**File:** 161-2-964

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

**WILLIAM THOMAS VAUGHAN**

and

**TREASURY BOARD**

Respondent



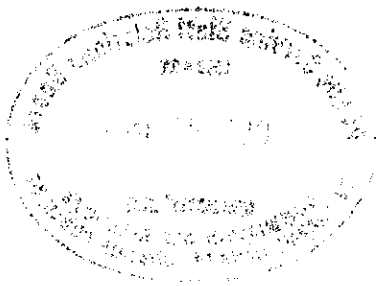
**RE:** Complaint under section 23 of the Public Service Staff Relations Act

***Before:*** Evelyne Henry, Deputy Chairperson

***For the Complainant:*** Suzelle Brosseau, The Professional Institute of the Public Service of Canada

***For the Respondent:*** Richard Fader, Counsel

Heard at Vancouver, British Columbia,
October 26, 1999.



Mr. Vaughan is complaining that the employer has failed to implement an adjudication decision dated August 12, 1998, by not paying him the fifteen-week separation benefit so ordered.

The Board accepts the facts of this case as stated by adjudicator Colin Taylor in the two decisions rendered in Board file No. 166-2-28296: the first on August 12, 1998 and the second on March 18, 1999.

Adjudicator Taylor made the following findings in his first decision:

> *1. The Employer's lay-off of the Grievor on February 23, 1996 was invalid.*
>
> *2. The Grievor's surplus period should have been extended to February 17, 1997, the date on which he was to report for duty.*
>
> *3. The Grievor's failure to report for duty on February 17, 1997 was a refusal of a reasonable job offer.*
>
> *4. The Grievor was laid off as at February 17, 1997.*
>
> *5. The Grievor is entitled to the separation benefit, pursuant to Article 7.3.1 of the WFAD.*
>
> . . .

It is not contested that, to this date, the employer has not paid the separation benefit pursuant to point 5 of the first decision.

The adjudicator had retained jurisdiction to deal with any issues arising out of the implementation of the first decision. The parties made written submissions and reappeared before adjudicator Taylor. The employer argued that it has no authority to make the payment awarded to the grievor because section 6.3 of the *Work Force Adjustment Directive* (WFAD) was statutorily suspended from operation during the period in which Mr. Vaughan was a surplus employee. The employer also argued that adjudicator Taylor was *functus officio* and without jurisdiction to entertain the grievor's application for remedial relief of the employer's failure to comply to the first decision.

Adjudicator Taylor found the following at pages 10 and 11 of the second decision:

. . .

> *It follows that there has been a final determination of the matter raised by the grievance. The Employer has simply failed to make the payment which is directed by the decision and which is the clear intention of the award.*
>
> *Thus, the real dispute between the parties is one of performance. The Employer has failed to do what the award directs - namely, to pay to the Grievor the separation benefit which the award directs be paid. That failure of performance, however, does not detract from the finality and certainty of the award. The Grievor says pay me the separation benefit which I was awarded. The Employer refuses to do so.*
>
> *I conclude that the award is a final determination of the matter raised in the grievance and I am* functus.

. . .

The adjudicator concluded, at page 12, that:

. . .

> *Section 97(6) simply circumscribes the power of the Board under section 23. In exercising its authority under section 23, the Board may not inquire into the basis or substance of the decision.*
>
> *The Grievor argues that the Employer has failed to give effect to the award by not paying the separation benefit. That complaint must be taken to the Board.*

. . .

Arguments for the complainant

The complainant read excerpts from the second decision and summarized the arguments put forward to adjudicator Taylor.

The complainant maintained that the WFAD is part of the collective agreement. He argued that the adjudicator had the authority to, and did, interpret the collective agreement. He stressed that, although the employer alleged that it cannot implement the decision because it goes against a statute, it argued at the same time that the decision is not wrong in law. However, the complainant submitted that the employer's position necessarily implies that there is an error in law, a judicial error, because, if the

decision goes against a statute, it necessarily must go against the collective agreement. He argued that the employer is implying that the adjudicator amended the collective agreement by ordering a redress that is not allowed by law. The complainant alleged that the employer was at liberty to make this argument, and should have made it, before adjudicator Taylor at the hearing leading to the first decision. The complainant argued that, if the employer did so, which is not clear, and if it felt that this argument was not taken into consideration, it should then have applied for judicial review of the first decision.

