Relations industrielles
Industrial Relations

Justice and the Grievance Procedure in the Federal Public Service
La justice et la procédure de règlement des griefs dans la fonction publique fédérale

William R. Moore

Volume 36, numéro 4, 1981

URI : https://id.erudit.org/iderudit/029207ar
DOI : https://doi.org/10.7202/029207ar

Aller au sommaire du numéro

Éditeur(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (imprimé)
1703-8138 (numérique)

Découvrir la revue

Citer cet article

Moore, W. R. (1981). Justice and the Grievance Procedure in the Federal Public Service. *Relations industrielles / Industrial Relations*, *36*(4), 848–864. https://doi.org/10.7202/029207ar

Résumé de l'article

Les relations professionnelles au sein de la fonction publique fédérale sont régies par une seule loi: la*Loi des relations de travail dans la fonction publique* (L.R.T.F.P.). Contrairement aux lois provinciales du travail, cette loi empêche les parties à une convention collective de porter certaines de leurs clauses à l'arbitrage (organisme où les griefs sont plaides devant une tierce partie indépendante). Par exemple, les différends relatifs aux nominations, aux promotions, aux mises à pied, aux mutations, aux notations de même que plusieurs autres ne sont pas « arbitrables ».

L'auteur se demande si les plaignants, dont les griefs ne peuvent être ainsi soumis à l'arbitrage, bénéficient d'une norme de justice comparable aux autres.

Les données proviennent de la section de l'environnement de l'Alliance de la fonction publique du Canada pendant la période s'étendant de janvier 1977 à juin 1979.

L'analyse des faits laisse voir que les restrictions imposées dans le cas de certains types de griefs créent un obstacle peu souhaitable et inutile à l'exercice de la justice.

En comparant la façon dont la direction répond aux griefs, selon qu'ils sont ou non soumis à l'arbitrage, aux différents stades de la procédure de règlements des griefs (pièces 1, 2 et 3), on n'y décèle à première vue aucun indice significatif de prévention contre les personnes dont les griefs ne sont pas « arbitrables ». Dans la mesure où l'on pouvait s'attendre à l'existence d'un penchant favorable à la direction dans les cas où celle-ci est elle-même l'autorité finale, cela est étonnant. Cependant, si l'on tient compte du résultat des décisions là où il y a appel à des tierces parties, généralement la Commission des relations de travail dans la fonction publique et, quelquefois la Cour fédérale, (pièces 4 et 5), on se rend à l'évidence que la direction penche fortement de son propre côté. En pratique, dix pour cent (22 sur 228) de tous les griefs ou vingt pour cent de tous les griefs « arbitrables » furent tranchés par une tierce partie indépendante. De ceux-ci, quatre sur cinq se terminèrent par une décision favorable au plaignant. C'est là une indication significative de l'importance d'avoir accès à un tribunal indépendant. Une révision des décisions se rapportant aux congés spéciaux fournit un exemple simple qui permet de souligner ce que démontrent les constatations générales. Tenant compte de la clause de la convention, les griefs relatifs aux congés spéciaux peuvent être ou non soumis à l'arbitrage. Parmi celles qui étaient admissibles à l'arbitrage, trois griefs furent concédés avant l'audition devant la Commission de telle sorte que, à la fin, deux seulement sur sept des affaires soumises à l'arbitrage furent rejetées, tandis que, dans la catégorie des affaires qui n'étaient pas « arbitrables », six des sept plaignants perdirent leur cause. Il est probable que les critères de la direction pour accorder un congé spécial étaient trop rigoureux, mais, pour quelques plaignants, il n'y avait pas d'autre recours.

En revisant les résultats, une règle générale devient évidente. À l'exception possible des cadres intermédiaires, chaque niveau successif de décision renverse un nombre considérable de décisions antérieures. Là où l'arbitrage est interdit, il semble raisonnable d'affirmer que plusieurs griefs se terminent prématurément en ce sens que le plaignant est forcé d'accepter une décision de la direction qui, autrement, tournerait en sa faveur.

