Date: 20030317

File: 166-20-31213

Citation: 2003 PSSRB 26

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

THERESA NIGRO SULLIVAN

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

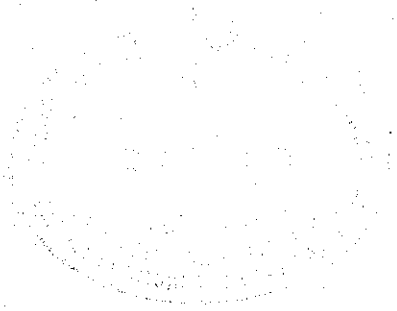
Employer

Before: Guy Giguère, Deputy Chairperson

For the Grievor: Herself

For the Employer: Normand Vaillancourt, Counsel, and Toby Hoffman, Co-Counsel

Heard at Ottawa, Ontario,
October 28, 30 and 31, 2002.



[1] On February 6, 2002, Keith Egli, then counsel for Theresa Sullivan, wrote to the employer, the Canadian Security Intelligence Service (CSIS), that Ms. Sullivan was grieving the termination of her employment due to the revocation of her top secret security clearance. On February 13, 2002, Normand Vaillancourt, counsel for CSIS, replied to Mr. Egli that Ms. Sullivan did not have the right to grieve the decision to revoke her security clearance. Mr. Vaillancourt explained that a valid top secret security clearance is a condition of employment at CSIS and therefore the termination of Ms. Sullivan's employment was of an administrative nature arising out of the revocation of her security clearance.

[2] On March 13, 2002, the instant grievance was referred to adjudication. On March 27, 2002, Mr. Vaillancourt informed the Public Service Staff Relations Board (Board) that the employer's position was that the revocation of the security clearance resulting in the termination of Ms. Sullivan's employment was not a matter that was referable to adjudication. Mr. Egli wrote to the Board on the same date stating that the grievor's position was that she was terminated from her position as a result of disciplinary action taken by the employer and that the issue of jurisdiction should be addressed with proper arguments at a hearing.

[3] On August 15, 2002, Mr. Egli informed the Board that Ms. Sullivan would now be representing herself before an adjudicator appointed under the *Public Service Staff Relations Act* (*PSSRA*).

[4] On October 3, 2002, Mr. Vaillancourt advised the Board that since Ms. Sullivan no longer had a security clearance the employer would be required to proceed in the absence of the grievor for a portion of the hearing in accordance with the applicable policy (HUM-504-1) promulgated pursuant to section 8 of the *Canadian Security Intelligence Service Act.* The relevant sections of the policy read as follows:

. . .

> ***6. CLOSED HEARINGS***
>
> *6.1 In cases where either the grievor or his/her representative are denied a security clearance or is unwilling to obtain a security clearance, those portions of the hearing that would result in the release of classified information will proceed in the absence of the grievor and his/her representative (at a "closed hearing").*

> *6.2 The parties will agree before the commencement of the hearing as to the sequence of the closed and open portions of the hearing.*
>
> *6.3 A summary of the information disclosed during the closed portion of the hearing shall be prepared by the Service and filed to be part of the record at the resumption of the open hearing.*
>
> *6.4 In grievances which relate to disciplinary measures, where the evidence presented in the absence of the grievor and his/her representative concerns the grounds upon which discipline was imposed, the summary should contain such information available to the adjudicator as will enable the grievor to be reasonably informed of the circumstances giving rise to the disciplinary action, having regard to whether the information should not be disclosed on the grounds that its disclosure may be injurious to national security.*
>
> . . .

[5] On October 11, 2002, Ms. Sullivan informed the Board that she agreed with Mr. Vaillancourt's proposal that CSIS would commence with the closed portion of the hearing on October 28 and 29, 2002.

