# Critical Job Interest Protection in the Public Service of Canada

## Introduction

Canadian labour relations policy favors a grievance procedure culminating in arbitration as the appropriate method to resolve disputes arising during the life of a collective agreement. However, most collective agreements confer upon the duly certified bargaining agent exclusive control of the grievance channels. The result may be catastrophic for the individual employee who finds himself in the hands of an unfriendly union. To mitigate this harsh effect, several approaches have developed.

One judicial theory states that an individual employee may, in certain circumstances, ignore the grievance procedure entirely and proceed directly to the courts to enforce perceived expectations arising under the collective agreement.[1] The respective labour relations legislation of Manitoba, New Brunswick, Newfoundland and Nova Scotia make provision for an employee to present a personal grievance to the employer at any time.[2] In addition, the provinces of Ontario and British Columbia impose upon the bargaining agent "the duty of fair representation" in matters relating to the representation of employees' interests.[3] Finally, the Government of Cana-

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[1] This is the approach taken in *Re Grottoli* v. *Lock & Son Ltd* (1963) 39 D.L.R. (2d) 128, and *Hamilton Street Railway Co.* v. *Northcott* (1966) 58 D.L.R. (2d) 708.

For a criticism of these cases see B. Adell, *Labour Law — Collective Agreement — Right of Individual Employee to Sue Employer* (1967) Can.Bar Rev. 354 *et seq.*

[2] *Labour Relations Act,* S.M. 1972, c.75, s.114; *Industrial Relations Act,* R.S.N.B. 1973, c.I-4, s.105; *The Labour Relations Act,* R.S.N. 1970, c.191, s.33; *Trade Union Act,* S.N.S. 1972, c.19, s.14.

According to the editor of *Labour Relations Law,* Industrial Relations Centre, Queen's University, Kingston (1974) "there is virtually no authority defining the scope of employee rights under these provisions or reconciling them with the statutory position of a trade union as exclusive bargaining agent" (at 384).

[3] *The Labour Relations Act,* R.S.O. 1970, c.232, s.60; *Labour Code of British Columbia,* S.B.C. 1973, c.122, s.7. For an analysis of the Ontario legislation see C. Riggs, "The Duty of Fair Representation Under the Labour Relations Act" in *Labour Law, The Employee, Union Member, Trade Union and Employment Standards,* Department of Continuing Education, The Law Society of Upper Canada, Osgoode Hall, Toronto, April 1975, B-1 *et seq.*

da has by statute[4] conferred upon its public servants the right to refer a grievance to adjudication without invoking the aid or approval of the bargaining agent in matters relating to the employee's "critical job interests".[5]

The purpose of this article is to explain the nature and scope of the statutory protection afforded federal public servants with regard to their "critical job interests", particularly in relation to discharge, and to describe the various safeguards for individual rights developed in the case law pursuant to the provisions of the enabling legislation.

## Statutory protection of critical job interests in the federal Public Service

Section 91 of the *Public Service Staff Relations Act*[6] confers upon the individual employee[7] the right to refer a grievance[8] to adjudication where the grievance relates to the interpretation or application of a provision of a collective agreement or an arbitral award. The grievance may not be referred to adjudication until the employee has exhausted the grievance procedure.[9] Moreover, he must obtain the approval of the bargaining agent to refer the matter to adjudication and the bargaining agent must signify its willingness to represent the employee in the adjudication proceedings.

However, in matters relating to disciplinary action resulting in discharge, suspension or a financial penalty, the employee may refer

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[4] *Public Service Staff Relations Act*, R.S.C. 1970, c.P-35.

[5] The phrase "critical job interests" has been coined by the American commentator, Professor A. Blumrosen in *Legal Protection for Critical Job Interests: Union Management Authority Versus Employee Autonomy* (1959) 13 Rutgers L.R. 631.

[6] *Supra*, note 4.

[7] "Employee" is defined by s.2 of the *Public Service Staff Relations Act, supra*, note 4.

[8] "Grievance" is defined by s.2 of the *Public Service Staff Relations Act, ibid.*

[9] The right to present a grievance to the employer is governed by s.90 of the *Public Service Staff Relations Act, ibid.* For an explanation of the interplay between ss.90 and 91 of the *Public Service Staff Relations Act, ibid.*, see J. Finkelman, *Notes for Introductory Remarks to the Special Joint Committee of the Senate and House Of Commons on Employer-Employee Relations in the Public Service of Canada*, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on Employer-Employee Relations in the Public Service, Issue no. 1, 1, 32. See also *Re Cooper* [1974] 2 F.C. 407, 412 *per* Pratte J., and H. Arthurs, *Collective Bargaining by Public Employees in Canada: Five Models*, Institute of Labor and Industrial Relations, Wayne State University (1971), 50.

