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Date: 20050324

File: 166-02-34997

Citation: 2005 PSSRB 27



Public Service
Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

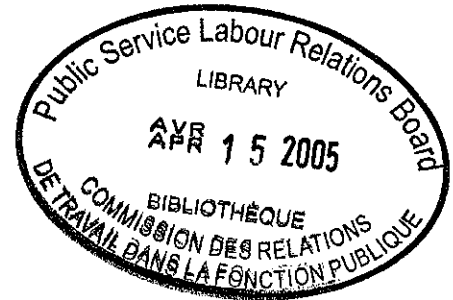
GONÇALO MONTEIRO

Grievor

and

TREASURY BOARD
(Canadian Space Agency)

Employer



Before: Yvon Tarte, Chairperson

For the Grievor: Richard Tremblay, Professional Institute of the Public Service of Canada

For the Employer: Lise Bourgeois-Doré, Treasury Board

(Decided without a hearing)

DECISION

[1] On August 19, 2004, through his union, Gonçalo Monteiro referred his grievance dated March 23, 2004, to adjudication:

[TRANSLATION]

I contest my employer's February 27, 2004 decision not to renew my contract after March 31, 2004, at a time when four students were hired in my section. I consider that I have been the victim of a constructive dismissal since no valid reason has been given to me, and the duties I performed have not come to an end and will be performed by students who work without pay.

[2] Mr. Monteiro requests the following corrective action:

[TRANSLATION]

I request that my position be converted into indeterminate employment as is now the case for six employees in the Information Technology (IT) Directorate or, failing that, that my contract be renewed immediately.

[3] Starting on October 4, 2002, Mr. Monteiro was a term employee of the Canadian Space Agency (the Agency), working as a CS-01 Technician, Network Support, at the Administration Branch in Saint-Hubert. According to subsection 16(1) of the *Canadian Space Agency Act*, the employees required for the proper conduct of the work of the Agency (with the exception of astronauts) are to be appointed in accordance with the *Public Service Employment Act* (the PSEA). On March 21, 2003, Mr. Monteiro accepted an offer of extension dated March 14, 2003. The letter of offer of employment indicates that this appointment was also a term appointment and would begin on March 31, 2003, and end on March 31, 2004.

[4] In a letter dated February 27, 2004, Mr. Monteiro was informed that his term employment would end on March 31, 2004, as indicated in the letter of offer of employment.

[5] In a letter to Mr. Monteiro dated April 22, 2004, Jacques Lachapelle, Director, Administration, responded to Mr. Monteiro's grievance on behalf of the employer at the first level of the grievance settlement procedure, as follows:

[TRANSLATION]

I am writing in response to the above-noted grievance dated March 23, 2004, in which you asked that your position be converted into indeterminate employment as is now the case for six (6) employees in the Information Technology (IT) Directorate or, failing that, that your contract be renewed immediately.

[...]

My analysis of the grievance shows that in a letter dated February 27, 2004, you were informed that your term employment would end on March 31, 2004, as indicated in the letter of offer of employment that was sent to you on March 14, 2003, and that you accepted on March 21, 2003.

With regard to the six positions you mention, I emphasize that these positions "converted into indeterminate employment" will be staffed by means of competitions, which were posted while you were still an employee, thus allowing you to apply.

The fact remains that the resources available did not make it possible to offer you term employment at the end of your contract. In fact, over the past year, budget cuts have meant the elimination of three positions in the IT Directorate, including yours. I can assure you that you have not been subject to constructive dismissal. I remind you that your position was created in order to meet a specific need; it has not been possible to extend your employment beyond March 31, 2004. In addition, the students have not been hired in order to replace you; they are here on a training program, for a short period.

You state in your grievance that the duties you performed have not come to an end. It is true that it has been necessary to reallocate the work among the resources available; however, doing so is management's prerogative and cannot in any way be interpreted as an obligation to extend your employment beyond March 31, 2004.

[...]

