L-B

Date: 20011002

File: 166-2-30615

Citation: 2001 PSSRB 100

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

SELWYN A. PIETERS

Grievor

and

TREASURY BOARD
(Federal Court of Canada)

Employer

Before: Yvon Tarte, Chairperson

For the Grievor: Selwyn A. Pieters

For the Employer: Kathryn Hucal

(Decided without an oral hearing on the basis of written submissions.)

[1] On May 18, 2001, Selwyn Pieters referred his grievance dated December 24, 1999, to adjudication. That grievance provides:

> *I grieve that the employer's decision to "not renew" my employment contract is inequitable, vindictive and such inequity and vindictiveness has resulted in my constructive dismissal from my position as a REGISTRY OFFICER effective December 14, 1999.*
>
> *This constructive dismissal has caused me tremendous stress, humiliation, loss of dignity and emotional distress.*

[2] Mr. Pieters seeks the following corrective action:

> *Reinstatement to my position without loss of seniority and benefits; compensation for intentional inflictment of emotional distress; compensation for loss of dignity and humiliation; damages in the amount of $150,000.00.*

[3] The following is a brief summary of the relevant facts leading up to Mr. Pieters' referral of his grievance to adjudication. Mr. Pieters accepted a term appointment as a Registry Officer, PM-1 (Program and Administrative Services Group), with the Federal Court of Canada and he was employed there for the duration of the term, that is, from June 14, 1999, to December 14, 1999. His appointment was not renewed.

[4] As part of his written representations at the first level of the grievance procedure, Mr. Pieters stated:

> *As this constructive dismissal grievance is founded on "inequity and vindictiveness" it will be necessary to review my history at the Federal Court of Canada, including a number of incidents that occurred while I worked at the Federal Court of Canada, Toronto Local Office, that cumulatively an inference can be drawn to support my position that the Federal Court constructively dismissed me. Such treatment included the following treatment:*
>
> *a. being denied proper training and assistance;*
>
> *b. being subject to ongoing unjustified criticism;*
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> *c. support not provided as required to meet my needs for job success;*
>
> *d. being over-supervised and over-monitored;*
>
> *e. being subjected to work overloading and being overextended;*

> *f. being the subject of rude, condescending, abrupt and humiliating treatment;*
>
> *g. being the subject of on-going scapegoating and unfairness;*
>
> *h. being selectively denied professional development and other opportunities that were available to other term PM-01 registry officers, because of all of the above, I believed that my job was threatened;*
>
> *i. the employer was oblivious to my obvious difficulties and failed to do anything about them, and notwithstanding my complaints of not being treated fairly or with consideration, or of inadequate training and resource support, I continued to be subjected to inequitable treatment;*
>
> *j. I was constructively dismissed by the employer's decision to "not renew" my employment contract or offer me a new employment contract at the end of my term on December 14, 1999 as an act of inequity and vindictiveness in reprisal for attempting to resist all of the aforesaid acts and omissions;*
>
> *k. all of which were in bad faith.*

[5] In a letter to Mr. Pieters dated February 23, 2000, Susan Findlay, Manager, replied on the employer's behalf at the first level of the grievance process. First, Ms. Findlay raised an objection to the timeliness of the grievance. She then stated:

> *Notwithstanding the above, the cessation of your employment was the result of the expiration of a "specified term" under section 25 of the Public Service Employment Act and not as a result of a decision of the employer independent of the terms of the contract. Accordingly, it was not a "dismissal".*

[6] Robert Biljan, Administrator of the Federal Court of Canada, in the employer's reply at the final level of the grievance process dated June 27, 2000, endorsed the position taken by Ms. Findlay.

[7] In a letter dated August 10, 2000, the grievor's bargaining agent, the Public Service Alliance of Canada (PSAC), advised him as follows:

> *Further to our recent correspondence concerning your grievance, please be advised that you may pursue a grievance citing constructive dismissal as a ground of termination before the Public Service Staff Relations Board*

> *entirely at your own expense, without the support of the Public Service Alliance of Canada.*
>
> *I wish to make it entirely clear that the Alliance position that such a grievance lacks adequate evidentiary support remains unchanged, and we remain of the opinion that the Board lacks jurisdiction to address this matter. Further, I wish to make it clear that the Alliance will accept no liability in the event that the employer seeks reimbursement of its costs in defending any such grievance.*

[8] Presumably as a result of the advice that he received from the PSAC to the effect that the grievance could not be referred to adjudication under the provisions of the Public Service Staff Relations Act (PSSRA), the grievor launched an action in the Federal Court of Canada against Her Majesty in right of Canada: *Pieters v. Her Majesty the Queen*, Court file T-817-00.