Summary of the Information Disclosed During the Closed Portion of the Hearing

[6] On Monday, October 28, 2002, a closed hearing was conducted in the instant grievance. At the outset of the closed hearing, Mr. Vaillancourt indicated that, although oral testimony from two members of CSIS would be given, the employer was not abandoning its argument that the adjudicator did not have jurisdiction to hear this matter. A summary of the testimony of the witnesses was prepared by the employer on October 29, 2002 and filed as part of its record at the resumption of the hearing on October 30:

> . . .
>
> ***II – First Witness***
>
> *3. The first witness was an employee of the Service who had knowledge of the Service internal security investigation regarding the Grievor.*
>
> *4. The witness informed the Adjudicator how the internal security investigation commenced and the scope of the investigation.*

5. *The witness took the Adjudicator to documents which demonstrated that the Grievor had contact with a Person of Operational Interest ("POI") to the Service. Through reference to the documents the witness informed the Adjudicator that the Service took measures to verify the information regarding the Grievor's contact with the POI before three internal security interviews with the Grievor commenced.*

6. *The witness took the Adjudicator to documents produced regarding three interviews conducted with the Grievor.*

7. *The witness described what a POI was and how this related to Service mandate.*

8. *Through reference to the documents the witness informed the Adjudicator that the Grievor knew about the POI.*

9. *Through reference to the documents the witness informed the Adjudicator that the Grievor had authorized contact with the POI as a function of her duties.*

10. *Through reference to the documents the witness informed the Adjudicator about the Grievor's telephone contacts with the POI and the receipt of a gift from the POI, all of which were reported to the Service up and until December 1998.*

11. *Through reference to the documents the witness informed the Adjudicator that in December 1998, the Grievor was instructed to cease contact with the POI.*

12. *Through reference to the documents the witness informed the Adjudicator that the Grievor did not abide by the Service direction to cease contact and continued to have contact with the POI.*

13. *Through reference to the documents the witness informed the Adjudicator that the Grievor did not report her contact with the POI to the Service after December 1998.*

14. *Through reference to the documents the witness informed the Adjudicator that the Grievor had opportunities to report her contact with the POI to the Service but did not do so.*

15. *Through reference to the documents the witness informed the Adjudicator that the Grievor attempted to rationalize her contact with the POI to the Service.*

16. *Through reference to the documents the witness informed the Adjudicator that the Service was aware of the personal circumstances of the Grievor and at all times treated the Grievor with understanding.*

III – Second Witness

17. *The second witness was a CSIS employee who has knowledge of the internal security investigation regarding the Grievor.*

18. *Through reference to the documents the witness informed the Adjudicator how the internal security investigation commenced and the scope of the investigation.*

19. *Through reference to the documents the witness informed the Adjudicator that from the outset the matter regarding the Grievor was treated as a breach of security investigation and not a conduct and discipline matter.*

20. *The witness informed the Adjudicator that the Grievor was not the subject of disciplinary measures. She received full pay and benefits throughout the course of the internal security investigation regarding allegations of unreported contact with a POI, including the administrative leave period, and there was no change in her status with the Service until January 11, 2002, the date on which the Grievor's security clearance was revoked.*

21. *The witness informed the Adjudicator that prior to the events which gave rise to the internal security investigation, the Grievor was not the subject of disciplinary measures and performed her duties well.*

22. *Through reference to the documents the witness informed the Adjudicator that the Grievor's unreported and unauthorized contact with the POI amounted to violations of Service policies.*

23. *Through reference to the documents the witness informed the Adjudicator that the Grievor's actions violated Service policies and placed in doubt her ability to retain her security clearance.*

24. *Through reference to the documents the witness informed the Adjudicator that the Service considered the possibility of finding other employment for the Grievor but this was not feasible since it is a condition of employment that Service employees have a Top Secret clearance, and it was not within the mandate of*

the Service to appoint the Grievor to other positions within the Government of Canada.

25. *The witness stated that the documents indicated that the Grievor placed her reliability and loyalty in serious doubt by violating conduct policy, willfully hiding information from the Service and misleading the Service about her contacts.*

26. *The witness stated that the documents indicated a lack of trust in the Grievor's ability to have a security clearance that would allow her to continue employment with the Service.*

27. *The witness stated that the documents indicated that the recommendation made at the end of the internal security investigation was to revoke the Grievor's security clearance since there was no other reasonable alternative.*

...

Evidence of the Grievor Disclosed During the Open Portion of the Hearing on Wednesday, October 30, 2002

[7] Ms. Sullivan graduated from university with a Bachelor of Arts degree, majoring in law. She worked for a short period with an accounting firm prior to being hired by CSIS. She was 23 years old when she was hired, and she initially worked in security screening as an analyst; later on, after training, she worked as an investigator. At the time of the termination of her employment, Ms. Sullivan was an intelligence officer at a level 8 classification with an annual salary of $65,000, and she had 12 years of service with CSIS. Her performance appraisals had no blemishes and showed an outstanding performance. She was rarely sick, and showed dedication to the Service. There were never any disciplinary issues during her 12 years of service until the incident that led to the termination of her employment.

