

CANADA / JUDGMENT

Glowinski v. Canada (Treasury Board)

2006 FC 78

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DECIDED

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Glowinski v. Canada (Treasury Board)

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Decision Content

Date: 20060126

Docket: T-240-05

Citation: 2006 FC 78

Ottawa, Ontario, January 26th, 2006

PRESENT: THE HONOURABLE MR. JUSTICE KELEN

BETWEEN:

KENT DANIEL GLOWINSKI

Applicant

and

THE TREASURY BOARD,

THE MINISTER OF INDUSTRY CANADA,

and THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

- [1] This is an application for judicial review of a decision by the Treasury Board and by Industry Canada on or about January 17, 2005 that the applicant was an employee in the Public Service and for this reason was not entitled to negotiate his pay under the Treasury Board "Pay Above The Minimum On Appointment From Outside The Public Service" policy. This case raises the issues whether a student employed in the Public Service is, or is not, an employee in the Public Service, whether a multitude of Treasury Board policies can or should be given legal effect, and whether the applicant can come before this Court before filing a grievance under the federal scheme for dealing with labour disputes. The applicant took the position with Corporations Canada that he was "outside the Public Service" while employed as a student under the Federal Student Work Experience Program, and for that reason he was entitled to negotiate above the minimum pay scale for the CO-01 position which he was offered with Corporations Canada.

FACTS

- [2] From May 3, 2004 to September 3, 2004 the applicant was employed while a law student under a student "co-op" contract at Corporations Canada, a branch of the Operations Sector of the Ministry of Industry Canada. Corporations Canada is charged with administering, inter alia, the Canada Business Corporations Act, R.S.C. 1985, c. C-44 in respect of federally governed companies.
- [3] On September 7, 2004 the applicant was re-hired at Corporations Canada under a Federal Student Work Experience Program (FSWEP) contract that was to end May 6, 2005. This program employs thousands of students annually.
- [4] In August 2004 the applicant applied by open competition for the non-student position of Arrangements and Exemptions Officer (CO-01) at Corporations Canada. On January 13, 2005 the applicant was offered the CO-01 position for the determinate period of January 17, 2005 to August 31, 2005 at a salary of \$41,321. The offer provided that salary was determined in accordance with the "Public Service Terms and Conditions of Employment Regulations", a policy directive established by the Treasury Board.

- [5] Before accepting the offer, the applicant had made his superiors aware that he wished to negotiate a salary above the minimum salary for the CO-1 position based on the applicant's experience and legal education. The salary range for the position was \$41,321 to \$54,975.

THE DECISION

- [6] At the time of offer on January 13, 2005, Ms. Cheryl Ringor, Director of the Compliance and Policy Directorate of Corporations Canada, advised the applicant that the Industry Canada Human Resources Branch had decided not to negotiate a salary and that the offer must be accepted or declined on its terms. The applicant requested reasons from Industry Canada why he was not entitled to negotiate his starting CO-01 salary. The applicant was informed by Ms. Ringor that the offer would remain open for four days so that the applicant could explore the reasons, and presumably attempt to change the position of the Human Resources Branch.
- [7] Instead, the next day, on January 14, 2005, the applicant accepted the offer of employment without attempting to persuade Human Resources that it should authorize the negotiation of a higher salary for the applicant.
- [8] By Notice of Application dated February 10, 2005 the applicant commenced this application for judicial review.
- [9] On February 15, 2005 the Treasury Board advised the applicant by electronic mail that students under FSWEP contracts were "employees" for the purpose of pay rate determination. By way of several such messages, it was explained to the applicant that:
- i. the power of establishing terms and conditions of employment in the Public Service is delegated to the Treasury Board by section 11 of the Financial Administration Act, R.S.C. 1985, c. F-11;
 - ii. the rate of pay on appointment to the Public Service is set by the Board's "Public Service Terms and Conditions of Employment Regulations" enactment;
 - iii. section 22 of the Terms and Conditions of Employment Regulations provides that, subject to any other enactment of the Treasury Board, the rate of pay on appointment shall be the minimum rate applicable to the position;
 - iv. the "Audit, Commerce and Purchasing Collective Agreement" fixes the minimum pay rate for the CO-01 position at \$41,321;
 - v. the "Pay Above The Minimum On Appointment From Outside The Public Service" enactment provides for discretionary salary negotiation; and
 - vi. as students are "employees" in the Terms and Conditions of Employment Regulations, the applicant is therefore not subject to the Outside Appointment enactment, and Mr. Glowinski must be paid the minimum rate for the CO-01 position.