[6] In a letter to Mr. Monteiro dated July 8, 2004, manager Pierre Richard responded to Mr. Monteiro's grievance on behalf of the employer at the last level of the grievance settlement procedure, as follows:

[TRANSLATION]

First of all, I would like to stress that the conversions to which you refer in your letter are not conversions. They are

competition processes, some of which you entered, and of which the outcome is still to be determined, since no offers have yet been made.

[...]

[...] I remain convinced that your employment ended according to the rules, that is, because the period of employment had come to an end, as was indicated in your letter of offer of employment and as you were informed by your supervisor starting in April 2003. In this regard, the Public Service Employment Act provides that you ceased to be an employee on that date.

[...]

[7] The grievance was referred to adjudication on August 19, 2004; on January 5, 2005, the employer notified the Public Service Staff Relations Board (the Board) that an objection to the Board's jurisdiction to hear the grievance would be made shortly. On February 8, 2005, the Board received a copy by facsimile of the objection by the employer. The objection reads as follows:

[TRANSLATION]

I am writing in order to inform you of the objection by the employer concerning the jurisdiction of an adjudicator of the Public Service Staff Relations Board (hereinafter "the Board") to hear the above-mentioned matter.

[...]

Starting on October 4, 2002, Mr. Monteiro was a term employee of the Canadian Space Agency (the Agency), working as a Technician, Network Support, at the Administration Branch in Saint-Hubert, Quebec. His term employment was extended on several occasions. The last offer of term employment was made to him on March 14, 2003, for the period from March 31, 2003, to March 31, 2004 [...]

On February 27, 2004, management informed Mr. Monteiro that his term employment would not be extended and would therefore end at closing time on March 31, 2004, as indicated in his last letter of offer of employment [...]

The employer argues that non-extension of a person's term appointment does not constitute termination of employment within the meaning of the Public Service Staff Relations Act (the PSSRA). Under section 25 of the Public Service Employment Act (the PSEA), a person who is appointed for a

specified period ceases to be an employee at the expiration of that period [...]

The end of Mr. Monteiro's employment does not constitute "termination of employment" within the meaning of section 92 of the PSSRA. His employment ended as indicated in his employment contract dated March 14, 2003. As well, concerning the corrective action requested, the employer considers that the Board does not have jurisdiction to allow this corrective action, since it is the Public Service Commission that has the authority to make appointments [...] Section 8 of the PSEA provides: "Except as provided in this Act, the 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."

In this regard, we ask the Board to read the Federal Court of Appeal decision in Dansereau v. National Film Board, [1979] 1 F.C. 100, as well as the Board decisions in Hanna (Board File No. 166-2-29643) and Pieters, 2001 PSSRB 100 (Board File No. 166-2-30615).

In light of the foregoing, the employer maintains that Mr. Monteiro's grievance may not be referred to adjudication under section 92 of the PSSRA, and the employer objects to the Board's appointing an adjudicator to hear this case on its merits.

Accordingly, we respectfully ask the Board to dismiss this reference to adjudication, without an oral hearing and without delay, for lack of jurisdiction. If the employer does not obtain this order, it respectfully asks that the grievor express in writing why, in his opinion, the Board has jurisdiction to hear this case.

[...]

[8] On February 15, 2005, the Board forwarded a copy of this letter to Mr. Monteiro's representative, Richard Tremblay, with a request that the Board be notified of the bargaining agent's position with regard to this objection. The bargaining agent's response was sent by e-mail on February 23, 2005, and reads (in part) as follows:

[TRANSLATION]

I am writing following today's telephone conversation. As was noted at that time, we have no comment to make with regard to the objection by the employer's representative concerning an adjudicator's jurisdiction in this matter. We

therefore realize that the Board will render a preliminary decision following this objection by the employer.

[9] On March 7, 2005, the Board acknowledged receipt of the above-mentioned letters dated February 8 and 23, 2005, and notified the parties that the Board would render a decision based on the merits of the case.

Reasons for decision

[10] The relevant legislative provisions are the following:

Public Service Staff Relations Act

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.