[8] In December 1996, Ms. Sullivan first met "A.B.". In the following months, she had several occasions to see him. In May 1997, she attended a meeting where she, as well as other employees, noted that "A.B." showed a personal interest in her.

[9] When Ms. Sullivan arrived home on Friday, February 13, 1998, her furniture was missing as well as some clothes. She initially thought that her house had been burglarized but later realized that her husband had left her. It was a traumatic experience for her; she had no knowledge of her husband's intention to leave her and

she was devastated. The following Monday she went in to work as usual, as work was one of the two things that she could hold onto in life beside her family. A week later, Ms. Sullivan received a phone call at work from "A.B.". He called a general telephone number that was given to him at one of the meetings held between December 1996 and May 1997. He seemed to know that something was wrong, but her recent separation was not discussed. Soon after, "A.B." sent her a sympathy card, which she found flattering. She informed her immediate supervisor about it, her Director General, the Chief for the Ottawa region, and also discussed it with her colleagues.

[10] After her break-up, Ms. Sullivan's supervisor suggested that she see a counsellor from Health Services. She did not follow his suggestion but when her family became concerned about the emotional distress caused by her separation, she agreed to see her doctor. He prescribed some medication and recommended that she seek counselling. In June 1998, Ms. Sullivan met with "C.D.", a counsellor from Health Services at CSIS. Ms. Sullivan met with "C.D." on a regular basis until December 1998, and met with her for the last time in 1999. Ms. Sullivan never mentioned to "C.D." the calls she was receiving from "A.B.", as her discussions with "C.D." were mostly about her husband having left her.

[11] Ms. Sullivan continued to receive telephone calls at work from "A.B." and at one point provided "A.B." with her home telephone number. She even received a gold chain from "A.B.", which she showed around at work. Ms. Sullivan explained that she had informed the employer of the calls that she was receiving from "A.B." and that she had given him her home telephone number. The employer, however, showed no interest until December 1998 when her supervisor asked her to put everything in writing. Her manager reviewed it and gave her an explicit written direction that she discontinue her relationship with "A.B." Ms. Sullivan, however, ignored the written direction and continued her relationship with "A.B.". After 10 months, she had grown quite fond of "A.B.". He talked about marriage and she wanted to know more of his intentions; therefore, she continued the relationship.

[12] Ms. Sullivan testified that what she did was wrong but it was a mistake as her judgment was questionable at the time. Ms. Sullivan stated that she never discussed CSIS matters with "A.B." and she did not get any information of an intelligence nature from him. From January to April, they talked every two weeks. She even telephoned him at work and sent him photographs of her family.

[13] In April 1999, she travelled to see "A.B.". She informed her employer of her trip but did not mention that she was going to see "A.B.". Ms. Sullivan explained that in her mind her supervisor must have known that she was travelling to see "A.B." since her destination was near "A.B.'s" residence. Ms. Sullivan believes that her supervisor decided not to talk about it. When she returned home, she and "A.B." talked regularly on the phone but "A.B." sounded somehow different. Then, in June 1999, he stopped calling and Ms. Sullivan was very disappointed by this.

[14] In February 2000, Ms. Sullivan received a phone call from "A.B.", who tried to explain why he had stopped calling. She told him that she did not want to hear from him anymore and that was the last time she spoke to him.

[15] In February 2001, Ms. Sullivan was interviewed as part of the renewal process for her security clearance. She did not mention her relationship with "A.B." when asked if she had unauthorized contact with persons of an operational interest. In cross-examination, she was asked why she did not reveal her continued contact with "A.B". Ms. Sullivan explained that there had been only a period of six months of continued undisclosed contact with "A.B.", from January to June 2000. She pointed out that she could not have been compromised by this relationship, as she was no longer married. She explained that during the course of the 10-month period of authorized contact with "A.B." she developed a personal interest in him. She stated that her manager must have known about her continuing relationship with "A.B.", including her trip, but decided to turn a blind eye.