ISSUES

[10] There are two main issues raised in this application:

1. Should the Court, in its discretion, decline to exercise its judicial review jurisdiction because this issue was properly subject to the grievance process which is an adequate alternative remedy and which should have been pursued before seeking judicial review by this Court?; and
2. Did the Board err in concluding that the applicant was an "employee" within the "Public Service" prior to his appointment to the CO-01 position, and therefore not entitled to negotiate a salary under the Treasury Board Policy "Pay Above The Minimum On Appointment From Outside The Public Service"?

ANALYSIS

Issue No. 1: Should the Court, in its discretion, decline to exercise its judicial review jurisdiction because this issue was properly subject to the grievance process which is an adequate alternative remedy which should have been pursued before seeking judicial review by this Court?

[11] Section 91 of the Public Service Staff Relations Act, R.S.C. 1985, c. P-35 provides an internal grievance scheme for work-related disputes between the employee and the public service employer. The Supreme Court of Canada in *Vaughan v. Canada*, [2005] 1 S.C.R. 146 held per Binnie J. at paragraph 2 that the Courts should decline to exercise jurisdiction over workplace issues except on a judicial review:

¶ 2 I agree with the appellant that the statutory language and context of the PSSRA do not amount to the sort of explicit ouster of the jurisdiction of the courts as was the case in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. Nevertheless, while the courts retain a residual jurisdiction to deal with workplace-related issues falling under s. 91 of the PSSRA, but not arbitrable under s. 92, the courts should generally in my view, as a matter of discretion, decline to get involved except on the limited basis of judicial review. The facts of this case, insofar as we can ascertain them, afford a good illustration of why judicial restraint in this area is desirable. I would dismiss the appeal.

[Emphasis added]

[12] It is recourse to judicial review that is sought by the applicant in the case at bar. However, in *Vaughan*, *supra*, the Supreme Court held per Bastarache J. at paragraph 54 (dissenting on other grounds) that judicial review only lies to the Federal Court from a final decision taken under section 91 of the PSSRA:

¶ 54 To determine whether the s. 91(1) scheme is exclusive, we must first look at its operation. This provision allows employees, including those not subject to a collective agreement, to grieve virtually all employment-related issues up to and including the final level of the grievance process. Third-party adjudication is only permitted under s. 92(1) for specific issues arising out of a collective agreement, discipline or termination of employment. A final decision taken under s. 91 is subject to judicial review under s. 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7.

[Emphasis added]

[13] In this case, the applicant did not file a grievance; he immediately sought judicial review from the Court. The Supreme Court in *Vaughan*, *supra*, rejected this approach per Binnie J. at paragraph 39:

¶ 39 Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

[Emphasis added]

Existence of an adequate alternative remedy

[14] Also in considering whether the Court should decline its judicial review jurisdiction, the Federal Court of Appeal in *Froom v. Canada (Minister of Justice)*, [2005] 2 F.C.R. 195 (C.A.) held per Sharlow J.A. at paragraph 12 that the test is whether the alternative remedy is adequate, not whether it is perfect:

¶ 12 It is well established that the Federal Court has the discretion to decline to exercise its judicial review jurisdiction if the applicant has available an adequate alternative remedy: *Fast v. Canada (Minister of Citizenship and Immigration)* (2001), 41 Admin. L.R. (3d) 200 (F.C.A.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. In considering whether to decline jurisdiction, the test is whether the alternative remedy is adequate, not whether it is perfect. The decision to decline or refuse to decline jurisdiction is discretionary, and cannot be reversed on appeal unless the Judge has considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion: *Canadian Pacific Ltd. v. Indian Band Matsqui*, [1995] 1 S.C.R. 3, at paragraph 39 (per Lamer C.J., on this point writing for the majority).