Plusieurs facteurs peuvent s'associer et contribuer à expliquer le phénomène de la partialité de la direction, mais le principal, c'est le fonctionnement de la responsabilité et de l'autorité entre les différents niveaux de direction. Il est compréhensible que les cadres inférieurs soient peu disposés à faire droit à un grief qui peut avoir pour conséquence de rescinder une directive donnée par un supérieur. Conclusion pratique: il est important de traiter avec quelqu'un qui possède l'autorité nécessaire pour trancher le problème et, de ce fait, minimiser le nombre des conflits d'intérêts possibles. Malheureusement, cela pose un dilemme au niveau supérieur de la direction dans le cas des griefs qui ne sont pas « arbitrables ». Le syndicat peut choisir de défendre l'affaire devant le sous-ministre, un sous-ministre adjoint ou encore un fonctionnaire du service du personnel. Idéalement, tous les griefs « non-arbitrables » qu exigent une décision du sous-ministre ou d'un sous-ministre adjoint devraient être discutés avec ceux-ci. Autrement, un conflit d'intérêt peut se soulever si le fonctionnaire du service du personnel laisse entendre à ses supérieurs qu'ils sont dans l'erreur, peut-être même à la suite d'une recommandation faite plus tôt par ce même service du personnel. Cependant, si le syndicat se présente toujours devant le sous-ministre ou un sous-ministre adjoint, il est susceptible de contrarier le fonctionnaire supérieur en prenant beaucoup de son temps. Le danger, c'est que ceux-ci deviennent indisposés contre le syndicat avant qu'ils ne le soient contre le système lui-même. Si le sous-ministre adjoint se voit obligé de traiter chaque grief dans lequel son autorité est impliquée, le syndicat perdra sa crédibilité. Ce ne sont pas tous les griefs qui atteignent le stade final qui sont défendables ou même sensés, et un sous-ministre adjoint n'appréciera pas que l'on contourne son service du personnel dans de pareilles situations. D'autre part, si le syndicat se dérobe au service du personnel lorsqu'il s'agit d'une bonne cause, il indique d'avance à la direction qu'il estime avoir une bonne affaire en main.

Le scénario précédent, même s'il ne se présente pas dans toutes les affaires, montre que des facteurs complexes influent sur un processus judiciaire qui n'est pas indépendant. C'est peut-être un hommage à rendre à la direction de dire que, d'une façon générale, elle ne semble pas consciemment prendre avantage « d'avoir le dernier mot » quand les griefs ne sont pas « arbitrables ». Toutefois, le taux élevé des gains dans les affaires qui vont à l'arbitrage démontre nettement qu'il n'y a pas de substitut à une agence de révision indépendante dans le système judiciaire. En conséquence, on peut conclure que la règle de justice dans le fonctionnement du mécanisme d'arbitrage des griefs au gouvernement fédéral serait améliorée si la*Loi des relations de travail dans la fonction publique* était modifiée de façon à rendre tous les griefs admissibles à l'arbitrage.

Justice and the Grievance Procedure in the Federal Public Service

William R. Moore

The research findings presented here indicate that justice is deterred because of legislative restrictions that preclude certain grievance issues from adjudication.

The justice of the grievance procedure depends on the extent to which it results in "fair" decisions, arrived at within a reasonable period of time, and in turn the extent to which it is perceived to be equitable and efficient. This article attempts to determine whether the grievance procedure in the federal public service promotes an acceptable level of justice.

It would be difficult, if not impossible, for any person to assess individual grievances and determine whether or not the results were "fair". Subjective judgments would be inevitable. Any attempts to define the criteria of equity would place questionable limitations on the findings and of course one would still be faced with the multitude of unique cases requiring the researcher's personal judgment. Similarly, it might be difficult to determine, from an analysis of individual grievances, whether or not they were resolved within a reasonable time frame. An alternative approach, however, which is feasible in analyzing grievances in the federal public service, is to compare the nature of outcomes pertaining to grievances eligible for adjudication to those whose outcomes are entirely at management's discretion (non-adjudicable). If for example, the outcomes for adjudicable grievances were to show a significantly greater proportion of decisions favouring the grievor than the corresponding outcomes for non-adjudicable grievances, one could argue with some degree of confidence that the legislation is inequitable to persons unable to secure an independent hearing of their dispute. The analysis, in effect, tests comparatively, management's ability to render unbiased decisions on the grievances of its own employees.

* MOORE, William R., Queen's University, Kingston, Ontario.

BACKGROUND TO THE GRIEVANCE PROCEDURE

Adjudicable versus Non-Adjudicable

Not all grievances that may be presented by an employee are subject to third-party determination (adjudication). That form of relief is available only if the grievance is related to:

(a) the interpretation or application in respect of him/her of a provision of a collective agreement or an arbitral award, or

(b) disciplinary action resulting in discharge, suspension or a financial penalty[1].

As in the private sector, the right to proceed to adjudication flows from the provisions of the collective agreement. However, unlike private sector legislation, the Public Service Staff Relations Act removes many matters from the scope of federal public sector bargaining, with the effect that such matters are also ineligible for adjudication. Furthermore Sections 56(2)(a)(b) prohibit the alteration or elimination of any term or condition which would require the enactment or amendment of any legislation by Parliament, except for purposes of appropriating money. Consequently, examples of issues removed from the scope of adjudication include grievances relating to such topics as appointments, promotions, lay-offs, transfers, training, and appraisals.

The Procedure

The maximum number of grievance levels in the federal public service is four. In practice, most departments have instituted a three tier system. When a grievance is filed at the first level, it is heard by local management. If the grievance is advanced to the second level, then a higher level of management passes judgment. Then, assuming that the grievance is presented at the final level, the Deputy Head or more usually his delegated representative, a Staff Relations Officer or perhaps an Assistant Deputy Minister (ADM). Most grievance actions are terminated at the final level; however, if a member is denied the requested remedy and wishes to pursue matters further, the bargaining agent may represent him at adjudication providing two conditions are met: (1) The grievance must be adjudicative in nature, and (2) The union's Executive Management Committee (EMC) must give its approval.

