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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

GURBAX DHUDWAL, AZMINA HIRJI, LAUREN KUNIMOTO, DANIELA SALMEN, PAUL SKINNER, DAVID ERNEST HARDER, PATRICK ANTHONY LOGAN, DARSHAN SINGH

Grievors

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

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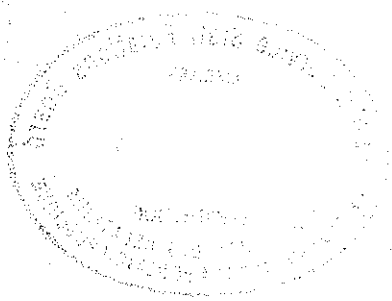
COMMISSION DES RELATIONS DE TRAVAIL DANS LA FONCTION PUBLIQUE

Before: Guy Giguère, Deputy Chairperson

For the Grievors: Paul Reniers, The Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, Counsel

Heard at Vancouver, British Columbia,
October 28, 2003.



[1] Gurbax Dhudwal, Azmina Hirji, Lauren Kunimoto, Daniela Salmen and Paul Skinner each filed a grievance between December 2001 and February 2002. They grieved that the employer, contrary to clause 34.05 of the collective agreement and section 91 of the *Public Service Staff Relations Act* (PSSRA), had improperly refused to address earlier grievances that they had filed regarding the adequacy of the recourse provided to them under the Canadian Customs and Revenue Agency (CCRA) staffing program.

[2] On July 11, 2002, D.J. Tucker, Assistant Commissioner, Human Resources at CCRA, replied to those grievances at the final level. He wrote that the issues that they had raised are staffing matters that cannot be addressed through the grievance process. He explained that, section 91 of the PSSRA and clause 34.05(a) of the collective agreement state that where there is another administrative procedure provided in or under an Act of Parliament to address the employee's specific complaint, such procedure should be followed. He denied the grievances and indicated that the Staffing Recourse established by the CCRA is the administrative procedure available to the grievors.

[3] On October 8, 2003, the grievors all filed complaints under section 23 of the PSSRA. They explained that they had been denied the right to grieve in violation of section 8(2)(c)(ii) of the PSSRA. They also complained that the employer had failed to comply with section 74.1 of the Regulations of the PSSRA by refusing to reply to their grievances.

[4] Patrick Anthony Logan, David Ernest Harder and Darshan Singh also employees of the CCRA, filed similar complaints under section 23 of the PSSRA between July and October 2003.

[5] At the hearing, both representatives agreed that even if the burden of proof lay with the grievors/complainants, it would be preferable to have the employer start, as the evidence presented by the employer was of a more general nature.

Evidence

[6] Margaret Rashid, Acting Director of Resourcing and Careers, Management Division, CCRA, explained that with the coming into force of the *Canada Customs and Revenue Agency Act* (CCRA Act), S.C. 1999, c. 17 in November 1999, the appointment

authority was given to the CCRA. Prior to the coming into force of the *CCRA Act*, the Public Service Commission had authority over staffing recourse in CCRA. As a result of the new Act, CCRA had to develop its own staffing recourses. Ms. Rashid indicated that staffing is divided in three phases and that each phase has its own recourses and that corrective measures can be taken at any phase.

[7] The first phase is a prerequisite phase where pre-selection is done; candidates are screened out and have the right to individual feedback. They can raise concerns with the selection board, who has made the assessment at this stage. If it is realized that an error has been made, the individual will be put back in the competition.

[8] The second phase is the assessment phase where candidates who have been pre-selected are assessed against established assessment criteria for the position such as knowledge, abilities, suitability and competence. Two steps are available for the recourse at this level. Individual feedback similar to what is available at the pre-screening phase, where candidates have the opportunity to see how they were assessed and can raise concerns with the selection board. Following individual feedback, the candidates are also entitled to seek the decision review. The decision review is conducted by the supervisor of the hiring manager. The criteria for decision review is whether the candidate was treated in an arbitrary manner during any particular stage of the selection process. The definition of "arbitrary" is found at Tab 14 of the Canada Customs and Revenue Agency Staffing Program (Exhibit E-2, page 4):

> ***Arbitrary*** *is defined as follows:*
>
> > *"In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale, on established policy; not the result of a reasoning applied to relevant considerations; discriminatory (i.e. difference of treatment or denial of normal privileges to persons because of their race, age, sex, nationality, religion, or union affiliation."*

If it is found to be arbitrary, several corrective measures can be taken such as putting back the candidate in the competition and having the assessment redone or if the assessment tool does not assess competency, redesign of a new tool. Ms. Rashid explained that this finding is subject to judicial review and has been reviewed in the past by the Federal Court.

[9] The third phase of the staffing process is the placement phase where the candidates who met all the assessment criteria are placed in a pool and from that pool placement is made. At that phase, candidates have access to individual feedback as in the previous phases, followed by either decision review process or an independent third party review. Ms. Rashid indicated that in the instant grievances and complaints, all employees were at the second phase of the staffing process, the assessment phase. They received individual feedback and they sought a decision review as they were not happy with the assessment and wanted to be found qualified. Ms. Rashid explained that the staffing recourses are subject to judicial review. However, the grievors/complainants did not seek judicial review except for Darshan Singh (Exhibit E-12).