[16] On December 9, 2001, Ms. Sullivan's Director General (DG) informed her that she would be interviewed at a later date by the Internal Security (IS) and it was better that she not come into the CSIS building. She acknowledged to her DG that she indeed had continued contact with "A.B.". She was put on administrative leave during the investigation by IS and was advised by her DG that she should meet with a counsellor from Health Services for assistance and support during the IS investigation. The DG informed Ms. Sullivan that he had spoken to "E.F." who would be telephoning her to provide support.

[17] Ms. Sullivan indicated that she knew that "E.F." worked in Health Services. In cross-examination, she specified that she had also sought out "E.F." for counselling after "C.D." left CSIS and that she had met with "E.F." the day before her suspension.

[18] Ms. Sullivan explained that she was sceptical about "E.F.'s" role for several reasons. One of the reasons was that "E.F.'s" office was on the same floor as IS. Ms. Sullivan felt that, given the context of this investigation, "E.F." might have passed on some of their conversations to IS. Also, "E.F." asked Ms. Sullivan to sign a waiver authorizing "E.F." to discuss with the DG any relevant information provided during their conversation. Ms. Sullivan explained that she signed the waiver as she felt she had nothing to hide. At the hearing, Ms. Sullivan alluded that "E.F." might have also passed information to her DG that led to the termination of her employment. She cooperated fully with the investigator and even asked her DG if she could undergo a polygraph examination to prove that she did not divulge any unauthorized information to "A.B." She asked for the most experienced polygraph tester but unfortunately he was inexperienced. She was interviewed for three hours by this polygraph tester before being tested. He asked her questions such as the exact number of times she had lied in her life. When she replied that he must mean an estimate, he insisted that it would have to be the exact number of times and this went to her integrity. In Ms. Sullivan's opinion, the unprofessionally administered polygraph test denied her the opportunity to clear her reputation with her employer.

[19] On January 11, 2002, Ms. Sullivan's DG telephoned her to advise her that he wanted to meet with her. As she was not authorized to enter the CSIS building, he requested to meet with her at her house. She was uncomfortable with this and they therefore agreed to meet at a *Starbucks* coffee shop. The DG gave her the letter of termination signed by Ward Elcock, which reads as follows:

> *On December 4, 2001, you were advised that you were subject of a breach of security investigation regarding allegations of unreported contact with a person of operational interest to the Service.*
>
> *I have now been advised of the results of this investigation and based on the findings, I have concluded that you did have unreported and unauthorized contact. You consciously and willfully pursued a relationship with this individual, after being instructed to cease contact. By doing so, you repeatedly violated Service Security Policy by virtue of not reporting contact with this individual and you concurrently violated Conduct and Discipline Policy by disregarding specific direction from your manager.*

> *Such behaviour is contrary to the Service's professional code of conduct to which all Service employees are expected to adhere. Your actions have also placed your loyalty and reliability in serious doubt. Consequently, as per Government Security Policy chapter 2-4.5, I am revoking your security clearance.*
>
> *As you are aware, a valid Top Secret security clearance is a condition of employment in the Service. Since revocation of your clearance will preclude you from discharging your duties, you are being dismissed from the Service as of this date.*
>
> *It is also my duty to inform you that section 42(3)(a) of the* CSIS Act, *permits you to lodge a complaint regarding the revocation of your security clearance to the Security Intelligence Review Committee.*
>
> . . .
>
> *It is with deep regret that I have taken this decision but the gravity of your actions have left me no choice in this matter.*

[20] The DG informed Ms. Sullivan that he was sorry about the termination of her employment and that he had cancelled her scheduled appointment with "E.F.". He also informed her that he had made new arrangements so that "E.F." would be there to give her support later on that day. Ms. Sullivan was quite upset by this and she told the DG to cancel the new appointment with "E.F."

[21] Later on she sought help from the Employee Association, which advised her that, as she was no longer an employee of CSIS, it could not assist her. Ms. Sullivan explained that she was never advised by the employer during the period that she was on administrative leave that she could seek the assistance of the Employee Association. Since then, Ms. Sullivan has found part-time work and she has also tried to seek employment in the federal Public Service but has been unsuccessful so far as the positions that she has applied for require a secret or top secret security clearance. She also feels that, when her DG announced at a general staff meeting that she had lost her security clearance, this severely tarnished her reputation and chance of employment within the federal government.