1 Section 90(1) of the *Public Service Staff Relations Act,* R.S. c. P-35. See also Section 98 which allows either the employer or bargaining agent to file a grievance seeking to enforce an alleged obligation arising out of the collective agreement or an arbitral award.

THE RESEARCH DATA

The statistical data related in this article has been gathered from one employee unit, the Environment Component of the Public Service Alliance of Canada. The Environment Component draws its membership of 7 000 employees from Environment Canada and the newly created (Spring of 1979) Department of Fisheries and Oceans. For the purpose of drawing conclusions from the data, employer-employee relations are held to be typified by the Component as far as grievances are concerned. Admittedly, differing levels of justice will exist between each departmental staff relations office and its respective employee representatives: however, because the representatives share so much in common (eg. their goals of representing the employee, their legislation and standardized procedures, their collective agreements, and to some extent their government counterparts) the differences are not taken to detract from the findings.

This study reports the outcomes for 228 grievances, exclusive of appeals and classification grievances[2], that were filed with the Environment Component over a 2 1/2 year period — January 1977 to June 1979.

Each grievance was examined according to the following characteristics,

(i) type
(ii) duration
(iii) identity of the final management to hear the case
(iv) outcome
(v) adjudicability.

The 228 grievance tabulations were then collected and categorized by whether the grievance was adjudicable or non-adjudicable under Section 91 of the Public Service Staff Relation Act (PSSRA). There were 119 non-adjudicable grievances representing 16 different "types" of complaints. For purposes of presentation, the 16 types were further organized into 6 larger "classes": termination of employment, directives, staffing, special leave, miscellaneous, and appraisal. The remaining 109 adjudicable grievances resulted from 19 "types" of complaints; however, the types were more easily re-organized so that they are reported in only 5 larger "classes": pay, discipline, leave, special leave, and miscellaneous.

The outcomes of the adjudicable and the non-adjudicable grievances are portrayed in tables. The consolidated "types", or "classes", are found

2 Appeals and classification grievances are processed through a separate mechanism.

along the left hand column, while the outcomes are depicted along the upper, horizontal side. There are 6 categories of outcomes:

(1) Granted: The requested remedy is granted in full.

(2) Denied: The requested remedy is denied in full.

(3) Partially Granted: The requested remedy is partially granted.

(4) Abandoned: The grievance is abandoned either by written notice or by a failure to transmit the grievance to the next level.

(5) Resolved: The grievance remedy is informally granted; that is, no formal recognition is given in the form of a written reply from management.

(6) Partially Resolved: The grievance remedy is partially granted, but no formal recognition is given in the form of a written reply from management.

In addition to the 6 categories of outcomes found in the tables, a simplified version of the outcome totals is reported beneath the tables. Percentage totals are shown for the "denied" and "abandoned" groupings, while the 4 other totals are gathered under the heading of "pro-grievor action". The title "pro-grievor action" is given to indicate that the grievance initiated some response from management in favour of the grievor.

For purposes of presentation, the various units of data will be referred to as exhibits.

DATA INTERPRETATION AND HIGHLIGHTS

Does It Make a Difference if a Grievance Is Not Adjudicable?

EXHIBIT 1 — FIRST AND INTERMEDIATE LEVEL RESULTS

At first glance, one is struck by the fact that the pro-grievor action taken at the lower levels is noticeably greater if the grievance is adjudicable. Upon taking a closer look, it seems that much of the pro-grievor resolutions at the early stages are concerned with matters of pay (14 out of 23). What does this say about the difference in outcomes? It could be suggested that pay grievances have developed a more definite set of precedents because of adjudication decisions which are followed by lower management; however, it is unlikely that this would account for such a difference in the success rates of pay grievances over other adjudicable grievances. The most likely explanation is that local and regional management better understand pay

EXHIBIT 1

First and Intermediate Level Results

Adjudicable

Table 1(a)

Type of Grievance	Overtime	*Granted*	*Denied*	*Partially Granted*	*Abandoned*	*Resolved*	*Partially Resolved*	*Totals*
Pay		5	25	—	3	9	—	42
Discipline*		—	6	—	2	—	—	8
Leave		—	13	1	3	1	2	20
Special Leave*		N/A	N/A	N/A	N/A	N/A	N/A	N/A
Miscellaneous		2	10	—	4	3	2	19
Totals		7	54	1	12	13	2	89
% Totals		7.9	60.7	1.1	13.5	14.6	2.2	100%

Pro-grievor action : 25.8%
Denied : 60.7%
Abandoned : 13.5%
100%

Non-Adjudicable

Table 1(b)