[9] In a decision dated May 16, 2001, McKeown J. of the Federal Court, Trial Division, dismissed the grievor's claim on the ground that it disclosed no reasonable cause of action. In so doing, he stated at paragraphs 2 and 3:

> *[2] The Plaintiff states that there are serious issues affecting both his important constitutional rights as an African Canadian male to equality in employment with the Government of Canada and to protection from discriminatory and bad faith discharge by the Registry of the Federal Court. In addition, he submits that his claim discloses the serious issues of: defamation; wrongful discharge; breach of contract; unlawful interference with economic interest; abuse of public office; intentional infliction of mental suffering; and injury to his career and reputation.*
>
> *[3] If it were not for the Plaintiff's* Charter *arguments, I could dismiss the Statement of Claim on the grounds that the Plaintiff was subject to a limited term contract.*

[10] McKeown J. stated further at paragraph 5:

> *[5] See* Eskasoni School Board/Eskasoni Band Council v. MacIsaac, *[1986] F.C.J. No. 263 (C.A.) 137, wherein the Court held that the word "dismissal" does not include embracing the failure of an employer to renew a contract for a fixed term of employment. If it were not for the Charter remedies, this would be the end of the matter.*
>
> . . .

McKeown J. stated further at paragraphs 7 to 10 inclusive:

> *[7]* Pursuant *to Article M-38.02 of the Collective Agreement, the Plaintiff was a party to the Collective Agreement. The Plaintiff went through the grievance procedure and at no time did he raise sections 7, 15 and 24.1 of the* Charter. *According to the Supreme Court of Canada in* Murray Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929, if the Plaintiff had chosen to refer the matter to an adjudicator, an adjudicator would have had jurisdiction to deal with the* Charter *issues. In addition, if the adjudicator had not dealt with the* Charter *arguments raised, then the Federal Court would have had the authority to do so.*
>
> *[8] The* Public Service Employment Act *(the "PSEA"), the* Financial Administration Act *R.S.C. 1985, c. F-11 (the "FAA"), and the* Public Service Staff Relations Act *(the "PSSRA") are the main statutes that govern labour relations between the Queen in right of Canada and her employees. The* PSEA *deals with the appointment of public servants by the Public Service Commission. Section 21 of the* PSEA *provides the mechanism by which an appointment to a position in the public service can be appealed. The* FAA *makes the Treasury Board responsible for personnel management in the public service of Canada on behalf the Queen. This includes the determination of the terms and conditions of employment as well as powers with respect to personnel management. Under the* PSSRA, *an employee who feels aggrieved by the interpretation or application of a provision of a collective agreement is entitled to present a grievance as was done by the Plaintiff. This right is subject to the limitation that the employee grievance be approved and represented by the employee's bargaining agent.*
>
> *[9] Finally, the* PSSRA *contains a prohibitive clause which provides that a decision taken at the final level in the grievance process is final, and no further action can be taken in respect of the grievance in question. This is subject to the right of the Applicant to seek judicial review of the adjudication process under the* Federal Court Act, *R.S.C. 1985, c. F-7.*
>
> *[10] The courts have clearly established that the* PSSRA *is a complete code governing relations between Her Majesty and Her employees, and that under the above clauses, the grievance procedure is the only recourse available to public servants. As a result, if an employee's complaints are remediable at all, they are remediable under the PSEA and the PSSRA.*

[11] McKeown J. concluded at paragraphs 15, 17 and 18 of his decision:

> *[15] I agree that the Plaintiff's claim raises very important* Charter *issues, but the Plaintiff could have presented these issues before an adjudicator. If the adjudicator had refused to hear such issues, the Plaintiff would have been entitled to present them to the Federal Court on an application for judicial review of the adjudicator's decision. The Federal Court of Appeal in* Johnson-Paquette, supra *decision is binding upon me, and in any event its reasoning is very persuasive...*
>
> . . .
>
> *[17] I decline to exercise my judicial discretion to permit this action to go forward. The* Charter *issues are not being ignored, however such issues must be dealt with in the manner suggested by the Federal Court of Appeal in* Johnson-Paquette, supra.
>
> *[18] I find that the Plaintiff could have proceeded by way of an adjudication and judicial review thereof, or by judicial review of the filed grievance. The Court could have dealt with the* Charter *issues under either of these scenarios. However, the Plaintiff did not raise the* Charter *in the process of the grievance procedure.*

