Date: 20081218

Docket: T-75-08

Citation: 2008 FC 1395

Ottawa, Ontario, December 18, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

KATHERINE SPENCER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Katherine Spencer's employer refused to provide her with benefits under the "Work Force Adjustment" provisions of her collective agreement on the grounds that she was not an indeterminate government employee when her employment ended.

[2] An adjudicator with the Public Service Labour Relations Board concluded that the "pith and substance" of the grievance related to Ms. Spencer's status under the Treasury Board's *Term Employment Policy*, rather than a question as to the interpretation or application of the relevant collective agreement. As such, the grievance was outside the scope of the jurisdiction conferred on

adjudicators by subsection 209(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*).

[3] Ms. Spencer now seeks judicial review of the adjudicator's decision, asserting that the adjudicator erred in declining jurisdiction in relation to this matter. According to Ms. Spencer, the *Term Employment Policy* was legally binding on her employer, and had the force of law. As a consequence, Ms. Spencer says that the adjudicator was required to consider the Policy in determining the proper interpretation and application of the collective agreement.

[4] For the reasons that follow, I find that the adjudicator was correct in concluding that the grievance was beyond her jurisdiction. As a consequence, the application for judicial review will be dismissed.

Background

[5] Ms. Spencer worked for the federal Public Service for several years on a succession of term contracts. At the time that her employment ended, she was a member of the bargaining unit governed by the Applied Sciences and Patent Examination (SP) collective agreement between the Treasury Board and The Professional Institute of the Public Service of Canada.

[6] After Ms. Spencer was advised that her employment would cease with the expiration of her most recent contract, she filed a grievance alleging that the termination of her employment was "an improper lay-off and in violation of the WFA [Work Force Adjustment] provisions of [her]

collective agreement". By way of corrective action, she sought the benefits stipulated in the "*Work Force Adjustment Directive*".

[7] The *Work Force Adjustment Directive* is included as an appendix to the collective agreement. It provides certain benefits to employees affected by work force adjustment situations, but applies only to employees within the bargaining unit who have "indeterminate" status.

[8] After her grievance was denied through the internal grievance process, Ms. Spencer's grievance was then referred to adjudication in accordance with subsection 209(1) of the *PSLRA*.

[9] In assessing the merits of Ms. Spencer's grievance, the adjudicator would have had to determine whether she was an indeterminate employee within the meaning of the Work Force Adjustment provisions of the collective agreement.

[10] Ms. Spencer argued that because she had been continuously employed as a term employee for more than three years at the time of the purported termination of her employment, the combination of subsection 59(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 & 13 (*PSEA*), and section 7 of the Treasury Board's *Term Employment Policy* resulted in her automatically becoming an indeterminate employee within the meaning of the collective agreement.

[11] Subsection 59(1) of the *PSEA* provides that:

59. (1) Unless the employee requests otherwise of the deputy head, the period of employment of an employee who is employed for a specified term as a result of an appointment or deployment is converted to indeterminate in the employee's substantive position, at the end of the cumulative period of employment specified by the employer in circumstances prescribed by the employer.	**59.** (1) La durée des fonctions du fonctionnaire qui est employé pour une durée déterminée par voie de nomination ou de mutation devient indéterminée dans son poste d'attache lorsqu'il a occupé un emploi dans les circonstances déterminées par l'employeur pendant une période cumulative fixée par celui-ci, sauf si le fonctionnaire demande à l'administrateur général que la durée continue d'être determine.

