ADJUDICATIONS UNDER THE PUBLIC SERVICE STAFF RELATIONS ACT (CANADA) - A COMPARATIVE ANALYSIS OF THE INTERPRETATION AND APPLICATION OF COLLECTIVE AGREEMENTS IN THE FEDERAL PUBLIC SERVICE AND THE PRIVATE SECTOR

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Submitted to: The Institute of Comparative Law
McGill University

September, 1979

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ABSTRACT

An examination of the process of resolution of rights disputes in the Federal Public Sector under the Public Service Staff Relations Act as compared with the private sector. The work initially examines the historical legislative background to the Public Service Staff Relations Act and notes the manner in which the development of controlling agencies have affected the scope of rights adjudication. The applicable provisions of the Public Service Staff Relations Act are examined and the process of rights disputes resolution under the Act are examined and compared with that predominant in the private sector. The statutory limitations on the rights of federal public servants to refer grievances to adjudication are described and examined with reference to the applicable jurisprudence. The scope of adjudication permitted under the legislation is critically examined with reference to the applicable authorities and proposals for extending the scope of adjudication are noted. Separate chapters are devoted to the related topics of group grievances and policy grievances.

L'ARBITRAGE SOUS LA LOI SUR LES RELATIONS DE TRAVAIL DANS LA FONCTION PUBLIQUE - UNE ETUDE COMPARATIVE DE L'INTERPRETATION ET DE L'APPLICATION DES CONVENTIONS COLLECTIVES DANS LA FONCTION PUBLIQUE FEDERALE ET DANS LE DOMAINE PRIVE.

Résumé

Une étude qui tâche de comparer le développement de résolutions de droits acquis sous les conventions collectives reglées par la loi sur les Relations de Travail dans la fonction publique fédérale et celles dans le domaine privé. Tout d'abord l'étude revoit le plan historique de la loi fédérale et signale l façon dont le contrôle des agences fédérales a influencé le processus des arbitrages qui se concernent avec ces droits. On examine les provisions statutaires de la loi sur les relations de travail dans la fonction publique et ainsique le processus de résolutions de droits acquis sous les conventions collectives réglées par cette loi, en comparant le tout avec le même processus dans le secteur privé. On revoit aussi an analysant la jurisprudence les limites statutaires qui prescuvent en quelles circonstances les employés dans la fonction publique peuvent référer leurs griefs a l'arbitrage. On examine à fond les limites de l'arbitrage, sous la loi en revoyant les arrêtes et en discutant les propositions d'élorgri ces limites. De chapîtres individus discutent les questions de griefs politiques et de griefs collectifs.

PREFACE

In 1967 Parliament enacted the Public Service Staff Relations Act which provided the legislative foundation for collective bargaining in the Federal Public Service. Part IV of the Act conferred upon Public Servants the right to initiate grievances concerning their terms and conditions of employment and to refer certain grievances to third party adjudication. The purpose of this work is to critically examine and evaluate the process of development of this resolution of rights disputes in the Federal Public Sector, and to compare that development where appropriate, with that of the arbitration of rights disputes in the private sector and to note differences and similarities in the trend of decision making in both sectors.

The emphasis of the paper is directed towards jurisdictional issues as the author's research and experience has revealed little or no major distinctions between the sectors in the development of the applicable substantive law of arbitration. A very limited amount of scholarly work has been undertaken on the subject of the development of the adjudication process as applied to the Federal Public Service, other than a number of articles published prior to or shortly after the Public Service Staff Relations Act was enacted which for the most part were discriptive of the new process. Presumably the lack of research in the area is attributable to the fact that the decisions of the adjudicators appointed under the Act have not been commercially reported. The author's familiarity with the subject matter under discussion, dates from 1971 while employed as a Student-at-Law acting for bargaining agents and individual grievors he gained initial exposure to the resolution of rights disputes under the Public Service Staff Relations Act

Subsequent thereto in 1974-75 the author was employed as a Law Officer of the Crown by the Department of Justice seconded to the Treasury Board where he was engaged as full-time counsel representing the employer at adjudication under the Public Service Staff Relations Act.

During the period 1977-79 the author has been employed in the Toronto Regional Office of the Department of Justice in the Civil Litigation Section and has been primarily assigned the majority of adjudication cases scheduled for hearing before the Public Service Staff Relations Board as counsel for the employer, the Treasury Board, during which period he gained further exposure to the issues herein discussed.

The responsibility for the text is that of the author's alone but the author would be remiss if he did not acknowledge his indebtedness to the officers of the Public Service Staff Relations Board and the Treasury Board who supplied the author with information and unreported Federal Court decisions.

Mr. Stanley Hartt, Barrister and Solicitor, read an earlier draft of the paper and made many helpful suggestions for change. Needless to say the author is alone responsible for any remaining shortcomings in the study.

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CHAPTER I

INTRODUCTION

The arbitration of grievances is a process of adjudication whereby disputes concerning the application or interpretation of collective agreements are finally resolved.

In defining the scope of grievance arbitration, it is important at the outset to make the distinction between the resolution of interest disputes and rights disputes, the former being a completely separate process from the latter, both of which are characterized as labour arbitration.

> "The most publicized contests in North America -- a "Big Steel" strike, or a Canadian Rail Strike, for example -- almost invariably arise out of "interest disputes". In other words, after months of bargaining and mediation or conciliation, the parties fail to conclude a new collective agreement as sought by all available means to advance or protect its own economic interests, and neither is willing to risk its future on the unpredictable conclusions of a stranger."[1]

Interest disputes are concerned primarily with what has been described as "law formulation".[2] It is a preliminary stage to regular relations between the parties according to an established framework. In practice, of course, interest disputes are not entirely concerned with "law formulation". Previous collective agreements, agreements adopted in similar industries, and federal and provincial legislation exert a certain control, of varying degree, over negotiation of agreements. For the purposes of this paper, however, the primary distinguishing feature of this interest dispute is that it has its origin in the conflicting "wants" of the parties at a time when reconciliation of these "wants" is the overriding consideration. The result of arbitration is the formulation of rules governing future relations between the parties.

On the other hand, a rights disputes is concerned with the application or interpretation of a current, collective agreement. Academically, the resolution of a rights dispute involves the application of existing rules and in this sense differs from the resolution of an interest dispute. However, as Brown has been quick to point out, the interpretation

.../2

and application of a collective agreement often involves a certain amount of rule formulation.[3] After all, it is rather unlikely that every circumstance would be anticipated by a collective agreement.

A rights dispute arises when a party to a collective agreement feels he, or it, has a grievance and seeks to resolve it according to the principles contained in the collective agreement. Linked with disputes concerning the disagreement between the parties arising out of the interpretation and application of language in collective agreements are disputes concerning discipline that employers have meted out to employees for misconduct, which disputes are governed by the generally adopted principle that an employer in meting out discipline to employees for misconduct must do so fairly, that is, there must be just cause for the imposition of discharge or other disciplinary penalties to employees.

In 1967 Parliament enacted the Public Service Staff Relations Act which provided the legislative basis for collective bargaining in the Public Service of Canada. Part IV of that Act, conferred upon public servants the right to initiate grievances concerning their terms and conditions of employment and also recognized the right of public servants to refer certain grievances to adjudication. The purpose of this paper is to critically examine and evaluate the adjudication process as it has developed since its inception in 1967.

The emphasis of this paper is directed to the manner in which the resolution of rights disputes have developed since the enactment of the Public Service Staff Relations Act in 1967, and to compare the trend of decision making where applicable with that of the arbitration of rights disputes in the private sector, noting similarities and distinctions. It is proposed to examine the historical background to the legislation and to remark on the development of controlling agencies and to determine the extent these agencies, namely, the Public Service Commission and the Treasury Board have affected the scope of grievance adjudication. It is proposed to then examine the statutory framework establishing the process of grievance

resolution and to determine how it functions in practice involving a determination of how this process compares with that of the private sector.

Under the Public Service Staff Relations Act there are a number of statutory restrictions upon the right of employees to initiate and refer grievances to adjudication which are examined in Chapter 5.

The Scope of Adjudicability under the Act is discussed in Chapter 6. This issue is directly related to the statutory division of responsibility for management of the Public Service and it is this area which has spawned the most difficult issues for adjudicators under the Act.

The paper would not be complete without an examination of group grievances and policy grievances which discussion is to be found in Chapters 7 and 8.

[1]JOLLIFFE, E.B., Adjudication in the Canadian Public Service, 20 McGill Law Journal, at p. 351.

[2]BROWN, D.J.M., Interest Arbitration - Task Force on Labour Relations, Study No. 18, Ottawa; Information Canada, 1970

[3]Ibid, p. 8

CHAPTER II

PRIVATE SECTOR LEGISLATIVE FRAMEWORK

Modern Canadian Labour Relations Legislation in both the Federal and Provincial spheres[1] may be traced back to the Wagner Act of 1935 in the United States[2].

However, a distinctly Canadian feature of our Labour Relations Law derived from Order in Council No. 1003 in the requirement that collective agreements provide for the arbitration of disputes during their term and that there be no strikes or lockouts during that period.

Professor A.W. Carrothers has summarized the significance of P.C. 1003 in this manner:

> "P.C. 1003 recognized the policy of collective bargaining through agents of employees, and accordingly, prohibited specified unfair labour practices. It established an administrative board to certify the bargaining authority and to settle the bounds of the bargaining units. It placed limitations on the place and methods of recruting union membership, and restricted the use of economic weapons. More particularly, strike and lockouts were prohibited except in the negotiation of collective agreements, and then only after the machinery of conciliation was exhausted. It was thus necessary to require the peaceful settlement of disputes arising through the course of the collective agreement: herein lies the kernel of present day grievance arbitration. After the war, when the Emergency Order-in-Council was no longer operative (it was amended in 1947 to make wages a bargainable matter), labour relations reverted to the federal and provincial fields. By 1948, the federal parliament and most provincial legislatures had enacted statutes modelled on P.C. 1003"[3]

The basic provincial and federal statutes, with the exception of Quebec and British Columbia, still retain the basic features adopted in their early Legislation from P.C. 1003, and with the exception of Saskatchewan, certain provisions requiring the compulsory arbitration of grievances during the terms of the collective agreements.[4]

E.B. Jolliffe in discussing the effect of the arbitration clauses being incorporated into the various federal and provincial legislation has stated:

> "Through these distinctively Canadian requirements, arbitration in the private sector continues to be theoretically consensual although in reality it is imposed upon the parties by law"[5].

In 1967, Parliament enacted the Public Service Staff Relations Act[6], an Act respecting employer employee relations in the Public Service of Canada which Act conferred upon employees of the Government of Canada the rights to bargain collectively with respect to their terms and conditions of employment, and a process for the arbitration or adjudication of rights disputes.

[1]Toronto Electric Commissioners v. Snider, [1925] A.C. 396 established that each of the Provinces had jurisdiction over Labour Relations within the Province and that the Federal Government had jurisdiction over inter-provincial employers and its own employees.

[2]CARROTHERS, A.W., Collective Bargaining Law in Canada, 1965 pp. 1-75.

[3]ibid pp. 7-8.

[4]Federal employees of Crown Corporations and of inter-provincial employers, see the Canada Labour Code, R.S.C. 1970 Ch. L-1 and in particular SS. 155 et seq.

In Quebec the governing Statute is the Labour Code, S.Q. 1964 C. 45, S.Q. 1968 C. 14, S.Q. 1968 C. 48, 1969 C. 47 and in particular S. 88 et seq. which provides for the arbitration of grievances but its form is distinct from that as other provinces.

In Ontario see the Labour Relations Act, R.S.O. 1970 C. 232 as amended S.O. 1975 C. 76 and in particular Section 37.

In Alberta see the Alberta Labour Relations Act 1973, S.A. 1973, C. 33 and in particular Section 138.

In British Columbia see the Labour Code of British Columbia, S.B.C. 1973, C. 122 Part VI and in particular Section 92 et seq.

In Manitoba see the Labour Relations Act, S.M. 1972, C. 75 and in particular S. 69.

In New Brunswick see the Industrial Relations Act; R.S.N.B. 1973, C. 1-4, S. 55, and S.S. 73 et seq.

In Newfoundland see the Labour Relations Act, R.S.N. 1970, C. 191 and in particular S. 23.

In Nova Soctia, see Trade Union Act, S.N.S. 1972, C. 19 and in particular SS. 40 et seq.

In Prince Edward Island see the Labour Act, R.S.P.E.I. 1974, C. L-1 and in particular Section 36.

In Saskatchewan see the Trade Union Act, 1972, S.S. 1972, C. 137 and in particular S. 25 et seq.

[5]JOLLIFFE, E.B., Adjudication in the Canadian Public Service 20 McGill Law Journal, p. 352.

[6]R.S.C. 1970, C. P-35, p. 352.

CHAPTER III

BACKGROUND AND LEGISLATIVE DEVELOPMENT IN THE CANADIAN PUBLIC SERVICE

A brief overview of the background of labour relations in the federal public sector will serve to place the present Legislation in perspective. Prior to Confederation in 1867, the Colonial Legislatures operated on a well developed system of patronage. The ruling dynasties in those times have come to be known by various titles. In Lower Canada, the Chateau Clique in Upper Canada, the Family Compact.

Upon Confederation it became essential for Canada to establish a Federal Civil Service. As may be expected, the system of patronage persisted, even after the passage of the first Civil Service Act in 1868.

Due to parliamentary agitation for reform, a Royal Commission was established in 1880 to investigate the problem. The findings of the Royal Commission published in 1889, were informative but its recommendations were largely ignored. Not until a 2nd Royal Commission was appointed in 1907 was any positive action taken. The new Civil Service Act of 1908 reflected the reform attitude, in that, patronage was reduced by introduction of open job competitions to be administered by a new two man Civil Service Commission[1].

During the First World War, patronage again slipped into the Civil Service:

> "The loophole of "temporary" appointment allowed of a continuing, if diminished exercise of old methods, and patronage continued unabated in the "outside" service. During the 1st World War, the service expanded from 40,000 to 60,000 and most of the increase was accomplished without reference to the Commission"[2].
>
> "The entire service was again in a deplorable state. Strenuous demands for reform were again being made and in 1918 another Civil Service Act was passed. It established a new Civil Service Commission; extended the application of the merit system to the outside service and again forbade political partisan activity ... The Commission had an additional duty of organizing and calssifying the service, the Act effectively

> wiped out political patronage, with trifling exceptions, and a systematic classification system was established which was incorporated into the Civil Service Act in 1919. It was not until the 1950's that reform again was being sought"[3].

It must be stressed that public civil servants have enjoyed the right to organize into associations in the sense that their right has never been denied[4]. What was lacking, until the new Civil Service Act of 1961, was any statutory recognition of the associations' demands for negotiation rights. In this sense, the Public Service lagged far behind the private sector. The Collective Bargaining Act of 1943 and the Order-In-Council P.C. 1003 of 1944 led to the implementation of similar provisions by the provinces in the 1940's for employees in the private sector and thus have enjoyed the right to organize and bargain collectively. These rights also included the right to grieve, and appeal adverse decisions.

In 1957 the Civil Service Commission was asked to re-evaluate its role. This re-evaluation was the result of increasing pressure brought to bear by the very large associations of Public Servants then in existence. The report of the Civil Service Commission led to the incorporation into the New Civil Service Act of 1961, of the "right to direct consultations between the staff associations, the Minister of Finance and the Civil Service Commission respecting remuneration and terms and conditions of employment[5]. As a concommitant of this right, appeal machinery was established for hearing grievances respecting demotions and suspensions as well as dismissals. No longer were appeals a matter of "grace".

The Civil Service Act of 1961 remained in force until the passage in 1967 of the Public Service Staff Relations Act, Public Service Employment Act and an Act to amend the Financial Administration Act. In effect, these modern Acts served to clarify the respective roles of the Public Service Commission, a new Public Service Staff Relations Board and the Treasury Board.

It is necessary to consider the important factors that may account for the delay experienced by Federal Public employees in achieving collective bargaining rights enjoyed by private sector employees.

The first is the doctrine of sovereignty or the immunity of the State or Crown and second is the division of responsibility between the Treasury Board and the Civil Service Commission. When general Labour Legislation was first passed in 1943, it affected only the private sector. Public Servants did not come under its purview as the Crown was immune from general legal rules governing private relations. This common law principle may, of course, be overridden by an Act of Parliament.

The doctrine of sovereignty of the State or Crown was also applicable to the Crown in Right of the provinces and accordingly, general Labour Relations Legislation passed by the provinces for the private sector did not apply to the Provincial Crown's own employees.

The advent of collective bargaining for public servants in most provincial jurisdictions has been one of evolution through a similar statutory process of consultation[6] to bilateral negotiations with the Government retaining the right to make final decision to that of full collective bargaining with its attributes, namely, conciliation, arbitration of both interest and rights disputes and in some jurisdictions the right to strike[7].

Thus while employees in the private sector, have generally enjoyed the benefits of Collective Bargaining Legislation since the 1940's the Federal Public Service remained without the benefit of substantial changes wrought in the field of Labour Relations until the passage of the Civil Service Act of 1961. H.W. Arthurs has described the situation in the following manner:

> "No significant formal machinery for labour management consultation at the federal level appeared until 1944. In that year, the federal government created the National Joint Council of the Public Service of Canada to advise it on wages and working conditions for its employees. Other bipartite advisory groups were established in the suc-

> ceeding years, one of the most important was the Pay Research Bureau, whose function was the development of benchmarks for public employment conditions based on carefully selected private equivalences. Institutionally, the federal governments' agreement in 1953, to the voluntary, revocable check-off of dues strengthened the various employee organizations.
>
> Whatever else these years of development represented, by the early 1960's there was not yet a regime of collective bargaining in the Public Service. The federal government continued to act unilaterally in fixing wages for its employees, although it was ostensibly committed to accepting the guidance of the Civil Service Commission. The Commission, in turn, engaged in consultation with employee associations - initially on an informal basis, but after 1961 pursuant to a statutory mandate"[8].

Another factor creating confusion and reducing the efficiency of existing labour relations machinery in the Federal Public Service was the division of responsibility between the Treasury Board and the Civil Service Commission.

Initially, responsibility for remuneration and terms and conditions of employment in the Public Service were vested in the Public Service Commission (created by the Civil Service Act of 1908). In the period preceding the Depression in 1928 the Commission enjoyed wide powers in classification of duties, remuneration, and hiring (competitions). With the advent of the depression, it became necessary to supervise government spending more closely. In 1931, Parliament established the position of comptroller of the Treasury whose duties were described as follows:

> "This new officer was required to keep a continuous record of commitments, issue cheques, (and) scrutinize all departmental expenditures. The Treasury Board's powers expanded through its power over expenditures".[9]

The Treasury Board's controls gradually encroached upon the Commissions Statutory Powers. In effect, both agencies were acting in a managerial capacity without any clear guidelines as to the authority each was to possess. This confusion was recognized early, but it was not until the passage of the

Financial Administration Act in 1951 that the powers of the Treasury Board and Civil Service Commission were defined with any precision. This new Act gave the Treasury Board authority to determine salary recommendations. The primary authority of the Commission was limited to the recruitment of employees, as was recommended in the 1946 Report of the Royal Commission on Administrative Classifications in the Public Service[10].

As associations of public service employees pressed for formal bargaining procedures, confusion arose as to who would negotiate on behalf of the employer, the government. This led in part to a request by the Prime Minister in 1957 that the Civil Service Commission appraise its role in the government:

> "In its report it recommended that the government (through its Treasury Board if so designated) assume the role of organizing departments and allow more delegation of authority to ministers and deputy ministers in organizing into departmental matters for better efficiency. The commission on the other hand should retain the exclusive role in matters of classification, and since this function was distinct from managerial and salary determination problems there should be little or no problem in establishing such distinctions of authority"[11].

The recommendations contained in the Commissions Report were largely incorporated into the Civil Service Act of 1961. Although the Commission retained the right to make recommendations with regard to salary, which placed an obstacle in the way of collective bargaining, public servants were given, for the first time, the right of appealon matters of demotion, suspension and dismissals together with the right to be consulted on matters of remuneration and terms and conditions of employment. In order to further clarify the changes incorporated into the Civil Service Act, three other bills were passed through Parliament. The last of these, Bill C-182[12], was the most significant in that:

> "This Bill made the Treasury Board the principal agent of the Government. It signs collective agreements; has authority over matters of general administrative policy; organization of the public service and control of establishments; financial management and personnel management in the public services..."[13]

The Civil Service Act of 1961 and its provision for procedures for consultation did not satisfy the staff associations as final authority rested with the Governor in Council. As civil service associations could not see any substantial improvement in their position, the associations continued their efforts to seek direct negotiation with binding arbitration as evidenced by a resolution of the Civil Service Federation of Canada at its convention in 1962 which read:

> "That the Federation be directed to continue its efforts to secure for all civil servants the right of negotiation on all matters that effect their welfare with compulsory and binding arbitration subject to the will of Parliament as the enforcement instrument"[14]

During the federal election campaign of 1963, each of the major political parties committed themselves during the campaign to a system of collective bargaining in the federal public service. Subsequent to the election, a Committee was established entitled "The Preparatory Committee on Collective Bargaining in the Public Service" under the chairmanship of Mr. A.D. Heeney, the former chairman of the Civil Service Commission. The Heeney Report of the Committee was made public in July 1965 recommending, inter alia, that disputes arising under the new collective bargaining system which it proposed should be settled by an independent arbitration tribunal. With respect to the issue of the right to strike, the Report stated as follows:

> "At the present time, most of the employees to whom the proposed system would apply do not have the right to strike and would be subject to disciplinary action by the employer if they were to participate in a strike. Nothing is intended to change the position".[15]

However, the successful seventeen day postal strike following the recommendations substantially influenced both the attitudes of employers and employee representatives towards

the recommendations of the Preparatory Committee. A fact finding commission into the strike, the results of which for the most part vindicated the postal workers' position, together with a government realization that it could not in practise suspend or discharge thousands of employees, led to a consideration of giving federal public employees the right to strike. In addition, to the success of the postal strike at this time, there was a growing identification of public employees with the private sector of the Canadian Labour Movement, which influenced other Civil Service Employee Associations to demand the right to strike instead of compulsory arbitration[16].

Subsequently the draft legislation introduced in Parliament provided a formula whereby a union could elect upon certification to opt either for binding arbitration or a conciliation/strike route.

The Public Service Staff Relations Act was introduced into the House of Commons by Prime Minister Lester B. Pearson on April 25th, 1966, and received Royal Assent on February 23rd, 1967. The Act provided the legislative framework for the establishment of collective bargaining in the Federal Public Service[17].

The significance of this historical perspective to the subject at hand is threefold. First, it is apparent that the public servants' right to negotiate a collective agreement, and to grieve originated in legislation, and not in practice. It is also readily apparent that, as an employer, the government is unique in the sense that it is also the rule-maker. The federal government's reliance on the notion of sovereignty hindered the development of the formal mechanics of labour relations in the public service, including the right to grieve. Thus the public sector lagged behind the private sector, and there still remain some important differences primarily in the areas of the scope of collective bargaining and the scope of grievance resolution. Finally, and more specifically, the development of controlling agencies in the Public Service has, in a material way, affected the manner of grievance resolution

adopted by the government in the Public Service Staff Relations Act of 1967.

The differences become more apparent upon examinations of the relevant Sections of the Public Service Staff Relations Act.

[1]Simmons, C.G., Cases and Materials in Labour Relations in the Public Sector, p. 1-2.

[2]Hodgetts, J.E., and Corbett, D.C., eds, "Canadian Public Administration, (Toronto 1960), p. 266, quoted in Simmons, op. cit. p. 3.

[3]Simmons, C.G., op. cit. p. 3.

[4]ibid p. 3.

[5]ibid p. 3.

[6]With the exception of Saskatchewan, British Columbia and Quebec, Saskatchewan was the first provincial jurisdiction to implement a collective bargaining regime in 1944 without going through a process of consultative procedures. Quebec adopting a similar course some twenty years thereafter and British Columbia in 1973.

[7]It is beyond the scope of this paper to trace the evolution of collective bargaining for employees of the Crown in Right of the Provinces. For further reading see J.E. Hodgetts O.P. Dwivendi, Provincial Governments as Employers, the Institute of Public Administrator of Canada, McGill, Queens University Press, Montreal 1974, Chapter 10.

Woods, H.D., Labour Policy in Canada, 2nd ed., MacMillan of Canada, Toronto 1973, Chapter VIII.

[8]Arthurs, H.W., Collective Bargaining in the Public Service of Canada, (1968) 67 Mich. Law Rev., 971 quoted in Simmons op. cit. p. 18-19.

[9]Royal Commission on Government Organization (Ottawa, 1962), Vol. 1, p. 93.

[10](Ottawa, 1946), p. 17.

[11]Arthurs, H.W., Collective Bargaining by Public Employees in Canada Five Models, 1971, Excerpts from Chapter I: Background reproduced in Simmons, C.G., and Swan, K.P., Labour Relations in the Public Sector Cases and Materials, Faculty of Law, Queen's Universit Kingston, Ontario, August 1977, p. 9.

[12]ibid, p. 9.

[13]Simmons, C.G., Cases and Materials, op. cit., p. 9.

[14]Civil Service Review, Vol. XXXV, Nov. 3, December 1962 p. 211.

[15] Preparatory Committee Report on Collective Bargaining in the Public Service, Ottawa, 1965, p. 36-37.

[16] Arthurs, H.W., Collective Bargaining in the Public Service of Canada, op. cit. p. 17.

[17] Public Service Staff Relations Act, S.C. 1967.

CHAPTER IV

THE FRAMEWORK OF THE PUBLIC SERVICE STAFF RELATIONS ACT (AN OVERVIEW)

The Public Service Staff Relations Act was introduced into the House of Commons by Prime Minister Lester B. Pearson on April 25, 1966, and received Royal Assent on February 23rd, 1967. The Act reflected most of the changes recommended by the Preparatory Committee on Collective Bargaining in the Public Service, which Committee was established in 1963.[1] The Act provided the legislative framework for the establishment of collective bargaining in the Federal Public Service.

General Application of the Act

The legislation applies to all portions of the Public Service as defined in the Act, and in particular, all Government Departments named in Schedule "A" to the Financial Administration Act; a number of boards, commissions and agencies in respect of which the Treasury Board is the employer, as set out in Schedule 1 , to the Public Service Staff Relations Act and certain boards and commissions under Federal Jurisdiction that are separate employers as specified in Part II of Schedule I of the Public Service Staff Relations Act.[2]

Grievances Described - Limitations

Part IV of the Act deals with the subject matter of grievances[3] and in particular Section 90 vested in "employees"[4] of the Public Service a statutory right to present grievances concerning; (a) the interpretation or application in respect of them of (1) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or (2) a provision of a collective agreement or an arbitral award[5] or (b) as a result of any occurrence or matter affecting these terms and conditions of employment ..., in respect of which no administrative procedure is provided in or under an act of Parliament.

Section 91 of the Act recognized the right of "employees" to refer certain grievances relating to the interpretation or application of a provision of a collective agreement or an arbitral award[6], or (11) disciplinary action resulting in discharge, suspension, or a financial penalty,

to third party adjudication (synonymous with arbitration in the private sector) after exhausting all steps in the grievance process of the Department, board, commission or agency concerned. The decision of the adjudicator by virtue of the provisions of Section 96 of the Act is made binding on all parties thereto.

In those grievances that may not be referred to adjudication the decision of the representative of the employer at the final level of the grievance process is final (Section 95(2) of the Act).

The Act sought to adopt most of the policies and procedures in labour relations in the private sector. However, there are significant differences.

The fundamental difference lies in the fact that the right of employee to grieve and to submit a grievance to arbitration in the private sector flows from the provisions in the collective agreement entered into by the parties thereto, whereas in the Federal Public Service the employee's right to grieve and to refer a grievance to adjudication flows from the statute and as such those rights are independent of provisions which may be contained in a collective agreement negotiated between the bargaining agent and the Treasury Board or a Separate Employer. This significant distinction stems from the unique position of the government as employer and legislator and reflects an attempt to impose a general standard on a large and diverse organization. It is critical that this fundamental distinction be borne in mind when attempting to apply private sector jurisprudence to Federal/Public Sector cases, especially to questions of jurisdiction.[7]

Subject to certain qualifications then, an employee in the Federal/Public Service has a legal right recognized in Section 90 of the Public Service Staff Relations Act to present a grievance irrespective of the existence of a collective agreement that may be applicable to him.

The Adjudication System as Compared with Arbitration in the Private Sector

The System of adjudication established pursuant to the

Public Service Staff Relations Act (as amended) has many distinguishing features from the system of ad hoc arbitration that is predominant in the private sector.

Prior to the amendments of the Public Service Staff Relations Act in 1975[8] Section 92 of the Act provided for the appointment of adjudicators for a fixed term of not more than five years to hear and adjudicate upon grievances referred to adjudication under the Act. Prior to the 1975 amendments one of the adjudicators appointed pursuant to Section 92 of the Act was chosen Chief Adjudicator[9] who was responsible for the administration of the grievance adjudication system; for conducting all references referred to adjudication pursuant to Section 98[10] of the Act; and either hearing all Section 91a referrals himself or assigning them to other adjudicators.

The Chief Adjudicator was also authorized by regulations passed pursuant to Section 99(3)(a) of the Act[11] to resolve preliminary and interlocutory matters[12] encompassing motions for the enlargement of prescribed times, the consolidation of two or more grievances for the purposes of a hearing, contested applications for adjournment, and the addition of interested persons as organizations as third parties to proceedings[13].

Prior to 1975 amendments pursuant to Section 92(2) of the Act Adjudicators could only be removed from office during their respective terms by the Governor in Council upon the unanimous recommendation of the Public Service Staff Relations Board[14].

The 1975 amendments provided for the appointment by the Governor in Council of a Board consisting of a Chairman, Vice-Chairman and at least three Deputy Chairmen and such other full time and part-time members as the Governor in Council deemed necessary to perform the duties of the Board[15].

The reconstituted board assumed jurisdiction over the duties previously rendered by the Chief Adjudicator and the part-time adjudicators to whom the Chief Adjudicator assigned cases.

The former Chief Adjudicator became a Deputy Chairman of the Board and was assigned continuing responsibilities for the administration of the process of adjudication.

The former part-time adjudicators were appointed part-time members of the Board[16].

Section 11(3) of the Act now provides that board members are to be appointed by the Governor in Council from a list prepared by the Chairman of the Board, after consultation by him with all of the bargaining agents and the Treasury Board, as employer, and the separate employees and the list will include other eligible persons whom the Chairman considers suitable for appointment as members.

Section 11(2)[17] of the Act now provides that the members of the Board shall be appointed by the Governor in Council to hold office during good behaviour for such period as may be determined by the Governor in Council. However, in the case of the Chairman, Vice-Chairman and the Deputy Chairman, the term cannot exceed ten years, and in the case of any other members of the Board the term cannot exceed seven years[18].