[12] In a letter dated July 25, 2001, the PSSRB advised Mr. Pieters and the employer as follows:

> *The material contained in this file, including the decision of Mr. Justice McKeown issued on May 16, 2001, (Court file T-817-00) was referred to the Board for its consideration and I was directed to advise the parties that the Board intends to determine the following issue on the basis of written submissions:*
>
> > *Does an adjudicator appointed under the* Public Service Staff Relations Act *have the requisite jurisdiction under subsection 92(1) to entertain a grievance relating to the employer's non-renewal of an employee's term appointment or is the employer's reply at the final level of the grievance process "final and binding for all purposes of this Act and no further action under this Act may be taken thereon", with the meaning of subsection 96(3)?*
>
> *In this regard, I refer you the decision of the Federal Court of Appeal in* Dansereau v. National Film Board, *[1979] 1 F.C. 100 and to the recent decision of adjudicator L-P. Guindon in* Marta *(Board file 166-2-29643). Copies of these decisions are enclosed for your information.*

[13] The following is a summary of the parties' written submissions.

Submissions of the grievor

[14] Under section 91 of the PSSRA all employees, whether unionized or not, have the right to file grievances relating to a wide range of matters. However, only certain classes of grievances can be referred to adjudication under section 92 thereof - grievances relating to alleged breaches of a collective agreement and grievances involving disciplinary action resulting in a financial penalty. Pursuant to subsection 96(3) of the PSSRA, the employer's reply at the final level of the grievance process in relation to a grievance which cannot be referred to adjudication "is final and binding for all purposes of this Act and no further action under this Act may be taken thereon".

[15] Adjudicators appointed under the PSSRA have through their decisions established a structure for their jurisdiction with reference to grievances which involve the non-renewal of a specified term appointment. They have found that in most cases a non-renewal cannot be considered to be a "termination of employment" as that term is used in section 92 of the PSSRA: *Hanna* (Board file 166-2-26983); *Blackman* (Board file 166-2- 27139); *Beaulieu* (Board file 166-2-27313); *Laird* (Board file 166-2-19981); *Lecompte* (Board file 166-2-28452) and *Marta* 2001 PSSRB 1(166-2-29643). See also the decision of the Federal Court of Appeal in *Dansereau v. National Film Board,* [1979] 1 F.C. 100.

[16] The grievor submits that an adjudicator appointed under the PSSRA has the requisite jurisdiction to entertain a grievance relating to the employer's non-renewal of an employee's term appointment in certain specific circumstances:

a) Disguised discipline may be found, adjudicators have stated, where the employer's decision to lay off a grievor reeks of bad faith and where there are any number of motivating factors in the employer's mind other than those of economic necessity or volume of work-load which caused it to want to sever the employment relationship.

b) Allegations that the non-renewal is disguised disciplinary action.

c) Allegations that there was conduct on the part of the employer in violation of the *Charter of Rights and Freedoms.*

[17] In this regard, the grievor pointed out that he specifically raised the issue of the employer's bad faith in his first level grievance presentation.

[18] In *Guertin* (Board file 166-2-36 at page 9), the adjudicator adopted the following definition of a disciplinary offence:

> *Any breach of the professional obligations of the worker in the execution of his obligation to work or, more generally, any disturbance created by him in the proper operation of the enterprise can be called a disciplinary offence, whether for example these are instances of unpunctuality, unwarranted absences, violations of security rules, hygiene, insubordination, inaccuracy, negligence or disloyal acts.*

[19] In *Steen* (Board file 166-10-4186 at page 30), the adjudicator held that, to establish that the actions of the employer in an alleged lay-off situation were disciplinary, a grievor must "demonstrate that his termination of employment was due to a cause personal to him".

[20] The grievor submits that there can be little doubt that the actions of the employer were due to a "cause personal to" the grievor. The employer was responding to what was perceived to be disruptive behaviour in the workplace.

[21] First, the grievor had attempted for a long period to ensure that he was properly trained for the position of Registry Officer at the Federal Court of Canada, which the employer perceived as being disruptive.

[22] Second, the employer treated the grievor in such a way as to suggest that he was guilty of misconduct.

