

5-1-1979

## Comment on *Jacmain v. Attorney General of Canada and the P.S.S.R. Board*

Norman M. Fera

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Administrative Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

---

### Recommended Citation

Norman M. Fera, "Comment on *Jacmain v. Attorney General of Canada and the P.S.S.R. Board*", Comment, (1979) 5:2 DLJ 364.

This Commentary is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

The recent Supreme Court of Canada decision in *Jacmain v. A. G. of Can. and the P.S.S.R. Board*<sup>1</sup> partly clarifies the rights and “protections” accorded a federal government probationary worker upon dismissal. Regretably, however, with reference to the role of a grievance adjudicator (a federal tribunal) in such matters, and even more so with reference to the role of the courts in “supervising” the jurisdictional findings of such a tribunal, the *Jacmain* decision is less instructive.

The facts of the case are relatively complex. *Jacmain* had been an employee with the Department of National Revenue prior to entering a competition with the Office of the Commissioner of Official Languages. In May 1973 he was appointed to the Complaints Branch of that Office but about nine months later he was notified in writing<sup>2</sup> by the Commissioner of Official Languages that he would be rejected during his probationary period<sup>3</sup> pursuant to the provisions of the *Public Service Employment Act*.<sup>4</sup> Under s.28<sup>5</sup> of that *Act*, the deputy head is authorized, at any time during a probationary period,<sup>6</sup> to give notice to the employee and the Public Service Commission that he intends to reject the probationer for

---

\*B.A. (Laur.) Teach. Lic. (Ont.),  
B.A., M.A. (Carelton), LL.B. (U. of O.).

1. Case unreported at time of writing. Judgment was rendered September 30, 1977. [Now reported as [ 1978 ] 2 S.C.R. 15 ed.]

2. Prior to the receipt of that letter, on October 23, 1973, the Commissioner of Official Languages informed Mr. *Jacmain* of the former's intention to reject him.

3. During the probationary period, Mr. *Jacmain* was Chief of Division in the Complaints Branch of the Office of Official Languages.

4. R.S.C. 1970, c. P-32

5. Section 28(3) of the *Public Service Employment Act* provides:

(3) The deputy head may, at any time during the probationary period, give notice to the employee and to the Commissioner that he intends to reject the employee for cause at the end of such notice period as the Commission may establish for any employee or class or employees and, unless the Commission appoints the employee to another position in the Public Service before the end of the notice period applicable in the case of the employee, he ceases to be an employee at the end of that period.

6. It was not contested that the notice of rejection of February 25, 1974 was within *Jacmain's* probationary period.

cause at the end of the notice period.<sup>7</sup> That same section requires the deputy head to furnish to the Public Service Commission *reasons* for his intention to reject the employee during his probation.<sup>8</sup> Purportedly in accordance with that requirement, the employer notified the Commission in writing that during the probationary period Mr. Jacmain “was not able to fulfil a function”<sup>9</sup> in the Office of the Commissioner of Official Languages.

Immediately upon receiving his notice of termination,<sup>10</sup> Mr. Jacmain instituted a grievance<sup>11</sup> on the basis that he was, in fact, being dismissed from his position with no reasons having been given and that the action of the employer was in truth a disciplinary discharge.<sup>12</sup> The employer, of course, answered that allegation

---

7. That period is established by the Public Service Commission for any employee or class of employees. See s.28(3) of the *Public Service Employment Act*, *supra*, note 5.

8. See s.28(4) of the *Public Service Employment Act*, *supra*, note 4

9. The nature of the function Jacmain was unable to fulfil to the satisfaction of the Commission was not stated. Under s.18(4) of the *Public Service Employment Act*, *supra*, note 4, a deputy head who gives notice that he intends to reject an employee for cause must also furnish the Public Service Commission with reasons for such rejection.

10. The terms “termination”, “dismissal” or “severance” will be used throughout the paper in a general sense to refer to termination of employment for whatever reason — rejection for cause or disciplinary discharge or release by the Civil Service Commission under s.31 of the *Public Service Employment Act*, *supra*, note 4.

In this paper, the word “rejection” or a form of it is reserved to refer to “rejection for cause during a probationary period” under the terms of the *Public Service Employment Act*, *supra*, note 4, and the word “discharge” or a form of it is reserved to refer to disciplinary discharge under the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35.

Unfortunately, and this point is underlined, as used by the Adjudicator (a federal tribunal), the Public Service Staff Relations Board (both authorized by the *Public Service Staff Relations Act*) and the courts, those words are not so reserved. Accordingly, when reading any of the decisions or judgments rendered by those tribunals, the context in which the term is used must be carefully considered.

11. Where the grievance of an employee is with respect to disciplinary action resulting in discharge, s.91(1) (b) of the *Public Service Staff Relations Act* entitles the employee to refer the grievance to adjudication. Where, however, a probationary employee ceases to be an employee because of rejection for cause, pursuant to s.28(3) of the *Public Service Employment Act*, he has no right to refer the matter to adjudication.

Also, a probationary worker rejected for cause has a right to grieve under s.90 of the *Public Service Staff Relations Act*. Jacmain’s grievance was considered under s.90 and rejected. However, it appears that not all grievors under s.90 are entitled to adjudication under s.91.

12. It should be noted here that just before issuing a notice of rejection, the Commissioner of Official Languages had imposed a five day suspension on Mr.

throughout by insisting that Jacmain's discharge was not disciplinary but was rather rejection during probation.

Under the *Public Service Staff Relations Act*,<sup>13</sup> a disciplinary action (not a rejection for cause during probation) resulting in discharge permits the grievor, after exhausting the grievance process, to have the matter referred to adjudication,<sup>14</sup> and, indeed, Mr. Jacmain took that course of action. At that level, the adjudicator first made a preliminary determination<sup>15</sup> that the employer's rejection of Jacmain constituted a disciplinary discharge and that, therefore, as adjudicator, he had jurisdiction to hear the matter on its merits. Following such a hearing, the adjudicator held that there had been insufficient reason for Jacmain's disciplinary discharge and accordingly allowed his grievance and ordered reinstatement and reimbursement for his loss of earnings.<sup>16</sup>

Totally dissatisfied with that decision, the employer questioned the adjudicator's jurisdiction and referred the issue to the Public Service Staff Relations Board. The Board, however, held that the adjudicator had not erred in law nor exceeded his jurisdiction to hear the case, notwithstanding that Mr. Jacmain was on probation and that he had purportedly been rejected under s.28(3) of the *Public Service Employment Act*. The Board held further that the adjudicator had not erred when he concluded that Jacmain's dismissal was of a disciplinary nature and that Mr. Jacmain had been discharged without sufficient reason.

The employer proceeded under s.28 of the *Federal Court Act*<sup>17</sup> to ask the Federal Court of appeal to review and set aside the decision of the Public Service Staff Relations Board. The decision of the Court of Appeal was subsequently appealed to the Supreme Court of Canada. In the course of that judicial process a number of important issues became evident. Some of them are relatively specific, others are more general and far reaching in their implications. Unfortunately, as will be seen, not all questions are definitively resolved by the Courts. Some of the issues are noted below, and, in the course

---

Jacmain but that this had been revoked following a different grievance adjudication.

13. *Supra*, note 10. This Act hereinafter referred to as the *PSSR Act*, and the *Public Service Employment Act* will hereinafter be referred to in the notes simply as the *PSE Act*.

14. See s.91 of the *PSSR Act*.

15. That determination rendered August 1, 1974.

16. That decision rendered January 31, 1975.

17. S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c.10

of the paper, where possible, an attempt will be made to summarize the views of the Courts as they relate to them:

(1) First, is the employer's characterization of the dismissal as either a rejection for cause or disciplinary discharge decisive in determining whether or not, with reference to that dismissal, an adjudicator acting under the *Public Service Staff Relations Act* had jurisdiction to hear a grievance? Or is such an adjudicator entitled to inquire into the facts of a particular case to determine whether or not the action taken by the employer was, in fact, rejection for cause (during the worker's probation) or a disciplinary discharge?

(2) Does protection against disciplinary discharge extend to probationary workers or, more broadly, does rejection of a probationary employee for cause, of itself, constitute a disciplinary discharge?

