Date: 20011005

File: 166-2-29678

Citation: 2001 PSSRB 101

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

CARMEL FORTIN

Grievor

and

TREASURY BOARD
(Citizenship and Immigration Canada)

Employer

Before: Léo-Paul Guindon, Board Member

For the Grievor: Richard Bell, Counsel

For the Employer: Richard Turgeon, Counsel

Heard at Bathurst, New Brunswick,
April 25 to 27, 2001.

[1] Upon commencement of the hearing, the employer withdrew the request for simultaneous interpretation services that it had made on September 8, 2000. The parties stated that they were in agreement to proceed with the hearing without simultaneous interpretation.

[2] The grievance presented by Carmel Fortin on April 6, 1999 states the following:

> [Translation]
>
> *I am presenting this grievance because I was treated unfairly in the reverse order of merit evaluation process in connection with the work force adjustment exercise of July 17, 1996. My supervisor Tim Shaw took part in that evaluation even though he detested me. He therefore could not be impartial. No one should be judged by an adversary or by someone who has an interest in the process. The adjustment constituted disciplinary action and not budget action. Also, when I was declared surplus, my employer failed to offer me employment opportunities even though jobs were available at the time. Although I filed a complaint with the Public Service Commission on July 25, 1996, I feel aggrieved by its findings. The investigator failed to demonstrate objectivity and the outcome of his investigation was not favourable to me. I have initiated a process to have the case reopened by the Commission.*
>
> *If I have delayed in presenting this grievance, it was because I had confidence in the process initiated before the Public Service Commission. I am asking to be heard immediately at the second level.*
>
> *CORRECTIVE ACTION REQUESTED*
>
> *I am asking to be put back into my position or a position at a comparable level in New Brunswick within the Public Service of Canada.*
>
> *I am also requesting full compensation for the harm I have suffered as a result of this unjustified lay-off.*

[3] The employer argued that the adjudicator does not have jurisdiction to hear Mr. Fortin's grievance pursuant to subsection 92(1) of the *Public Service Staff Relations Act* (*PSSRA*). This case involves a resignation made in connection with a work force reduction governed by the *Public Service Employment Act* and cannot be referred to adjudication because of the exclusion set out in subsection 92(3) of the *PSSRA*. The work force reduction program in which Mr. Fortin participated arose from the *Budget*

Implementation Act, 1995, which authorized the Governor in Council to designate departments to which the *Work Force Adjustment Directive* applied (Exhibit E-1, Tab 4). The *Implementation Act* authorized the Governor in Council to designate departments governed by the program respecting early departure incentives, unpaid surplus status and lay-offs through amendments to the *Public Sector Compensation Act*. The order in council of December 7, 1995 designated Citizenship and Immigration Canada as a "most affected" department able to offer early departure incentives (Exhibit E-1, Tab 11). That order suspended the guarantee of a reasonable job offer in the Department of Citizenship and Immigration for a three-year period. The employer was therefore not required to offer employment opportunities to Mr. Fortin in the context of the massive work force reduction.

[4] Moreover, Mr. Fortin was selected as "surplus" in the reverse order of merit evaluation process provided for in subsection 34(1) of the *Public Service Employment Regulations*. The Public Service Commission is the entity that has jurisdiction to hear any complaints concerning the reverse order of merit evaluation process (subsection 7(1) of the *Public Service Employment Act*). The Public Service Staff Relations Board (PSSRB) does not have jurisdiction to hear Mr. Fortin's complaint concerning the application of that process, which is under the jurisdiction of the Public Service Commission.

[5] The employer asked the adjudicator to decline jurisdiction to hear Mr. Fortin's grievance and submitted *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225, in support of its argument.

[6] The grievor argued that the work force adjustment constituted disguised disciplinary action and not budget action. Subsection 92(1) of the *PSSRA* provides for adjudication when the termination of employment is the result of disciplinary action. *Rinaldi*, *supra*, *Robert Stokes and Department of Advanced Education and Labour, Province of New Brunswick* and *Matthews* (Board file 166-20-27336 and Federal Court files T-618-97 and T-623-97) were submitted by the grievor in support of his argument. The adjudicator has jurisdiction to hear all of the evidence so as to determine whether the termination of employment was disguised disciplinary action.

