T-761-96

OTTAWA, ONTARIO, THE 25th DAY OF FEBRUARY 1997

PRESENT: THE HONOURABLE MR. JUSTICE NOËL

BETWEEN:

HER MAJESTY THE QUEEN,
represented by the Treasury Board,

Applicant,

- and -

MARIO RINALDI,

Respondent,

- and -

MARGUERITE-MARIE GALIPEAU, in her capacity as an Adjudicator
selected pursuant to paragraph 95(2)(*c*)
of the *Public Service Staff Relations Act*,
R.S.C., 1985, c. P-35,

Mis-en-cause.

O R D E R

The motion is dismissed.

Marc Noël
Judge

Certified true translation

Stephen Balogh

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REASONS FOR ORDER

NOËL J.

The applicant is seeking an order prohibiting the Adjudicator selected pursuant to the *Public Service Staff Relations Act*[1] from hearing and adjudicating the respondent's grievance on the ground that she lacks jurisdiction to do so.

[1] R.S.C., 1985, c. P-35.

I FACTS

The facts as presented by the applicant in her memorandum are not in dispute. Following a major reorganization at the Canadian Space Agency, the respondent was told on September 6, 1995 that the position he held[2] had been abolished. As a result of that decision, the respondent was given notice that he would be declared surplus for the period from November 8, 1995 to May 7, 1996 and that he would be laid off at the end of that period if he had not found another position in the public service.

Dissatisfied with the decision, the respondent presented a grievance to his employer under section 91 of the *Public Service Staff Relations Act*. His grievance read as follows:

> I grieve management's decision to terminate my employment.

Under the heading *Corrective Actions Requested* on the grievance form, the respondent asked:

> ·That I be re-instated in my position of Vice President, Corporate Services, or in a comparable position;
> ·That I be compensated for all damages and financial penalties;
> ·That the Canadian Space Agency and other federal government organizations take appropriate actions in an attempt to alleviate damages done to my reputation, or any action as required.[3]

On November 29, 1995, the respondent was told that he could submit written or oral representations concerning his grievance, but he elected to add nothing.

On December 15, 1995, the respondent's grievance was dismissed for the sole reason that the decision to lay him off was made in conformity with section 29 of the *Public Service Employment Act*.[4]

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[2] Vice President, "Corporate Services".

[3] Exhibit C, at p. 15 of the applicant's record.

[4] R.S.C., 1985, c. P-33. Subsection 29(1) reads as follows:

29(1) Where the services of an employee are no longer required by reason of lack of work, the discontinuance of a function or the transfer of work or a function outside the Public Service, the deputy head, in accordance with the regulations of the Commission, may lay off the employee.

Dissatisfied with this decision, the respondent referred his grievance to adjudication under section 92 of the *Public Service Staff Relations Act,*[5] and Adjudicator Galipeau was selected pursuant to paragraph 95(2)(*c*) of that Act.[6]

A few days before the hearing of the grievance, the applicant, through her counsel, notified the Public Service Staff Relations Board that she intended to object to the Adjudicator's jurisdiction on the ground that the decision to terminate the respondent's employment had been made under the *Public Service Employment Act*, which, according to subsection 92(3) of the *Public Service Staff Relations Act*, barred a referral to adjudication.

The hearing of the grievance commenced on April 1, 1996. Following the parties' representations on the applicant's preliminary objection, the Adjudicator decided that she had jurisdiction to hear the grievance in so far as the respondent satisfied her that his lay-off was a subterfuge to terminate his employment.[7] She therefore decided to pursue the hearing. When the hearing resumed the next morning, counsel for the employer advised the Adjudicator of his intention to apply for a writ of prohibition against that decision. The Adjudicator accordingly adjourned the hearing. She also agreed to prepare a written version of the oral decision she had rendered at the hearing the previous day. Her decision reads as follows:

> If you establish that the termination of the employment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise, then I would be willing to say that subsection 92(3) of the Public Relations [*sic*] Staff Relations Act does not prevent me from having jurisdiction. I would therefore be willing to hear your witnesses.