According to the complainant, this leads to the question of who has the authority to review an adjudication decision if there is an error in law. The complainant referred the Board to the decision of *Beirnes v. Canada (Treasury Board),* [1993] F.C.J. No. 970 (Q.L.), which states that this authority lies with the Trial Division of the Federal Court; the Board can review its own decisions, but not those of adjudicators. Only the Trial Division of the Federal Court can do so. Neither the adjudicator nor the Board has the authority to review the decision, even less so the employer.

The complainant submitted that, in this case, the employer did not apply to the Federal Court for judicial review of the first decision; while it is the only place where an adjudication decision could be challenged, the employer took instead the matter into its own hands. The consequences of this attitude amount to contempt of the adjudication process, which is clearly outlined by law; it demonstrates a flagrant lack of respect towards the adjudicator, and his authority under the *Public Service Staff Relations Act* (PSSRA), and constitutes complete disrespect towards the complainant, who had to go through the grievance process in a timely manner to seek his rights upheld. The complainant reminded the Board that he has been waiting since 1995 to see a resolution of this matter, and since August 1998 to receive his separation benefit. The complainant asked what is the point of having a grievance process if the employer can do indirectly what it cannot do directly, simply by refusing to implement the decision.

In conclusion, the complainant asked that, pursuant to subsection 97(6) and section 23 of the PSSRA, the Board take the appropriate action to give effect to the first

decision, reiterated by the second decision, and order the employer to pay the separation benefit.

The complainant also pointed to the fact that the employer is really seeking to reargue its case. He reminded the Board that it has no authority to inquire into the basis and substance of the first decision, but only into whether the employer has failed to give effect to the first decision.

Given the circumstances, and "wanting to err on the side of safety", the complainant asked the Board to remain seized with the matter should any issue arise about the quantum of the separation benefit.

Arguments for the employer

The employer replied that it is not taking the position that the first decision amended the collective agreement. The employer did not argue that there was any error in the adjudicator's interpretation of the collective agreement.

The employer submitted that subsection 97(6) of the PSSRA does not allow the Board to look at whether an issue has been argued before the adjudicator.

The employer submitted that the adjudicator could not interpret the collective agreement in any other way than he did; "his job was to interpret the collective agreement and he interpreted that section, and for the purpose of this hearing, he interpreted it correctly". The employer added however that there is an outside force, an Order-in-Council, prohibiting to make the payment ordered.

The employer noted that much was being made that it had not sought judicial review of the first decision. The employer submitted that "as we see no error in interpreting or applying the collective agreement", judicial review was not a recourse. The adjudicator found that the grievor was laid off at the end of January 1997, and that he is entitled to separation benefits. The employer is not challenging that interpretation or application of the collective agreement.

The employer submitted that the *Beirnes* decision (supra) is irrelevant to the present case. That case stands for the proposition that there is a distinction between adjudication decisions and Board decisions and this is all that case is about; it has no

application here and the employer is not challenging the interpretation of the collective agreement made by the adjudicator.

The employer argued that the complainant is in a position no different from that of other public servants who have been laid off. The employer alleged that, in the five to six years that the Order-in-Council prohibition lasted, no public servant has received separation benefits pursuant to the WFAD. The employer argued that there is no special category of public servants not bound by statutes. The employer added that no payment can be made from public money without statutory power to do so; it is not just wrong to make such a payment, it is illegal. This is not lack of respect for adjudicator Taylor or the complainant; it is basic constitutional law. The employer referred the Board to the following extract of a decision of the Privy Council in *Auckland Harbour Board v. The King* (1923), [1924] A.C. 318, at pages 326 and 327:

. . .

> *... For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced.*

. . .