[7] The preliminary objection with regard to my jurisdiction to hear this grievance was taken under advisement, with the employer being required to provide evidence of

the procedure that led to the employee's resignation as well as his acceptance of the early retirement program. In addition, the grievor was required to demonstrate that the process that led to the termination of his employment was disguised disciplinary action. According to the reasoning of Noël J. in *Rinaldi*, *supra*, an adjudicator has jurisdiction to hear a grievance under paragraph 92(1)(*b*) of the *PSSRA* when it has been established "that the termination of the employment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise."

[8] The evidence pertaining to those elements cannot be separated from the evidence on the merits of the grievance, which will make it possible to determine whether Mr. Fortin was in fact declared surplus pursuant to the *Budget Implementation Act, 1995* and the amendments made by that Act to the statutes and regulations governing employment in the Public Service. I will also need to determine whether that decision was made in bad faith and constituted disguised disciplinary action according to the principle established by the Federal Court of Canada in *Rinaldi*, *supra*. In the instant case, the PSSRB has jurisdiction to determine whether the termination of employment being contested by the grievor did in fact originate from the work force reduction program and whether that procedure was applied in good faith and did not constitute disguised disciplinary action.

The facts

[9] Mr. Fortin had been employed at the Department of Citizenship and Immigration since March 1978 and held the position of immigration officer (PM-02) in Edmundston when his job ended on September 27, 1996 in connection with a work force reduction program.

[10] The order in council of December 7, 1995 (Exhibit E-1, Tab 11) designated the Department of Citizenship and Immigration as being "most affected" under the *Work Force Adjustment Directive.* Sixteen persons were surplus in the Atlantic region, and the Edmundston office had to reduce the number of immigration officer positions from four to two. According to witness Ronald Heicsler (Director, Operations, for the Atlantic region in 1995-96), the work force reduction stemming from the *Budget Implementation Act, 1995* was determined following an evaluation of the performance of the various offices, and it was decided to make cuts at the offices with the poorest performances while continuing to meet service needs. That decision was made in February or March 1996 by a committee comprised of representatives from Quebec

(Guynette Boivin) and the Atlantic region (Roger Lamb, Pauline Alain and Bob Moore) as well as Ronald Heicsler.

[11] A reverse order of merit evaluation process had to be applied at the Edmundston office, since the staff reductions among immigration officers could not take place through resignations. Guynette Boivin (Director, Human Resources) informed the affected employees, including Mr. Fortin, how to prepare their evaluation files. The employees in question each gave their evaluation file to the supervisor (Pauline Alain) for her comments. The employees were able to propose changes to the evaluation file containing the supervisor's comments before the final version was sent to Moncton for the employees to be classified by an evaluation committee. According to Mr. Fortin's testimony, his former supervisor (Tim Shaw) served on a committee to assess the evaluation reports with Ms. Alain and Raymond Bélanger. Mr. Shaw was Mr. Fortin's supervisor from 1982 to 1994, except for a two-year period (from 1992 to 1994). Ms. Alain was not very familiar with Mr. Fortin, whom she had been supervising for only two years (from 1994 to 1996), and she wanted to take advantage of Mr. Shaw's more thorough knowledge. There was no conflict in the sporadic contact (twice a year) between Mr. Fortin and Pauline Alain. In addition, the grievor had a satisfactory relationship with Raymond Bélanger (Mr. Bélanger apparently communicated with Mr. Fortin on the Saturday before the hearing of this case.)