his grievance to adjudication on his own initiative once he has exhausted the grievance procedure. He need not obtain the approval of the bargainning agent, nor must he invoke its aid. The adjudicator is assigned by the Public Service Staff Relations Board[10] and his decision may be reviewed and set aside by the Federal Court pursuant to section 28 of the *Federal Court Act*.[11]

The adjudicators have given a broad interpretation to what constitutes disciplinary action.[12] However, the *Public Service Employment Act*[13] makes provision for the termination of the services of an employee for reasons other than discipline and these provisions may serve to bar completely a reference to adjudication. For example, if an employee has been absent from duty for a period of one week or more for other than proper reasons, he may be declared to have abandoned his position, whereupon he ceases to be an employee;[14] similarly, a probationary employee may be dismissed for cause during the probationary term;[15] an employee may be "laid off" because of lack of work or the discontinuance of a function[16] and an employee may be "released" from the Public Service for reasons of incompetence or incapacity.[17] The Act also provides the employee with the right to appeal his "release" to an independent Appeal Board established by the Public Service Commission.[18]

Suppose the services of an employee have been terminated pursuant to one of the provisions of the *Public Service Employment Act* and the employee considers that in reality the action taken

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[10] S.92 of the *Public Service Staff Relations Act, supra,* note 4, as am. by S.C. 1974-75, c.67, s.24. For a more detailed explanation of the adjudicative process in the Canadian Public Service see E.B. Jolliffe, *Adjudication in the Canadian Public Service* (1974) 20 McGill L.J. 351.

[11] S.C. 1970-71-72, c.1. Until October, 1975 the decision of the adjudicator could also be "appealed" to the Public Service Staff Relations Board pursuant to s.23 of the *Public Service Staff Relations Act, ibid.* That section was repealed by S.C. 1974-75, c.67, s.11.

[12] See, *e.g., Godfrey* (166-2-98) (Morin). In referring to the various decisions of the adjudicators and the Public Service Staff Relations Board, I have used the system of citation established by the Board.

[13] R.S.C. 1970, c.P-32. This Act makes provision, *inter alia,* for the establishment of the Public Service Commission which is charged with maintaining the merit principle and is responsible for the recruitment, appointment, training, promotion, transfer and release of federal public servants.

[14] *Public Service Employment Act, ibid.,* s.27.

[15] *Ibid.,* s.28.

[16] *Ibid.,* s.29.

[17] *Ibid.,* s.31.

[18] *Ibid.*

against him was disciplinary in nature. Can the employee refer the matter to adjudication to determine whether the action taken was in truth disciplinary and if so, whether the discipline was warranted in the circumstances?

In *Attorney General of Canada* v. *The Public Service Staff Relations Board,*[19] the applicant had been appointed to a position with the Office of the Commissioner of Official Languages. Within the delay prescribed by the probationary period, the employee was notified that he would be rejected on probation. He instituted a grievance under section 90(1) of the *Public Service Staff Relations Act*[20] on the ground that the rejection on probation was in reality a disciplinary measure, and unjustified in the circumstances. At each level of reply in the grievance procedure, the employer answered that the rejection on probation was properly taken in accordance with section 28 of the *Public Services Employment Act.*[21]

The employee eventually referred the matter to adjudication[22] under section 91 of the *Public Service Staff Relations Act.* The employer objected to the jurisdiction of the adjudicator to hear the reference on the ground that the action taken by the employer was not disciplinary in nature and thus could not be a proper subject matter for a reference to adjudication. The employee maintained that it was an established principle that where such an objection was made by the employer, the employee could prove on the balance of probabilities that the matter should be characterized as disciplinary in nature rather than as a rejection on probation; if the employee was successful in establishing this, the adjudicator would then have jurisdiction to render a decision on the merits, notwithstanding the fact that the dismissal had occurred during the probationary period.[23]

Adjudicator Weatherill accepted the employee's argument and clothed himself with jurisdiction to determine the true nature of the termination of employment. On being referred to the Public Service Staff Relations Board,[24] the decision was affirmed.

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[19] Federal Court of Appeal, A-689-75, as yet unreported.

[20] *Supra,* note 4.

[21] *Supra,* note 13.

[22] Jacmain (166-2-1510) (Weatherill).

[23] Some examples where this principle has been discussed are: *Randall* (166-2-41) (Arthurs); *Dubois* (166-2-58) (Martin); *Czubrewicz* (166-2-61) (Arthurs); *Malouin* (166-2-63) (Arthurs); *Shaw* (166-2-68) (Arthurs); *Proudlove* (166-2-69) (Arthurs); *Gallant* (166-2-121) (Jolliffe); *Chimirri* (166-2-224) (Jolliffe); *Fardella* (166-2-734) (Meyer) esp.2.