Termination of Employment	*Granted*	*Denied*	*Partially Granted*	*Abandoned*	*Resolved*	*Partially Resolved*	*Totals*
	—	29	—	—	—	—	29
Directives	—	21	—	3	2	—	26
Staffing	2	18	—	1	2	—	23
Special Leave***	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Miscellaneous	—	7	—	1	7	—	15
Appraisal	—	14	—	3	2	—	19
Totals	2	89	—	8	13	—	112
% Totals	1.8	79.5		7.1	11.6		100%

Pro-grievor action : 13.4%
Denied : 79.5%
Abandoned : 7.1%
100%

Duration "Table"	Adjudicable	Non-adjudicable
Average time for pro-grievor action or abandonment to take place	14.3 days**	25.4 days
Standard deviation for the averages of the types of cases	2.6	2.38
Standard deviation for the individual grievances	8	21

* All 7 Special Leave Cases and 13 of the 19 Discipline Cases were heard only at the final level.
** Note: all days are working days (e.g. Monday thru Friday, less paid holidays).
*** All 7 Special Leave Cases were heard only at the final level.

EXHIBIT 2

Final Level Results

Adjudicable

Table 2(a)

	Granted	*Denied*	*Partially Granted*	*Abandoned*	*Resolved*	*Partially Resolved*	*Totals*
Pay	4	12	1	1	6	1	25
Discipline	1	14	2	2	—	—	19
Leave	1	11	1	—	—	—	13
Special Leave	2	5	—	—	—	—	7
Miscellaneous	5	4	—	1	—	—	10
Totals	13	46	4	4	6	1	74
% Totals	17.9	62.2	5.4	5.4	8.1	1.3	

Pro-grievor action : 32.4%
Denied : 62.2%
Abandoned : 5.4%

Average time to final level décision: 61.5 days.
Standard deviation of average time for the 5 types of cases: 8.3 days.
Standard deviation for the individual grievances: 36 days.

Non-Adjudicable

Table 2(b)

	Granted	*Denied*	*Partially Granted*	*Abandoned*	*Resolved*	*Partially Resolved*	*Totals*
Termination of Employment	1	17	3	2	6	—	29
Directives	6	13	—	1	1	—	21
Staffing	1	13	1	3	—	—	18
Special Leave	—	6	1	—	—	—	7
Miscellaneous	2	3	—	—	2	—	7
Appraisal	8	3	—	—	3	—	14
Totals	18	55	5	6	12	—	96
% Totals	18.8	57.3	5.2	6.2	12.5		

Pro-grievor action : 36.5%
Denied : 57.3%
Abandoned : 6.2%

Average time to final level decision: 62 days.
Standard deviation of average time for the 6 types of cases: 5.4 days.
Standard deviation for the individual grievances: 37.6 days.

EXHIBIT 3

Overall Results for the Component National Office (e.g. outcome of all grievances filed with the Environment Component at the Final Level and pre-Final Level stage).

Adjudicable

Table 3(a)

	G	*D*	*PG*	*A*	*R*	*PR*	*Totals*
Pay	9	12	1	4	15	1	42
Discipline	1	14	2	4	—	—	21
Leave	1	11	2	3	1	2	20
Special Leave	2	5	—	—	—	—	7
Miscellaneous	7	4	—	5	3	—	19
Totals	20	46	5	16	19	3	109
% Totals	18.3	42.2	4.6	14.7	17.4	2.8	

Pro-grievor action : 43.1%
Denied : 42.2%
Abandoned : 14.7%
100%

Average time for the resolution of a grievance filed with the Component National Office (excluding adjudication): 39.6 days.

Non-Adjudicable

Table 3(b)

	G	*D*	*PG*	*A*	*R*	*PR*	*Totals*
Termination of Employment	1	17	3	2	6	—	29
Directives	6	13	—	4	3	—	26
Staffing	3	13	1	4	2	—	23
Special Leave	—	6	1	—	—	—	7
Miscellaneous	2	3	—	1	9	—	15
Appraisal	8	3	—	3	5	—	19
Totals	20	55	5	14	25	—	119
% Totals	16.8	46.2	4.2	11.8	21		

Average time: 54.4 working days.

Pro-grievor action : 42. %
Denied : 46.2%
Abandoned : 11.8%
100%

Average time for the resolution of a grievance filed with the Component National Office (excluding adjudication): 54.4 days.

EXHIBIT 4

Post-Grievance Results

Adjudicable Grievances — *Non-Adjudicable Grievances*

Table 4(a)

	Adjudication & Court						
	G	*D*	*P*	*A*	*R*	*P*	
Pay	2	3*	—	—	1	—	3+3*
Discipline	—	1	8	—	1	—	10
Leave	1	—	—	—	2	2	3
Special Leave	—	—	—	—	3	—	3
Miscellaneous	—	—	—	—	—	—	—
Total	3	1+3*	8	—	7	—	19+3*
% Totals	13.6	18.2	36.4	—	31.8	—	

Only 2 non-adjudicable grievances were sent to court. Both cases dealt with Rejection on Probation and both were conceded out of court by Treasury Board. One took approximately 500 working days, the other 450 working days.

