

**Date: 20080422**

**Docket: T-2170-06**

**Citation: 2008 FC 525**

**Ottawa, Ontario, April 22, 2008**

**PRESENT: The Honourable Madam Justice Dawson**

**BETWEEN:**

**ROBERT BURLEY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The issue raised in this application for judicial review is whether Robert Burley was, for the purpose of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 (PSSA), employed by the public service while he was engaged in language training as a recruit for the Foreign Service Development Program (FSDP).

[2] In these reasons, I find that there is no basis to interfere with the decision under review, which found that, for the purpose of the PSSA, Mr. Burley was not employed in the federal public service while in language training. He was not, therefore, required or entitled to

contribute to the PSSA during that period, and he was not entitled to accrue pension credits under the PSSA during the time spent in language training.

### **Background Facts**

[3] Mr. Burley is now a Foreign Service Officer (FSO) at the Department of Foreign Affairs and International Trade (DFAIT).

[4] By letter dated June 18, 1998, Mr. Burley was advised that the DFAIT had accepted his participation in the federal public service language training program and that, upon successful completion of that program, he would be offered a position as a FSO in the FSDP. The letter further advised that Mr. Burley would be assigned “*ab initio*” (non-employee) status while taking language training before being appointed to the FSDP. The terms and conditions applicable to Mr. Burley’s participation in the language training program were attached to the letter. The letter concluded by asking that Mr. Burley sign and return the last page of the terms and conditions, thus confirming that he accepted the offer of language training. While a signed copy of the letter has not been located, it is acknowledged between the parties that Mr. Burley reported for language training as the letter required.

[5] During the course of language training, Mr. Burley was paid a sum of money, representing eighty percent (80%) of the salary paid to FSOs. That sum was subject to a number of deductions, including federal income tax, federal employment insurance premiums, and provincial pension plan contributions.

[6] On December 1, 1998, Mr. Burley received a Notice of Contributory Status for Superannuation (Notice), which indicated that he was a contributor under the PSSA effective October 18, 1998. The effective date contained in the Notice was later revised to reflect the date in 1999 when Mr. Burley commenced his work at DFAIT as a FSO.

[7] On September 2, 1999, Mr. Burley successfully completed his language training.

[8] On September 3, 1999, Mr. Burley was offered, by way of letter, an indeterminate appointment as a FSO. He was informed that, upon accepting the offer, he would be hired under the FSDP. The terms and conditions of employment were attached to this letter of offer. Mr. Burley returned a signed copy of the terms and conditions.

[9] On October 5, 2006, Mr. Burley wrote to the Treasury Board Secretariat, Pension and Benefits Sector (TBS), inquiring as to why the period of language training was not considered to be pensionable service.

[10] On November 9, 2006, the TBS determined that Mr. Burley, while participating in the language training, did not hold employee status for the purpose of the PSSA.

[11] On December 8, 2006, Mr. Burley commenced an application for judicial review of the decision made by the TBS, being matter T-2170-06.

[12] On December 15, 2006, Mr. Burley initiated a grievance in respect of the TBS's decision. This was to avoid any argument that judicial review was not an available remedy and that Mr. Burley's only recourse was through the grievance procedure.

[13] On March 22, 2007, an Assistant Deputy Minister of Human Resources (ADM) endorsed the decision made by the TBS, finding that individuals participating in the language training were not employees for the purpose of the PSSA and were without status until satisfaction of the language requirements. The ADM also found that Mr. Burley was not a member of the foreign service bargaining unit because he was not an employee of the public service while he was attending language training. Accordingly, the ADM concluded that Mr. Burley was not entitled to grieve decisions made before his appointment as a FSO. In the result, Mr. Burley's grievance was dismissed.

[14] On April 4, 2007, Mr. Burley commenced an application for judicial review of the decision made by the ADM, being matter T-553-07.

[15] On May 31, 2007, Prothonotary Tabib consolidated matters T-2170-06 and T-553-07, ordering that subsequent documents be filed only in proceeding T-2170-06.

### **The Decisions Below**

(i) Treasury Board Secretariat

[16] The decision of the TBS may be summarized as follows:

- As a pre-condition to being required to make superannuation contributions, the PSSA requires that an individual be employed in the public service.
- Mr. Burley was in the FSDP, but he did not meet the language requirements of the program. As such, Mr. Burley was given an opportunity to participate in language training, the successful completion of which would lead to a job offer. Mr. Burley was not appointed to a Foreign Service position immediately.
- The expressed intent of the DFAIT, and the agreement of the parties, was that employment in the Foreign Service would only start when Mr. Burley successfully completed language training.
- While on language training, Mr. Burley did not have employee status and was not required to contribute to the Public Service Superannuation Account. The language training period was not pensionable service.

