

Date: 20071128

Docket: T-821-06

Citation: 2007 FC 1250

Ottawa, Ontario, November 28, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

FERMIN GARCIA MARIN

Applicant(s)

and

**TREASURY BOARD OF CANADA
(PUBLIC WORKS AND GOVERNMENT SERVICES CANADA)**

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Fermin Garcia Marin from an Adjudicator's decision rendered under section 92 of the *Public Service Staff Relations Act*¹, R.S.C. 1985, c. P-35 (Act).

¹ This statute has since been repealed and this provision replaced by section 209 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22. However, pursuant to section 61 of the new act, the former act continues to apply to grievances presented before April 1, 2005.

Background

[2] Mr. Marin has been employed with Public Works and Government Services Canada (Department) since 1977. By all accounts, he has been a valued employee and throughout his career he has held a number of significant management positions in the Department. In 1995, Mr. Marin was appointed to the position of Manager of the Clothing and Textiles Division at a classification level of PG-06. The Clothing and Textiles Division was, at the time, working closely with the Department of National Defence (DND) on procurement matters; however, that relationship appears to have deteriorated over time.

[3] In late 2001, Mr. Marin's immediate supervisor, John Holinsky, decided to move Mr. Marin into a 9-month temporary special projects position. This was intended to improve the relationship between the Department and the DND. Unfortunately, this reassignment seems to have been carried out without any consultation with Mr. Marin. Needless to say, Mr. Marin was not pleased with this change in the terms of his employment. He felt that he was singularly being held accountable for a problem for which he was not responsible. He made his feelings known to Mr. Holinsky and to others in the Department and went so far as to hire a lawyer to communicate his displeasure to the Deputy Minister.

[4] On December 17, 2001, Mr. Marin went on extended sick leave. He did not return to work until September 3, 2002; when he did return, he requested reinstatement to his former position. Mr. Holinsky declined that request and, instead, assigned additional special project tasks to Mr. Marin.

This led to an exchange of rather blunt e-mails between Mr. Marin and Mr. Holinsky, the contents of which disclose a dysfunctional working relationship.

[5] Throughout late 2002 and early 2003, Mr. Marin and Mr. Holinsky continued to communicate by e-mail. Mr. Holinsky was attempting to promote Mr. Marin's work on the special projects he had assigned. Mr. Marin responded by expressing his dissatisfaction with the scope of the assigned work and by continuing to assert his claim to be returned to his former position. The record does provide some substantiation for Mr. Marin's complaint that he had been sidelined by Mr. Holinsky but it also reflects an increasing level of insubordinate commentary by Mr. Marin.

[6] Later in 2003, Mr. Marin's former responsibilities as Manager of the Clothing and Textiles Division were assigned to another person under the new title of Manager, Supply. This led to a complaint by Mr. Marin under section 34.3(1) of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 which culminated in an inquiry and in a report favourable to Mr. Marin.

[7] In July 2003, Mr. Marin also made a complaint to the Acting Director of the Department, Normand Masse, with respect to the issue of outstanding performance pay. When he did not receive a satisfactory response, he filed a grievance with respect to the Department's failure to provide him with a performance review for 2002-2003 and the resulting failure to award performance compensation. Mr. Marin's grievance was framed as follows:

Department has failed to properly assess performance pay award for '2002/2003' period.

Department has failed to do performance rating for 2002/2003 period.

[8] The above-noted grievance was denied at the final level by the Assistant Deputy Minister. It is apparent from the evidence that the Department's explanation for its failure to conduct a performance evaluation was that Mr. Marin had failed, when asked, to provide any information about what he had accomplished during his special project assignments. Mr. Marin also confirmed that at the final stage, when he was asked by the Assistant Deputy Minister to provide an outline of the work he had carried out, he refused to do so. This impasse left the Department with no information upon which it could carry out a performance assessment and no corresponding basis to award performance compensation.

[9] Mr. Marin was not satisfied with the resolution of his grievance and sought to have it formally adjudicated under section 92(1) of the Act. The Public Service Staff Relations Board requested clarification from him to ascertain whether the grievance came within the Board's jurisdiction to hear matters involving discipline resulting in a suspension or a financial penalty. Mr. Marin responded by asserting, for the first time, that the Department's denial of performance compensation was part of a long-standing pattern of barely disguised discipline beginning with his wrongful reassignment in 2001.