[23] Third, the grievor was the only term employee who was not offered a new contract. The three other term PM-01 Registry Officers were given developmental assignments, acting PM-03 Registry Officer appointments; their contracts were all renewed and in a competition that followed shortly thereafter all of the term PM-01 Registry Officers were placed on an eligibility list and promoted to indeterminate PM-03 Registry Officers. The employer set up a procedure for acting assignments and failed to follow that procedure when it appointed two term PM-01 Registry Officers to acting PM-03 Registry Officer positions. As stated by the adjudicator in *Matthews* (Board file 166-20-27336, March 5, 1997, at pages 52 and 53) legislation, regulations, policies and procedures "are not to be applied selectively, but uniformly, otherwise

employer-employee relations would be managed on a chaotic ad hoc basis". The employer's conduct in relation to the grievor indicates bad faith and disguised discipline.

[24] The grievor submits that there are also significant examples of the employer's exercise of bad faith in its decision to terminate the grievor's employment.

[25] Adjudicators have found that there is bad faith/disguised discipline and consequently have taken jurisdiction when the following have been present:

a) where the evidence establishes that there was work available in the workplace at the time of the alleged lay-off: *Hamilton* (Board file 166-2-76 at page 5).

b) where there is evidence that the termination was linked to personality conflicts with the grievor: *Steen* (Board file 166-10-4186 at page 9); *Laird* (Board file 166-2-19981 at page 25).

c) where employees or managers known to have animosity toward the grievor are asked to make or participate in decisions about him : *Laird*, (supra, at page 27).

d) where the actions of the employer after the termination indicate that the employee simply was not wanted: *Laird* , (supra), at page 25; *Matthews*, (supra, at page 52).

e) where the actions of the employer indicate a determination on the part of the employer not to re-hire her for vacancies which subsequently come up: *Laird*, (supra, at page 30).

f) where the employer had "unambiguously made up its mind to get rid of the grievor": *Mallett* (Board files 166-2-15344 and 15623 at page 29).

[26] The grievor submits that all of these factors are present in his grievance. The employer's decision not to renew Mr. Pieter's term was made in bad faith and was, in effect, disguised discipline. Therefore, an adjudicator appointed under the PSSRA has jurisdiction to hear and determine his grievance.

[27] In any event, and in the alternative, McKeown J. found in his decision of May 16, 2001, that:

> *It is clear that the foregoing matters could be dealt with under the grievance procedure (para. 12).*
>
> *I agree that the Plaintiff's claim raises very important Charter issues, but the Plaintiff could have presented these issues before an adjudicator...(para. 15).*
>
> *I decline to exercise my judicial discretion to permit this action to go forward. The Charter issues are not being ignored, however such issues must be dealt with in the manner suggested by the Federal Court of Appeal in* Johnson-Paquette, *supra (para. 17).*
>
> *I find that the Plaintiff could have proceeded by way of an adjudication and judicial review thereof... . (para. 18).*

[28] McKeown J. found at paragraph 10 of his decision that the decision of the Supreme Court of Canada in *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929 and the decision of the Federal Court of Appeal in *Johnson-Paquette v. Canada,* [2000] F.C.J. No. 441 stand for the proposition that:

> *The courts have clearly established that the PSSRA is a complete code governing relations between Her Majesty and Her employees, and that under the above clauses, the grievance procedure is the only recourse available to public servants. As a result, if an employee's complaints are remediable at all, they are remediable under the PSEA and the PSSRA.*

[29] Finally, the grievor argues that, if an adjudicator appointed under the PSSRA were to decline jurisdiction to hear and determine this matter, the grievor would be left without recourse. In *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69, the Manitoba Court of Appeal looked at the issue of effective remedies and found at paragraph 92 that "there is no effective redress in this case without the ability to test the decision by binding third party adjudication on the merit".

[30] Under international law precepts in general, the right to an effective remedy is an independent right. Article 8 of the *Universal Declaration of Human Rights* recognizes the right to an effective remedy by competent tribunals for statutory and constitutional violations:

> *Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*

[31] In *R. v. Williams*, [1998] 1 S.C.R. 1128 McLachlin J. wrote at page 1152:

> *A Charter right is meaningless, unless the accused is able to enforce it.*

[32] The grievor submits that he is entitled to have his grievance determined on the merits by binding third party adjudication, that is, by an adjudicator appointed under the PSSRA.

