File: 169-2-612

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD OF CANADA
(Correctional Service of Canada & Human Resources Development Canada)

Employer

RE: Reference under Section 99 of the
Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Bargaining Agent: Derek Dagger

For the Employer: Gail Sinclair

Heard at Toronto,
9 February 1999.

The bargaining agent has filed a reference under section 99 of *the Public Service Staff Relations Act* (PSSRA) concerning the rights of Derek Rose "to either employment or lay off with all rights that attach". The reference also requests that the employer reply to grievances filed by Mr. Rose several years earlier.

Very early on in this process the employer objected to the Board's jurisdiction to hear this matter. By letter dated 22 July 1998, the employer contended that since the matters which the bargaining agent sought to enforce could be the subject matter of a grievance or grievances, section 99 was not available to redress the situation.

In response to the employer's objection, the bargaining agent replied on 27 July 1998:

> *In response to R. Munro's letter of July 22, 1998, one of the matters the Alliance and Mr. Rose wish to put before the Board is that Mr. Rose had grieved, but that the employer did not process nor respond to the grievances, thus closing the door to that method or resolving disputes.*
>
> *I need hardly point out that suggesting that one grieve the fact that the grievance process is not working or being ignored, gets us no where.*
>
> *Moreover, as at least in the department's eyes, Mr. Rose is not considered an employee and therefore not a member of the bargaining unit, he has no standing/status from which to grieve.*
>
> *Finally, the Act provides for a section 99 reference even where the matter is a grievable one, assuming the department/employer will agree. Given the gravity of this matter and the prejudice to Mr. Rose if the matter were to continue unresolved I would think the employer would agree to put this case before the Board.*

On 14 August 1998, the employer replied to the bargaining agent's comments as follows:

> *In the present application under section 99 of the Act the Bargaining Agent seeks to enforce an obligation under article 38 of the PSAC master agreement, namely that the employer respond to a grievance at the final level within 30 days.*
>
> *It is the Employer's position that the act excludes an application via section 99 on any violation which is*

enforceable through a grievance. The grievance procedure and the Employer'' obligations regarding replies are covered by article 38 of the master agreement between the Public Service Alliance of Canada and the Treasury Board. The requirement to reply to a grievance was therefore enforceable through the grievance process and if necessary adjudication. In addition, pursuant to section 76.1 (1) (b) of the P.S.S.R.B. Regulations and Rules of Procedure, an employee may present a grievance to adjudication within 30 days of the earlier of a) the day he receives a reply at the final level or b) the last day on which the authorized representative of the employer was required to reply to the grievance. The applicable date under b) by the employer's calculation was June 5, 1995 given that a transmittal was submitted to the final level on April 21, 1995. The employee therefore had two options when he received no reply by the due date; submit the grievance to adjudication under 76. (1) (b) of the regulations and/or file a grievance alleging a violation of the requirement under article 38 of the master agreement to reply to grievances at the final level of the grievance process.

In light of the grievor's failure to exercise either of the above noted options and his total lack of action in the ensuing three years, the grievor has effectively abandoned his grievance and should not now be allowed to resurrect it through a section of the Act which has no application. Further supporting this contention are the provisions of Clause 38.21 of the PSAC master agreement which hold that an employee failing to present a grievance to the next higher level within the prescribed time limits is deemed to have abandoned the grievance unless he was unable to comply with time frames due to circumstances beyond his control.

At the hearing the employer reiterated its objection as to jurisdiction.

Counsel for the employer then presented written argument respecting the issue of jurisdiction. Those representations are as follows:

1. The Employer submits that the Adjudicator does not have jurisdiction to hear a reference under section 99 of the Public Service Staff Relations Act (the "Act") R.S.C. 1985, c. P-35 in the circumstances of this case.

2. By the very terms of s. 99 of the Act, the reference procedure is only available, without the consent of the employer, to enforce an obligation under a collective agreement if that obligation is not one "the enforcement of which may be the subject of a grievance". The obligation, if any, that Mr. Rose seeks to enforce is one that may be, and

> *has been, the subject of several grievances. It follows the Board is without jurisdiction to hear this reference.*
>
> *3. Moreover, this case raises grievances regarding the Work Force Adjustment Policy. By the terms of the PSAC Master Collective Agreement (the "Master Agreement"), this policy forms part of the collective agreement. It follows that all grievances based on the policy must be filed in accordance with the terms of the Master Agreement, which provides "the grievance procedure will be in accordance with Section 14 of the NJC By-Laws."*
>
> *4. This procedure is mandatory. It has not been followed. It is submitted that this provides an additional reason why the board is without jurisdiction to hear this matter.*
>
> *5. As stated above, Mr. Rose commenced grievances, but failed to seek redress within the requisite time limits when the employer did not provide replies on a timely basis. It can therefore be argued that Mr. Rose abandoned his grievances, or at the very least that he faces the bar of delay.*
>
> *6. It is submitted that the Board should not allow s. 99 of the Act to be used by grievors to do indirectly what they can no longer do directly.*
>
> *7. Finally, it is submitted that redress is not available to Mr. Rose under s. 99 of the Act given that he is no longer an employee within the terms of the section.*

In response to these arguments Mr. Dagger asked to first be allowed to produce Mr. Rose as a witness on the jurisdictional issues.