The new Regulations and Rules of procedure effective October 23rd, 1975[19] provide for the resolution of a number of preliminary and interlocutory matters by the Board, namely;

(a) on its own motion or at the request of a party direct that information or material contained in any document filed be made more complete or specific[20];

(b) where the Board deems necessary, at any time direct that a proceeding be consolidated with any other proceeding before the Board;

(c) in the interests of justice the Board may adjourn any hearing ...[21];

(d) the Board may reduce the time prescribed for doing any act, serving any notice, filing any document, or taking any proceeding before or after the expiration of the time prescribed[22];

(e) the Board, where it is satisfied that it is necessary or convenient in the public interest reduce the prescribed times for doing the matters set out in (d) infra[23];

(f) the Board may dismiss an application or complaint on the ground that the matter does not disclose on its face sufficent grounds for hearing, subject to a request for review by the applicant or complainant[24]; and

(g) the Board is empowered to summon and enforce the attendance of a witness[25].

As stated, the amendments purported to appoint adjudicators as part-time members of the Board. Ostensibly, the adjudicators were vested with all of the powers of the Board with respect to the conduct of hearings. However, the Federal Court of Appeal in the case of Doyon v. The Public Service Staff Relations Board and Garant, unreported[26] per Mr. Justice Pratte, determined that it could not be inferred that adjudicators' decisions were decisions of the Board as the definitions of "the Board", in the Act did not necessarily incorporate an adjudicator into the Board. Accordingly, as certain powers under the Act are expressly given to the Board it could be argued that there is no authority for adjudicators to exercise those powers.

It should be noted, that the Act provides in effect three avenues of redress for an aggrieved employee although in practice all references have been heard by the Chief Adjudicator or a single adjudicator selected by him[27].

Section 94 of the Act[28] contemplates that the parties may (a) name an adjudicator in the collective agreement in which case the Board shall[29] (mandatory) refer the matter to the adjudicator so named and (b) that an aggrieved employee may request the establishment of a Board Arbitration composed of a member of the Board, who shall be the Chairman, and one person nominated by each of the parties, but this avenue is not open if the employer voices an objection to the establishment of the Board[30] referred by it[31].

Section 97(1) of the Act stipulates that in the case where the parties name an adjudicator in the collective agreement, the method of determining remuneration and defraying the expenses of the adjudicator shall be as established in the col-

lective agreement, naming the adjudicator. In the event that there is no such provision stipulated in the collective agreement the expenses are to be borne equally by the parties.

Section 97(2) of the Act provides that where a grievance is referred to a Board of Adjudication the expenses of the nominee of each party shall be borne by each respectively.

In the case of a reference to an adjudicator other than an adjudicator named in a collective agreement and other than a Board of Adjudication and where an employee is represented by a bargaining agent (Section 97(2) provides that the bargaining agent is liable to pay such part of the costs of the adjudication as may be determined by the Secretary of the Board with the approval of the Board.

In fact as the parties have utilized the adjudicator appointed by the Board since the adjudication system was implemented the Board has not sought to recover from the parties the cost of adjudication as contemplated in Section 97.

In the practical administration of the system of adjudication cases are scheduled in advance for hearing either in Ottawa, where the Treasury Board and the Bargaining Agents have their offices, or in the locations from which the grievance originated, as that location is often the most convenient forum to all parties and to accommodate witnesses. Adjudicators (part-time board members) have been appointed from the various regions throught Canada and they usually have cases assigned to them that have been scheduled for hearing in their respective areas.

The Attorney General of Canada, pursuant to the provisions of the Department of Justice Act[32] which charges the Attorney General with the regulation and conduct of all litigation

for or against the Crown or any Public Department in respect of any subject within the authority or jurisdiction of Canada provides counsel from the Department of Justice to act for the Treasury Board (the employer in all adjudication hearings). Legal Officers of the Department seconded to the Treasury Board represent the employer in cases scheduled for hearing in areas other than Montreal, Toronto and Winnipeg, where counsel employed in the Civil Litigation Sections of the respective Regional Offices of the Department provide representation.

A number of the bargaining agents have in house staff lawyers to provide representation at adjudication. Other bargaining agents have staffs of experienced lay advocates, who provide representation in the more routine cases and the agents retain outside legal counsel for the more significant cases. Another bargaining agent has a combination of staff lawyers and experienced lay advocates.

In the private sector the incidence of lay representation at arbitration is more predominant. It may be argued that the mandatory use of legal counsel acting on behalf of the employer and the high incidence of the use of legal counsel acting on behalf of the grievors in the Federal/Public Sector tends to make that process more technical and legalistic than arbitration in the private sector.

Department of Justice Officers seconded to the Treasury Board and counsel and or representatives with the various bargaining agents, except where local counsel have been retained, usually travel from Ottawa to represent the parties at adjudication case scheduled for hearing outside the Toronto, Montreal and Winnipeg regions. There have been hearings in all provinces and in the Yukon and Northwest Territories as the majority of Federal Public Servants are now employed outside of the National Capital Region[33].

In private sector arbitration the parties usually nominate respectively a member of the Board of arbitration which members in turn nominate a neutral chairman, to constitute a tripartite board, or in the alternative, the parties mutually

agree on a sole arbitrator, the costs of which are borne by the parties. In the private sector either the tripartite board or a single arbitrator is appointed by the parties usually on an ad hoc basis. Thus, it is apparent that the parties exercise a much greater degree of control over the arbitration process in the private sector than in the Federal Public Sector where the adjudicator is appointed and holds office under the provisions of the Act.

In the private sector there are in addition considerable delays arising out of the process of selection and availability of arbitrators who are acceptable to the parties. In Ontario these problems have been studied by Mr. Justice Kelly, a retired Justice of the Ontario Supreme Court who has made recommendations for legislative change to the Provincial Minister of Labour[34].

The availability of a permanent panel of single adjudicators in the Federal Public Sector, it is suggested, has resulted in a more expeditious process of resolving grievances.

On the other hand, it may be argued that the parties would have more confidence in an arbitrator of their own choosing and would more readily accept such an arbitrator's disposition of the grievance.

The parties are not advised in advance of the date scheduled for hearing which adjudicator has been assigned to hear the reference, presumably to ensure that either or both parties not seek unmeritorious adjournments in the hope of obtaining a more acceptable adjudicator when the matter is rescheduled.

An adjudicator appointed under the Public Service Staff Relations Act it may be argued because of his relative degree of security of tenure, may tend to upstage the parties, whereas a private sector arbitrator must be responsive to the position of both parties in order to ensure his acceptability in the next submission to arbitration. Perhaps, however, the very fact that the private sector arbitrator is dependent upon the goodwill of the parties may lead one to conclude that the arbitrator is not more responsive as he or she may be inclined to alternate decisions in favour of one party and then the other to ensure continued acceptability.

The option in the public sector of resorting to an arbitrator of the parties own choosing is present in the Act if the parties became disenchanted with the appointed adjudicators although it may not be a totally realistic option as there is a strong disincentive for not resorting to this option as the statute will require the parties to finance the arbitration themselves.

The author ventures, however, that this issue may really be an artificial one: as for the most part, at least in Ontario those part-time adjudicators appointed under the provisions of the Public Service Staff Relations Act are also the arbitrators most in demand in the private sector.

With a permanent panel of adjudicators in the Federal/ Public Sector there has grown up a tendency of consistency or uniformity in the decision making process and prior decisions are referred to as precedents.

E.B. Jolliffe, the former Chief Adjudicator and Deputy Chairman of the Board stated in an early case:

> "The result of an adjudication interpreting a collective agreement should not be regarded by either party as an isolated phenomenon to be filed away and forgotten. It is relevant when consideration is given to any similar case arising under the same language ..." If not challenged "it should be accepted as part of the jurisprudence relating to the applicable language. Any other course is incite caprice inconsistency and perhaps chaos in the administration of collective agreements and the grievance processes within the public service. Further, undue rigidity can only encourage a multiplicity of references to adjudication, many of them on the same point.
>
> In my opinion, it was not the intent of the Act to provide facilities for endless exercises of litigious habits or gambits by employers or employees; the purpose was to introduce some order, consistency and justice into employer-employee relations by way of collective agreements under which disputes were to be resolved in the grievance process and ... as a last resort ... by adjudication. In other words, a legislative effort, has been made to establish what might be termed the rule of law in place of unfettered administrative discretion in the one hand and

> irresponsible employee protests on the other ... Repetitive and unnecessary adjudications would amount to a waste of public funds and resources."[35]

More recently Adjudicator Beatty has observed;

> "Faced with such an unequivocal interpretation of the very provisions of the same collective agreement as those which are in issue before me, I would be loathe to interfere with such settled opinion (and the parties' subsequent reliance on it) unless I were satisfied that it was clearly in error. Were one to adopt any other position, the effect of an adjudicator's decision would be merely transitory and devoid of impact, and the parties would be encouraged to "re-arbitrate" any decision unfavourable to their interests. Moreover it is not as if an aggrieved party is remediless in the face of an award whose validity it disputes. This employer is more than familiar with the proper means by which it could have challenged an award such as Larose had it wished to do so. It is to those procedures rather than to a subsequent arbitration proceeding that resort should have been had if the employer wished to challenge the Larose award."[36]

A review of the decisions of the Board reveals for the most part the application of the principles enunciated by both Adjudicators, Jolliffe and Beatty. Nevertheless on some issues and in particular those involving the interpretation and application of special leave provisions common in most collective agreements, the part-time members of the Board appear equally divided as to the relevant principles to be applied and the success or failure of a particular application for special leave especially relating to snowstorms is very much contingent upon which Adjudicator the parties draw and to what school he or she belongs[37].

It can be argued that following of the doctrine of precedent and a high degree of consistency in the decisions of the adjudicators can work to the detriment of the parties by introducing too much rigidity and a slavish adherence to precedent into the system.

But it must be remembered that there are now 16 certified bargaining agents, the Treasury Board and four

separate employers administering collective agreements for approximately one hundred bargaining units in the Federal/Public Service[38].

Many of the collective agreements have common clauses with identical language and as a result an adjudication decision affecting one employee, in one particular bargaining unit may have implications throughout a large segment of the public service affecting a number of bargaining units.

Whereas in the private sector an arbitration is resolving a dispute concerning only one bargaining unit, one local union and one employer and this decision will not affect any other employment situation.

Thus it may be argued that an ad hoc system of arbitration in the Federal/Public Sector operating without regard to previous decisions would have a deleterious affect on industrial relations and that the interests of the parties would be better served by a system that encourages uniformity and stability in the adjudication process.

As the decisions of adjudicators may have a service wide affect most reasons for decisions drawn by adjudicators are fully supported with both public and private sector authorities and where applicable, court decisions. Section 96 of the Act requires an adjudicator after considering the grievance to render a decision thereon, and to send a copy of the decision to each party and its representative, to the bargaining agent, and to deposit a copy of the decision with the Secretary of the Board. Section 99 (3)(d) empowers the Board to make regulations respecting the form of decisions rendered by adjudicators and by Section 86(1) of the Public Service Staff Relations Board Regulations and Rules of Procedures[39], the Board has directed that the decision of an adjudicator or a Board of Adjudication shall contain; (a) a summary statement of the grievances, (b) a summary of the representations of the parties (c) the decision on the grievance, and (d) the reasons for decision.

Statutory Nature of Adjudication System

As the adjudication process is established by the statute,

adjudication proceedings in the normal course have been open to the public[40] whereas arbitration proceedings are of a private nature and the public is not permitted to attend.

The Remedial Authority of the Arbitrator as Compared with that of the Adjudicator

In Ontario, Section 37(1) of the Labour Relations Act, provides in part as follows:

> "Every collective agreement shall provide for the final and binding settlement by arbitration ... of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement ..."[41]

The imperative of the Section, namely; that arbitration of a dispute shall provide for the final and binding settlement of that dispute has been interpreted as being the basis to vest Arbitration Boards with wide remedial authority.

As early as 1950, Professor Bora Laskin, now C.J.C. concurred in by Mr. C.L. Dubin, (now Mr. Justice Dubin S.C.O.) sitting as arbitrators in the case of United Electrical, Radio Machine Workers of America, Local 514, and Re. Amalgamated Electric Corporation[42], having determined on the merits that the company had violated an article in the applicable collective agreement in refusing to give an employee a three day trial period as a factory clerk, after the employee had been laid off, was requested by the union to hold a further hearing for the purpose of establishing the amount of compensation to which the employee was properly entitled.

The company took the position that the Board had no jurisdiction to deal with the question of compensation or damages and that the Board was limited to a mere declaration of the meaning of the Collective Agreement.

The Board stated at p. 603:

> "As a matter of principle, and in light of the terms of the Agreement, this Board is of opinion that its powers to make a binding decision involves powers to direct such affirmative action as would remedy, the breach declared to exist. A declaration or finding divorced from a direction for its implementation does not in this Board's view, meet the requirements of a binding decision. A decision is binding

> when it requires the doing or not doing of something by the defaulting party, related to the default of which it is guilty and intended as a remedy for such default. In so far as a declaration carries no obligation of compliance in relation to the specific case, it cannot be a binding decision."

In 1973, the Ontario Divisional Court had occasion to address itself to the same general issue in the case of Re. Samuel Cooper and Co. Ltd., and International Ladies Garment Workers Union et al[43].

In that case Dean Arthurs, sitting as an Arbitrator found that the Applicant had violated its collective agreement with the Respondent, Union, in having contracted out work to non-union shops and in doing so had failed to observe the Union's security provisions of the agreement and failed to remit payments in respect to the sick benefit, retirement, severance pay and welfare funds. Dean Arthurs ordered the Applicant to pay damages in respect of its failure to make contributions to the various funds and ordered the company to require all of its employees to become members of the union; to deduct from the wages of each employee the monthly union dues; to commence contributions to the various funds and to cease sub-contracting. The case came before the Divisional Court on an application for Judicial Review to quash the award of the Arbitrator. Mr. Justice Lacourciere, for the Court at page 846, having referred to the above noted award in Amalgated Electric Corporation stated:

> "In our opinion, the jurisdiction of the Arbitrator, was sufficiently wide to encompass a full range of remedy, unless, expressly limited by the Labour Relations Act or the terms of the Collective Agreement. I can find no such limitation and wording in Section 37(1) of the Act is such that the Arbitrator was correct in this particular case in making the orders provided."

Specific Remedies Fashioned by Arbitrators in the Private Sector

A. Remedies

(i) Damages

In the case of Re. Oil Chemical and Atomic Workers and

Polymer Corporation Ltd.,[44] on an application for certiorari arising out of an arbitral award by then Arbitrator Laskin, the issue arose as to whether the Arbitration Board had power to award damages for breach of the terms of the Agreement even though such power was not expressly stated therein. The Collective Agreement between the union and the employer were governed by the Industrial Relations and Disputes Investigation Act[45] which provided for arbitration as an ultimate resort of any grievance involving alleged misrepresentation or violation of the provisions of the Agreement. Section 19(3) of that Act, required that every person bound by the agreement;

> "Shall comply with the provision for final settlement contained in the agreement and give effect thereto".

At page 182 of the decision Mr. Justice McRuer stated as follows:

> "In the second place, it (the collective agreement) is not that sort of contract that can be terminated by repudiation by one party merely because the other party has broken one of its terms. Under the Statute "all differences between the parties" must be settled without stoppage of work. I think this aspect of the matter raises a stronger inference that the matter of damages for breach of the agreement should be assessed by the Board of Arbitration than in the case of a mere commercial contract ...
>
> My conclusion is that, unless there is force in the argument that the Board cannot award damages against the union because it is not a legal entity, I think it must be taken that it has the same jurisdiction with respect to damages suffered by the employer as by the employees."

Mr. Justice McRuer then determined that on account of the fact that a Trade Union has the legal capacity to enter into a collective agreement, it also has the capacity to incur liability for damages. Mr. Justice McRuer's decision was subsequently appealed to the Ontario Court of appeal and ultimately to the Supreme Court of Canada. Mr. Justice Cartwright who delivered the Judgment of the Court, dealt with the jurisdiction of an Arbitral Board to award and assess damages and stated at page 342 of the decision:

> "On this branch of the matter, I find myself, as did the Court of Appeal, in complete agreement with the reasons of McRuer, C.J.H.C., and for the reasons given by him I would dismiss the appeal".[45]

B. Substitution of Lesser Penalties for Disciplinary Offences

In the case of Port Arthur Ship Building Company and Harry W. Arthurs et al[46], the Supreme Court of Canada determined that Arbitrator Arthurs who had substituted the penalty of suspension for that of discharge had exceeded his jurisdiction by amending the provisions of the particular collective agreement, which agreement did not contain a provision empowering an Arbitrator discretion to vary penalties.

Mr. Justice Judson for the Court stated at page 95;

> "Furthermore, and as I have already indicated there is no doubt in my mind that the award should be quashed. An Arbitration Board of the type under consideration has no inherent powers of review similar to those of the Court's. Its only powers are those confered upon it by the collective agreement and these are usually defined in some detail. It has no inherent powers to amend, modify, or ignore the collective agreement. But this is exactly what this Board did in this case and it was clearly in error in so doing, and its award should be quashed".

It is, of course, readily apparent that in the language adopted by Mr. Justice Judson in Port Arthur's there is a complete contradiction of the ratio of Polymer, a decision of the same Court. In fact, Mr. Justice Judson did not even refer to the Polymer case in his judgment. Professor Paul Weiler in his article "The Remedial Authority of the Labour Arbitrator"[47] comments at page 40;

> "This analysis which was adopted by Judson, J., without any further contribution of note is not an adequate response to the issue. The clear implication of Polymer is that the scope of remedial authority in arbitration is not to be assessed by reference only to the written intention of the parties; equally important is the statutory context of a Labour Relations Policy in favour of final and binding settlement of disputes through arbitration".

Subsequent to the Supreme Court of Canada decision in

Port Arthur, the Ontario Legislature amended the Ontario Labour Relations Act, by explicitly conferring jurisdiction on Arbitrators to grant whatever remedies they believed to be just and equitable when they found discipline to be unjustified and thus Section 37(8) of the Act now provides:

> "Where an Arbitrator or Arbitration Board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction, that is the subject matter of the Arbitration, the Arbitrator or Arbitration Board may substitute such other penalty for the discharge or discipline as to the Arbitrator or Arbitration Board seems just and reasonable in all of the circumstances."

C. Remedy in Kind

A remedy has been adopted in a number of cases dealing with missed opportunities to perform overtime arising out of the interpretation of collective agreements, which provide for equal distribution of overtime. Having determined that an employe has been by-passed to perform overtime in contravention of the applicable clause in the collective agreement, arbitrators rather than awarding payment for the missed opportunity have directed the employer to grant the aggrieved employee another opportunity. In the case of Re. Canadian Johns-Manville and International Chemical Workers, Local 346,[48], Arbitrator Burkett, reviews the jurisprudence and at page 271 refers to Re. Rothmans of Pall Mall Canada Limited and Tobacco Workers' International Union, Local 319[49], at p. 62-3 (Shime), as authority for the proposition the quote reads as follows:

> In the missed overtime cases the better practice would be to provide a remedy in kind where possible. This remedy adequately compensates the employee and does not punish the employer by making it pay twice for work performed. While this remedy must depend on the particular wording of the collective agreement, the difficulty lies in recreating the situation by giving an employee the opportunity when he is available and in circumstances that do not affect other employees. Under some collective agreement where there is an "equalization" clause it is possible to award a remedy in kind as it can reasonably be achieved. Under other agreements the situation cannot be recreated particularly because it affects other employees and, accordingly, a monetary award is more appropriate."

Although not explicitly stated, it is apparent that the rationale for such a remedy in kind is based upon not only the collective agreement but also the Statute, namely; Section 37 of the Labour Relations Act as it has been interpreted in the earlier cases discussed.

Equitable Relief

Under this heading, it is necessary to consider whether Arbitrators in the private sector based on the interpretation of the Statute or the Collective Agreement have authority or jurisdiction to grant relief in the nature of specific performance or in the nature of a mandatory injunction upon the basis that there is a necessity to vest in an Arbitrator a full range of remedies in order to effect a final and binding settlement of a dispute between the parties. Reference has already been made to the case of Re. Samuel Cooper & Co. Ltd. and International Ladies' Garment Workers Union et al[50]. As indicated, the Divisional Court had occasion to review a decision of Dean Harry Arthurs where the Arbitrator had ordered the Company;

1. to require all of its employees to become members of the Union;
2. to take from the wages of each employee the monthly Union dues;
3. to commence contributions to the various funds; and
4. to cease sub-contracting.

Mr. Justice Lacourciere for the Court stated at page 845:

> "The applicant's complaint is that these provisions of the award are in the nature of mandatory injunctions on issues and questions not directly referred to him. The applicant argues that a mandatory injunction should not issue where damages would be an adequate remedy at law: London & Blackwell R. Co. v. Cross (1886), 31 Ch.D. 354 at p. 369; Ramsay v. Barnes (1913), 5 O.W.N. 322, Cadwell & Fleming v. C.P.R. Co. (1916), 37 O.L.R. 412 at pp. 421-4, 28 D.L.R. 190; Carroll v. Perth (1863), 10 Gr. 64. It is also argued that such injunction should not be issued where it would require continued supervision

or superintendence" Attorney-General v. Staffordshire County Council, [1905] 1 Ch. 336; Ryan v. Mutual Tontine Westminster Chambers Association, [1893] 1 Ch. 116 at p. 128.

It is clear in our opinion, that, at the time of the making of his award, the arbitrator had decided that the collective agreement was subsisting, notwithstanding expiry of the duration period set out in article 46 (July 31, 1972) inasmuch as neither party had given the required notice of its desire to terminate. The arbitrator in the questioned portion of his order in effect directed the applicant to adhere to the terms of the collective agreement, to prevent continuing violations, and to prevent "the unpleasant and expensive prospect of a series of fresh claims and proceedings to correct a series of breaches".

We are all satisfied on the record that the arbitrator correctly concluded after hearing evidence that any and all conditions precedent to the hearing of the grievance had been satisfied, that article 32(b) was directory. The only course open to him to bring in a final and binding settlement by arbitration of the differences between the parties involved the making of affirmative directions. With respect to the arbitrator's power to take such affirmative action, this Court has been referred to the language of Section 37(1) of the Labour Relations Act, R.S.O. 1970, C. 232, which reads:

> 37(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable".

Mr. Justice Lacourciere continued at page 846;

> "It appears that the special tribunals created by unions and employers, and directed by statute to bring about final and binding settlement of all differences, ought to have the necessary powers to achieve such results."

Federal Public Sector

A review of the Public Service Staff Relations Act evidences no provision similar to that contained in Section 37(1) or (8) of the current Ontario Legislation stipulating that a collective agreement shall provide final and binding

settlement by Arbitration of all differences between the parties or expressly conferring upon an Adjudicator or Arbitrator power or authority to substitute other penalties for discharge or discipline. Rather the only Sections of the Act that appears applicable to the question of the jurisdiction of the Adjudicator are Sections 95, 96 and 98 of the Act which read as follows:

> "95(1) Subject to any regulation made by the Board under paragraph 99 (1)(d), no grievance shall be referred to Adjudication and no Adjudicator shall hear or render a decision on a grievance until all procedures established for the presenting of the grievance up to and including the final level in the grievance process have been complied with.
>
> (2) No Adjudicator shall in respect of any grievance render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.
>
> (3) Where (a) a grievance has been presented up to and including the final level in the grievance process, and
>
> (b) the grievance is not one that under Section 91 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.
>
> 96(1) Where a grievance is referred to Adjudication, the adjudicator shall give both parties to the grievance an opportunity of being heard.
>
> (2) After considering the grievance, the adjudicator shall render a decision thereon and (emphasis added)
>
> (a) send a copy thereof to each party and his or its representative, and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and
>
> (b) deposit a copy of the decision with the Secretary of the Board.
>
> (3) In the case of a board of adjudication, a decision of the majority of the members on a grievance is a decision of the board thereon, and the decision shall be signed by the chairman of the board.

(4) Where a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take such action. (emphasis added)

(5) Where a decision on any grievance requires any action by or on the part of an employee or a bargaining agent or both of them, the employee or bargaining agent, or both, as the case may be, shall take such action. (emphasis added)

(6) the Board may, in accordance with Section 20, take such action as is contemplated by that Section to give effect to the decision of an adjudicator on a grievance but shall not inquire into the basis or substance of the decision."

Section 98 provides:

"(1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and

(a) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and

(b) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies,

either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the chief adjudicator who shall personally hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.

(2) the chief adjudicator shall hear and determine the matter so referred to him as though it were a grievance, and subsection 95(2) and Sections 96 and 97 apply to its hearing and determination". (emphasis added)

From the author's review of the authorities, it is apparent that the remedial authority of adjudicators of the Public Service Staff Relations Board arising out of these Sections of the Act have not been the subject matter of any direct comment by the Federal Court of Appeal. The only decision that is marginally relevant is that of Sant P. Singh,[51] wherein

Chief Justice Jackett upon a Section 28 Application directed an adjudicator who having determined that there had been breaches of a collective agreement with respect to the pay of this specific employee then directed the matter back before the adjudicator for a decision as to what relief should be awarded to the Applicant for such breaches.

The Sections of the Statute above set out were not considered or commented upon in the text of the decision. Rather the decision merely contemplated that the Adjudicator did have jurisdiction to award relief for the breaches of the collective agreement. It is apparent from the above noted Sections that the only jurisdiction expressly conferred upon an adjudicator is to render a decision pursuant to Section 96 (2) and under Section 96 Subsections (4) and (5), it may be argued that it is contemplated that the jurisdiction or authority of the adjudicator goes beyond mere declaration as the Section contemplates an adjudicator requiring action on the part of the Employer or the bargaining agent and the Sections then require the Employer or the bargaining agent to take such action. Certainly the statute is silent with respect to any express remedial authority.

A review of the reported adjudication decisions dealing with the general issue of the remedial authority of the adjudicator under the Act reveals a lack of hard analysis of the above noted sections and a rather blind application of the private sector awards and jurisprudence, although those awards and jurisprudence were decided with reference to specific statutory enactments such as Section 37 of the Ontario Labour Relations Act, which expressly provide for the final and binding settlement by arbitration of all differences between the parties. Nevertheless, it is useful to canvass the authorities to date.

A. Damages

The Public Service Staff Relations Board has been granting relief in the nature of damages and in fact did so in the very first case that was scheduled for adjudication, namely; Caron [52], wherein the first Chief Adjudicator, H.W. Arthurs

determined that Caron had been wrongfully terminated from his employment status as a public servant and accordingly, awarded to him by way of compensation an amount of money equal to six months pay. There was no discussion in the decision of the Adjudicator's authority to award damages.

It is of interest that the first occasion from the author's review of the decisions that the issue was squarely raised, was not until 1978 in the case of Underhill and the Treasury Board (Post Office Department)[53]. Underhill filed a grievance protesting the employer's failure to supply him with his clothing entitlement of work trousers pursuant to an article in the applicable collective agreement. Upon the facts, Adjudicator Norman, determined that in fact the grievor was delayed in receiving his work trousers. Counsel for the Union relied on the case of Polymer Corporation referred to supra and requested of the Adjudicator that he go beyond a mere declaration that the collective agreement had been violated to assert his authority to award damages in the matter. Adjudicator Norman stated as follows at page 3 of the decision:

> "In the course of his argument, Mr. Baxter asserted that this was a 'test' case to determine whether adjudicators under the Public Service Staff Relations Act had jurisdiction to award monetary damages. Although I have not been able to find any as assistance in adjudication decision, I am satisfied that an adjudicator stands on the same footing in this regard as does any other statutory arbitrator. The statutory arbitrator's jurisdiction to award damages has been widely approved in the years since the Polymer award. Recent judicial endorsation of the principle is to be found in Re. Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America (1976)8 O.R. 103, where the Ontario Court of Appeal states at 114:
>
> > There is no specific limitation on the jurisdiction of the Board with respect to monetary awards. It is within the general jurisdiction of the board of arbitration to make a monetary award for breach of the collective agreement which award is necessary to place the injured grievor in the position he would have been in

had the contract been carried out; Re. Polymer Corp. and Oil Chemical and Atomic Workers Union, Local 16-14".

Having so stated, Adjudicator Norman, found, however, on the facts of this case that this was not an occasion on which he ought to exercise his jurisdiction to award monetary compensation for breach of a collective agreement as the subsequent remedy in kind initiated by the employer was endorsed as being a sufficient compensatory measure in the circumstances of the case, that is, he was subsequently provided with his trousers.

Noticeably absent from the decision is any analysis of the statutory provisions in the Public Service Staff Relations Act as compared with the then Section 19(3) of the Industrial Relations and Disputes Investigation Act that was being interpreted in Polymer.

In the case of Rohana Goodale and the Treasury Board (Post Office Department)[54] Goodale had been released during her probationary period but rather then launching a grievance alleging disciplinary discharge she grieved a violation of the training clause in the applicable Collective Agreement and asked for reinstatement with no loss of pay. In his first decision the then Chief Adjudicator Jolliffe declined jurisdiction upon the grounds that as a former employee alleging a violation of the collective agreement in accordance with Sections 90 and 91 of the Act he did not have jurisdiction to hear and determine the grievance. The case was then taken by the Union to the Federal Court of Appeal wherein the Federal Court reversed the earlier decision and determined that the adjudicator did in fact have jurisdiction. Having determined that the employer had in fact violated the training clause in the collective agreement the issue that required determination in the second Goodale case was whether or not an Adjudicator under the Public Service Staff Relations Act in dealing with a rejected employee, pursuant to Section 28 of the Public Service Employment Act and having determined that the employer had violated the training clause in the collective agreement had jurisdiction to reinstate the employee or in the alternative, to fashion another remedy.

Counsel for the grievor referred to the Polymer decision as authority for the proposition that an Adjudicator was free to fashion the remedy that appeared appropriate in the circumstances of the case and argued that there was no ground for distinguishing between the private sector and the public sector, and that the law as established in Polymer was applicable to adjudications under the Public Service Staff Relations Act.

Counsel for the employer, the author in this case, argued that he knew of no authority to prevent the adjudicator from fashioning a remedy by way of compensation or otherwise, although contended that an adjudicator had no jurisdiction to reinstate a rejected employee as this would involve an appointment which could only be made by or on behalf of the Public Service Commission. The then Chief Adjudicator stated at page 61 of the decision:

> "My view is that counsel for the employer was right on both counts, and also that counsel for the grievor was right in asserting that the principle of Polymer is applicable".

He continued:

> "In her original grievance, Ms. Goodale, requested reinstatement with pay and the training provided for by Article 39.09. The relief sought was in the nature of an order for "specific performance".
>
> As already indicated, such an order cannot be made to reinstate the grievor would amount to appointing or re-appointing her as a probationary employee. Employer's counsel relies on the doctrine that appointments are exclusively the prerogative of the Public Service Commission. ... to interpret Section 91 and 96 of the Public Service Staff Relations Act in such a way as to conflict with the provisions of the Public Service Employment Act, would offend against Section 56(2) of the Public Service Staff Relations Act itself (which provides that no collective agreement shall provide directly or indirectly for the alteration

> or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment.
>
> (a) the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation, or
>
> (b) that has been or may be, as the case may be, established pursuant to any Act specified in Schedule III.)
>
> and would be contrary to the principle made clear in the second Gloin decision by the Adjudicator, and endorsed by the Court in its second Gloin Judgment. In my view an adjudicator has no power to order reinstatement in a case where the grievance is based on a violation of the agreement and not on a unlawful discharge".