(ii) Assistant Deputy Minister

[17] The ADM concurred with the TBS, articulating essentially the same reasons that the TBS had given for its decision. As set out above, the ADM also went on to find that, because Mr. Burley was not an employee of the public service at the time he participated in the language training program, he was not considered to be a member of the foreign service bargaining unit. In consequence, he was not allowed to grieve decisions taken prior to his appointment to the public service.

(iii) What is the decision at issue?

[18] In their written materials, the parties did not raise as an issue the ADM's conclusion that Mr. Burley was not entitled to grieve pre-appointment decisions. Mr. Burley's submissions challenge only the decision of the ADM and do not expressly deal with the decision of the TBS. The Attorney General argues to uphold the decision of the TBS. In oral argument, counsel for the Attorney General asserts that any comments made by the ADM in her reasons, other than her conclusion that Mr. Burley could not grieve this matter, were *obiter*.

[19] In light of the consolidation order, the fact that the parties have joined issue on the narrow question of whether Mr. Burley was employed by the public service for the purpose of the PSSA while in language training, and the fact that the TBS and the ADM gave essentially the same reasons for their conclusions that he was not an employee of the public service, I am not satisfied that anything turns on which decision is properly before the Court. The real question to be decided is whether the time spent in language training is pensionable service under the PSSA.

[20] The parties did not put sufficiently detailed submissions before the Court with respect to Mr. Burley's right to grieve that would make it advisable or necessary to decide this issue.

### **Standard of Review**

[21] Mr. Burley submits that the appropriate standard of review to be applied to the decision of the ADM is correctness.

[22] Applying the standard of review factors discussed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, Mr. Burley submits that:

- there is only a limited privative provision found in section 214 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA); and
- the ADM has no relative expertise in matters of statutory interpretation.

[23] No factor is said to favour deference. Rather, the question is a pure question of law for which no deference is owed to a decision-maker who has no expertise in respect of the legislation at issue.

[24] The Attorney General submits that the appropriate standard of review to be applied to the decision of the TBS is reasonableness. The question is characterized to be one of applying the law to a particular set of facts, thus attracting the standard of reasonableness.

[25] It is when considering the standard of review that the failure of the parties to join issue on which decision is properly reviewable becomes a complicating factor. This is because the parties differ as to each decision-maker's degree of expertise and because there is a weak privative provision found in section 214 of the PSLRA that applies to final level grievance decisions.

[26] Again, I do not think that much of substance turns on this. In my view, both the decision of the TBS and the decision of the ADM withstand scrutiny even on the less deferential standard of correctness.

### Analysis

[27] The TBS found that recruits who take part in language training have non-employee, or *ab initio*, status. It further found that the intention of the DFAIT, and the agreement of both parties, was that employment in the Foreign Service would only start once language training was successfully completed. The ADM also found that Mr. Burley was not an employee of the federal public service while he participated in language training, but that, instead, he had *ab initio* status.

[28] I begin by reviewing the evidence relevant to those findings. Two documents are important. The first is the June 18, 1998 letter; the second is the September 3, 1999 letter.

[29] The June 18, 1998 letter:

- confirmed that Mr. Burley had been accepted by the DFAIT into the federal public service language training program;
- stated that *ab initio* status would be assigned to Mr. Burley as a person who agreed to take language training before appointment to the FSDP-1 group and level;



- confirmed that, upon successful completion of the language training, Mr. Burley would be offered a position as a FSO in the FSDP;
- attached terms and conditions that included the following:
  - during language training, Mr. Burley would receive compensation equivalent to 80% of the FSDP entry rate, from which income tax, Canada or Québec pension plan contributions, and employment insurance would be deducted;
  - “[t]he time spent on language training is not considered a period of employment in the public service; accordingly, you are not eligible for such staff benefits as insurance plans and a retirement pension”; and
  - if Mr. Burley did not obtain the required language proficiency within the time allowed, he would not receive a job offer and would not be eligible for the FSDP.

[30] The September 3, 1999 letter:

- offered Mr. Burley an indeterminate appointment as a FSO, FSDP-1, starting September 3, 1999;
- attached a summary of terms and conditions of employment that included the following:

- “[u]pon entering the Public Service, you will be entitled to certain benefits, such as annual vacation leave, cumulative sick leave, disability insurance and a superannuation plan, as well as the chance to join a group insurance plan. A representative from the Department’s pay section will contact you in the days following your appointment to provide you with the information in this regard”;
- was signed by Mr. Burley on the last page of the terms and conditions, which stated “I accept this offer and the associated conditions.”