[24] *Treasury Board* v. *Jacmain* (168-2-87) (Brown).

However, the Federal Court of Appeal, Heald J., Urie and Ryan JJ. concurring, set aside the decision of the Public Service Staff Relations Board. According to Mr Justice Heald, section 91 of the *Public Service Staff Relations Act* did not expressly confer jurisdiction upon adjudicators in matters relating to rejection for cause during the probationary period. Since the Act was silent on this matter, it was improper for the adjudicator to have assumed jurisdiction:

> [T]he whole intent of section 28 [of the *Public Service Employment Act*] 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.[25]

On the basis of *Attorney General of Canada* v. *The Public Service Staff Relations Board* it would appear that adjudicators will in the future be prevented from lifting the probationary veil. Moreover, the logic of Mr Justice Heald's argument dictates that the mere invocation by the employer of *any* provision of the *Public Service Employment Act* regulating the termination of an employee's services for causes other than discipline will serve as a complete bar to adjudication. Since this decision of the Federal Court of Appeal runs contrary to established adjudicative practice, it may well serve as a basis for future litigation.

**Management rights and discharge for just cause**

Traditional management rights such as the determination of manpower requirements, the allocation and effective utilization of manpower resources, the determination of the requirements for training and development of personnel, the classification of positions and the determination and regulation of pay, hours of work and leave are reserved to the Treasury Board as the Public Service

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[25] *Attorney General of Canada* v. *The Public Service Staff Relations Board, supra,* note 19, 10.

Employer[26] by the provisions of section 7(1) of the *Financial Administration Act*.[27] The Treasury Board also has the right to "establish standards of discipline in the public service and prescribe the financial and other penalties including suspension and discharge, that may be applied for breaches of discipline or misconduct".[28]

Although the Act does not specifically state that an employee may not be discharged from the Public Service for reasons other than just cause, the adjudicators have given it this interpretation. For example in *Larivière*[29] the grievor was a penitentiary guard subject to the *Penitentiary Act*[30] and the *Public Service Staff Relations Act*,[31] but not to the *Public Service Employment Act*.[32] Counsel for the employer submitted that the grievor was properly discharged pursuant to the provisions of the *Penitentiary Act* and that the power of the adjudicator was limited to reviewing the procedural correctness of the discharge and not to questioning whether the dismissal was in substance improper.[33] Adjudicator Morin disagreed:

> We are fully agreed on the fact that the Adjudicator must not substitute himself for the Employer to thus impose his own personal point of view. However, we believe that the Adjudicator should do more than verify whether the dismissal procedure was respected and whether there

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[26] S.2 of the *Public Service Staff Relations Act, supra,* note 1, defines "employer" to mean:

> "Her majesty in right of Canada as represented by,
> (a) in the case of any portion of the public service of Canada specified in Part I of Schedule I, the Treasury Board, and
> (b) in the case of any portion of the public service of Canada specified in Part II of Schedule I, the separate employer concerned."

Some examples of portions of the Public Service of Canada specified in Part I of Schedule I as represented by the Treasury Board are: Canadian Transport Commission, Public Service Commission, Immigration Appeal Board and Staff of the Supreme Court. Included also are all commonly known departments of Government such as: National Defense, Post Office, Health and Welfare, and Consumer and Corporate Affairs. Some examples of portions of the Public Service of Canada specified in Part II of Schedule I, that is, the separate employers concerned, are: National Film Board, Economic Council of Canada, and the Public Service Staff Relations Board. For a more detailed explanation of the nature of Crown employment in Canada, see D. Stanley, *Prerogative in Private and Public Employment* (1974) 20 McGill L.J. 394, 397 *et seq.*

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

[28] *Ibid.*, s.7(1)(f).

[29] (166-2-8) (Morin).

[30] R.S.C. 1970, c.P-53.

[31] *Supra,* note 4.

[32] *Supra,* note 13.

[33] *Larivière, supra,* note 29, 6.

> actually exists a cause for such a decision. In each case, we have to look for the real cause of the disciplinary measure, then we must verify whether the acts committed by the employee are sufficiently serious to justify the penalty inflicted ... .[34]

**The procedure to adduce evidence at adjudication in disciplinary cases and the burden of proof**

In accordance with the general evidentiary principle that he who alleges must prove, the adjudicators have considered that in discharge cases the onus of justification rests initially with the employer.[35]

As to the nature of the burden of proof, the Public Service employer need only prove its case on the balance of probabilities as in civil matters and not beyond a reasonable doubt as in criminal matters. However, this standard is subject to the qualification that "it must be applied with caution in respect of an alleged breach of discipline or misconduct which also appears to have elements of a criminal offence".[36]

Nevertheless, even where criminal elements are present, the burden of proof on the employer remains that of the balance of probabilities. In *Bell*,[37] the representative for the grievor argued that where the employer based its disciplinary action on conduct which was "tantamount to a criminal offence" it was incumbent upon the employer to establish "beyond a reasonable doubt" that the actions were justified.[38] Adjudicator Beatty responded:

> If this ever was the accepted arbitral position in the private sector (which I doubt) it is clear that it is no longer so now. It is clear from a review of the awards in the private sector, as well as those in the public sector ...[39] that even where the grounds of discharge relied upon

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[34] *Ibid.*, 6-7.

