

LIP

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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

RACHEL GROTTOLI

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Martin Ranger, Counsel, The Professional Institute of the Public
Service of Canada

For the Employer: Renée Roy, Counsel

Heard at Ottawa, Ontario,
August 2, 2001.



DECISION

[1] On November 8, 2000, Rachel Grottoli filed a grievance concerning management's decision to revoke her appointment to a Computer System (CS) level 1 position with the Canada Customs and Revenue Agency (CCRA). That grievance reads as follows:

I am grieving the Agency's disciplinary decision dated October 24th 2000 revoking my appointment to a CS-1 position. The Agency, following competition no. 2000 CCRA-NOR-1210-0027 made me an offer of employment which I accepted in good faith. Based on this offer, I sold my house in Sudbury and moved to Ottawa at my expense and purchased a house in Orleans. Because of the Agency's offer I have incurred large financial debts. I have been doing above satisfactory work in my CS-1 job and the Agency must be estopped from relying on a technicality such as the area of selection to revoke my position. I also grieve any overpayment created as a result of the October 24th 2000 decision.

Ms. Grottoli requested the following corrective action:

That the decision of October 24th 2000 be revoked and that I be given back my CS-1 position with full arrears of salary and benefits effective October 25th 2000, including but not limited to any sick leave benefits taken as a result of the Agency's decision.

[2] Prior to receiving the CS-1 position, Ms. Grottoli was classified as a clerical and regulatory (CR) level 3 employee, in the Sudbury Tax Office. She was the successful applicant for a CS-1 position located at the Ottawa Tax Office.

[3] The grievor contended that the revocation of the appointment was disguised discipline and sought to be reinstated to the CS-1 position.

[4] The employer contended that the revocation was an administrative decision made necessary by the fact the grievor supplied inaccurate information to the selection board. Therefore, the employer contends that the grievor should not have been considered as a candidate for the vacancy.

[5] This is a preliminary decision with respect to the issue of jurisdiction. The employer contends that since this was an administrative action, done in good faith, an adjudicator appointed under the *Public Service Staff Relations Act* (PSSRA) lacks jurisdiction to hear the matter.

[6] The grievor contends that the matter is, in reality, discipline and therefore an adjudicator has jurisdiction to hear the matter pursuant to subsection 92(1) of the PSSRA.

Background

[7] Subsection 92(1) of the PSSRA states:

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.

[8] Ms. Grottoli states that as a result of a letter she received dated October 24, 2000 (Exhibit E-4), she has suffered a financial penalty. The letter signed by Lysanne Gauvin, Assistant Commissioner, Northern Ontario Region, CCRA, states in part:

...

The area of selection for the CS-01 selection process was open to: "Persons residing and/or working within a 60 kilometer radius of Ottawa". The result of the investigation clearly demonstrated that at the time of your application, March 22, 2000, you did not meet the prescribed area of selection criteria as noted on the notice. Your explanation with regard to having dual residencies in Rockland and Garson, does not meet the area of selection guidelines. You indicated on your on-line application and subsequent resumé erroneous and/or incomplete information regarding the area of selection, your experience and education. Such information misled the selection board which ultimately included you in the selection process which resulted in your

subsequent assessment and appointment to the CS-01 group and level.

Therefore, according to the authority delegated to me by the Commissioner, I hereby revoke your appointment to the CS-01 group and level effective Tuesday, October 24, 2000 at the close of business. As of Wednesday October 25, 2000 you will revert to your substantive group and level of CR-3, Administrative Clerk in the Sudbury Tax Services Office. To allow you sufficient time to put your personal affairs in order, administrative arrangements are currently being made to provide you with a temporary secondment at the CR-3 group and level in Ottawa until March 5, 2001. Further details regarding your temporary assignment will be communicated to you by the end of the week by Mr. Mike Quebec, Acting Director, Ottawa Tax Services Office.