(3) Where the adjudicator (like any other federal tribunal) is challenged on the matter of his jurisdiction, what step or procedure should he take?

(4) On whom does the burden of proving absence of jurisdiction in the administrative tribunal lie? And if the tribunal's jurisdiction is challenged on appeal or in review proceedings, does that burden shift?

(5) Is subs. 28(1) (a) or (c)<sup>18</sup> of the *Federal Court Act* applicable when challenging the decision of an administrative tribunal on questions of jurisdictional fact or law?

(6) In the "review" of a tribunal's decision on questions of jurisdiction, what is the role of the Federal Court of Appeal?

(7) Is the standard or test for the *review* of jurisdictional findings of fact different from that used when reviewing findings of law going to jurisdiction?

The unanimous judgment of the Court of Appeal delivered by

---

18. Section 28 of the *Federal Court Act* reads as follows:

28.(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that it made in a preverse or capricious manner or without regard for the material before it.

Heald J. is examined first.<sup>19</sup> One of the first issues he considered was the duty of an administrative tribunal faced with a challenge to its jurisdiction. In that regard, Heald J. adopted the views of Jackett C.J. in an appendix to the latter's decision in *Cutter*.<sup>20</sup> There, the Chief Justice wrote:

. . . speaking very generally, when such a question arises, a Tribunal must take a position [as to its jurisdiction] even though it cannot make a binding decision<sup>21</sup> . . . .

. . . .  
In order to reach a conclusion on such a question, it may, depending on the circumstances, have to hear evidence with regard thereto. If it concludes that it has no jurisdiction and consequently refuses to proceed, a person who feels aggrieved by that conclusion has his remedy in *mandamus*. If it concludes . . . it has jurisdiction . . . [and proceeds], a person who feels aggrieved by that conclusion has his remedy in *prohibition*<sup>22</sup> or a s.28 application<sup>23</sup> in respect of the Tribunal's ultimate decision depending on the circumstances.<sup>24</sup>

Having decided that the adjudicator hearing Jacmain's grievance proceeded properly in making a determination as to its own jurisdiction, Heald J. next set out to consider whether or not, on the evidence, there was support for the adjudicator's decision that the dismissal was disciplinary in nature. He found, however, that all communication both to Jacmain and the Public Service Commission was unequivocal in expressing the view that the employee was being rejected for cause.<sup>25</sup> Further, the Court found that the

---

19. See *A. G. of Canada v. P.S.S.R. Board*, [1977] 1 F.C. 91

20. *Cutter Laboratories International v. Anti-dumping Tribunal*, [1976] 1 F.C. 446

21. In some instances a statutory right of appeal on a question of law lies to another tribunal or, often, the regular courts. There is, of course, a right of *review* at common law or, now quite frequently, under some statutory provision.

22. As was decided in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, a person alleging that the tribunal in question does not have jurisdiction may bring the point before the tribunal or he may proceed directly to the court for *prohibition*, especially if the matter of jurisdiction is a "short and neat question of law" and not a question of law depending upon particular facts. In that regard see the *Bell* case at 722 where Martland J. (delivering the majority judgment) refers to *Exparte Northfield (Highgate) Ltd.*, [1957] 1 Q.B. 103 at 107.

23. If a party brings the issue of jurisdiction to the tribunal itself and the tribunal decides contrary to its contention and then proceeds to decide on the merits, the party who feels aggrieved could then certainly proceed to have the decision set aside in the Court of Appeal under s.28 of the *Federal Court Act*.

24. In *Cutter*, *supra*, at 453

25. Jacmain apparently made many complaints relating to the administration of the

evidence as to cause adduced before the adjudicator, showed clearly a classic example of behaviour which would justify rejection of an employee during a probationary period.<sup>26</sup>

In the course of his judgment, Heald J. noted that the Public Service Staff Relations Board, in confirming the adjudicator's decision, had relied on the decision in *Fardella*.<sup>27</sup> In that case, the Department of Indian Affairs and Northern Development had appointed the individual involved, on a probationary contract, as a child care worker at La Tuque Student Residence. The Department, however, terminated his employment when he refused to comply with an order of the administrator directing him to bring to Sunday service all children under his care. In *Fardella*, the Federal Court of Appeal found that the adjudicator had been correct in assuming jurisdiction as it was indeed a disciplinary discharge under s.91 of the *Public Service Staff Relations Act* and not rejection of a probationary employee under s.5 of the *Indian School Residence Administration and Child Workers Employment Regulations*.

However, Mr. Justice Heald found the factual situation in *Fardella* quite different from that in *Jacmain*. He wrote in his judgment:

In *Fardella* . . . it was far from clear that the applicant was being "rejected" rather than being discharged for disciplinary reasons. While there was some indication originally that steps would be taken to reject *Fardella* on probation, subsequent events took place which were more consistent with a disciplinary discharge. This is not the situation in the case at bar where the two letters of February 25, 1974<sup>28</sup> clearly establish rejection during the probation period.<sup>29</sup>

With respect, it is difficult to accept the view that there were significant distinctions to be found between the circumstances of the

---

office. He complained constantly, loudly and bitterly. There were outbursts, slamming of doors and continual "jeremiads".

26. Heald J. noted in *Jacmain* (C.A.), *supra*, note 19 at 98 that the Adjudicator had conceded that the conduct complained of would justify rejection of an employee during a probationary period.

27. *Fardella v. The Queen*, [1974] 2 F.C. 465

28. In a letter dated February 25, 1974, the commissioner of Official Languages notified Jacmain that he was to be rejected during his probationary period. On the same date and to comply with the provisions of s.28(4) of the *Public Service Employment Act*, the Commissioner wrote to the Public Service Commission notifying it of his intention to reject Jacmain because he was unable to fulfil his designated function.

29. *Jacmain* (C.A.), *supra*, note 19 at 98.

two cases. In both, the employee was appointed to his respective position subject to a probation period.<sup>30</sup> In both cases, before the end of that period,<sup>31</sup> a superior made it clear in oral conversation with the worker involved<sup>32</sup> that steps would be taken to reject him during probation. In each case the worker received a letter indicating that employment would be terminated before the end of the trial period.<sup>33</sup> And in both cases, the employer attempted to impose a suspension before the official notification of termination of employment.<sup>34</sup>

In any event, having found the termination of employment in *Jacmain* to be one of rejection for cause (during probation), Heald J. then wondered whether or not an adjudicator acting under s.91 of the *Public Service Staff Relations Act* might still be said to have jurisdiction in such a matter.<sup>35</sup> To assist him in the query, His Lordship turned again to *Fardella* and also the decision of the Supreme Court of Canada in *Bell Canada v. Office and*

30. Fardella's probationary period was to be one year long. *Jacmain*, too, was appointed to the Complaints Branch of the Commission of Official Languages subject to a probation period.

31. In *Jacmain* (C.A.), *supra*, note 19 at 94, Heald J. makes it clear that the notice of rejection of February 25, 1974 was within *Jacmain's* probationary period. In *Fardella*, *supra*, the applicant was appointed on October 18, 1972 subject to a one year probation and given written notice November 10, 1972 that his position would terminate December 11, 1972.

32. In *Fardella*, *supra*, note 27, Fr. Bonnard, the employee's superior, told the grievor on Oct. 23, 1972 that he had little choice but to recommend termination of the worker's employment in light of the worker's attitude. On October 25 of the same year, Fr. Bonnard advised the worker orally that steps would be taken to reject him on probation. In *Jacmain* (C.A.), *supra*, note 19 the Commissioner of Official Languages informed the worker orally on October 23, 1973 of the employer's intention to reject during probation.

33. The letter sent from the employer to *Jacmain* was dated February 25, 1974. In *Fardella*, *supra*, note 27, in a letter written November 10, 1972, the Department of Indian and Northern Development said: ". . . your appointment was subject to a probation period . . . [As] . . . you have failed at many occasions to carry out duties, which were part of your job, we advise you that your appointment . . . will terminate on December 11, 1972."

34. In *Jacmain* (C.A.), *supra*, note 19, the Commissioner of Official Languages, prior to giving notice of termination of employment, had imposed a five day suspension. In *Fardella*, *supra*, note 27, we find that a suspension had been given the worker prior to his notification of termination of employment.