[35] See *Stewart* (166-2-2000) (Jolliffe) 24-25.

[36] *Ibid.*, 26.

[37] (166-2-1788) (Beatty) 30.

[38] *Ibid.*

[39] Adjudicator Beatty was referring to *Dixon* (166-2-555) (Jolliffe). Chief Adjudicator Jolliffe's exact words in the *Dixon* decision were: "To put the proposition in other words, the standard of proof at the adjudication of a disciplinary case under the Public Service Staff Relations Act resembles the standard of proof recognized at a civil trial, not at a criminal trial.

With that proposition, I am in general agreement, subject to an important qualification. When the basis for disciplinary action is the employer's opinion or belief that the employee has committed an offence for which he could be prosecuted under the Criminal Code, the principles of natural justice and common sense require an adjudicator to assess 'the balance of probabilities' with great care and caution — and by tests which would satisfy a judge rather

> by the employer embrace conduct of a criminal nature, the adjudication of an employee's discharge grievance falls to be determined by the civil burden of proof, viz. on the balance of probabilities.[40]

**The nature of the discipline**

Once the employer has established on the balance of probabilities that there existed just cause to discipline the employee, a question arises as to the nature of that discipline.

In the private sector, there are two main viewpoints on the nature of industrial discipline. Some argue that such discipline is analogous to criminal law, others maintain that it is analogous to contract law. The first viewpoint has been summarized as follows:

> [The criminal law and industrial discipline] are means deliberately used to attain compliance with approved ways of behaving. The criminal law is directed to reducing criminal behaviour, and industrial discipline is directed to reducing violations of the laws of the plant ... [both] employ the same kind of sanction: the organized, negative sanction. By 'organized', I mean that the sanctions are made and applied by the community's organs of authority, as contrasted with spontaneous reactions of persons in the community, which sociologists call 'informal' sanctions. By 'negative', I mean that the sanctions operate through disapprobation and discouragement, in a word, through punishment, as contrasted with those which operate through approbation and encouragement, often denominated 'positive sanctions'. In short, both criminal law and industrial discipline are organized sanctioning systems resting on the use of punishment.[41]

The second viewpoint emphasizes that the relationship between state and citizen as reflected in the criminal law is primarily prohibitive, and is distinct from the relationship between employer and employee, which is characterized largely by affirmative and positive elements. According to this latter viewpoint, the relationship is a bargain, "an exchange of services for wages",[42] ill-defined though the terms may be:

> The employers' obligations are enforced through the collective agreement and the grievance procedure. The employee's obligations are enforced through a system of inducements and sanctions including those we call industrial discipline. The thrust of industrial discipline is prohibitive to

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than by tests which would satisfy an auditor or administrative superior." (at 29)

[40] *Supra*, note 37.

[41] S. Kadish, "The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations" in *Proceedings of the 17th Annual Meeting National Academy of Arbitrators (1964)* 125-128; taken from *Labour Relations Law, supra*, note 2, 304.

[42] *Labour Relations Law, ibid.*

> some extent: thou shalt not lift company property, thou shalt not slug thy foreman, etc. But the affirmative commands are more prominent and more significant. They include dependability, diligence, collaboration, conformity, and all the other requirements for efficient production in a complex organization.
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> A *disciplined worker*, therefore, is not merely one who keeps out of fights, refrains from smoking in the washroom, and otherwise obeys the rules of comportment. He also makes a positive contribution more or less equivalent to what was contemplated when the employment relationship was originally sealed.[43]

In the Public Service of Canada the criminal law analogy is generally accepted[44] and three important consequences result: The first is the issue of providing the employee with due notice of the forbidden conduct. Second is the question of the right of the employer to suspend an employee indefinitely pending the results of a court proceeding in which he is involved. Third is the determination of the nature of the factors to be considered in assessing the appropriate penalty in the circumstances.