The Adjudicator's Decision

[10] The Adjudicator dismissed Mr. Marin's grievance on jurisdictional grounds and on its merits. He found that Mr. Marin had failed to allege at any previous stage of the grievance that the denial of a performance assessment and the resulting loss of performance compensation were the

consequence of disguised discipline. He also found that Mr. Marin had never previously linked his grievance to the earlier history concerning his employment reassignment. Mr. Marin's attempt at the adjudication stage to characterize the Department's conduct as disciplinary was thus found to constitute a modification of the grievance which, according to the authority of *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109, 37 N.R. 530 (F.C.A.) at para. 5, is impermissible. The Adjudicator concluded, therefore, that he had no jurisdiction to deal with Mr. Marin's claim. Nevertheless, having heard all the evidence, the Adjudicator went on to decide the case on the merits and he concluded that Mr. Marin had failed to establish that the Department's treatment of him constituted discipline. In dismissing Mr. Marin's various allegations, the Adjudicator made the following factual findings:

[87] In the present case, the actions of the employer in assigning the grievor to Special Projects on November 7, 2001, and in reorganizing the Division on April 1, 2003, were not taken in response to voluntary malfeasance by the grievor. The evidence convinced me that those decisions were taken to improve the department's ability to communicate with the DND and not as a reproach to the grievor. I accept the testimony of Mr. Holinsky to this effect. Those actions were taken pursuant to the employer's right to determine the organization of the public service to assign duties to employees to improve the services provided by the PWGSC, particularly to the DND, pursuant to section 7 of the *PSSRA*. I agree with the adjudicator in *Veilleux* (supra) that unless the adjudicator is satisfied that the matter involves disguised disciplinary action, the adjudicator cannot take the place of the employer in matters respecting the organization of work or the assignment of duties to positions. The evidence leads me to conclude that the assignment to Special Projects was a decision of an administration nature, not a disciplinary one.

...

[95] [...] The evidence demonstrates that the employer requested reports on the tasks performed and a plan to resolve the issues involving Corcan but the grievor did not respond. It is

understandable that, under these circumstances, Mr. Holinsky stated that he was unable to assess the grievor's performance. The absence of response from the grievor to Mr. Holinsky's requests to follow-up on the new tasks brings me to reject his argument founded on the default of management to ask him to provide information prior to stating that his performance was unable to be assessed. Further, any such error on the part of management was corrected at the final level of the grievance process when management asked him again to provide a list of work accomplished during the year but the grievor refused.

...

[98] The Performance Pay Administration Policy of the Treasury Board was not applied by management when it failed to complete performance appraisals for 2000/2001, 2001/2002 and 2002/2003. This was a mistake of an administrative nature. No evidence showed that there was a link to a desire to discipline the grievor or that there was a link between the threat of retaliation stated to the grievor by Mr. Holinsky at the October 17, 2002, meeting and Ms. Fyfe-Fortin's conclusion that she was unable to assess the grievor's performance for the 2002-2003 period. Even though Ms. Fyfe-Fortin testified and was cross-examined by the grievor, the issue of discipline and retaliation was never raised by the grievor and I am left only with her evidence to the effect that she was unable to assess the grievor's performance as she was unable to gather evidence regarding the grievor's work during the period in question. The grievor has not proven discipline as he produced no evidence allowing me to conclude that, on a balance of probabilities, he had been disciplined for any culpable act on his part for that period.

Issues

- [11] (a) What is the appropriate standard of review for the issues raised by the Applicant?
- (b) Does the Adjudicator's decision reflect a reviewable error?

Analysis - Standard of Review

[12] It is clear from the recent authority of *Shneidman v. Canada (Customs and Revenue Agency)*, 2006 FC 381, 289 F.T.R. 256, aff'd 2007 FCA 192, 365 N.R. 285, that the standard of review for the Adjudicator's jurisdictional ruling in this case is correctness. In the *Shneidman* case the adjudicator took jurisdiction over an issue of due process involving a collective agreement and was found by Justice Sandra Simpson to have strayed outside of the jurisdictional boundaries set by section 92(1) of the Act. Justice Simpson's decision was upheld on appeal for the following reasons at para. 24:

In my view, however, before considering the breadth of the grievance, it was necessary to ask whether Ms. Shneidman “presented a grievance” regarding the violation of her rights under article 17.02 of the collective agreement to the final level within the meaning of the opening words of subsection 92 (1) of the PSSRA. Whether or not the language of the grievance is potentially broad enough to include a complaint that the collective agreement has been violated, the complaint will not be permitted to proceed to adjudication, and thus will not be in the adjudicator's jurisdiction, unless it has been specifically raised at the final level. Neither the Adjudicator nor Justice Simpson considered this preliminary question of whether the specific claims relied upon by Ms. Shneidman before the Adjudicator had been raised at the final level. After considering this question, I find no basis for interfering with Simpson J.'s conclusion that the Adjudicator erred in taking jurisdiction over Ms. Shneidman's complaint that her collective agreement rights were violated.