At page 63 of the decision the Adjudicator continued:

> "Reinstatement being impossible, another form of relief must be devised. The only practical and effective alternative, ... would be monetary compensation".

and accordingly, the Chief Adjudicator awarded to the grievor by way of damages or compensation six months pay.

Again, absent from this decision is any reference to the statutory authority in the Public Service Staff Relations Act conferring jurisdiction upon an Adjudicator to award damages. Nevertheless, it is apparent from the decision that on account of the provisions of Section 56 of the Public Service Staff Relations Act an adjudicator is restricted in fashioning a remedy from requiring that either party do something that would require the enactment or amendment of any legislation by Parliament.

The second Goodale decision was applied and damages awarded in the Singh case[55]. The Board determined that the grievor had been denied advancement beyond a certain pay barrier on account of polititial bias by the employer and the adjudicator

lacking jurisdiction, as determined by the Federal Court of Appeal, to exercise the discretion of the Deputy Head to advance the grievor, the Board awarded damages in the amount of $9,300.00 for loss of earnings and loss of increase in employment benefits.

Does an Adjudicator have the Power to Substitute or vary Disciplinary Penalties

In the case of Gerald W. Parashchyniak and the Treasury Board, (Post Office Department)[56], the grievor had presented a grievance grieving his discharge from the Post Office Department as a result of his involvement in an illegal walk-out. The then Chief Adjudicator Jolliffe substituted a penalty of nine months suspension without pay or other benefits. The issue arose in the case as to whether an adjudicator had jurisdiction to vary the disciplinary penalty meted out by the employer, where the employer had proved cause for the imposition of a disciplinary penalty.

During the course of argument, counsel for the employer argued that the adjudicator had no jurisdiction to reduce the penalty. The Chief Adjudicator reasoned as follows at page 43 of the decision:

> "If this novel suggestion had any merit, I would have expected it to be tested in the Courts long ago. The only authority mentioned by counsel was Port Arthur Shipbuilding Co. v. Arthurs et al (1969) S.C.R. 85; (1968) 70 D.L.R. (2nd) 693.
>
> In the case cited the Supreme Court of Canada (confirming Brooke, J. and reversing the majority in the Ontario Court of Appeal) quashed a majority "award" reducing the discharges of three employees to suspensions. The case turned on certain language in the Ontario Labour Relations Act and even more clearly on the provisions of a collective agreement in the private sector. A board of arbitration had functioned under clauses of that agreement relating to management rights, grievances and arbitration. In the judgment of the Supreme Court it was said by Judson, J.: "But as the agreement is presently drawn the Board's power is limited to a determination whether management went beyond

> its authority in this case". He also said: "An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement ...."
>
> In this case, I am not acting under powers conferred by a collective agreement. The grievor had a statutory right to grieve and to refer his grievance to adjudication under Sections 90 and 91 of the Public Service Staff Relations Act. In hearing and determining the case, I am exercising the jurisdiction vested in me by Sections 92, 94, 95 and 96 of the Act. Under Section 96(2) I have a duty to render a decision, and under subsections (4) and (5) the employer and the employees are bound thereby. The "jurisdiction" or "power" to decide this case is to be found in the provisions of the statute rather than the language of an agreement.
>
> It is important to understand that the provisions of Part IV of the Public Service Staff Relations Act every "employer" and every "employee" (as defined by the Act) whether or not any collective agreement exists. Thus, even if there had been no collective agreement in force with respect to Gerald Parashchyniak in January, 1974, or even if he had been excluded as a managerial and confidential employee from the coverage of an existing agreement, his rights to grieve against a disciplinary discharge and to refer his grievance to adjudication would have been identically the same, and my duty to render a decision would have been no different.
>
> For the foregoing reasons I do not think the principle of the Port Arthur case is applicable to this adjudication. I have dealt with the point at some length because --- as far as I am aware --- it was raised for the first time at the hearing of this case before me on April 11, 1974, after a period of seven years in which adjudicators have repeatedly exercised in discharge cases the jurisdiction described above."

This decision was not challenged in the Court, pursuant to Section 28 of the Federal Court Act nor is the

author aware of Port Arthur being raised in any subsequent adjudication. Nevertheless, it is certainly apparent that the Public Service Staff Relations Act contains no specific remedial authority expressly conferring upon an Adjudicator a discretion to vary disciplinay penalties. It is of interest to note that the Special Joint Committee on Employer/Employee Relations in the Public Service in its report to Parliament dated February 26th, 1976, specifically recommended at page 47 of its report, Recommendation 60:

> "That an Adjudicator should be empowered to rescind the termination where he upholds the employees grievance or substitute other action if the employer's action was not well-founded, but he should not be empowered to recommend or effect an alternate appointment".

Nevertheless, in light of the Port Arthur case and in light of the lack of an express provision in the Public Service Staff Relations Act, expressly conferring upon an adjudicator the above described discretion it is apparent that the Treasury Board as employer would not wish to challenge the authority of an adjudicator to substitute a lesser penalty in disciplinay cases

Of interest to this particular discussion and to the general subject of remedial authority of the adjudicator is the effect of the recently decided case of the Supreme Court of Canada in Heustis v. New Brunswick Electric Power Commission Case[57]

In that case, an employee of the New Brunswick Electric Power Commission was discharged for acts committed during an illegal strike. His dismissal was referred to an adjudicator under Section 92 of the Public Service Labour Relations Act, R.S.N.B. 1973, C. p. 25, which Act was patterned after the Public Service Staff Relations Act. The adjudicator found that the employee deserved some discipline but ruled that he had no jurisdiction to vary the penalty of discharge imposed by the employer. The grievor applied for an order of certiorari in the New Brunswick Supreme Court which held that the Adjudicator had jurisdiction to vary the penalty. The employer appealed to the Court of Appeal of New Brunswick which Court allowed the appeal and set aside the order quashing the adjudicators decision. The grievor appealed to the Supreme Court of Canada which allowed the appeal and restored the judgment of the Supreme Court of New Brunswick.

The Supreme Court of Canada, per Dickson, J., held that the adjudicator had authority to vary the penalty. Mr. Justice Dickson having referred to Section 92(1) of the N.B. Public Service Labour Relations Act which contains language virtually identical to Section 91 of the Public Service Staff Relations Act, stated at p. 116:

> "The collective agreement in this case, more importantly, the applicable statutory provisions respecting adjudication, can be readily distinguished from those operating in the Port Arthur Ship Building Case. There being nothing in either the agreement or the Act, which expressly precludes the adjudicators exercise of remedial authority, I am of the opinion that an adjudicator ... has the power to substitute some lesser penalty for discharge where he had found just and sufficient cause for disciplinary action, but not for discharge."

It is apparent then that the Supreme Court of Canada has adopted the approach of Mr. Jolliffe in Parashchyniak and presumably as the language of the New Brunswick Act is virtually identical to that in the Federal Act, it is arguable that adjudicators have the same power, albeit, that there is no specific provision in the statute conferring that jurisdiction on adjudicators.

Remedy in Kind

As discussed in the Section dealing with the remedial authority of a private sector arbitrator whereby arbitrators have awarded remedies in kind, it is apparent that on a number of occasions adjudicators in the public sector have fashioned a similar remedy.

In the Maille case[58], where the employer had erroneously and in contravention of the provisions of the collective agreement failed to offer overtime work to an employee, it was determined that an employee would not as a matter of course be entitled to damages for wages lost due to his having been deprived of the overtime opportunity if a comparable substitute opportunity to work overtime could be provided at a later date.

Similarly, see the case of Underhill[59], discussed supra herein.

Equitable Relief

It is interesting that the Public Service Staff Relations Board although having determined that it has jurisdiction to award damages under the statutory provisions of the Public Service Staff Relations Act, nevertheless, had determined that it does not have jurisdiction under the Act to fashion a remedy by way of equitable relief.

In the case of The Canadian Union of Postal Workers and the Treasury Board[60], involving a Section 98 (policy) grievance, wherein it was alleged that management at the Post Office had failed to observe or carry out certain obligations relating to notice of technological change and had requested enforcement of the obligation, the Board had to determine its jurisdiction to award equitable relief, and in particular was requested to make a declaration or order that the employer implement no further technological changes until the grievance procedure established under the pertinent article in the collective agreement had been exhausted. The Chief Adjudicator Mr. Jolliffe, determined as follows at page 63 of the decision:

> "In the first place, there is no express provisions in Section 98 of the Act for the granting of injunctive relief. This decision does not turn on the point, but it may be appropriate to comment on the limits of equitable jurisdiction. When Parliament enacted the Federal Court Act, it was thought necessary to provide expressly in Section 18 that "the Trial Division has exclusive original jurisdiction to issue an injunction ..." in certain cases, and it was further provided in Section 44 that "in addition to any other relief that the Court may grant or award, a mandamus, injunction or order for specific performance may be granted ... by the Court in all cases in which it appears to the Court to be just or convenient to do so ..." No such provisions appear in the Public Service Staff Relations Act. It seems clear that the jurisdiction to grant injunctions and other equitable remedies, long exercised by superior courts of the provinces, can be vested in other tribunals only by express enactment."

At page 65 of the decision the then Chief Adjudicator stated further:

> "The bargaining agent here seeks enforcement of certain obligations under a collective agreement. Although questions of law have arisen, the problem is essentially one of labour-management relations; this is not a lawsuit. Litigants frequently resort to the Courts for remedies which are not always appropriate to the resolution of a dispute between management and a union. Section 98 of the Act seems to have been designed to provide the parties with assistance in the administration of their agreements and not to vest in this Board the power to impose extraordinary sanctions such as the injunction. True, certain decisions such as re Coles, 169-2-12 and 168-2-31) and re Maloughney (169-2-24 and 168-2-47) required payments of money to individuals, but such payments necessarily resulted from the obligations found to have existed in the applicable collective agreements".

The above noted decisions appear to the author to contain certain inconsistencies with respect to the general remedial authority given to an adjudicator under the Act. On the one hand, the Board has stated that it has no jurisdiction to grant equitable relief as such relief can be vested in the Tribunal only by express enactment, yet on the other hand, the Board appears to have adopted the principles in Polymer albeit in the technological change case it is contemplated that the Board can award payments of money to individuals where there has been a breach of the collective agreement. However, in the private sector, it appears that jurisdiction to grant equitable relief, from the case law reviewed is based exactly upon the same reasoning that a private sector arbitration tribunal was deemed to have jurisdiction to award damages as in Polymer.

The other inconsistency, of course, is the position of the Board that the decision in Port Arthur Shipbuilding is not applicable to the Board albeit that it does not have express provisions in the Act conferring jurisdiction on it to substitute or vary disciplinary penalties, yet in the case of equitable relief it is found that because it does not have that express relief it cannot in law grant such relief.

Enforcement of Adjudication Decisions

The enforcement of adjudication decisions is provided for in three sections of the Act. Section 96 of the Public Service Staff Relations Act requires that where a decision on a grievance referred to adjudication requires any action by or on the part of the employer or requires any action by or on the part of an employee or bargaining agent or both of them the party concerned shall take such action[61]. Section 96(6) authorizes the Board in accordance with Section 20 of the Act to take such action as is contemplated by that Section to give effect to the decision of the adjudicator on a grievance.

Section 20 of the Act empowers the Board to examine and inquire into any complaint inter alia that the employer or an employer organization, or persons acting on their behalf has failed to give effect to a decision ... inter alia ... of an adjudicator with respect to a grievance.

Pursuant to Section 20, Subsection 2, if the Board determines that any person has failed to implement an adjudicator's decision the Board itself may direct that the person concerned comply with the Board's order or direction.

Since 1967 to date out of one hundred and seventy six complaints referred to the Board pursuant to Section 20 of the Act, nineteen complaints have concerned alleged failures to give effect to a decision of an adjudication[62].

In the event there is failure to comply with the Board's order or direction the Board is directed pursuant to Section 21 of the Act to forward to the Minister through whom it reports to Parliament a copy of its order, a report of the circumstances, and all relevant documents, who in turn is directed to lay the relevant documents before Parliament within fifteen days after receipt thereof. From the inception of the legislation to date it has not been necessary for the Board to resort to this means of enforcement[63].

There is no provision in the Public Service Staff Relations Act similar to Section 37(10) of the Ontario Labour

Relations Act which provides for the enforcement of arbitration decisions in the private sector where there is a failure to comply by filing a copy of the decision in the office of the Registrar of the Supreme Court of Ontario, whereby the decision is entered in the same way as a judgment or order of that Court and is enforceable as such ...

Statutory Review

Part V of the Public Service Staff Relations Act and in particular Section 100, Subsection (1) provides that except as provided in this Act every order, award, direction, decision, declaration or ruling of an adjudicator is final and shall not be questioned or reviewed in any Court[64].

Subsection 2 of Section 100 provides that no order shall be made or process entered and no proceedings shall be taken in any court Whether by way of injunction, certiorari, prohibition, quo warranto or otherwise to question, review, prohibit or restrain ... an adjudicator in any of its proceedings[65].

Prior to the 1975 Amendements to the Act, Section 23 thereof (which was repealed at that time)[66] provided that where any question of law or jurisdiction arises in connection with a matter that has been referred ... to an adjudicator pursuant to this Act, the adjudicator, or either of the parties may refer the question to the Public Service Staff Relations Board for hearing or determination.

Since the 1975 Amendements, theBoard's consideration of such questions referred pursuant to Section 23 has been limited to referrals from adjudication proceedings commenced before the 1st day of October 1975 and to the extent that not all Section 91 references commencing prior to October 1st, 1975, have been determined at this time this Section is still relevant as there exists the possibility of further referrals[67].

Section 23 of the Act enabled the Board to review the decision of an adjudicator on specific questions of law and jurisdiction where it was alleged that the adjudicator had

erred in law or had exceeded or failed to exercise his jurisdiction. In addition, Section 23 contemplated a referral to the Board on such questions upon the request of an adjudicator for his guidance where he entertained a doubt as to the applicable law or to the extent of his jurisdiction[68].

The scope of review of the Board of adjudicators decisions contemplated by Section 23 of the Act was discussed in the case of Thomas Frost and Carlson v. The Attorney General of Canada[69].

Chief Justice Jackett for the Court stated at page 218:

> "I have no doubt that the Public Service Staff Relations Board has unrestricted authority, under Section 23 of the Public Service Staff Relations Act, to determine any question of law arising in connection with a matter that has been referred to an adjudicator under that Act. The relevant provisions of the Act seem clear and unambiguous ..."

Mr. Justice Thudow observed at page 221-222:

> "There does not appear to me to be any valid reason for giving the expression "any question of law or jurisdiction" as used in this provision a restricted meaning. In particular I can see no justification for restricting the sort of question of law referrable to the Board under Section 23 of the sort of question which would justify review of the decision of an arbitrator whether statutory or consensual, on the principles applied in certiorari proceedings. The interpretation of a contract is prima facie a question of law ..."

Thus, the Federal Court of Appeal determined that the Board in exercising its review power under Section 23 of the Act had wider powers than that possessed by a superior court in certiorari proceedings in reviewing the proceedings of statutory or consensual tribunals.

On the other hand the Board has determined that Section 23 of the Act did not provide for a party to obtain from the Board a declaratory or advisory ruling on any

question that may arise in the course of proceedings before an adjudicator[70].

In 1971 Parliament enacted the Federal Court Act[71]. Section 28(1) of the Act provided in part:

> "Notwithstanding ... the provisions of any other Act, the Federal Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi judicial basis, made by or in the course of proceedings before a Federal Board, commission or other Tribunal, upon the ground that the Board, commission or Tribunal;
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
> (c) based its decisions or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

As Section 28 of the Federal Court Act begins with the words, notwithstanding the provisions of any other Act the Court of Appeal has jurisdiction etc. ..., the Federal Court of Appeal had held in the case of Re. Attorney General of Canada and The Public Service Staff Relations Board, per Pratte,J., that the opening words of Section 28 have nullified the privitive clause in Section 100 of the Act:

> "In their ordinary and natural sense those words refer, in my view, to legislative provisions of all kinds, including privitive clauses that would otherwise limit the jurisdiction of the Court under Section 28. With respect, I cannot see any reason for ascribing a more limited meaning to those words. I am therefore of the opinion that the opening words of Section 28 have the effect of nullifying the privative clauses that were in existence at the time of the enactment of the Federal Court Act[72].

In this case another issue was whether the repeal of Section 100 of the Act and the enactment of a new Section 100(1) by Section 29 of Chapter 6 of the S.C. 1974-75, which, of course, was enacted after June 1st, 1971, the date on which the Federal Court Act came into force, affected the application of the opening words of Section 28 of the Federal Court Act. Mr. Justice Pratte held that since the new Section is in substance the same as the old and as according to Section 36(f) of the Interpretation Act[73], it is not to be read as a new law but as a consolidation and as declaratory of the law in the old Section, Section 28 of the Federal Court Act nullified this privative clause as well[74].

The scope of reviewof the Federal Court of Appeal under Section 28 of the Act was discussed in the case of Thomas Frost and Carlson v. The Attorney General of Canada, where the Court held that it had authority to substitute its own opinion in place of that of the Board or the Adjudicator on questions of interpretation. Mr. Justice Thurlow stated:

> "The jurisdiction of this Court under Section 28 of the Federal Court Act, and in particular Section 28(1)(b) is not limited to dealing with points of law which would be open if this proceeding were by way of certiorari, it seems clear that this Court is not bound to choose between and give effect either to the interpretation put upon the collective agreement by the adjudicator or to that put upon it by the Board but has authority to substitute its own opinion and to direct that its interpretation be put into effect."[75]

However, preliminary determinations made by a statutory tribunal before coming to the determination which it must make is not liable to have such preliminary determinations reviewed by the Federal Court of Appeal under Section 28. Where an error is made on a preliminary decision leading up to the final decision the decision can be set aside only if the mistake renders the final decision invalid. Thus such an interim ruling may be the basis for review of the final decision but not until the final decision requried to be made has been made.[76]

Nor will the Federal Court of Appeal interfere with a finding of fact made by a statutory tribunal unless there was a complete absence of evidence to support the finding or a wrong principle was applied in making the decision.[77]

In practical terms apart from issues of interpretation it is apparent that the Federal Court of Appeal will be loathe to interfere in references arising out of disciplinary adjudications which turn for the most part on findings of fact or the exercise by an adjudicator of his discretion, so long as the discretion is not exercised in an illegal manner.[78]

Since the deletion of Section 23 from the Act in the 1975 Amendments, the Public Service Staff Relations Board has noted a sharp reduction in the number of questions of law or jurisdiction referred to the Board and contemplates the use of Section 23 petering out as outstanding references referred prior to October 1st, 1975, are disposed of. On the other hand, the Board has noted a sharp increase in the number of references to the Federal Court of Appeal under Section 28 of the Federal Court Act

Private Sector Arbitration Influences on Public Service Adjudication

As stated most of the adjudicators appointed pursuant to the Public Service Staff Relations Act are experienced and reputed arbitrators in the private sector and as such they have drawn upon that experience and frequently utilized private sector arbitration awards to assist in the resolution of public sector grievances.

On account of the fact that the right to grieve and the rights to refer a grievance to adjudication are rooted in the statute as opposed to the collective agreement the private sector awards have been of marginal assistance in resolving jurisdictional issues.

However, adjudicators in resolving substantive questions of law involving (a) the interpretation and application of provisions in collective agreements, and (b) disciplinary grievances

have drawn heavily on the private sector awards for guidance. A survey of the case law supports the contention that there is a relatively high degree of consensus between the sectors with few exceptions.

Oneother distinguishing feature also is apparent upon a review of the public service decisions and that is the relative degree of uniformity in the adoption of major legal principles evident in the decisions which is not true of the private sector awards.

[1]Public Service Staff Relations Board, First Annual Report, 1967-68, p. 9.

[2]Public Service Staff Relations Act 1966-67 c. 72, Section 3, Public Service is defined as "meaning the several positions in or under any Department or other portion of the Public Service of Canada as specified from time to time in Schedule I," to the Act.

[3]Grievance is defined in the Act as meaning a complaint in writing presented in accordance with this Act by an employee on behalf of himself or one or more other employees...

[4]Employee is defined in Section 2 of the Act as meaning a person employed in the Public Service other than certain named categories of persons.

[5]Note, however, that Section 90 Subsection 2 provides that "an employee is not entitled to present any grievance relating to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award unless he has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies ..."

[6]Note that Section 91 Subsection 2 restricts the circumstances where an employee may refer an interpretation grievance to adjudication to those where the bargaining agent has signified in a prescribed manner, its approval of the reference, and its willingness to represent the employee in the adjudication proceedings.

[7]See discussion in Chapter 3.

[8]S.C. 1974-75 c. 16.

[9]Public Service Staff Relations Act Section 94 amended S.C. 1974-75 c. 16 s. 26.

[10]Amended S.C. 1974-75 c. 16 s. 27.

[11]Public Service Staff Relations Board Regulations and Rules of Procedure made by S.O.R. 67 155 as amended S.O.R. 72-117, revoked by S.O.R./75-604 at which time new Regulations and Rules of Procedure of Public Service Staff Relations Board were substituted effective October 22nd, 1975.

S.O.R. 75-604 Canada Gazette Part II Vol, 109 No. 20, Octo. 10, 197

[12]S.C. 1974-75 c. 16 Section 28(1).

[13]Rule 55 now see S.O.R. 75-604.

[14]Section 92(2) repealed S.C. 1974-75 c. 16 now see Section 11 as amended.

[15]S.C. 1974-75 c. 16 s. 2 repealed Section 11 of the Act and substituted the within noted provision. In addition, the definition of adjudicator in Section 2 was repealed and a new definition substitued therefor reflecting the amendment to Section 11, i.e. "adjudicator means a member ..."

[16]S.C. 1974-75 c. 16 s.2, s.32(4)(5).

[17]S.C. 1974-75 c. 16 s.2.

[18]S.C. 1974-75 c. 16 Section 2, substituting Section 11(2).

[19]S.O.R. 75. 604 Canada Gazette, Part II No. 109, No. 20, October 10, 1975.

[20]ibid, Section 6.

[21]ibid, Section 7.

[22]ibid, Section 8.

[23]ibid, Section 9.

[24]ibid, Section 10.

[25]ibid, Section 11. Prior to the 1975 Amendments to the Act, the Board had no subpoena power to compel the attendance of witnesses in adjudication hearings. The Regulation is passed pursuant to Section 20 and 108 of the Act. S.C. 1974-75 c. 16. Section 20 as amended empowered the Board to summons and enforce the attendance of witnesses in adjudication proceedings.

[26]Court File No. A-455-78.

[27]Information, G. Plant, Registrar, Public Service Staff Relations Board.

[28]Section 94 as amended s.c. 1974-75, c. 16, Section deleting references to the "Chief Adjudicator" and substituting "The Board".

[29]The author is not aware of any parties naming an adjudicator in a collective agreement since the inception of the adjudication process.

[30]Section 93 as amended, S.C. 1974-75, c. 16. Section 25 deleting the reference to "adjudicator" and substituting therefor "member".

[31]Section 94(2)(c) as amended S.C. 1974-75 c. 16 Section 26 deleting the reference to the Chief Adjudicator and substituting the pronoun "it" for the Board.

[32]R.S.C. 1970, Ch. J-2.

[33]Public Service Staff Relations Board Eleventh Annual Report 1977-78 Minister of Supply and Services 1978, p. 35.

[34]Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration under the Labour Relations Act (July, 1978)

[35]Derbyshire and Treasury Board, Adjudication File No. 167-2-5 at p.4. (Jolliffe).

[36]Chandler et al, Adjudication File No. 166-2-4139-4142, (Beatty).

[37]Willens, Adjudication File No. 166-2-621,
Dupras, Adjudication File No. 166-2-628,
Villeneuve, Adjudication File No. 166-2-629,
Duval, Adjudication File No. 166-2-630,
Leclair, Adjudication File No. 166-2-631,
Steele, Adjudication File No. 166-2-633,
Boutin, Adjudication File No. 166-2-635,
Guerin, Adjudication File No. 166-2-648,
Benson et al, Adjudication File No. 166-2-1557, 1565,
Lang & Paige, Adjudication File No. 166-2-4794, 4795,
Dollar, Adjudication File No. 166-2-5024 - represent one school of thought diametrically approved by the adjudicators in
Towsend, Adjudication File No. 166-2-3460,
Charbonneau & Brisebois, Adjudication File No. 166-2-4825, 4826,
and Hunter, Adjudication File No. 166-2-5387.

[38]Public Service Staff Relations Board Eleventh Report 1977-78, as of March 31st, 1978

[39]S.O.R. 75-604 10 October 1975 Canada Gazette Part II Vol. 109, No. 20.

[40]Public Service Staff Relations Board is a "Tribunal" within the meaning of Section 28 of the Federal Court Act and as such must respect the principles of natural justice.

In McKendry, Adjudication File No. 166-2-674, Chief Adjudicator E.B. Jolliffe determined that he had authority to determine that in the interestsof justice and pursuant to Section 92(2) of the

Act that a hearing should be held in camera where the grievor had been charged with an indictable offence under the Criminal Code and certain evidence to be tendered at the criminal trial would also be tendered in the adjudication and that in the circumstances it would not be in the interests of justice that any of the evidence receive publicity prior to the criminal trial.

In Bellemare, Adjudication File No. 166-2-2341 all hearings were held in camera in the interests of justice, Adjudicator DesCoteaux relying upon the decision in McKendry.

Note the McKendry case was quoted with approval by the Ontario Divisional Court in Re. Toronto Star and Toronto Newspaper Guild, 14 O.R. (2nd) 278 at pages 282-3 where Mr. Justice Grange held that an arbitration tribunal in the private sector had a discretion to determine whether the public should be admitted to the proceedings of the Board, but that where there was not full agreement the Board members to exclude the public and the board on the request of one party excluded the public the Board makes an error in law.

[41] R.S.O. 1970, c. 232.

[42] (1950) 2 L.A.C. 597.

[43] [1973] 20 O.R. 841.

[44] (1959) 10 L.A.C. 51 (Lasking) [1961] O.R. 176; affirmed [1961] O.R. 438; (C.A.), affirmed [1962] S.C.R. 338.

[45] [1962] S.C.R. 338 at 342.

[46] [1969] S.C.R. 85.

[47] Weiler, P., The Remedial Authority of the Labour Arbitrator, Canadian Bar Review, 1974, Volume LII.

See also;

Steinberg, M., The Remedial Authority of the Labour Arbitrator A Postscript, 15 Osgoode Hall Journal No. 1 at p. 251.

[48] (1976) 12 L.A.C., 2nd, 266.

[49] (1974) 8 L.A.C. 2nd. 60 at pp. 62-3.

[50] [1973] 2 O.R. 841.

[51] Unreported Court File No. A-614-77 and A-247-78.

[52]Adjudication File No. 166-2-1 (Arthurs).

[53]Adjudication File No. 166-2-2773 (Norman).

[54]Adjudication File No. 166-2-3050 (Jolliffe).

[55]Adjudication File No. 166-2-3077 (O'Shea).

[56]Adjudication File No. 166-2-1184 (Jolliffe).

[57]27 N.R. 103, reference to N.B. Case.

[58]Board File No. 168-2-33.

[59]Adjudication File No. 166-2-2773.

[60]Adjudication File No. 169-2-81-837, Enforcement p. 30.

[61]Public Service Staff Relations Act, Section 96(4) and (5).

[62]Information supplied by Nicole Gaudet, Assistant Registrar, Public Service Staff Relations Board as of August 10th, 1978.

[63]Information supplied by W.L. Nisbett, Former Director, Legal Services, Treasury Board.

[64]Section 100(1) and (2) of the Public Service Staff Relations Act was repealed and re-enacted by S.C. 1974-75 c. 16, Section 29 to reflect the changes in the composition of the Board in the 1975 Amendments.

[65]ibid.

[66]S.C. 1974-75 c. 16, Section 11.

[67]Information furnished by Nicole Gaudet, Assistant Registrar, Public Service Staff Relations Board as of August 10th, 1978.

[68]See Amor Board File 168-2-4(1969) and Morrison, Board File 168-2-3(1969).

[69]/1972/F.C. 208.

[70]Morrison, Board File 168-2-3(1969).

[71]S.C. 1970-71-72 c.1.

[72] Re. Attorney General of Canada and Public Service Staff Relations Board /1977/ 74 D.L.R. (3rd) 306 per Pratte, J., at page 309.

[73] R.S.C. 1970 c. I-23.

[74] op. cit. per Pratte, J., at p. 310.

[75] /1972/F.C. 208 at p. 222.

[76] In Re. Danmor Shoes Co. Ltd., /1974/ 1 F.C. 22 (F.C.A.).
Center For. Public Interest Law v. Canadian Transport Commission /1974/1 F.C. 332 (F.C.A.).

[77] Sarro-Canada Limited v. Anti Dumping Tribunal et al /1978/ 22 N.R. 225.
P.P.G. Industries Ltd. v. Anti-Dumping Tribunal, /1978/ 22 N.R. (F.C.A.)

[78] Lew & Leibovitch v. The Attorney General of Canada et al Unreported, Court File No. A-575-78, Judgment delivered June 27th, 1979.
Boulis v. Minister of Manpower and Immigration /1974/S.C.R. 875 at 877.

CHAPTER V

LIMITS TO THE ADJUDICATION OF GRIEVANCES

There are several restrictions on the rights of employees to present a grievance going to the jurisdiction of adjudicators. By virtue of the Definition Section of the Act and in particular Section 2, thereof which contains the definition of employees, certain named classes of persons are deemed not to be employees for the purposes of the Act:

> "namely a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act, a person locally engaged outside Canada, a person whose compensation for the performance of the regular duties of his position or office consists of fees of office, or is related to the revenue of the office in which he is employed, a person not ordinarily required to work more than one-third of the normal period for persons doing similar work, a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms or conditions substantially the same as a member thereof, a person employed on a casual or temporary basis, unless he has been so employed for a period of six months or more; a person employed by or under the Board (Public Service Staff Relations Board) and a person employed in a managerial or confidential capacity[1]."

In the case of Hislop, the Chief Adjudicator, as he then was, dismissed without a hearing, a grievance which Hislop sought to refer to adjudication because at the time his alleged grievance arose, he was a casual employee with less than six months service, and as such was excluded from the application of the Act by Section 2M[2].

Former Employees

Apart from the above noted limitations, the opening words of the Definition Section, reads "employee" means a person employed in the "Public Service" and concludes "and for the purposes of this definition, a person does not cease to be employed in the Public Service by reason only of ceasing to work as a result of a strike or by reason of only of his discharge contrary to this or any other Act of Parliament. The definition of grievance in Section 2, part (b) of the Section states that for the purposes of any of the provisions of this Act respecting grievances with

respect to disciplinary action resulting in discharge or suspension, a reference to an "employee" includes a former employee ..

It is apparent then, that as Section 91 of the Act provided subject to certain conditions, that a grievance may be referred to adjudication by an "employee" that it is arguable that this right was not given to former employees, excepting those whose employment ended as a result of being on strike or as the result of an unlawful discharge. This question has been the subject matter of a number of decisions of adjudications and of the Federal Court of Appeal.