### 1. *The issue of providing due notice to the employee of the forbidden conduct*

The principle that the employer must provide the employee with due notice of the forbidden conduct is well recognized in the case law developed pursuant to the *Public Service Staff Relations Act*. Its best expression may be found in a decision of the Federal Court of Appeal, *Norman L. Wright* v. *Public Service Staff Relations Board*:

> [A]n employee cannot, as a matter of substance, be dismissed for disciplinary reasons or misconduct without being informed of what is alleged against him in such terms that he can make his answer thereto, not only before he is discharged but also at each stage of the grievance procedure.[45]

Moreover, the adjudicators have recognized as applicable to the Public Service the classical doctrines developed in the private sector imposing "due process" on the employer's power to discipline, namely, the doctrine of the "culminating incident", and the doctrine of "condonation".

#### a) The doctrine of the culminating incident

This principle requires the employer to prove that the "culminating incident" itself was of such a nature as to warrant dis-

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[43] *Ibid.*, 304-305.

[44] See *e.g.*, *Bell, supra*, note 37.

[45] [1973] F.C. 765, 779.

cipline. Only after such a case has been made can the employer raise the employee's previous record to justify the specific disciplinary action in question. The doctrine

> ... stands as a shield for aggrieved employees whose work record is somewhat tarnished by past misconduct. It guards against the chance that an aggrieved employee will be judged guilty of the most recent disciplinary offence charged against him in part on his tarnished record of behaviour in the work place.[46]

An example of the application of the doctrine is the case of *Vogel*.[47] The employer gave no formal notice to the grievor of the culminating incident upon which it was relying to serve as a springboard to the grievor's past disciplinary record. Adjudicator Norman sustained the grievance on the ground, *inter alia*, that fairness demanded that before an employer could "rely upon an incident which in itself merits some disciplinary action as a springboard to an employee's past disciplinary record, that culminating incident ought itself to have been the occasion of a formal disciplinary step by the employer".[48]

Within the context of the *Public Service Staff Relations Act* the doctrine of the "culminating incident" has been extended so that the employer may not attack the credibility of the aggrieved employee as a witness by introducing into evidence his past disciplinary record until the culminating incident has been proven. In *Shanks*,[49] counsel for the employer submitted that the adjudicator could assess the aggrieved employee's credibility as a witness not only on his testimony as it pertained to the "culminating incident", but also on his disciplinary record as a whole. In rejecting this argument, Adjudicator Norman pointed out that the culminating incident doctrine had been evolved in order to avoid "guilt by accumulation".[50]

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[46] *Shanks* (166-2-619) (Norman) 3. See also *Gosnell* (166-2-1467, 166-2-1471) (Jolliffe) 39: "The rule is not a mere legalistic technicality, as some may imagine. The rule is based solidly on irrefutable logic and fundamental principle. It would be irrational and illogical to presume that misconduct must have occurred today because it is known that misconduct occurred in the past. Further, any such presumption of guilt is contrary to a basic principle of British jurisprudence, which Canada has been fortunate to inherit. That principle demands respect in the employment relationship as it does in the courts and elsewhere."

For a statement of the rule in the private sector see *Re United Steelworkers of America and Aerocide Dispensers Ltd* (1963) 15 L.A.C. 416, 419 *per* Laskin J.

[47] (166-2-1473) (Norman).

[48] *Ibid.*, 15.

[49] *Supra*, note 46.

[50] *Ibid.*

Since the employer was bound to prove the necessity for disciplinary action on the basis of the incident before the adjudicator, without reliance on earlier misconduct, the employer must be prevented from in any way referring to such past misconduct until its "initial burden of proving the case on the balance of probabilities"[51] had been discharged.

**b) The doctrine of condonation**

The common law doctrine of condonation is described by MacLennan J.A. in *McIntyre* v. *Hockin*:

> When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away. ... If he retains the servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new. No doubt the employer ought to have a reasonable time to determine what to do, to consider whether he will dismiss or not, or to look for another servant. So, also, he must have full knowledge of the nature and extent of the fault, for he cannot forgive or condone matters of which he is not fully informed. Further, condonation is subject to an implied condition of future good conduct, and whenever any new misconduct occurs, the old offences may be invoked and may be put in the scale against the offender as cause for dismissal.[52]

The leading case invoking the doctrine of condonation as a bar to discharge from the Public Service is *Vogel*.[53] In that case the grievor was charged on July 30, 1973 with deliberately wasting time. Noted also were disturbing other employees, extremely poor work, creating a greater work load for others, and consuming a bottle of beer during normal working hours without permission. He was suspended for five days and at the same time warned of impending release if work did not improve. In fact, within a few weeks of this disciplinary action having been taken, his work having not improved, the grievor was discharged. The letter of dismissal stated:

> You have been aware for some time of the dissatisfaction this base has had with your work and attitude and have been warned on many previous occasions that your dismissal was imminent if you persisted along these lines. As a result of your own decision not to conform to requirements this dismissal has come about.[54]

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[51] *Ibid.*, 4.
[52] (1889) 16 O.A.R. 498, 501 *et seq.*
[53] *Supra*, note 47.
[54] *Ibid.*, 1.