35. Section 91(1) says, in part:

Where an employee has presented a grievance up to and including the final level in the grievance process with respect to . . . disciplinary action resulting in discharge, suspension or a financial penalty, and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.



*Professional Employee's International Union*.<sup>36</sup> He first considered the following passage of Chief Justice Jockett in the first mentioned case:

. . . I do not wish to be taken as expressing an opinion that, where there has been, in fact, a rejection under section 5 [of the Indian School Residence Administrators and Child Care Workers Employment Regulations] or under s.28 of the Public Service Employment Act, it can be classified as a dismissal in order to create jurisdiction under s.91 of the . . . [*Public Service Staff Relations Act*]. Insubordination during a probationary period might well be "cause" for rejection, either of itself or taken with other matters, just as it might be ground for disciplinary action even during a probationary period. *There should, however, be no room for doubt, if the matter is handled as it should be handled, as to which action has been taken* [emphasis added].<sup>37</sup>

At best, that comment raises more questions than it answers, and, perhaps, should never have been employed as a guiding instrument. Further, it appears to mesh together a number of important issues which must surely be considered separately. For instance, assuming that classification of the dismissal as a disciplinary discharge is crucial for the purpose of giving the adjudicator jurisdiction, it is only then that it becomes absolutely necessary to establish criteria to differentiate between the two types of dismissal. It might be that form, and form alone, would emerge as the discriminating factor. And it would also be vital to determine which "body", in the first instance, was authorized to make a judgment as to the type of dismissal involved. On the other hand, the nature or type of dismissal might be inconsequential. For example, if the adjudicator were empowered to consider both matters of rejection and discharge, or if rejection, in most cases at least, were to be seen as part of the larger category called "disciplinary discharge", then certainly the dichotomy and the criteria necessary to make the distinction would both be virtually unnecessary. And it would no longer be vital to designate a particular body or person as the one responsible for determining whether the dismissal was of one kind or another. In short, therefore, contrary to what is suggested by the quotation, if rejection can be classified as a dismissal so that an adjudicator under the *Public Service Staff Relations Act* has jurisdiction, then it is academic, at best, to be concerned with whether or not a certain type of conduct establishes one form of

36. [1974] S.C.R. 335

37. In *Fardella*, *supra*, note 27 at 480

dismissal or another, or whether the dismissal was indeed rejection or discharge.

In any event, from what the Chief Justice said in *Fardella* it appears that he would place considerable weight, if not total reliance, on the “way” in which the employer handled the matter. In other words, if the matter were handled by the employer from the start and consistently thereafter as either rejection for cause or disciplinary discharge there should be no subsequent question or issue to be resolved concerning it. It is perhaps because of such reasoning that Heald J. stressed in *Jacmain* that, unlike the matter in *Fardella*, the facts before him were “clear and unequivocal”<sup>38</sup> and that the letters of February 25, 1974 from the employer both to *Jacmain* and the Public Service Commission were absolutely clear and definitive in expressing the view that the employee was being rejected for cause within the meaning of the *Public Service Employment Act*.<sup>39</sup>

In *Jacmain*, Heald J. also concurred with what he believed to be the view of Chief Justice Jockett<sup>40</sup> where there was in fact a rejection under s.28 of the *Public Service Employment Act*, it could not be classified as a discharge in order to create jurisdiction under s.91 of the *Public Service Staff Relations Act*. But in finding the *Jacmain* matter to be truly a rejection for cause, Heald J. looked beyond the mere intention and conduct of the employer. He fully examined all the evidence<sup>41</sup> adduced before the adjudicator — including, but not restricted to, the evidence relating to the employer’s letters — and then and only then concluded that

. . . the conduct complained of in this case is a classic example of behaviour which would justify rejection of an employee during a probation period (and this was conceded by the adjudicator)  
 . . .<sup>42</sup>

38. In *Jacmain* (C.A.), *supra*, note 14 at 98

39. *Id.* at 96-7

40. Jockett C.J. may have expressed that view in *Fardella*, *supra*, note 27 at 480. Heald J. found such holding to exist in the quote noted in the text, *supra*. The reader, like this writer, may find the interpretation given that passage by Heald J. extremely difficult to accept. (See p. 98 in *Jacmain* (C.A.).)

41. At one point in *Jacmain* (C.A.), *supra*, note 19 at 97 Heald J. wrote: “The evidence as to the cause adduced before the adjudicator was, *inter alia*, to the effect that *Jacmain* made many complaints relating to the administration of the office, that he complained constantly . . . bitterly, that it was Mr. *Jacmain*’s attitude, as displayed in tactlessness and impoliteness . . . that gave his employer cause for complaint.”

42. In *Jacmain* (C.A.), *supra*, note 19 at 98.

Mr. Justice Heald also wondered what the result might be if the employer were less than honest as to his reasons for terminating employment. Reiterating that the employer in *Jacmain* had ample cause for rejection, he assumed that

There could *only* be disciplinary action camouflaged as rejection in a case where no valid or *bona fide* grounds existed for rejection.<sup>43</sup> (Italics added.)

In such cases, it would appear that Heald J. would be prepared, despite the employer's consistency and persistence, to support a finding of disciplinary discharge during probation. One wonders, however, whether there exists any conduct which might be said to support a disciplinary discharge, but which, at the same time, could not be seen as supporting rejection for cause.<sup>44</sup> If that were the case, it would be impossible to dismiss a probationary worker on disciplinary grounds, and such worker would never receive the benefits of the adjudicative process upon termination of his employment.

Having concluded definitively, however, that the factual situation in *Jacmain* gave the employer ample cause for rejection, Heald J. then considered whether "action taken to separate an employee from his employment that is, in form,<sup>45</sup> under one authority [might]

---

43. *Id.* at 99.

44. As noted by de Grandpré J. in *Jacmain supra*, note 1 (S.C.C.):

The employer's right to reject an employee during the probation period is *very broad*. To use the words of s.28 of the *Public Service Employment Act* . . . it is sufficient that there be *a* cause, a reason. Counsel for the appellant forthrightly acknowledged at the hearing that at first glance the legislative provision would appear to allow the employer to advance *almost any reason*, and that his decision could not be disputed unless his conduct were tainted with bad faith.

Also, in his judgment de Grandpré cited and seemed to approve of the following from *Re United Electrical Workers & Square D.Co., Ltd.*, (1956) 6 Lab. Arb. Cas. 289 at 292:

An employee . . . on probation . . . is undergoing a period of testing. The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employer's character . . . and general suitability for retention . . . . Although . . . any employee . . . can be discharged for cause . . . , the employment of a probationer may be terminated if, in the judgment of the company prior to completion of the probation period, the probationer has failed to meet the standards set by the [employer] and is considered to be not satisfied.

45. Having considered the evidence as to cause which was before the adjudicator and having considered also other aspects of the factual situation in *Jacmain* and having then concluded that the dismissal was in fact rejection for cause, it seems strange that Heald J. would again return to the use of the word "form" at this point in his judgment.

be treated as having been taken under another’’.<sup>46</sup> And after reviewing the *Bell Canada*<sup>47</sup> decision, he concluded:

For the adjudicator to have jurisdiction under section 91(1) (b) [of the *Public Service Staff Relations Act*] on the facts of this case, it would be necessary for that section to have included in it, the words: “a rejection for cause during the probationary period” or words of like intent. Without words of that nature, the adjudicator is without jurisdiction.<sup>48</sup> (Italics added)

Displeased with the ultimate decision of the Federal Court of Appeal, Jacmain proceeded to the Supreme Court of Canada. But there, too, he was to be disappointed. The nine man Bench split five to four in favour of the employer and rendered three substantially different sets of reasons.

Speaking for himself, Martland, Judson and Ritchie JJ., Mr. Justice de Grandpré found the crux of the matter to be this:<sup>49</sup>

. . . does rejection of an employee on probation because his superior is not satisfied with him constitute a disciplinary action which is therefore subject to adjudication?