[12] The "cumulative period of employment specified by the employer" referred to in subsection 59(1) of the *PSEA* has been identified in section 7.1 of the Treasury Board's *Term Employment Policy*, which provides that:

7. 1. Subject to section 7.2, where a person who has been employed in the same department/agency as a term employee for a cumulative working period … of **three (3) years** without a break in service longer than sixty (60) consecutive calendar days, the department/agency must appoint the employee indeterminately at the level of his/her substantive position. **This appointment must be made in accordance with merit as provided for in the *Public Service Employment Regulations* established by the Public Service Commission**. The "same department" includes functions	7**.**1. En vertu du paragraphe 7.2, lorsqu'une personne travaille dans le même ministère ou organisme en tant qu'employé nommé pour une période déterminée … pendant une période cumulative de **trois (3) années** sans interruption de service de plus de soixante (60) jours civils consécutifs, le ministère ou organisme doit nommer l'employé pour une période indéterminée au niveau égal à celui de son poste d'attache. **Cette nomination doit être effectuée selon le principe du mérite comme prévu dans le *Règlement sur l'emploi dans la fonction publique,* établi par la Commission de la fonction**

that have been transferred from another department/agency by an act of Parliament or order-in-council. [Emphasis added.]	**publique**. Le « même ministère » comprend les fonctions qui ont été transférées d'un autre ministère ou organisme aux termes d'une loi du Parlement ou d'un décret en conseil. [Je souligne.]

[13] Before Ms. Spencer's grievance could be heard on its merits, counsel for the employer raised an objection to the jurisdiction of the adjudicator to entertain the grievance. According to the employer, in order to determine Ms. Spencer's entitlement to Work Force Adjustment benefits, the adjudicator would have had to interpret the Treasury Board's *Term Employment Policy*, rather than deal with a question as to the interpretation or application of the collective agreement. As a result, the grievance was outside the jurisdiction of an adjudicator appointed under the provisions of the *PSLRA*.

[14] The employer conceded that *if* Ms. Spencer was an indeterminate employee, she would have undoubtedly been entitled to take advantage of the Work Force Adjustment provisions of the collective agreement. What was in dispute, from the employer's perspective, was whether Ms. Spencer was in fact an indeterminate employee.

The Adjudicator's Decision

[15] The adjudicator noted that in accordance with the provisions of section 208 of the *PSLRA*, individuals may grieve many matters that touch on the conditions of their employment through the

internal grievance process. However, the classes of grievances that can be referred to third-party adjudication are considerably narrower.

[16] Observing that adjudicators do not have plenary or inherent jurisdiction, the adjudicator found that her jurisdiction was confined to the matters identified in subsection 209(1) of the *PSLRA*, which states that:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to	**209.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;	a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;	b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;
(c) in the case of an employee in the core public administration,	c) soit, s'il est un fonctionnaire de l'administration publique centrale :
(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act	(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de

for any other reason that does not relate to a breach of discipline or misconduct, or	l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,
(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or	(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;
(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.	d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

[17] The adjudicator found that Ms. Spencer's grievance did not involve a question as to the interpretation or application of the collective agreement as contemplated by paragraph 209(1)(a), and there was no suggestion that it fell within any of the situations outlined in paragraph 209(1)(b) through (d).

[18] According to the adjudicator, the "pith and substance" of Ms. Spencer's grievance was "whether or not, by operation of the *Term Employment Policy*, Ms. Spencer is eligible to take advantage of the lay-off protections outlined in the collective agreement": see *Spencer v. Deputy Head (Department of the Environment)*, 2007 PSLRG 12, at para. 21.

[19] The adjudicator acknowledged that it was conceivable that once the threshold question as to whether Ms. Spencer was an indeterminate employee was answered, a question might still remain regarding her status, which could fall under the collective agreement. However, the adjudicator was of the view that she could not answer the threshold question, with the result that the employer's jurisdictional objection was allowed and Ms. Spencer's grievance was dismissed.

Issue

[20] The only issue in this case is whether the adjudicator erred in finding that it was beyond her jurisdiction to consider the provisions of the Treasury Board's *Term Employment Policy* in determining whether the Work Force Adjustment provisions of the collective agreement applied to Ms. Spencer.