(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, [...]

[...]

(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.

[11] The jurisdiction conferred on an adjudicator by section 92 is quite narrow and may not be broadened, even by consent of the parties. This jurisdiction is limited,

first, to the interpretation or application of a collective agreement and, second, to disciplinary action, termination of employment, or demotion. According to the wording of his grievance, Mr. Monteiro contests the termination of his employment. I must therefore begin by determining whether the employer's decision not to renew the grievor's employment contract constitutes either a "termination of employment" within the meaning of paragraph 92(1)(b) of the PSSRA or, as Mr. Monteiro claims in his grievance, a constructive dismissal. I do not believe that this is the case, for the following reasons.

[12] First, the employer did not have to take any specific steps to that end, as it would have had to do, for example, to send the grievor for training, or to lay him off in order to terminate his employment. The evidence has established that Mr. Monteiro's employment ended in accordance with the provisions of his term employment contract and section 25 of the PSEA. I consider that the Federal Court of Appeal decisions in *Dansereau v. National Film Board*, [1979] 1 F.C. 100, and *Eskasoni School Board/Eskasoni Band Council v. MacIsaac*, [1986] F.C.J. No. 263 (C.A.) support this finding. The concept of termination of employment implies a unilateral decision by an employer to terminate an employment contract that would otherwise have continued to exist.

[13] The Federal Court of Appeal reached the same conclusion in *Dansereau (supra)*, which dealt with the end of a person's term employment. That Court found that this person had not been laid off, since the period for which she had been employed had expired and her employment had ended in accordance with the terms of her contract. At pages 101 and 102, that Court states as follows:

An employee hired for a specific term is not laid off when this term expires, since the termination of his employment at that time is not due to lack of work but to the terms of the contract under which the employee was hired.

In the present case, in light of the evidence on the record, I must find that Mr. Monteiro's employment ended in accordance with his employment contract and that the principles set out in *Dansereau (supra)* apply to the present case.

[14] The Board adjudicators who have had before them a grievance contesting failure by the employer to renew an employment contract have all found that they do not

have jurisdiction to determine the matter under the relevant provisions of the *PSSRA*, in the following decisions: *Hanna* (Board File No. 166-2-26983 (1996)); *Blackman* (Board Files Nos. 166-2-27134 and 27139 (1996)); *Beaulieu* (Board File No. 166-2-27313 (1997)); *Marta*, 2001 PSSRB 1; *Marinos* (Board File No. 166-2-27446 (1997)) and *Lecompte* (Board File No. 166-2-28452 (1999)). It follows that Mr. Monteiro's grievance may not be referred to adjudication under subsection 92(1) of the *PSSRA*.

[15] As was found in my decision in *Hanna (supra)*, Mr. Monteiro's employment ended in accordance with the terms of his contract, not following a decision by the employer independent of that contract. Thus, it cannot be said that what occurred was a "termination of employment" within the meaning of section 92 of the *PSSRA*.

[16] In *Blackman (supra)*, the adjudicator writes as follows, at pages 7 and 8:

[...] Furthermore, as was the case in Hanna (supra), the grievor's employment was not terminated by the employer within the meaning of subsection 92(1) of the PSSRA. Rather his appointment was for a four year term and that term came to an end. Pursuant to section 25 of the Public Service Employment Act (PSEA), the grievor ceased to be an employee upon the expiration of that term. [...]

[17] With regard to the corrective action requested (indeterminate appointment or renewal of the grievor's contract), it is clear that the Board does not have the authority to grant this corrective action. Section 8 of the *PSEA* provides that, in the absence of provision to the contrary, it is the Public Service Commission that has the exclusive authority to appoint persons to positions within the public service.

[18] I am therefore obliged to find that I do not have the necessary jurisdiction to hear Mr. Monteiro's grievance, and I allow the preliminary objection by the employer.

[19] Accordingly, the grievance is denied.

**Yvon Tarte,
Chairperson**

OTTAWA, March 24, 2005.

P.S.S.R.B. Translation