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Date: 20011218

File: 166-2-30414

Citation: 2001 PSSRB 130



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**CLIFFORD LEE FOX**

Grievor

and

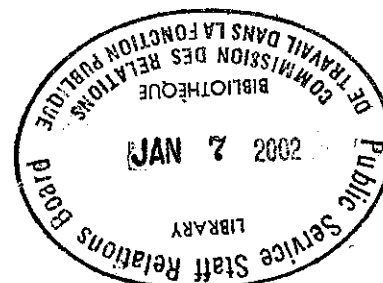
**TREASURY BOARD  
(Immigration and Refugee Board)**

Employer

**Before:** Yvon Tarte, Chairperson

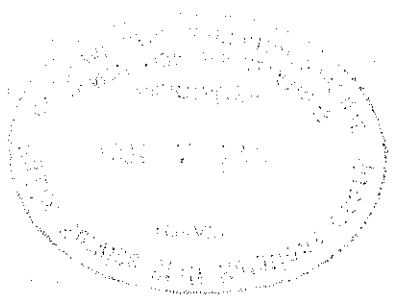
**For the Grievor:** Pierre Bérubé, Counsel

**For the Employer:** Estelle Renaud, Treasury Board, and Karl G. Chemsí, Counsel



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(Decision rendered on the basis of written arguments)



## DECISION

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[1] The purpose of this decision is to determine whether the Board should exercise its powers pursuant to section 84 of the *PSSRB Regulations and Rules of Procedure, 1993* (Regulations) to dismiss, for want of jurisdiction, the grievance referred by Clifford Lee Fox to adjudication under section 92(1)(b) of the *Public Service Staff Relations Act* (PSSRA).

[2] Section 84 of the Regulations reads as follows:

*84. (1) Subject to subsection (2), but notwithstanding any other provision of these Regulations, the Board may dismiss a grievance on the ground that it is not a grievance that may be referred to adjudication pursuant to section 92 of the Act.*

*(2) The Board, in considering whether a grievance should be dismissed pursuant to subsection (1), shall:*

*(a) request that the parties submit written arguments within the time and in the manner specified by the Board; or*

*(b) hold a hearing.*

...

[3] Paragraph 92(1)(b) of the PSSRA stipulates as follows:

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

...

*(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.*

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**The Facts**

[4] On March 7, 2000, Mr. Fox and the employer signed a Memorandum of Agreement resolving four grievances, including two referrals to adjudication (former grievances) and two complaints of harassment presented to the employer by Mr. Fox. The Memorandum of Agreement contained an obligation of confidentiality, along with a \$10,000 penalty. On March 8, 2000, Mr. Fox informed the Board that he was withdrawing the former grievances from adjudication.

[5] On September 8, 2000, Mr. Fox filed a grievance alleging that the employer had revealed the contents of the Memorandum of Agreement to the media and requested that the employer pay him the \$10,000 penalty (new grievance). Mr. Fox referred his new grievance to adjudication on February 29, 2001 pursuant to paragraph 92(1)(b) of the PSSRA.

[6] On April 23, 2001, the employer challenged the jurisdiction of an adjudicator to hear the new grievance. It argued that the Board was no longer seized with the former grievances and therefore had lost jurisdiction to hear any dispute arising from the application of the Memorandum of Agreement with respect to the former grievances. The employer asked the Board to dismiss the new grievance without a hearing.

[7] On May 2, 2001, Mr. Fox acknowledged that the former grievances had been resolved once and for all by the Memorandum of Agreement. He claimed, however, that the new grievance, filed after the signing of the Memorandum of Agreement, dealt with the failure to comply with one of the obligations contained in that document.

[8] On May 28, 2001, the employer reiterated its objection to the jurisdiction of an adjudicator to hear the new grievance and pointed out that the new grievance did not meet the criteria for referral to adjudication set out in subsection 92(1) of the PSSRA. The employer requested once again that the new grievance be dismissed without a hearing.

[9] On June 1, 2001, the Board informed the parties that it intended to deal with the issue of jurisdiction on the basis of written arguments. This process was completed on October 25, 2001.

### Position of the Parties

[10] Mr. Fox submitted his written arguments on September 4, 2001. He felt that presenting his arguments before those of the employer constituted a procedural defect that was "highly prejudicial" to him. He alleged that the new grievance was separate from the former grievances, which he withdrew. He clarified that the new grievance related to the application of an agreement between the parties. He argued that the Supreme Court of Canada ruled in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, among others, that tribunals specializing in labour relations have exclusive jurisdiction "... to hear any dispute arising from said labour relations ...".

[11] The employer responded on September 24, 2001. It argued that the new grievance was not a grievance that could be referred to adjudication pursuant to subsection 92(1) of the PSSRA because it related to the application of an agreement entered into by the parties to resolve the former grievances. It alleged that the new grievance did not deal with any of the matters set out in paragraph 92(1)(b) of the PSSRA. It added that paragraph 92(1)(a) of the PSSRA does not apply to disputes arising from the application of a settlement agreement. Paragraph 92(1)(a) of the PSSRA stipulates as follows:

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

*(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

...