In the case of Purdy et al[3], the then Chief Adjudicator E.B. Jolliffe, determined without a hearing that three employees had ceased to be employees as defined in Section 2(m) of the Public Service Staff Relations Act, because they were no longer employed as of the date a collective agreement was signed and as such certain retroactive provisions of the collective agreement did not apply to them.

Similarly in the case of Bath[4], Chief Adjudicator Jolliffe determined that a former post mistress who had been laid off and subsequently grieved that she had not been re-appointed in keeping with commitment in the applicable collective agreement that appointments from layoff lists would be made by order of merit, was no longer an employee as such no longer had status to refer such a grievance to adjudication.

In Clark[5], an employee had presented a grievance concerning an interpretation question with the support of his bargaining agent to the final level pursuant to Section 90 of the Act, but after initiating the grievance he had resigned from the Public Service.

The issue to be determined by the Chief Adjudicator, E.B. Jolliffe, was whether a grievance can be referred to adjudication under Section 91 of the Act by a person who had ceased to be an employee since the grievance was originally presented. At page 7 of the decision, the Chief Adjudicator determined that Clark was not an "employee" within the meaning of the Act and had no right to refer his grievance to

adjudication. His decision was based on the definitions in Section 2 of the Act and the language in Section 91 where the right to refer a grievance was established within circumscribed limits. At page 11 of the decision Mr. Jolliffe rejected the application of the private sector award in Standard Bread[6] which held that the term employee was descriptive only and that a former employee was entitled to file his grievance, upon the basis that he was bound by the statutory definition of an "employee" in the Act. However, in Maloughney[7] the Board upon a reference under Section 98 of the Act determined that a former member of a bargaining unit whose employment had been terminated prior to the execution of a new collective agreement, who was seeking retroactive salary increases, as he was no longer an employee he could not present a grievance under Section 90 or to refer such a grievance to adjudication under Section 91 of the Act, the bargaining agent could refer the matter to the Chief Adjudicator under Section 98 of the Act as to enforce an obligation to which it alleged arose out of the collective agreement.

However, this trend of decisions by adjudicators concerning the rights of former employees to present grievances and refer them to adjudication has been reversed by three recent decisions of the Federal Court of Appeal.

In Lavoie vs. Government of Canada[8], a probationary employee in the Post Office Department was rejected as an unsatisfactory employee during his probationary period. The person grieved "his dismissal" and the Public Service Staff Relations Board granted him an extension of time within which to file a grievance. The Crown alleged before the Federal Court of Appeal that because the employee was rejected, that he was not an employee for the purposes of filing an application to extend the time for filing a grievance.

Chief Justice Jackett, Pratte J., concurring concluded at pages 524-525:

> "In my view, the introductory words of Section 90(1) of the Public Service Staff Relations Act must be read as including any person who feels himself to be aggrieved as an "employee".

> Otherwise a person who, while an "employee" had a grievance - e.g. in respect of classification or salary would be deprived of the right to grieve by a termination of employment e.g. by a layoff. It would take very clear words to convince me that this result could have been intended[9]".

In Re. Gloin, Brimbleby, Kwiatoski, Parney and Stewart[10], the Federal Court of Appeal allowed the grievors' appeal and quashed a decision of adjudicator Brent where she had ruled that the grievors who were grieving that they had been wrongfully dismissed during their probationary period for failure to pass mechanization training, were not employees under the Public Service Staff Relations Act and could not grieve.

Adjudicator Brent had determined at p. 6 and 7 of her decision[11]:

> "It is clear that Section 91 refers only to employees and that the definition of employee which must govern is that contained in Section 2 of the Act that definition covers only people who have ceased to work. The grievors clearly did not cease to work as a result of a strike and therefore if they are to be considered employees within the meaning of the Act they must assert they were improperly discharged as set out in the definition. ... In Section 7(1)(f) of the Financial Administration Act and in Section 106 of the Public Service Terms and Conditions of Employment Regulations one finds that the meaning of discharge is restricted to the termination of employment for breaches of discipline or misconduct! None of the grievors were discharged, all were rejected for cause, therefore, none of them were employees within the meaning of the Public Service Staff Relations Act ... There has been no allegation of discharge masquerading as some non disciplinary separation and so no possibility of asserting jurisdiction under Section 91 ...[12]"

Mr. Justice Urie for the Court determined that the adjudicator erred in finding that the Applicants were not employees:

> "In concluding as she did, that she had no jurisdiction because the grievors were not employees at the time of the reference to adjudication or at the time the grievances were filed, the adjudicator's decision is contrary to a recent decision of this Court in the case of The Queen v. Lavoie, (1977) 18 N.R. 521, where it was held that the introductory words of Section 90(1) of the Public Service Staff Relations Act include any person who feels himself to be aggrieved as an employee. Counsel for the Respondent attempted to distinguish the Lavoie case on the basis that its application was limited to the case of an employee seeking to show that a rejection was really a disciplinary discharge under Section 91(1)(b) and did not apply to a person seeking redress under Section 91(1)(a), as here. In my view there is no merit in this submission and the 'employee' as used in the introductory words of Section 91(1) must also of necessity, be read in the same manner as that word is used in the introductory portion of Section 90(1) and includes any person who feels himself aggrieved as an employee irrespective of whether he seeks redress under clauses (a) or (b) of Section 91(1). Read in this fashion, the Applicants in the case at bar are clearly included in the definition of employee as contained in Sections 90(1) and 91(1)[13]."

The last case in the trilogy is Goodale v. The Attorney General of Canada[14], whereby the grievor appealed the decision[15] of former Chief Adjudicator E.B. Jolliffe to the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act. Goodale, a Post Office employee in Windsor was rejected during her probationary period for cause. She grieved pursuant to Section 91(1)(b) of the Act and alleged that the employer had violated a clause in the collective agreement that provided that new employees were to receive sufficient and adequate training and as such that she be reinstated with no loss of pay and be provided with the necessary training.

Mr. Jolliffe at p. 8 of the decision stated:

> "An "employee" can present a grievance alleging that a provision of an applicable

> agreement has been misapplied or misinterpreted in respect of him or her. A former employee, however, cannot present such a grievance, nor can it be referred to adjudication under Section 91(1)(a). The only former employee who can grieve and go to adjudication is one who alleged an unlawful discharge, as is made clear in Section 2 of the Act. ... Neither in the original grievance nor in the evidence and representations submitted at the hearing in the Windsor Post Office was there the slightest suggestion of disciplinary action ... Since I cannot hold that the defence falls within either (a) or (b) of Subsection (1) in Section 91, I have no jurisdiction to grant any relief to Mrs. Goodale".[15]

Prior to the hearing in the Federal Court of Appeal counsel for the employer conceded the application and agreed to consent to an order allowing the Section 28 application setting aside the decision of the adjudicator and remitting it to the Board on the merits. The rational for the concession were the two prior adverse decisions of the Federal Court of Appeal in Lavoie and Gloin et al.[16]

At the resumption of the hearing in Goodale[17] the Board, per E.B. Jolliffe, expressed the view that the decisions of the Federal Court of Appeal in Lavoie and Gloin et al were incorrectly decided, without regard to the clear language of Section 2 of the Act, i.e. the definition of "employee" and "grievances".

With all due respect for the Federal Court of Appeal, the author agrees with the views expressed by E.B. Jolliffe and suggests that the Court has disregarded Section 2 of the Act and has placed a meaning on the opening words of Sections 90 and 91 that they do not reasonably bear.

No Infringement of Safety or Security of Canada

By virtue of Section 112 of the Act it is provided that nothing in the Public Service Staff Relations Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation

given or made by or on behalf of Government of Canada in the interest of the safety or security of Canada in any state allied or associated with Canada.

No Other Statutory Provision for Redress

Section 90, Subsection 1 restricts the rights of employees as defined in Section 2 of the Act to grieve matters in respect of which no administrative procedures for redress is provided in or under any Act of Parliament.

Subject then to the foregoing restrictions then an employee in the Federal Public Service has a right to grieve, which right flows from Section 90 of the statute as opposed to a provision in the collective agreement between an employer and a bargaining agent acting on behalf of employees.

Savings Provisions - Managerial & Confidential Employees

It was noted at p. 62 supra that in the definition of "employee" in Section 2 of the Act, persons employed in a managerial or confidential capacity were deemed not to be employees for the purposes of the Act. However, by virtue of the provisions of Section 2, the definition of "grievance" there are certain saving provisions with respect to the right of these employees to present grievances.

A person employed in a managerial or confidential capacity is defined in Section 2 of the Act as meaning any person who is employed in a position confidential to the Governor General, a Minister of the Crown, a Judge of the Supreme Court or Federal Court of Canada, the Deputy Head of a Department or the Chief Executive Officer of any other portion of the Public Service, a Legal Officer in the Department of Justice, certain employees designated by the Public Service Staff Relations Board, who have executive duties and responsibilities in relation to the development and administration of government programs, whose duties include those of a personnel administrator or who had duties that directly involve him in the process of collective bargaining on behalf of the employer with grievances presented in accordance with the Act.

In Section 2 of the Act, the Definition Section with respect to the meaning of the term "grievance" it is provided that for the purposes of the Act respecting grievances, a reference to an "employee" includes a person who would be an employee but for the fact that he is a person employed in a managerial or confidential capacity.

Similarly, the same Definition Section provides that for the purposes of any of the provisions of the Act respecting grievances with respect to disciplinary action resulting in discharge or suspension a reference to an employee includes a person who would be a former employee but for the fact that at the time of his discharge or suspension he was a person employed in a managerial or confidential capacity.

Thus managerial and confidential personnel are given a statutory right to grieve even though they are not included in the bargaining unit for which a bargaining agent has been certified as though they were employees which includes the right to grieve disciplinary action taken against them by the employer and to refer such grievance to adjudication.

Section 90, Subsection 3, provides that employees who are not included in a bargaining unit for which an employee organization has been certified as bargaining agent (i.e. managerial and confidential exclusions) may seek the assistance of and, if he chooses, may be represented by an employee organization in the presentation and reference to adjudication of a grievance. This writer, however, is unaware of discharged or suspended employees of the management category resorting to this practice but rather have in practice have retained and have been represented by independent counsel.

These provisions are distinctly different from those found in the private sector, where managerial personnel are identified with the employer as its agents, and therefore not entitled to the protection afforded by the applicable Labour Relations Legislation and the collective agreement.

In the case of Smedley et al[18] it was determined that employees excluded from any bargaining unit by reason of being

employed in a managerial or confidential capacity have the right to refer a disciplinary case to adjudication under Section 91(1)(b) of the Act. However, they have no such right under paragraph 91(1)(a) on account of the fact that no collective agreement is applicable to them. The complainants in this case attempted to refer to adjudication a complaint concerning pay rates differential established unilaterally by the employer although the provisions were closely similar to those employees covered by a collective agreement.

The procedure adopted in the case was that the employer had to establish that the grievors had been duly designated "managerial and confidential" at which time the reference was dismissed for lack of jurisdiction without an inquiry into the merits.

This principle was reaffirmed in Montgomery et al[19] where the grievors claimed entitlement to straight time pay for two additional hours worked beyond 40 hours per week in accordance with a provision in the Ships' Officers Collective Agreement. Chief Adjudicator Jolliffe as he then was, determined on the basis of material filed, that the grievors were not members of the Ships' Officers Bargaining Unit as they were all managerial and confidential exclusions and that they could not resort to the agreement signed between the Treasury Board and the Canadian Merchant Seamans Guild, and that as they were not employees as defined by the Act, they did not have the right to refer their grievances to adjudication, other than those involving disciplinary actions resulting in discharge, suspension or a financial penalty.

Bargaining Agent's Approval

Another important distinction between arbitration in the private sector and the federal public sector is that if the grievance is one which involves the interpretation or application of a collective agreement or an arbitral award, a representative of the bargaining agent must signify in a manner prescribed by regulation that the bargaining agent (a) approves of the reference to adjudication and (b) is willing to represent the employee in the adjudicator proceedings.

Nor is the employee entitled to present or process[20] such a grievance in the first instance unless he has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement applies[21].

In addition, Subsection 4 of Section 90 makes it clear that it is only the approval of the bargaining agent for the aggrieved employee and not just any bargaining agent that is required.

Several important issues have arisen over the years with respect to the requirement of bargaining agent approval involving issues tantamount to a denial of natural justice and duties of fair representation where bargaining agents have withdrawn their consent to the reference to adjudication once given, or have refused to consent in the first instance.

Under Section 2 of the Act, a grievance is defined as meaning a complaint in writing presented by an employee. Section 90 and 91 of the Act refer only to an employee presenting and referring a grievance to adjudication. Thus the proprietary right to present a grievance and to refer it to adjudication is vested solely in the employee. But with respect to grievances involving the interpretation or application in respect of him of provision of a collective agreement or an arbitral award, the bargaining agent may effectively veto such a grievance if it chooses not to approve the grievance or to represent the employee at adjudication.

The prerequisite of the approval of the bargaining agent is not applicable in disciplinary grievances where the employee may be represented by himself, counsel, or by another person. However, in practice those employees who are members of a bargaining unit are represented by representatives of the bargaining agent, or by counsel retained by the bargaining agent.

In Hislop[22], the Chief Adjudicator, E.B. Jolliffe, as he then was, dismissed without a hearing the grievances of Mr. Hislop who sought to refer his grievance to adjudication. The Chief Adjudicator determined that the bargaining agent for

which Mr. Hislop had been employed did not approve the reference, as Mr. Hislop was a casual employee and as such was excluded from the definition of employee under the Act and in addition, the bargaining agent informed the Chief Adjudicator in writing that even if it qualified for adjudication it would not support the adjudication because it was satisfied the decision made by the Department at the final level was both proper and fair. The grievance was dismissed on both grounds as (a) he was not an employee and (b) his reference lacked the approval of the bargaining agent. It should be noted that another bargaining agent of which Mr. Hislop was not a member attempted to approve the referral, however, the Chief Adjudicator, determined that this was not the appropriate bargaining agent to grant approval under Section 91 of the Act.

In O'Sullivan[23], the grievor alleged a misapplication of the Ships Officers Collective Agreement dealing with overtime pay. The bargaining agent, the Canadian Merchant Service Guild, informed the Board in writing "that this particular case has been reviewed by the officers of the Guild and we can find no solid grounds for continuing this case under the terms of the present collective agreement. Therefore, we do not feel that the case warrants adjudication at this time." The Chief Adjudicator referring to Section 90(2) of the Act rejected the reference without a hearing as the bargaining agent declined to approve the reference or represent the employee.

In the Dooling case[24], the grievor with his bargaining agents approval referred his grievance concerning lack of consultation with his bargaining agent when new parking regulations were instituted, to adjudication. The day prior to the fixed date for hearing the bargaining agent wrote to the Board withdrawing its support of the grievance on the grounds that the grievance no longer qualified for adjudication under Section 91 of the Act. Adjudicator P. Meyer, now Mr. Justice Meyer of the Quebec Superior Court, convened the hearing at which time the grievor appeared on his own behalf and indicated his

desire to proceed with his grievance although his parking privileges had been restored. The representative for the bargaining agent and counsel for the employer united in opposing the grievor's request. The grievor sought to amend his grievance at that time to seek monetary compensation for his disbursements for parking from the time of denial of parking privileges until they were reinstated.

The grievor argued that the grievance was basically the property of the grievor and not the bargaining agent and that the legislation must take cognisance of the rights of individual employees and that the Act was silent on the right of a bargaining agent to withdraw its consent to adjudication in the absence of the concurrent consent of the grievor. He referred to the decision of the Supreme Court of Canada in Hoogendoorn v. Greening Metal Products et al[25] in support of his position.

Adjudicator Meyer determined that references to adjudication under Section 91 of the Act fell into two distinct categories. Where references related to disciplinary action resulting in discharge, suspension or a financial penalty he stated that it was clear that the individual grievor had status to refer the grievance to adjudication alone, but that where the grievance related to the interpretation or application of a provision of a collective agreement, the grievor may not refer the grievance to adjudication unless the bargaining agent signified in prescribed manner its approval of the reference and its willingness to represent the grievor in the adjudication proceedings.

In referring to Section 90 and 91 of the Act, the Adjudicator determined "that since the bargaining agent must screen all grievances relating to the interpretation of the collective agreements, since these involve questions of policy affecting the employees collectively, I conclude that there must be a continuing willingness on the part of the bargaining agent to represent the grievor" and "that where bargaining agent withdrew its consent to the reference the grievance ceased to be adjudicable.

Adjudicator Meyer stated, however, at p. 12:

> "Of course, the employee's association has a duty of fair representation and such a withdrawal may be unjustified or in bad faith. The aggrieved employee in such event might have some other recourse under the Act, before the Board itself or otherwise, but not the right to proceed with the grievance itself".

One commentator has argued that the Public Service Staff Relations Act has no where given to the bargaining agent the right to withdraw its consent once properly given and suggests that once the approval and willingness has originally been given by the bargaining agent the grievor has an acquired right to reference to adjudication and no withdrawal by the bargaining agent should deprive the grievor of the right[26]. Cases decided subsequent to Dooling have followed the approach taken by Adjudicator Meyer.

In Presley[27] the grievor referred a contract grievance to adjudication with the approval and support of his bargaining agent. The bargaining agent and the Treasury Board negotiated a lump sum settlement of his grievance and the parties advised the Board that the grievance had been settled, and the bargaining agent requested to withdraw the grievance from adjudication.

Mr. Presley was requested by the Public Service Staff Relations Board to indicate whether he concurred with the request of the bargaining agent to withdraw the reference from adjudication to which he replied in writing that he was not satisfied with the purported settlement and that he would not be satisfied with any decision outside of adjudication.

The bargaining agent notified the Board that the settlement had been orally accepted by the grievor and that he in fact had accepted a cheque in the amount of $600.00 as a lump sum payment and that the bargaining agent was withdrawing its support.

The Chief Adjudicator scheduled a show cause hearing at which an opportunity was offered to show that the settlement made on behalf of the employee had been unauthorized, but that

opportunity was declined. Counsel for the employee argued that he had an unqualified statutory right to adjudication and sought to amend the original grievance. The Chief Adjudicator held when a settlement had been concluded and the support of the bargaining agent withdrawn the grievance had become non adjudicable.

Another case of interest is Lachance[28] where two employees represented by the same bargaining agent had opposing interests. Lachance was supported by the Canadian Union of Postal Workers and Jacob by the Letter Carriers Union of Canada. The Letter Carriers' Union objected that the Lachance grievance lacked the approval of the bargaining agent, the Council of Postal Unions as required by Section 91(2) of the Act. A preliminary hearing was conducted to which both employees, the Council of Postal Unions, the Letter Carriers' Union of Canada, and the Canadian Union of Postal Workers were invited. Chief Adjudicator Jolliffe ruled that the authority to approve the grievance had been delegated to the Canadian Union of Postal Workers by the Council of Postal Unions and that Lachance had status to refer his grievance to adjudication. The Chief Adjudicator directed, however, that Jacob be added as a party to the reference pursuant to the then Rule 55B of the Board's Rules of Procedure and at the subsequent hearing on the merits both employees were represented by separate counsel.

The issue of union's failure to represent was raised in the case of Montreuil v. Canadian Union of Postal Workers and Public Service Staff Relations Board[29].

Montreuil was an employee of the Post Office Department and a member of the bargaining unit for which the Canadian Union of Postal Workers was the certified bargaining agent, sought to present a grievance regarding the application to him of a provision in the applicable collective agreement. The bargaining agent had refused to grant its approval to the grievance. Montreuil launched a complaint pursuant to Section 20 of the Public Service Staff Relations Act to the Board charging that the union had refused to approve his grievance solely on the ground that he was a casual employee rather than

a permanent or part-time employee.

The Public Service Staff Relations Board determined that it was competent to hear the complaint under Section 20 (1)(a) of the Act which empowers the Board to inquire into:

> "a complaint that an employee association ... has failed to observe any prohibition contained in Sections 8, 9, or 10 of the Act."

The Board determined that the union had infringed Section 8(2)(b)[30] of the Act by seeking to impose on an employee a condition namely that of becoming a permanent or part-time employee that was likely to restrain him from exercising a right under the Act, that of presenting a grievance and found that the union had failed in its obligation to provide fair representation for the complainant. Accordingly, the Board ordered the union to consider the complainant's grievance and to exercise its discretionary power in that regard consistent with legal principles of fair representation.

The Canadian Union of Postal Workers sought to review the decision of the Board before the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act.

Mr. Justice Pratte for the Court allowed the application setting aside the decision of the Board and stated in part:

> "Section 8(2)(b) merely prohibits the imposition "on an appointment or in a contract of employment" of any condition that seeks to restrain an employee from exercising a right under the Act. Even if it were assumed that the Board was correct in saying that the complaint charged that the union sought to impose conditions of that sort it is impossible to argue that those conditions were imposed "in a contact of employment "or" on an appointment.

At the hearing of the Section 28 Application, the employee contended that his complaint was to be interpreted as charging the union, by refusing to consider his grievance with seeking to deprive him of the right to present a grievance relying upon Section 8(a)(c) of the Act any other means to compel an employee .. to restrain from exercising any other right under this Act.

Mr. Justice Pratte for the Court stated:

> "This provision, Section 8 (2)(c) prohibits anyone from putting pressure on an employee in order to induce him not to exercise a right under the Act. This is not the charge made against the union by the complaint. According to Section 90(2), the complainant had the right to present his grievance only if he had obtained the union's prior approval. The complainant's right to present a grievance was conditional; its existence depended upon the union's approval. By refusing to approve the grievance, the union did not use any means to restrain the complainant from exercising a right, it simply acted as if such right did not exist."

The learned Judge continued:

> "actually, Mr. Montreuil's charge against the union was simply that it had failed in its obligations toward the employees, it was supposed to represent. Perhaps there is merit to this complaint, but it is not one that the Board had the power to examine."

It is apparent then that under the Public Service Staff Relations Act that individual employees cannot initiate interpretation grievances or refer them to adjudication without the approval and support of the bargaining agent and the employee is left without recourse even in those situations where the bargaining agent may be withholding its support for reasons that may be other than in good faith.

Under the Labour Relations Act of the Province of Ontario[31], Section 37(1) requires the resolution by arbitration of all differences between the parties, and the parties are the company (or council of employees) and the union or council of trade unions (clause 1(1)(e). The statute then does not give an individual the right to bring a grievance to arbitration. Whereas in the federal public sector, Sections 90 and 91 allow an individual carriage of grievances for disciplinary action resulting in discharge, suspension or financial penalties, the right to refer a grievance to adjudication in matters concerning the interpretation or application of a collective agreement requires the approval of the bargaining agent.

In the private sector if an arbitration puts employee benefits directly in issue, those employees who will be affected by the decision are generally entitled to notice of the proceedings. These cases must be distinguished from those where the employee is affected merely as an employee, as in policy grievances.

There must be "substantive benefits of particular employees ... put in issue"[32]. Failure to give notice will be grounds for review for "there has been no arbitration of the issues involved"[33].

In Re. Hoogendoorn[34] the Supreme Court of Canada held that a policy grievance arbitration concerning a duty on the company to direct an employee to sign a dues deduction authorization form or face disciplinary action by way of discharge, notice of which was not given to the employee concerned, was not necessary to determine that Hoogendoorn was required to do so. Rather the proceeding was aimed at getting rid of Hoogendoorn as an employee because of his refusal either to join the union or pay the dues. The union took a position completely adverse to Hoogendoorn. It wanted him dismissed. The Supreme Court ruled that there was a denial of natural justice to proceed in Hoogendoorn's absence and the award was quashed.

It is submitted, then, that the rule in the private sector is that if the real issue in an arbitration affects the rights of specific individuals they must receive adequate notice and have an opportunity to be heard[35]. In public sector cases discussed supra, Lachance is directly on point where Jacob although not having the status to refer his case to adjudication was given notice of the proceedings as his seniority would be affected by the decision, and was permitted to participate and in fact was represented by counsel.

In both Dooling and Presley both grievors were given notice of the proceedings and participated in the hearing either personally or through counsel.

In Hislop and O'Sullivan although these cases were

decided without a hearing, the Chief Adjudicator entertained written submissions on behalf of both grievors.

As a matter of practice the Board, when informed of the settlement of a grievance between the employer and the bargaining agent affecting an individual grievor whose name does not personally appear in the minutes of settlement indicating his approval, writes to the grievor directly to obtain his consent prior to disposing the grievance.

Exhaustion of the Grievance Process

Section 91(1) of the Act provides that where an employee has presented a grievance up to and including the final level in the grievance procedure; with respect to .... a, and b, and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

Thus, it is a condition precedent to the referral of both contract and disciplinary grievances to adjudication that the employee exhaust the established grievance procedure.

In Hodgson[36] the first Chief Adjudicator H.W. Arthurs stated:

> "Suffice it to say that the clear intention of that Section is to require exhaustion of all procedure up to the final level of the grievanceprocess ... No matter how anxious may be any Tribunal to reach the merits of a controversy, to give the party a day in court there comes a point at which observance of its procedural rules is so casual that refusal to hear the case is the only way of vindicating the system".

It should be noted, however, that in a number of collective agreements the parties have agreed to by-pass certain levels in the grievance procedure and to present the grievance only at the final level as in the case of discharge where the requirement to proceed through all levels of the grievance procedure could work a hardship on the grievor.[37]

[1]Bill C-28 introduced into Parliament in November 1978, (which died on the Order Book when the general election was called) proposed to broaden the definition of managerial duties and thus increase the number of managerial exclusions from collective bargaining under the Act.

[2]Adjudication File No. 166-2-117 at p. 2.

[3]Adjudication File No. 166-2-100 at p. 2.

[4]Adjudication File No. 166-2-505.

[5]Adjudication File No. 166-2-598.

[6]13 L.A.C. 327 (Thomas).

[7]Board File 168-2-47.

[8]18 N.R. 521.

[9]ibid at p. 524-525.

[10]20 N.R. 475.

[11] ibid, p. 478.

[12]20 N.R. 475 at 478.

[13]ibid p. 479.

[14]Unreported Federal Court of Appeal File No. A-55-78.

[15]Adjudication File No. 166-2-3050.

[16]Information received by L. Holland counsel, Dept. of Justice, June 22nd, 1978.

[17]Hearing held June 23, 1978, Royal York Hotel, Toronto, D. Olsen, Counsel for the Employer, P. Cavalluzo, Counsel for the Grievor.

[18]Adjudication File No. 166-2-1446-1448.

[19]Adjudication File No. 166-2-2078.

[20]Section 91(2) Public Service Staff Relations Act.

[22]Adjudication File No. 166-2-117.

[23]Adjudication File No. 166-2-380.

[24]Adjudication File No. 166-2-308.

[25](1968) S.C.R. 30.

[26]Aggarwal, A.P., Adjudication of Grievances in Public Service 28 Industrial Relations No. 3 at p. 522.

[27]Adjudication File No. 166-2-442.

[28]Adjudication File No. 166-2-959.

[29]25 N.R. 493, (F.C.A.).

[30]Section 8(2)(b) reads .. No person shall (b) impose any condition upon appointment or in a contract of employment or propose the imposition of any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under the Act.

[31]R.S.O. 1970, c. 232.

[32]Re. Bradley et al and Ottawa Professional Fire Services Association et al (1967), 63 P.L.R. (2nd) 376 (C.A.) at pp. 381-82

[33]ibid p. 382.

[34]Re Hoogendoorm and Greening Metal Product & Screening Equipment Co. et al
(1967), 62 D.L.R. (2d) C.A. (1967) 65 D.L.R. (2d) 641 S.C.C.

[35]Other cases on point since Hoogendoorn

Re. International Chemical Workers Local 817, and Somerville Industries Ltd. 1969 20 L.A.C. 404 (Palmer)

Re. Westroc Industries Ltd. and United Cement, Lime and Gypsum Workers Local 366 (1973) 5 L.A.C. (2d) 61 (Beatty).

Re. Goldstein Food Mart Ltd. and Retail Clerks International Union, Local 486; (1972) 1 L.A.C. (2d) 59 Weatherhill.

General Refractories Co. of Canada Ltd. and United Steel Workers, Local 14857, (1975) 10 L.A.C. (2d) 110 (Shirne).

Re. Gilbarco Canada Ltd. and Canadian Union of Golden Triangle Workers (1973) 1 L.A.C. (2d) 348 (Carter).

Re. Edwards of Canada Unit of General Signal of Canada Ltd. and United Steelworkers, Local 7466, (1974), 6 L.A.C. (2d) 137 (Adams).

Re. McMaster University and Service Employees International Union, Local 532, (1975) 10 L.A.C. (2d) 130 (Shirne).

[36] Adjudication File No. 166-2-249 at p. 6.

[37] i.e. Postal Operations Group (Non Supervisory) Code 608 175, Article 9:75 and Chapter of Limits to Adj. Grievances

CHAPTER VI

THE SCOPE OF ADJUDICABILITY

As distinct from provisions in collective agreements in the private sector where there is no statutory limitations in the arbitration of grievances and where arbitrators have jurisdiction to determine whether a matter is arbitrable, the Public Service Staff Relations Act in Section 91 strictly limits the categories of grievances that may be referred to adjudication once the other conditions precedent to the referral to adjudication discussed above have been satisfied.

In order to refer a grievance of an individual employee to adjudication, the grievance must fall within the ambit of either of two categories;

(a) a grievance is with respect to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award or

(b) a grievance with respect to disciplinary action resulting in discharge, suspension, or a financial penalty.

It can be readily seen, then that although the right to grieve matters is all encompassing as setout in Section 90 of the Act including inter alia the interpretation or application to an employee of a provision of a statute, or of a regulation, bylaw, direction or other instrument made or issued by the employer, dealing with the terms and conditions of employment, these matters are excluded from the purview of third party adjudication and the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of the Act and no further action may be taken thereon[1].

The records of decisions of the Public Service Staff Relations Board are replete with decisions of adjudicators who have been required to determine the proper scope of adjudication under Section 91 of the Act and, accordingly, have rejected large numbers of grievances as being non adjudicable. Parties have attempted on occasion, by inserting provisions in the collective agreements, to enlarge the scope of adjudication, however, such attempts have been determined to be invalid in the light of the statutory provisions[2].

Thus, Parliament has distinguished between those "rights" which can be safeguarded through the grievance procedure and those which can be protected through third party adjudication. The distinction was commented upon by the first Chief Adjudicator, H.W. Arthurs in this manner:

> "It is evident that Parliament could have given a broad mandate to adjudicators to hear and decide all matters which can be made the subject of grievances. Instead, the legislation specifically limits adjudication to grievances involving either the administration of the collective agreement, or disciplinary action, although an employee has the right to grieve where his interests are affected by the interpretation or application of a provision of a statute, or a regulation, by law, direction or other instrument ... dealing with the terms and conditions of employment."[3]

Adjudicators have held that the following classes of grievances inter alia are not adjudicable under the provisions of Section 91 (a) and (b) of the Act.