Mr. Rose testified that he began his career in the public service of Canada in November 1982, as a Correctional Service Canada (CSC) Living Unit Officer at Drumheller, Alberta. In July 1984 he was transferred to the institution at Warkworth in Ontario.

Sometime in 1989, Mr. Rose was advised that the position he occupied had been identified as surplus to requirements effective 21 August 1989 (Exhibit A-1, undated Notice of Surplus Status). The surplus notice stated that he was entitled to surplus priority status until 20 February 1990 at which time he would cease to be employed with CSC unless before that day he was reassigned to another position.

Mr. Rose was also told that he could be compensated for his unused surplus period if he resigned and relinquished his priority rights. In mid May 1989, Mr. Rose accepted the buyout package, giving his last day of employment as 31 October 1989 (Exhibit A-2).

In the meantime, Mr. Rose was offered in August 1989, a term position as Adjudicator at Employment and Immigration Canada (EIC) for the period 5 September 1989 to 4 September 1991 (Exhibit A-3). This offer was accepted by Mr. Rose on 1 September 1989 on the understanding, confirmed in writing by CSC in Exhibit A-4, that his surplus priority status would consequently terminate on 4 September 1991.

During his term as an EIC adjudicator Mr. Rose decided to further his education. Having been unsuccessful in obtaining leave from his employer, he resigned from his position to attend university from September 1989 to April 1991.

In early September 1991, Mr. Rose received a letter from CSC telling him that his surplus priority status was being extended to 4 October 1991 (Exhibit A-6). Shortly thereafter he received an offer of employment from CSC for a position at the CO-II level. Mr. Rose declined this offer since he wanted to pursue his courses at university and believed he would continue to benefit from priority status following his term employment.

In early November 1991, Mr. Rose was advised orally by the Public Service Commission (PSC) his lay-off status was rescinded by CSC and that any future priority rights would have to be assured by EIC. Mr. Rose confirmed this conversation by letter to the PSC dated 8 November 1991 (Exhibit A-7).

On 12 November 1991, CSC confirmed that it was no longer providing priority status to Mr. Rose (Exhibit A-9). In December 1991, the PSC advised Mr. Rose that he had ceased to be an employee when he resigned from his term position as adjudicator to attend university.

Mr. Rose asked the PSC to investigate this matter and report back on his status.

Following his term at university, Mr. Rose was offered and accepted in June 1991 a 6-month term as adjudicator and EIC. This term adjudicator position was extended until the end of 1992.

On 12 November 1992, Mr. Rose was advised that his term position as adjudicator would not be extended beyond 31 December 1992 since the office to which he was assigned, was closing operations at that time (Exhibit A-5).

In August 1992 the PSC issued a case report on Mr. Rose (Exhibit A-10). This report which includes a detailed chronology of Mr. Rose's saga concludes:

> *Based on the research and analysis of the available information, the complainant's allegation that he has been improperly denied surplus/lay-off rights in accordance with the Public Service Employment Act, is deemed to be founded. The complainant was declared surplus to requirements effective 21 August 1989 and his surplus status was extended to 04 September 1991, with a lay-off date of 04 October 1991. The complainant secured specified period employment with EIC, on two separate occasions as an indeterminate employee in surplus status. When he "terminated his term", he merely discontinued his employment with this department. He did not sever his employment with the Public Service and he was only temporarily struck off strength, receiving no remuneration for his actions. The PSC did not act in bad faith when they removed the complainant's name from the priority system, they were taking this action as a result of information which they had received at the time. The fact remains, the complainant continues to maintain his indeterminate status and should be accorded all of the rights and benefits which correspond with that status.*

Following discussions with the author of the PSC report, Mr. Rose presented three identical grievances (Exhibits A-11, A-12 and A-13) in October 1992 against the PSC, EIC and CSC requesting "restoration of the cash out package" or in the alternative "restoration of (...) priority staffing rights...".