[31] On this evidence, I find that the TBS and the ADM correctly concluded that Mr. Burley and the DFAIT had agreed that, while in language training, Mr. Burley had *ab initio* status. The expressed intention of the DFAIT and Mr. Burley was that his employment as a FSDP-1 would only commence after language training was successfully completed. In that circumstance, Mr. Burley was not entitled to participate in the superannuation plan under the PSSA until after successful completion of the language training.

[32] I recognize, however, that employment in the public service is not governed solely by principles of contract or employment law. It is also regulated by statute. It is therefore necessary to consider whether the conclusion reached by the TBS and the ADM is consistent with the provisions of the PSSA.

[33] In my view, the following provisions of the PSSA are relevant:

An Act to provide for the superannuation of persons employed in the public service

Loi pourvoyant à la pension des personnes employées dans la fonction publique

[...]

[...]

“public service” means the several positions in or under any department or portion of the executive government of Canada, except those portions of departments or portions of the executive government of Canada prescribed by the regulations and, for the purposes of this Part, of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer and office of the Conflict of Interest and Ethics Commissioner and any board, commission, corporation or portion of the federal public administration specified in Schedule I;

« fonction publique » Les divers postes dans quelque ministère ou secteur du gouvernement exécutif du Canada, ou relevant d’un tel ministère ou secteur, et, pour l’application de la présente partie, du Sénat et de la Chambre des communes, de la bibliothèque du Parlement, du bureau du conseiller sénatorial en éthique, du bureau du commissaire aux conflits d’intérêts et à l’éthique et de tout office, conseil, bureau, commission ou personne morale, ou secteur de l’administration publique fédérale, que mentionne l’annexe I, à l’exception d’un secteur du gouvernement exécutif du Canada ou de la partie d’un ministère exclus par règlement de l’application de la présente définition.

[...]

"salary" means

(a) as applied to the public service, the basic pay received by the person in respect of whom the expression is being applied for the performance of the regular duties of a position or office exclusive of any amount received as allowances, special remuneration, payment for overtime or other

[...]

«traitement »

a) La rémunération de base versée pour l’accomplissement des fonctions normales d’un poste dans la fonction publique, y compris les

compensation or as a gratuity unless that amount is deemed to be or to have been included in that person's basic pay pursuant to any regulation made under paragraph 42(1)(e), and

(b) as applied to the regular force or the Force, the pay or pay and allowances, as the case may be, applicable in the case of that person as determined under the *Canadian Forces Superannuation Act* or the *Royal Canadian Mounted Police Superannuation Act*;

allocations, les rémunérations spéciales ou pour temps supplémentaire ou autres indemnités et les gratifications qui sont réputées en faire partie en vertu d'un règlement pris en application de l'alinéa 42(1)e);

b) la solde, ainsi que les allocations, payables dans le cadre de la force régulière ou de la Gendarmerie en vertu de la *Loi sur la pension de retraite des Forces canadiennes* ou de la *Loi sur la pension de retraite de la Gendarmerie royale du Canada*.

[...]

4.(1) Subject to this Part, an annuity or other benefit specified in this Part shall be paid to or in respect of every person who, being required to contribute to the Superannuation Account or the Public Service Pension Fund in accordance with this Part, dies or ceases to be employed in the public service, which annuity or other benefit shall, subject to this Part, be based on the number of years of pensionable service to the credit of that person.

[...]

4.(1) Sous réserve des autres dispositions de la présente partie, une pension ou autre prestation spécifiée dans la présente partie doit être versée à toute personne qui, étant tenue de contribuer au compte de pension de retraite ou à la Caisse de retraite de la fonction publique d'après la présente partie, décède ou cesse d'être employée dans la fonction publique, ou relativement à cette personne; sous réserve des autres dispositions de la présente partie, cette pension ou prestation est basée sur le nombre d'années de service ouvrant droit à pension au crédit de cette personne.

[...]

5.(1) Subsections (1.1) to (1.4) apply to persons employed in the public service, other than

(a) [Repealed, 1992, c. 46, s. 2]

(b) an employee who is engaged for a term of six months or less or a seasonal employee, unless he or she has been employed in the public service substantially without interruption for a period of more than six months;

(c) subject to section 5.2, a person who, immediately before July 4, 1994, was employed in the public service as a part-time employee within the meaning of this Act as it read at that time and who has been so employed substantially without interruption since that time;

(d) an employee in receipt of a salary computed at an annual rate of less than nine hundred dollars, except any such employee who was a contributor under Part I of the *Superannuation Act*

[...]