(1) Alleged inequities or discrepancies in classification or reclassification or conversion to a new pay scale.[4]

(2) A written reprimand, not involving any financial penalty.[5]

(3) Denial of promotion although a denial of an increment could in certain circumstances, constitue disciplinary action.[5a]

(4) Refusal of a special holiday when the refusal was not personal in its application but general throughout the public service.[6]

(5) Allegedly unfair application or interpretation of Public Service terms and conditions of employment regulations.[7]

(6) Alleged discrimination in competitions conducted by the Public Service Commission requiring a language qualification.[8]

(7) Allegation that certain employees had been hired without notice of competition appearing to violate the Public Service Employment Act and not a collective agreement.[9]

(8) Alleged improper treatment with respect to sick leave, where it appeared, inter alia, that the grievance was not one in respect of which no administrative procedure for redress is provided in or under any Act of Parliament.[10]

(9) Alleged improper compulsory retirement action by Deputy Head by virtue of authority contained in Section 20(12) of the Public Service Superannuation Regulations.[11]

(10) Alleged violation of a rule relating to overtime compensation appearing in a personnel manual used within a department but not relating to any provision in a collective agreement.[12]

(11) Where it is clear on the face of the record that an adjudicator has no jurisdiction to grant relief.[13]

Attempts by Parties by Agreement to Enlarge the Scope of Adjudication

As stated, parties have attempted on occasion to enlarge the scope of adjudicability by inserting such provisions in their collective agreements. Such attempts, however, have been determined to be invalid in light of the statutory provisions in the Public Service Staff Relations Act. In Salter and Pursaga[14], the grievors attempted to refer grievances to adjudication concerning "warning letters" which related to their performance as letter carriers. They relied upon a provision in the collective agreement for the Postal Operations Group (non-supervisory) that "discipline shall be for just cause and subject to the grievance procedure and adjudication". The Chief Adjudicator, firstly, determined that the warning letters constituted "discipline". It was then necessary to determine whether the grievances could be referred to adjudication by virtue of a provision in the collective agreement -- when the grievance

was not referrable to adjudication under Section 91 of the Act as it did not relate to (a) the interpretation or application of a provision of a collective agreement or (b) disciplinary action resulting in discharge, suspension or a financial penalty.

He stated at p. 19 of the decision:

> "In reading article 9 as a whole, I find that the parties have attempted to incorporate in it not only the whole of the grievance procedure on which they have agreed,[15] but also a recitation of what employees are entitled to by statute, and then the parties have gone further and attempted to improve upon or modify the statutory rights which already exist ... the right to grieve is statutory created by Section 90 of the Act, just as the right to refer certain cases to adjudication is created by Section 91. Yet some employees speak of article 9 as though it alone gave them the right to grieve and to go to adjudication."

At p. 21 the Chief Adjudicator stated in part ... referring to Section 91(1)(b):

> "If it had been contemplated that all discipline should be adjudicable, Parliament would have said so" "The statutory jurisdiction of adjudicators is confined to those forms of disciplinary action specified in paragraph (b) of Subsection 1 of Section 91."

Counsel for the grievors argued that the adjudicator was not asked to adjudicate upon disciplinary action but on the interpretation or application of article 9 in the collective agreement, i.e. that "discipline" shall be subject to adjudication. At p. 21-22 of the decision, Mr. Jolliffe posed the following questions:

> "Can the parties by indirect means, confer on the adjudication system, powers and responsibilities deliberately withheld by Parliament? Can the jurisdiction so carefully delineated in the Act be indirectly enlarged ... and substantially enlarged by way of provisions the parties agree between themselves to write into their grievance procedure? Can they create entirely new substantive rights disguised as procedural provisions ...? ... Can the parties by

> agreement between themselves properly, charge the Board and the adjudication system with the additional costs of an enlarged jurisdiction never authorized by Parliament?"

He concluded:

> "that the parties cannot achieve by indirect means that which could not have been achieved directly ... The jurisdiction of adjudicators is ... limited to the jurisdiction granted by the Public Service Staff Relations Act. ... Those provisions in article 9 of the agreement which purport to create a substantive right to adjudication are of no effect".

The Deputy Chairman, E.B. Jolliffe, in the case of the Canadian Union of Postal Workers and Turmel[16] reached a similar conclusion against adjudicability where the Canadian Union of Postal Workers sought in its own name to refer a group grievance affecting several hundred employees as individuals, relying on a provision in the Postal Operations Group Non-Supervisory collective agreement that defined "grievance" as meaning a complaint in writing, presented by an employee on his own behalf or on behalf of one or more employees, or by the Union on behalf of one or more adequately identified employees."[18]

The Deputy Chairman held that such a reference purporting to be under Section 91 of the Act, was not within the statutory provision that "where an employee has presented a grievance ... he may refer the grievance to adjudication nor was the grievance adjudicable under Section 98 of the Act (policy grievances)[19] which enables a bargaining agent to refer to adjudication an allegation that the employer has breached an obligation to the bargaining agent, because as Section 98(1)(b) provides, the obligation must not be an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement applies. In this case the dispute could be the subject of an individual employee grievance. Thus the jurisdiction to adjudicate was based exclusively on the statute and could not be enlarged by way of a definition agreed to by the parties.

The issue arose again in Baril[20], wherein adjudicator Lachapelle, rejected the ratio in Salter and Pursaga and ruled in a preliminary decision that a letter of reprimand was adjudicable under Section 91(1)(a) of the Act relying on the article in the applicable collective agreement which provided that discipline shall be for just cause. The employer applied to the Federal Court (Trial Division)[21] for a Writ of Prohibition, to prohibit the adjudicator from proceeding to consider the grievance on the merits. Mr. Justice Marceau granted the Writ determining that the statutory jurisdiction of Adjudicators was confined to those forms of disciplinary action specified in Section 91(1)(b) of the Act.

He stated in part:

> "I do not think that paras. (a) and (b) of S. 91(1) of the Public Service Staff Relations Act can be interpreted in isolation from each other. In enacting this provision Parliament clearly intended to limit and define the cases in which an employee, whether or not he was a member of a union, would be entitled to submit his grievance to this method of adjudication which it was establishing and entrusting to the supervision of the Board that it has just created. It is clear that Parliament did not intend all grievances to require the intervention of an official adjudicator in addition to the levels of the ordinary procedure. First in para. (a) it considered cases involving some group interest (whence moreover, the requirement of S. 91(2) and then in para. (b) it dealt with cases of disciplinary action in which individual interest is clearly predominant. By expressing itself as it did, Parliament appears to me to have intended to begin with an overall consideration of all grievances involving disciplinary action against individuals and then to eliminate all but those dealing with disciplinary action entailing discharge, suspension or a financial penalty. In my view, this provision of para. (b) is specific, complete in itself and applicable to all employees whether or not they are covered by a collective agreement, and it is the only provision applicable when the grievance concerns disciplinary action .." [22]

With respect to the argument that the applicable article in the collective agreement namely, that disciplinary action may not be taken without just cause, had the effect of causing all grievances concerning disciplinary action to come within the scope of adjudication as an interpretation grievance under Section 91(1)(a).

The learned Judge stated:

> "... we would have to conclude that Parliament left it up to the agreement between the parties to extend at will the right to adjudication and, consequently, the jurisdiction of the adjudicator, at the same time allowing a quasi automatic distinction to be made for all practical purposes between unionized and non-unionized employees. It cannot be admitted, however, that such a delegation of power could be made in such an indirect and camouflaged way, and it is unthinkable that such a distinction between Government employees was intended...."[23]

Adjudicability of Actions Taken Pursuant to the Provisions of the Public Service Employment Act[24]

The most difficult issues which have been presented to adjudicators are those involving the determination of the permissible scope of adjudication where counsel for the employer have objected to the jurisdiction of the adjudicator to hear and determine a reference where it is alleged that the actions grieved were taken by management pursuant to the provisions of the Public Service Employment Act and as such were beyond the scope of adjudication as contemplated by Section 91 of the Act.

Briefly, the Public Service Employment Act establishes the Public Service Commission whose mandate is to maintain the merit system and is responsible for the recruitment, appointment, training and promotion of public servants.

In addition, the Public Service Employment Act contains inter alia statutory provisions dealing with demotions or release of employees for incompetence or incapacity, (as opposed to disciplinary discharges); rejection of employees during their probationary period, lay off of employees for lack of work or

discontinuation of a function; resignations of employees, declarations of abandonment of positions, resignations and expiration of terms.

It is the Public Service Staff Relations Board, however, established pursuant to the Public Service Staff Relations Act, which is responsible for collective bargaining, labour relations and the grievance procedure and not the Commission.

Nor is the Commission concerned with management prerogatives and responsibilities such as the regime disciplinaire of the employer which is the responsibility of the Treasury Board by virtue of Section 7(1) of the Financial Administration Act.[25]

The Public Service Employment Act provides for the establishment of an appeal board which is an independent tribunal appointed by the Public Service Commission to hear conplaints against:

(a) appointments by closed competition, that is a competition open only to employees of the Public Service involving a promotion or transfer.[26]

(b) promotion without competition.[27]

(c) demotion or release for incompetence or incapacity.[28]

An examination of each of the categories both for which an appeal is provided and for which an appeal is not provided is instructive in defining the scope of adjudication.

A. Matters for Which an Appeal is Provided

1. Appointments by Closed Competition Involving a Promotion or Transfer and (b) Promotion without Competition

It has been held by adjudicators that an alleged discrimination conducted by the Public Service Commission requiring a language qualification was not adjudicable.[29] Similarly, jurisdiction has been declined where it has been alleged that certain employees have been hired without notice of competition appearing to violate the Public Service Employment Act and not a collective agreement.[30]

2. Demotion or Release for Incompetence or Incapacity

In Dunaenko[31] a civilian employee of the Department of National Defence grieved and referred to adjudication (a) his indefinite suspension which was conceded by the employer prior to the adjudication hearing, and (b) his release for incapacity pursuant to Section 31 of the Public Service Employment Act. Prior to the adjudication hearing an Appeals Officer of the Public Service Commission after a hearing dismissed his appeal launched pursuant to Section 31 of the Public Service Employment Act.

The Chief Adjudicator, E.B. Jolliffe, as he then was conducted an adjudication hearing, heard evidence and determined that the issue in the case was whether the release under Section 31 of the Public Service Employment Act was in reality a discharge for disciplinary reasons, so as to establish his jurisdiction under Section 91(b) of the Public Service Staff Relations Act, and if this was the case, was the penalty of discharge appropriate in the case.

Upon reviewing the evidence he found that there was not proof of incapacity but rather that Dunaenko's behaviour had become sufficiently abnormal to make him unacceptable to a significant number of other employees. He concluded at p. 58 of the decision, however, that the termination was not disciplinary and accordingly that he did not have jurisdiction to adjudicate upon the merits of the termination. He stated:

> "I have no power to determine whether the release was justified or to grant any relief in relation thereto because that is a matter within the exclusive jurisdiction of the Public Service Commission".[32]

In Cooper the grievor referred to adjudication a reference alleging that his release for incompetence and incapacity was in fact disciplinary action resulting in discharge, after having appealed his release to the Public Service Commission Appeal Board, which dismissed his appeal. The employer objected to the matter being heard by the Chief Adjudicator on the grounds that

the release was made pursuant to Section 31 of the Public Service Employment Act and could not therefore be the subject matter of a grievance as another administrative process was provided for by law relying upon Section 90(1) of the Public Service Staff Relations Act and further argued that the grievance was untimely. The Chief Adjudicator granted an extension of time to the grievor and fixed a date for hearing. The employer, maintained its objection to adjudicability and referred the decision of the Chief Adjudicator to the Public Service Staff Relations Board pursuant to Section 23 of the Act challenging the Chief Adjudicator's decision to entertain the grievance. The Public Service Staff Relations Board held that because another administrative process had been provided by law to challenge a release under Section 31 of the Public Service Employment Act, such a termination of employment was not adjudicable.

Cooper then appealed the Board's decision to the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act.

The Federal Court of Appeal dismissed the appeal. Pratte, J., stated:

> "Under the Public Service Staff Relations Act the jurisdiction of an adjudicator is limited both by Section 90 and 91. A grievance may not be referred to adjudication if it relates to a matter in respect of which no grievance has been presented under Section 90 or to a matter which does not fall within Section 91. Under Section 90 a grievance may not be presented if relates to a matter in respect of which an administrative procedure for redress is so provided under which an employee's grievance may be redressed the aggrieved employee cannot resort to the grievance procedure under Sections 90 and 91 of the Public Service Staff Relations Act but must submit his complaint to the authority which has, under the appropriate statute, the power to deal with it. An employee who is dissatisfied with the decision of that authority may not file a grievance under Section 90 and 91 in respect of that decision ... When a

> recommendation is made by the Deputy Head under Section 31(1) whatever be the real motives that may have prompted him to make it, no grievance under the Public Service Staff Relations Act since Section 31(3) provides for an appeal from that recommendation to a board which is the sole authority with the power of deciding whether the recommendation is justified. That board is the tribunal endowed by Parliament with the power of deciding whether there is a bona fide recommendation for release on grounds of incompetence or incapability and whether such recommendation should be acted upon.
>
> It follows that once a board acting under Section 31(3) has decided that an employee is to be released pursuant to the recommendation of the Deputy Head, no grievance may be presented or referred to adjudication with respect to that decision."[33]

In references to adjudication filed subsequent to the decision of the Federal Court of Appeal in Cooper arising out of releases for incompetence or incapacity under Section 31 of the Public Service Employment Act, the former Chief Adjudicator dismissed the references without a hearing adopting the reasoning of Mr. Justice Pratte that a release purporting to be make pursuant to Section 31 of the Public Service Employment Act, "whatever be the real motives" is neither grievable or adjudicable.

It is apparent then at least that in those cases where an appeal is provided under the provisions of the Public Service Employment Act, i.e. appointments by closed competition involving a promotion or transfer and in demotion or releases for incompetence or incapacity, that as there is an administrative procedure for redress provided employees cannot resort to the grievance procedure and adjudication under Sections 90 and 91 of the Public Service Staff Relations Act. In the Richardson case the then Chief Adjudicator in dismissing the reference upon the ground that in light of the Federal Court of Appeal's decision in Cooper, that a release purporting to be made pursuant to Section 31 of the Public Service Employment Act, "whatever be the real motives" is neither grievable nor adjudicable, expressed concern that he regarded the rule "as an invitation to abuse of the law in that the express provision for redress

in Part IV of the Public Service Staff Relations Act may thus be evaded or defeated by unscrupulous or ignorant persons."

It is suggested, however, that as there is an appeal right specifically conferred upon an employee who is released or demoted for incompetence or incapacity, the propriety of that action can be aired if such action was taken for improper motive before the Public Service Commission Appeal's Board an independent tribunal operating in the Public Service, overwhich the Public Service Staff Relations Board has neither supervisory nor appellate jurisdiction. It is suggested that as a matter of propriety the Public Service Staff Relations Board must give effect to the decision of another tribunal specifically vested with jurisdiction in the matter.

However, the Public Service Employment Act did not provide an appeal mechanism for those employees who had complaints concerning:

(a) a rejection of an employee during his probationary period.[35]

(b) a lay off of an employee under for lack of work or discontinuation of a function.[36]

(c) resignation of an employee in anticipation of a release.[37]

(d) appointment in an open competition that is a competition open to both employees in the Public Service and outside of the Public Service.

(e) declaration of abandonment of a position by an employee by which the employee ceases to be an employee.[38]

Employees with grievances involving complaints of those matters for which both an appeal is provided under the Public Service Employment Act and of those matters for which an appeal is not provided under the Public Service Employment Act have attempted to refer grievances to adjudication upon the basis that the employer's action was in fact disciplinary

in response to misconduct, under the guise of rejection or other action taken under the Public Service Employment Act, in an attempt to establish jurisdiction under the provisions of Section 91 1(b) of the Public Service Staff Relations Act.

B. Matters for Which an Appeal is not Provided under the Public Service Employment Act

(a) A Rejection of an Employee During his Probationary Period

Section 28 of the Public Service Employment Act which sets out the procedure to be followed on the rejection for cause of a probationary employee does not provide an administrative procedure for redress. Section 28(3) provides that the Deputy Head may at any time during the probationary period, give notice to the employee and to the Commission that he intends to reject the employee for cause at the end of such notice period as the Commission may establish for any employee or class of employees, and, unless the Commission appoints the employee to another position in the Public Service before the end of the notice period applicable in the case of the employee, he ceases to be an employee at the end of that period.

It is clear that a probationary employee who has received notice of the Deputy Head's intention to reject him for cause has the right to grieve under Section 90 of the Public Service Staff Relations Act. However, if his grievance is rejected the issue then becomes whether he has a right to refer his rejection on probation to adjudication under Section 91 of the Public Service Staff Relations Act. This has perhaps been the thorniest issue in the resolution of rights disputes since the implementation of the Public Service Staff Relations Act involving numerous references to the Board under Section 23 of the Act from the decisions of adjudicators, several appeals from the Board, to the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act and an appeal to the Supreme Court of Canada.

On the one hand it may be argued that upon the plain meaning of Section 28 of the Public Service Employment Act

no administrative redress is contemplated and, accordingly, a probationary employee acquires no vested right to adjudication and once the employer has characterized the action taken as rejection on probation that determination is final and binding and deprives the adjudicator of jurisdiction to even consider whether or not the employer's actions was disciplinary action within the meaning of Section 91(1)(b) of the Public Service Staff Relations Act.

On the other hand, it may be argued that the mere assertion by the employer that there was a rejection for cause during the probationary period and that no disciplinary action was involved is not sufficient and that where it is established by evidence that disciplinary action has in fact been taken under the guise of rejection on probation, then it is the substance and not the form of the action taken which is determinant of whether or not the case is adjudicable under Section 91 of the Act. As a result of the decisions both positions at one time or another have been predominant.

In Caron the very first case scheduled for adjudication, and heard by the first Chief Adjudicator, H.W. Arthurs, Caron grieved that his termination of employment with the National Capital Commission at the end of his probationary period constituted a discharge and was unjustified. The employer contended that the termination resulted when the grievor was simply not appointed to a position upon the completion of his probationary period. (Note that Section 28 of the Public Service Employment Act did not apply to the National Capital Commission). The Adjudicator in a preliminary decision, held that upon the successful completion of the grievor's probationary period, he should have been placed by the National Capital Commission in a position commensurate with his ability or placed upon an eligible list for such a position - unless cause existed sufficient to justify his discharge, he ought not to have been released outright. After a further hearing, the adjudicator found Caron guilty of neither misconduct nor incompetence, hence there was no reason for terminating his status as a permanent employee. However, he determined that reinstatement

would not be appropriate in the circumstances and he awarded instead a monetary sum equal to six months pay.

In rejecting the employer's contention that the grievor was simply not appointed at the end of his probationary period, Arthurs stated:

> "The statute gives an employee the right to an adjudication of a disciplinary action taken against him which leads to his discharge. This right is not to be thwarted by a razor thin semantic distinction between discharge and failure to appoint following probation."

The employer referred the preliminary decision of the adjudicator to the Public Service Staff Relations Board pursuant to Section 23[39]. Before the Board, the employer relying upon Section 7(1)(f) of the Financial Administrative Act, Section 28 of the Public Service Staff Relations Act, argued that the subject matter of Section 28 of the Public Service Employment Act unlike Section 7 of the Financial Administrative Act and Section 91 of the Public Service Staff Relations Act is not one over which the Treasury Board has jurisdiction, the subject matter of Section 28 is the rejection of an employee employed on a trial basis and found to be unsuitable, the subject matter of the other two statutes is the application of penalties for misconduct and that Parliament has not used the term discharge in relation to the rejection of an employee on probation, and that there is a difference between the rejection of a probationary employee and disciplinary action which is basic to the whole scheme of the legislation, and accordingly that Parliament did not intend that an adjudicator under the Public Service Staff Relations Act should have authority to overrule management's decision on the suitability of a probationary employee; rather an adjudicator's authority to review the decision of management should be confined to cases where management was meting out discipline.

The Board held in obiter, as it was not called upon to determine whether the cause for rejection by a Department Head of a probationary employee appointed by the Public Service Commission may be reviewed by an adjudicator under the Public Service Staff

Relations Act as employees of the National Capital Commission were not appointed by the Commission and the Public Service Employment Act was not applicable.

Nevertheless, in reply to the employer's argument the Board stated at p. 6:

> "It is impossible, in our view under the terms of the relevant legislation to draw as sharp a distinction as counsel proposes between rejection of an unsuitable probationary employee on the one hand, and discharge as a form of disciplinary action, on the other. Where an employer terminates the employment relationship between himself and a probationary employee, he may be doing so for any one of a number of reasons - because he has come to the conclusion that his original evaluation of the capability and suitability of the employee was wrong, or because he is of the opinion that the employee by his conduct during the probationary period has merited discipline, or because of a combination of the two. The true reason can only be determined upon a review of all the facts. ... Under the legislative scheme applicable to employment in the Public Service of Canada Subsection 1, of Section 91 of the Public Service Staff Relations Act does not distinguish between probationary employees and permanent employees -- whatever remedy is available to both classes."

In Caron's particular case, however, the Board found that the adjudicator acted within his jurisdiction in hearing the facts of the case and that the inferences to be drawn from the facts of the case were his alone and, accordingly, dismissed the reference.

After the decision in Caron, Adjudicators followed the practice of reserving their decisions on preliminary objections to jurisdiction in probationary employee cases pending determination of the facts in the particular case.[40]

In Morrison[41], the grievor contested his rejection on probation on the grounds that he was not a probationary employee at the time as he had been rehired after retiring from the Public Service on medical grounds. Adjudicator Martin held in a preliminary decision that in the circumstances the grievor

was not a probationary employee and had the status of a permanent employee at the time of termination. A further hearing was held to determine whether there was just cause for discharge of the grievor. The adjudicator held that the grievor had suffered disciplinary action and that his conduct did not warrant disciplinary action and ordered him reinstated.

The decision was referred to the Public Service Staff Relations Board pursuant to Section 23 of the Act. The Board set aside the adjudicator's decision upon the basis that the adjudicator had erred in finding that Morrison was not a probationary employee and referred the matter back to the adjudicator for further hearing. In the interim the parties settled the dispute.

The Board having determined that the adjudicator had erred in finding that Morrison was not a probationary employee afforded a full opportunity of another hearing for the parties to address themselves to the issue whether a probationary employee in the circumstances of Morrison was entitled to refer his grievance to adjudication under Section 91 of the Act. After full argument the Board determined:

(a) that Section 28(5) of the Public Service Employment Act does not provide an administrative procedure for redress which would preclude a probationary employee from presenting a grievance pursuant to Section 90(1) of the Public Service Staff Relations Act;

(b) that the term "employee" as defined in Section 2 of the Public Service Staff Relations Act clearly includes a probationary employee and there are no qualifying words anywhere in the Act that impose limitations on the rights that may be exercised by a probationary employee over and above any limitations that are imposed on continuing employees;

(c) the Board determined after considering Section 28(3) of the Public Service Employment Act and Section 7(1)(f) of the Financial Administration

Act, at p. 17 that it could not have been the intention of Parliament that the door to adjudication should be closed by a Deputy Head taking disciplinary action and camouflaging it as rejection on probation thereby precluding a probationary employee from having his "discharge" examined by an adjudicator;

(d) the Board placed a caveat on this determination at p. 17:

"It does not follow that all a probationary employee has to do to have his grievance adjudicated on its merits is to allege disciplinary discharge. If he refers his grievance to adjudication and his claim that his severance from employment constituted disciplinary action resulting in discharge is challenged by the employer, he still has to prove affirmatively that the matter is within the jurisdiction of the adjudicator .." ... and at p. 20 "the burden of showing that the action taken by the employer is in fact disciplinary falls on the aggrieved employee."

(e) the Board at p. 20 of the decision discussed the criteria an adjudicator should adopt in assessing whether a probationary employee has established that his grievance falls within the jurisdiction of an adjudicator under Section 91(1)(b) of the Public Service Staff Relations Act:

"The adjudicator must take into account the fact that a deputy head, in making up his mind to reject a probationary employee, will weight a variety of factors, including not only competence and competence, but also compatibility work habits, response to direction and so on some aspects of which may at first glance appear to have a disciplinary overtone. The adjudicator can assert jurisdiction in response to a grievance under Section 91(1)(b) only if the real and effective cause for termination of

> employment is some sort of disciplinary misconduct or default that would, if established, warrant disciplinary action. Rejection for cause which is not disciplinary in this sense is not reviewable by an adjudicator."

The Board concluded at p. 21 that where the employer asserts that the employee has been rejected for cause during his probationary period it was incumbent upon the adjudicator to make an inquiry as to:

> "whether the real and effective reason for termination of employment is disciplinary."

Adjudicators faced with probationary employees presenting grievances alleging wrongful disciplinary action after the Board decision in Morrison adopted the criterion set out supra and asserted their jurisdiction to determine the merits of disciplinary action whether or not it was so characterized by the employer.[42]

The next case of importance in tracing the chronology of "rejection on probation cases" was that of Fardella.[43] Fardella grieved his rejection on probation and referred it to adjudication. The grounds for rejection were primarily based upon his refusal to take all of the boys in his charge at an Indian School residence to chapel services on Sunday mornings. The grievor contended that he refused to order any children to attend chapel services because any coercion with regard to religious observance was contrary to his own conscience, as he felt that there were strong moral grounds for allowing children freedom of choice.

Adjudicator Meyer as he then was, found that the grievor's own right to religious freedom had not been violated, nor had the religious freedoms of the children been abrogated as claimed by the grievor. The adjudicator also had to deal with an objection to his jurisdiction under Section 91 of the Act dismissing the objection after hearing evidence and concluding that the reference to adjudication concerned a grievance with respect to disciplinary action resulting in discharge.

The adjudicator determined that some disciplinary action was required but tempered the discharge by a suspension for the period between his termination and reinstatement subject

to the grievor filing with the registrar of the Public Service Staff Relations Board a written undertaking that he would conform to the instructions relating to bringing the children to religious services on Sunday morning. In the event he failed to file such an undertaking the discharge would stand.

The grievor referred the decision of adjudicator Meyer to the Public Service Staff Relations Board pursuant to Section 23 of the Act which affirmed the decision of the adjudicator holding that the order given to the grievor by his superiors respecting the attendance of the boys at chapel services was legal and did not abridge the grievor's right of religious freedom.

The grievor then appealed to the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act to set aside the decision of the Public Service Staff Relations Board. The Federal Court of Appeal affirmed the decision of the Public Service Staff Relations Board stating that such compulsory church attendance was not an abridgement of freedom of religion in the absence of evidence that such attendance was contrary to the child's religious belief.

More important, however, for the purposes of this discussion, were the comments of Chief Justice Jackett at p. 589-590 of the decision with respect to the objection to the adjudicator's jurisdiction. He stated:

> "While the question is not free from doubt on the material in this case, I am not prepared to disagree with the conclusion of the adjudicator and of the Board that there was a dismissal. In coming to that conclusion, I do not wish to be taken as expressing an opinion that where there has been in fact, a rejection ... under Section 28 of the Public Service Employment Act, it can be classified as a dismissal in order to create jurisdiction under Section 91 of the Public Service Employment Act (should read Staff Relations Act). Insubordination during a probationary period might as well be "cause" for rejection, either of itself or taken with other matters, just as it might be ground for disciplinary action even during a probationary period. There

> should, however, be no room for doubt, if the matter is handled as it should be handled, as to what action has been taken."

This statement of the Chief Justice in Fardella [44] influenced counsel acting for the Treasury Board as employer, and in subsequent cases they renewed their objections to the jurisdiction of adjudicators to inquire into the facts of a particular case to determine whether in fact the action taken by the employer in that case, was a rejection for cause or a disciplinary discharge for if the employer had characterized the action taken as rejection for cause it was alleged that this was sufficient for Section 28(3) and (4) of the Public Service Employment Act to apply and ousted the jurisdiction of the adjudicator under Section 91(1)(b) of the Public Service Staff Relations Act.

Although counsel met with little success with this argument it was resolved to first advance this argument before an adjudicator and if rejected to refer it to the Board and ultimately to the Federal Court of Appeal.

In Jacmain the grievor had joined the office of the Commissioner of Official Languages and had been rejected during his probationary period by the commissioner. He presented a grievance pursuant to Section 90 of the Act and when it was rejected he referred it to adjudication alleging that his rejection on probation was in fact a disciplinary discharge.

Counsel for the employer disputed the jurisdiction of the adjudicator submitting that the action taken with respect to Jacmain was not a disciplinary discharge but a rejection of an employee during his probationary period pursuant to Section 28 of the Public Service Employment Act and thus could not be the subject matter of a reference under Section 91.

Having considered the submissions of the parties and having reviewed the evidence before him, adjudicator Weatherhill concluded that the employer's rejection of Jacmain constituted a disciplinary discharge thus clothing him with jurisdiction

under Section 91 to hear the grievance on its merits. He subsequently held a hearing on the merits and held that there had been insufficient reason for Jacmain's discharge, allowed his grievance and directed reinstatement of his position and reimbursement for loss of earnings.

Adjudicator Weatherhill found on the facts at the last page of his decision:

> "Having heard and considered all the evidence, I conclude that the behaviour of the grievor towards his colleagues, his superiors and some of his subordinates was somewhat irascible, reflecting his own personality. He did not fully adjust to the practises and atmosphere of the office and to the requirements of his superiors."

He concluded:

> "I do not, however, consider this to be sufficient reason for his discharge."

The employer referred this decision to the Public Service Staff Relations Board pursuant to Section 23 of the Public Service Staff Relations Act.

The Board agreed with the adjudicator and dismissed the reference:

> "We do not find that the adjudicator in the instant case erred in law or exceeded his jurisdiction by agreeing to hear the case notwithstanding that the aggrieved employee was on probation at the time of the termination of his employment or that the termination of his employment purportedly was a rejection during probation made pursuant to Subsection 28(3) of the Public Service Employment Act. Neither do we find that the adjudicator erred in law or jurisdiction when, having concluded that the reasons for dismissing the aggrieved employee were of a disciplinary nature, he heard the case as a grievance against disciplinary action resulting in discharge."

The employer then referred the decision of the Board to the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act claiming that the adjudicator had exceeded

his jurisdiction.

The Court of Appeal per Heald, J., having referred to Fardella v. The Queen, stated at p. 8-10:

> I have no hesitation in expressing the view that the conduct complained of in this case is a classic example of behaviour which would justify rejection of an employee during a probation period (and this was conceded by the adjudicator). It might also be ground for disciplinary action even during a probationary period.
>
> However, on the facts here present, it is clear that the employer intended to reject and did in fact reject during probation and was, in my view, quite entitled so to do. That being so, the adjudicator was without jurisdiction to consider the grievance under Section 91 and erred in law in so doing."

Mr. Justice Heald then referred to the decision of the Supreme Court of Canada in Bell Canada v. Office and Professional Employee's International Union,[45] and then stated:

> "In my view, the whole intent of Section 28 is to give the employer an opportunity to assess an employee's suitability for a position. If, at any time during that period, the employer concludes that the employee is not suitable, then the employer can reject him without the employee having the adjudication avenue of redress. To hold that a probationary employee acquires vested rights to adjudication during his period of probation is to completely ignore the plain meaning of the words used in Section 28 of the Public Service Employment Act and Section 91 of the Public Service Staff Relations Act.
>
> Mr. Jacmain clearly had the right to grieve under Section 90 of the Public Service Staff Relations Act. His grievance was considered and rejected. However, not all grievors under Section 90 are entitled to adjudication under Section 91. The right to adjudication is restricted to those grievors bringing themselves within the four corners of Section 91(1) which, on the facts here present, Mr. Jacmain has not been successful in doing.