If that were indeed the starting point of the inquiry, then it seems to assume that there is no question as to whether or not the decision was truly a rejection for cause or a disciplinary discharge. It starts from the premise that there was a rejection for cause and queries whether such rejection is also an adjudicable disciplinary matter. In other words, the inquiry becomes essentially one of determining whether rejection of a probationary employee is also, for the purposes of s.91 of the *Public Service Staff Relations Act*, a disciplinary action. Whether or not Mr. Justice de Grandpré intended to make that the crucial issue is unclear.<sup>50</sup> In fact, the issue

46. In *Jacmain* (C.A.), *supra*, note 19 at 99.

47. *Supra*.

48. In *Jacmain* (C.A.), *supra*, note 19 at 99-100.

49. In the Court of Appeal, Heald J. suggests in *Jacmain* (C.A.) *supra* note 19 at 98 that the conduct complained of in this case, besides justifying rejection of an employee during probation, “might also be ground for disciplinary action during a probationary period.” Compare, however, comments of Heald J. at 100 in his judgment where he wrote: “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 s.28 of the *Public Service Employment Act* and s.91 of the *Public Service Staff Relations Act*.” In the Supreme Court of Canada, de Grandpré J. quotes from the parts of the judgment in the Court of Appeal and concurs with the views expressed by the lower Court. (*Supra*, note 1.)

50. That this was not an error in phrasing seems evident from another statement of de Grandpré J. He wrote: “The employer . . . [submitted] through counsel that rejection during a probationary period . . . does not constitute discharge.”

is never fully considered and is never answered in his judgment. Instead, the major part of his inquiry<sup>51</sup> seems to focus on the fundamental question as to whether the employer's action was truly rejection for cause or a disciplinary discharge.<sup>52</sup>

Early in the judgment, de Grandpré J. examined the Adjudicator's analysis of the facts and the latter's finding that

. . . the behaviour of the grievor towards his colleagues, his superiors and some of his subordinates was somewhat irascible, reflecting his own personality.

Then, without much further explanation, His Lordship made it clear that he fully accepted the Adjudicator's finding of fact and questioned only his conclusion of law. At this point in the judgment, there appears to be a digression. Mr. Justice de Grandpré notes that where there is contradictory evidence on the facts relating to a question of jurisdiction, appeal tribunals<sup>53</sup> are not bound by the limits of s.28(1) (c) of the *Federal Court Act*.<sup>54</sup> In other words, where the issue is jurisdictional, the Court may set aside the impugned decision without finding it preverse or capricious.<sup>55</sup>

Having made those observations, de Grandpré J. then turned to consider the views of Heald J. in the Court below and interpreted his decision in this way:<sup>55a</sup>

51. In the last few pages of his judgment de Grandpré J. considered the appellant's claim that the Court of Appeal erred by examining the matter in light of the English version of the adjudicator's decision when the decision was delivered in French. It is only in the judgment of de Grandpré J. that this issue is considered. He found no substantial difference between the two versions and underlined the fact that his own opinion was based purely and simply on the adjudicator's finding of fact.

52. Like the other members of the Court de Grandpré J. accepted the view that the jurisdiction of the Adjudicator was dependent on the matter involving "disciplinary action resulting in discharge, suspension or a financial penalty" under the terms of s.91(1) (b) of the PSSR Act. At one point Mr. Justice de Grandpré wrote: "In the context of the case at bar, the adjudicator has jurisdiction only if the matter involved is disciplinary . . . ."

53. It appears that de Grandpré J. is here referring only to the Court of Appeal in the exercise of its original review powers under s.28 of the *Federal Court Act*.

54. *Supra*, note 18.

55. According to Dickson J. in *Jacmain* (and this point is discussed later in the paper) s.28(1) (c) of the *Federal Court Act* concerns questions of fact *within* jurisdiction. de Grandpré J. suggests that review under that subsection is relatively restricted, whereas review under, say, s. 28(1) (a) (concerning jurisdictional matters) is not so limited. Section 28 is set out in note 18, *supra*.

55a. Elsewhere de Grandpré J. wrote:

The case at bar is not a case of disciplinary action. The employee's poor conduct, irascible attitude and unsatisfactory adjustment to his surroundings were valid reasons for his superior's unwillingness to give him a permanent position in his Service.

The Court of Appeal held, when the case came before it, that the adjudicator did *not* have jurisdiction to weigh the cause of rejection once it was established that this cause was not frivolous and that the rejection was not based on anything but good faith . . . . (Italics mine.)

Where the Adjudicator erred, according to Mr. Justice de Grandpré, was in weighing the evidence before him to determine whether there was sufficient cause for rejection when, under the terms of s.28 of the *Public Service Employment Act*, it is sufficient that there be a cause, a reason.<sup>56</sup> Implicitly, then, de Grandpré J. accepted the Adjudicator's authority to inquire into whether the grievor's dismissal was disciplinary in nature or whether it was truly rejection for cause. But since there were "bona fide grounds for rejection", to use a phrase of Heald J., it was not open to the Adjudicator to consider, as he did, whether there were sufficient reasons.

In a concurring judgment, Pigeon J. seems to have used a similar approach and arrived at the same result. He found one of the "true questions" in the case to be this:

Was the Adjudicator entitled to review *the sufficiency of the cause of rejection* in order to decide whether it was in fact a disciplinary dismissal? (Italics added)

In answering that question, His Lordship may be said to have proceeded in this way:

(1) An employer cannot deprive an employee of the benefit of the grievance procedure by labelling a disciplinary discharge a rejection.

(2) Where a probationary employee is purportedly rejected by the deputy head under s.28 of the *Public Service Employment Act*, "an adjudicator has jurisdiction to inquire whether what is in form a rejection is in substance a disciplinary dismissal."

(3) In determining whether or not he has jurisdiction, the Adjudicator is not permitted to

- (a) review the deputy head's decision as to the suitability of the employee or
- (b) determine whether a rejection was adequately motivated or
- (c) decide whether or not there was sufficient cause to justify the rejection.

---

56. At one point before the Supreme Court of Canada, Jacmain's counsel conceded that the statutory provisions would seem to allow the employer to dismiss a probationary for almost any reason. Refer again to note 44, *supra*.

However, given the restrictions set out in number three (above), it is difficult to see how the Adjudicator might carry out his role as set out in number two. In other words, one would have thought that an Adjudicator would almost of necessity be required to inquire both into the motivation of the employer and into the sufficiency of reason or cause to determine “whether what is in form a rejection is in substance a disciplinary dismissal”. But that proposition would apparently involve, among other things, placing on the word “form”<sup>57</sup> a meaning the Justice did not intend.

Thus, under the approach suggested by the majority (i.e., the judgments of de Grandpré and Pigeon JJ.), it appears that any *bona fide* ground, which in conjunction with other grounds would be sufficient to support rejection but which of itself does not, is nonetheless sufficient to oust the jurisdiction of the Adjudicator under s.91 of the *Public Service Staff Relations Act*. And since, as indicated, it is difficult to conceive of any ground which would support or help support disciplinary discharge<sup>58</sup> but not rejection, it is also difficult to conceive of any situation where an Adjudicator might have jurisdiction with respect to any probationary worker,<sup>59</sup> unless, of course, as de Grandpré J. and others suggested, rejection of a probationary employee, of itself, constitutes a disciplinary action. But no member of the Supreme Court seems to have

---

57. Elsewhere in his judgment, Pigeon J. gave some indication of what he would not be prepared to accept in this regard. He wrote: “At the hearing, counsel for the Attorney-General properly conceded that the right of a probationary employee to launch a grievance against a disciplinary decision could not be ousted by making such dismissal in the form of a rejection under s.28 of the *Public Service Employment Act*”.

At another place he wrote: “. . . I cannot agree that an employer can deprive an employee of the benefit of the grievance procedure by *labelling* a disciplinary discharge a rejection . . .” (Italics added.)

58. In his judgment de Grandpré J. recognized that the remarks quoted from *Re United Electrical Workers*, *supra*, note 44, were made in a case involving discharge in the private sector. He could see no basis, however, for saying that in this area there was a distinction between the private and public sectors. He added: “In the public sector, as in the private sector, the employee who wants to improve his lot must still, I hope, take certain risks.”

59. Dickson J. in his judgment wrote:

The issue which this appeal brings squarely to the fore is whether the protection against disciplinary discharge [i.e., the right to have the matter proceed to adjudication] extends to probationary employees.

. . .