[Emphasis added]

[15] The question for this Court, therefore, is whether there was an adequate alternative remedy available to the applicant in the review at bar? Were there circumstances demonstrating that internal grievance resolution alone would be an inadequate remedy?

The review at bar

[16] Turning to the review at bar, at the material time of January 2005, Parliament had established a comprehensive statutory labour dispute resolution scheme for the Federal Public Service. Before its repeal effective March 31, 2005, subparagraph 91(1)(a)(i) of the PSSRA provided that an employee of the Public Service had the right to grieve administrative decisions relating to the interpretation or application of statute, regulation or policy, under the grievance scheme:

Right of employee

91. (1) Where any employee feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) 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, [...]

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

[Emphasis added]

Droit du fonctionnaire

91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé:

a) par l'interprétation ou l'application à son égard:

(i) soit d'une disposition législative, d'un règlement - administratif ou autre -, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,

[...]

[Je souligne]

[17] As an employee, the applicant had the right to present a grievance under subsection 91(1) of the PSSRA, since the impugned decision of the Treasury Board or Industry Canada related to the interpretation or application of a policy direction made by the employer. Whether the applicant was entitled to negotiate a salary greater than the minimum rate of pay specified by the "Audit, Commerce and Purchasing Collective Agreement" is dependent on the interplay of the Treasury Board's "Public Service Terms and Conditions of Employment Regulations" policy, the "Pay Above The Minimum On Appointment From Outside The Public Service" policy, and other Treasury Board policies discussed below.

- [18] In the Court's view, the statutory grievance process would have been an adequate alternative remedy to judicial review in this case. There is no allegation that the grievance levels up to and including the final level are incapable of granting the applicant the relief sought. The Court should decline jurisdiction under section 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7, by reason that the applicant failed to exhaust the available and alternate remedy of grieving the respondents' decision to the final level prior to commencing this application for judicial review.
- [19] The applicant submitted that he could not file a grievance because he was not an employee entitled to file a grievance until he accepted the offer of employment effective January 17, 2005. The applicant could have refused the CO-01 position because Industry Canada would not negotiate the salary above the minimum, and then the applicant could have brought this application for judicial review. However, the applicant accepted the CO-01 position. At that point, the applicant became an employee and was bound to follow the grievance process under section 91 of the PSSRA which is intended to deal with all employment-related issues including the application and interpretation of Treasury Board Policies.
- [20] Because the Court has declined to exercise its jurisdiction in this case, it is not necessary to consider the second issue before the Court. However, in the event that I have erred in that determination, I will decide the second issue.

Issue No. 2: Did the Board err in concluding that the applicant was an employee within the Public Service prior to his appointment to the CO-01 position, and therefore not entitled to negotiate a salary under the Treasury Board Policy "Pay Above The Minimum On Appointment From Outside The Public Service"?

- [21] The applicant submits that his superiors indicated a willingness to negotiate a salary above the minimum on the CO-01 pay scale but the applicant's superiors were informed that the applicant was already, as a student, an employee of the Public Service so that the "Pay Above The Minimum On Appointment From Outside The Public Service" policy did not apply to the applicant.
- [22] The applicant submits, as a student working for Corporations Canada under a Federal Student Work Experience Program term contract, he was not an employee of the Public Service with the benefits and entitlements of such employees. Accordingly, when he applied in a competition open to the public for the CO-01 position at Corporations Canada, he was outside the Public Service, and therefore entitled to negotiate above the minimum pay for the position as provided in the "Pay Above The Minimum On Appointment From Outside The Public Service" Treasury Board policy. This policy gives the Department the discretion to negotiate above the minimum salary for a position in three situations when hiring a person from outside the Public Service.