Arguments

For the Grievor

[22] Ms. Sullivan submitted that, as the employer argues that she is not entitled to grieve, it should have the onus of proving that her continued employment with CSIS could cause a threat to national security. If, as the employer contends, an adjudicator appointed under the *PSSRA* does not have jurisdiction to hear this grievance, then she is left with no recourse. However, it is her submission that the termination of her employment was disciplinary in nature and therefore an adjudicator does have jurisdiction to hear her grievance.

[23] Ms. Sullivan argued that the reason why the employer chose the revocation of her security clearance was to avoid legal action before an adjudicator appointed under the *PSSRA* and any other legal recourse for wrongful dismissal that she might have. She stated that, since CSIS is responsible for the granting of security clearances, it is easy for the employer to choose this route. As indicated in her termination letter, the employer contends that Ms. Sullivan can complain to the Security Intelligence Review Committee (SIRC) about the revocation of her security clearance. Nevertheless, SIRC can only make recommendations to CSIS about a security clearance. In the end, it is CSIS's decision to grant or not to grant a security clearance, as the employer is the one making the final decision even after a review by SIRC.

[24] Ms. Sullivan further submitted that the employer acted in bad faith by using "E.F." as a tool to gather information to help the employer terminate Ms. Sullivan's employment. She accepted "E.F.'s" help because, for security reasons, she could not speak to anybody else about her situation. She provided consent to "E.F." to release information to her DG at a time when she was not thinking clearly and able to give valid consent. Ms. Sullivan's DG appointed "E.F." as her counsellor and he made appointments for her with "E.F.". This evidence, according to Ms. Sullivan, shows that "E.F." was a means of getting information leading to Ms. Sullivan's dismissal.

[25] The employer also acted in bad faith in failing to provide an experienced polygraph tester to enable Ms. Sullivan to clear her reputation with the employer.

[26] Ms. Sullivan submitted that the employer also showed bad faith by not advising her that she could get the assistance of the Employee Association while she was on administrative leave during the investigation process. Also, the employer failed to inform her in the letter of termination of her right to grieve under the *PSSRA*.

[27] Ms. Sullivan argued that the employer had to know that she was continuing her relationship with "A.B." even after she was advised to stop it. She informed the employer that she was travelling to a location near "A.B.'s" residence four months after she was given an order not to continue her relationship with him. The employer knew that she was an employee undergoing a personal crisis and could reasonably assume that by travelling to a location near "A.B.'s" residence she might be seeking to pursue the relationship.

[28] Ms. Sullivan acknowledged that by pursuing undisclosed and unauthorized contact with "A.B.", she committed a significant breach of conduct. This breach of conduct requires disciplinary action. However, there are mitigating circumstances that should be taken into account. It is the first blemish on an exemplary record. This was a period of a personal crisis in her life.

[29] Ms. Sullivan concluded by stating that by revoking her security clearance, not only has the employer deprived her of her position with CSIS but it has also denied her the right to work in the future for the federal government, which is a disproportionate penalty for her misconduct.

For the Employer

[30] Mr. Vaillancourt submitted that by virtue of subsection 91(2) and section 113 of the *PSSRA*, an adjudicator is without jurisdiction to hear Ms. Sullivan's grievance and to award any corrective action with respect to the loss of her security clearance. His arguments on jurisdiction were presented at the beginning of the "open" hearing in a detailed memorandum of fact and law.

[31] In summary, Mr. Vaillancourt argued that the revocation of the grievor's security clearance was an action taken pursuant to the Government Security Policy, made on behalf of the Government of Canada in the interest of the safety and security of Canada. As a result, this matter is not grievable under section 113 of the *PSSRA*, as the revocation of the grievor's security clearance is a decision of the Deputy Minister made

under the authority of the Government Security Policy. Section 113 of the *PSSRA* reads as follows:

> ***113.*** *(1) Nothing in this Act or any other Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.*
>
> *(2) For the purposes of subsection (1), any order made by the Governor in Council is conclusive proof of the matters stated therein in relation to the giving or making of any instruction, direction or regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.*

[32] Mr. Vaillancourt also submitted that an adjudicator is without jurisdiction to hear this grievance, as it is not within the scope of section 92 of the *PSSRA*. Section 92 of the *PSSRA* establishes different criteria for employees in a department or other portion of the Public Service of Canada as opposed to those of separate employers. CSIS is a separate employer and therefore only a grievance with respect to disciplinary action resulting in termination of employment, suspension or a financial penalty may be referred to adjudication. The decision of the Director to revoke Ms. Sullivan's security clearance was purely administrative and is therefore not adjudicable.