Submissions of the employer

[33] It is the employer's position that pursuant to subsection 96(3) of the PSSRA the employer's decision on Mr. Pieter's grievance at the final level of the grievance process is final and binding and no further action under the PSSRA may be taken in relation to it. Therefore, an adjudicator appointed under the PSSRA has no jurisdiction to hear this matter.

[34] As the grievor points out in his submissions, adjudicators have issued a number of decisions which clearly establish that the non-renewal of a term contract is not a termination or dismissal as the word is used in section 92 of the PSSRA. These decisions, when reviewed by the Federal Court, have been upheld. The employer referred to the following decisions in support of this position: *Dansereau v. National Film Board,* (supra); *Eskasoni School Board/Eskasoni Band Council v. MacIsaac,* [1986] F.C.J. No. 263 (F.C.A.) at page 137 and *Marta,* (supra).

[35] Contrary to the grievor's submission, as was indicated by the adjudicator in *Marta* the employer's motivation regarding the non-renewal of a term contract is not relevant to the determination of an adjudicator's jurisdiction to hear the grievance. Nonetheless, the grievor argues that the non-renewal of his contract is due to bad faith on the part of the employer and this bad faith vests the adjudicator with jurisdiction to hear the matter.

[36] The employer denies the grievor's allegations of bad faith but submits that, even if some or all of these allegations are true, they do not demonstrate bad faith in the non-renewal of his specified period appointment. Furthermore, there is no evidence to

indicate that these incidents affected the employer's decision not to renew the grievor's specified period appointment. In addition, none of the decisions relied upon by the grievor in support of his position that an adjudicator would have jurisdiction to entertain his grievance if the employer acted in bad faith relates to the employer's failure to renew a term contract. For example, the grievors in *Hamilton*, (supra), *Steen*, (supra) and *Laird*, (supra), had all been laid off.

[37] Finally, the grievor argues that, if the adjudicator does not take jurisdiction to hear and determine his grievance, he will be left without recourse and on this basis he is entitled to a hearing. In fact, the grievor has had recourse to the formal grievance procedure as provided for under the terms of his collective agreement and to the Federal Court, Trial Division, as demonstrated by the decision of McKeown J. Furthermore, he has appealed that decision to the Federal Court of Appeal: Court file A-336-01. The grievor may be dissatisfied with the decisions he is receiving but there is no doubt he has had recourse to remedial processes. To allow this grievance to be referred to adjudication would subvert the grievance process. The employer submits that the adjudicator has no jurisdiction to hear the grievance.

Reply of the grievor

[38] In his reply, the grievor reiterates many of the arguments contained in his original submissions. He alleges that, while it is true that generally speaking an adjudicator does not have jurisdiction to deal with a grievance against the employer's non-renewal of a term contract, the situation is otherwise if it can be established that the employer acted in bad faith or that the non-renewal was disguised disciplinary action or if there are allegations that there was conduct on the part of the employer in violation of the *Charter of Rights and Freedoms.*

[39] The grievor submits that where there is a right there must be an effective remedy: *Phillips v. Harrison*, (supra). This is particularly true when a breach of the *Charter* is alleged: *R. v. Williams*, (supra). Furthermore, in dismissing the grievor's claim McKeown J. stated at paragraph 15 of his decision:

> *...the Plaintiff's claim raises very important* Charter *issues, but the Plaintiff could have presented these issues before an adjudicator.*

[40] The jurisprudence is clear that an adjudicator has jurisdiction to deal with the *Charter* issues in this case: *Weber v. Ontario Hydro*, (supra); *Johnson-Paquette v.*

Canada, [2000] F.C.J. No. 441 (C.A.); *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Mills v. The Queen*, [1986] 1 S.C.R. 863.

[41] The grievor repeats his view that the employer exercised bad faith in its decision to terminate his employment. The grievor again refers to the decisions which he relied on in his original submissions to establish that an adjudicator, when the employer's bad faith has been established, has jurisdiction to hear and determine a grievance arising out of the termination of the grievor's employment, even though the grievance is not, on its face, adjudicable under section 92 of the PSSRA. He concedes that none of this jurisprudence deals with the employer's failure to renew a term contract. Nonetheless, he argues that the same principles apply to that situation. Furthermore, the grievor argues that the decision of the Federal Court, Trial Division, in *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 also supports his position as does the adjudicator's decision in *Leonarduzzi* (Board file 166-2-27886). An application for judicial review of the latter decision has been dismissed by the Federal Court Trial Division: Court file T-1231-99. Accordingly, the grievor submits that the adjudicator does have jurisdiction to hear and determine his grievance.