Standard of Review

[21] Ms. Spencer submits that the issue in this case is a true question of jurisdiction, with the result that the standard of review should be that of correctness. She acknowledges that the adjudicator undoubtedly had expertise in interpreting and applying the provisions of the collective agreement. However, Ms. Spencer argues that this expertise does not extend to deciding the legal question of whether the Treasury Board's *Term Employment Policy* is legally binding on the employer, an issue that must be determined in order to answer the jurisdictional question.

[22] In contrast, the employer submits that the standard of review should be that of reasonableness. In support of this contention, the employer points to the strong preclusive clause

contained in subsection 233(1) of the *PSLRA*, and to the significant expertise of members of the Public Service Labour Relations Board in relation to labour relations issues.

[23] The employer also argues that the question of whether Ms. Spencer could benefit from the Work Force Adjustment provisions of the collective agreement required an appreciation of both legal and factual matters. As such, it was not a pure question of law that was "of central importance to the legal system", nor was it one that was "outside the specialized area of expertise of the adjudicator" (quoting from *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 60 and 70).

[24] It is not necessary to resolve the dispute as to the applicable standard of review in this case, as, for the reasons that will be explained below, I am of the view that the adjudicator was correct in her conclusion that Ms. Spencer's grievance was beyond her jurisdiction.

The Content of the Record

[25] Before turning to address the substantive issue raised by this application, however, it is first necessary to address an issue that arose in the course of the hearing with respect to the content of the record.

[26] That is, Ms. Spencer objects to the inclusion in the respondent's record of two letters sent by her union to the Public Service Labour Relations Tribunal, which letters are dated November 23, 2006, and May 28, 2007, respectively. Ms. Spencer asserts that the letters were not before the adjudicator, and thus are not properly part of the record on this application for judicial review.

[27] While the letters do appear to have been sent to the PSLRB, the Court has not been provided with a copy of the Certified Tribunal Record in this case. As a result, it has not been possible to verify by means of reference to the Tribunal record whether the letters in question were actually put in front of the adjudicator herself. Moreover, no affidavit was filed on behalf of the respondent in relation to this application, and thus there is no evidentiary support for the respondent's submission that the letters were indeed in front of the adjudicator when she made her decision.

[28] While extraneous material may be admissible on judicial review in certain situations (see, for example, *Pathak v. Canada (Canadian Human Rights Commission),* [1995] 2 F.C. 455 (F.C.A.)), no basis has been advanced for admitting the letters in question here. As a consequence, the letters are not properly part of the record, and will be struck. That said, there is nothing in either letter that would have affected the outcome of this case.

Analysis

[29] It is clear that adjudicators are not confined in their deliberations to the four corners of the relevant collective agreement.

[30] For example, adjudicators must consider and apply employment-related statutes in determining the substantive rights and obligations of the parties to the collective agreement in question: see, for example, *McLeod v. Egan*, [1975] 1 S.C.R. 517; *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, 2003 SCC 42, at para. 24.

[31] Indeed, the power and duty of adjudicators to apply the law extends to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11: see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at paras. 56, 60 and 61.

[32] According to Ms. Spencer, there is no meaningful distinction between employment rights provided for by statute or regulation, and those provided for through a legally enforceable government policy. As a consequence, adjudicators have not only the jurisdiction, but the positive duty to interpret and apply all enforceable rights in determining the interpretation of a collective agreement.

[33] In support of her contention that the Treasury Board's *Term Employment Policy* is a legally binding policy, Ms. Spencer submits that if subsection 59(1) of the *PSEA* provided for automatic conversion to indeterminate status after a specified period of service under term contracts, there would be no doubt that she would be able to grieve the denial of work force adjustment benefits under the collective agreement.

[34] Ms. Spencer argues that there should be no difference in principle whether the necessary period of service is identified in subsection 59(1) of the *PSEA* itself, or in a Treasury Board policy enacted under the authority of that statutory provision. In either case, Ms. Spencer says that the *Term Employment Policy* was legally binding on the adjudicator, and should have been applied by the adjudicator in the context of her grievance.

