was a lay-off. However, that too is not adjudicable as lay-offs are covered by section 29 of the *PSEA* and, in *Rinaldi* (Board files 166-2-26927; 26928 and 27383), the adjudicator decided that jurisdiction could be conferred in a lay-off only if it was, in reality, an unlawful dismissal.

In this case, with all the downsizing going on, the reduction was done pursuant to the *PSEA* and there is no jurisdiction under the *PSSRA* to hear this.

The grievor has not demonstrated that the employer displayed bad faith that culminated in discharge. Although some discipline is present, it was very minor. Furthermore, the grievor was treated like all other employees who were surplused in that he was offered EDI or other jobs. It could be said that reasonable job offers were made, but when he declined interest in any of them, the Department kept looking and did not make a formal offer. This kept the EDI option available to Mr. Flynn and he ultimately took it.

In the further alternative, Ms. Bidal argued that even if bath faith were found, as in *Rinaldi* (*supra*), this still does not confer jurisdiction on the adjudicator. The Department had cutbacks; therefore, the grievor cannot show his declaration of surplus singled him out in any way. Major Pucci decided to obtain computer services from Edmonton Garrison and the grievor's position was affected.

There is no evidence to demonstrate that the employer’s action was outside section 29 of the *PSEA*. Therefore, there is no jurisdiction for the adjudicator to decide this case.

Reasons for Decision

The issue to be decided here is whether the resignation amounted to disguised discipline (in which case there is jurisdiction to hear the matter).

In *McIlroy* (*supra*), Board Member S.J. Frankel was asked to find that a resignation was indeed disguised discipline and the Board had jurisdiction to hear the matter. At page 29 of the decision, the adjudicator writes:

> *37. … In a long succession of grievance cases arising out of termination of employment (other than discharge) adjudicators had found it necessary to determine as a preliminary question of fact whether or not the termination, regardless of its technical form (i.e. lay-off or rejection on probation, etc.), was attributable in whole or in part to some disciplinary motive of the employer. It is now established that if he finds this element of disciplinary intent an adjudicator can assume jurisdiction to determine the grievance on its merits. (See The Attorney General of Canada v. Public Service Staff Relations Board [1977] 1 F.C. 91 affirmed [1978] 2 S.C.R. 15 in Roland Jacmain v. The Attorney General of Canada et al). I would emphasize, however, that it is not enough for the disciplinary element to be present in the environment within which the termination takes place; it must bear a causal relationship to the termination action.*
>
> *…*

Further along, at pages 31 and 32, the adjudicator writes:

> *40. In the circumstances of the present case it is not enough to argue that Mrs. McIlroy's resignation was involuntary, that it was "engineered" by the employer. It is necessary to prove that it was the result of disciplinary action or that it was extracted under the threat of disciplinary action…. Unless he can prove that the threat of release was disciplinary in its intent, the only recourse may be to seek relief in another forum.*
>
> *…*

In applying those principles to the case in front of me, the onus is on the grievor to establish that his termination was attributable to disguised discipline. I do not believe there is sufficient evidence to meet this burden of proof. There was, in my view, not enough evidence to establish, on a balance of probabilities, that the actions

of the employer leading to the termination of the grievor's employment were anything other than administrative decisions dealing with a well-known downsizing exercise.

I conclude, based on the above, that I lack jurisdiction to decide the matter before me. It is therefore not necessary to make a finding on the timeliness issue.

Having drawn that conclusion, I would however like to comment on the resignation itself, although it is recognized resignations do not fall under the jurisdiction of the *PSSRA*.

Like the situation described in *Arsenault* (*supra*), Mr. Flynn's resignation had its advantages. He was able to avail himself of the EDI package, which resulted in a lump-sum payment. The options available to Mr. Flynn were spelled out in the letters sent to him on November 7, 1997 and January 8, 1998. He elected to submit his resignation on March 9, 1998. He had ample time to weight the pros and cons, as it were, of resigning and I believe this is what Mr. Flynn did; I believe he examined the final package to which he was entitled under the EDI and, by submitting a resignation, he opted to receive it.

For all these reasons, I dismiss this grievance for want of jurisdiction.

Joseph W. Potter,
Deputy Chairperson

OTTAWA, November 23, 1999.