*Prima facie* they are protected. Yet, if . . . rejection for cause in effect subsumes disciplinary discharge, then every case of rejection for cause and the protection proves to be illusory.

seriously considered that possibility.

There is one other matter raised in the judgment of Pigeon J. which should be mentioned here. Having reached a conclusion as to the Adjudicator's function and jurisdiction, His Lordship then turned to speculation and considered a "secondary" issue, one which, in light of his first determination, no longer required a definitive answer. He wrote:

*I doubt that if I held the Adjudicator could review the sufficiency of the cause of rejection, I would hold the Federal Court of Appeal entitled to revise his decision. It is true that it is a finding on which his jurisdiction depends, however it was noted in Segal v. The City of Montreal (1931, S.C.R. 460 at p. 473) that where the jurisdiction depends on contested facts, a superior court will hesitate before reversing the inferior court's finding of fact, and will only do so on "extremely strong" grounds. (Italics added.)*

Dickson J., speaking for himself, the Chief Justice and Spence J., in dissent, would, it appears, tend to agree with that last proposition. However, his approach on other issues and his perception of what the Adjudicator is to consider are so fundamentally at variance that they must be fully set out here.

In the course of his reasons, Dickson J. considered the judgment of the Federal Court of Appeal in the instant case (approved, it will be recalled, in part at least, by de Grandpré J.). According to Mr. Justice Dickson, Heald J. proceeded on this basis:

(1) Jacmain's attitude with respect to his superiors, his colleagues and his work was wrong.

(2) That would justify rejection for cause.

(3) There could only be discharge for disciplinary reasons where there was no valid cause for rejection.

(4) Therefore, the termination of employment was a rejection for cause, and the adjudicator was without jurisdiction.

With reference to that reasoning, Dickson J. commented:

[It] . . . contains fundamental fallacies. First, it approaches the matter from the wrong end. Two questions must be distinguished: (i) was the termination of employment disciplinary discharge, or rejection for cause? [That is a jurisdictional question.] (ii) was termination [for either reason] justified?<sup>59a</sup> [That question goes to the merits.]

Mr. Justice Heald answered the second question [namely, that

59a. It would seem, however, that once the Adjudicator decided that the matter were truly rejection for cause, he would not have jurisdiction to proceed to consider



there was justification for rejection] and used . . . [that] answer to resolve the first question. The proper approach is to answer the first question and then, depending upon the answer, to proceed to the second question.

And to also distinguish his own approach from that of Pigeon J., Mr. Justice Dickson added:

. . . it does not inexorably follow that, simply because there lurked in the background some cause which might justify rejection, the termination must, of necessity, be rejection and not disciplinary discharge.

Before outlining the steps in the reasoning of Dickson J. based on the premises just noted, it is best to pause here to consider what both he and, to a certain extent, de Grandpré J. noted about the supervisory jurisdiction of the Federal Court of Appeal.

It will be recalled that Mr. Justice de Grandpré in his judgment sought to point out the fundamental difference between paragraphs (a) and (c) of section 28(1) of the *Federal Court Act*.<sup>60</sup> He concluded that where the question was jurisdictional, the Court of Appeal was permitted to set aside the decision of an administrative tribunal without finding it preverse or capricious. The point made by Mr. Justice de Grandpré seems to be dealt with more fully in the judgment of Dickson J. and the latter's preliminary observations may, perhaps, be best set out in this fashion:

(1) If a question is a jurisdictional question of either fact or law, then s.28(1) (a) of the *Federal Court Act* is the applicable provision.

(2) If the matter is a question of law *within jurisdiction*, then s.28(1) (b) is the applicable provision.

(3) And if the question is one of fact *withing jurisdiction*, then s.28(1) (c) applies.

There are at least two other significant comments of Mr. Justice Dickson in this area which should be noted.

First:

Section 28(1) (c) is an *addition to the common law* and concerns non-jurisdictional questions of fact. (Italics added.)

Also:

. . .the Courts . . . should exercise restraint in declaring a tribunal to be without jurisdiction when it has reached its decision

---

the merits of the case and decide whether the rejection were justified. Dickson J. does not expressly consider that issue.

60. Refer again to note 18, *supra*.

honestly and fairly and with due regard<sup>61</sup> to the material before it. The Court should allow some latitude in its surveillance of jurisdictional findings. It should ask whether there is *substantial evidence*<sup>62</sup> for decisions of fact and *rational basis* for decisions of law, or mixed decisions of fact and law. The error must be manifest.<sup>63</sup> The role of the Court is one of review, not trial *de novo*. (Italics added.)

Concerning the last passage quoted, it will be recalled that Pigeon J. (Beetz J. concurring), seems to have expressed a similar view; that is, with reference to judicial supervision of a tribunal's findings of fact. But where the judgments of Dickson and Pigeon JJ. are fundamentally at variance is with reference to the function or scope of authority, in a broad sense, of the Adjudicator in determining whether there has been rejection for cause or disciplinary discharge. Pigeon J. would curtail the Adjudicator's role to that of discerning whether or not there might be said to be "some ground for rejection" while Mr. Justice Dickson would not so restrict him. And the fundamental difference between Dickson and de Grandpré JJ. appears to be that the former would restrict a review court in overturning an Adjudicator's decisions on jurisdictional questions, whereas the latter does not appear to concur in the view that questions of fact determined by inferior tribunals should be interfered with only in exceptional circumstances.<sup>64</sup>

61. In *In re North Coast Air Service Ltd.*, [1972] F.C. 390 (C.A.) Walsh J. at 420 found that no positive evidence had been placed before the Court which indicated that

"due consideration" had not been given the appellant's submission. In the *North Coast* case it was contended that the manner in which the appellant's commercial services licence had been amended by the Air Transport Committee "amounted to a decision founded on an erroneous finding made without regard to the material before the Commission". (Compare that wording with s.28(1) (c) of the *Federal Court Act*.)

It is interesting to find the use of the word "due" in the Supreme Court of Canada with reference to what an administrative tribunal must be seen to do when deciding jurisdictional questions of fact.

62. Presumably, a review court would intervene only where it found no evidence to support the inferior courts determination on a question of jurisdictional fact or where there was only *some* evidence to support the tribunal's finding.

63. Under s.28(1) (b) of the *Federal Court Act*, errors of law no longer have to appear on the face of the record. Accordingly, if the no-evidence rule is an error of law as found in *Commonwealth of Puerto Rico v. Hernandez* [1973] F.C. 1206 (see esp. 1208), then such lack of evidence need not appear patent. It seems, however, that jurisdictional errors of fact must be "manifest".

64. This last assertion concerning the position of de Grandpré J. is strongly dependent on what one finds the Court of Appeal to have decided at first instance in that regard and whether or not such views are reflected in three paragraphs of the

Let us now set out Mr. Justice Dickson's position more fully:

(1) Rejection for cause<sup>65</sup> and disciplinary discharge are separate and distinct concepts.<sup>66</sup>

(2) The dividing line between the two may be blurred, but it is a line which the adjudicator must draw and the matter is not concluded by the employer characterizing the severance as rejection for cause.

(3) Accordingly, an adjudicator is entitled to hear evidence and inquire into the facts of a particular case to determine whether the action taken by the employer is, in fact, a rejection for cause or a disciplinary discharge.

(4) Substance and not form governs. The form of the notice cannot deprive an adjudicator of jurisdiction if *on all the facts*, the action taken by the employer is truly disciplinary in nature.

(5) In the instant case, the Adjudicator heard the evidence and found that no reason had been given by the employer either orally or in writing for the worker's dismissal and that the only cause for such dismissal that could be adduced from all the evidence was a prior attempt to discipline the employee with a five day suspension — a suspension which was revoked following a different grievance adjudication.<sup>67</sup>

(6) Insofar as the Adjudicator had to choose between conflicting pieces of data, the question was one of jurisdictional fact; as it required a decision as to whether or not either of the two relevant

---

judgment of Heald J. quoted and concurred in by de Grandpré J. in his own judgment.

But there is also subsidiary support for the contention that de Grandpré J. would permit review of a tribunal's findings on questions of jurisdiction on the basis of a trial *de novo*. At another place in his judgment he wrote: ". . . where there is contradictory evidence on the facts relating to a question of jurisdiction, appeal tribunals are not bound by the limits imposed by s.28(1) (c) [of the Federal Court Act]. They may set aside the decision without finding it perverse or capricious". Upon examining the context of those remarks one might well assume that the "appeal tribunals" referred to is, in fact, the Federal Court of Appeal exercising its original supervisory power under s.28 of the *Federal Court Act*.