Reasons for decision

[42] The relevant statutory provisions are the following:

Public Service Staff Relations Act

> ***91.*** *(1) Where any employee feels aggrieved*
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> *(a) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award, or*
>
> *(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),*

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

(2) An employee is not entitled to present any grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of and, if the employee chooses, may be represented by any employee organization in the presentation or reference to adjudication of a grievance.

(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as bargaining agent, in the presentation or reference to adjudication of a grievance.

***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.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

(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.

(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(b) any portion of the public service of Canada specified in Part II of Schedule I.

...

96.*(3) Where a grievance has been presented up to and including the final level in the grievance process and it is not one that under section 92 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.*

Financial Administration Act

11.*(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*

...

(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;

> *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;*

Public Service Employment Act

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

[43] Article 18, Grievance Procedure, of the collective agreement between the PSAC and the Treasury Board, Code 300/98, covering all employees in the Program and Administrative Services group provides:

> *18.01 In cases of alleged misinterpretation or misapplication arising out of agreements concluded by the National Joint Council (NJC) of the Public Service on items which may be included in a collective agreement and which the parties to this Agreement have endorsed, the grievance procedure will be in accordance with Part 14 of the NJC By-Laws.*
>
> *18.02 Subject to and as provided in Section 91 of the Public Service Staff Relations Act, an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 18.05 except that,*
>
> > *(a) where there is another administrative procedure provided by or under any Act of Parliament to deal with the employee's specific complaint, such procedure must be followed, and*
> >
> > *(b) where the grievance relates to the interpretation or application of this Agreement or an arbitral award, the employee is not entitled to present the grievance unless he or she has the approval of and is represented by the Alliance.*
>
> *18.03 Except as otherwise provided in this Agreement, a grievance shall be processed by recourse to the following levels:*
>
> > *(a) level 1 - first level of management;*
> >
> > *(b) levels 2 and 3 - intermediate level(s) where such level or levels are established in departments or agencies;*

(c) final level - Deputy Head or Deputy Head's authorized representative. Whenever there are four levels in the grievance procedure, the grievor may elect to waive either Level 2 or 3.

18.04 The Employer shall designate a representative at each level in the grievance procedure and shall inform each employee to whom the procedure applies of the name or title of the person so designated together with the name or title and address of the immediate supervisor or local officer-in-charge to whom a grievance is to be presented. This information shall be communicated to employees by means of notices posted by the Employer in places where such notices are most likely to come to the attention of the employees to whom the grievance procedure applies, or otherwise as determined by agreement between the Employer and the Alliance.

18.05 An employee who wishes to present a grievance at a prescribed level in the grievance procedure shall transmit this grievance to his or her immediate supervisor or local officer-in-charge who shall forthwith:

(a) forward the grievance to the representative of the Employer authorized to deal with grievances at the appropriate level, and

(b) provide the employee with a receipt stating the date on which the grievance was received by him or her.

18.06 Where it is necessary to present a grievance by mail, the grievance shall be deemed to have been presented on the day on which it is postmarked and it shall be deemed to have been received by the Employer on the date it is delivered to the appropriate office of the department or agency concerned. Similarly the Employer shall be deemed to have delivered a reply at any level on the date on which the letter containing the reply is postmarked, but the time limit within which the grievor may present his or her grievance at the next higher level shall be calculated from the date on which the Employer's reply was delivered to the address shown on the grievance form.

18.07 A grievance of an employee shall not be deemed to be invalid by reason only that it is not in accordance with the form supplied by the Employer.

18.08 An employee may be assisted and/or represented by the Alliance when presenting a grievance at any level.

18.09 The Alliance shall have the right to consult with the Employer with respect to a grievance at each level of the

grievance procedure. Where consultation is with the deputy head, the deputy head shall render the decision.

18.10 An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause 18.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.

18.11 The Employer shall normally reply to an employee's grievance, at any level in the grievance procedure, except the final level, within ten (10) days after the date the grievance is presented at that level. Where such decision or settlement is not satisfactory to the employee, he or she may submit a grievance at the next higher level in the grievance procedure within ten (10) days after that decision or settlement has been conveyed to him or her in writing.

18.12 If the Employer does not reply within fifteen (15) days from the date that a grievance is presented at any level, except the final level, the employee may, within the next ten (10) days, submit the grievance at the next higher level of the grievance procedure.

