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File: 166-2-31934

Citation: 2004 PSSRB 81



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

DANIELLE LONGPRÉ

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer



Before: Jean-Pierre Tessier, Board Member

For the Grievor: Bertrand Myre, Canadian Association of Professional Employees

For the Employer: Hélène Brunelle, Counsel

(Decision rendered without a hearing)

DECISION

[1] The employer is asking the Board to exercise its power to dismiss a grievance presented by Danielle Longpré, for lack of jurisdiction.

[2] Danielle Longpré began working for a specified period on January 4, 2000, at the Department of National Defence as a librarian. Her term employment was extended several times.

[3] Her last offer of employment was for a specified period from March 29, 2002, to June 28, 2002 (exhibit in the file). On May 22, 2002, Ms. Longpré was informed that her term was not renewed because of insufficient work and that, consequently, her employment would terminate on June 28, 2002.

[4] On July 4, 2002, the grievor contested the employer's decision to terminate her employment. She believes that it is a disguised dismissal and that it is an abusive decision, made in bad faith. During the grievance process, she claimed that her term was not renewed as a reprisal for the grievances she had filed on March 28 and April 23, 2002 (exhibit in the file).

[5] The grievance was referred to adjudication on February 13, 2003. The employer challenged the adjudicator's jurisdiction. It argues that the non-renewal of the appointment of a person appointed for a specified period does not constitute termination of employment within the meaning of the *Public Service Staff Relations Act (PSSRA)*. After various exchanges, the Board asked the parties to submit written arguments in summer 2003 so that a decision could be rendered based on the written submissions. The file was sent to me on December 11, 2003.

Arguments of the parties

[6] According to the employer, a person appointed for a specified period ceases to be an employee at the expiration of that period, pursuant to section 25 of the *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.

[7] The employer further argues that:

[Translation]

[...]

Ms. Longpré's dismissal does not constitute a "termination of employment" within the meaning of section 92 of the PSSRA. Her employment ceased in accordance with what was set out in her work contract and not as a result of a decision by the employer that was independent of that contract. Moreover, in terms of the corrective action requested, the Board does not have the authority to grant it. Section 8 of the PSEA states: "Except as provided in this Act, the [Public Service] Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament."

[...]

[8] In this regard, the employer asks the Board:

[Translation]

[...]

[...] to take into account the decision of the Court of Appeal in Dansereau v. National Film Board, [1979] 1 F.C. 100, and the decisions of the Board in Hanna (Board file No. 166-2-29643) and Pieters, 2001 PSSRB 100 (Board file No. 166-2-30615). [...]

[9] For his part, the grievor's representative argues that, even though the *Public Service Employment Act* states in section 25 that "An employee who is appointed for a specified period ceases to be an employee at the expiration of that period", an adjudicator has jurisdiction to examine the employer's conduct.

[10] The grievor's representative points out that the Federal Court of Appeal intervened in the case of a rejection on probation (*Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429).

[11] Furthermore, an adjudicator intervened in *Laird v. Treasury Board (Employment and Immigration Canada)*, Board file No. 166-2-19981 (1990) (QL) to decide to award compensation to the grievor for the remainder of the period of her term, having found

that she was unfairly discharged prior to the end of her term. In addition, the employee claimed that she was the victim of reprisals.

[12] The grievor's representative submitted seven tabs containing various documents, such as performance evaluations, correspondence regarding the library reorganization, and case law.

[13] The employer replies that, in *Pieters* (supra):

[Translation]

[...]

[...] Chairperson Yvon Tarte recently examined the question of whether the non-renewal of a term contract constitutes a termination of employment within the meaning of section 92 of the PSSRA. At page 18 of his decision, Chairperson Tarte states:

"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)."

Thus, the PSSRB's case law is well established to the effect that an adjudicator does not have jurisdiction to hear the grievance of an employee who is grieving because his work contract has expired. For this reason, and pursuant to subsection 96(3) of the PSSRA, the employer's response at the final level of the grievance process is "final and binding".

[...]

[14] In reply to the arguments presented by the grievor's representative, the employer states as follows:

[Translation]

[...]

In response to Mr. Bertrand's argument to the effect that "it is not because a decision flows from the PSEA that an adjudicator does not have jurisdiction to hear a grievance", we respectfully submit that subsection 92(3) of the PSSRA removes terminations of employment made under the Public Service Employment Act from the jurisdiction of the

adjudicator and does so subject to the principles set out in Penner and Laird.