[12] According to Mr. Fortin, Tim Shaw's participation in the reverse order of merit process could only be prejudicial to him. Mr. Shaw was his supervisor from 1982 to 1994 and, according to Mr. Fortin, various incidents show that Mr. Shaw continually tried to fault him during that time. The difficult relationship between Mr. Fortin and Mr. Shaw apparently dates back to March 1979, when Mr. Shaw responded negatively to information Mr. Fortin had given him about a competition for positions at the Bathurst, Edmundston and Moncton offices. Mr. Fortin said that Mr. Shaw did not appreciate the fact that the decision to assign Mr. Fortin to the Edmundston position was made without his being consulted.

[13] E-mail messages pertaining to the cases of Erik Krauss (April 1994) and Abina (November 1993), in which Mr. Shaw criticized the grievor for failing to write a report and failing to follow instructions, were filed as Exhibit E-4. These are examples of the alleged harassment which Mr. Fortin says was inflicted on him by Mr. Shaw. Mr. Fortin says that Mr. Shaw's criticisms in these e-mails were not justified.

[14] Mr. Fortin was suspended for two days on April 26, 1994 for pushing Mr. Shaw during an incident that took place on April 18, 1994 (Exhibit G-3, Tab 2). No grievance was presented in relation to that disciplinary action, since Mr. Fortin's wages were never docked pursuant thereto. An information for assault was filed in the Provincial Court of New Brunswick in connection with that incident, and Mr. Fortin received an absolute discharge upon pleading guilty (Exhibit G-3, Tabs 3 and 4). The criminal information laid by Mr. Shaw against Mr. Fortin greatly disturbed the latter, who imagined the negative impact it could have on his career if he were to be convicted. According to Mr. Fortin, the information was disproportionate in relation to the incident.

[15] Mr. Shaw reportedly held Mr. Fortin responsible for an administrative investigation that was conducted against him in 1992. Mr. Shaw was then transferred out of the Edmundston office for nearly two years. Mr. Heicsler confirmed that an administrative investigation had been conducted against Mr. Shaw but could not say why he was gone from the office for two years.

[16] According to Mr. Fortin, all of the above-mentioned incidents show that Mr. Shaw's participation in the reverse order of merit determination process could not have been impartial towards him. The employer's bad faith is evident when we consider that Mr. Shaw participated in the process despite the objections made by Mr. Fortin to Ms. Alain on the matter.

[17] Mr. Fortin filed a complaint with the Public Service Commission on July 25, 1996 alleging that his evaluation was flawed because of Mr. Shaw's participation in the process. The case report dated January 2, 1997 dismissed the complaint (Exhibit E-2). Mr. Fortin's request of April 14, 1999 to the Public Service Commission to have the investigation reopened was refused on May 25, 1999 (Exhibit E-3).

[18] On July 9, 1996, Bob Moore (CIC Director) informed Mr. Fortin that, further to the evaluation process, he was ranked fourth on the eligibility list and would be declared surplus (Exhibit G-3, Tab 6). The same information was sent to him again on July 17, 1996, and no specific reason could explain this new correspondence (Exhibit G-3, Tab 7).

[19] On July 31, 1996, Mr. Fortin was notified by Richard Anderson (Director General for the Quebec/Atlantic region) that there was a possibility of his position being

declared surplus. This correspondence informed him of the options available to him if his position were to be declared surplus. Mr. Fortin was invited to speak with a human resources advisor about the possibility of alternating with another employee, which was possible before the position was declared surplus. He was advised that he could receive more information on the options available (the *Early Retirement Incentive Program,* or ERI, the *Early Departure Incentive,* or EDI, lump sum payments if applicable, and priority rights for an appointment within the Public Service) from a human resources advisor. According to Nicole Leblanc's testimony, the option of lump sum payment(s) did not apply in cases in which positions were cut, and the three options offered to Mr. Fortin were the ERI, the EDI and priority rights.

[20] An attempt to alternate with Judy Bagley-Woodsocq did not materialize because Ms. Bagley-Woodsocq apparently changed her mind and rejected that option after Bob Moore checked with her. Another PM-02 position in Saint John was apparently available for alternation (for a nine-month period), but it was no longer available by the time another employee told the grievor about it. According to the information provided, Mr. Ouellet held the position in Saint John for nine months through alternation and was subsequently transferred to an indeterminate position in Moncton.