[10] Two employees testified for the bargaining agent and it was agreed with the employer's representative, that their testimony would describe what the grievors/complainants had gone through with the staffing process, their experience in the recourse process.

[11] Paul Skinner, AU-2 at CCRA Burnaby Fraser TSO, explained that he has been a steward since 1996 with the bargaining agent and that he is now part of the executive of the Institute's CCRA Vancouver Branch. In this capacity, he has kept track of the grievances and complaints that are the subject of this hearing and he is also a complainant and grievor in two of those files.

[12] There was an AU-2 competition at the Burnaby Fraser office which was the first staffing process under the CCRA Act. He observed that it was a learning process for management and that managers might not had received enough training. Initially, when candidates requested individual feedback, time limits were set on the duration of the individual feedback. The candidates were provided a copy of the exam and solution but were given half an hour to take notes of those documents. After the bargaining agent intervened, the employer eventually agreed to provide copies of these documents but only to the candidates who had requested the information.

[13] There were problems at the decision review stage where candidates who wanted to have union representation during the review were told that the union representative accompanying them could only observe and take notes. The candidates were asked to provide written submissions for the decision review. Their submissions dealt in great

part with the questions asked in the competitions which were very subjective. The candidates wanted to discuss this at the decision review but were denied this.

[14] Mr. Skinner's personal experience was not better. He could not get a copy of the documentation initially at individual feedback. In decision review, he wanted to discuss the answers he had given to a written test and was told that the decision reviewer could not discuss his answers or the corrections. The decision reviewer asked him about his involvement in the union. His concerns were not addressed in the answer to his written submission. He grieved on December 3, 2001 (Exhibit G-5) that the staffing recourse failed to adequately deal with his complaint and concerns on the staffing process. The employer's response (Exhibit G-6) was that the issue raised in his grievance concerns a staffing matter for which a recourse is provided under clause 54.1 of the CCRA Act; and this matter is not subject to grievance. Following the response of the employer, Mr. Skinner filed a second grievance which is the subject of this hearing. In this grievance he explained that: "There is no alternative process in place after CCRA unfairly conducts the staffing recourse procedure and therefore such conduct is grievable. (...) Contrary to article 34.05 of the collective agreement and section 91 of the PSSRA, the employer has improperly refused to address my grievance regarding the adequacy of recourse provided to me under the Agency's staffing program."

[15] In cross-examination, Mr. Skinner explained that he did not file for judicial review in federal court of the staffing recourse.

[16] Daniela Salmen is an Acting AU-02 in the Verification Unit of the Vancouver TSO. She explained that she was a candidate for an AU-02 competition. As she was not successful, she requested individual feedback. Dick Wong, the Chair of the selection board advised her that the individual feedback would only last 15 minutes and that she could not see a copy of the exam, her answers or her marks. He asked her to put her questions in writing. He told her also that her marks would not be changed as a result of the individual feedback and that the purpose of this meeting was not to go over the test with a fine tooth comb. After individual feedback, she went back to her desk to make notes of the meeting (Exhibit G-12). She inquired with the Human Resources section on the process to file an access request to get a copy of the test. She was later informed that she should ask a second time from the selection board to have access to the test (Exhibit G-13).

[17] On August 2, 2001, she met again with the selection board. Ms. Salmen testified that Dick Wong told her that as soon as she saw her results, 57 on 100, she immediately started to look for more marks. Dick Wong explained that he wanted verbatim answers from Blair's philosophy of audit as was stated in the competition poster. Ms. Salmen explained that this was not posted in the Vancouver TSO as Mr. Blair is Director of the Burnaby Fraser TSO and authored a memo which is referred to Blair's philosophy of audit. Half an hour was allocated for the individual feedback meeting and as they ran out of time, she was granted a third interview which occurred the following day. She asked for Kurt Siegert to be present as a union representative but this was denied and he was not allowed to come in the room. When she noted to Mr. Wong that her marks added to 58 and not to 57 as reported on her test, he became agitated and angry. He responded that he would not discuss the marking and that could be done at the next phase, the decision review.

[18] The decision review was before Mike Quebec, Assistant Director, Verification and Enforcement Division of the Vancouver TSO. Kurt Siegert accompanied her. She explained to Mr. Quebec how she was treated in the individual feedback meeting, how her marks did not add up. Mr. Quebec listened to her and said that he would arrange for another individual feedback meeting. Her written questions and comments about the test (Exhibit G-15) were not discussed as she felt Mr. Quebec wanted to end the meeting shortly.

[19] Thereafter, she had a fourth individual feedback interview with Dick Wong. He said that they could take all the time that they needed. She asked him questions about the test (Exhibits G-15 and G-16), how the board had determined her marks on several questions. His responses were that he did not know or remember. He explained also that her answer might be correct but not the answer they were looking for. She pointed out to Mr. Wong that the final marks did not reconcile and, his reply was that the marks would not be changed. She then grieved that the staffing recourse had failed to adequately deal with her complaint (Exhibit G-17). The employer's response was similar to the others that this matter is not grievable since it concerns a staffing matter where there is another administrative procedure. She therefore filed a second grievance (Exhibit G-19) grieving that the employer had improperly refused her grievance.