Pro-grievor action : 81.8%
Denied : 18.2%

* Refers to 3 cases on Severance Pay which lost after an appeal by the government.

Average time spent in adjudication: 111 days.

Average time spent on 3 special cases: 400 days in adjudication,
700 days in court.

EXHIBIT 5

Final Standings after Court and Adjudication

Adjudicable Grievances

Table 5(a)

After Court and Adjudication	*G*	*D*	*P*	*A*	*R*	*PR*	*Totals*
Pay	11*	9*	1	4	16*	1	42
Discipline	1	5*	10*	4	1*	—	21
Leave	2*	8*	2	3	3*	2	20
Special Leave	2	2	—	—	3	—	7
Miscellaneous	7	4	—	5	3	—	19
Total	23	28	13	16	26	3	109
% Totals	21.1	25.7	11.9	14.7	23.9	2.7	100%

Pro-grievor action : 59.6%
Denied : 25.7%
Abandoned : 19.7%
100%

Non-Adjudicable Grievances

Table 5(b)

After Court Results	*G*	*D*	*PG*	*A*	*R*	*PR*	*Totals*
Termination of Employment	1*	15*	3	2	8*	—	29
Directives	6	13	—	4	3	—	26
Staffing	3	13*	1	4	2	—	23
Special Leave	—	6	1	—	—	—	7
Miscellaneous	2	3	—	1	9	—	15
Appraisal	8	3	—	3	5	—	19
Totals	20	53	5	14	25	—	119
% Totals	16.8	44.5	4.2	11.8	22.7	—	

Pro-grievor action : 43.7%
Denied : 44.5%
Abandoned : 11.8%
100%

* indicates categories in which changes in outcome have occurred.

EXHIBIT 6

TABLE 6

The Final Level Hearings: Who Represented Management?

	Staff Relations		*ADM**	
	outcome	*outcome as % of heard*	*outcome*	*outcome as % of heard*
Granted	28	17.1%	3	50%
Denied	99	60.4%	2	33.3%
Partially Granted	9	5.5%	—	—
Abandoned	10	6.1%	—	—
Resolved	178	10.4%	1	16.7%
Partially Resolved	1	0.5%	—	—
	164	100%	6	100%

* All 6 cases heard by the ADM were non-adjudicable.

issues. Not only are pay issues the most frequent of any they have to deal with, but the regional personnel offices are responsible for administering the pay system. As a result, they should have the competence to deal with most pay problems. Also unlike the other grievances that local management must reply to, a pay grievance is often the result of a clerical decision as opposed to a management decision. Thus, management probably feels less pressured if they grant the grievance because in most cases they are not overruling either their own decision or that of a superior's.

Consequently, since pay grievances explain much of the pro-grievor action and they in turn are explained by factors other than adjudication, there is not deemed to be, on average, a significant difference between the outcome of adjudicable and non-adjudicable grievances at the lower levels.

Conclusion: The level of justice is approximately the same for the two grievance types at this stage.

EXHIBIT 2 — FINAL LEVEL RESULTS

Grievance outcomes for adjudicable and non-adjudicable grievances at the Final Level are approximately the same according to the columnar percentage totals. There is, however, perhaps an indication of a different application of justice for Special Leave cases. Special Leave cases are found in

both categories of grievances: those which could be sent to third parties showed slightly higher success rates from the grievor's point of view. More will be said about this point when Exhibit 5 is examined.

Conclusion: There is no significant indication of differing justice levels at this stage. Special Leave outcomes might show a difference in levels but it is difficult to say for sure at this point.

EXHIBIT 3 — OVERALL RESULTS FOR ALL GRIEVANCES IN WHICH THE ENVIRONMENT COMPONENT NATIONAL OFFICE WAS INVOLVED

These tables serve to suggest that, on average, outcomes for adjudicable grievances are not radically different than outcomes for non-adjudicable grievances. This result is surprising. One might expect the decisions to reflect a pro-management bias in the cases where management is itself the final authority. Indeed if the analysis was to stop here, it might well be concluded that the figures contained no real evidence of injustice. The analysis however, does not stop at this point. It is important to examine the results of those cases pursued by way of Adjudication and/or Federal Court.

EXHIBITS 4 AND 5 — ADJUDICATION AND COURT RESULTS

The most significant story, on the effect of adjudication, is told in Exhibits 4 and 5. Before viewing the adjudication and court results the level of justice seems to be fairly equal for all grievances. This same view is quickly discarded after looking at the adjudication results. Virtually 10% (22 of 228) of all grievances or 20% of all adjudicable grievances handled by the Environment Component found their way to adjudication. Of these, 4 in 5 engendered action favourable to the grievor. This provides a stark contrast with the situation for non-adjudicable grievances. There, 100% of the court cases were settled in favour of the grievor, but the volume of cases was 2 not 22. Evidently, justice took a beating as far as the non-adjudicable cases were concerned.