[33] The grievor bears the onus of establishing that the employer's actions were disciplinary. The facts do not support the finding that the Director exercised his discretion in bad faith. Mr. Vaillancourt argued that nothing in Ms. Sullivan's testimony or argument disputes any facts in the summary of the closed hearing.

[34] Mr. Vaillancourt submitted that the requirements of the grievor's position include a top secret security clearance. As she no longer met this requirement of the position, her employment was terminated. This, he argued, is similar to *Singh vs. Canada (Public Works and Government Services)*, [2001] F.C.J. No. 891, in which Mr. Justice Dubé found that an adjudicator appointed under the *PSSRA* has jurisdiction to inquire as to whether or not the employer searched diligently for alternate positions within the department that would not require a secret security clearance. Mr. Justice Dubé found support for such position in the Government Security Policy. However, this decision is easily distinguishable from the instant grievance. In *Singh*

(*supra*), Mr. Justice Dubé found that subparagraph 92(1)(b)(ii) of the *PSSRA* provided such jurisdiction to the adjudicator. In the instant grievance, this subparagraph does not apply to employees of CSIS since, as a separate employer, only grievances with respect to disciplinary action resulting in termination of employment, suspension or financial penalty may be referred to adjudication (paragraph 92(1)(c) of the *PSSRA*). Non-disciplinary termination of employment of CSIS employees is not adjudicable under the *PSSRA* and an adjudicator is therefore without jurisdiction to inquire as to whether CSIS searched diligently for an alternative position. Nevertheless, every employee of CSIS is required to have a valid top secret security clearance and therefore alternative employment was not available for Ms. Sullivan within CSIS.

[35] Mr. Vaillancourt submitted that the bad faith argument advanced by Ms. Sullivan at the hearing had nothing to do with the Director's decision to revoke her security clearance. The polygraph examination was inconclusive; therefore, the decision of the Director could not be supported by this inconclusive polygraph. As to the bad faith argument relating to "E.F.'s" involvement, it is irrelevant as there is no evidence that what "E.F." heard from Ms. Sullivan was used in any way by the Director to come to his decision. The accusations made by the grievor in regard to "E.F." are unfair. There is evidence of personal difficulties and a history of previous counselling by the grievor. In light of this, the DG did the right thing by suggesting to Ms. Sullivan that she participate in counselling by "E.F." "E.F." was not a stranger to Ms. Sullivan as Ms. Sullivan had sought her assistance prior to the termination of her employment.

[36] Mr. Vaillancourt submitted alternatively that Ms. Sullivan breached a number of policies by having unauthorized and undisclosed contact with "A.B.", which warranted the termination of her employment. She had an obligation to divulge the continued relationship with "A.B." and, by not respecting this, she broke the CSIS security policy (Exhibit E-6) in a deliberate manner by engaging in a relationship with "A.B.". The employer has lost total confidence in her ability to pursue her functions as an employee of CSIS. By her actions Ms. Sullivan has demonstrated that she does not have the reliability required of an employee of CSIS.

[37] Mr. Vaillancourt submitted, as a further alternative, that as a result of section 91 of the *PSSRA*, the grievor is precluded from presenting the instant grievance as the grievor has access to an alternative administrative procedure for redress, namely SIRC. Under section 42 of the *Canadian Security Intelligence Service Act* redress is available

when a security clearance is revoked. Accordingly, Ms. Sullivan complained to SIRC and her complaint is being investigated. Section 42 of the *Canadian Security Intelligence Service Act* reads as follows:

> *42. (1) Where, by reason only of the denial of a security clearance required by the Government of Canada, a decision is made by a deputy head to deny employment to an individual or to dismiss, demote or transfer an individual or to deny a promotion or transfer to an individual, the deputy head shall send, within ten days after the decision is made, a notice informing the individual of the denial of the security clearance.*
>
> *(2) Where, by reason only of the denial of a security clearance required by the Government of Canada to be given in respect of an individual, a decision is made to deny the individual or any other person a contract to provide goods or services to the Government of Canada, the deputy head concerned shall send, within ten days after the decision is made, a notice informing the individual and, where applicable, the other person of the denial of the security clearance.*
>
> *(3) The Review Committee shall receive and investigate a complaint from*
>
> *(a) any individual referred to in subsection (1) who has been denied a security clearance;*
>
> *or*
>
> *(b) any person who has been denied a contract to provide goods or services to the Government of Canada by reasons only of the denial of a security clearance in respect of that person or any individual.*
>
> *(4) A complaint under section (3) shall be made within thirty days after receipt of the notice referred to in subsection (1) or (2) or within such longer period as the Review Committee allows.*