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[5] *Ibid*., Exhibit F, at p. 19 of the applicant's record. See Appendix F.

[6] 95(2) Where a grievance has been referred to adjudication and the aggrieved employee has notified the Board as required by subsection (1), the Board shall, in the manner and within the time prescribed,

(*c*) in any other case, refer the matter to an adjudicator selected by it.

[7] The Adjudicator appears to have agreed to answer this question hypothetically in response to the insistence of counsel for the respondent, who, concerned with the fees his client might have to pay him, wanted to know from the outset whether the Adjudicator would be declining jurisdiction regardless of the evidence of subterfuge he intended to adduce. See the Adjudicator's reasons for decision, at p. 5.

IIPOSITIONS OF THE PARTIES

The applicant submits, first, that the respondent cannot alter the substance of his grievance by alleging for the first time before the Adjudicator that his lay-off was a disguised disciplinary dismissal carried out in bad faith. Second, the applicant submits that in any event, the Adjudicator lacks jurisdiction to determine the respondent's grievance because the purpose of the grievance was to challenge a lay-off under section 29 of the *Public Service Employment Act*.[8]

The respondent submits that the failure to mention the relevant statutory provisions in his grievance or to use the exact wording that appears in the statute does not bar it. He further submits that the sole purpose of the evidence he intends to adduce before the Adjudicator is to define the exact scope of the grievance and that no alteration is contemplated. The respondent concedes that a lay-off within the meaning of section 29 of the *Public Service Employment Act* is outside the Adjudicator's jurisdiction. However, he submits that the disguised dismissal he intends to prove is clearly within the jurisdiction conferred on the Adjudicator by section 92 of the *Public Service Staff Relations Act*.[9]

III ANALYSIS AND DECISION

To qualify for adjudication, the respondent must satisfy the requirements of subsection 92(1) of the *Public Service Staff Relations Act*, the relevant portions of which read 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
> . . .
> (*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[10] or designated pursuant to subsection (4),
> (i) disciplinary action resulting in suspension or a financial penalty, or

[8] Applicant's memorandum of argument, paras. 20-21.

[9] Respondent's memorandum of argument, paras. 4-8.

[10] Due to its enabling legislation, the Canadian Space Agency is deemed to be included in Part I of Schedule I to the Act.

> (ii) termination of employment or demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act*,
>
> . . .
>
> 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.

Paragraphs 11(2)(*f*) and (*g*) of the *Financial Administrat*ion Act[11] read as follows:

> 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, and without limiting the generality of sections 7 to 10,
>
> . . .
>
> (*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. . . .

Thus, to qualify for adjudication, the respondent must prove either a disciplinary action resulting in suspension or a financial penalty, or a termination of employment or demotion pursuant to the *Financial Administration Act*. Furthermore, subsection 92(3) of the *Public Service Staff Relations Act* provides that a grievance with respect to a termination of employment under the *Public Service Employment Act* cannot be referred to adjudication.[12]

Bearing this statutory context in mind, the applicant submits that the case at bar raises two questions of law: whether the respondent could alter his grievance once it was before the Adjudicator and whether an adjudicator has jurisdiction to hear a grievance when the employer relies on the abolishment of a position under section 29 of the *Public Service Employment Act* as the reason for termination.

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[11] R.S.C., 1985, c. F-11.

[12] 92(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*.