[13] It is very clear that the above holding applies equally to the circumstances of Mr. Marin's grievance. It was only at the adjudicative stage that Mr. Marin characterized his complaint in a manner that would invoke the adjudicative jurisdiction conferred by section 92(1) of the Act and, as in *Shneidman*, above, this is an issue for which the standard of review is correctness.

Analysis - Merits

[14] There is no dispute in this case that Mr. Marin did not expressly raise the issue of "disguised discipline" at any of the earlier stages of his grievance. He argues now, though, that this allegation was "intrinsic" to his grievance. He says that the Adjudicator ought to have looked beyond the language of the grievance, behind the Department's ostensible motivation for its actions and into the entire history of his employment complaints. He also relies on the case of the *Gingras v. Treasury Board*, 2002 PSSRB 46, [2002] C.P.S.S.R.B. No. 36 where the failure to explicitly allege the disciplinary nature of the grievance was found not to be an obstacle to its later adjudication.

[15] The fundamental problem with Mr. Marin's argument is that it flies in the face of his own admission that the issue of disguised discipline had not been raised before by him either in writing or during his oral submissions to the Department. Those undisputed facts take Mr. Marin's case outside of the holding in *Gingras*, above, and place it squarely within the holding of the Federal Court of Appeal in *Burchill*, above, and in *Shneidman*, above. In *Burchill*, Justice Arthur Thurlow discussed the problem of modifying a grievance at the adjudication stage at para. 5 as follows:

In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91 (1). Under that provision it is only a grievance that has been presented and dealt with under s. 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that he is being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under

subsection 91 (1) was not laid. Consequently, he had no such jurisdiction.

[16] In my view, the *Burchill* case is indistinguishable from the circumstances of Mr. Marin's claim and the Adjudicator was correct to apply it to the undisputed facts before him. Mr. Marin's case is not comparable to *Gingras*, above, where the issue of discipline had previously been raised at the final stage of the grievance and where the adjudicator found that the employer fully understood the case it was facing. There is, therefore, no basis on this record for setting aside the Adjudicator's jurisdictional ruling in this case.

[17] In light of the above finding, it is unnecessary to decide whether the Adjudicator erred in rejecting Mr. Marin's claim on the merits. Suffice it to say that the Adjudicator's factual findings are amply supported by the evidence presented.

[18] The record does disclose that Mr. Marin was, in some measure, the author of his own misfortune. Notwithstanding the questionable treatment that was accorded to him in connection with his reassignment in 2001, his responses to Mr. Holinsky and later to the Assistant Deputy Minister reflect a degree of defiance that could not have but worsened an already strained employment relationship. Had Mr. Marin simply responded appropriately to the Assistant Deputy Minister's request for an outline of his accomplishments, he would undoubtedly have received the performance appraisal to which he was entitled and, if appropriate, an award of performance pay. The Adjudicator found this aspect of Mr. Marin's conduct to be troubling and, indeed, it was.

[19] After reviewing the record, I can find nothing which would support Mr. Marin's complaints concerning the Adjudicator's various procedural and evidentiary rulings. All of those rulings appear to me to be fair and appropriate and well within the Adjudicator's procedural discretion.

[20] In the result, this application for judicial review is dismissed. Having regard to the circumstances of the underlying dispute, I will limit the costs payable by Mr. Marin to the Respondent to the amount of \$500.00 inclusive of disbursements.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable by Mr. Marin to the Respondent in the amount of \$500.00 inclusive of disbursements.

“ R. L. Barnes ”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-821-06

STYLE OF CAUSE: FERMIN GARCIA MARIN
v.
TREASURY BOARD OF CANADA
(PUBLIC WORKS AND GOVERNMENT SERVICES
CANADA)

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: September 18, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** BARNES J.

DATED: November 28, 2007

APPEARANCES:

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