The overall effect is visible in Exhibit 5. The pro-grievor action, instead of being the same in Tables 5(a) and 5(b), is now significantly greater for the adjudicable grievances. The result is highlighted when the individual grievance types are examined. Every single class of adjudicable grievance indicates more pro-grievor action than denials, whereas the same claim can be made for only 2 out of 6 non-adjudicable classes (miscellaneous and appraisal).

Furthermore, there is a radical difference in the outcomes of Special Leave grievances. Special Leave cases provide a unique opportunity to search for different levels of justice. Results are found in both tables because the particular clause which permits adjudication was only gradually being included in different collective agreements. Three Special Leave cases were conceded by Treasury Board just before adjudication bringing the total to 5 out of 7 cases fully granted. Whether or not there would have been such a turn around for the 6 corresponding denials in Table 5(b) cannot be claimed with certainty; however, it looks like a good bet. Management's criteria for granting special leave seems to have been too stringent, but for some grievors there was no recourse.

JUSTICE AT THE DIFFERENT STAGES

There is a steady improvement in success rates for the grievor the farther his grievance advances. Some grievances however, are terminated prematurely. Thirty grievances (13.2%), for example, were abandoned. To the extent that the abandonments resulted from (a) fear of reprisals, (b) difficulties or barriers to maintaining the grievance, or (c) discouragement about achieving a suitable redress, then justice was deterred. Even more encompassing in its influence on justice though, is the effect, previously emphasized, of denying recourse to adjudication for particular grievance types. Too many grievances are prematurely terminated because of an inequitable section in the legislation that restricts the jurisdiction of the Public Service Staff Relations Board (PSSRB).

THE PROBLEM OF AUTHORITY

As one looks over the tabulated outcomes for each of the grievance levels, it becomes obvious that, except perhaps for 2nd level management, each successive hearing level overturns a significant amount of the previous decisions.

Any number of reasons may exist to explain why higher levels of management will grant remedies that lower levels denied. Sometimes it is because of the expertise involved, sometimes because of the more distanced perspective and often it is due to the authority vested in the decision maker. The aspect of perspective and authority can be very important. Disciplinary discharge cases for instance, are heard only at the final level. A few more resolved in favour of the grievor but most were denied. To overturn a disciplinary discharge, the decision of the Deputy Head must be reversed because it is (s)he that originally signed the discharge. Consequently, if the Final Level hearing is held with a staff relations officer, the question of

authority may play a prominent part in the decision. The staff relations officer cannot simply change his own mind. He must also convince his superiors that the original decision was faulty. This can be particularly embarrassing when the Staff Relations Branch is likely to have approved the discharge in the first place. It seems reasonable to suggest that a conflict of interest exists when staff relations is faced with overturning the decision of a superior, especially when it is evident that most (9 out of 14) disciplinary discharge cases are in some way overturned in the grievor's favour at adjudication.

This same conflict of interest between the authority of junior management and that of senior management exists in grievances which cannot be heard by an independent third party. Termination of employment cases provide excellent proof of this. The only persons with the authority necessary to terminate someone's employment with the Public Service are either the Deputy Minister or the appropriate ADM. Thus, when a related grievance is filed, the junior management reply is basically a formality because the management involved could not overrule their superior even if (s)he wanted to. Since, in the case of most Final Level hearings, it is the staff relations officers who represent management, the results suggest this same reluctance to overturn an order of a superior: most of the pro-grievor action was taken informally, outside the grievance procedure; the only grievance granted was the result of a hearing with the ADM; and what is more, the two cases taken to court were eventually conceded by Treasury Board (Exhibit 2). Further support for thinking that a staff relations officer has a difficult time overcoming the conflict of interest involved with reversing a superior's decision is found in Exhibit 6. Far more pro-grievor actions came from the ADM than from Staff Relations. One must be cautious in relying on this particular exhibit alone because the sample size of "ADM heard" cases is very small; however, the findings are consistant with what the previous exhibits have suggested. That is, it is important to deal with someone who has the authority to handle the problem and thereby minimize potential conflicts of interest.

CATCH 22

This last finding is extremely difficult to practice, especially for non-adjudicable grievances. If a case is "promising" for the grievor and it can be sent to adjudication, then at least the grievor has access to an authority sufficient to grant the appropriate remedy. A dilemma arises with non-adjudicable grievances though. Ideally all non-adjudicable grievances which challenge a decision authorized by an ADM should be heard by that same ADM, otherwise a conflict of interest is bound to arise when a junior officer

considers the consequences of suggesting to his superior(s) that the ADM was misinformed and/or wrong. However, an ADM will soon become upset if he is forced to handle numerous grievances. The danger is that he will become upset with the Union before he does with the system. If the ADM is confronted with handling every grievance to which his authority has in some way been involved, the Union will soon lose its credibility. Not all grievances that reach the Final Level are defensible or even sensible and an ADM will become frustrated simply because he will see his Staff Relations Branch being by-passed as it probably never has been before. But, as soon as the Union tries to maintain credibility by taking only the "promising" non-adjudicable cases to the ADM, it might just as well concede most of the cases it takes to Staff Relations. After all, if the criteria for a hearing with the ADM is a "good" case for the grievor, the implication is that the cases to be heard by Staff Relations are not worth bothering the ADM about. This scenario is perhaps on the extreme side; nevertheless, it shows the tremendous difficulty of ensuring justice when an independent, authoritative third party cannot be applied to.