[38] In support of his arguments, Mr. Vaillancourt relied on the following: *Employment in the Federal Public Service,* Renée Caron, Canada Law Book; *Mohammed v. Canada (Treasury Board)* (1999), 250 N.R. 181 (F.C.A.); *Jacmain v. Attorney General of Canada et al.* (1978), 81 D.L.R. (3d) 1 (S.C.C.); *Nablow* (Board files 166-20-24982 and 166-20-25306); *Rennick* (Board file 166-20-21907); *Seabrooke* (Board file 166-20-26759); *Thomson v. Canada (Deputy Minister of Agriculture)* (1992), 89 D.L.R. (4th) 218 (S.C.C.); *Rhonda Lynn Lee v. Attorney General of Canada,* [1981] 2 S.C.R. 90 (S.C.C.); *Attorney*

General of Canada v. Paul Murby et al., [1981] 1 F.C. 713 (C.A.); *Fritz* (Board files 166-2-14801 and 14802); *Fritz v. Canada (Treasury Board)*, [1985] F.C.J. No. 814 (C.A.); *Singh* (Board file 166-2-29399); *Kampman* (Board files 166-2-21656 and 166-2-21771) and *Lily Kampman v. Her Majesty the Queen*, Federal Court of Appeal file A-84-92.

Reasons for Decision

[39] The scope of grievances that can be referred to adjudication is limited under section 92 of the *PSSRA*. Section 92 reads 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,*
> >
> > *(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.*

[40] CSIS is a separate employer and its employees are not included under paragraph 92(1)(b) or subsection 92(4). It follows that, for non-unionized CSIS employees, as in the instant case, only grievances dealing with disciplinary action can be referred to adjudication under paragraph 92(1)(c).

[41] In the letter of termination, the employer stated that the cause for termination was the revocation of Ms. Sullivan's security clearance. Counsel for the employer argued that this revocation was purely administrative in nature and therefore not adjudicable under paragraph 92(1)(c) of the *PSSRA*.

[42] The grievor on the other hand argued that the termination of her employment was disciplinary in nature and the employer acted in bad faith and used the revocation of her security clearance as a way of avoiding the referral to adjudication of her grievance. This argument is analogous to the one made in *Jacmain* (*supra*). In that case, the Supreme Court of Canada found that an adjudicator appointed under the *PSSRA* could, in the face of a jurisdictional objection, make a determination as to whether or not by rejecting the employee on probation the employer acted in bad faith to camouflage disciplinary action.

[43] The case law[1] is quite clear that revocation of a security clearance *per se* is of an administrative nature and cannot be the subject of a grievance referred to adjudication under paragraph 92(1)(c) of the *PSSRA*. However, the grievor is arguing that, before an adjudicator can conclude that he has no jurisdiction under the *PSSRA*, he must make a determination that the employer did not act in bad faith to disguise disciplinary action and that the revocation of her security clearance was in fact the reason for the termination of her employment. I agree with counsel for the employer that the grievor bears the onus of establishing that the employer's actions were disciplinary and therefore I will review the allegations of bad faith.

[44] Ms. Sullivan has submitted that the employer acted in bad faith in three specific instances. The first instance of bad faith according to Ms. Sullivan was when "E.F." was used by the employer as a tool to gather information to help terminate Ms. Sullivan's employment. Ms. Sullivan explained the reasons why she came to this conclusion. One of the reasons was that "E.F.'s" office was located on the same floor as IS. Assuming that this reason, given the context of this case, would have put "E.F." in an appearance of conflict between her duties, I still would not find this evidence sufficient to find bad faith on the employer's part. Ms. Sullivan was asked to sign a waiver authorizing "E.F." to discuss with the DG any relevant information provided during their conversations. I cannot draw a conclusion based on this evidence in itself; I have not seen the waiver, nor did "E.F." testify, nor did any other witness explain to me the purpose of this waiver. I have asked myself if, as Ms. Sullivan contends, the employer was acting in bad faith, why would "E.F." have asked for a waiver to discuss information with the DG. Some appointments were made by the DG for Ms. Sullivan to meet with "E.F." Ms. Sullivan had consulted Health Services before; it was known to the employer that she had gone through a difficult period when her husband left her. I find that on a balance of probabilities, it is more likely that the DG made those appointments to help Ms. Sullivan through this difficult period. Ms. Sullivan had consulted "E.F." in the past; therefore, it was normal for Ms. Sullivan to continue to see "E.F." after she was put on administrative leave.