[23] Based upon my review of the material, I am satisfied, on a balance of probabilities, that Industry Canada did decide that the applicant was not entitled to negotiate because, as a student employee, he was already an employee of the Public Service, and therefore not being appointed from outside the Public Service. It is not necessary to review this evidence because this was conceded during the hearing after carefully examining the evidence.

[24] Also at the hearing, both parties agreed that there are over ten different Treasury Board policies and regulations which apply to this case, and they are inconsistent with respect to whether the applicant was, or was not, an employee at the time he applied for the CO-01 position with Corporations Canada. I will illustrate by setting out some of these policies and regulations.

1. "The Terms and Conditions of Employment for Students" Policy

[25] This policy was part of the applicant's FSWEF contract with Industry Canada. A definition of "employee" is set out in the Treasury Board's "Terms and Conditions of Employment for Students" policy for students employed under FSWEF contracts. Section 1.2 of the Student Policy provides that unless provided in that policy, the definitions from the "Public Service Terms and Conditions of Employment Regulations" apply. Section 1.4 of the student policy provides that students are employees under the Financial Administration Act, but are not subject to the PSSRA:

1.2 Definitions

Unless provided herein, the definitions shall be those used in the Public Service Terms and Conditions of Employment Regulations for non-executive group employees.

[...]

1.4 Legal status

Students are defined as employees under the Financial Administration Act and the Government Employees Compensation Act. However, they are not subject to the Public Service Staff Relations Act, and an exclusion order under the Public Service Employment Act precludes their eligibility for closed competitions while they are working as students.

[...]

3.21 Continuous Employment

If a student ... is subsequently appointed to the Public Service, assignments may be counted as continuous employment.

Therefore, students like the applicant employed by Industry Canada, are "employees" under the "Terms and Conditions of Employment for Students" policy.

2. "The Public Service Terms and Conditions of Employment Regulations" Policy

[26] Despite its name, the "Regulations" are not enacted subordinate legislation. Rather these "Regulations" are simply another Treasury Board policy. "Employee" is defined in section 2 of the "Public Service Terms and Conditions of Employment Regulations" as a person employed in Part I Service and classified in an occupational category:

2. [...]

employee means a person employed in Part I Service, classified in one of the occupational categories defined and listed in Section 2 of the Public Service Staff Relations Act other than a person who is employed as a teacher, or a principal in the Department of Indian Affairs and Northern Development, a person to whom the Ships' Crews Regulations, 1964, the Ships' Officers Regulations, 1964 apply, or any person whose terms and conditions of employment are set out in the Management Category Terms and Conditions of Employment Directive;

The PSSRA "occupational categories" under section 2 were repealed in 1992. See PSSRA amendment where "occupational category" was repealed, S.C. 1992 c.54, s.32. Therefore the remaining requirement for "employee" status is being a person employed in Part I Service, and not falling within the listed exceptions.

[27] Under this definition the applicant as a student employed with Industry Canada was an employee. However, since the Regulations are only policy, the fact that the PSSRA was amended in 1992 may not affect the reference in the definition to the repealed occupational categories. In that case, it is unclear whether the applicant was an employee under policy.

[28] Section 22 of the "Public Service Terms and Conditions and Employment Regulations" provides that the applicant's salary on appointment to the CO-01 position must be at the minimum rate applicable under the collective agreement, absent any other enactment by the Treasury Board:

Rate of pay on appointment or deployment

22. Subject to these regulations and any other enactment of the Treasury Board, the rate of pay of a person on appointment to Part I Service shall be the minimum rate applicable to the position to which the employee is appointed.

The "Audit, Commerce and Purchasing Collective Agreement" fixes the minimum pay rate for the CO-01 position at \$41,321. However, the Treasury Board policy which permits negotiation with a person appointed from outside the Public Service is such an enactment so section 22 of the "Employment Regulations" is not pertinent.

