Date: 20060324

Docket: T-1817-04

Citation: 2006 FC 381

Ottawa, Ontario, March 24, 2006

PRESENT: THE HONOURABLE MADAM JUSTICE SIMPSON

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LILLIAN SHNEIDMAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this application, the Attorney General of Canada (the "Employer") seeks judicial review, pursuant to section 18.1(4)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "*Act*"), of a decision dated September 9, 2004 (the "Decision") made by an adjudicator (the "Adjudicator") appointed under the *Public Service Staff Relations Act*, R.S.C., c. P-35, in which she determined, on a preliminary motion, that Lillian Shneidman's discharge from the Canada Customs and Revenue Agency ("CCRA") was *void ab initio*.

THE BACKGROUND

[2] In 2001 an investigation was commenced into allegations that Lillian Shneidman (the "Employee") had accessed confidential taxpayers' information without authorization, and had disclosed that information to a third party (the "Allegations").

[3] In March 2001, the Employee met twice with Normand Rodrigue, a Senior Investigator with the Employer's Security Directorate, who was investigating the Allegations. Prior to the first meeting, the Employee asked Mr. Rodrigue if she should have a union representative present, and she was told that there would be no point because a union representative would have no right to make representations during the meeting. Both meetings, therefore, proceeded without the presence of her union representative.

[4] Mr. Rodrigue prepared an investigation report in which he indicated that the allegations against the Employee had been substantiated. The Employee was asked to submit a written response to this report. To permit her to prepare her response, the Employer offered the Employee the opportunity to review an unredacted copy of the investigation report on the basis that she would read it alone, without the assistance of her union representative, and without taking notes. She was, however, offered the opportunity to view a redacted copy of the investigation report with her union representative. The Employee was not happy with these offers; she wanted an opportunity to view an unredacted copy of the investigation report with her union representative prior to submitting a

response. This request was denied, and the Employee did not prepare a response. Accordingly, her employment was terminated on May 18, 2001, without the benefit of her response.

THE GRIEVANCE

[5] On May 24, 2001, the Employee grieved her termination (the "Grievance"). The Grievance read as follows:

> I grieve the letter of dismissal given to me on May 18, 2001 by Don Collins and signed by Gerry Troy. I maintain that this decision to terminate my employment is unwarranted, unreasonable, excessive and without just, reasonable and sufficient cause.

[6] The Grievance asked that the following corrective action be taken in relation to the Employee's termination:

- She wanted to be reinstated in her position as a PM-2 Non Filer Investigator effective May 18, 2001.
- She wanted all references to her termination and all ancillary matters removed from any and all files in which they were contained and destroyed in her presence.
- She wanted to suffer no loss of pay and benefits and wanted to be granted any other remedy to make her whole again.

[7] Under the CCRA's grievance process, grievances dealing with termination are first considered at the final level. This Grievance was unsuccessful at that level. The Employee then referred it to adjudication, and a hearing before the Adjudicator was scheduled for May 25, 2004.

THE PRELIMINARY OBJECTION

[8] On May 18, 2004, just one week before the hearing, the Employee raised a preliminary objection. She alleged that her termination was *void ab initio* due to violations of article 17.02 of a collective agreement between the Public Service Alliance of Canada and the Canada Customs and Revenue Agency. There was no issue between the parties that article 17.02 was in force at the relevant time. It provided that:

> When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.

[9] The Employee made two separate arguments in the preliminary objection. First, she said that she had been denied union representation during her two meetings with Mr. Rodrigue. Second, she argued that she had been denied union representation when given the opportunity to read the unredacted investigation report.

THE ISSUES BEFORE THE ADJUDICATOR

[10] The Adjudicator first had to decide whether she had jurisdiction to consider the preliminary objection. This depended on whether the wording of the Grievance was broad enough to cover allegations that breaches of the collective agreement had occurred prior to the termination. She then

considered whether Article 17.02 of the collective agreement had, in fact, been breached, and what the appropriate remedy would be for such a breach.

The Decision

[11] The Decision is structured in three parts. First, the Adjudicator assumed jurisdiction on the basis that:

> The text of her grievance is clear and broad enough to include a challenge to the validity of the disciplinary action because of a denial of contractual due process. Ms. Shneidman clearly challenges the 'decision to terminate my employment…' and in the corrective action requested, she included the statement: '… that I be granted any other remedy to make me whole again.'

Second, she turned to the interpretation of article 17.02 of the collective agreement, and found that the term "disciplinary hearing" encompassed both the meetings with Mr. Rodrigue, and the viewing of the unredacted investigation report. Accordingly, she decided that the Employee had been denied union representation. Lastly, the Adjudicator concluded that the Employee's termination had been *void ab initio*.

The Issue on Judicial Review

[12] The first issue before this Court is whether the Adjudicator erred when she concluded that she had jurisdiction to consider the preliminary objection.

THE STANDARD OF REVIEW

[13] The Employer submits that the standard of review on the jurisdictional question is correctness, while the Employee proposes patent unreasonableness.

[14] The Employer submits that the preliminary objection effectively constituted a new grievance: it addressed pre-termination procedures, which allegedly violated the collective agreement, and which the Employer says were not included in the grievance, as opposed to the decision to terminate, which was the subject of the grievance. The Employee, on the other hand, says that a grievance need not specifically mention a pre-termination violation of a collective agreement if that violation is subsumed in the propriety of the discharge.