However, prior to the hearing before the adjudicator, the employer had given the grievor no indication that any incident subsequent to July 30, 1973 had been relied upon as a basis for discharge. The grievor's representative pleaded condonation, and the adjudicator agreed that there were grounds for invoking the doctrine. The employee had not been advised at the time of, or shortly after, the incident subsequent to July 30, 1973 "that he was in any kind of jeopardy of being discharged ... [and] he ought to have been so advised as a matter of fairness ... in order to invest time in seeking other employment if he chose to do so".[55]

2. *The right of the employer to suspend an employee indefinitely pending the results of a court proceeding in which the employee is involved*

Related to the issue of "due process" is the problem of whether an employer may suspend indefinitely an employee who is involved in court proceedings, pending the outcome of such proceedings. A typical example of this situation is the *Guenot* case.[56] The grievor, a Customs Officer at the Department of National Revenue, was arrested at his place of work by the R.C.M.P. on January 19, 1974 and charged with assisting in smuggling automobile and truck parts and accessories valued at over $200.00, contrary to section 192 of the *Customs Act*.[57] On the same day, he was suspended indefinitely pending the resolution of his case in the courts. Adjudicator Simmons heard the grievance on June 27, 1974 and learned at that time that the earliest date at which the matter could be disposed was May, 1975. The grievor sought reinstatement during the intervening months while the matter would remain unresolved before the courts, and claimed that he had not received any information from the R.C.M.P. which would enable him to prepare a defense to the charge. In the meantime, he pleaded innocence and denied any involvement whatsoever.

The evidence at adjudication indicated that the grievor could undertake duties other than those performed at the time of his arrest and that he was willing to take any type of work. However,

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[55] *Ibid.*, 20. Adjudicator Norman also stated that "[e]xceptions to the principle might include cases where no injustice is being done to the affected employee due to prior notice having been communicated to him and cases where the incident was not within the knowledge of the employer at the time of disciplinary action being taken against the employee" (at 15).

[56] (166-2-1498) (Simmons), now reported at (1974) 6 L.A.C. 400.

[57] R.S.C. 1970, c.C-40.

the employer would not consider the possibility of continuing to employ the grievor even in a position which would not require him to meet the public, because the employer had lost trust in him. Moreover, the employer decided that due to the seriousness of the charge, the operation and morale of the Department would be affected if the grievor had been retained in *any* position.

Reviewing the relevant decisions in the private sector relating to the right of the employer to suspend an employee who has been arrested and charged with an offence, Adjudicator Simmons concluded that the employer does not have an untrammelled right to suspend such an employee, and furthermore he cannot completely disassociate himself from the matter to await disposition by the courts, but must, within a reasonable period of time, objectively consider the possibility of reinstating the grievor.[58] Relying on *Phillips Cables Ltd*,[59] Adjudicator Simmons considered the following as indices of an objective assessment: What impact would the grievor's presence at work have on its business operation as well as on the efficiency and morale of the other employees; was arrest and charge work-related; could the employee be sufficiently supervised so as to remove him from constant suspicion; could he be moved to another work area to remove the source of conflict.[60]

Adjudicator Simmons considered that the question of what constitutes a reasonable period of time within which the objective assessment should be made depended on the circumstances of each case. On the evidence before him, he found that continued suspension of the grievor was unwarranted and that the employer had failed to consider objectively the possibility of reinstatement. Accordingly, he ordered that the grievor be reinstated without loss of compensation and without prejudice to the right of the employer to institute discharge proceedings should further information about the nature of the grievor's offense become available.[61]

The question of indefinite suspension pending the results of a court proceeding in which the employee was involved was again raised in *Horsfield*.[62] The grievor was arrested at his place of work by the R.C.M.P. on March 22, 1974 and charged with the offense of forgery, contrary to section 324(1)(b) of the *Criminal Code*,[63] and

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[58] *Supra*, note 56, 8, 10.
[59] (1974) 5 L.A.C. (2d) 274 (Adams).
[60] *Supra*, note 56, 10.
[61] *Ibid.*, 14-15.
[62] (166-2-1568) (Simmons).
[63] R.S.C. 1970, c.C-34.

was told to remain at home until he received further instructions. He continued to receive compensation until May 13 at which time he was notified that he was to be suspended without pay. The court appearance was postponed until October 1, 1974, the first day of the preliminary hearing was October 7, 1974, and the next scheduled hearing was to have been January 27, 1975. At the grievance heard on October 28, 1974, the grievor alleged, *inter alia*, that the peremptory action taken by the employer in suspending him was a denial of natural justice.