3. Student Employment Programs Regulations SOR/97-194

- [29] These Regulations are in fact Regulations enacted under the Public Service Employment Act. Section 5 of these Regulations provide that a student employed in the Public Service is eligible to participate in closed competitions and for appointment from within the Public Service when such students are specifically included in the area of selection determined for the closed competition.
- [30] These Regulations contain a "whereas" clause in paragraph (c) that students employed under the Student Employment Programs are excluded from the operation of the Public Service Employment Act with certain exceptions. The applicant submits that this exclusion means that students employed in the Public Service cannot apply for internal federal government jobs. Of course, this submission is inconsistent with section 5 of the Regulations referred to above which provides that students employed in the Public Service are eligible to participate in closed competitions and for appointment to the Public Service from within the Public Service when such students are specifically included in the area of selection determined for the closed competition. Since the competition for the Corporations Canada CO-01 position was an open competition, students employed in the Public Service were entitled to apply as all members of the public were. Accordingly, these Regulations are not relevant.
4. The Federal Student Work Experience Program Policy
 5. The Post-Secondary Co-op/Internship Program Policy
 6. The International Exchange Program For Students Policy
 7. The Secondary School Co-op Education Program Policy
 8. The Student Employment Policy

- [31] Under these policies, the student is employed in the Public Service, but without some of the rights as other employees of the Public Service. The applicant submits that section 2 of the Student Employment Policy sets out "policy objectives" and states:

To encourage federal organizations to hire students in order to develop a pool of qualified candidates for future Public Service appointments.

The applicant submits that this means that FSWEPP students are not presently part of the Public Service. The Court does not accept this submission. All this means is that students, who are part of the Public Service, are hired to develop a pool of qualified candidates for future appointments to the Public Service. This does not mean that they are not already a part of the Public Service in their capacity as student employees.

9. "The Pay Above the Minimum on Appointment from Outside the Public Service" Policy

[32] The policy does not define an employee or who is a person "outside" or "inside" the Public Service. The "Pay Above The Minimum On Appointment From Outside The Public Service" applies to "all departments and other portions of the Public Service listed in Part I of Schedule I of the Public Service Staff Relations Act", which includes Industry Canada. This enactment provides for discretionary salary negotiation under three specific conditions:

The rate of pay on appointment to the Public Service shall be the minimum of the applicable pay scale unless one of the following conditions clearly applies:

- there is a shortage of skilled labour in the field involved, as evidenced by local or regional labour market surveys from recognized institutions;
- there are unusual difficulties in filling the position with properly qualified candidates (e.g., the minimum rate of pay is not competitive with the rates offered by local or regional employers for similar duties); or
- operational conditions require the presence of a highly skilled or experienced employee who can assume the full duties of the position immediately upon taking employment (e.g., no alternative left but to pay above the minimum as training a novice employee would impose an unacceptable burden on the employing department).

[Emphasis added]

[33] For the applicant to be eligible to negotiate a rate of pay above the minimum for the CO-01 position, under the policy, that position must be his first appointment to the Public Service, and one of the three listed conditions must apply. Only then would the employer have discretion to negotiate a higher rate of pay.

10. The Government Employees Compensation Act, R.S.C., G-8

[34] This law defines "employee" for the purposes of this Act is inter alia, "any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty". Obviously this definition of employee would cover the applicant as a student employee.

11. Pay Administration Guide Policy

[35] This Treasury Board policy defines "probationary period" as:

means the period from the date of appointment of a person from outside the Public Service, to the Public Service until the end of such period as the Public Service Commission shall establish by regulation for that employee ...

The applicant submits that since the applicant was subject to a probationary period when he started the CO-01 position with Corporations Canada on January 17, 2005, this means that he was not part of the Public Service prior to that appointment.

[36] The Court agrees that this implies that the applicant was outside the Public Service for the purposes of the probationary period policy. However, this is inconsistent with other policies which provide that the student is an employee of the Public Service.