18.13 The Employer shall normally reply to an employee's grievance at the final level of the grievance procedure within thirty (30) days after the grievance is presented at that level.

18.14 Where an employee has been represented by the Alliance in the presentation of his or her grievance, the Employer will provide the appropriate representative of the Alliance with a copy of the Employer's decision at each level of the grievance procedure at the same time that the Employer's decision is conveyed to the employee.

18.15 The decision given by the Employer at the Final Level in the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication.

18.16 In determining the time within which any action is to be taken as prescribed in this procedure, Saturdays, Sundays and designated paid holidays shall be excluded.

18.17 The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the employee and, where appropriate, the Alliance representative.

18.18 Where it appears that the nature of the grievance is such that a decision cannot be given below a particular level of authority, any or all the levels, except the final level may

be eliminated by agreement of the Employer and the employee, and, where applicable, the Alliance.

18.19 Where the Employer demotes or terminates an employee for cause pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, the grievance procedure set forth in this Agreement shall apply except that the grievance shall be presented at the final level only.

18.20 An employee may abandon a grievance by written notice to his or her immediate supervisor or officer-in-charge.

18.21 An employee who fails to present a grievance to the next higher level within the prescribed time limits shall be deemed to have abandoned the grievance, unless the employee was unable to comply with the prescribed time limits due to circumstances beyond his or her control.

18.22 No person who is employed in a managerial or confidential capacity shall seek by intimidation, by threat of dismissal or by any other kind of threat to cause an employee to abandon his or her grievance or refrain from exercising his or her right to present a grievance as provided in this Agreement.

18.23 Where an employee has presented a grievance up to and including the Final Level in the grievance procedure with respect to:

(a) the interpretation or application in respect of him or her of a provision of this Agreement or a related arbitral award, or

(b) disciplinary action resulting in suspension or a financial penalty, or

(c) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act,

and the employee's grievance has not been dealt with to his or her satisfaction, he or she may refer the grievance to adjudication in accordance with the provisions of the Public Service Staff Relations Act and Regulations.

18.24 Where a grievance that may be presented by an employee to adjudication is a grievance relating to the interpretation or application in respect of him or her of a provision of this Agreement or an arbitral award, the employee is not entitled to refer the grievance to adjudication unless the Alliance signifies in the prescribed manner:

> *(a) its approval of the reference of the grievance to adjudication, and*
>
> *(b) its willingness to represent the employee in the adjudication proceedings.*

[44] Mr. Pieters alleges that an adjudicator appointed under the PSSRA has the authority to hear and determine his grievance against the employer's failure to renew his term contract provided he can establish that the employer acted in bad faith. He relies on the decision of McKeown J. in *Pieters v. Her Majesty the Queen*, (supra), among others, in support of his position. Clearly, an adjudicator is a creature of statute and has only the powers which have been given to him by statute, in this case the PSSRA. Mr. Pieters maintains that an adjudicator does have the requisite jurisdiction to entertain his grievance as the employer's failure to renew his term contract constituted a "termination of employment" motivated by the employer's bad faith and therefore falls within subparagraph 92(1)(b)(ii) of the PSSRA.

[45] The first thing I must determine is whether the employer's failure to renew the grievor's term contract is a "termination of employment" within the meaning of subparagraph 92(1)(b)(ii) of the PSSRA. I do not believe it is for the following reasons. No action was required on the employer's part, as would be the case, for example, in the rejection on probation or the lay-off of an employee, to bring the grievor's employment to an end. Rather, it came to an end by virtue of the provisions of his term contract and by virtue of section 25 of the *Public Service Employment Act*. I believe that support for this conclusion can be found in the decisions of the Federal Court of Appeal in *Dansereau v. National Film Board*, (supra), and *Eskasoni School Board/Eskasoni Band Council v. MacIsaac*, (supra).

[46] When faced with a grievance against the employer's failure to renew a term contract, adjudicators have consistently found that they do not have jurisdiction to determine the matter under the relevant provisions of the PSSRA: *Hanna*, (supra), *Blackman* , (supra), *Beaulieu*, (supra), *Lecompte*, (supra), and *Marta*, (supra). In *Laird*, (supra), although the employer's decision to lay off a term employee prior to the end of her contract was motivated by bad faith, the adjudicator found that he only had jurisdiction to award the grievor compensation for the balance of her term. Under the circumstances, the employer's motivation for not renewing Mr. Pieters' term contract is irrelevant to the determination of the adjudicator's jurisdiction. Those decisions which the grievor relied on to establish that an adjudicator would have jurisdiction to

hear and determine Mr. Pieters' grievance, provided he could establish bad faith on the employer's part, relate to lay-off or rejection on probation, both of which require the employer to take some action to terminate the employee's employment.