Adjudicator Simmons affirmed the view he expressed in *Guenot* that while an employer may suspend an employee indefinitely pending the results of a court proceeding in which the employee is involved, it must objectively consider the possibilities of reinstatement to active employment within a reasonable period of time. He found on the evidence that the employer had not demonstrated, on the balance of probabilities, that its business operation would be adversely affected by the grievor's presence at work or that it was not possible for the employer to supervise the employee without shouldering an unreasonable burden, and there was no evidence to lead him to conclude that the efficiency or morale of the other employees would be detrimentally affected if the employer reinstated the grievor. Accordingly, he ordered that the grievor be reinstated without prejudice to the right of the employer to institute discharge proceedings at a later date. The issue of lost compensation was not raised.

### 3. *Factors in assessing the appropriate penalty*

In readjusting the disciplinary measures taken by the employer, the adjudicators have asked themselves the following questions: Was the discipline imposed reasonably related to the gravity of the offense? Was its aim correction? Were mitigating factors accounted for?

Immediate dismissal has been upheld in cases where the offense has apparently made a continuing working relationship impossible. For example, in *Chevalier*[64] where the discharge was based on the ground of assault on a superior accompanied by acts of insubordination and lying, with no extenuating circumstances, provocation or excuse pleaded, discharge was held to be justified. Similarly in *Larivière*[65] a discharge was upheld where the grievor had uttered abusive and menacing words toward a superior and had inten-

[64] (166-2-1617) (Garant).
[65] (166-2-8) (Morin).

tionally and without any justification assaulted another employee in the course of his duties.

In another case, *McKendry*,[66] the grievor was discharged for, *inter alia*, purchasing shares in a company while it had business pending with the employer. Chief Adjudicator Jolliffe found that disciplinary action was in order and discharge the appropriate penalty on the ground that the employee's actions were in conflict with the fundamental principle that public servants must not use, for private gain, information to which they have access and which is otherwise unavailable to the general public.[67]

On the other hand, in some cases, the potential value to the Public Service of a reformed employee was considered more important than immediate dismissal. For example, in *Baker*,[68] the grievor, a postal employee, was discharged for a violation of section 55 of the *Post Office Act*.[69] During the course of his duties, he had taken out of an unsealed envelope a pamphlet entitled "Sex Education", read a little and passed it along to a fellow employee. Chief Adjudicator Jolliffe reduced the penalty to suspension without pay or other benefits for seven months on the grounds that the absolute prohibition of section 55 of the *Post Office Act* was not being uniformly enforced at the grievor's Post Office, a fact of which the employees were aware, the grievor was cooperative and straightforward with his supervisor at his investigation, and his demeanor as a witness at the adjudication hearing was such as to suggest that he was not dishonest.

Similarly, in *Segin*[70] the grievor had been discharged for theft of two dollars from the mail but had been acquitted of a criminal charge. Chief Adjudicator Jolliffe found that the grievor did not intend to steal the money in the legal or ordinary sense of the word. The penalty of discharge was reduced to a suspension without pay or benefits for eight months since there were mitigating circumstances: The employee had intended only to "borrow" the money for a temporary period of time, he had a good record, there were "grounds for expecting his redemption" and he was "capable of rehabilitating himself as a reliable and trusted employee".[71]

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[66] (166-2-674) (Jolliffe); Substantive issue available in summary form only, *infra*, note 67.

[67] *Index to Adjudication Decisions*, Staff Relations Division, Personnel Policy Branch, Treasury Board (166-2-674).

[68] (166-2-123) (Jolliffe).

[69] *Post Office Act*, R.S.C. 1952, c.212, s.55, now R.S.C. 1970, c.P-14, s.58.

[70] (166-2-396) (Jolliffe).

[71] *Ibid.*, 12.

The criteria upon which adjudicators have determined that some other, reduced penalty would be more appropriate than discharge were reviewed in *Stewart*:

> [L]ong-term suspension for a very serious offence is more appropriate than discharge, provided that the employee has a good record, provided that there are extenuating circumstances and provided further that there are reasonable grounds for expecting the employee's redemption.[72]

**The problem of alcoholism**

Alcoholism has given rise to a number of interesting decisions concerning the appropriate penalty to be awarded. According to the case law, alcoholism is considered to be a sickness and not *per se* just cause for discipline. "Society and the law no longer regard punishment or discipline as the appropriate response to pathological conditions, whether of the mind or of the body."[73]

Nevertheless, where alcoholism results in an assault on a supervisor, the employee may be subject to disciplinary action:

> Alcoholism and other forms of addiction are increasingly recognized by administrators and personnel men as among the most difficult and costly problems confronting management in North America. It is obvious that when addiction leads to a single outburst of outrageous misconduct — such as assaulting a supervisor — the employee may be discharged.[74]