I am particularly disappointed that your conduct has not supported established Agency values. These values, along with the eight principles enunciated in the CCRA Staffing Program form the basis of the Canada Customs and Revenue Agency. As employees of the Canada Customs and Revenue Agency, we have an obligation to uphold these values and principles.

...

[9] Ms. Grottoli testified she was living in Sudbury in the early portion of 2000 when she applied for two positions, one in Ottawa and one in Sudbury. She was screened out of the competition for the Sudbury position.

[10] The competition poster for the Ottawa position (Exhibit E-1) stated the competition was open to "persons residing and/or working within a 60 kilometres radius of Ottawa".

[11] Ms. Grottoli submitted an application on March 22, 2000 for the Ottawa position (Exhibit E-2) and gave, as her address, a residence in Rockland, Ontario which is located just outside Ottawa. She testified she had been travelling to Rockland on a by-weekly basis since mid-February 2000 in search of a job as well as affordable housing and schooling for herself and her two children.

[12] The grievor was seeking to move out of Sudbury to escape an abusive marriage.

[13] After applying for the CS-01 position in Ottawa, the grievor was called at her work site in Sudbury by the Manager of the Ottawa Taxation Office, Bernie Cuerrier.

Mr. Cuerrier informed Ms. Grottoli that he was part of the selection board, and he would conduct the interview with her, via telephone, at a later date at her Sudbury home.

[14] The telephone interview took place, and on May 23, 2000 Ms. Grottoli received a letter of offer (Exhibit G-1) for the CS-01 position in the Ottawa Tax Office.

[15] This offer necessitated Ms. Grottoli seeking a variance in her divorce agreement with respect to her mobility with her children outside the Sudbury area. She ultimately was successful in getting this variance. Following that, she sold her Sudbury home and purchased a home in Ottawa and commenced working in July 2000.

[16] There were no problems with her work that I was made aware of.

[17] In September 2000, Mr. Cuerrier called Ms. Grottoli into his office and showed her a series of e-mails and correspondence (Exhibit G-2 and G-3) indicating her ex-husband had written to complain that she had not met the selection criteria for the position.

[18] As a result of these written inquiries, the CCRA undertook a review of the competition process for the CS-01 position. This review was conducted by Denis Maurice, Manager, Staff Relations, Ottawa Technology Centre. His report (Exhibit E-5) drew a number of conclusions, stating at page 5:

...Ms. Grottoli...provided the selection board with inaccurate information concerning her address, education and experience...

[19] On October 24, 2000, Ms. Grottoli was called in to meet with the new Director of the Ottawa Taxation Office, Mike Quebec. Ms. Grottoli was invited to have a union official attend with her, and she did so.

[20] Mr. Quebec stated that after he received and reviewed the investigation report from Mr. Maurice, he felt there were serious irregularities with respect to the staffing of the position. Mr. Quebec stated he felt Ms. Grottoli did not meet the education and experience criteria established for the position nor did she meet the residency requirements.

[21] Rather than move Ms. Grottoli back to her substantive CR-3 position in Sudbury, Mr. Quebec stated that, out of compassion, a temporary CR-3 position in Ottawa was offered to her to allow her to make other arrangements.

[22] Mr. Quebec stated there was no intent whatsoever to discipline Ms. Grottoli. It was an administrative decision made necessary by the fact Ms. Grottoli had not met the selection criteria for the position, and she should have been screened out.

Grievor's Argument

[23] There is no question Ms. Grottoli has suffered a financial penalty and it is the grievor's position that this resulted from a disciplinary action by the employer.

[24] The employer claims that Ms. Grottoli lied and misled the selection board. How could she mislead them when the evidence indicated they clearly knew she lived in Sudbury. The interview was conducted over the telephone. Therefore, one has to conclude the selection board waived this requirement.

[25] There is no evidence to suggest she lied on her application. The selection board could pursue any question they felt appropriate given what was on the application and obviously the selection board felt Ms. Grottoli met the requirements of the position because they offered her the job.

[26] Simply because the employer states that there was no intent to discipline does not mean it did not occur. The employer concluded the conduct of Ms. Grottoli was wrong and it took action which amounted to discipline.