This second question can be answered easily. In my view, there is no question that, according to the hypothesis on which the Adjudicator based her decision, she was perfectly right to find that she has jurisdiction to hear and decide the grievance. As Marceau J.A. said in *Attorney General of Canada* v. *Penner*:[13]

> A camouflage to deprive a person of a protection given by statute is hardly tolerable.[14]

Contrary to the applicant's submission, no statutory amendment has limited this principle. The addition to the *Public Service Staff Relations Act* of subsection 92(3), which bars the adjudication of a grievance with respect to a termination of employment under the *Public Service Employment Act*, does not remove jurisdiction from the Adjudicator solely because such a termination of employment is relied on by the employer. Subsection 92(3) clearly bars a referral to adjudication only where there was in fact a termination of employment under that Act. The hypothesis on which the Adjudicator based her decision in fact concerns a situation in which an employer disguises an unlawful dismissal under cover of the abolishment of a position through a contrived reliance on that Act. Such a situation would clearly fall within the jurisdiction conferred on adjudicators by paragraph 92(1)(*b*) of the *Public Service Staff Relations Act*.

However, I must say that the hypothesis adopted by the Adjudicator is not likely to be easy to prove. The respondent's assertion that he can prove his employment was not terminated under the *Public Service Employment Act* when the employer is relying on section 29 of that Act is far from obvious. A reorganisation under subsection 29(1) takes place when restraint measures (which are easily proven) result in the abolishment of positions (which are once again easily proven). If the reorganization that results in the abolishment is not challenged and/or a de facto abolishment of positions occurs, it is hard to imagine how the resulting lay-offs can have been effected otherwise than as a result of the discontinuance of functions within the meaning of section 29.

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[13] [1989] 3 F.C. 429.

[14] *Idem*, at p. 440.

This is just as true if the respondent can prove a turbulent employment relationship. He would then also have to show that the employer's reliance on section 29 is contrived.[15] While such evidence cannot be excluded at the conceptual level, it is hard to imagine how the respondent would be able to establish it. Nonetheless, since this is the hypothesis adopted by the Adjudicator for the purposes of her decision and since the possibility it confirms cannot be entirely ruled out, I consider myself bound by it for the purposes of this judicial review. I must therefore find that the Adjudicator was right to assume jurisdiction subject to the respondent's ability to prove his assertion.

Concerning the first question, the applicant points out that the respondent's grievance was as brief as it was laconic; he merely challenged the employer's decision to abolish his position and lay him off. He made no allusion to a disguised dismissal.

The respondent states that his grievance challenged the decision to "terminate"[16] his employment. He stresses the fact that his grievance asked that any necessary action be taken to alleviate the damage done to his reputation.[17] According to him, a person's reputation cannot be damaged if his or her employment is terminated due to factors beyond anyone's control, such as a shortage of work. However, a person's reputation can be damaged if he or she is unlawfully dismissed, as the respondent claims to have been. Finally, the respondent submits that if the applicant misunderstood the grievance when it was made, she cannot hold it against him today.[18]

The importance of the wording of a grievance lies in the fact that the allegations made in it have the effect of attributing jurisdiction. Since the adjudication procedure

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[15]I want to emphasize that in so far as the action or termination of employment occurred under section 29, a simple demonstration of bad faith or malicious intent on the employer's part (such as proof of an obvious desire to get rid of the employee at the first opportunity) would not confer jurisdiction on the Adjudicator since, whether or not there was bad faith, the grievance would still be a grievance with respect to a termination of employment under the *Public Service Employment Act*, which subsection 92(3) of the *Public Service Staff Relations Act* excludes from the Adjudicator's jurisdiction. When the employer argues that the employment was terminated under the *Public Service Employment Act*, the only way to show that it was not would be to prove that the conditions required to apply it were in fact not present at the relevant time and that the employment cannot therefore have been terminated under that Act.

[16]This is the word used on the grievance form.

[17]". . .to alleviate damages done to my reputation".