Conclusion with respect to Treasury Board Policies

[37] This Court concludes, and the parties at the hearing have agreed, that there are a multitude of different Treasury Board policies defining "employee" in inconsistent ways. Many policies state that the applicant, as a student, is an employee in the Public Service. Other policies suggest that the applicant is not a regular employee in the Public Service.

Should this Court interpret, apply or reconcile inconsistent and conflicting policies?

[38] The Financial Administration Act, R.S.C. 1985, c.F-11 provides in subsection 11(1) a definition for "enactment" which reads:

11. (1) ... "enactment" includes any regulation, order or other instrument made under the authority of an Act.
11. (1) ... « texte législatif » Y sont assimilés les règlements, décrets et autres textes d'application d'une loi.

[39] Paragraph 11(2)(i) to the Financial Administration Act provides that:

11. (2) ... the Treasury Board may, in the exercise of its responsibilities and relation to personnel management including its responsibilities in relation to employer and employee relations in the Public Service, and without limiting the generality of section 7 to 10,

[...]

- (i) provide for such other matters, including terms and conditions of employment not otherwise specifically provided for in this subsection, as the Treasury Board considers necessary for effective personnel management in the Public Service.
11. (2) ... le Conseil du Trésor peut, dans l'exercice de ses attributions en matière de gestion du personnel, notamment de relations entre employeur et employés dans la fonction publique :

[...]

- i) réglementer les autres questions, notamment les conditions de travail non prévues de façon expresse par le présent paragraphe, dans la mesure où il l'estime nécessaire à la bonne gestion du personnel de la fonction publique.

[40] The Treasury Board policies referred to above are within the definition of "enactment", as set out in subsection 11(1) of the Financial Administration Act. The jurisprudence shows that whether such a policy creates legal rights which a Court can define or enforce depends on the intent and the context in which the policy was issued. See *Endicott v. Canada*(Treasury Board), 2005 FC 253, per Strayer D.J at paragraph 11:

¶ 11 The 1999 Policy in question here was not delegated legislation. It was clearly a directive by Treasury Board as to how departments should deal fairly with their employees. Whether such internal directives create legal rights which a court can define or enforce, appears from the jurisprudence to depend on what the intent was and the context in which the directive was issued.

[Emphasis added]

Generally speaking such policies are not legally binding unless the enabling statute requires the Department to issue the policy. If a policy is issued under a mandatory provision in a statute it is more likely to be given the force of law than a policy issued under a permissive provision. In *Endicott*, supra, Justice Strayer considered a Treasury Board policy entitled the "The Bilingualism Bonus Plan". Justice Strayer held at paragraph 12:

¶ 12 In that case the Plan had been adopted by the Treasury Board and was very precise. It left no discretion to departments. In its decision the Court of Appeal does not elaborate the criteria upon which it found that the Policy could support a cause of action but it so held (referring to *Gingras v. Canada* 1994 FC 734 (C.A.)).

- [41] Justice Strayer referred to two other Federal Court cases which held that Treasury Board policies were to be given legal effect because there was clear statutory authority for those policies. At the same time, Justice Strayer canvassed other cases where internal policies were held not to be legally binding including a Treasury Board policy made under subsection 11(2) of the Financial Administration Act. In that case, *Gerard v. Canada*, [1994] F.C.J. No. 420, Justice Rouleau held that a policy under subsection 11(2) of the Financial Administration Act has no force of law can be inferred from the fact that the Treasury Board could have enacted the same subject matter by Regulation under another subsection of the Financial Administration Act if the Treasury Board intended the policy to be legally binding.
- [42] The Court is of the view that it should not interpret or reconcile inconsistent and conflicting Treasury Board policies and should not give legal effect to a multitude of such policies. I agree with Justice Rouleau in *Girard*, supra, that if the Treasury Board intended these policies to have a legal effect the Treasury Board would have exercised its right to enact these policies by way of regulation under the applicable section of the Financial Administration Act.
- [43] Moreover, this dilemma of a multitude of inconsistent Treasury Board policies underlines the reason why an aggrieved employee, such as the applicant, should first proceed with a grievance under the dispute resolution process set out in section 91 of the PSSRA. This grievance process provides that an employee may grieve with respect to the interpretation or application of a "direction or other instrument" made or issued by the employer. This obviously would include the Treasury Board policy at play in this case. A Court of law should not give policies the force of law unless Parliament clearly intended such policies to be given the force of law and such policies are clear, and not inconsistent with other policies.