Conclusion: There is in all probability judging from the exhibits presented, a substantial difference in the justice available to grievors with issues that cannot be sent to adjudication versus issues that can be sent to adjudication. It would seem therefore that one very feasible solution that would improve justice would be to make *all* grievances adjudicable.

What About The Time?

Are the time delays in grievance settlements significant? The grievances were examined on an adjudicable versus non-adjudicable basis as well as on an overall basis.

ADJUDICABLE VERSUS NON-ADJUDICABLE

Exhibit 1 shows that, on average, adjudicable pro-grievor decisions or abandonments tend to take just over half the time (14.3 vs 25.4 days) that non-adjudicable grievances take. In addition, the standard deviation for individual grievances indicate that adjudicable decisions tend to be more consistent about the time taken (e.g., a narrower distribution). Part of the reason for this undoubtedly stems from the dominance of pay grievances. Another reason, though, is suggested by a combination of intuition and experience: since adjudication can be and is used by union representatives as a threat when presenting a grievance at the lower levels, perhaps it contributes to faster action by local and regional management. To the extent that this is true, the more grievance types that are eligible for adjudication, the fewer

time delays at the first levels. Then, in so much as time delays discourage justice, faster processing will improve justice.

It would appear, unfortunately, that on average, cases eligible for adjudication which are not solved by local or regional management take just as long to be dealt with by the time the final level reply is issued (e.g., 62 days). This means that adjudicable grievances take slightly longer to process at the final level. One reason for this is that both parties may have to gather more information and/or consult with their adjudication experts. Thus, if all grievances were adjudicable, decisions may come faster at the lower levels, but they would probably be of the same duration by the time the final level was issued.

A closing consideration in comparing the duration of the two types of grievances is that if a non-adjudicable grievance is to be contested, it has to go through the Federal Court of Appeals. This can take upwards of two years before even a hearing date is set. In comparison, an adjudication hearing will not usually be delayed much more than three months.

OVERALL

How significant time delays are in the justice of decisions depends on a multitude of factors: what type of grievance it is, how many people are affected, if money is involved, the emotional state of the parties involved and so on. The time taken to render a final decision affects each grievance and each grievor differently. The longer the time, the more detrimental the impact on the achievement of justice. Thus, suffice it to say that the shorter the time taken, the better. The data suggests that by making all grievances adjudicable, some improvements should occur. Other improvements depend more on manpower allocations and a cost-benefit analysis, the likes of which is beyond the scope of this work.

SIGNIFICANCE OF THE STUDY

The data and analysis presented in this article clearly indicate that restriction placed on the types of grievances eligible for adjudication create an undesirable and unnecessary hindrance to justice. No man made system of legal justice will ever be perfect, but whenever the level of justice can reasonably and practicably be improved, every attempt should be made to do so. The biggest and most obvious first step to improving the level of justice available to federal public employees is to allow employee representatives the discretion to take *any* type of grievance to adjudication.

La justice et la procédure de règlement des griefs dans la fonction publique fédérale

Les relations professionnelles au sein de la fonction publique fédérale sont régies par une seule loi: la *Loi des relations de travail dans la fonction publique* (L.R.T.F.P.). Contrairement aux lois provinciales du travail, cette loi empêche les parties à une convention collective de porter certaines de leurs clauses à l'arbitrage (organisme où les griefs sont plaidés devant une tierce partie indépendante). Par exemple, les différends relatifs aux nominations, aux promotions, aux mises à pied, aux mutations, aux notations de même que plusieurs autres ne sont pas «arbitrables».

L'auteur se demande si les plaignants, dont les griefs ne peuvent être ainsi soumis à l'arbitrage, bénéficient d'une norme de justice comparable aux autres.

Les données proviennent de la section de l'environnement de l'Alliance de la fonction publique du Canada pendant la période s'étendant de janvier 1977 à juin 1979.

L'analyse des faits laisse voir que les restrictions imposées dans le cas de certains types de griefs créent un obstacle peu souhaitable et inutile à l'exercice de la justice.