Arguments

[20] Mr. Fader submitted that the PSSRA provides a limited right to grieve under section 91(1). When there is an administrative procedure for redress as provided in or under an act of Parliament, there is no right to grieve for the employee. The CCRA is a separate employer (section 50 of the CCRA Act) it has exclusive right to appoint (section 53(1) of the CCRA Act) and it must develop a program governing staffing including recourse for employees (section 54(1) of the CCRA Act). The CCRA has established a staffing program comprising a staffing recourse process. One grievor/complainant did seek judicial review to the Federal Court as the staffing recourse of CCRA is subject to judicial review. If the grievors were unhappy with the result of the staffing recourses, they should have sought a judicial review before the Federal Court.

[21] In support of his arguments, Mr. Fader submitted the following case law: *Re Cooper,* [1974] F.C.J. No. 1016 (C.A.) QL; *Canada (Attorney General) v. Boutilier,* [2000] 3 F.C. 27 QL; *Kehoe v. Treasury Board (Human Resources Development Canada),* (Board file 166-2-29657); *Anderson v. Canada (Customs and Revenue Agency),* [2003] F.C.J. No. 924 QL; *Sargeant v. Canada (Customs and Revenue Agency),* [2002] F.C.J. No. 1372 QL; *Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency),* [2002] F.C.J. No. 161 QL.

Arguments for the Bargaining Agent

[22] Mr. Reniers submitted that the redress procedure provided under the staffing program of CCRA does not have the stature or the authority of other redress procedure and does not provide redress for matters that grievors or complainants are seeking. The right to grieve in the Public Service is fundamental to labour relations under the PSSRA. The grievors/complainants are submitting that the staffing recourse is grievable but not adjudicable. By this, they are asking that their supervisors/managers be accountable to higher managers of CCRA for the way they perform their duties in the staffing recourse. The grievance process encourages dialogue and it is an economical process. It becomes very expensive for employees to go to Federal Court as it requires lawyers and has lengthy timelines. Access is limited as the Federal Court is not an administrative procedure for redress. The grievance process works as these instant grievances/complaints brought improvements by the employer in its competition process and staffing recourse procedures.

Reasons for Decision

[23] Section 91(1) of the PSSRA reads as follows:

> ***91.*** *(1) Where any employee feels aggrieved*
>
> *(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.*

The uncontradicted evidence is that the employer has established a staffing program with staffing recourse under section 54 of the CCRA Act. The evidence is also that this staffing recourse does provide an administrative procedure for redress. Ms. Rashid testified that through the staffing recourse, redress can be given, as a candidate can be put back in the competition and reassessed. Also, the assessment tool can be redesigned if necessary.

[24] In *Re Cooper* (*supra*), the Federal Court of Appeal, at paragraph 11, found that where such an administrative procedure for redress is provided, the employee must submit his or her complaint to the authority which has, under the appropriate statute the power to deal with it. The Court was clear that this employee may not file a grievance under section 91 or 92 of the PSSRA in respect of that decision.

[25] The grievors/complainants are dissatisfied with the manner in which the staffing recourse was performed. As found in *Re Cooper* (*supra*), the manner in which the administrative procedure is provided cannot be grieved. This is a matter for judicial review in the Federal Court.

[26] The evidence is that the grievors/complainants have availed themselves of the appropriate administrative procedure for redress when they asked for individual feedback and decision review in the staffing recourse provided by the employer. Because they were not satisfied of the result of the staffing recourse, they filed their grievances and the employer replied that this was not a grievable matter. They then filed grievances and complaints that they had been denied the right to grieve. One of the grievors/complainants, Darshan Singh, did file for judicial review of the decision review process.

[27] The remedy that the grievors are seeking does not lie with adjudicators appointed under the PSSRA, but rather in the Federal Court. Indeed, there have been several requests for judicial review as found in the case law submitted by the employer where the Federal Court did review the staffing recourse of the CCRA and individual cases.

[28] I therefore find that the grievances must be denied for want of jurisdiction. For these same reasons, the complaints must be dismissed since no right to grieve was denied as these staffing matters and specifically the staffing recourse cannot be subject of a grievance under the PSSRA.

[29] This said, the grievors'/complainants' description of the staffing recourse they experienced was certainly troubling. There was no evidence from the employer on this aspect and there might be some mitigating factors that I have not heard. Nevertheless, the evidence of the bargaining agent was that, as a result of these grievances, measures were taken by the employer to improve its review process. This shows to me the importance of communication between the parties. Further concerns with the staffing recourses that the bargaining agent and its members might have, should also be communicated to the employer in less formal ways than judicial review. I urge the parties to develop a mechanism to address this.

Guy Giguère,
Deputy Chairperson

OTTAWA, December 18, 2003.