[12] The employer pointed out that, in any event, Mr. Fox holds a managerial or confidential position and that he is not part of any bargaining unit: he is not covered by any collective agreement. It argued that the Board does not have jurisdiction to decide whether or not the terms of a settlement agreement have been observed. In support of its arguments, the employer referred to the following decisions:

- *Treasury Board v. Déom* (Board file 148-2-107);
- *Mason* (Board file 166-2-9779);
- *Wallingham* (Board file 166-2-17593); and
- *O'Neil* (Board files 166-2-25361, 25361 to 25368, 25613 to 25615 and 172-2-827).

[13] On October 25, 2001, Mr. Fox replied that the right to refer to adjudication, pursuant to paragraph 92(1)(a) of the PSSRA, a grievance relating to the application of an arbitral award includes the right to refer one relating to the application of the Memorandum of Agreement. He added that paragraph 2(1)(a) of the PSSRA, which provides a definition of the term "grievance" expressly gives him the right to file a grievance. He argued that the Board had jurisdiction to hear the new grievance.

#### **Reasons for Decision**

[14] Before addressing the issue before the Board, I want to point out that the procedure followed for the submission of written arguments in this matter would not have prejudiced Mr. Fox. Indeed, before referring the new grievance to adjudication, it was Mr. Fox's responsibility to establish that an adjudicator had jurisdiction to hear the matter. Further, Mr. Fox took advantage of the opportunity given to him by the Board to reply to the employer's arguments. In these circumstances, Mr. Fox cannot claim to have been treated in any way that might have prejudiced his interests.

[15] In the matter before us, the Board must decide if it should exercise its power to dismiss the new grievance, for want of jurisdiction. Therefore, the employer asked the Board to exercise its powers pursuant to section 84 of the Regulations.

[16] I will first consider whether in this case it is appropriate to apply the procedure set out in section 84 of the Regulations.

[17] In *Gascon*, 2000 PSSRB 68 (166-2-28934), the Board was seized with an application to dismiss a grievance on the ground that it was outside its jurisdiction. This application had been filed pursuant to section 84 of the Regulations. At §14 of that decision, the Board found that the procedure set out in section 84 of the Regulations is appropriate when the file raises serious doubts as to whether the grievance constitutes a grievance that may be referred to adjudication. At §15, it also found that, based solely on the file, there was an arguable case that the grievance was eligible for referral to adjudication. It therefore dismissed the employer's application.

[18] The approach in *Gascon*, *supra*, was used by the Board in *Kehoe*, 2001 PSSRB 9 (166-2-29657). In that case, the Board found that, on the face of the record, the grievance was not one which could be presented pursuant to subsection 91(1) of the Act and, as such, could not be referred to adjudication pursuant to subsection 92(1). It

also found it appropriate to have recourse to the process set out in section 84 of the Regulations. Accordingly, it dismissed the grievance for want of jurisdiction.

[19] In this instance, the file raises serious doubts as to whether the new grievance constitutes "... a grievance that may be referred to adjudication pursuant to section 92 of the Act ...". Mr. Fox referred the new grievance to adjudication on the basis of paragraph 92(1)(b) of the PSSRA. This paragraph gives a grievor the right to refer to adjudication a grievance with respect to disciplinary action resulting in suspension or a financial penalty or termination of employment or demotion pursuant to paragraphs 11(2)(f) or (g) of the *Financial Administration Act*. The record before the Board does not contain any element that might suggest that the new grievance falls into the category prescribed in paragraph 92(1)(b) of the PSSRA.

[20] In his written arguments, Mr. Fox then argued that paragraph 92(1)(a) of the PSSRA, authorizing the referral to adjudication of a grievance in respect of the application of an arbitral award, also allowed the referral to adjudication of a grievance in respect of the application of the Memorandum of Agreement. This argument ignores the definition of the expression "arbitral award" contained in subsection 2(1) of the PSSRA. This definition reads as follows:

*"arbitral award" means an award made by an arbitration Board or an arbitrator in respect of a dispute.*

The PSSRA's definition of the expression "arbitral award" is very clear and obviously undermines Mr. Fox's argument.

[21] Based on the record before the Board, which consists of the written arguments of the parties, it appears that the new grievance is not one that can be referred to adjudication pursuant to section 92 and that the Board does not have jurisdiction to hear it. In these circumstances, it is appropriate to use the procedure set out in section 84 of the Regulations to dismiss it.

[22] For these reasons, the employer's application is allowed. Mr. Fox's new grievance is dismissed because it falls outside the Board's jurisdiction.

**Yvon Tarte,  
Chairperson**

OTTAWA, December 18, 2001.

PSSRB Translation