Jacmain then appealed the decision to the Supreme Court of Canada.[46]

The Supreme Court of Canada delivered a majority judgment rendered by de Grandpré, J., concurred in by Martland Judson and Ritchie, J.H., a concurring judgment by Pigeon, J., agreeing in the result and a dissenting judgment rendered by Dickson, J., with whom the Chief Justice and Spence, J., concurred.

At p. 37-38 of the decision having stated that he concurred with the views expressed in the Court of Appeal quoted supra, stated with respect to the authority to reject under Section 28 of the Public Service Employment Act.

> "The employer's right to reject an employee during a probationary period is very broad. To use the words of S. 28 of the Public Service Employment Act, mentioned above, it is necessary only that there be a reason. Counsel for the appellant forthrightly acknowledged at the hearing that at first glance the legislative provision allows the employer to advance almost any reason, and that the employer's decision cannot be disputed unless his conduct was tainted by bad faith. He nevertheless submitted that by the combined effect of S. 28 of the Public Service Employment Act and S. 91 of the Public Service Staff Relations Act Parliament removed disciplinary matters from the employer's discretion. He also clearly agreed with the findings of the adjudicator and the Board that in this case the reason for the rejection was purely disciplinary.

Mr. Justice de Grandpré, J., then explored the jurisdictional problem at p. 38:

> "In view of my finding on the merits, I do not have to decide whether the adjudicator has jurisdiction when the rejection is clearly a disciplinary action. The employer denied this jurisdiction before both the adjudicator and the Board but appeared to accept it in this Court. Clearly, if the Public Service Employment Act does not give the adjudicator jurisdiction in such a case, the consent of the employer cannot do so: Essex County Council v. Essex Incorporated Congregational Church Union. The question remains ope

Mr. Justice de Grandpre concluded at p. 38:

> "The case at bar is not a case of disciplinary action. The employee's poor conduct, inascible attitude and unsatisfactory adjustment to his surroundings were valid reasons for his superiors' unwillingness to give him a permanent position in his service ..." and dismissed the appeal.

Mr. Justice Pigeon in his concurring judgment stated as follows at p. 40 et seq.

> "I had the advantage of reading the opinions written by Dickson and de Grandpre, J.J. As my approach to the questions raised is somewhat different I find it necessary to express my own views.
>
> At the hearing, counsel for the Attorney-General properly conceded that the right of a probationary employee to launch a grievance against a disciplinary dismissal could not be ousted by making such dismissal in the form of a rejection under S. 28 of the Public Service Employment Act. This means that, on a grievance being filed, the Adjudicator had jurisdiction to inquire whether the rejection was in fact a dismissal as alleged by the grievor. I therefore agree that the Public Service Staff Relations Board was right in so holding in accordance with Fardella v. The Queen.
>
> .....While the Adjudicator was entitled to inquire whether the grievor's rejection was in fact a disciplinary dismissal, this inquiry was on a fact on which his jurisdiction depended, his findings could not therefore be considered as conclusive and was subject to review as a matter of law. (Bell v. Ontario Human Rights Commission).

Having reviewed the opinions of the Adjudicator, the Board and the Federal Court of Appeal, the Judgment of Pigeon, J., continued:

> "It will be noted that, whereas the Adjudicator affirmed by the Board was of the opinion that the facts shown in support of the rejection were not "sufficient reason" for Jacmain's discharge, the Federal Court of Appeal was of the view that they were "ample cause for rejection". In my view this means that the true questions in this case are the following:
>
> 1. Was the Adjudicator entitled to review the sufficiency of the cause of rejection in order to decide whether it was in fact a disciplinary dismissal?
>
> 2. If so, was his opinion subject to review by the Federal Court of Appeal?
>
> It is clear that, prior to the enactment of the Public Service Staff Relations Act, a rejection of a probationary employee under S. 28 of the

Public Service Employment Act was just as final as a discharge by the Public Service Commission under S. 21. In the latter case as we have seen, the Federal Court of Appeal decided in Re. Cooper that S. 90 and 91 of the Public Service Staff Relations Act would not authorize a grievance when the Public Service Commission had upheld a recommendation of the deputy head that the employee be released. Although I agree that, in the case of a probationary employee rejected by the deputy head under S. 28, an Adjudicator has jurisdiction to inquire whether what is in form a rejection is in substance a disciplinary dismissal, I cannot agree that this does invest the Adjudicator with jurisdiction to review the deputy head's decision as to the suitability of the employee.

In the present case, the Adjudicator found that there were grounds for deciding that the employee was unsuitable. However, differing in that respect from the deputy head's judgment, he was of the opinion that those grounds, as established before him, were not sufficient to justify the rejection. In my view this is what he was not authorized to do because he only had jurisdiction to review a disciplinary dismissal not a rejection. On the basis on which the Adjudicator proceeded in the instant case, he would review every rejection because he would hold it to be disciplinary whenever in his opinion there was insufficient cause. Just as I cannot agree that the employer can deprive an employee of the benefit of the grievance procedure by labelling a disciplinary discharge a rejection, I cannot agree that an Adjudicator may proceed to revise a rejection on the basis that if he does not consider it adequately motivated, it must be found a disciplinary discharge.

I doubt that if I held the Adjudicator could review the sufficiency of the cause of rejection, I would hold the Federal Court of Appeal entitled to revise his decision. It is true that it is a finding on which his jurisdiction depends, however, it was noted in Segal v. The City of Montreal, at p. 473, that where the jurisdiction depends upon contested facts, a superior court will hesitate before reversing the inferior court's finding of fact, and will only do so on "extremely strong" grounds.

> On the whole, however, it appears to me that in this case the result of the Adjudicator's inquiry into the facts was that there were indeed some grounds for rejection of the employee as unsuitable. The decision that this was really a disciplinary discharge was based on the Adjudicator's judgment that those grounds were insufficient. This means that the Adjudicator substituted his opinion for that of the deputy head on a matter on which the law provides no appeal from the latter's decision.

In his dissenting judgment Mr. J. Dickson having reviewed the grievance and Section 28(3) of the Public Service Staff Relations Act, stated at p. 20:

> "The issue which this appeal brings squarely to the fore is whether the protection against disciplinary discharge extends to probationary employees. In terms, the answer is undoubtedly in the affirmative. The word "employee" contained in S. 91(1) of the Public Service Staff Relations Act does not exclude employees on probation. Prima facie they are protected. Yet, if the interplay of S. 28(3) of the Public Service Employment Act and S. 91(1) of the Public Service Staff Relations Act is such that rejection for cause in effect subsumes disciplinary discharge, then every case of disciplinary discharge constitutes inherently a case of rejection for cause and the protection proves to be illusory. In my view, rejection for cause and disciplinary discharge are separate and distinct concepts.
>
> Sometimes the acts of an employee will give rise to disciplinary action which may, or may not, then or at a later date, lead to dismissal. Rejections for cause will be for reasons otherwise than disciplinary. The fact that the employer may have some cause for complaint about the employee does not, by that fact alone, transform what would otherwise be a disciplinary discharge into a rejection for cause. The dividing line between the two may be blurred, but it is a line which the Adjudicator must draw and the matter is not concluded by the employer characterizing the severance as rejection for cause.

Having reviewed the Adjudicator's reasons for decision Mr. Justice Dickson concluded at p. 32 as follows:

"There was clearly sufficient basis for the Adjudicator's conclusion. The "rejection" gave effect to an intention expressed by the Commissioner of Official Languages on October 23, 1973. The only grounds on October 23rd, 1973, were disciplinary.

The Adjudicator went on then to resolve a second question, namely, whether in any event an Adjudicator has jurisdiction to hear cases involving disciplinary action resulting in discharge that are presented as rejection during a probationary period. He answered this question in the affirmative. I do not see in what possible way the Ajudicator's decision of August 1, 1974, can be open to attack. For the reason set forth in that decision he concluded that he had jurisdiction. In my opinion, the conclusion he reached came within permissible limits.

The merits of the case were then gone into in a later hearing, to which I have referred, and at that time evidence was given on behalf of the employer, respecting the appellant's "attitude." The Adjudicator concluded that the appellant's behaviour was "somewhat irascible," but he did not consider this to be sufficient reason for his discharge.

As I read the judgment of Mr. Justice Heald, his reasoning appears to proceed on this basis:

1. The appellant's attitude was wrong.
2. This would justify rejection for cause.
3. There could only be discharge for disciplinary reasons when there was no valid cause for rejection.
4. Therefore, the termination of employment was a rejection for cause, and the Adjudicator was without jurisdiction.

The reasoning, with respect, contains fundamental fallacies. First, it approaches the matter from the wrong end. Two questions must be distinguished: (i) was the termination of employment disciplinary discharge, or rejection for cause? (ii) was termination justified? The first is a jurisdictional question; the second goes to the merits. Mr. Justice Heald answered the second question and used the answer to resolve the first question. The proper approach is to answer the first question and then, depending upon the answer, to proceed to the second question.

> Second, it does not inexorably follow that, simply because there lurked in the background some cause which might justify rejection, the termination must, of necessity, be rejection and not disciplinary discharge.
>
> I would allow the appeal set aside that judgment of the Federal Court of Appeal and restore the decision of the Public Service Staff Relations Board.

Professor K.E. Norman, has canvassed the effect of three judgments of the Supreme Court of Canada in the adjudication of G.M. Smith[47], p.8 et seq.:

> "My analysis of the Supreme Court's three opinion in Jacmain comes down to this. Five of the nine members of the Court, as it was composed on September 30, take Mr. Justice Dickson's first point. An Adjudicator does have jurisdiction to inquire whether what is in form a rejection is in substance a disciplinary dismissal. But, six members of the Court have set their faces against his second point, as it is set down in the above excerpt from his judgment. An Adjudicator's jurisdiction in the case of the terminated probationer thus is more apparent than real. The Adjudicator who takes jurisdiction, as Mr. Weatherhill did in Jacmain, and who is faced with new evidence which, taken alone, might justify rejection, as Mr. Weatherill was, ipso jure, is rendered impotent. In effect, once credible evidence is tendered by the Employer to the Adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The Adjudicator at that moment, loses any authority to order the grievor resinstated on the footing that just cause for discharge has not been established by the Employer".

The Deputy Chairman, E.B. Jolliffe, has had occasion (in obiter) to review the state of the law as it relates to probationary employees in his second decision in Rohana Goodale[48], at p. 32 et seq.:

> "There may be many more objections to jurisdiction in probationers' cases, but it can no longer be denied that when such an objection is raised, an Adjudicator has a duty to inquire into the "jurisdictional facts" and must not accept or decline jurisction until it is established what those facts were. Moreover, it was clearly the view of five of nine

> judges of the Supreme Court in Jacmain, that if it is proved to an Adjudicator a so-called "rejection" was in fact a disciplinary discharge, the Adjudicator has a further duty. That duty is ... in the words of Section 96(1) and (2) of the Public Service Staff Relations Act --- to "give both parties to the grievance an opportunity of being heard" and then "after considering the grievance ... render a decision thereon". This was exactly the approach taken by at least five different Adjudicators" Arthurs in Caron, myself in Sabourin and Headley (166-2-410 and 4100), (now Mr. Justice Meyer) in Fardella, Simmons in Nanayakkara (166-2-2812), and Deputy Chairman Mitchell in Myers (166-2-3703). In all these probationers' cases (not taken to Court by the employer) disciplinary action was proved, evidence was received on the merits and decisions were rendered in favour of the grievors. That approach seems to have been validated by Jacmain and Richard, although there remains room for doubts as to the result if (in the words of Dickson, J.) "there lurked in the background some cause which might justify rejection," a doubt which will perhaps be resolved in future cases".

Jolliffe suggests that in future cases it "may become established that the line between "disciplinary action", and rejection for cause should be drawn where the effective or dominant cause, the causa causans of the termination was one rather than the other. It is respectfully suggested, however, that the causa causans test is not consistent with the decision of the Supreme Court's decision in Jacmain as once it has been determined that there is a reason justifying rejection during the probationary period, valid on its face, the Adjudicator has no jurisdiction to review the matter.

A route of redress that has not been explored by probationers who have been rejected during their probationary period is that of the Federal Court, Trial Division in an application for a declaration that the Deputy Head has not complied with Section 28 of the Public Service Employment Act or in the alternative that the decision to reject was based on erroneous grounds, whether or not the rejection was a camouflaged discharge.

1. Probationary Employees in the Private Section (Compared)

In the private sector employers and bargaining agents have usually reached an understanding reflected in the collective agreement that there should be no review of the decision of the employer to reject a newly hired probationary employee, although there are some collective agreements that do provide for arbitral review of a probationary employee.

In those situations where the parties have explicitly agreed that there should be no review of the decision to reject a probationary employee, arbitrators have traditionally recognized the sanctity of such a provision. A recent line of arbitral awards have held that Section 37 of the Ontario Labour Relations Act, which provides that a collective agreement contain a provision to settle by arbitration all differences arising from the interpretation application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, and its underlying policy dictates arbitration of all differences arising during the currency of the collective agreement and accordingly, that, if the parties attempt to avoid this result by some agreed provision barring arbitration of any such grievance Section 37(1) renders the provision illegal and unenforceable by an arbitrator[50].

In the collective agreements that do provide for the arbitral review of the rejection of a probationary employee, and in those situations where an arbitrator assumes jurisdiction despite a no review clause; the primary issue facing arbitrators are the criterion upon which the employers decision to reject a probationary employee is to be reviewed.

Messrs. Brown and Beatty have canvassed the various approaches in the following manner:

> "In the vast majority of the earlier awards, and indeed in some of the more recent ones, some arbitrators have expressed the view that unless there is a clause in the agreement to the contrary, the termination of a probationary employee is within the sole discretion of the employer. Indeed, some arbitrators have asserted that in discharging a probationer, an employer need not give any

> reasons for the termination even to the employee. Another arbitrator, however, articulated a standard diametrically opposed to the position adopted by the majority of his colleagues which posits that, unless the agreement provides otherwise, probationary employees are entitled to the same rights in grieving their discharge as seniority rated employees except that such an employee's obvious lack of a long and blameless employment record might not entitle him to the same consideration as it would an employee who had such a record. Although this position has received some support, in the vast majority of awards it has either expressly or implicitly failed to gain acceptance. Between these two polarities, the majority of arbitrators have sought a middle ground. Although there are some differences in approach and result between these awards, common to all of them is the principle that although the employer is obliged to prove some cause for the discharge of a probationary employee, it need not be of the same form or weight as that required to justify the discharge of a seniority rated employee. Necessarily, on this latter standard the termination of a probationary employee would not be subject to the same standard of review as that invoked against the dismissal of a seniority rated employee.[51]

A review of the Public Service Staff Relations Board decisions where adjudicators have assumed jurisdiction under Section 91(1)(b) of the Public Service Staff Relations Act upon the grounds that the rejection on probation was in fact a camouflaged discharge reveals that this distinction has not been given cognizance.

For example in the cases, Sabourin and Headley, the Chief Adjudicator, Jolliffe, in determining that there was not just cause of the discharge of these two employees who were purportedly rejected during their probationary periods stated at p. 36 of the decision:

> "I think that while the general principles of discipline may be the same with respect to all employees, nevertheless a probationer cannot be regarded as having the same interest or commitment in his job as a long-service employee. To put it bluntly, the probationer has yet to prove himself. He has not served long enough to claim reinstatement and at the same level and in the same terms as another employee who has served for a number of years."

Thus, in these cases the adjudicator did not distinguish between the weight and gravity of the misconduct required to justify the discharge of a seniority rated employee and a probationary employee, but rather saw the distinction as being relevant only to the remedy fashioned and in these cases he directed reinstatement of the two employees as probationers, but not reinstatement with pay and other benefits.[52]

An exception is the case of Dirren[53], where the adjudicatc noted that the type of offence for which an employee on probation may be discharged need not be extremely serious in nature.

Recent Developments

It may be anticipated that the recent decision of the Supreme Court of Canada in the case of Arthur Gwyn-Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police et al[54], will affect the legal remedies available to probationary employees who are rejected pursuant to Section 28 of the Public Service Employment Act although from the reasons for decision the principles therein would appear not to be applicable to private sector employers and their employees.

Nicholson was employed by the Haldimand-Norfolk Regional Board of Commissioners of Police as a probationary constable, who was informed by letter that his services had been terminated. The record indicated that he was not told why he was dismissed, nor was he given any notice, prior to dismissal of the likelihood of his dismissal, or of the reasonsfor, nor, any opportunity to make representations before his services were terminated.

The applicable statutory provisions contained in the Police Act of the Province of Ontario and the regulations made pursuant thereto contemplated that a constable who had served eighteen months or more was afforded protection against arbitrary discipline or discharge through the requirement of notice and hearing and appellate review. However, there was no explicit provision for the protection of a constable who had served a period less than eighteen months.

Chief Justice Laskin for the majority stated at p. 10 and 11:

> "In so far as the Ontario Court of Appeal, based its conclusion on the expressio unius rule of construction, it has carried the maxim too far .... Quoting from the case of Colguhoum v. Brooks (1888) 21, Q.B.D. 52, and of the Statement of Lopes, L.J., at p. 65 as follows that "the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied leads to inconsistency or injustce"

The Chief Justice stated:

> "This statement commends itself to me and I think it is relevant to the present case where we are dealing with the holder of a public office, engaged in duties connected with the maintenance of public order and preservation of the peace, important value in any society".

The Chief Justice continued at p. 13:

> "...I am of the opinion that although the appellant cannot clearly claim the procedural protections afforded to a constable with more than eighteen months service, he cannot be denied any protection. He should be treated "fairly" not "arbitrarily".

The Chief Justice accepted as a common law principle what Megarry J. accepted in Bates v. Lord Hainsham[55] at page 1378 "that in the sphere of the so-called quasi-judicial the rules of national justice run, and that in the administrative or executive field there is a general duty of fairness".

The Chief Justice concluded that in the case at bar the general duty of fairness required that "the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine to respond". Accordingly, the Court directed that the appeal be allowed, the judgment of the Ontario Court of Appeal be set aside and the decision of the Ontario Divisional Court quashing the decision of the Haldimand-Norfolk Board of Police Commissioners be restored.

Presumably, as a result of this decision of the Supreme Court of Canada a new avenue for the challenging of administrative decisions where no appeal is contemplated by statute has been opened in those cases where minimum standards of fairness have not been followed.

It is doubtful, however, whether Adjudicators exercising jurisdiction under Section 91 of the Public Service Staff Relations Act have been vested with sufficient jurisdiction to review cases such as these, rather it appears the more appropriate route to challenge administrative decisions would be to the Federal Court, Trial Division, pursuant to its exclusive original jurisdiction.

Matters for which an Appeal is not Provided under the Public Service Employment Act

(b) A Lay-Off of an Employee for Lack of Work or Discontinuation of a Function

Section 29 of the Public Service Employment Act provides as follows:

> "(1) Where the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the Deputy Head, in accordance with regulations of the Commission may lay-off the employee. ..".

The trend of decisions rendered by Adjudicators have consistently recognized that where there is an absence of discipline in the action taken, an employee who has purportedly been laid off under Section 29 of the Public Service Employment Act has no right to adjudication under Section 91 of the Public Service Staff Relations Act, although he may or may not have a remedy by way of appeal or review under another statute. In the case of Piche, Laurin, Dumas and Murphy[56], the first Adjudicator, H.W. Arthurs decided without a hearing a grievance that had been referred to adjudication by four former employees of the Department of National Defence who contended that they were wrongly dismissed. The employer contended that the grievance should not be submitted to adjudication upon the grounds that they were merely laid off, under Section 29 of the Public Service Employment Act as an economy measure. The then Chief Adjudicator invited the parties to submit written argument as to whether the grievance should be submitted to adjudication. The bargaining agent for the grievors sought to demonstrate that the grievors were in fact exposed to

"disciplinary action resulting in discharge". Adjudicator Arthurs held, "the union's submission was devoid of any allegation that termination of the employment of the grievors was due to any cause personal to them" ... and continued, "and in default of such an allegation, I must decide the case on the assumption that they were as the employer states laid-off as an economy measure."

The Adjudicator ruled that the grievance did not present an issue which was capable of being submitted to adjudicatic and determined that the limits of an adjudicator's jurisdiction were defined by statute and "although a liberal interpretation had generally been placed upon Section 91 there were cases in which no relief could be given and this was such a case."

To the same affect, there are a number of other decisions of adjudicators, namely; Nempton[57], (Jolliffe) and Bower[58], (Melanson) However, in the case of Hamilton[59], (Martin) the grievor alleged that he was in fact discharged for refusing to take a trade's test a second time after failing the test the first time he wrote it. Counsel for the employer submitted that the grievor was laid-off for lack of work. After a hearing, Adjudicator Martin, determined on the evidence that work was available and that the practice was to lay-off in accordance with the principles of seniority. Adjudicator Martin determined that the real reason for the lay-off was the grievor's refusal to take a trade's test and to that extent was disciplinary action. The Adjudicator further determined that the employer had a right to require the grievor to take the test and that failure on the test or refusal to take it would justify discharge. The Adjudicator then ordered the grievor to take the test and if successful he was to be ordered reinstated without back pay. The employer referred the decision of the adjudicator to the Public Service Staff Relations Board under the then Section 23 of the Public Service Staff Relations Act, however, the reference was subsequently withdrawn.

In the case of Gibbard and the National Film Board, employer, one of the separate employers, the grievor, Gibbard,

claimed that her lay-off was in violation of the collective agreement as there was work available for her. The employer submitted that her lay-off was due to a Government austerity program. This case may be distinguished from the earlier cases discussed as in this case the applicable collective agreement between the National Film Board and the Bargaining Agent, Syndicat General du Cinema et de la Television contained a restriction on the Film Board's prerogative to lay-off employees. Article 31 of the applicable collective agreement stipulated that the employer must maintain the principle and the practice of obtaining the services of regular employees and that it was agreed that services of free-lancers shall not be obtained to circumvent the provision of this agreement to terminate employment of regular employees. As stated in the earlier cases it had not been alleged any contract violation. The then Chief Adjudicator, Jolliffe, determined that the lay-off of the aggrieved employee was contrary to the provisions of the applicable collective agreement and held that she was entitled to re-instatement as a regular salaried employee of the Board and she was to be paid full compensation and other benefits accordingly.

Another interesting case concerning lay-off and involving the interpretation of a clause in a contract was considered by the Public Service Staff Relations Board and the Federal Court of Appeal in Grey[59(b)]. Letter Carriers at Toronto claimed severance pay arising out of their alleged lay-off in accordance with their collective agreement after being suspended from duty during the 1975 strike of inside postal workers. The employer alleged that the Letter Carriers had not been laid-off because no procedure prescribed in Section 29 of the Public Service Employment Act had been followed, but rather the Letter Carriers had been placed temporarily on off duty status, as there was little or no mail for them to deliver. The Public Service Staff Relations Board sitting as a division of the Board per Jolliffe and Mitchell determined that off-duty status lacked any authority in law and that in fact the grievors had been laid off. They further determined that there could be a temporary lay-off without termination of employment and that the term

lay-off must be understood in its ordinary sense as the collective agreement did not make reference to Section 29 of the Public Service Employment Act. Accordingly, the majority held that the grievors were entitled to severance pay.

Deputy Chairman, Falardeau-Ramsay, determined in a dissenting opinion that the term lay-off as used in the collective agreement had the same meaning as that used in Section 29 of the Public Service Employment Act and as such in order for there to be a lay-off, a termination of employment was necessary and since on the facts of this case the employment relationship had not been severed, the grievors had no immediate entitlement to severance pay.

The Treasury Board referred the decision of the Board to the Federal Court of Appeal pursuant to Section 28 of the Federal Court Act and the Federal Court of Appeal per Pratte, J., Heald, J., and Urie, J., determined that when the parties "used the expression lay-off in the collective agreement, one was entitled to presume, in the absence of any indication of a contrary intention that the parties intended to refer to a termination of employment" .... and, accordingly, the Federal Court of Appeal granted the application of the Treasury Board and set aside the decision of the Board upon the basis that a "lay-off within the meaning of article 30 had not occurred and thus, the respondent and the other grievors had not established their entitlement to the severance pay provided[60].

In summary, then, it is clear that there is no jurisdiction pursuant to Section 91 of the Public Service Staff Relations Act afforded an adjudicator to review a decision of the Deputy Head to lay-off a public servant unless, (1) the concerned employee establishes that in fact the lay-off was a camouflaged discharge in which case an Adjudicator would have jurisdiction pursuant to Section 91(1)(b) of the Act or (2) that the collective agreement applicable to the concerned employee contained provisions dealing with the circumstances under which the employer could lay-off an employee, in which the concerned employee would have to allege a violation of that article in the collective agreement. This is assuming that the trend

of decisions discussed supra namely; Lavoie are not challenged and that the principle that former employees have a right to grieve and refer matters to adjudication is maintained.

As stated, there is no statutory requirement that a public servant who was to be laid-off be given an opportunity to challenge the facts upon which decisions are made which result in that public servant being laid-off. However, in light of the recent decision of the Supreme Court of Canada, in Nicholson vs. Haldimand Norfolk Regional Board of Commissioners of Police et al, heard October, 1978, discussed in full in the Section dealing with probationary employees, it may be argued that in any lay-off under the Public Service Employment Act where an employee was laid-off without being told thereasons and given an opportunity to respond notwithstanding that the legislation in question did not call for such a procedure, the lay-off may be challenged on that ground which might result in a determination that the lay-off was not effective unless the public servant concerned was given such an opportunity.

It is suggested then that before a Deputy Head makes a decision to lay-off a specific public servant, he must as a minimum requirement inform the public servant of the reasons and facts upon which he proposes to make the decision and thereafter to afford the public servant either orally or in writing an opportunity to respond and challenge the facts upon which that decision will be based.

Matters for which an Appeal is not Provided under the Public Service Employment Act

(c) Resignations

Section 26 of the Public Service Employment Act provides as follows:

> "An employee may resign from the Public Service by giving to the Deputy Head notice in writing of his intention to resign and the employee ceases to be an employee on the day as of which the Deputy Head accepts in writing his resignation."

In the case of James E. McDougall[61], the grievor

had tendered his resignation verbally and left his ship after a dispute with the Captain. The grievor returned to the ship some four days later at which time the Captain ordered him off the ship as he had hired another engineer in the interim. The grievor alleged that his termination was in fact a disciplinary discharge. The employer in this case was the Fisheries Research Board, Government of Canada. The then Chief Adjudicator Jolliffe did not have to interpret Section 26 of the Public Service Employment Act but rather the Government Ships Officers Regulations, which in effect provided that resignation meant that the employee had with the consent of the appropriate Deputy Head terminated his employment voluntarily. Adjudicator Jolliffe on the facts of this case found that the grievor did in fact terminate his employment voluntarily, albeit, it was in the form of an oral resignation, and accordingly, held that as the grievor had voluntarily resigned and as his resignation had been accepted that the case was not one of disciplinary action resulting in discharge, and accordingly, the grievance was dismissed.

Similarly, in the case of J. Paquette[62], Post Office Department, the grievor Paquette after having admitted signing fraudulent physician's certificates to support absences from work, tendered his resignation in writing. His resignation was duly accepted in writing by the Local Manager. Subsequent to this time, the grievor attempted to withdraw his resignation and when management refused to permit him to withdraw his resignation he filed a grievance which was subsequently referred to adjudication alleging a disciplinary discharge. Adjudicator DesCoteaux at a Preliminary Hearing heard evidence as to whether the resignation was voluntary in the circumstances and determined on the facts that the resignation was in fact voluntary and as such he lacked jurisdiction to hear the grievance and accordingly dismissed it on that basis.

However, in LaFleur[63], Canadian International Development Agency, the grievor was suspended on suspicion of misconduct an alleged assault upon a subordinate, at which time he was advised to resign and he did so in writing, however, it

was not accepted in writing by a representative of management until two days later, while in the interim the employee sought to withdraw his resignation.

At the Preliminary Hearing, counsel for the employer argued that the adjudicator lacked jurisdiction as the grievor had in fact resigned as per Section 26 of the Public Service Employment Act . Adjudicator Simmons held, rejecting the objection to jurisdiction, that there had been no effective resignation within the statutory meaning, as the original letter of resignation had been signed in the belief that it would further the grievor's career and that the official acceptance on behalf of the employer had not been authorized by the Deputy Head. The adjudicator further determined that if the employer refused to make the grievor whole then it would be because of some disciplinary action resulting in discharge or suspension, and accordingly, he would assume jurisdiction and render a decision on the merits, that is, unless the grievor were reinstated, the termination would become adjudicable as a disciplinary discharge.

It is respectfully suggested that this decision may be in error. The adjudicator in order to find a basis for his jurisdiction initially had to determine that there had been no effective resignation within the statutory meaning. Having made that determination, initially he then inferred that if the employer refused to make the grievor whole it would be because of some disciplinary action. It appears to the author that adjudicator has no jurisdiction under Section 91 to determine the validity of employer compliance with Section 26 of the Public Service Employment Act, such a determination may be sought by resort to the Federal Court, Trial Division by way of a declaratory action.

An adjudicator's jurisdiction under Section 91 must be founded on evidence of disciplinary action initially not by inference. Once a grievor can establish that the action taken on the evidence was in essence disciplinary then under Section 91 the adjudicator may make ancillary determinations i.e. that the resignation was or was not voluntary in the circumstances of the case.

In Harnatiuk[63(b)], the grievor claimed her resignation was submitted under duress. In that case the employee had she not resigned would have been faced with release action pursuant to Section 31 of the Public Service Employment Act. Adjudicator Norman determined that there was no evidence of disciplinary action and declined jurisdiction. He further determined that he lacked authority under Section 91 of the Act to declare the resignation a nullity for non compliance with Section 26 of the Public Service Employment Act, and stated that relief ought to be sought in the Trial Division of the Federal Court.

In Theoret[64], the adjudicator determined that in a case of alleged resignation by analogy with rejection on probation cases, an adjudicator had jurisdiction to inquire whether there were elements of discipline.

Similarly, in Jackson[65], Deputy Chairman Kates in a preliminary determination where counsel for the employer had objected to the jurisdiction of the Board, found that the allegations that the resignation of the grievor was proferred under duress and threats were unfounded and found the resignation to be voluntary. Counsel for the employer had admitted for the purposes of the jurisdictional issue that the case was tainted with a disciplinary motive for the purposes of Section 91(1)(b) of the Act as had the grievor not resigned an indifinite suspension would otherwise have been imposed.

The question of whether the grievor's resignation was technically perfected in accordance with Section 26 of the Public Service Employment Act arose during the hearing as the grievor sought to revoke his resignation before the time it was to take effect, although the resignation had previously been accepted in writing. Counsel for the grievor and the employer adopted the position that the issue of compliance with Section 26 of the Public Service Employment Act was not a relevant consideration that ought to be dealt with by the Board at adjudication.

