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File: 166-34-32035

Citation: 2004 PSSRB 33

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DONALD W. KREWAY

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

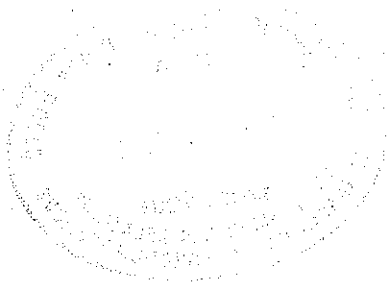
Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Rosalie Armstrong, Counsel

Heard at Regina, Saskatchewan,
January 28 and 29, 2004
(Written submissions March 4, April 2 and April 19, 2004)



DECISION

[1] This is a preliminary decision concerning the grievance filed by Donald Kreway in May 2002. Mr. Kreway grieved that the Canada Customs and Revenue Agency (CCRA, as it was then called) contravened Appendix "E" of his collective agreement. At the time that he filed his grievance Mr. Kreway was an internal auditor, classified as an AS-04. The reference to Appendix "E" of his collective agreement is a reference to the Work Force Adjustment (WFA) Appendix.

[2] Mr. Kreway's grievance and corrective action requested read as follows:

> Grievance
>
> *I grieve that the employer has willfully contravened Appendix "E" of my collective agreement.*
>
> Corrective action requested
>
> *That I be declared surplus retroactive to November 1, 2001, and that I be appointed as a surplus employee with priority rights to the PM4 Collections Team Leader position effective November 1, 2001. Any other remedies that are reasonable under the circumstances.*

[3] Following the completion of the evidence from three witnesses, including Mr. Kreway, it became apparent that Mr. Kreway wanted to be appointed to a position that he did not occupy, and which was encumbered by another individual. No one had informed this other individual of his right to attend and be represented at the hearing (see *Bradley v. Ottawa Professional Firefighters Association (Re)* (1967), 63 D.L.R. (2d) 376, [1967] 2 O.R. 311 (C.A.)).

[4] I raised this procedural issue with the parties at the conclusion of the evidentiary portion of the hearing, and also raised the question as to whether I had jurisdiction to appoint the grievor to a position which was encumbered by someone else. The parties requested that they make written submissions on the jurisdictional question only.

[5] Accordingly, on February 2, 2004, a letter was sent to both parties by the Public Service Staff Relations Board (the Board) asking them to provide a written submission on the following question:

> whether the adjudicator has jurisdiction to grant the redress sought by the grievor.

[6] This decision deals with the above jurisdictional issue.

Submission of the Bargaining Agent

[7] On March 4 and April 19, 2004, the Public Service Alliance of Canada filed its written submission and written reply respectively, and they are on file with the Board.

[8] In summary, the bargaining agent states that the grievance alleges a violation of the collective agreement, and, as such, it is adjudicable under paragraph 92(1)(*a*) of the *Public Service Staff Relations Act* (*PSSRA*). Furthermore, subsection 23(2) of the *PSSRA* provides the adjudicator with the power to give effect to, and ensure compliance with, the collective agreement. This grievance involves an alleged violation of the Workforce Adjustment Appendix (WFAA) of the collective agreement.

[9] The CCRA is a separate employer, not governed by the statutory staffing regime of the *Public Service Employment Act* (*PSEA*).

[10] Subsection 54(2) of the *Canada Customs and Revenue Agency Act* (*CCRAA*) states that no collective agreement can deal with matters governed by the staffing program. As the staffing program does not govern matters covered by the WFAA, there is no contradiction between the rights in the WFAA, and the ability to remedy a breach thereof, and the terms of the *CCRAA*.

[11] The remedy sought here is simply what the WFAA recognizes as the grievor's entitlement.

Submission of the Employer

[12] On April 2, 2004, the employer filed its written submission, and these are on file with the Board.

[13] The employer maintained that the adjudicator had no jurisdiction to hear the grievance because the relief sought by Mr. Kreway was to be placed in a higher level position, and this would effectively be an appointment, which no adjudicator can do.

[14] Appendix "E" of the collective agreement applicable to the grievor provides an obligation on the employer to make a reasonable job offer to affected employees. The purpose is not to provide for promotion, which would be the case if Mr. Kreway was granted the relief he seeks.

[15] An adjudicator is not empowered to appoint employees to desired positions: see *Rodney* (PSSRB File No. 166-2-25911 (1994) (QL)). Only the CCRA has the power to make appointments pursuant to sections 53 and 54 of the *CCRAA*.

