

PUBLIC SERVICE STAFF RELATIONS ACT  
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

FERNAND L.G. VALOIS,

Grievor,

AND:

TREASURY BOARD  
(Transport Canada),

Employer.

DECISION

Before: R.D. Abbott, Board Member and Adjudicator.

For the Grievor: J.L. Shields, Counsel.

For the Employer: Ms. M.-M. Galipeau, Counsel.

Heard in Sault Ste. Marie, Ontario, on March 25, 1981.

FORCED TRANSFER CONSIDERED DISCIPLINE

*And transfer grievance. Director of  
the adjudicator's jurisdiction is addressed.*

ART 7  
Code 402/79

JLB  
3/25/81

## DECISION

These grievances arose out of the employer's ordering the transfer of the grievor from Sault Ste. Marie to Toronto. Two of the grievances (files 166-2-9388 and 9390) in essence request as corrective action that the transfer be explained and justified. Neither of these grievances allege a violation of a collective agreement or disciplinary action. These two grievances were withdrawn from adjudication by counsel for the grievor at the commencement of the hearing of this reference and need not be considered further in this decision.

File 166-2-9389 is a reference to adjudication of a grievance arising out of the same ordered transfer. The grievance requests as corrective action that the transfer be rescinded. Counsel for the grievor indicated that it was a disciplinary measure resulting in a financial penalty and, accordingly, was referable to adjudication pursuant to paragraph 91(1)(b) of the Public Service Staff Relations Act. By letter prior to the hearing of this reference, counsel for the employer indicated that my jurisdiction to hear and determine the matter would be challenged.

When the hearing opened, Ms. Galipeau for the employer submitted that I should dismiss the grievance on the ground that I lacked jurisdiction, without hearing evidence and argument on the issue. It was her submission that the

grievance form initiating this case expressly attacks the grievor's transfer. She argued that a transfer cannot be "disciplinary action resulting in . . . a financial penalty" in the terms of paragraph 91(1)(b) of the Public Service Staff Relations Act.

In support of her position, Ms. Galipeau cited the recent judgment of the Federal Court of Canada, Trial Division, in Dubé v. The Queen (judgment dated October 31, 1980, court file T-4401-79). In that case an employee attacked his transfer from Paris to Ottawa through a civil suit. Certain passages of the judgment of Moreau J. suggest that a transfer is entirely within the employer's discretion and cannot be questioned. Ms. Galipeau also cited Chief Adjudicator Jolliffe's two decisions in Crewe (Board file: 166-2-294). There, the grievor attacked both his transfer and the employer's declaration that he had abandoned his position.

On the basis of the cited cases, Ms. Galipeau suggested that this case was obviously not within my jurisdiction, simply because the grievance, on its face, was an attack on a transfer, and there was no need to proceed further. She suggested that I should at once dismiss the grievance, exercising a power similar to that of a court of law when it dismisses a case when the

statement of claim reveals no cause of action.

For the grievor, Mr. Shields pointed out that a grievance form is not analogous to a statement of claim in a court action. This was not a case where it was obvious at the outset that I lacked jurisdiction, and therefore, he should be given the opportunity to attempt to establish that the transfer here in question was for disciplinary reasons and that it involved a financial penalty.

After a short recess, I orally ruled that I wished to proceed to hear evidence and argument on the jurisdictional issue. I believe it would be helpful to restate here the reasons I gave orally at the hearing. I agree with Mr. Shields that a grievance form is not analogous to a statement of claim. It is usually prepared by laymen, and it serves a very different purpose from that of a statement of claim. The practice of arbitrators and of adjudicators under the Public Service Staff Relations Act has been to permit considerable latitude in amending grievance forms on their enlargement through evidence and argument, provided that the employer, through the form or otherwise, has been placed in a position to know what really was the complaint of the grievor.

As I saw it, the real issue here was whether the

case was obviously, on the face of the grievance form, outside my jurisdiction. I was prepared to hold that it was not obviously outside my jurisdiction. It is not clear that the employer has an unfettered discretion to transfer employees where the transfer is founded on disciplinary reasons. In Crewe (supra), Mr. Jolliffe made it quite clear in his Show Cause decision (dated July 13, 1970) that he was prepared to receive evidence on the issue of whether the transfer was based on disciplinary grounds. In his final decision (dated September 16, 1970) the Chief Adjudicator found, first, that the transfer was within the lawful power of the employer, and secondly, that it was not disciplinary action on the basis of the evidence tendered. For our purposes here, it is highly significant that the Chief Adjudicator was prepared to consider whether or not the transfer was a disciplinary measure within the terms of paragraph 91(1)(b).

I do not think that the Dube' judgment forces me to disregard the Crewe decision. There it was not in issue whether the transfer was for disciplinary reasons: the case was a civil suit not a grievance under the Public Service Staff Relations Act. Granted, Moreau J. did refer (at page 3 of the judgment) to the Act, and went on to say . . . I know of no provision, either

in these statutes or elsewhere, allowing the employee to dispute, in a court of law or in any other manner, the decision to move him from one position to another equivalent position.

It is significant that Moreau J. did not refer to section 91 of the Act, and, as noted earlier in this decision, in any event, there was no reason for him to consider the question of whether grievances attacking transfers could be referred to adjudication under that section. Furthermore, there is nothing in the Dubé judgment which stands for the proposition that no transfer can be "disciplinary action resulting in . . . a financial penalty." The statements in the judgment as to the employer's discretion to order a transfer could just as well have been made about a discharge or a suspension, without detracting from the principle that such action by the employer may fall within the terms of paragraph 91(1)(b) of the Act.

Accordingly, I directed that the hearing should proceed. However, I reminded Mr. Shields that the financial loss, if any, suffered by his client due to his transfer, could not of itself be considered a financial penalty. In my opinion, he was obliged to establish that the transfer was deliberately chosen as the employer's

disciplinary response, to cause the financial loss. Only then could I hold that the transfer constituted "disciplinary action resulting in . . . a financial penalty." (Ms. Galipeau, at this point, interjected that Mr. Shields should also be reminded that since it appeared that the grievor was no longer an employee, and reinstatement had not been requested, there would be no value in the rescission of the transfer even if that was eventually obtained.)

After due consideration, Mr. Shields made the following statement:

It is agreed that, admitted, by the grievor and on his behalf, that there is no available evidence to show that the transfer was deliberately chosen to cause a financial loss to the employee. Rather than proceed with evidence regarding disciplinary reasons, the admission is made as stated. A Decision should be issued on that basis.

In view of Mr. Shield's admission on behalf of the grievor, I have no choice but to terminate these proceedings on the ground that there is no evidence before me to bring the impugned transfer within the terms of paragraph 91(1)(b) of the Public Service Staff Relations Act and I therefore have no jurisdiction to hear and determine the reference to adjudication. Accordingly, this matter is

terminated and the file ordered to be closed.

For the Board,

R.D. Abbott,  
Board Member and Adjudicator.

OTTAWA, April 14, 1981.