Mr. Rose agreed to have the three grievances consolidated. The second level response to these grievances, dated 2 April 1993, indicated that Mr. Rose had been placed in the National Applicant Inventory System as of 23 December 1992 and that the Staffing Programs Branch of the PSC would be marketing him for suitable positions for a period of ten months (Exhibit A-14). No further redress was granted.

There is some confusion as to whether Mr. Rose's consolidated grievances were referred to the third level of the grievance process. A union official told Mr. Rose that the consolidated grievances had been transmitted to the next level while the employer denied that fact.

Mr. Rose presented two other grievances on 23 February 1993 (Exhibits A-15 and A-16). The employer (EIC) responded by letter dated 4 May 1993, that since he no longer enjoyed tenure with the Public Service and did not meet the definition of employee in the PSSRA, there was no authority to deal with his grievances (Exhibit A-17). The letter went on to say:

> *In any event, the subject of your grievance concerning the denial of your lay-off rights (Grievance # HQ-920021) has been dealt with at the first level by Ken McIntosh, Director, Toronto Adjudication and by myself at the second level on April 2, 1993. Since the grievances dated October 9, 1992 were identical to the one dated October 1, 1992 it was decided, with your union's concurrence, that your three submissions would be dealt with as one grievance.*
>
> *I have not found any evidence that you were not given a valid lay-off notice. However, with respect to your lay-off status with Correction Services Canada, the Public Service Commission investigated your complaint and concluded that you were denied your rights in accordance with the Public Service Employment Act. The Public Service Commission placed you in the National Applicant Inventory System for a ten (10) month period to remedy the situation.*
>
> *Base on the above, I am satisfied that the action taken is appropriate, under the circumstances, and I am not prepared to grant the relief you requested.*

Mr. Rose eventually filed a complaint against the PSAC under section 23 of the PSSRA alleging a violation of subsection 10(2) which imposes on the bargaining agent, a duty of fair representation. The matter which was scheduled to be heard by the Board on 15 May 1997, was eventually settled by the parties (see Board file 161-2-827).

With these facts in mind Mr. Dagger argued that Mr. Rose had somehow fallen between legislative or bureaucratic cracks. Since the employer has taken the position in Exhibit A-17 that Mr. Rose is no longer an employee and cannot grieve, the only

avenue of redress to permit a determination of Mr. Rose's status lies under section 99 of the PSSRA.

Ms. Sinclair replied that Mr. Rose's status as an employee is only one of the arguments presented by the employer. The bargaining agent has not presented any worthwhile argument to counter the employer's position that the PSSRB has no jurisdiction in this matter.

Reasons for decision

The provisions of section 99 of the PSSRA, exist to allow an employer or a bargaining agent to refer to the Board matters which arise out of a collective agreement or arbitral award and which cannot be the subject matter of a grievance by an employee. Section 99 of the PSSRA reads as follows:

> ***99.*** *(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*
>
> *(1.1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, the bargaining agent may, in the prescribed manner and with the agreement of the employer, refer the matter to the Board.*
>
> *(2) Where a matter is referred to the Board pursuant to subsection (1) or (1.1), the Board shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.*
>
> *(3) The Board shall hear and determine any matter referred to it pursuant to subsection (1) or (1.1) as though the matter were a grievance, and subsection 96(2) and sections*

> *97 and 98 apply in respect of the hearing and determination of that matter.*

It is clear that the matters which the bargaining agent wishes to refer to the Board under section 99, are in fact issues which could have been and were the subject matter of several grievances. The fact that Mr. Rose, or his union representative, or both, did not fully and in a timely manner pursue the remedies available through the grievance process and adjudication does not in some way change the nature of his complaints to make them matters that fall within the ambit of section 99.

When the employer failed to respond to the grievances at any level of the grievance process, the aggrieved employee could have referred them to the next higher level, including adjudication (section 38 of the PSAC master agreement and/or section 73 and section 76 of the *P.S.S.R.B. Regulations and Rules of Procedures, 1993*).

Mr. Rose failed to properly prosecute his grievances. He cannot now remedy his problem by using section 99. Although subsection 99(1.1) allows the hearing of grievable matters, that can only be done with the consent of the employer. No such consent or agreement was forthcoming in this case.

Finally, a person who is no longer an employee may nevertheless present a grievance under section 91 of the PSSRA and refer it to adjudication under section 92 of the Act provided the subject of the grievance relates to a matter that occurred while he or she was an employee (see the *Queen v. Lavoie* [1978] 1 F.C. 778 and *Gloin et al v. Attorney General of Canada* [1978] 2 F.C. 307).

For these reasons, the Board finds that it has no jurisdiction to deal with this reference under section 99.

Yvon Tarte
Chairperson

Ottawa, March 17, 1999