[35] In support of this contention, Ms. Spencer relies on decisions such as those in *Endicott v. Canada (Treasury Board)*, 2005 FC 253, *Glowinski v. Canada (Treasury Board)*, 2006 FC 78, *Gingras v. Canada*, [1994] 2 F.C. 734 (C.A.) and in *Myers v. Canada (Attorney General)*, 2007 FC 947.

[36] In *Endicott*, the grievance in issue was based upon the failure of a final level grievance officer to treat two predecessor versions of the Treasury Board *Term Employment Policy* as legally binding. The Court noted at paragraph 11 of its decision that whether the policies in question created legal rights that a court could define or enforce depended upon the intent behind, and context in which the policies were issued.

[37] The Court noted that the policies in issue in *Endicott* were not delegated legislation. Considering the content of the term employment policies in effect at the relevant times, as well as the context surrounding their development, the Court found no indication that the policies were intended to be treated as a law conferring a term appointment on the applicant.

[38] Ms. Spencer says that the rationale in *Endicott* suggests that the opposite conclusion should be drawn in her case in light of the new statutory basis for the current *Term Employment Policy.*

[39] In *Gingras*, the Federal Court of Appeal gave effect to the Treasury Board "Bilingualism Bonus Plan", where the policy in question was precise, conferred a specific benefit, and left no discretion to government departments. Ms. Spencer argues that in *Gingras,* there was no

requirement that the government enact a bilingual bonus policy, but that having done so, it was bound to follow it. In this case, the *PSEA* specifically required the enactment of a term employment policy, which is all the more reason why the policy should be binding on the employer.

[40] In contrast, in *Glowinski*, the question was whether an individual was a public service "employee". The applicant sought judicial review of the decision of the Treasury Board and Industry Canada that he was indeed a public service employee. There were a number of different Treasury Board policies defining "employee" in inconsistent ways.

[41] The Court in *Glowinski* noted that, as a rule, such policies are not legally binding unless the enabling statute requires a department to issue the policy. The Court then refused to interpret or reconcile the inconsistent Treasury Board policies, or to give them legal effect, holding that if the Treasury Board had intended the policies to have legal effect, the Treasury Board would have exercised its right to enact the policies by way of regulation. Ms. Spencer submits that where, as here, the policy is required by statute, the Court should be more ready to give the policy the force of law.

[42] The respondent submits that conversion to indeterminate status under the provisions of the Treasury Board's *Term Employment Policy* is not automatic after three years of term employment, and that, unlike the situation before the Federal Court of Appeal in *Gingras*, there is a discretionary component to the policy.

[43] In this regard, the respondent points to section 7.1 of the policy, which states that appointments to indeterminate positions must be made in accordance with the merit principle, as provided for in the *Public Service Employment Regulations*, S.O.R./2005-334, established by the Public Service Commission.

[44] Moreover, while the Court gave legal effect to a "Government Security Policy" in the *Myers* case, the evidence before the Court in that case was that the relevant agency had entered into a memorandum of understanding with the Treasury Board, whereby the agency agreed to be subject to the provisions of the Policy. There is no similar evidence before the Court on this application, and the *Myers* decision is thus distinguishable on that basis.

[45] In deciding whether the adjudicator was legally bound to follow the provisions of the Treasury Board's *Term Employment Policy*, and whether the policy should have been applied by the adjudicator in the context of Ms. Spencer's grievance, it bears repeating that there was no question as to the interpretation of the collective agreement before the adjudicator. Indeed, the employer had conceded that if Ms. Spencer was in fact an indeterminate employee, she was entitled to the Work Force Adjustment benefits provided for in her collective agreement. The only issue in dispute was whether or not she was in fact an indeterminate employee.