65. "Rejection for cause", Dickson J. wrote, "will be for reasons otherwise than disciplinary."

66. In arriving at that conclusion Dickson J. implicitly found that protection against disciplinary discharge extended to probationary employees and that it could not be assumed that rejection for cause subsumed disciplinary discharge.

67. In October of 1973 Jacmain was suspended for five days — a disciplinary action. That action led to a grievance adjudication in which the adjudicator ordered on March 27, 1974 (File 166-2-1002) that the suspension be revoked and that all references to that suspension in official records be expunged. The adjudicator noted, however, that the employee's conduct had been reprehensible.

statutes<sup>68</sup> covered the data chosen, it was a question of law.<sup>69</sup>

(7) As the issue here was neither a question of fact or law *within* jurisdiction, the review Court — namely, the Federal Court of Appeal — was not inhibited by either s.28(1) (b) or (c) of the *Federal Court Act*.

(8) The crucial issue, therefore, was simply whether or not the Adjudicator's decision fell within tolerable parameters.

(9) In considering a jurisdictional question under its supervisory powers, the role of the Court of Appeal is one of review and not trial *de novo*. Accordingly, the correctness of every detail upon which the jurisdiction of a tribunal depends cannot be subjected to re-trial in the Court of Appeal (under s.28 of the *Federal Court Act*) and its opinion substituted for that of the tribunal.<sup>70</sup> The Court must allow some latitude in its surveillance of jurisdictional findings. And so, by attempting to examine in "every detail" the "factual issues" upon which the Adjudicator's jurisdiction depended, the Court of Appeal erred.

(10) On the jurisdictional question of fact, there was *substantial evidence* to uphold the decision that what occurred was a discharge for disciplinary reasons. Accordingly, the Adjudicator did have jurisdiction to proceed to the merits of the case and consider whether there was sufficient reason for the discharge on disciplinary grounds. And on the jurisdictional question of law, there was a *rational basis* for the Adjudicator's decision concerning the scope of the two *Acts* — the *Public Service Employment Act* and the *Public Service Staff Relations Act*.

The ultimate result achieved by Mr. Justice Dickson may seem to provide both for the aggrieved and the observer a greater level of satisfaction and seems to be more in symmetry with our general notions of justice. It seems to properly balance the interests of the employer and employee and to offer proper restraints for judicial intervention without at the same time giving unrestrained rein to the administrative process. But there are difficulties.

68. That is the *Public Service Employment Act*, and the *Public Service Staff Relations Act*.

69. The Supreme Court of Canada reaffirmed the distinction between jurisdictional questions of law and fact in *Metropolitan Life Ins. Co. v. Internat. Union of Operating Engineers, Local 796*, [1970] S.C.R. 425. For earlier cases in the area see *Toronto Newspaper Guild and Globe Printing Co.*, [1953] 2 S.C.R. 18 and *Jarvis v. Associated Medical Services Ltd.*, [1964] S.C.R. 497. See also *Galloway Lumber Co. Ltd.* [1965] S.C.R. 222

70. That sentence is almost a verbatim reproduction of the words used by Dickson J.

For example, in assessing the Adjudicator's determination on the jurisdictional question of fact, Mr. Justice Dickson noted that there was substantial evidence upon which the Adjudicator might rely to uphold his decision that a disciplinary discharge was involved. His Lordship felt, therefore, that the Adjudicator could next proceed to consider whether, on the merits, there was sufficient reason for discharge on disciplinary grounds. Some doubt arises, however, as to whether or not the Adjudicator proceeded exactly in that way. As analyzed and set out in the judgment of de Grandpré J.<sup>71</sup> and that also of Pigeon J.<sup>72</sup>, the Adjudicator first set his mind to weighing the evidence before him for the purpose of determining whether or not there was sufficient cause for *rejection*. Having found the grounds insufficient, he concluded that a disciplinary discharge was in fact involved. Assuming the Adjudicator proceeded in that fashion, without in any way attempting to disparage either him or

---

71. As alluded to earlier, there is some difficulty in understanding the judgments and decisions in this case because of the imprecision with which certain words are used. Often the words "dismissal", "severance", "discharge", "rejection" or "termination" are used in a general sense; sometimes, however, the word "discharge" is used to refer to "disciplinary discharge" and the word "rejection" is used to mean "rejection for cause". In their judgments, neither de Grandpré or Pigeon JJ. appears to reserve the use of the word "discharge" for reference to disciplinary discharge.

de Grandpré J. sets out the adjudicator's analysis of the facts and his conclusion in this way: (a) The adjudicator considered the evidence and concluded that the grievor's behaviour was somewhat irascible. (b) The adjudicator weighed those facts and reasoned that there was not sufficient reason to justify dismissal of the probationer. (c) The adjudicator then concluded that the grievor was not rejected for cause and that he had been discharged on disciplinary grounds without sufficient reason.

72. The following series of assertions from the judgment of Pigeon J. clearly indicate that as he viewed the tribunal's "procedure", the adjudicator first determined that there was not a sufficient basis to found rejection for cause and used that determination to decide it was in fact a disciplinary discharge: (1) "The Adjudicator being of the opinion that the facts proved did not constitute sufficient reason for the discharge [of the probationer] held it to be disciplinary . . . ." (2) "In my view . . . [one of the] true questions in this case [is] this: 1. Was the Adjudicator entitled to review the sufficiency of the cause of rejection in order to decide whether it was in fact a disciplinary dismissal." (3) "In the present case, the Adjudicator found that there were grounds for deciding that the employee was unsuitable. However, differing in that respect from the deputy head's judgment, he was of the opinion that these grounds as established before him, was not sufficient to justify rejection. In my view this is what he was not authorized to do because he only had jurisdiction to review a disciplinary dismissal not a rejection." (4) ". . . I cannot agree that an adjudicator may proceed to revise a rejection on the basis that if he does not consider it adequately motivated, it must be found a disciplinary discharge."

the method used, it does appear to be a backward method of proceeding. It will be recalled that the Adjudicator under the *Public Service Staff Relations Act* is authorized to consider disciplinary discharges not matters of rejection for cause. Under the approach apparently taken by the Adjudicator, the impression is certainly left that at the outset, he dealt with or attempted to decide a matter outside his jurisdiction. Of course, in his defence, it might be argued that his initial steps were but part of a more comprehensive preliminary inquiry into his jurisdiction. But whether or not Mr. Justice Dickson would in other circumstances approve of such an approach is, at best, a moot point.<sup>73</sup>

Moving on to another aspect of the case, it does not appear to be particularly evident that the Adjudicator himself perceived (or there was in fact) “substantial evidence” upon which to make a finding that the matter was disciplinary in nature. As noted by a unanimous Court of Appeal, the Adjudicator conceded that the conduct complained of in this case was a classic example of behaviour which would justify *rejection* of an employee during probation.<sup>74</sup> In the Supreme Court, de Grandpré and three other members of the Bench concurred with the Court of Appeal on that point. And in the judgment of Dickson J. there is a lengthy passage from the Adjudicator’s decision indicating the latter’s acceptance of the view that “it was Mr. Jacmain’s *attitude . . .* that gave his employer cause for complaint”. And elsewhere, the Adjudicator wrote:

I agree that it is important for the employer to assess the *attitude* of an employee *during his probation period*.<sup>75</sup> (Italics added)

---

73. It will be noted that in his judgment Dickson J. insists that a review court should not interfere with the findings of an Adjudicator on questions of fact if there is substantial evidence for the decision. Presumably then, an Adjudicator, not to be overturned on decisions of fact, must be of the opinion that there was substantial evidence on which to base his decision.

It might be as well that determinations of an Adjudicator on questions of fact would not be interfered with by a review court if the latter found substantial evidence to support the Adjudicator’s decision even though the Adjudicator himself, on consideration of the evidence, was not of the opinion that *substantial* evidence existed.