Employer's Argument

[27] The employer presented its book of authorities with respect to a variety of cases dealing with issues of what constitutes discipline.

[28] The evidence shows there was no bad faith exhibited by the employer and the behaviour is simply not consistent with disciplinary action.

[29] While there may be allegations of misconduct on the part of Ms. Grottoli, the employer never acted on them. Instead, the employer took the necessary administrative action to correct an incorrect staffing process.

Decision

[30] This is a preliminary decision dealing with the question of jurisdiction pursuant to subsection 92(1) of the PSSRA.

[31] The grievor states that the selection board would have reviewed her application for the position and if they felt she did not meet a specific selection criterion they obviously waived that criterion.

[32] At this juncture I do not have enough information to know whether this is true or not. However, if it is true, then an argument could be made that Ms. Grottoli did nothing wrong. Having done nothing wrong, she could therefore not have lied or misled the selection board in anyway. Therefore, the only conclusion I can reach, according to the grievor, is that the employer's actions were disciplinary.

[33] I believe the grievor has at least advanced the possibility that the matter could be disciplinary in nature. I am not saying it is a certainty that discipline ensued, but without hearing the full case I can not say discipline has not occurred.

[34] The grievor bears the onus of showing discipline has taken place. There is no doubt some financial loss has been incurred by the grievor, but it must be related to discipline for me to have jurisdiction to hear the matter pursuant to subsection 92(1) of the PSSRA. It is not possible for me to determine this matter without hearing all the relevant evidence and argument. The door is still open to the grievor to meet this burden due to the preliminary findings above.

[35] I note that in *Tudor-Price* (Board file 166-2-10155) Deputy Chairperson Kates issued a finding of what constituted discipline in a situation where an employee could not avail himself of the same redress process as was afforded to other public servants. At page 53 of the decision, he writes:

...

Another concern that has emerged in this case pertains to the anomaly of the governing staff relations legislation pertaining to the status of employees employed at the C.D.C. to challenge the employer's decision to release for incapacity or incompetence. For the most part it is expressly provided under section 31 of The Public Service Employment Act that public servants terminated for these reasons are entitled to challenge the employer's recommendations for release to the

Appeals Division of the Public Service Commission. By virtue of a legislative anomaly employees engaged by the C.D.C. are not protected by that provision. Accordingly, should Mr. Tudor-Price fail to satisfy me of my jurisdiction to entertain his grievance for alleged misconduct he is denied an otherwise appropriate remedy before a properly constituted tribunal. In other words, where employees of the C.D.C. have recourse under paragraph 91(1)(b) of The Public Service Staff Relations Act to challenge terminations arising out of culpable misconduct or malfeasance, they are denied like rights shared by federal public servants elsewhere to challenge terminations relating to innocent or involuntary cause. In short, these employees, and Mr. Tudor-Price particularly, are clearly the objects of discrimination attributable to deficiencies in the legislation. For that reason the words "disciplinary action resulting in discharge" used in paragraph 91(1)(b) of the Act cannot be given a narrow, technical meaning. Rather the language must be interpreted to accord with the general objective of labour relations legislation in frustrating arbitrariness and unfairness in an employer's treatment of its employees' job security.

...

[36] Accordingly, the Secretary of the Public Service Staff Relations Board (PSSRB) will be asked to establish dates for a full hearing on the merits, and only following that hearing will I be able to determine whether or not the burden has been met by the grievor. At that hearing, the parties should also address the estoppel issue raised by the grievor in her grievance.

[37] In the meantime I would strongly urge the parties to avail themselves of the mediation services that the PSSRB provides. On the surface this is a situation that begs for some compromise resolution by the parties. However, if they can not resolve the matter, or choose not to do so, the matter will be set down for a full hearing and a final decision will be rendered following the tendering of full evidence and argument.

**Joseph W. Potter,
Vice-Chairperson.**

OTTAWA, August 28, 2001.