The employer then submitted a copy of the *Public Sector Compensation Act* and referred the Board to paragraph 7.3(3)(*a*), which states:

> *7.3. (3) The Governor in Council, on the recommendation of the Treasury Board, may amend the Work Force Adjustment Directive in relation to any of the following matters:*
>
> *(a) the suspension of the separation benefit;*

. . .

The employer then presented a copy of an Order-in-Council amending the WAFD, effective July 15, 1995, and referred the Board to provision 6, which states:

> *6. During the period beginning on July 15, 1995 and ending on June 23, 1998, the application of section 7.3 of the* [Work Force Adjustment] *Directive is suspended.*

The employer explained that adjudicator Taylor clearly found that the grievor was laid off in January 1997 and that provision 6 therefore applies. The employer added that, in view of section 26 of the *Financial Administration Act*, it cannot pay Mr. Vaughan:

> *26. Subject to the Constitution Acts, 1867 to 1982, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament.*

The employer argued that it is not challenging the interpretation of adjudicator Taylor, but added that "no bureaucrat can, on a whim" make the payment. The employer submitted that it was not proper to pay the complainant a separation benefit if it is specifically prohibited to do so. It argued that it had simply no authority to make the payment. The employer cannot see a way around it.

Reply for the complainant

In reply, the complainant stated that the employer is seeking to reargue its case, which is not allowed under subsection 97(6) of the PSSRA. The complainant added that he fails to understand the employer's logic when it says that, although the decision of the adjudicator is fine, it cannot apply it because part of the WFAD has been suspended. Pretending that no payment can be made implies that the adjudicator has erred in law; in such a case, the appropriate recourse would have been to seek judicial review of the first decision.

Reasons for decision

Mr. Vaughan is complaining, pursuant to paragraph 23(1)(*c*) of the PSSRA, that the employer has failed to give effect to the first decision of adjudicator Taylor.

The employer admitted that it has failed to pay Mr. Vaughan, contrary to what has been ordered by adjudicator Taylor. The reasons given by the employer to justify its omission are arguments that have, or should have, been made at adjudication. The

position that the employer took in these proceedings amounts to attempting to reargue the case that has been decided by adjudicator Taylor. Subsection 97(6) of the PSSRA specifically prohibits the Board from inquiring into the basis or substance of that decision:

> ***97.*** *(6) The Board may, in accordance with section 23, take such action as is contemplated by that section to give effect to the decision of an adjudicator on a grievance but shall not inquire into the basis or substance of the decision.*

The employer argued that the first decision is correct in law but that, nevertheless, it cannot legally pay the separation benefit ordered by the adjudicator. These two statements simply cannot co-exist: either the interpretation of the collective agreement is correct and the employer must find a way to pay the complainant, or there was an error in law and the appropriate action was to seek judicial review of the first decision.

The employer's decision not to seek judicial review, and position that the adjudicator's decision is correct in law, leaves me no choice but to order that the employer use whatever power or prerogative it has to pay the complainant. I am certain that, the employer having been able to convince the Governor General in Council to suspend parts of a collective agreement, it has the ability to arrange for the payment of the separation benefit in this case, even if it means obtaining the authorizations to make an *ex gratia* payment to meet its obligation under the PSSRA.

The employer's action, or should I say inaction, in this case amounts to a total contempt of the adjudication process. The arguments I have heard are fallacious: the employer is well aware of the effects of statutory modification to collective agreements; it is common knowledge that most, if not all, of the employer's collective agreements contain a clause dealing with future legislation that may render parts of them null and void. The employer preferred to take the law into its own hands in deciding to ignore the first decision of the adjudicator; this is simply unacceptable as it brings the adjudication process into disrepute and invites chaos in labour relations in the Public Service. The employer is quite familiar with the process for judicial review and has decided not to follow it.

For these reasons, the employer must pay the complainant the separation benefit ordered by adjudicator Taylor and I order that this be done within eight weeks from the receipt of this decision.

**Evelyne Henry,**
**Deputy Chairperson.**

OTTAWA, December 21, 1999.