But if one presumes that on the evidence the Adjudicator must be of the view that substantial evidence existed to support his determination, then the Adjudicator’s perception of the evidence at the time of the determination becomes significant for the purpose of determining the role of the review court.

74. The Court referred to the “Appeal Case” at pp. 70 and 73.

The Court of Appeal added, parenthetically it seems: [Jacmain’s conduct] . . . *might* also be ground for disciplinary action . . . .” (Italics added.)

75. The Adjudicator’s later conclusion that there was “no evidence relating to the

Finally, there is the decision of the Public Service Staff Relations Board noting that the Adjudicator fully reviewed the evidence relating to the grievor's "attitude" and that he fully acknowledged that Mr. Jacmain had not fully adjusted to the practices and atmosphere of the office and to the requirements of his superior.

Assuming that the grounds for dismissal are ultimately grouped under one head (rejection) or another (discharge),<sup>76</sup> then it seems that every time there is a ground capable of supporting rejection it becomes more difficult to make a finding that there existed substantial evidence to support a disciplinary discharge. But even if we doubt that reasoning and the approach it supports, and accept, instead, the view that the Adjudicator, in this case, did perceive substantial evidence to support a disciplinary discharge, might it not be argued from what he said that he also perceived substantial evidence to support rejection for cause. And if that was the case, should the position and function of the Court still remain that of review?

---

attitude of Mr. Jacmain" seems strange in light of the Adjudicator's total acceptance of the Deputy Commissioner's testimony which dealt with, among other things, Mr. Jacmain's tactlessness and impoliteness, in outbursts and the like. All that appears in the decision of the Adjudicator dated January 31, 1975 and partly reproduced in the judgment of Dickson J.

Although one cannot be sure, it may be that the principal witness — a Mr. Jean-Marie Morin, Deputy Commissioner — did not explicitly state in his testimony before the Adjudicator that it was Mr. Jacmain's *attitude* which precipitated the employer's action to dismiss the probationer. Mr. Morin, however, did testify (and his testimony was fully accepted by the Adjudicator) as to what specific things Mr. Jacmain did and gave details of the worker's constant complaining.

And as noted by the Federal Court of Appeal, the Adjudicator ultimately summarized matters as follows: "All things considered, it was Mr. Jacmain's attitude as displayed in tactlessness and impoliteness . . . and in continual "Jeremiads" that gave the employer cause for complaint."

Further, in the same decision dated January 31, 1975, the Adjudicator writes on the matter of attitude: ". . . I conclude that the behaviour of the grievor towards his colleagues, his superiors and some of his subordinates was somewhat irascible . . . . He did not fully adjust to the . . . atmosphere of the office . . . ."

Adding to what may be confusing about the decision of the Adjudicator is the following comment he made: "Although this issue tends to raise questions which are *more* of a disciplinary nature, I *do* recognize that the employer, even in the public service, has the right to reject an employee who cannot adjust to the everyday routine of his job."

76. There is at least some support for that view in the judgment of Dickson J. See note 65, *supra*.

In his judgment Dickson J. wrote:

. . . if the correctness of every detail upon which the jurisdiction of the tribunal depends is to be subject to re-trial in the Courts and the opinion of a judge

This line of inquiry raises an even more fundamental question not considered in the judgment of Mr. Justice Dickson and that is whether or not the perception of the Adjudicator as to the existence of substantial evidence to support his finding is to be considered particularly crucial or whether a review court may, in spite of its limited powers in such matters, uphold a tribunal's findings as to the type of dismissal involved provided it, the court, and not necessarily the Adjudicator, finds substantial evidence to support the tribunal's determination. In other words, while in the opinion of the Adjudicator there may only be *some* evidence to support his classification of the dismissal, a review court will not substitute its opinion for that of the tribunal as to the nature of the dismissal provided that the court finds, in its view, substantial evidence to support the Adjudicator's determination on point. If that were the case, then, with reference to jurisdictional questions, the court would seem to be involved in something which might be appropriately termed a "semi-trial *de novo*".

Indeed, let us consider more broadly the general principle that in supervising the function of an administrative tribunal, the courts are to exercise only a review power and not intervene if there is "substantial evidence<sup>77</sup> to support decisions of fact and a rationale basis for decisions of law". Obviously, *in the opinion*<sup>78</sup> of Dickson J. there was substantial evidence to support the Adjudicator's finding of fact. In arriving at that conclusion, he reviewed and cited a number of passages from both the written decision of the Adjudicator and the Public Service Staff Relations Board to which the matter had been referred. In proceeding in that manner His Lordship *appears* to be demonstrating how a review court should proceed. But the interesting question is this: By what "process" does a review court determine whether or not there is in fact

---

substituted for that of the tribunal, then the special experience and knowledge of the members of such a tribunal and the advantage they have of hearing and seeing the witnesses may be lost.

77. S.A. de Smith in *Judicial Control of Administrative Action* at 119-20 has noted:

"The adoption of a general rule in English administrative law empowering the courts to set aside findings of fact by statutory tribunals . . . if "unsupported by substantial" evidence would create difficulties. If such a rule were to become meaningful, it would require bodies which at present conduct their proceedings informally to have verbatim transcripts or to keep detailed notes of evidence. If the administrative findings were made partly on the basis of inspection and views, a body of super-inspectors would be needed.

78. *Infra.*, note 77.



“substantial evidence” on which a tribunal might base its finding of fact? Is it not perhaps correct to suggest that in making such a determination the court is involved in a weighing of the evidence and injecting to a significant extent its own perception of the matter.<sup>79</sup> Of course, it will be argued that when a supervisory court considers and weighs the evidence in such matters it does so not only for the purpose of determining whether there is truly “substantial evidence” to support the tribunal’s finding of fact,<sup>80</sup> and, if it so finds, it stops short of rendering the decision it would have given on the jurisdictional question of fact and thereby preserves the distinction between a review and trial *de novo*.

But that theory, if it can be so labelled, is somewhat simplistic. Certainly, it takes little cognizance of psychological and other influences which direct the court from the outset to decide that there is not substantial evidence to support the tribunal’s findings. Of course, it can be argued that, generally, in the application of any rule of law to any factual situation, a court tends to or does in fact reach the result which most reflects its own biases and appreciation of justice. If that is so, then one can well imagine, despite the best of intentions, the impossibility of attempting to make the subtle distinctions and apply the type of restraint suggested in the judgment of Dickson J. In the end then, despite the highest hopes and arduous effort, the result achieved on “review” in this area may well coincide with that which would have been decided on “appeal”. But since “law” cannot long be detained or deterred by considerations of human weaknesses, we now turn to less ethereal considerations.

Is there any prior judicial authority to support the proposition that where jurisdictional questions are involved, the courts should avoid substituting their opinion on the merits for that of the statutory decision-maker? In his judgment, Dickson J. cites no cases.

---

79. At one point in his judgment Dickson J. commented: “In my opinion, the adjudicator was correct in classifying what occurred as a discharge for disciplinary reasons and . . . to proceed to . . . consider the merits of the matter.”

80. But, in how many instances would a court make a different determination (even where totally unrestricted) once it was totally satisfied there was *substantial* evidence to support a particular determination? Also, from a seemingly different perspective, in practice, if a court was of the opinion that there existed an overwhelming preponderance of evidence to support a different finding, it would not likely also find substantial evidence to support the tribunal’s determination knowing that “substantial evidence” would prevail over the “preponderance of evidence.”

In the United States certainly, the distinctions between jurisdictional and non-jurisdictional matters have been virtually abandoned as criteria for determining the scope of review. And generally findings of law are held beyond review if they have a rational basis and findings of fact are unreviewable if supported by substantial evidence.<sup>81</sup> But even there, commentators<sup>82</sup> have noted that the courts will carry out a *de novo* review of jurisdictional findings if and when they deem it necessary. And in England, even decisions of licencing justices to grant *discretionary* exemptions have been subjected to *de novo* review under the traditional remedies.<sup>83</sup> Indeed, as a general rule, it may be said that English courts will still normally review jurisdictional findings *de novo* except where jurisdiction to determine a matter is conferred upon a tribunal in rather "subjective" terms.<sup>84</sup> In Canada, too, unless the jurisdiction of the tribunal is strongly dependent on matters within the specialized knowledge of that decision-maker,<sup>85</sup> the courts have generally been willing to substitute their opinion on the merits for that of the tribunal on any type of jurisdictional question.<sup>86</sup> There is, however, the decision of the Supreme Court of Canada in *Segal v. The City of Montreal*.<sup>87</sup> In *Jacmain* both de Grandpré and Pigeon JJ. made reference to that case. In his judgment, the latter, as already noted, said:

. . . it was noted in *Segal* . . . that where the jurisdiction [of an administrative tribunal] depends upon contested facts, a superior court will hesitate before reversing the inferior court's *finding of fact*, and will only do so on "extremely strong"<sup>88</sup> grounds. (Italics added.)