[15] The *Public Service Staff Relations Act* (the "*PSSRA*") neither provides for an appeal, nor includes a privative clause. Parties to an adjudication under the *PSSRA* only have recourse to judicial review. However, the fact that judicial review is available for jurisdictional errors, under paragraph 18.1(4)(a) of the *Act*, suggests that an adjudicator is not given deference on jurisdictional issues.

[16] The *PSSRA* establishes a scheme to deal with labour disputes in the Federal Public Service. Jurisdictional limitations are present to ensure that adjudicators only consider cases that are properly brought under the *PSSRA*.

[17] In my view, the interpretation of the scope of the Grievance is not an exercise which engages the expertise of the Adjudicator. This is to be contrasted with a decision on the merits, in which that expertise would be most valuable. The real issue here is whether, in the face of paragraph 92(1)(a) of the *PSSRA* which is reproduced below in paragraph 21, it was open to the Adjudicator to read the Grievance as broadly as she did, and I think that is a question of law, which is clearly within the purview of this Court.

[18] For these reasons, I have concluded that the Adjudicator is not entitled to deference on the jurisdictional issue, and that the standard of review on this issue is correctness.

JURISDICTIONAL ISSUE

[19] The law as set out in *Burchill v. Canada*, [1981] 1 F.C. 109 (C.A.), and applied in *Shofield v. Canada (Attorney General)*, [2004] F.C.J. No. 784 (T.D.) establishes that an adjudicator does not have jurisdiction to hear a complaint that is not included in a grievance. In *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (T.D.) the Court held that an adjudicator may have jurisdiction where the language of the original grievance is broad enough to encompass the issue raised for adjudication. Accordingly, the issue in this case is whether the Grievance, which expressly grieves only the decision to terminate, can be read to encompass pre-termination violations of the collective agreement.

[20] Counsel for the Employee argued that her Grievance could be characterized as an attack on all aspects of her termination, and that her complaints about violations of article 17.02 of the collective agreement were covered by the Grievance. As discussed below, I am not persuaded by this argument for two reasons. First, the *PSSRA* suggests that the problems related to the collective agreement are not included in the Grievance because section 92 of the *PSSRA* provides a separate mechanism for grieving violations of collective agreements. Second, the language of her Grievance is clear and does not directly or indirectly refer to a violation of the collective agreement.

[21] Section 92 of the *PSSRA* provides 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 (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	92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur : a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale; b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la Loi sur la gestion des finances publiques; c) dans les autres cas, une mesure disciplinaire entraînant le licenciement,

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.	la suspension ou une sanction pécuniaire.

Section 92 distinguishes grievances relating to the provisions of collective agreements from grievances relating terminations. Both parties acknowledge that this grievance was referred to adjudication under paragraph 92(1)(c) of the *PSSRA*. It permits the adjudication of grievances relating to disciplinary action resulting in termination. Paragraph 92(1)(a), on the other hand, permits the adjudication of grievances relating to the interpretation or application of provisions of the collective agreement. The present Grievance refers only to the decision to terminate the Employee, and, therefore, was properly referred to adjudication under paragraph 92(1)(c). If the Grievance had been intended to encompass a procedural complaint about a violation of article 17.02 of the collective agreement, that portion of the Grievance should have been referred to adjudication under paragraph 92(1)(a).

[22] The Employee's counsel argued that she grieved her dismissal and that the entire process was part of the dismissal. However, in my view, she grieved the decision to terminate, and she grieved the letter of dismissal that contained that decision. The language of the Grievance is clear, and it does not invoke the collective agreement or raise pre-termination issues. In addition, contrary to the reasoning of the Adjudicator, the phrase "made whole" in the Employee's request for

corrective action clearly relates to a monetary award, and does not imply a request for relief for breaches of the collective agreement. In my view, the Employee's grievance is properly characterized as an attack only on the decision to terminate her employment.

CONCLUSION

[23] For these reasons I have concluded that the Adjudicator acted without jurisdiction when she heard the preliminary objection. In view of this conclusion, it is not necessary to address the other aspects of the Decision.

[24] The Decision will be set aside.

JUDGMENT

UPON the Applicant's application for judicial review of the Decision;

AND UPON reviewing the material filed and hearing the submissions of counsel for the Applicant and Counsel for the Respondent in Ottawa, Ontario on Tuesday, January 10, 2006;

AND UPON reserving my decision in order to give this matter further consideration.

NOW THEREFORE THIS COURT ORDERS that:

1. The application for judicial review is allowed with costs.
2. The Decision is set aside and the Grievance is to be heard on its merits by a different adjudicator.

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1817-04
TYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. LILLIAN SHNEIDMAN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 10, 2006
REASONS FOR JUDGMENT:	The Honourable Madam Justice Simpson
DATED:	March 24, 2006

APPEARANCES:

Mr. Neil McGraw	APPLICANT
Mr. Andrew Raven & Ms. Alison Dewar	RESPONDENT

SOLICITORS OF RECORD:

r. John H. Sims, Q.C. Deputy Attorney General of Canada	APPLICANT
Mr. Andrew Raven Raven, Allen, Cameron, Ballantyne & Yazbeck LLP Barrister and Solicitor Ottawa, Ontario	RESPONDENT