[21] On September 11, 1996, Mr. Fortin asked Guynette Boivin about the possibility of delaying the options process for the work force reduction program by six months. Mr. Fortin made the request because he was suffering from tendinitis in his shoulder and was expected to be incapacitated for six months. He was informed that he had to choose from among the options available before September 27, 1996. Mr. Fortin understood that the first day of the six months of pay in lieu of unfulfilled surplus period had been set at September 27, 1996. After that date, each work day would decrease the amount of pay in lieu of unfulfilled surplus period by an amount equal to one day's pay. This meant that the longer he put off the date on which his resignation came into effect, the lower would be the amount of compensation he would receive, without having to provide work. Mr. Fortin understood that delaying his resignation by six months would be the same as cancelling his pay in lieu of unfulfilled surplus period.

[22] According to Mr. Fortin, this was not a voluntary termination of employment for two reasons. First, he was told he would have to leave within 60 days or he would no longer have access to pay in lieu of unfulfilled surplus period. Second, he had to leave

in any event after the six-month period had expired. Once the six-month surplus period had expired, he would no longer be able to choose the ERI, which he viewed as undue pressure.

[23] Although the employer offered to provide Mr. Fortin with additional information about the options available through human resources advisors, he did not take advantage of those services. Nor did he make any inquiries of his union. He therefore had minimal knowledge of the various options available as of September 1, 1996. He had not been given a copy of the *Work Force Adjustment Directive.*

[24] Accordingly, after Ms. Boivin informed him of the terms and conditions for pay in lieu of unfulfilled surplus period, Mr. Fortin sent an e-mail to advise Sandra Delorme (pay specialist) that he was choosing that option as of September 27, 1996 (Exhibit G-3, Tab 8).

[25] On September 26, 1996, Assistant Deputy Minister Georges Tsaï recommended that the Director General, Human Resources, grant pay in lieu of unfulfilled surplus period and Mr. Fortin's request for early retirement.

[26] On September 27, 1996, Richard Anderson, Director General, Quebec/Atlantic region, advised Mr. Fortin that his position had been declared surplus and that he had to choose one of the options within 60 days of receiving the letter (Exhibit G-3, Tab 7).

[27] Mr. Fortin signed his request for early retirement (under the *Early Retirement Incentive Program*), his notice of termination and/or option for benefit and his application for retroactive remuneration on September 27, 1996. His request for pay in lieu of unfulfilled surplus period was signed on September 28, 1996 (Exhibit G-3, Tab 8).

[28] When asked on cross-examination if he had read the documents before signing them, Mr. Fortin answered that the writing was quite small and that he had simply signed them as instructed by the employer ("do this", "sign there", "send me that").

[29] He thus received pay in lieu of unfulfilled surplus period in the amount of $20,000 plus $14,000 in severance pay, for a total of $34,000. The pension amount to which he was entitled following acceptance of his request for early retirement was $15,000 per year.

[30] In retrospect, Mr. Fortin believes he was misinformed as to the various options available, particularly with regard to priority rights. He considers that he would have had a good chance of being appointed to another position if he had chosen that option. Accordingly, if he had been given the correct information, he could have agreed to alternate into the term position in Saint John that was available at the time. Like the employee who took that position, he could then have filled an indeterminate position and would not have been disadvantaged in attempting to live on an annual early retirement income of only $15,000.

[31] Through the testimony of Nicole Leblanc, human resources and work force adjustment advisor, the employer gave evidence concerning the entire legislative context that led to the work force reduction carried out in 1996 under the *Budget Implementation Act, 1995* (Exhibit E-1) and the reverse order of merit evaluation process that was applied at the Edmundston office.