Assuming, therefore, that the decision in *Segal* provides a sufficient

81. See Schwartz and Wade, *Legal Control of Government* at 234

82. See, for e.g., H.W.R. Wade, *Anglo-American Administrative Law: More Reflections* (1966) 82 L.Q.R. 266 at 232-9

83. See, for example, *R. v. Butt, ex p. Brooke* (1922) 38 T.L.R. 537. Compare with *Anisimic Ltd. v. Foreign Compensation* [1969] 2 A.C. 147.

84. See, for example, *Ashbridge Investments Ltd. v. Minister of Housing and Local Government*, [1965] 1 W.L.R. 1320; *McEldowney v. Forde*, [1971] A.C. 632, at 660-1 per Lord Diplock or *Secretary of State for Employment v. ASLEF* (No. 2), [1972] 2 Q.B. 455 (C.A.)

85. See, perhaps, *B.C. Prof. Engineers Assn. & Technical Employers' Union*, [1972] 3 W.W.R. 17 (B.C.)

86. See, for example, *Re Registrar of Used Car Dealers & Salesmen*, [1973] 1 O.R. 308 (C.A.)

87. [1931] S.C.R. 460

88. In *Segal, supra*, at 473, Martland J. used the expression "exceedingly strong".

basis to support the approach set out by Dickson J. in *Jacmain* with reference to questions of jurisdictional *fact*, must we also accept the view that on jurisdictional questions of *law* a tribunal's finding should prevail if there is a "rational basis"?

While one cannot be certain, the "test", if it can be called that, summarized by the phrase "rational basis" appears significantly less onerous than the one set for allowing some latitude on jurisdictional questions of fact. But assuming that assumption to be *incorrect*, it appears to this writer that the rationale<sup>89</sup> behind the view that a tribunal's findings of fact should be overturned only in the rarest of cases does not apply to decisions of law going to jurisdiction especially where it is clear that Parliament did not intend to make the tribunal the final arbiter of its own jurisdiction. Surely, when it comes to making determinations as to the applicability and meaning of statutes and other legal concepts, our system requires more than merely a *rational basis* for deciding one way or another. That such decisions should fall on those who may not even be members of the legal profession and should go unchallenged even though they do not fully accord with standards usually adhered to in the regular courts appears repugnant in the extreme. But again, all of what has been said here depends on what is meant and understood by the term "rational basis". The "test" it represents may indeed be extremely difficult to meet and may require far more than merely a general level of sanity.

But let us leave the realms of speculation and consider the present state of the law in light of the Supreme Court decision in *Jacmain*:

(1) First, as a preliminary point, there appears to be nothing in *Jacmain* to disturb the ruling of the Federal Court of Appeal in *Cooper*<sup>90</sup> that ss.90 and 91 of the *Public Service Staff Relations Act* does not authorize a grievance when the Public Service Commission upholds a recommendation of the deputy head that the employee be released.

(2) With reference to federal probationary employees, it appears to be unanimously agreed that the employer cannot deprive such a person of the benefit of the adjudicative process by labelling a dismissal rejection for cause when it is in fact disciplinary.

89. In *Reference Re Anti-Inflation Act* (1976) 68 D.L.R. (3d) 452 Laskin C.J.C. used the term "rational" in the context of finding that the Court would be unjustified in concluding that Parliament did not have a rational basis for regarding the *Anti-Inflation Act* as a measure which was temporarily necessary to meet a situation of economic crisis.

90. In *Re Cooper*, [1974] 2 F.C. 407

(3) It appears unanimous also that it is the Adjudicator who must determine, at first instance, whether what is in form rejection is in substance disciplinary.<sup>91</sup>

(4) And there appears to be nothing in *Jacmain* to disturb the holding in *Cutter*<sup>92</sup> that when a challenge appears attacking the jurisdiction of an administrative tribunal — here the adjudicator — the tribunal must take a stand with reference to its jurisdiction even though it cannot make an absolutely binding decision.

(5) But if there are grounds for rejection and if such grounds are not based on bad faith, then the Adjudicator has no jurisdiction to hear the probationer's grievance. Certainly, in determining whether or not the dismissal was in fact disciplinary in nature, the Adjudicator cannot review the sufficiency of cause for rejection or weigh the cause of rejection.<sup>93</sup>

(6) As noted by Heald J. in the Federal Court of Appeal, the *Bell Canada* decision seems to support the view (and such view appears implicitly supported by the entire Supreme Court in *Jacmain*) that if the matter is rejection for cause, then, as presently worded, the *Public Service Staff Relations Act* cannot be said to give the Adjudicator jurisdiction.

(7) However, as *Fardella*<sup>94</sup> indicates, if the matter is in fact disciplinary in nature, the adjudicator possesses jurisdiction even in cases involving probationary workers.

(8) In using the *Jacmain* decision to discern the role of the Federal Court of Appeal in the exercise of its jurisdiction under the *Federal Court Act*, one must proceed cautiously. As already mentioned, there is some significant *dicta* in the case. For example, in his judgment, Dickson J. characterized s.28(1) (c) as an "addition to the common law". And given the assertion of de Grandpré J. that he accepted the adjudicator's finding of fact and considered only his conclusion in law, then the following comment of His Lordship may also have to fall into the category of *obiter*: ". . . when there is contradictory evidence on the facts relating to a question of jurisdiction, appeal tribunals are not bound by the limits imposed by s.28(1) (c) [of the Federal Court Act.]"

91. In their judgments both Pigeon and Dickson JJ. are fairly explicit. de Grandpré, in his judgment, seems to accept that implicitly

92. *Supra*.

93. In the view of Dickson J., however, it does not necessarily follow that simply because there lurked in the background *some* cause to justify rejection that the termination must be rejection and not a disciplinary discharge.

94. *Supra*.

More generally, it may be said that since de Grandpré J. focused largely on the limits imposed on the adjudicator, his express remarks as to the review role of the Court of Appeal might be expected to be both sparse and nebulous. However, if we accept the view at least implicitly expressed by Dickson J. in his judgment that the Court of Appeal conducted a trial *de novo* on a factual issue (and thereby erred) and if we accept the view that de Grandpré J. cited with concurrence a sufficient portion of the judgment of Heald J. in the Court below which makes it reasonably clear that the Court of Appeal conducted a *de novo* “review”, then it can also be said that Mr. Justice de Grandpré would endorse “review” of an administrative tribunal’s jurisdictional findings as if it were an appeal. Whether that is really the case or whether future courts would accept that kind of reasoning appears dubious. Furthermore, even if it might be said that de Grandpré J. endorsed the proposition that a court is not restricted merely to a limited review on jurisdictional findings made by inferior tribunals, the judgments of Dickson and Pigeon JJ. together are sufficient to overrule the former’s holding. That is, of course, if one is prepared to find sufficient concurrence between the latter two Justices. With reference to findings of fact going to jurisdiction and only with reference to them, it will be recalled that Pigeon J. approved of *Segal* in that a superior court should hesitate before reviewing the inferior court’s findings and do so only on extremely strong grounds. Whether or not, on the basis of that authority, he would restrict the review court from conducting a trial *de novo* on such factual issues is arguable and whether such restrictions would apply in all cases is another moot point. Dickson J., it will be recalled, would seemingly restrict the Court of Appeal in all cases to a “review” role in such matters and would insist that the review court allow some latitude in its surveillance.

In conclusion, permit this brief prophetic remark: As it relates to the role or function of the Court of Appeal in its “review” of jurisdictional findings made by administrative tribunals, the *Jacmain* case will hardly be seen as definitive and, indeed, will breed much confusion and new litigation on point.