En comparant la façon dont la direction répond aux griefs, selon qu'ils sont ou non soumis à l'arbitrage, aux différents stades de la procédure de règlements des griefs (pièces 1, 2 et 3), on n'y décèle à première vue aucun indice significatif de prévention contre les personnes dont les griefs ne sont pas «arbitrables». Dans la mesure où l'on pouvait s'attendre à l'existence d'un penchant favorable à la direction dans les cas où celle-ci est elle-même l'autorité finale, cela est étonnant. Cependant, si l'on tient compte du résultat des décisions là où il y a appel à des tierces parties, généralement la Commission des relations de travail dans la fonction publique et, quelquefois la Cour fédérale, (pièces 4 et 5), on se rend à l'évidence que la direction penche fortement de son propre côté. En pratique, dix pour cent (22 sur 228) de tous les griefs ou vingt pour cent de tous les griefs «arbitrables» furent tranchés par une tierce partie indépendante. De ceux-ci, quatre sur cinq se terminèrent par une décision favorable au plaignant. C'est là une indication significative de l'importance d'avoir accès à un tribunal indépendant. Une révision des décisions se rapportant aux congés spéciaux fournit un exemple simple qui permet de souligner ce que démontrent les constatations générales. Tenant compte de la clause de la convention, les griefs relatifs aux congés spéciaux peuvent être ou non soumis à l'arbitrage. Parmi celles qui étaient admissibles à l'arbitrage, trois griefs furent concédés avant l'audition devant la Commission de telle sorte que, à la fin, deux seulement sur sept des affaires soumises à l'arbitrage furent rejetées, tandis que, dans la catégorie des affaires qui n'étaient pas «arbitrables», six des sept plaignants perdirent leur cause. Il est probable que les critères de la direction pour accorder un congé spécial étaient trop rigoureux, mais, pour quelques plaignants, il n'y avait pas d'autre recours.

En revisant les résultats, une règle générale devient évidente. À l'exception possible des cadres intermédiaires, chaque niveau successif de décision renverse un nombre considérable de décisions antérieures. Là où l'arbitrage est interdit, il semble raisonnable d'affirmer que plusieurs griefs se terminent prématurément en ce sens que le plaignant est forcé d'accepter une décision de la direction qui, autrement, tournerait en sa faveur.

Plusieurs facteurs peuvent s'associer et contribuer à expliquer le phénomène de la partialité de la direction, mais le principal, c'est le fonctionnement de la responsabilité et de l'autorité entre les différents niveaux de direction. Il est compréhensible que les cadres inférieurs soient peu disposés à faire droit à un grief qui peut avoir pour conséquence de rescinder une directive donnée par un supérieur. Conclusion pratique: il est important de traiter avec quelqu'un qui possède l'autorité nécessaire pour trancher le problème et, de ce fait, minimiser le nombre des conflits d'intérêts possibles. Malheureusement, cela pose un dilemme au niveau supérieur de la direction dans le cas des griefs qui ne sont pas «arbitrables». Le syndicat peut choisir de défendre l'affaire devant le sous-ministre, un sous-ministre adjoint ou encore un fonctionnaire du service du personnel. Idéalement, tous les griefs «non-arbitrables» qu exigent une décision du sous-ministre ou d'un sous-ministre adjoint devraient être discutés avec ceux-ci. Autrement, un conflit d'intérêt peut se soulever si le fonctionnaire du service du personnel laisse entendre à ses supérieurs qu'ils sont dans l'erreur, peut-être même à la suite d'une recommandation faite plus tôt par ce même service du personnel. Cependant, si le syndicat se présente toujours devant le sous-ministre ou un sous-ministre adjoint, il est susceptible de contrarier le fonctionnaire supérieur en prenant beaucoup de son temps. Le danger, c'est que ceux-ci deviennent indisposés contre le syndicat avant qu'ils ne le soient contre le système lui-même. Si le sous-ministre adjoint se voit obligé de traiter chaque grief dans lequel son autorité est impliquée, le syndicat perdra sa crédibilité. Ce ne sont pas tous les griefs qui atteignent le stade final qui sont défendables ou même sensés, et un sous-ministre adjoint n'appréciera pas que l'on contourne son service du personnel dans de pareilles situations. D'autre part, si le syndicat se dérobe au service du personnel lorsqu'il s'agit d'une bonne cause, il indique d'avance à la direction qu'il estime avoir une bonne affaire en main.

Le scénario précédent, même s'il ne se présente pas dans toutes les affaires, montre que des facteurs complexes influent sur un processus judiciaire qui n'est pas indépendant. C'est peut-être un hommage à rendre à la direction de dire que, d'une façon générale, elle ne semble pas consciemment prendre avantage «d'avoir le dernier mot» quand les griefs ne sont pas «arbitrables». Toutefois, le taux élevé des gains dans les affaires qui vont à l'arbitrage démontre nettement qu'il n'y a pas de substitut à une agence de révision indépendante dans le système judiciaire. En conséquence, on peut conclure que la règle de justice dans le fonctionnement du mécanisme d'arbitrage des griefs au gouvernement fédéral serait améliorée si la *Loi des relations de travail dans la fonction publique* était modifiée de façon à rendre tous les griefs admissibles à l'arbitrage.