Arguments

For the Grievor

[32] For the grievor, Mr. Bell submitted that relations between Mr. Fortin and his supervisor Mr. Shaw were very strained from the time Mr. Fortin was assigned to the Edmundston office in 1982. Mr. Shaw apparently did not accept the fact that Mr. Fortin was assigned to his team without his being part of the decision. Mr. Shaw continually tried to fault Mr. Fortin, as shown by the e-mails sent in 1993 and 1994 (Exhibit G-4). The culmination was on April 18, 1994, when Mr. Shaw laid an information for assault against Mr. Fortin (Exhibit G-3, Tab 4). Mr. Fortin received an absolute discharge upon pleading guilty. He was greatly shaken up by this criminal information, which came on top of disciplinary action (a two-day suspension) imposed on him on April 26, 1994 for the same incident (Exhibit G-3, Tab 2). The information demonstrates how much aggressiveness Mr. Shaw had against Mr. Fortin and shows that he could not be impartial in the reverse order of merit evaluation process.

[33] Mr. Bell submitted the decision rendered by the Public Service Commission Appeal Board in *Vincent Agostino et al.* (file no. 96-IMC-02162) dated November 4, 1997 (Exhibit G-3, Tab 9). In that decision concerning appointments made in connection with a reorganization at the Montreal office of Citizenship and Immigration Canada, it is noted that "some departmental spokespersons deliberately provided false information to their employees . . . over a long period of time" and that "Ms. Boivin's testimony very

easily adapted to the evidence as it developed, completely contradicting itself as the hearing went on" (pages 34 and 36). By inference, the adjudicator should consider the employer's bad faith as referred to in *Agostino*, *supra*, and apply it to this case, since the employer failed to call as witnesses Guynette Boivin, Richard Anderson, Tom Marshall, Pauline Alain and Tim Shaw, all of whom participated directly in the process that led to the termination of Mr. Fortin's employment.

[34] The employer was unable to explain why Mr. Fortin was advised that he would be declared surplus on two occasions, in letters dated July 9 and 17, 1996 from Bob Moore (Exhibit G-3, Tabs 6 and 7). On July 31, 1996, Richard Anderson, Director General, Quebec/Atlantic region, notified Mr. Fortin that there was a possibility of his position being declared surplus (Exhibit G-3, Tab 7). On September 27, 1996, Mr. Anderson informed Mr. Fortin that his position had been declared surplus (Exhibit G-3, Tab 7). A single conversation took place between Ms. Boivin and Mr. Fortin on September 11, 1996. Mr. Fortin's testimony clearly shows that Ms. Boivin exerted pressure to force him to opt for her program on that date by indicating to him that he would lose his option rights on September 27, 1996. That information was clearly false, since Mr. Fortin had 60 days starting on September 27, 1996 to choose the options that interested him.

[35] The employer did not offer the possibility of secondment to the term position in Saint John, New Brunswick that was granted to another employee on September 16, 1996 (Exhibit G-3, Tab 10). Yet the employer had been informed of Mr. Fortin's interest in accepting such a secondment to Judy Bagley-Woodsocq's position.

[36] According to Mr. Bell, the employer failed to demonstrate that the *Management of Work and Work Force Adjustment Policy* (Exhibit E-13) was followed, particularly with regard to the objective of minimizing the impact of work force adjustment situations on indeterminate employees. In Exhibit E-11, the employer referred to the reorganization of the Atlantic region and not to cuts. The cash-out recommendation and certification form (Exhibit E-11) indicated that Mr. Fortin's position was surplus and that there were no more vacant indeterminate positions available, without the employer proving this. The memorandums issued further to the *Budget Implementation Act, 1995* (Exhibits E-7 and E-8) clearly stated that the objective was to minimize the number of involuntary departures and that the employer had to provide affected employees with alternative employment opportunities in the Public Service

(Exhibit E-1, Tab 12). According to Mr. Bell, the employer reversed the order of the process, since the declaration of surplus position must come before the reverse order of merit evaluation process. In Mr. Fortin's case, the position was declared surplus on September 27, 1996 (Exhibit G-3, Tab 7), while the results of the reverse order of merit evaluation process were published on July 9, 1996 (Exhibit G-3, Tab 6). If Mr. Fortin had been informed on July 9, 1996 that his position would be declared surplus on September 30, 1996, he could have used that two-month period to consider the other options (transfer of positions between employees, priority rights, etc).