5.(1) Les paragraphes (1.1) à (1.4) s'appliquent à toute personne employée dans la fonction publique, à l'exception :

a) [Abrogé, 1992, ch. 46, art. 2]

b) d'un employé qui est engagé pour une durée maximale de six mois ou d'un employé saisonnier, à moins qu'il n'ait été employé dans la fonction publique sans interruption sensible pendant une période supérieure à six mois;

c) sous réserve de l'article 5.2, d'un employé à temps partiel travaillant à ce titre dans la fonction publique la veille du 4 juillet 1994 et dont le service à ce titre au sens de la présente loi — dans sa version à cette date — n'a pas été sensiblement interrompu depuis lors;

d) d'un employé qui touche un traitement calculé d'après un taux annuel inférieur à neuf cents dollars, à l'exception d'un employé qui était contributeur selon la partie I de la *Loi sur la pension de retraite* immédiatement

immediately before January 1, 1954 and has been employed in the public service substantially without interruption since that time;

(e) persons in positions, as determined by the Governor in Council with effect from July 11, 1966, in the whole or any portion of any board, commission or corporation that has its own pension plan while that pension plan is in force;

(f) an employee on leave of absence from employment outside the public service who, in respect of his or her current service, continues to contribute to or under any superannuation or pension fund or plan established for the benefit of employees of the person from whose employment he or she is absent;

(g) an employee whose compensation for the performance of the regular duties of his or her position or office consists of fees of office;

avant le 1<sup>er</sup> janvier 1954 et qui a été employé dans la fonction publique sans interruption sensible depuis cette époque;

e) des personnes qui occupent des postes, déterminés par le gouverneur en conseil avec effet à compter du 11 juillet 1966, au sein de quelque office, conseil, bureau, commission ou personne morale ou de quelque service de ceux-ci, ayant son propre régime de pension, tant qu'un tel régime de pension est en vigueur;

f) d'un employé en congé d'un emploi hors de la fonction publique, qui, à l'égard de son service courant, continue de contribuer à un fonds ou régime de pension de retraite ou de pension, ou en vertu d'un tel fonds ou régime, établi au bénéfice des employés de la personne qui lui a accordé un emploi d'où il est absent;

g) d'un employé dont la rémunération pour l'exercice des fonctions régulières de son poste ou de sa charge consiste en des honoraires;

h) d'un employé recruté sur

- (h) an employee engaged locally outside Canada; or
- (i) a sessional employee, a postmaster or assistant postmaster in a revenue post office, a person employed as a clerk of works, a member of the staff of Government House who is paid by the Governor General from his or her salary or allowance or an employee of a commission that is appointed under Part I of the *Inquiries Act* and added to Part I of Schedule I, unless designated by the Minister individually or as a member of a class.
- (j) [Repealed, 1992, c. 46, s. 2]
- place à l'étranger;
- i) d'un employé de session, d'un maître de poste ou d'un maître de poste adjoint dans un bureau de poste à commission, d'une personne employée en qualité de conducteur de travaux, d'un membre du personnel de la Résidence du gouverneur général qui est payé par le gouverneur général sur son traitement ou son indemnité, d'un employé d'une commission qui est nommée selon la partie I de la *Loi sur les enquêtes* et ajoutée à la partie I de l'annexe I, à moins qu'il ne soit désigné par le ministre, individuellement ou en tant que membre d'une catégorie.
- j) [Abrogé, 1992, ch. 46, art. 2]

[34] From these provisions, I take that:

- the purpose of the PSSA is to provide for the payment of superannuation benefits to “persons employed in the public service”;
- the PSSA covers a larger number of employees than the PSLRA;
- benefits are paid to those who are required to contribute to one of the specified accounts or funds;

- contributions are made by persons “employed in the public service”; and
- contributions are tied to a contributor’s salary, which is the basic pay received for performing the regular duties of a position or office.

[35] The PSSA does not define what is meant in subsection 5(1) by the phrase “persons employed in the public service.”

[36] To determine whether Mr. Burley was employed in the public service while on language training, I take instruction from the approach adopted by the Federal Court of Appeal in *Professional Association of Foreign Service Officers v. Canada (Attorney General)*, [2003] F.C.J. No. 483 (C.A.) (QL).

[37] That case involved persons similarly situated to Mr. Burley and the question before the Court of Appeal was whether successful candidates in the FSDP, while taking language training, were employees so as to be included in the bargaining unit represented by the association.