[47] The fact that Mr. Pieters is now raising certain allegations relating to the employer's violation of the *Charter of Rights and Freedoms* does not operate to give the adjudicator jurisdiction over a matter where he does not already have that jurisdiction. In this regard, I refer to the text *The Canadian Charter of Rights and Freedoms*, Third Edition, edited by Messrs Beaudoin and Mendes wherein it is stated at pages 19-21 and 19-22:

> *Not every court, tribunal or other arbiter would have jurisdiction over every* Charter *violation, of course. It would always be necessary to establish that the situation is within the jurisdiction of the body approached. At least three types of jurisdictional competence are possible, relating to (a) the subject matter, (b) the parties and (c) the remedy, and the Supreme Court of Canada seems to have held that each of these jurisdictional requirements must be satisfied in order to seek a remedy under section 24(1). [R. v. Mills, [1986] 1 S.C.R. 863.]*
>
> . . .
>
> *The plaintiff must, in other words, always establish that the subject with respect to which the alleged* Charter *violation took place is within the competence of the court, tribunal or arbiter approached. Madam Justice Wilson, speaking for half of a six-judge panel of the Supreme Court of Canada in* Singh v. Canada (Minister of Employment & Immigration), *confirmed this interpretation:*
>
> > *Section 24(1) of the* Charter *provides remedial powers to a "court of competent jurisdiction." As I understand this phrase, it premises the existence of jurisdiction from a source external to the* Charter *itself. [[1985] 1 S.C.R. 177 at 222.]*

[48] Therefore, Mr. Pieters' grievance cannot be referred to adjudication under subsection 92(1) of the PSSRA. The employer's reply at the final level of the grievance process is by virtue of subsection 96(3) "final and binding for all purposes of the Act and no further action under this Act may be taken thereon".

[49] Relying on the decision of the Supreme Court of Canada in *Weber v. Ontario Hydro*, (supra), and the decision of the Federal Court of Appeal in *Johnson-Paquette v. Canada*, (supra), McKeown J. stated the following at paragraph 10 of his decision:

> *The courts have clearly established that the PSSRA is a complete code governing relations between Her Majesty and Her employees, and that under the above clauses, the grievance procedure is the only recourse available to public servants. As a result, if an employee's complaints are remediable at all, they are remediable under the PSEA and the PSSRA.*

[50] There are two types of grievances under the PSSRA, those which can be referred to adjudication and those which cannot. In *Johnson-Paquette v. Canada*, the plaintiff filed a claim against her employer arising out of matters which she had grieved unsuccessfully. She maintained that, because her grievances could not be referred to adjudication, she was not precluded by the principles established in *Weber v. Ontario Hydro* from suing her employer on the same facts. Neither the Federal Court, Trial Division, nor the Federal Court of Appeal agreed with her and her claim was dismissed. According to Tremblay-Lamer J. of the Federal Court, Trial Division, the plaintiff could have applied for judicial review of the employer's reply at the final level of the grievance process. Tremblay-Lamer J. stated at paragraph 23 of her decision, that in filing her claim in the Federal Court the plaintiff was "attempting to seek judicial review of the grievance officer's decision by way of an action for damages in tort - this she cannot do". The Federal Court of Appeal dismissed the plaintiff's appeal.

[51] McKeown J., in dismissing Mr. Pieter's action against Her Majesty in right of Canada, stated the following at paragraph 18 of his decision:

> *I find that the Plaintiff could have proceeded by way of an adjudication and judicial review thereof, or by judicial review of the filed grievance.*

In so doing, I believe that McKeown J. was advising Mr. Pieters that whatever remedy he may have must be found in the provisions of the relevant statute, in this case the PSSRA. If his grievance is not one that can be referred to adjudication, then any remedy which he may have must be sought in the grievance process. It is during the grievance process that he should have raised his allegations of the employer's *Charter* violations. If Mr. Pieters was unhappy with the employer's reply at the final level of the

grievance process, it would then be open to him to apply for judicial review of that reply.

[52] In conclusion, therefore, Mr. Pieters' grievance is dismissed for want of jurisdiction.

Yvon Tarte,
Chairperson

OTTAWA, October 2, 2001.