[16] Paragraph 91(1)(*b*) of the *PSSRA* confirms that matters can be grieved where there is no other administrative procedure for redress. Subsection 54(1) of the *CCRAA* is clear that only the CCRA has the authority to provide recourse for staffing.

Decision

[17] The bargaining agent has stated this is a reference to adjudication under paragraph 92(1)(*a*) of the *PSSRA*. This section states in part:

> ***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,*
>
> [...]
>
> *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.*

[18] Subsection (2) simply states that the consent of the bargaining agent is required where an employee presents a grievance as described in paragraph 92(1)(*a*). In the instant case, the bargaining agent has provided its consent, and this is not at issue here.

[19] The employer advanced the position that the grievance could not proceed to adjudication because of the prohibition contained in subsection 91(1) of the *PSSRA*. This subsection states:

> ***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.*

[20] The employer stated that because there is another administrative procedure for redress found in the *CCRAA* (at section 54), and because the requested corrective action in the grievance deals with staffing, the grievance could not be heard at adjudication.

[21] Although the question that was framed to the parties was "whether the adjudicator has jurisdiction to grant the redress sought by the grievor", given the written submissions of the parties, the existing jurisprudence, and my decision in this matter, I have determined this question does not need to be answered at this juncture. However, given the decision that follows, this question may need to be addressed in the future.

[22] In my view, the central question to be answered in deciding this grievance is whether or not there has been a contravention of Appendix "E" of the collective agreement. The grievor has alleged that there has been such a contravention. Paragraph 92(1)(*a*) of the *PSSRA* provides for the adjudication of such issues, and I do not believe there can be any question that I have the requisite jurisdiction to determine whether or not the employer has violated the collective agreement.

[23] There is no other avenue of redress in those situations where it is alleged that the employer has violated a provision of the collective agreement.

[24] The problem in this case (if indeed there is any problem at all) is with respect to the relief the grievor is seeking.

[25] The requested corrective action may be something I am barred from ordering, but, in my view, this does not prevent me from hearing the reference to adjudication. I am not bound by the requested corrective action as stated in the grievance. Rather, I

can fashion a remedy I believe appropriate if I should find a violation of the collective agreement. In doing so, I would have to be mindful of whatever prohibitions exist in the *PSSRA* or elsewhere.

[26] Accordingly, there is no question in my mind that I have jurisdiction to hear this matter. This issue was also canvassed in *Public Service Alliance of Canada v. Treasury Board (Solicitor General - Correctional Service of Canada)* 2001 PSSRB 44, where Board Member L.-P. Guindon declined jurisdiction with respect to certain items of the requested corrective action, but dealt with the substantive matter.

[27] What is at issue is, firstly, whether or not there has been a violation of the collective agreement, as alleged by the grievor. If it is determined that the collective agreement has been violated, then the issue becomes whether or not the adjudicator has the jurisdiction to grant the redress as requested.

[28] Hypothetically, there may be a situation where the employer has failed to make a reasonable job offer under the WFA (something it was required to do) and in order to correct this, the adjudicator may decide that the only reasonable job offer that can be made in order to adhere to the collective agreement provisions is to a position already encumbered. The effect of the adjudicator's decision in this example would be to place the grievor in a position already encumbered. Clearly, the individual in the encumbered position should receive standing at adjudication should they wish it.

[29] In my view, I have jurisdiction to conclude that the employer has violated the collective agreement, if the evidence leads me to that conclusion. This decision does not deal with that issue as it has not yet been argued. The parties are free to argue that issue, if they so choose.

[30] However, if the bargaining agent is going to argue that the employer has violated the collective agreement and ask me to conclude that the grievor should be placed in another position, one that is encumbered by another employee, then the other employee must receive notice in advance of the hearing, and standing at the proceedings (see the principles enunciated in *Bradley* (*ibid*)) in the event that they indicate an intention to participate.

[31] Therefore, in the instant case, I find that:

a) I have jurisdiction to hear the reference to adjudication, and

b) If the bargaining agent is going to argue that the grievor is entitled to be placed in a position currently encumbered by someone else, that person should receive notice and a hearing *de novo* would ensue.

[32] I will leave it up to the parties to determine what course of action they wish to follow, and advise the Board's Assistant Secretary of Operations accordingly.

Joseph W. Potter,
Vice-Chairperson.

OTTAWA, April 30, 2004.