[45] The second instance of bad faith alleged by Ms. Sullivan is the polygraph examination that she underwent during the investigation by IS. The polygraph report was inconclusive and the employer did not conclude in any way that Ms. Sullivan had released unauthorized information to "A.B.". I therefore find no evidence of bad faith in the way the polygraph test was conducted.

[46] The third instance where the employer showed bad faith, according to Ms. Sullivan, was by not advising her that she could get assistance from the Employee Association while she was on administrative leave during the investigation process. Ms. Sullivan explained that this also occurred when the employer failed to inform her of her right to grieve under the *PSSRA*. I believe that, especially in view of the fact that most of CSIS employees are not unionized and have limited rights to refer grievances

[1] *Rhonda Lynn Lee v. Attorney General of Canada* (*supra*); *Fritz* (*supra*); *Fritz v. Canada (Treasury Board)* (*supra*); *Singh v. Canada* (*supra*); *Kampman* (*supra*) and *Lily Kampman v. Her Majesty the Queen* (*supra*).

to adjudication, the employer should inform employees as much as possible of their right to refer a grievance to adjudication and the possibility of getting assistance from the Employee Association while on administrative leave. Nevertheless, this is not evidence of bad faith by the employer and I cannot come to this conclusion.

[47] Ms. Sullivan did maintain for a period of time an undisclosed relationship with "A.B.", a person of operational interest to CSIS. She was given specific directions by the employer to cease contact with him but she decided to continue the relationship because she had become infatuated with this relationship. This was a very difficult period in Ms. Sullivan's life and "A.B." seemed at the time as the light at the end of the tunnel. However, by continuing a relationship with him, she was ignoring a direct order by the employer.

[48] Because of the nature of the intelligence security sector, employees cannot second-guess the employer when they are told to cease a relationship.

[49] Later on, she terminated the relationship with "A.B." but did not reveal to the employer the undisclosed relationship that she had maintained for several months. There were two instances where she could have come clean to the employer regarding her relationship with "A.B." She was not truthful when she was asked during an interview to review her security clearance if she had unauthorized contact with a person of operational interest to CSIS.

[50] I do not have here to review the reasons why the employer revoked Ms. Sullivan's security clearance. SIRC is reviewing a complaint by the grievor on this subject and its findings will address this. What I have to determine is whether the revocation of Ms. Sullivan's security clearance was frivolous, a ruse to camouflage a disciplinary measure. Clearly, I do not find so.

[51] I have looked at all of the evidence to see if, other than the arguments presented by Ms. Sullivan, there was any evidence of bad faith on the part of the employer. After reviewing the evidence, I cannot come to the conclusion that the decision to revoke Ms. Sullivan's security clearance was disciplinary action in disguise or anything other than an administrative decision taken in good faith. The evidence at the closed and open hearings has certainly convinced me that there were valid reasons for the employer to revoke Ms. Sullivan's security clearance. Ms. Sullivan essentially acknowledged the employer's allegations during her testimony. Accordingly, the

decision being challenged by Ms. Sullivan falls outside my jurisdiction and therefore her grievance is dismissed.

[52] All positions at CSIS require a top secret security clearance and the revocation of Ms. Sullivan's top secret security clearance implies that she can no longer work at CSIS. This does not mean, as Ms. Sullivan asserted, that, because of the loss of her top secret security clearance she is barred from finding employment elsewhere in the federal Public Service. There are positions in other departments where she could contribute and where no security clearance or a lower level of security clearance is required. The evidence that was presented to me shows that, apart from the undisclosed relationship with "A.B.", the employer considered Ms. Sullivan to be an excellent employee.

Guy Giguère,
Deputy Chairperson

OTTAWA, March 17, 2003.