[44] If I were to review the decision in this case on any of the three standards of review, I would conclude that the policies are inconsistent and the Court could not find the decision incorrect, unreasonable or patently unreasonable.

Mandamus

[45] The applicant seeks a writ of mandamus to compel the respondents to negotiate with the applicant, on a retroactive basis, a rate of pay above the minimum pay scale for the CO-01 position in accordance with the "Pay Above The Minimum On Appointment From Outside The Public Service" Treasury Board policy. The Court will not issue a writ of mandamus for the following two reasons:

1. this policy does not have any legal force or effect and therefore does not create any legal duty on the respondents to act; and
2. even if the policy had legal force, it is not mandatory. The salary negotiation is within the discretion of the employer. While the applicant submits that another employee for the same position was able to negotiate above the minimum pay scale, the employer states that that person was a lawyer called to the Bar, which the applicant was not, and that person had two years of legal experience.

Duty to act fairly

[46] The applicant submits that the respondents breached their duty to act fairly because they did not provide the applicant with the right to negotiate. The duty to act fairly applies to the applicant being provided with an opportunity of knowing the reasons for a decision being made against his interests, and an opportunity to respond. This duty was fulfilled in that the applicant was given four days, which the applicant chose not to accept, to explore and possibly change, the decision of the Human Resources Branch of Industry Canada that the Treasury Board policy precluded Industry Canada from negotiating with the applicant above the minimum pay scale for the CO-01 position.

COSTS

[47] The applicant, who is presently an articling student, was clearly an effective and well-liked student employee at Corporations Canada, and his superiors were willing to hire him because they valued his services. The applicant's contention that he was as a student, outside the Public Service, and therefore his Department had the discretion to negotiate pay above the minimum for the CO-01 position, was a contention based upon some Treasury Board policies, but not on others. The respondents advised the Court that they do not seek legal costs against the applicant if the Court dismissed this application. Accordingly, the Court will not award legal costs against the applicant in this case, and will make no order as to costs.

CONCLUSION

[48] The Court has concluded that:

1. it must decline to consider this application for judicial review because the applicant has failed to exhaust the available and alternative remedy of grieving this matter before commencing an application for judicial review; and
2. in any event, the Court has concluded that there is a multitude of conflicting Treasury Board policies on whether the applicant at the material time was an employee of the Public Service and this Court should not give legal effect to such policies. For this reason, the Court cannot issue a writ of mandamus or declaration because these policies do not create legal rights. At the same time, the grievance process is designed to apply and interpret such policies and resolve such workplace disputes.

ORDER**THIS COURT ORDERS THAT:**

This application for judicial review of a decision by the Treasury Board and by Industry Canada on or about January 17, 2005 that the applicant was an employee in the Public Service is dismissed.

"Michael A. Kelen"

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-240-05

STYLE OF CAUSE: KENT DANIEL GLOWINSKI v. THE TREASURY BOARD, THE MINISTER OF INDUSTRY CANADA and THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 17, 2006

REASONS FOR ORDER

AND ORDER: THE HONOURABLE MR. JUSTICE KELEN

DATED: JANUARY 26, 2006

APPEARANCES:

Kent Daniel Glowinski

(Self-represented)

FOR THE APPLICANT

John G. Jaworski

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Kent Daniel Glowinski

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FOR THE RESPONDENTS

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