From a review of the Private Sector awards on the issue of resignation, it is apparent that the trend of decisions, the issues raised and the manner in which they are resolved is

similar to those referred to in the Public Sector. The cases of Chrysler Corporation of Canada Limited, Windsor[66], and Best Pipe Company Limited[67], establish that in circumstances where an employee alleges that in fact there was no resignation that the procedure adopted is usually that the employee is required to establish a prima facie case, that is, that there was no voluntary resignation and that if such a case is made out the onus would then shift to the employer to prove just cause for termination in the same way as it would in an ordinary discharge case. However, a review of the awards indicates that in such cirumstances where an employee has made out a prima facie case then the onus shifts to the employer to prove just cause for determination, however, as the rights to arbitration flow from the language in the collective agreement, it appears that the arbitration boards then reviews terminations for reasons other then disciplinary misconduct, see in particular the Chrysler case.

Matters for which an Appeal is not Provided under the Public Service Employment Act

(d) Abandonment of Position

Section 27 of the Public Service Employment Act provides as follows:

> "An employee who is absent from duty for a period of one week or more, otherwise than for reasons over which, in the opinion of the Deputy Head, the employee has no control or otherwise than as authorized or provided for by or under the authority of an Act of Parliament, may by an appropriate instrument in writing to the Commission be declared by the Deputy Head to have abandoned the position he occupied, and thereupon the employee ceases to be an employee".

Although there is no right of appeal or ajudication in respect of action taken under Section 27 of the Public Service Employment Act, a number of grievances had been referred to adjudication wherein it has been alleged that a declaration of abandonment pursuant to Section 27 of the Act was a camouflaged discharge and thus was adjudicable under Section 91 of the Public Service Staff Relations Act.

In Klingbell[68], Department of Public Works, Klingbell was unable to return to work when required to, due to pressing personal matters outside of Canada. The employer declared Klingbell to have abandoned his position under Section 27 of the Public Service Employment Act. The employer at the hearing of the adjudication contended that the grievance was not adjudicable as there was no disciplinary action involved. Upon the facts of this case, the Adjudicator, W.S. Martin, dismissed the grievance for a lack of jurisdiction as there was no disciplinary action involved.

In this case the then Adjudicator, W.S. Martin, Q.C., stated at page 10 of his decision:

> "That the jurisdiction of an Adjudicator does not extend to an assessment of whether Section 27 of the Public Service Employment Act has been properly complied with procedurally. If a Deputy Head has acted illegally under that Section, the form of relief must lie elsewhere".

Similarly, in the case of Crewe[69], Ministry of Transport, the grievor Crewe upon being ordered to transfer from Halifax to Ottawa refused to relocate. Subsequently a declaration of abandonment was made under Section 27 of the Public Service Employment Act. The grievor submitted that the transfer was a disciplinary measure, unjustified and constituted a discharge. After a hearing the then Chief Adjudicator, Jolliffe, determined that the employer had a statutory authority to transfer employees under Section 7 of the Financial Administration Act, that the transfer in question was justified, that there was no evidence of discipline present and accordingly it was a true case of abandonment and thus there was no jurisdiction to hear the grievance.

However, in Dancey[70], Post Office Department, the grievor attempted to refer to adjudication a grievance alleging that what purported to be a declaration of abandonment under Section 27 did not correspond with the facts and was a disciplinary discharge camouflaged under another name. At a Preliminary Hearing to determine whether there was jurisdiction to hear the case, the then Chief Adjudicator, Jolliffe, found that the grievor

had been improperly absent without leave one day, that his absence for the following days was justifiable by reason of an illness known to the Supervisor and that Management had planned for some months to take disciplinary action by reason of absenteeism and also for suspected misconduct.

The Chief Adjudicator ruled that the facts did not fall within the language of Section 27 and that suspected misconduct had been the real reason for the action taken and that the grievance was adjudicable, as one arising out of a disciplinary discharge. In his reasons for decision at page 13 thereof, the then Chief Adjudicator, stated as follows:

> "Probation cases have been considered by the Board under the former Section 23 and by the Federal Court of Appeal in the cases cited. No abandonment case has hitherto reached either the Board of the Court of Appeal. Abandonment was discussed by W. Steward Martin, Q.C., my predecessor as Chief Adjudicator, in Klingbell, (166-2-88) where he deplored what had occurred but declined to accept jurisdiction, because it did not appear to be a disciplinary case. I took the same view in Crewe (166-2-294) which was, however, settled after a lengthy hearing. It is clear that where the facts clearly fall within the language of Section 27, and where there is no element of disciplinary action, the matter is not adjudicable under Section 91 and 96 of the Public Service Staff Relations Act. Is the result necessarily the same where the established facts do not fall within the language of Section 27 and where it is evident that if the employee had returned to work as scheduled the employer would have charged him with misconduct?
>
> Jacmain has been cited by counsel as authority for the unqualified proposition that rejections and declarations of abandonment, purporting to be authorized by the Public Service Employment Act, are not reviewable under Sections 91 and 96 of the Public Service Staff Relations Act. It is necessary to recall, however, that in his judgment Mr. Justice Heald quoted the observations of Chief Justice Jackett in Cutter Laboratories International and Cutter Laboratories Inc. v. Anti-Dumping Tribunal (1961) 1 F.C. 446 and also made reference to the Court's observations in the earlier case of Fardella. Further, Mr. Justice Heald remarked: "There could only be disciplinary action camouflaged as

> rejection in a case where no valid or bona fide grounds existed for rejection." In my view, neither Fardella nor Jacmain exclude the possibility that a "declaration of abandonment" may be found on the evidence at a preliminary hearing to be spurious, unauthorized by the Public Service Employment Act and a mere camouflage or subterfuge for avoiding adjudication upon a disciplinary discharge".

Subsequent to the decision in Dancey, Adjudicator Jolliffe, considered the same issue again in Mader[71]. In this case the employee deliberately left for two weeks for Florida, knowing that his request to take Annual Leave at that time had not been approved by Management.

The then Chief Adjudicator determined that the case fell within the language of Section 27 of the Public Service Employment Act and accordingly, reluctantly dismissed the reference to adjudication stating in part at page 8:

> "This case once again illustrates that the power to make a declaration of abandonment still exists and may be exercised in appropriate circumstances ... If there is no evidence of disciplining being contemplated on other grounds, and if abandonment has actually occurred in the form of an absence for seven days or more, an absence not authorized by Management or by law, it is the employer's prerogative to rely on Section 27".

The Chief Adjudicator continued at page 9:

> "It is unfortunate that the former employee in a case such as this has no remedy and is not permitted to plead that the result is unduly harsh and that he should be given a second chance. There are grounds for expressing sympathy with him in that he has lost a position which was apparently useful in pursuing his education and sympathy also with management in that it has lost an employee who seems to have ambition and ability above the average level".

Similarly in Morin,[72] Deputy Chairman, Falardeau-Ramsay, declined jurisdiction upon the grounds that there was no evidence whatsoever that a declaration of abandonment had been made for disciplinary reasons.

In Lee[73], Post Office Department, Adjudicator Weatherhill followed the reasons analagous to those in Dancey in an interim decision and determined that the grievor in this case was entitled to sick leave for the period during which it was alleged that he did not report for duty and that medical justification for his absence had been shown and accordingly, determined that it did not appear to have been circumstances in which the grievor could properly be said to have abandonned his position and determined upon the facts that having regard to all of the circumstances that the employer considered that there was grounds for discharge and determined that that is what in fact occurred.

In St.-Jacques[74], Post Office Department, Adjudicator Moalli recites all of the applicable jurisprudence from both the Public Sector Adjudication cases and reviews the applicability of the Supreme Court decision in Jacmain to determine firstly, that the fact that the employer has characterized the termination of an employee's employement as an abandonment of position, cannot prevent the employee from filing a grievance claiming that his dismissal was actually a disciplinary discharge, preliminary decision page 11.

At page 11 of the Final Decision, the Adjudicator summarized the applicable law as follows:

> "A declaration of abandonment of position by the Deputy Head is possible provided that the employee's absence (a) is not the result of circumstances over which he has no control or (b) is not in conformity with what is authorized or provided for by or under the authority of an act of Parliament".

Presumably if the answer to either of these questions is affirmative, then, that per se is not sufficient to render the grievance adjudicable but rather an adjudicator must ask the further question as stated by adjudicator Moalli at page 13 of the decision:

> "If there was no abandonment of position, can it be concluded that a disciplinary measure was imposed on the grievor?

It is certainly clear as contemplated by Adjudicator Martin in Klingbell that an adjudicator does not have jurisdiction to assess whether Section 27 of the Public Service Employment Act has properly complied with its procedure, yet it is suggested that this is exactly the procedure that has been adopted by adjudicators. Even more confusing, is the exercise that adjudicators have conducted following a determination that the employer has improperly complied with Section 27 of the Public Service Employment Act in that it has not met either or both of the provisions in the statute in order to determine that in fact what has occurred was a disciplinary discharge. It is suggested that the reasoning in a number of these cases is faulty and that it appears that once there has been a determination of improper abandonment under Section 27, that as a matter of course the action must be deemed to be a disciplinary discharge.

The author does not take issue with the proposition that if in fact there is a disguised discharge camouflaged as an abandonment, that there is jurisdiction under Section 91 to hear and determine the grievance.

It is apparent, however, that situations do arise from time to time where a Deputy Head may have acted illegally under Section 27 of the Public Service Employment Act yet upon the facts of the case there is no evidence that the termination was a camouflaged disciplinary discharge. In such a situation, it is apparent, that there would be no jurisdiction in the adjudicator pursuant to Section 91 and 96 of the Public Service Staff Relations Act to hear and determine the grievance.

The only relief available in such a case would be to commence an application for a declaration coupled with claim for damages in the Federal Court, Trial Division. In the case of Albin Achorner, Plaintiff and Her Majesty the Queen in Right of Canada,[75] Defendant, Mr. Justice Walsh determined on the facts that Achorner had no control over the events which led to his declaration of abandonment from the Post Office Department and that, accordingly, Section 27 was improperly applied in his case. At page 20 of the decision, Mr. Justice Walsh acknowledging that a declaration of abandonment by the Deputy Head appears to be an

administrative action which should not be reviewed by the Court, as it normally does not require any judicial or quasi judicial determination, nevertheless, determined that a Plaintiff would be left without any recourse wheatsoever unless the Court could intervene by declaratory order or otherwise to set aside the decision.

He stated as follows at page 20:

> "I cannot conclude that it was the intention of the Statute to leave an employee without any redress in the event that Section 27 is improperly applied. This situation is quite different from cases such as Re. Ahmad and Appeal Board established by the Public Service Commission (51 D.L.R. (3r) 470), in which the Court of Appeal, dealing with a Section 28 application, set aside a decision of an Appeal Board established by the Public Service Commission maintaining a dismissal under Section 31(1) of the Public Service Employment Act by the Deputy Head of the Department of an employee he deemed to be incompetent, held that the Board would not be justified in deciding that the Deputy Head's recommendation should not be acted on unless it has before it material that satisfied it as a matter of fact that he was wrong in forming the opinion that the person in question was incompetent. It was pointed out that this is a matter of opinion and all that is required is that it must be honestly formed based upon observation of persons under whom the employee worked. In the present case it is not a question of review of an administrative decision made on the basis of the judgment by the party making the decision as to an employee's competence or incompetence, but rather a finding which appears to have been based on two entirely erroneous conceptions:
>
> (a) that Achorner had abandoned his employment, when it was perfectly clear from his conduct and correspondence that he was not abandoning it, but wished to resume it as soon as he could be assured of doing so in safety' and
>
> (b) that he had absented himself otherwise than for reasons over which he had no control when it was perfectly clear that in fact he did have no control over the conditions which led him to absent himself, although immediately advising Mr. St.-Cyr of his reasons for doing so.

> Having concluded therefore that this decision cannot be sustained the consequent conclusion would be to find that Plaintiff, never having abandoned his employment must be considered to still be in such employment. However, the Statement of Claim does not ask for re-instatement but rather for cancellation of the contract of employment for all future legal purposes".

In the circumstances of this case, Mr. Justice Walsh, then, awarded damages in the amount of $10,000.00

It appears then, at least in the case of those employees that have been declared abandoned under Section 27 of the Public Service Employment Act that there is avenue for redress either; (a) in the circumstances where there has been an alleged camouflaged discharge before an adjudicator under Section 91 of the Public Service Staff Relations Act, or (b) in other cases where it is alleged that the Deputy Head has declared the employee abandoned on erroneous grounds before the Federal Court, Trial Division, in an application for declaration with ancillary relief claimed therein, irrespective of there being no appeal provisions set out in the Public Service Employment Act.

It appears that the comments made in the discussion concerning lay-off of an employee under Section 28 of the Public Service Employment Act dealing with the recent decision of the Supreme Court of Canada in Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police et al, may also be applicable to those employees who have been declared abandoned without being told the reason and given an opportunity to respond notwithstanding that the legislature in question does not call for such procedure, as in the case of probationary employees and lay-offs, it is suggested then that before the Deputy Head makes the decision to declare that a specific public servant has abandoned his position he must as a minimum requirement inform the public servant of the reasons and facts upon which he proposes to make the decision and thereafter afford that servant either orally or in writing an opportunity to respond and challenge the facts upon which the decision will be based.

In the private sector, a review of the decisions and the awards indicate that there is a divergence of opinion as to

whether an unauthorized absence which is tantamount to circumstances in which in the Public Sector the Deputy Head would declare that the employee had abandoned his position is conclusive that the employee has voluntarily quit his employment. However, in those collective agreements that contain provisions deeming an employee to have quit if the employee is absent for x working days without advising the employer or obtaining permission to be absent, it is clear that there would be no jurisdictural issue as a grievance pursued to arbitration would necessarily involve the interpretation or application to the grievor of that article in the collective agreement and would be prima facie adjudicable. In Re. United Steel Workers, Local 3021, and Federal Wire and Cable Company Limited[76], a grievor referred to arbitration an allegation that the Company had discharged him without cause. The company took the position that the grievor had quit and relied upon Section 3 of the then applicable collective agreement which read:

> "An employee shall be presumed to have quit if (a) an employee is absent for three working days without advising the Company's Employment Department and obtaining permission to be absent".

The Arbitrator, H.W. Arthurs, determined that on the facts of the case that the conditions set out in the article in the collective agreement were present for only two days and that the grievor had in fact a bona fide reason for absence which would have precluded the operation of the rule and accordingly reinstated the employee.

In Re. United Automobile Workers, Local 27 and Minnesota Mining and Manufacturing of Canada Limited[77], the grievor was entitled to one week's paid holiday requested a two week leave of absence, in order to make a three week trip over seas. Having regard to its own plant production requirements, the employer refused the two week request, but granted the one week's leave. The grievor, however, did not return until one week after the period for which she had been granted leave. The applicable collective agreement provided that seniority would be broken if an employee overstayed a leave of absence for a period of more than three working days unless the employee had a justifiable

reason for such absence. The Arbitrator determined that on the facts of this case that the grievor's employment had ceased just as though she had voluntarily quit the employment of the Company.

Similarly, in Re. Acme Steel Company of Canada Ltd. and United Steel Workers, Local 6572, a grievor referred to arbitra a grievance concerning his termination. The Company terminated the grievor's employment pursuant to an article in the collective agreement which read as follows:

> "An employee will be deemed to have quit if he fails to return to work at determination of his approved leave of absence or uses such leave of absence for purposes or cimcumstances other than for which it was granted."

Upon the facts of the case, it was determined that the grievor had made a written request for two weeks' leave of absence purportedly for the purpose of going to Europe in connection with a family matter, which was granted. Upon the facts of the case, it was ascertained that the grievor did not in fact go to Europe to deal with the personal matter for which he had sought leave of absence but rather arranged for the sale of a cottage and went to a farm.

On the evidence the adjudicator concluded that the grievor used his leave of absence for a purpose other than that for which it was granted and that accordingly applying the article in the collective agreement he was deemed to have quit and thus dismissed the grievance.

Summary

From the foregoing examination of the issues and the litigation that these issues have spawned it is readily apparent that the limited scope of adjudication contemplated by the Act, and the corresponding limited jurisdiction of adjudicators has in a number of instances created situations of frustration for both bargaining agents (grievors) and adjudicators.

The adjudicators have not hesitated to vent their frustration in those situations where they have found evidence of injustice but have been fettered by the Act in granting any relief, by expressing in strong terms their opinion on the merits of the case purportedly to influence the employer to voluntarily

correct the alleged injustice. Invariably the written decision finds its way into the media and then into the political arena to put pressure to bear on the employer to take corrective action.

The most recent example of this phenomena in this author's experience is that arising out of the case of Rohana Goodale discussed supra under the heading of probationary employees, where the adjudicator in the first decision declined jurisdiction upon the basis that Goodale was a former employee but nevertheless expressed himself in strong terms upon the merits, and upon being reversed by the Federal Court of Appeal on the jurisdictional issue, was faced with his own strong opinion albeit in obiter when the case was rescheduled for hearing on the merits.

The adjudicator in the second decision although now having jurisdiction determined that he did not have authority to reinstate the employee but nevertheless again voiced a strong opinion on the merits of the case which decision ultimately received prominent coverage in the media.

The author queries whether this is the proper role of adjudicators given that Parliament has not deemed it appropriate to confer upon them jurisdiction to hear and determine certain matters.

Certainly it makes the role of counsel for the employer more difficult, as he can advise his client that as a matter of law in a given case there is no jurisdiction for an adjudicator to hear and determine the matter, yet to be realistic, even though the matter is not adjudicable, counsel must be prepared to argue the case on the merits, for fear of an adverse opinion in obiter, or possibly settle the grievance albeit that there is no jurisdiction to hear the case in the first instance in light of the ultimate possible adverse media coverage.

The Public Service Staff Relations Board has stated that management cannot be motivated by the impact their decisions will have on the media[78]. This suggestion, however, ignores the reality of the situation and it is suggested that the propensity of adjudicators to express themselves strongly on

the merits in those cases where they clearly do not have jurisdiction are making themselves the tools of the parties for propaganda purposes and rather than resolving disputes are adding further tension to the overall labour relations scene and encourage the referral to adjudication of other grievances that are clearly not adjudicable.

The major Bargaining Agents, namely, the Public Service Alliance, the Professional Institute of the Public Service of Canada, as early as 1971 voiced their discontent with the limitation placed upon the adjudication of grievances[79].

For those grievances not at present referrable to adjudication it is of course, necessary that Management in the grievance process not treat grievances with mere formality or in an arbitrary manner. It may be argued that this has been the case and if so, this would justify an adjudicator in expressing himself upon the merits of a case in which he does not have jurisdiction.

In Derbyshire[80], the then Chief Adjudicator commented that "fewer cases will come to adjudication when more serious and bona fide efforts are made to resolve the dispute at the final level of the grievance process".

Thus, any supposed "unfairness" on the part of the employer may be grievable, but not all grievances are subject to adjudication. Thus a grievance is capable of being reviewed only if:

(1) the person aggrieved is not excluded from the definition of employee contained in Section 2 of the Act;
(2) there is no statutory provision for redress under any other Act of Parliament;
(3) if the grievance has to do with the interpretation or application in respect of a provision of a collective agreement or arbitral award; he has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies;

(4) the grievance does not relate to any action taken pursuant to an instruction, direction, or regulation given or made as described in Section 112.

Even if a grievance is susceptible of Departmental Review (administrative) it is not adjudicable unless it meets the conditions contained in Section 91 of the Act. Under the Act a grievance is adjudicable only when the employee has exhausted the grievance procedure that is that he has carried the grievance up to and including the final "level" and the grievance is in respect to the interpretation or application in respect of him of a provision of a collective agreement or arbitral award; or in the alternative, is in respect of disciplinary action resulting in discharge, suspension or a financial penalty.

[1]Sections 90 and 95(2) of the Public Service Staff Relations Act.

[2]See discussion at p. 85

[3]Segodnia and Kunder, Adjudication File No. 166-2-23 at p. 2.

[4]Beaulieu, Adjudication File No. 166-2-14,
Segodnia and Kunder, Adjudication Files 166-2-23-24,
McLaughlin, Adjudication File No. 166-2-29,
Gilmour, Adjudication File No. 166-2-31,
Greenwood, Adjudication File No. 166-2-65,
Frizell, Adjudication File 166-2-149,
Winters, Adjudication File No. 166-2-299,
Barratt, Adjudication File No. 166-2-913, in this case the employer alleged that the reference was in essence a classificatior grievance and as such was not adjudicable. Adjudicator Abbott because the original grievance on its face alleged a violation of the collective agreement directed that a further hearing be held on the merits of the case.
Roy, Adjudication File No. 166-2-1033,
Friyzell, Adjudication File No. 166-2-1689,
Kostiuk, Adjudication File No. 166-2-1926.

[5]Turner, Adjudication File No. 166-2-25 (75),
Barton, Adjudication File No. 166-2-202,
Salter and Pursaga, Adjudication Files No. 166-2-1572 and 1604, where the parties by agreement attempted to enlarge the jurisdiction to hear all disciplinary cases.
Palmer, Adjudication File No. 166-2-2107, where an employee grieved initially against a one day suspension which was reduced to a written caution within the grievance procedure. It was held there was no longer an adjudicable grievance.

[5a]Kosiday, Adjudication File No. 166-2-28,
Guerdin, Adjudication File No. 166-2-36,
Towers, Adjudication File No. 166-2-206, where the Chief Adjudicatc held that the denial of an increment was in the circumstances a form of punishment or disciplinary action and in this case the denial was not justified.
Sproule, Adjudication File No. 166-2-250, where it was alleged that the denial of an increment was for disciplinary reason. It was held there was insufficient evidence to establish the denial was for disciplinary reasons and the grievance was dismissed as non adjudicable.

[6]Kennedy and Foster, Adjudication Files No. 166-2-15 and 166-2-20.

[7]McMullen, Adjudication File No. 166-2-49,
Large, Adjudication File No. 166-2-77.

[8]Noble, Adjudication File No. 166-2-26,
Gow, Adjudication File No. 166-2-70.

[9] O'Neil, Adjudication File No. 166-2-745.

[10] Vezina, Adjudication File No. 166-2-67.

[11] Robertson, Adjudication File No. 166-2-454, although the then Chief Adjudicator E.B. Jolliffe declined jurisdiction, he expressed the opinion in obiter that the statutory authority was lacking for the regulation concerned the employee subsequently instituted an action in the trial division of the Federal Court. The Court held that the regulation concerned was ultra vires and that the compulsory retirement of the Plaintiff was a nullity which decision was upheld by the Federal Court of Appeal.

[12] Bellemare, Adjudication File No. 166-2-91.

[13] Hislop, Adjudication File No. 166-2-117.

[14] Adjudication Files No. 166-2-1572 and 1604.

[15] Note that Section 99(2) of the Act provides that provisions contained in a collective agreement with respect to the grievance procedure govern over any regulations made by the Board and where there is an inconsistency the regulations made by the Board do not apply.

[16] Adjudication File No. 166-2-3104.

[17] See discussion Group Grievances.

[18] Postal Operations Group (Non Supervisory) Internal Mail Processing Code 608175 Article 9.03 (a).

[19] See discussion Re. Policy Grievances at p. 153

[20] Adjudication File No. 166-2-2943.

[21] Re. Attorney General of Canada and LaChapelle et al 91 D.L.R. (3rd) 674.

[22] ibid pp. 679-680.

[23] ibid pp. 680-681.

[24] Public Service Employment Act, 1966-67 c. 71.

[25] R.S.C. 1970, c. F-10.

[26] Public Service Employment Act 1966-67, c. 71, Section 21.

[27] ibid.

[28] ibid, Section 31.

[29] Noble, Adjudication File No. 166-2-26.

[30] O'Neil, Adjudication File No. 166-2-745.

[31] Adjudication File No. 166-2-523 and 546.

[32] Dunaenko, Adjudication Files No. 166-2-523-546 at p. 62.

[33] Cooper, Adjudication Files No. 166-2-675, Board File No. 166-2-36. Cooper v. Treasury Board, 5 N.R. 373 at 378 leave to appeal to the Supreme Court of Canada dismissed by Laskin, C.J.C., Spence and Baetz, J.J., 1975, Bulletin of proceedings taken in the Supreme Court of Canada at page 19.

[34] Richardson, Adjudication File No. 166-2-1155.
Phillips, Adjudication File No. 166-2-1606.
Cathcart, Adjudication File No. 166-2-1929, 1934.

[35] Public Service Employment Act, Section 28 provides that the Deputy Head may at any time during the probationary period, give notice that to the employee and to the Commission that he intends to reject the employee for cause.

[36] ibid, Section 29 provides that where the services of an employee are no longer required because of lack of work or because of discontinuance of a function the Deputy Head may lay off the employee.

[37] ibid, Section 26 which provides that an employee may resign from the Public Service by giving to the Deputy Head notice in writing of his intention to resign and the employee ceases to be an employee on the day as of which the Deputy Head accepts in writing his resignation.

[38] ibid, Section 27 provides that an employee who is absent from duty for a period of one week or more, otherwise than for reasons over which, in the opinion of the Deputy Head, the employee has no control or otherwise then as authorized or provided for by on under the authority of an Act of Parliament may by an appropriate instrument in writing to the Commission be declared by the Deputy Head to have abandoned the position he occupied, and there upon the employee ceases to be an employee.

[39]Board File No. 166-2-2.

[40]See for example Munro, Adjudication File No. 166-2-78.
See for example Czubrewics, Adjudication File No. 1 -2-61.

[41]Morrison, Adjudication File No. 166-2-18,
Board File No. 168-2-3, Decision July 15th, 1979.

[42]See inter alia Fisher, Adjudication File No. 166-2-359.
Sabourin & Hedley, Adjudication Files No. 166-2-410-411.
McPhie, Adjudication File No. 166-2-590.
J.P. Gallant, Adjudication File No. 166-2-581.

[43]Adjudication File No. 166-2-734,
Board File No. 168-2-49,
Federal Court of Appeal 5 N.R. 571

[44]Of which the author was one

[45]Jacmain, Adjudication File No. 166-2-1510,
Board File No. 168-2-87,
Federal Court of Appeal File No. A-689-75,
Supreme Court of Canada

[46]Roland Jacmain v. the Attorney General of Canada and the Public Service Staff Relations Board (1978), 2 S.C.R. 15

[47]Adjudication File No. 166-2-3017.

[48]Adjudication File No. 166-2-3050.

[49]ibid, p. 32 et seq.

[50]Re. Int'l. Waxes and Oil Chemical and Atomic Workers International Union, 17 L.A.C. (2nd) (Schiff).

[51]Brown & Beatty, Canadian Labour Arbitration, p. 389-380.

[52]Adjudication Files No. 166-2-410-411, at p. 36.

[53]Adjudication File No. 166-2-2900.

[54]Unreported todate.

[55][1972] 1 W.L.R. 1373 at p. 1378.

[56]Adjudication File Nos. 166-2-44-47.

[57]Adjudication File No. 166-10-288.

[58]Adjudication File No. 166-2-75.

[59]Adjudication File No. 166-2-76.

[59(b)]Adjudication File No. 166-2-2297.

[60]Grey v. Attorney General of Canada 18 N.R. 393 per Pratte, J., at p. 396, Heald, J., at p. 398.

[61]Adjudication File No. 166-7-196.

[62]Adjudication File No. 166-2-1937.

[63]Adjudication File No. 166-2-2413.

[63(b)]Adjudication File No. 166-2-2834.

[64]Adjudication File No. 166-2-2462.

[65]Adjudication File No. 166-2-5885.

[66](1952), 4 L.A.C. 1291 (Cross).

[67]L.A.N. February, 1974 (Beatty).

[68]Adjudication File No. 166-2-88.

[69]Adjudication File No. 166-2-294.

[70]Adjudication File No. 166-2-2371.

[71]Adjudication File No. 166-2-2461.

[72]Adjudication File No. 166-2-2317.

[73]Adjudication File No. 166-2-2637.

[74]Adjudication File No. 166-2-3165.

[75]Unreported, Federal Court File No. T-3159-75.

[76]18 L.A.C. 5 (Arthurs).

[77]16 L.A.C. 309 (Revelle).

[78]Henderson & Thistle, Adjudication File No.s 166-2-5162 & 63.

[79]Brief of the Public Service Alliance of Canada, submitted to the Legislative Review Committee, Vol. 2 (1971). Brief of the Professional Institute of the Public Service of Canada, submitted to the Legislative Committee and submitted subsequently to the Special Joint Committee on Employer-Employee Relations in the Public Service 1974-75.

[80]Adjudication File No. 167-2-5 at p. 8.

CHAPTER VII

GROUP GRIEVANCES

A second category of employee complaints styled "Group Grievances" may be grieved and subsequently be referred to adjudication providing that all of the prerequisites and conditions precedent applicable to individual employee grievances have been satisfied. The Public Service Staff Relations Act although not specifically mentioning group grievances defines a grievance as "a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of himself and one or more other employees."[1] Adjudicators in a number of decisions have stipulated the prerequisites necessary to establish the criteria for a valid group grievance.

The issues of interpretation that have had to be resolved arising out of this Section of the Act is whether the "one or more other employees" must be identified specifically in the grievance, and if so, must such identification be by name, or is it sufficient for the purposes of the Act to identify them by reference to a distinct group composed of those employees.

The first Chief Adjudicator, W.S. Martin, considered this issue in three separate grievances. In Levesque et al v. The Treasury Board[2], Grievances were initiated on behalf of five named letter carriers as well as other unnamed letter carriers. Having referred to Section 2(p) of the Act, Adjudicator Martin stated as follows:

> "The Act confers the right upon a group grieving employees, alleging the same factual circumstances and alleging an identical misinterpretation or misapplication of a collective agreement by the employer, to have a single grievance processed to Adjudication assuming that the grievance is one of those that falls within the ambit of Section 91 of the Act.
>
> However, I stated at the hearing that if an employee elects to join with other employees in the processing ofa grievance, it is necessary that the other employees be specifically identified so that the employer is given the opportunity to assess the factual circumstances surround the claims by other employees, in order to ascertain that the claims by the other employees fall within the confines of the grievance as

> structured by the grievor signing the grievance. Thus, the disposition of the grievances in the instant case must be limited to the factual circumstances surrounding the questions raised in issue by the five grievors, and cannot enure for undefined grievors."

Subsequently, the same issue was addressed by Adjudicator Martin in the case of Southern and the Treasury Board, Post Office Department[3]. Southern, a Postal Clerk initiated the grievance on behalf of the employees of the Postal Stations Division with respect to an allegation that the employer had violated the applicable collective agreement by not granting a period of five minutes for wash up to employees in the Postal Stations. At page 1 of the decision, again having referred to Section 2(p) of the Public Service Staff Relations Act and to reasoning similar to that in Levesque, Adjudicator Martin stated as follows:

> "It is incumbent upon the grievor who is acting as a representative for other grievors to clearly and precisely specify the other joined grievors. In the instant case, there is no identification of the employees of the Postal Station Division other than the grievor. Therefore, the grievance must be interpreted as a complaint pretaining solely to the grievor".