[46] Ms. Spencer has herself conceded on this application that the "core of the dispute" before the adjudicator was whether or not she was an indeterminate government employee, such that the Work Force Adjustment provisions applied to her. In the circumstances, I am satisfied that the

essential nature of the dispute was the interpretation and application of the provisions of the *Term Employment Policy*, as opposed to the collective agreement.

[47] Moreover, I am not persuaded that the Treasury Board's *Term Employment Policy* was legally binding on the adjudicator. A review of the wording of the Policy confirms that there is a discretionary component to the policy, in that appointments to indeterminate positions must be made in accordance with the merit principle. If the adjudicator was bound to find that an employee automatically became indeterminate after three years of contract employment, no determination of merit would ever be made.

[48] Ms. Spencer argues that there is no discretion contemplated under the provisions of subsection 59(1) of the *PSEA*. She submits that subsection 7.1 of the *Term Employment Policy* must have been enacted under predecessor legislation that may have contemplated a consideration of merit in the conversion of term employees to indeterminate status. Given that such conversions no longer amount to "appointments" under the new legislation, merit is no longer a relevant consideration: see s. 59(2) of the *PSEA*.

[49] Ms. Spencer cannot have it both ways. On the one hand, she argues that the *Term Employment Policy* was legally binding on the adjudicator, and ought to have been applied to find that she was indeed an indeterminate employee. On the other hand, she is submitting that the express wording of the Policy should not be followed, as it has been superseded by intervening legislation.

[50] As explained above, I am satisfied that there is a discretionary component to the *Term Employment Policy*, as it currently stands. In the circumstances, I am not persuaded that the adjudicator was legally bound to apply the Policy.

[51] I note that my conclusion that the *Term Employment Policy* was not intended to be legally binding on the adjudicator is consistent with the wording of Article 36 of the collective agreement, which identifies all of the Treasury Board directives, policies and regulations that form part of the collective agreement itself. Included amongst these is the *Work Force Adjustment Directive*. The Treasury Board's *Term Employment Policy* is not included on the list.

[52] As a consequence, I am of the view that the adjudicator was correct in concluding that she was without jurisdiction to deal with Ms. Spencer's grievance. As a result, the application for judicial review is dismissed. In the exercise of my discretion, I decline to make any order as to costs.

[53] This finding does not necessarily leave employees such as Ms. Spencer completely without recourse. It is open to the Union to seek to have the *Term Employment Policy* incorporated into the collective agreement. Moreover, as discussed below, it may also be open to Ms. Spencer to seek judicial review of the final level grievance decision denying her claim for Work Force Adjustment benefits.

Extension of Time

[54] In the event that the Court were to find that the grievance was indeed beyond the jurisdiction of the adjudicator, Ms. Spencer seeks an extension of time in which to file an application for judicial review of the final level grievance decision denying her grievance alleging that the termination of her employment was an improper lay-off, in violation of the Work Force Adjustment provisions of her collective agreement.

[55] At the hearing of this application, counsel for the respondent conceded that Ms. Spencer has clearly demonstrated a continuing intention to pursue this matter, that there would arguably be some merit to the application, and that there is a reasonable explanation for Ms. Spencer's failure to commence an application for judicial review of the final level grievance decision in a timely manner.

[56] Insofar as the issue of prejudice to the employer is concerned, the respondent has now also conceded that it has not been prejudiced in any way by Ms. Spencer's delay in seeking judicial review of the final level grievance decision. The result of this is that there is no dispute but that Ms. Spencer has satisfied all four of the components of the *Hennelly* test: see *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.).

[57] I am also satisfied that it is in the interests of justice that the extension of time be granted.

[58] As a result, Ms. Spencer shall have 30 days from the date of this order in which to commence an application for judicial review of the final level grievance decision denying her grievance with respect to the termination of her employment.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, without costs. Ms. Spencer shall have 30 days from the date of this judgment in which to commence an application for judicial review of the final level grievance decision denying her grievance with respect to the termination of her employment.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-75-08
STYLE OF CAUSE:	KATHERINE SPENCER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
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