[37] The *Work Force Adjustment Directive* (Exhibit E-1, Tab 12) indicates that the employer must provide a copy of the *Directive* (section 1.1.13), which was not done in Mr. Fortin's case. According to section 1.1.27 of the *Directive*, surplus employees have priority for term positions, and the employer failed to offer Mr. Fortin the position in Saint John that was assigned to Mr. Ouellet for a nine-month period (Exhibit G-3, Tab 10). Exhibit G-3, Tab 10, shows that the employer failed to offer Mr. Fortin positions at a lower classification that were available, in violation of section 5.1.1 of the *Work Force Adjustment Directive.*

[38] The correspondence of September 27, 1996 (Exhibit G-3, Tab 7) does not meet the requirements of the *Work Force Adjustment Directive* (Exhibit E-1, Tab 12), since the deputy head failed to provide reasons for laying off the employee.

[39] According to Mr. Bell, the employer did not discharge its burden of proof because there was no direct evidence as to the procedure that was followed. In Mr. Fortin's case, other factors came into play, and this is a case of termination of employment not for administrative reasons but for disciplinary reasons.

For the Employer

[40] The employer submitted that the termination of Mr. Fortin's employment was a resignation made in the context of staff cuts. Mr. Heicsler testified concerning the procedure followed by the employer in implementing the specific cuts from the 1995 budget. The performance evaluations made with respect to the various offices led to the decision to cut the number of immigration officer positions in Edmundston from four to two.

[41] Since no employees volunteered to leave the Public Service, a reverse order of merit evaluation process had to be carried out, and Mr. Fortin ranked fourth. The evaluation committee was comprised of Pauline Alain, Raymond Bélanger and Tim Shaw. Mr. Fortin had a good relationship with Mr. Bélanger and Ms. Alain. No evidence was provided indicating that the conflict between Mr. Fortin and Mr. Shaw had had any kind of effect on Mr. Fortin's evaluation by the evaluation committee. Moreover, Mr. Fortin's complaint to the Public Service Commission denouncing Mr. Shaw's participation in the reverse order of merit evaluation process was dismissed.

[42] Mr. Fortin had a choice between the Early Departure Incentive, the Early Retirement Incentive Program and the reasonable job offer (Exhibit E-1, Tab 13). Mr. Fortin had the choice and could have opted for the reasonable job offer, whereby the employer must endeavour to make the employee a reasonable job offer within six months of the paid surplus notice. He could then have had unpaid surplus status for a one-year period before being laid off. Mr. Fortin chose the Early Retirement Incentive Program and took pay in lieu of unfulfilled surplus period. He made his choice after speaking with Ms. Boivin, a human resources specialist, and did not see fit to seek information from other advisors or his union. As an immigration officer, Mr. Fortin interpreted and applied legislation, directives and policies, and he was not credible when he testified that he did not read the letters and documents he signed in connection with his resignation and did not understand their significance.

[43] The employer tried in vain to satisfy the request for alternation between Mr. Fortin and Ms. Bagley-Woodsocq, but the latter changed her mind. This element demonstrates not that the employer wanted to get rid of Mr. Fortin but that, on the contrary, it attempted to respond to his requests. The employer could not offer the Saint John position to Mr. Fortin because the position was not indeterminate and did not meet the definition of a reasonable job offer under the *Work Force Adjustment Directive* (Exhibit E-1, Tab 12, page 4).