Similarly, in the case of Bourget and the Treasury Board[4], the grievor initiated the grievance on behalf of himself and other letter carriers, or supervisory letter carriers who had been alledgedly denied certain transportation benefits provided for by the collective agreement. Adjudicator Martin stated as follows:

> "As previously held, although a right of joint grievance is conferred under the provisions of the Public Service Staff Relations Act, unless joint grievors are identified by name, a grievance signed only by one grieving employee is deemed to be a single and not a collective grievance. In the instant case, this grievance must be considered to be a grievance filed solely on behalf of the grievor".

In addition, Adjudicator Martin in Bourget stipulates that the specification of the joint grievors is to be by name and goes on to imply that all of the grievors must sign the grievance.

However, in the case of Lasek v. The Treasury Board[5], Adjudicator, J.W. Weatherhill having accepted the principles set out in Southern by then Chief Adjudicator Martin; then goes on, however, to distinguish the application of that principle when it can be determined that the grievance relates to a small easily identifiable group if there are no variables affecting individual cases which would have any material effect and if no useful purpose would be served by requiring a multiplicity of grievances where one would do:

> "In that case Adjudicator Martin stated as follows:
> There remains the matter of the persons entitled to relief under this award. The grievance was brought by the grievor "on behalf of myself and any other employee who has been denied by the employer as I have". Section 2(p) of the Public Service Staff Relations Act defines a grievance as "a complaint in writing, presented in accordance with the Act, by an employee on his own behalf, or on behalf of himself and one or more other employees".
>
> In the Southern case, file 166-2-103, the then Chief Adjudicator dealt with a grievance purportedly filed on behalf of "the employee of the Postal Stations Division", in a matter dealing with the provision of washing up time. There was no identification of the employees involved apart from the grievor and it was held that the grievance pertained solely to the grievor. Certainly, as the Chief Adjudicator stated, such a grievance must clearly and precisely specify the other joint grievors. I am, with respect, in full agreement with the Southern case and with what was said there, and nothing in this award should be taken as detracting from that case. In the instant case, however the circumstances are very different from those of the Southern case. Here there is involved a particular small group of employees the individual members of which can be named with ease and precision. There are no variables affecting individual cases which would have any material effect. No useful purpose would be served by requiring a multiplicity of grievances where one would do. Accordingly, the

> objection to the form of the grievance is over-ruled. The grievance has been properly brought by Mr. Lasek on behalf of himself and all others in the Bargaining Unit, who attended the first date of examination following the completion of their working hours on March 31st, 1969. Each of the persons aggrieved is entitled to payment at overtime rates as above noted."

In the case of Dobson v. Treasury Board[6], Department of Energy, Mines and Resources, Adjudicator Abbott had occasion to review the existing awards on group grievances including Lasek in a case whereby Dobson a member of the crew of the C.S.S. Hudson grieved on behalf of himself and for the crew of the ship claiming that under the applicable collective agreement he and the crew were entitled to be paid at a rate of pay for western waters as opposed to eastern waters (which table was substantially lower). The grievance arose, as the ship had circumnavigated the North and South American Continent and for part of the voyage had been operating in western waters and the crew had continued to be paid at the rate specified for eastern waters.

Having reviewed the prior awards and the legislation the Adjudicator concluded at page 17 of the decision:

> "That only the named grievor, Mr. Dobson, is entitled to the benefits of and is bound by my decision. At the same time, the employer must be fully aware, as a result of this decision of what its duty is in relation to other members of the crew of C.S.S. Hudson. In my opinion, as expressed hereafter, they are entitled to the benefits of the varying rates of pay under what I determine to be the correct interpretation of the collective agreement".

The basis for his decision appears at page 16 and 17, namely that; "Adjudicators should be hesitant to make determination seriously and directly effecting the interest of employees, who have had no notice of and opportunity to participate in the grievance process".

Subsequent to his decision in Dobson, Adjudicator Abbott, in Tulk v. the Treasury Board[7], Department of Fisheries

and Forestry, had occasion to consider another group grievance and the proper form thereof but nevertheless, had to dismiss the grievance on the grounds that the grievance as constituted under Section 91 of the Act was not properly a grievance that could be referred to adjudication as there was no individual rights or privileges in connection with the grievance that were created or continued by the agreement, rather what the employees were seeking to enforce was a duty to consult which was rather a duty owed to the Bargaining Agent, not the individual members. Nevertheless, in commenting upon the form of the grievance, adjudicator Abbott stated at page 6 of the decision:

> "This grievance was a group grievance. Appended to the statement of grievance ... was a document indicating that its signatories "strongly support the grievance presented by E.L. Tulk ... All are indicated in the document to be members of the E.G. Group of Resource Development Branch at St. John's". I deem this to be, in form, a proper group grievance so that these individuals must be considered to be bound by this decision".

Similarly, in Philipps v. the Treasury Board[8], Post Office Department, the then Chief Adjudicator Jolliffe had occasion to comment on the same issue. At page 31 of the decision the then Chief Adjudicator determined that the grievance being considered must be dismissed as;

> "There was no obligation to process it as a so called group grievance, because it failed to identify any other employee alleged to be effected.

He continued:

> "In general my reasons for the conclusion just stated are analogous to those given by Adjudicator Abbott with respect to the adjudicability of the Dobson case as a group grievance. I must emphasize that the employer cannot be expected to give meaningful or intelligeable reply to a grievance presented on behalf of unidentified persons. It is first necessary to know what persons are alleged to be effected. In any event, if settlement is possible of what value would such a settlement be unless it named names? and to whom would compensation be paid?"

He continued at page 32:

> "...The grievance process must necessarily deal with specific cases, because relief sought in a grievance is sought for certain individuals, who may be numerous but are still individuals. It seems to me to be an essential feature of the system contemplated by the Act and also by procedures set out in agreements that the grievance process relates to the enforcement of individual rights and often the granting of remedies or relief to individual employees. The whole purpose of the system is to assure an individual employee a right conferred in general terms by an agreement or by the Act.
>
> I fail to see how a grievance can be processed, (much less adjudicated upon) unless both the grievance and the aggrieved employee or employees are identified."

Thus, under the provisions of the Act, Group Grievances may be adjudicated but it is apparent that the prevailing view of adjudicators is that all other employees interested in the outcome of the grievance must be, specified by name in the grievance and some would also require that they join in the grievance by affixing their signature to it.

In the private sector it is not unusual for a union to initiate a grievance on behalf of a group of employees provided that the group is readily identifiable and relief of a personal nature is sought. It is apparent, however, that technical problems with respect to the proper presentation of group grievances have arisen as well in the private sector.

In the case Re. International Association of Machinists & Aerospace Workers District Lodge No. 717 and Vickers Division Sperry Road Canada Ltd.[9], T.F.W. Weatherhill sitting as a sole arbitrator denied the grievance as it was expressly brought as a policy grievance but in fact arose out of individual claims and particular events and thus was clearly an individual grievance. The arbitrator reasoned that as the collective agreement provided separate procedures for individual and policy grievances the parties were entitled to insist on the proper procedure being followed.

In the case of Re. Corporation of the City of Toronto and Canadian Union of Public Employees, Local 43[10], arbitrator

J.D. O'Shea, allowed a group grievance brought as a policy grievance to be heard. In this case the president of the union filed a grievance on behalf of certain unnamed employees who had allegedly been denied proper overtime pay. The Corporation objected to the hearing of the grievance upon the grounds that it was a policy grievance rather than an individual grievance and was contrary to the intent of the collective agreement. O'Shea reasoned that:

> "The grievance may be more accurately characterized as a union grievance on behalf of a group of employees even though it was signed by only one employee. Mr. Doyle as president of the union signed the grievance on behalf of all employees who returned to work on May 9th after the strike. The Corporation through its records has knowledge of the identity of the employees on whose behalf the grievance was filed and also the hours actually worked by them. However, that may be, the identity of the employees and the hours worked by them is an evidentiary problem".

O'Shea then found that the grievance was not a policy grievance but a union grievance on behalf of a group of employees and as there was nothing in the applicable grievance procedure precluding a group grievance he determined that the grievance was arbitrable.

The author is not aware of any adjudication proceedings in the Federal Public Sector where it has been argued that the identity of the employees on whose behalf a group grievance has been filed where the employees are not individually named, is a matter of evidence. The author can discern no peculiar statutory distinction between the Federal Public Sector where an employee on behalf of himself and one or more other employees can initiate a group grievance and the private sector where the union can initiate a grievance on behalf of a group of employees that would defeat such an argument, if it is sound on its own merits.

[1]Public Service Staff Relations Act, Section 2(p).

[2]Levesque, Adjudication File No. 166-2-104 at pp. 94-96.

[3]Southern, Adjudication File No. 166-2-103.

[4]Bourget, Adjudication File No. 166-2-157.

[5]Lasek, Adjudication File No. 166-2-153.

[6]Dobson, Adjudication File No. 166-2-391.

[7]Tulk, Adjudication File No. 166-2-404.

[8]Phillipps, Adjudication File No. 166-2-515.

[9]19 L.A.C. 293.

[10](1973) 2 L.A.C. (2d.) 199.

CHAPTER VIII

POLICY GRIEVANCES

A third category of cases popularly known as "policy grievances" may also be referred to adjudication pursuant to Section 98 of the Public Service Staff Relations Act. Under Section 98 either the bargaining agent or the employer may refer a grievance to adjudication where either party is seeking to determine whether there is an obligation under a collective agreement or an arbitral award, and whether if there is, there has been a failure to observe or carry out the obligation.

An important qualification upon the referral of policy grievances, as explicitly stated in Section 98 is that the obligation is not an obligation the enforcement of which may be the subject matter of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies.

In the case of Professional Association of Foreign Service Officers and the Treasury Board[1], the bargaining agent alleged that the employer had defaulted in a commitment made by letters of understanding between the parties. The then Chief Afjudicator, E.B. Jolliffe, determined that the letters constituted supplementary provisions of a collective agreement but that he did not have jurisdiction to grant relief under Section 98 of the Act on account of the fact that the grievance could have been the subject of a grievance by an individual employee under Section 91 of the Act.

Chief Adjudicator Jolliffe, having referred to Section 98 of the Act stated as follows:

> "It is, thus, clear that not every dispute between a bargaining agent and the employer may be referred to adjudication under Section 98 ... it is a requisite under Section 98 (1)(b) that the obligation alleged is not an obligation the enforcement of which may be the subject of a grievance of an employee".

The Chief Adjudicator agreed with counsel for the bargaining agent that the dispute at adjudication was the kind of dispute which could be most appropriately conveniently determined upon initiation by the bargaining agent rather than by an employee but found that:

> "These considerations, however, in no way enlarge the scope of Section 98" and that:
>
> "The language of Section 97 takes no account of what may be a more appropriate procedure, whatever the circumstances of the case" and that:
>
> "its language is highly restrictive as far as the bargaining agent is concerned".

He continued:

> "The Act gives the Chief Adjudicator no power whatever to decide that a case may be more conveniently or appropriately heard and determined under Section 98 when it is clear that the same dispute would be adjudicable under Section 91 at the behest of an individual".

Conversely, it has been held by adjudicators that an employee has no status to proceed to adjudication under Section 91 1(a) of the Act, if the obligation alleged is essentially owing to the bargaining agent rather than to an individual employee[2], unless the grievance is one in which there could be an affect on the grievor so sufficiently immediate, direct and personal as to make his grievance one with respect to the interpretation or application in respect of him of a provision of a collective agreement[3].

In the references to adjudication initiated pursuant to Section 98 of the Act, the scope of policy grievances have raise difficult issues concerning the remedial authority of adjudicators acting pursuant to statutory authority which issues are more particularly discussed in the chapter in the remedial authority of the adjudicator.

It is perhaps appropriate, however, within the context of a discussion of policy grievances per se to note that the Chief adjudicators and now the Board have adopted the position that when acting under Section 98 of the Act, there exists the same authority to direct what corrective action is to be taken by a party found to be in default of an obligation as exists under Section 91 of the Act[4]. Save that pursuant to a Section 98 grievance there is no authority to grant consequential relief to individual employees where the real complaint was that of an alleged breach of an obligation owed by the employer to the bargaining agent[5].

As stated a policy grievance then may not be referred to adjudication if the obligation, the enforcement of which may be the subject matter of an employee's grievance. If an individual employee, however, is unwilling to present and refer a grievance to adjudication the outcome of which may affect all of the employees in the bargaining unit, that individual employee exercises a power tantamount to a veto.

It is suggested that the rigid statutory distinctions between policy grievances, individual and or group grievances has created unnecessary tensions and restrictions upon the grievance and adjudication system that was purportedly designed to ensure an expeditious and meaningful process of dispute resolution. Of course, the resolution of these issues cannot be resolved by the parties at the bargaining table, but rather requires statutory amendment.

Private Sector

In the private sector, if the collective agreement is silent on policy grievances and provides for individual grievances only, it is accepted law that in Ontario that there is authority in the Labor Relations Statute for the determination of policy grievances. The Ontario Labour Relations Act[6], Sections 37(1) and (2) provides that every collective agreement shall "provide for the final and binding settlement by arbitration .. of all differences between the parties arising from the interpretation, application or alleged violation of the agreement.

Section 1 (1)(e) of the Act defines the parties as the union and the employer, or a council of trade unions or an employer's organization.

In the case of United Steel Corp. Ltd. v. Fuller et al[7], Mr. Justice Wells as he then was determined that Section 37(1) and the model arbitration clause in Subsection 2 of Section 37 was authority for the arbitration of all disputes including policy grievances that arise out of a collective agreement. This decision has been folowed by arbitrators in the private sector[8].

There is a trend of arbitral authority to the effect that a policy grievance relating to an employee's personal attributes

or behaviour is inappropriately brought in that form.

In Re. Robson-Long Leathers Ltd. and Canadian Food and Allied Workers, Local 205L[9], O'Shea has canvassed the proper utilization of the policy grievance:

> "Usually the parties intend that policy grievances are to be filed in specific circumstances such as disputes concerning the interpretation of the provisions of a collective agreement and they often set up an abbreviated grievance procedure to deal with policy grievances ... If the collective agreement does not clearly and specifically circumscribe the area where a policy grievance may be used, the proper interpretation of the collective agreement may permit a union to file a policy grievance on behalf of a named employee if the employees claim involves a dispute concerning the interpretation of the collective agreement which establish the right to file a 'policy grievance'. In such circumstances a union may file a policy grievance even though the individual employee could have filed an individual grievance since the two types of grievances are not necessarily mutually exclusive. However, the remedy available under a policy grievance may not be the same as the remedy available under an individual grievance. In all such matters the terms of the collective agreement will govern.
>
> However that may be, it is difficult to envisage a collective agreement which sets up special procedures for a policy grievance which would permit a union to file a policy grievance on behalf of an employee where the employee's personal attributes or behaviour are the factors which gave rise to the grievance[10]."

Provisions in Collective Agreements purportedly limiting policy grievances have been interpreted both widely and literally.

In Re. United Automobile Workers, Local 252, and Canadian Trailmobile Ltd.[11], the union initiated a policy grievance alleging that the company had improperly instructed employees to work overtime while an employee in the same job classification had been laid off. The employee who had been laid off would not co-operate on initiating an individual grievance as he was working elsewhere for better pay.

The article in the applicable collective agreement dealing with policy grievances stipulated that:

> "it is the intention of the parties that the procedure provided shall be reserved for grievances of a general nature for which the regular grievance procedure for employees is not available and that it shall not be used to by-pass the regular grievance procedure".

The Arbitration Board determined that as the grievance in no way concerned the qualities or conduct of an employee it was of a general nature "within the meaning of the article and as the individual grievance procedure was not really available in a 'meaningful' sense as the only directly interested employee had established an apparently satisfactory employment relationship elsewhere and was not interested in enforcing any right she may have had against the company the grievance was a properly constituted policy grievance".

Similarly, in Re. Canadian Union of Public Employees Local 1090, and Township of Vaughn[12], the same issue arose wherein the union by way of policy grievance alleged that the collective agreement provided for a normal work week of five days, Monday to Friday, that the company had violated the agreement by scheduling a Tuesday to Saturday work week for particular employee, the employee concerned did not initiate an individual grievance. The applicable article in the collective agreement concerning policy grievances provided in part:

> "That the provisions of this Section may not be used with respect to a grievance directly affecting an employee or employees and that the regular grievance procedure shall not be by-passed".

The majority of the Board ruled that the grievance was arbitrable reasoning in part that the article in the collective agreement must be read in conjunction with Section 34(2) of the Governing Labour Relations Act so as to not deprive the union of its right to present a grievance relating to the interpretation of the collective agreement.

Perhaps the broadest statement of principles enunciated in favour of arbitrability is to be found in the case of Re. United Steel Workers, Local 2895, and Babcock & Wilcox Canada Ltd.[13] wherein a policy grievance concerned the employment of an individual who had been employed by the company but who had been

terminated apparently at his own request. The employee submitted to treatment at a psychiatric hospital and upon release sought re-employment and was refused. The Board ruled in favour of arbitrability stating:

> "We are of the opinion that whenever it can be stated that a difference of understanding exists between the union and the company which, while perhaps involving only one employee, by remaining unresolved may affect other employees in a similar manner in the future, then the union would process the grievance notwithstanding a possible over-lapping of union or 'general' vis a vis individual grievances which we have regarded as such in the past".[14]

In Re. Milk & Bread Drivers Dairy Employees Caterers and Allied Employees, Local 647, and Weston Bakeries Ltd.[15], the Arbitration Board formulated an approach to the issue in the following terms:

> "A union begins ... with a right to grieve itself for any violation of the agreement, even without the consent of an individual who may be directly affected ... However, it can contractually limit this right by appropriate language. No such limitations should be presumed from the alleged inherent individual (as opposed to general) nature of such grievances though. Only if the explicit language of the agreement, as fairly interpreted without any such presumptions, leads to the conclusions that the parties did intend to limit access to arbitration to union policy grievances should Arbitration Boards give effect to any such limitation[16].

The case of Re. Canadian Union of Public Employees, Local 1011 and Burlington Board of Education[17], is representative of a line of decisions whereby policy grievances were discussed where an individual grievance could have been initiated. In that case the union initiated a policy grievance claiming that payment should be made at appropriate overtime rates to all employees who had worked overtime on week-ends in specified periods. The collective agreement provided for policy grievances and that they be initiated at step 3 of the grievance procedure.

The applicable article also contained a provision that the article may not be used by the union to institute a complaint or grievance directly affecting an employee or employees which such employee or employees could themselves institute, and the regular grievance procedure shall not be by-passed".

The Board dismissed the grievance reasoning that upon reading the whole article in the collective agreement it seemed clear that the intention of the parties "was to limit the union policy grievance to only those situations which could not be made the subject of an employee grievance".

From the review of the awards it is apparent then that there is prevailing consensus of arbitrators in the private sector that would tend to permit policy grievances to be arbitrable even though the factual situation may also be the subject matter of a grievance by an individual employee. The positi of the Public Service Staff Relations Board in dealing with references under Section 98 of the Act is necessarily different as the jurisdiction of the Board to hear and determine the grievance is founded in the statute itself with the explicit admonition that no such case may be referred under Section 98 if the obligation alleged is one which may be the subject of an individual employee grievance. In the private sector, the arbitrators find their jurisdiction in the policy grievance articles in the collective agreements and the model arbitration clauses in the applicable statute which provides authority for the arbitration of all disputes including policy grievances.

[1]Adjudication File No. 169-2-78, at pages 19 & 25.

[2]Morabito, Adjudication File No. 166-2-77 (Meyer).
Smith, Adjudication File No. 166-2-847 (Meyer).

[3]Filby, Adjudication File No. 166-2-963, (Abbott).

[4]Maloughney, Adjudication File No. 168-2-47.

[5]International Brotherhood of Electrical Workers, Local 2228 and Treasury Board, Board File No. 169-2-11.
Public Service Alliance of Canada and Northern Power Commission Board File No. 169-10-13.

[6]R.S.O. 1970, Chapter 232.

[7](1958) 12 D.L.R. (2nd) 322 (High Court).

[8]Re. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647, and Weston Bakeries Ltd., (1970) 21 L.A.C. 308 per Weiler at p. 310.
"There is no doubt that this theory is accepted as law in arbitration precedents today".

[9](1973), 2 L.A.C. (2nd) 289.

[10]ibid, pp. 294-5.

[11]19 L.A.C. 227 (Adell).

[12](1969) 20 L.A.C. 392 (Weatherhill).

[13](1971) 22 L.A.C. 383.

[14]ibid p. 386.

[15](1970) 21 L.A.C. 308 (Weiler).

[16]ibid pp. 313-314.

[17](1967) 18 L.A.C. 347 (Barber).

A. RECOMMENDATIONS FOR REFORM

In 1973, J. Finkelman, Q.C., then Chairman of the Public Service Staff Relations Board, was asked by the Honourable Allan MacEachen, then President of the Privy Council, to undertake an investigation and to prepare a report on employer and employee relations in the Public Service of Canada, and to make proposal for legislative change to the Public Service Staff Relations Act. In May of 1974, Mr. Finkelman submitted to the House of Commons a three part paper entitled "Employer Employee Relations in the Public Service of Canada". Subsequently, on October 22nd, 1974, it was ordered by Parliament that a Special Joint Committee of the Senate and the House of Commons be appointed to consider and make recommendations upon Parts 1, 2 and 3 of the Finkelman Report.

The Joint Committee was subsequently duly organized and held 40 public meetings between November 1974 and June 1975. It received thirty-one briefs by interested parties with respect to proposed legislative change to the Public Service Staff Relations Act. The Special Committee on Employer Employee Relations in the Public Service presented its Report to Parliament on February 26th, 1976, which Report included some seventy-two recommendations[1].

A number of bargaining agents representing employees were critical of the statutory divisions of authority and responsibility as raising awkward barriers against the logical processes of personnel administration in the Public Service and against the resolution of problems facing individuals and groups of employees as witnessed by the two independent regulatory agencies, namely, the Public Service Commission which derives its authority and responsibility from the Public Service Employment Act and the Public Service Staff Relations Board which derives its authority from the Public Service Staff Relations Act. The Committee, in its Report to Parliament, did not make any substantial recommendations for change, but merely recommended that a special Task Force be established to review the situation[2].

The following discussion canvasses the recommendations pertaining directly to the extension or restriction of the resort to the adjudication of rights disputes by the Public Service Staff Relations Board.

B. Recommendations Extending the Scope of Adjudication

The Committee recognized that under the present system there was a great deal of difficulty in distinguishing between behaviour requiring disciplinary action and involuntary infractions which may be traced to incompetence or incapacity. As noted, only disciplinary action resulting in discharge or suspension can be referred to third party adjudication. Whereas, with respect to matters of incompetence or incapacity under the auspices of the Public Service Commission, there are appeal rights to an Appeal Board established by the Commission. The Committee noted a great deal of confusion both by management as to which option to use, and the argument by bargaining agents who were seeking the elimination of the divided authority. Accordingly, the Committee recommended in Recommendation No. 58 that where the action of the employer will result in the termination of employment, and the reasons alleged by the employer are misconduct, abandonment of position, incompetence or incapacity, the employee should be entitled to grieve the termination action and refer it to adjudication before the Public Service Staff Relations Board.

The Committee further recommended that the Public Service Staff Relations Act be amended to specifically empower the adjudicator to rescind the termination where he maintains the employee's grievance or substitute another remedy if the employer's action was not well-founded. he should not be empowered to recommend or effect an alternate appointment[3].

Classification - Grievance

Under the Act as presently constituted, classification standards are established unilaterally by the employer. The Committee recommended, however, that there should be some extension of the scope of bargaining so as to include clas-

classification standards. These recommendations were included in Recommendations 34 to 40 of the Report. However, provisions in collective agreements with respect to classification standards were recommended to be treated as special agreements having their own duration and that the strike route with respect to the resolution of classification disputes would be prohibited. It was further proposed that classification grievance, i.e., rights disputes, should be the subject matter of adjudication[4].

C. Recommendation - Restricting the Scope of Adjudication

With respect to the issue of managerial and confidential exclusions, the Committee concluded that persons exercising effective control over employees, especially in relation to other persons who are members of a bargaining unit, should properly be identified as management and should be excluded from bargaining agents. This conclusion was reflected in Recommendation No. 57 which was a recommendation to amend the Definition Section of the Act defining persons employed in a managerial or confidential capacity[5].

Accordingly, if the Definition Section were to be so amended then Section 91(a) would no longer be applicable to these employees as there would be no collective agreement applicable to them.

It was not until the Spring of 1978 that the Government acted to amend the Public Service Staff Relations Act following the Report of the Committee on Employer Employee Relations in the Public Service in Bill C-28. This Bill only received first reading and died on the Order Book. Bill C-28 was succeeded by a new Bill, Bill C-22, which maintained many of the principles contained in Bill C-28. This new Bill was introduced into the House of Commons in November 1978, but it died on the Order Book as well when the general election was called for May, 1979.

The only recommendation relevant to the foregoing discussion in that proposed Bill was the recommendation of both the Finkelman Report and of the Committee on Employer Employee Relations in the Public Service to broaden the definition of

managerial duties and thus increases the number of managerial exclusions from collective bargaining under the Act. In addition, all Treasury Board employees, on account of the fact the Treasury Board exercises a special responsibility as the employe for all public servants, would have been excluded from bargaining under the Act.

[1]Speaker of the House of Commons, Report to Parliament (Employer-Employee Relations in the Public Service) p. 6

[2]ibid, pp. 6, 7, 8 and 9.

[3]See discussion on the Remedial Authority of the Adjudicator and in particular Re. Goodale.

[4]Speaker of the House of Commons, op. cit., pp. 20-21.

[5]ibid, pp. 28-29.

CHAPTER 10

CONCLUSION

In summary a federal public servant has the right to grieve virtually any alleged complaint concerning his terms and conditions of employment, however, not all grievances are subject to third party adjudication.

A grievance is capable of being reviewed only if the person initialing the grievance is not excluded from the definition of employee contained in Section 2 of the Act, there is no statutory provision for redress under any other Act of Parliament; if the grievance pertains to the interpretation or application in respect of a provision of a collective agreement or arbitral award he has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies; The grievance procedure has been exhausted and most significantly the grievance meets the conditions stipulated in Section 91 of the Act.

Thus, although adjudicators under the Public Service Staff Relations Act have a comparatively limited jurisdiction and are subject to judicial review in the Federal Court of Canada it is fair to say that they have succeeded in providing a relatively expeditious and meaningful process of rights disputes resolution to the Federal Public Service and for the most part bearing in mind the unanimity of decision making have brought a great deal of consistency and uniformity to the principles applicable to the resolution of rights disputes of public servants employed in a wide variety of duties throughout Canada.

BIBLIOGRAPHY

Adams, G.W., Grievance Arbitration and Judicial Review in North America
(1971) 9 Osgoode Hall, L.J., 443.

Aggarwal, A.P., Adjudication of Grievances in Public Service of Canada
1973 Industrial Relations, Vol. 28 No. 3.

Arthurs, H.W., Adjudication of Grievances
(1968) 13 Can. Lab. 9:24

Arthurs, H.W., Collective Bargaining in the Public Service of Canada
(1968) 67 Mich. Law Rev., 971.

Arthurs, H.W., Collective Bargaining by Public Employee Unions in Canada, Five Models,
The University of Michigan - Wayne State University, Am. Arb., 1971.

Beatty, D.M., Procedural Irregularities in Grievance Arbitration
(1974) 20 McGill L.J. 378.

Brown, D.J.M., Interest Arbitration Task Force on Labour Relations, Study No. 18
Ottawa, Information Canada 1970.

Brown, D.J.M. & Beatty, D.M., Canadian Labour Arbitration,
(Canada Law Book Limited, 1977)

Brief of the Public Service Alliance of Canada - submitted to the Legislative Review Committee, Vol. 2 (1971)

Brief of the Professional Institute of the Public Service of Canada - submitted to the Legislative Review Committee, Vol. 2 (1971)

Carrothers, A.W., Collective Bargaining Law in Canada
Toronto Butterworths 1965.

Civil Service Review, Vo. XXXV No. 3, December 1962.

Finkelman, J., Report on Employer- Employee Relations in the Public Service of Canada
1974 Industrial Relations Vol. 29 No. 4.

Finkelman, J., Employer-Employee Relations in the Public Service of Canada - Proposals for Legislative Change,
Information Canada, Ottawa, 1974

Gunderson, M., (ed), Collective Bargaining in the Essential and Public Service Sectors, University of Toronto Press, Toronto 1975

Herman, E.E., The Canadian Approach to Grievance Arbitration in the Public Sector, Collective Negotiations Vol. 3(1) Winter 1974

Hodgetts, J.E., & O.P. Dwivendi, Provincial Governments as Employers the Institute of Public Administration of Canada McGill, Queen's University Press, Montreal 1974

Jolliffe, E.B., Adjudication in the Canadian Public Service 20 McGill Law Journal

Kelly, A., Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration, Ontario Ministry of Labour, 1978.

The Law Society of Upper Canada, Department of Continuing Education, Labour Arbitrations in Ontario, edited lecutres from the programme held on April 22, 1977.

Laskin, B., Problems of Procedure and Proof in Labour Arbitration, 1962 r Can. Pub. Admin. 76

Palmer, E.E., Collective Agreement Arbitration in Canada Butterworth & Co. Toronto, 1978

Preparatory Committe Report on Collective Bargaining in the Public Service, Ottawa, 1965.

Public Service Staff Relations Board, First through - Eleventh annual reports. Ministry of Supply and Services, Canada

Royal Commission on Government Organization, Ottawa 1962 Vol. 1

The Senate and House of Commons, Minutes of Proceedings and Evidence of the Special Joint Committee on Employer/Employee Relations in the Public Service, First Session thirtieth Parliament,

Simmons, C.G., Cases and Materials in Labour Relations the Public Sector, Faculty of Law, Queen's University, Kingston, Ontario.

Simmons, C.G., Labour Relations in the Public Sector, Cases and Materials, Queen's University, Kingston, Ontario, August, 1977.

Steinberg, M., The Remedial Authority of the Labour Arbitrator A Postscript, 15 Osgoode Hall Law Journal

No. 1 at p. 251

Stanley, D., Prerogative in Private and Public Employment (1974) 20 McGill Law Journal 394.

Speaker of the House of Commons, Report to Parliament, Employer Employee Relations in the Public Service, First Session, Thirtieth Parliament 1974-75-76.

Tacon, S.A., The Effect of Judicial Review on Grievance Arbitration, 1976, 14, Osgoode Hall, L.J., 661

Treasury Board Canada, Proposed Changes to the Public Service Staff Relations Act, November 1978.

Weiler, P.C., The Role of the Labour Arbitrator, Alternate Versions, (1969) U.of Toronto, L.J. 16.

Weiler, P.C., The Remedial Authority of the Labour Arbitrator Canadian Bar Review, 1973.

Weiler, P.C., The Arbitrator, The Collective Agreement and the Law, 1972, 10 Osgoode Hall, L.J., 141

Woods, H.D., Labour Policy in Canada, 2nd ed., MacMillan of Canada, Toronto 1973