[18]Respondent's memorandum of argument, paras. 9, 10, 11 and 15.

provided for in the *Public Service Staff Relations Act* follows on a conciliation process, only those grievances that have been presented at all the levels provided for in the Act can be referred to adjudication.[19] It follows that an employee cannot change the nature of his or her grievance once it is before an adjudicator, as the effect of doing so would be to submit a grievance to adjudication that has not been presented at all the levels of conciliation provided for in the Act. In my view, that is what led Thurlow C.J. to say the following in *Burchill* v. *A.G. of Canada*:[20]

> In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(*a*) or (*b*) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.[21]

It should be mentioned that it was clear in *Burchill* that the grievance the employee had tried to present before the adjudicator was a new grievance unrelated to the original one.[22]

In *Perreault* v. *Treasury Board (Transport Canada)*,[23] the employer relied on *Burchill* to try to have a grievance dismissed on the ground that the allegation of bad faith, which was made for the first time before the adjudicator, had the effect of transforming the original grievance into a new grievance. Adjudicator Tenace disposed of this argument as follows:

> Counsel for the employer also submitted that the grievor had referred a new grievance to adjudication inasmuch as the grievor was alleging bad faith for the first time at adjudication. In my opinion, the grievor's meaning and intention have been reasonably clear throughout. He believes that he was not given a "fair shake" during his training period and he felt that management wanted to get rid of him. This becomes quite clear when one reads the lengthy attachment

[19] See sections 91 and 92 of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

[20] [1981] 1 F.C. 109.

[21] *Idem.*, at p. 110.

[22] In his original grievance, the employee claimed to have retained his indeterminate employee status, which meant that his discharge was unlawful. It was not until after this grievance had been dismissed that the employee alleged for the first time before the adjudicator that he had been the victim of a disguised disciplinary action.

[23] File No. 166-2-26094.

> which the grievor wrote to accompany his grievance. In my opinion, the facts do not mesh with the reasoning expressed in Burchill (supra) and it has no application to the instant case.

Thus, the adjudicator concluded that the allegation of bad faith did not change the nature of the grievance. According to him, the employee's position had been reasonably clear throughout the process. Even though the allegation of bad faith was not formally stated until adjudication, it added nothing new to the grievance and did not change its nature.

In the case at bar, it is primarily on the basis of the wording of the respondent's grievance that the Court must determine whether the allegation he made at adjudication so altered his original grievance as to change its nature and make it a new grievance. For this purpose, it should be noted that the respondent's original grievance challenged the decision to "terminate" his employment, asked that he be reinstated in his position or a comparable position with compensation for damage and financial losses and that appropriate action be taken to alleviate the damage his dismissal had done to his reputation.

It is therefore reasonable to infer from this grievance that the respondent was challenging the employer's right to terminate his employment and was claiming the right to be reinstated in his former position or a comparable position with compensation, and that he considered his reputation to have been sullied by his dismissal.

On its face, this grievance could be based on any ground of unlawfulness, since no cause of unlawfulness is specified. The only question is therefore whether the respondent gave his employer sufficient notice of the exact nature of his grievance. The affidavit filed by the respondent in this matter indicates that at the same time as his first grievance against his employer, he presented a second, in which he stated the following:

> Further to an investigation report received October 25, 1995, I grieve the Canadian Space Agency's management's continuing disciplinary actions to present me with a written reprimand, to remove me from my functions and to abolish my position of Vice-President, Corporate Services.[24]

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[24] Respondent's affidavit, paragraph 3, Exhibit I. The Adjudicator stayed the adjudication of this grievance pending the Court's decision in the case at bar. (Reasons for the Adjudicator's decision, at p. 6.).

When considered in combination with the first grievance, this one leaves no doubt as to the respondent's exact position in the case at bar. In his opinion, both the abolishment of his position and his lay-off constituted disciplinary action taken by the employer without justification and unlawfully. Accordingly, it cannot be said that the respondent's employer was not given sufficient notice of the nature of his grievance in the course of the conciliation process or that he so altered his grievance at adjudication as to change its nature and make it a new grievance.

For these reasons, the motion is dismissed.

Marc Noël
Judge

Ottawa, Ontario
February 25, 1997

Certified true translation

Stephen Balogh

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.:	T-761-96
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. MARIO RINALDI *et al.*
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 18, 1997

REASONS FOR JUDGMENT BY NOËL J. DATED FEBRUARY 25, 1997

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