In response to Mr. Bertrand's argument concerning the applicability of the principles set out in Penner, we respectfully submit that these principles do not apply in this matter. In that instance, the Federal Court of Appeal found that the adjudicator was without jurisdiction with respect to a rejection on probation once it was established that the employer had concluded in good faith that the employee did not have the required skills. Penner does not examine the issue raised in this instance, specifically, the non-renewal of a term contract. We reiterate that the complainant was not rejected on probation prior to the end of her term.

In response to Mr. Bertrand's claim, with respect to the applicability of the principles set out in Laird, we respectfully submit that these principles may not be applied in the present circumstances. In Laird, it was decided that the employer's decision to dismiss the employee prior to the end of the term set out in the contract was motivated by bad faith. In light of that, the adjudicator found that he had jurisdiction to award compensation to the employee for the remainder of the period covered by the contract. In this instance, the employer did not terminate the complainant's contract prematurely. It is not a question of dismissal and, consequently, the argument of a disguised dismissal is without grounds.

[...]

[Emphasis in the original]

[15] The exhibits in the file show that, during discussions at the first level of the grievance process (letter of August 12 in the file), the employer dismissed the grievor's claim that her term was not renewed as a reprisal for the grievances she had filed on March 28 and April 23, 2002.

[16] The employer argues that a report on the restructuring of library operations was presented in January 2002 and that cost savings justified the non-renewal of the grievor's term.

Reasons for decision

[17] The question before the Board is whether it should dismiss the grievance filed by the grievor, for lack of jurisdiction. The employer's request relates to the Board's authority as set out in section 84 of the *PSSRB Regulations and Rules of Procedure* (1993) (*Regulations*), which reads as follows:

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

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

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

(b) hold a hearing.

[...]

[18] For its part, section 92 of the PSSRA stipulates as follows:

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

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

(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, subsection to subsection (2), refer the grievance to adjudication.

[...]

(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.

[...]

[19] In *Gascon v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2000 PSSRB 68, the Board was seized with a request to dismiss a grievance for lack of jurisdiction. In its decision, the Board stated at paragraph 14 that recourse to the procedure set out in section 84 of the *Regulations* is appropriate when the file raises serious doubts as to whether the grievance constitutes a grievance that may be referred to adjudication. Furthermore, at paragraph 15, the Board stated that, based solely on the file before it, there was an arguable case that the grievance constituted an eligible grievance for referral to adjudication. The Board therefore dismissed the request.

[20] A similar approach was followed in *Kehoe v. Treasury Board (Human Resources Development)*, 2001 PSSRB 9.

[21] I agree with the employer that a grievance presented contesting the non-renewal of a term may not be referred to adjudication unless there is bad faith on the part of the employer or disciplinary reasons. See *Dansereau v. National Film Board*, [1979] 1 F.C. 100 (C.A.), *Vogan v. Treasury Board (National Defence)*, Board file no. 166-2-26900 (1996) (QL), *Lecompte v. Treasury Board (Health Canada)*, Board file no. 166-2-28452 (1999) (QL), *Marta v. Treasury Board (Royal Canadian Mounted Police)*, 2001 PSSRB 31.

[22] The grievor is claiming that the employer acted in reprisal against her as a result of her grievances dated March 28 and April 23, 2002. However, well before these grievances, we find, under Tab 2 of the documents submitted, an evaluation report dated February 20, 2002, in which the employer questions the quality of the grievor's work.

[23] The employer argues administrative grounds, specifically, the reorganization of the library. The documents submitted under Tabs 3 and 5 describe a study on the streamlining of the library. However, the letter of May 24, 2002, on the impact of the reorganization, specifies that if any reorganization takes place, it will not begin before September 2002.

[24] In this matter, I do not know if the grievor will be able to establish that the employer acted in bad faith or if the action constitutes disciplinary action rather than the non-renewal of a term. However, accepting the facts alleged as established, I find

that, based solely on the file before the Board, there is an arguable case that the grievance is eligible to be referred to adjudication.

[25] For these reasons, I do not feel it is appropriate to apply the procedure set out in section 84 of the *Regulations*. The employer's request to dismiss the grievance outright, without a hearing, is dismissed. I order the Assistant Secretary, Policy and Operations, to contact the parties to place this matter on the roll so that it can be heard by an adjudicator.

Jean-Pierre Tessier
Board Member

OTTAWA, July 5, 2004

P.S.S.R.B. Translation