[44] The procedure followed by the employer demonstrates that it acted in good faith and in accordance with the legislation, policies and directives applicable under the *Budget Implementation Act, 1995.* Although incidents led the employer to take disciplinary action in 1994, and although the strained relationship between Mr. Fortin and Mr. Shaw was proven, the grievor failed to demonstrate that there was a

connection between those disciplinary elements and the application of the *Work Force Adjustment Directive.*

[45] The facts in *Matthews*, *supra*, a case submitted by Mr. Bell, are different from those of this case, since the complainant was excluded from the organization before the implementation of the measures intended to reduce surpluses. That decision therefore cannot apply in the instant case. *Agostino*, *supra*, also submitted by Mr. Bell, cannot apply in the instant case because Ms. Boivin's credibility, which was criticized in that decision, cannot be called into question in this case since she did not testify here.

Reasons for Decision

[46] The issue in this case is whether the employer's decision to declare Mr. Fortin surplus was indeed made pursuant to the provisions of the *Public Service Employment Act* or whether it was in fact disguised disciplinary action.

[47] According to the evidence adduced before me, the federal budget of February 1995 imposed significant cuts on the Public Service, and the Department of Citizenship and Immigration was designated as a "most affected" department by the order in council of December 7, 1995. The work force reduction program thus applied to the Department of Citizenship and Immigration, and the Quebec/Atlantic regional branch had to conduct a performance evaluation of the various offices in order to determine surplus positions. The employer designated two of the four immigration officer positions at the Edmundston office as surplus. Since none of the immigration officers volunteered to leave the Public Service, a reverse order of merit evaluation process had to be carried out.

[48] The process followed by the employer in designating surplus positions and the decision to proceed with the evaluation of employees in reverse order of merit seem to have been in compliance with the *Budget Implementation Act, 1995* and the *Work Force Adjustment Directive.* The grievor did not submit any evidence that the decision to declare two of the four positions at the Edmundston office surplus was in violation of the applicable legislation, regulations or directives.

[49] The basis of the grievor's argument is the contention that Mr. Shaw's participation in the reverse order of merit evaluation process tainted the procedure and meant that it was disguised disciplinary action. Although the grievor

demonstrated the existence of a turbulent employment relationship with Mr. Shaw, he did not adduce any evidence that the evaluation that was carried out was tainted. During his testimony, he did not specify in what way his evaluation was incorrect or what element of his evaluation was influenced by Mr. Shaw's alleged negative attitude towards him. There was no evidence that any kind of behaviour by Mr. Shaw during the evaluation procedure could have influenced the other members of the evaluation committee. Mr. Fortin's good relationship with Mr. Bélanger (who was part of the evaluation committee) does not seem to have enabled him to obtain any information in that regard. Accordingly, despite the disciplinary action taken in 1994 under Mr. Shaw's management, the grievor failed to demonstrate how the reverse order of merit evaluation process constituted disguised disciplinary action.

[50] The employer's bad faith, through Mr. Shaw's participation in the committee conducting the reverse order of merit evaluation, was not demonstrated by the grievor. To demonstrate bad faith, it is necessary to prove specific behaviour or actions on the employer's part, such as being disloyal, underhanded, duplicitous, false or treacherous, which was not done in the instant case. In *Rinaldi*, *supra*, Noël J. of the Federal Court of Canada provided the following reasoning, which must be applied here:

. . .

> *. . . A reorganisation under subsection 29(1) takes place when restraint measures . . . result in the abolishment of positions. . . . If the reorganization that results in the abolishment is not challenged and/or a de facto abolishment of positions occurs, it is hard to imagine how the resulting lay-offs can have been effected otherwise than as a result of the discontinuance of functions within the meaning of section 29.*
>
> *This is just as true if the respondent can prove a turbulent employment relationship. He would then also have to show that the employer's reliance on section 29 is contrived. . . .*

. . .