However, where the employer has accepted responsibility to promote, encourage and even insist upon the diagnosis, treatment and rehabilitation of an employee who has been addicted to alcohol, and to the extent that the employer has failed to live up to its own self-imposed responsibilities, there will be a good defense to a discharge action for assault, insubordination, poor attendance and poor reporting practices by an alcoholic. In *Embury*[75] the grievor was discharged on just such a basis. His defense was that the penalty of discharge was too severe in the circumstances, since the employer had not given him ample notice of the gravity of his alleged misconduct and his poor work performance was due to an alcoholic problem which he had solved by the time of the hearing, notwithstanding the employer's failure to avail him of the opportunity to undergo the employer's rehabilitation program.

Chief Adjudicator Jolliffe found that the grievor had committed an unprovoked assault on the supervisor, and the question to be decided was whether the penalty of discharge was appropriate in

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[72] *Supra*, note 35, 74.
[73] *Washbrook* (166-2-133) (Jolliffe) 22.
[74] *Embury* (166-2-618) (Jolliffe) 21.
[75] *Ibid.*

the circumstances. An important issue considered in resolving the question was whether the employer had any responsibility for the unsatisfactory employment record of the grievor. The Chief Adjudicator found that the employer had been aware of the grievor's alcoholic problem for several years and had not responded by imposing progressive discipline or insisting on diagnosis and treatment, a program which the employer had itself designed to deal with problem drinking and drug misuse. The document setting out the appropriate program made it clear that the Post Office had undertaken the responsibility of promoting, encouraging and at times insisting "upon the diagnosis, treatment and rehabilitation of employees who have become addicts".[76] While this required a joint employer-employee effort, responsible management could no longer "sit back and allow conditions to deteriorate to the point where employment must be terminated".[77]

On the issue of whether it was appropriate to take into consideration the rehabilitation of the employee after the event leading to his discharge, the Chief Adjudicator considered that

> ... it would be highly artificial in considering disciplinary penalties to pretend that the only relevant information about an employee is whatever would have been available at the time of his offence, and that information subsequently available should be excluded from consideration. To be realistic, evidence as to his character and potential value which comes to light after the offence may be as important as anything available before the offence.[78]

Since the employer was not diligent in affording the grievor an opportunity to rehabilitate himself through the employer's own rehabilitation program and since the grievor had produced considerable evidence regarding the possibility of his own rehabilitation, Chief Adjudicator Jolliffe found that discharge was unwarranted in the circumstances and substituted a suspension without pay for eleven months.

**The extent of the adjudicator's authority to order remedial action**

The extent to which an adjudicator may take remedial action under the *Public Service Staff Relations Act*[79] on disciplinary measures instituted by the employer has not been as thoroughly canvassed as it has in the private sector.[80] In fact, adjudicators have

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[76] *Ibid.*, 19.
[77] *Ibid.*
[78] *Ibid.*, 27.
[79] *Supra*, note 4.
[80] See, *e.g.*, E.E. Palmer, *The Remedial Authority of Labour Arbitrators* (1960) 1 Current Law and Social Problems 125, 152; *Re International Assoc.*

consistently maintained their prerogative to reduce a penalty of discharge to one of suspension where the circumstances have warranted it. Although the employer has never formally challenged this position by way of reference to the Public Service Staff Relations Board or the Federal Court of Appeal, the question arose in the *Paraschyniak* case.[81] Counsel for the employer submitted to the Chief Adjudicator that he had no jurisdiction to reduce the penalty of discharge. Chief Adjudicator Jolliffe responded as follows:

> It has been urged that I have no "jurisdiction" to reduce the penalty. If this novel suggestion had any merit, I would have expected it to be tested in the courts long ago . . . .
> 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 Section 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 Section 92, 94, 95 and 96 of the Act. Under Section 96(2) I have a duty to render a decision, and under subsection (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.[82]

**Conclusion**

The question of the legal rights of an individual employee in the collective bargaining setting is part of the general problem of finding a balance between liberty and authority. The Government of Canada has considered it appropriate to confer upon its public servants an unfettered right to refer to adjudication matters relating to their "critical job interests". The case law that has subsequently been developed has ensured that principles of natural justice shall apply to decisions concerning the question of whether or not an employee should be discharged. In view of the current research and development in the entire area of collective bargaining, the provisions of the *Public Service Staff Relations Act* might well serve as a model for the general approach to the question of individual rights in the administration of the collective agreement.

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*of Machinists and S.K.D. Manufacturing Ltd* (1969) 20 L.A.C. 231 (Weiler); P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (1974), 143.

[81] (166-2-1184) (Jolliffe).

[82] *Ibid.*, 43-45.

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