[38] At paragraph 10 of its reasons, the Court of Appeal characterized the question before the Public Service Staff Relations Board to be “whether someone who was not working under any private contract but was occupied as a student of language in a government language program and being paid a stipend by the Government of Canada for her presence there could be considered to be ‘employed in the Public Service.’” The Court of Appeal stated that determination of that question did not involve common law principles of contract law. Rather,



the question would be answered by the application of relevant federal statutes governing employment in the public service.

[39] The Court of Appeal then went on, at paragraph 14, to state:

The Board had to decide what is required for one to become an "employee" within the meaning of section 34 of the Public Service Staff Relations Act. In the Econosult case at 634 Sopinka J. quoted with approval from the decision of this Court under appeal where Marceau J.A. stated:

There is quite simply no place in this legal structure for a public servant (that is, an employee of Her Majesty, a member of the Public Service) without a position created by the Treasury Board and without an appointment made by the Public Service Commission.

For this reason the Supreme Court found that there was "just no place for a species of de facto public servant who is neither fish nor fowl".(Page 633). In the present case the applicant is contending that the candidates for the FSDP, while on language training, were some kind of de facto employees although they had not yet been given any formal appointment. It is true that DFAIT had recruited these candidates, screened them and put them on language training. It is not in dispute that DFAIT had the delegated authority from the Public Service Commission to appoint these candidates to Foreign Service Officer positions. But there is no formal instrument making such an appointment prior to their completion of language training. Section 22 of the Public Service Employment Act which governs hiring in the Public Service provides as follows:

22. An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument.

\* \* \*

22. Toute nomination effectuée en vertu de la présente loi prend effet à la date fixée dans l'acte de nomination,

le cas échéant, indépendamment de la date de l'acte même.

In the case of Ms. Qureshi (and no one disputes that this was typical of the group in question) it was not until the letter of June 16, 1999 from the Department to Ms. Qureshi that an offer of appointment was made. The first paragraph starts out as follows:

On behalf of the Department of Foreign Affairs and International Trade, I am pleased to offer an indeterminate appointment as a Foreign Service Officer, FSTP-01, with the Trade Commissioner Service. Your starting date is June 11, 1999.

As mentioned before, that offer was formally signed as accepted by Ms. Qureshi. The applicant has been unable to point to any other "instrument of appointment" which fixed any date, as required by section 22 of the Public Service Employment Act.

[40] While I acknowledge that this determination was made in the context of different legislation, the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, I consider the nature of the Court of Appeal's analysis to be applicable in order to determine whether Mr. Burley was employed in the public service for the purpose of the PSSA while in language training.

[41] Section 22 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 (PSEA), which was relied upon by the Court of Appeal, was also in force on the dates relevant to this application: June 18, 1998 and September 3, 1999.

[42] In the present case, there were only two documents capable of being instruments of appointment within the meaning of section 22 of the PSEA. The first is the June 18, 1998 letter. However, this letter, and its appended terms and conditions, are explicit that language training

had to be successfully completed before appointment to the FSDP-1 of the FSDP, and that “time spent on language training is not considered a period of employment in the public service.” It was not until the letter of September 3, 1999 that Mr. Burley was offered an indeterminate appointment and advised that “[u]pon entering the Public Service, you will be entitled to certain benefits, as such as [...] a superannuation plan [...] .”

[43] I conclude from this that Mr. Burley was not, for the purpose of the PSSA, employed in the public service until September 3, 1999. He was not, therefore, entitled to accrue pension credits under the PSSA before that date.

[44] In conclusion, Mr. Burley argues that it is anomalous that the time spent in language training is not pensionable employment for *ab initio* recruits to the FSDP, but it is pensionable employment for recruits to the FSDP who are already employed in the public service.

[45] There is no evidence before the Court as to the terms and conditions upon which recruits already in the public service undertook their language training. However, such terms and conditions are likely connected to collectively bargained agreements. I do not assume that any benefits obtained in the collective bargaining process would necessarily accrue to *ab initio* recruits.

[46] For these reasons, the application for judicial review is dismissed.

[47] Both sides sought costs if successful. I see no reason why costs should not follow the event. Accordingly, the applicant shall pay to the respondent costs in accordance with the mid-point of column 3 of the Tariff.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is dismissed.
2. The applicant shall pay to the respondent costs in accordance with the mid-point of column 3 of the Tariff.

“Eleanor R. Dawson”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2170-06

**STYLE OF CAUSE:** ROBERT BURLEY, applicant  
v. ATTORNEY GENERAL OF CANADA, respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 31, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** DAWSON J.

**DATED:** APRIL 22, 2008

**APPEARANCES:**

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