[51] The grievor submitted that he experienced undue pressure and was misinformed by Ms. Boivin during a telephone conversation on September 11, 1996. The information provided concerning the reduction in the amount of pay in lieu of unfulfilled surplus period as of September 27, 1996 was accurate. The start date of the six-month unfulfilled surplus period was the date on which he was declared surplus

(September 27, 1996), and every day worked after that date reduced the pay for the unfulfilled period in accordance with Part VII of the *Work Force Adjustment Directive* (Exhibit E-1, Tab 12). It must also be considered that Mr. Fortin had been informed as of July 9, 1996 that he would be declared surplus (Exhibit G-3, Tab 6) and that options had been indicated to him in the correspondence of July 31, 1996 (Exhibit G-3, Tab 7). Moreover, further details concerning the options had been attached to the correspondence of July 31, 1996, as can be seen from Exhibit G-3, Tab 7. The employer had also indicated therein that more information could be obtained from a human resources advisor. Mr. Fortin had in his possession details on all of the options available and had had five weeks to obtain additional information by the time he spoke with Ms. Boivin on September 11, 1996. During that five-week period, he did not see fit to make inquiries with human resources advisors or his union, and he cannot blame the employer for the fact he felt pressured because he had to make a choice about options of which he did not have an altogether clear understanding because of his own turpitude. Furthermore, between September 11, 1996 and the time when he signed the relevant documents, another two-week period elapsed without Mr. Fortin taking the opportunity to verify the information provided by Ms. Boivin.

[52] I cannot accept as evidence of the employer's bad faith the fact that no reasonable job offer was made to Mr. Fortin prior to his being declared surplus. First, Mr. Fortin's choice to opt for pay in lieu of unfulfilled surplus period and for early retirement means that he was not in fact eligible for priority rights for appointment within the Public Service. Second, despite the evidence that a nine-month position was reportedly available in Saint John at a similar PM-02 level, the position could not be considered a "reasonable job offer" within the meaning of the *Work Force Adjustment Directive.* The *Directive* indicates that a reasonable job offer is an offer of indeterminate employment within the Public Service, a characteristic that the position in Saint John did not have. The employer was not required to offer the position to Mr. Fortin, who did not choose the third option of priority rights, since the order in council of December 7, 1995 suspended the guarantee of a reasonable job offer (Exhibit E-1, Tab 11).

[53] For these reasons, I conclude that the decision to declare Mr. Fortin surplus was made in accordance with the applicable legislation and regulations and that the

termination of his employment was in compliance with subsection 29(1) of the *Public Service Employment Act.*

[54] The evidence failed to demonstrate that the employer acted in bad faith in implementing the work force reduction program and in concluding that the position held by Mr. Fortin was surplus. It was not demonstrated that the reverse order of merit evaluation process was in bad faith because of Mr. Shaw's participation in the evaluation committee. The entire procedure followed by the employer in applying the *Budget Implementation Act, 1995*, the work force reduction program and the *Work Force Adjustment Directive* was in good faith, and the termination of Mr. Fortin's employment occurred in compliance with the applicable legislation and policies.

[55] The employer discharged its burden of proof by demonstrating to my satisfaction that Mr. Fortin's resignation arose from the *Budget Implementation Act, 1995* and the work force adjustment procedure.

[56] Mr. Fortin did not discharge his burden of proof, since he failed to demonstrate that the procedure followed by the Department in declaring him surplus was simply a ruse to disguise a dismissal for disciplinary reasons as an administrative termination. The grievor could have called whatever witnesses he believed necessary to make his case, and he cannot blame the employer for not calling them. Each party is in control of its own evidence, and if the grievor believed that the testimony of Ms. Boivin, Mr. Anderson, Mr. Marshall, Ms. Alain and Mr. Shaw was necessary to his case, it was his duty to summon them himself rather than assuming that the employer would call them as witnesses.

[57] In light of the foregoing, the termination of Mr. Fortin's employment does not constitute a disguised disciplinary termination and constitutes an administrative decision made in good faith and in accordance with subsection 29(1) of the *Public Service Employment Act.*

[58] Mr. Fortin's grievance is accordingly covered by the exclusion provided for in subsection 92(3) of the *Public Service Staff Relations Act* and cannot be within my jurisdiction. The grievance is therefore dismissed.

Léo-Paul Guindon,
Board Member

OTTAWA, October 5, 2001

PSSRB Translation