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Citation: 2006 PSLRB 102



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

NANCY B. WITHERSPOON

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as

Witherspoon v. Treasury Board (Department of National Defence)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievor: Alan Phillips, Professional Institute of the Public Service of
Canada

For the Employer: Drew Heavens, Treasury Board Secretariat

Heard by teleconference,
June 28, 2006.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Nancy B. Witherspoon (the “grievor”) was employed at the Department of National Defence (DND). On March 22, 2004, she filed a grievance, against her employer, the Treasury Board. She alleged the following:

...

I grieve the employer has discriminated against me in their failure to find me accommodated work assignment. The employer is aware of my disability and this is in violation of the collective agreement and the Canadian Human Rights Act.

...

[2] She requested corrective action as follows:

...

I be offered suitable employment within DND.

...

[3] On April 1, 2005, the *Public Service Labour Relations Act* (the “new Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the “former Act”).

[4] The grievor relies on article 44 of the collective agreement in her reference to adjudication filed before the Board on March 6, 2006.

Summary of the evidence

[5] The grievor also filed a complaint to the Canadian Human Rights Commission (CHRC) on March 17, 2004, complaining that she believed that she has been, and continues to be, the subject of discrimination because of disability in violation of subsection 3(1) and section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. At that time, she stated that she had requested that her employer be accommodating since August 22, 2003, without result.

[6] On March 24, 2005, the complainant was informed by the CHRC of the following decision:

...

Before rendering its decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 41(1)(b) of the Canadian Human Rights Act, not to deal with the complaint at this time because:

- the complaint could more appropriately be dealt with according to a procedure provided for under another Act of Parliament. At the termination of this procedure, or if it proves not to be reasonably available, the Commission may exercise its discretion to deal with the complaint at the complainant's request.

Please note that, if you are not satisfied with the final outcome and you wish to pursue the matter, you must contact the Commission as soon as possible.

...

[7] On January 30, 2006, the Director General Labour Relations and Compensation for the DND informed the grievor of the final-level reply in the departmental grievance process to the effect that the corrective action requested (to be appointed at a suitable employment within DND) would not be granted. Notwithstanding that the grievance had been denied, the employer offered an assignment to a specific position and to special projects.

[8] At the teleconference on June 28, 2006, the parties clarified that the grievor requested to be appointed to an accommodated position within the DND and sought damages for the failure of her employer to accommodate her since August 27, 2003. They alleged that an adjudicator did not have jurisdiction on this matter and requested that I render a decision on this jurisdictional issue.

Summary of the arguments

[9] At the teleconference, the grievor submitted arguments that were summarized in writing and read as follows:

...

In addition to my comments of today regarding the remedy sought by the grievor seeking an appointment with DND, it is well understood and agreed that an Adjudicator does not have the authority under the Public Service Staff Relations Act (PSSRA) to make appointments to the Public Service. That

is reserved for the Public Service Commission and their delegates under Section 10 of the Public Service Employment Act.

In addition, I would offer the following cases in support of our position that the Public Service Staff Relations Board has no jurisdiction in this matter;

Boutilier v. Canada (Treasury Board) [1998] F.C.J. No. 1635

It should be noted that in *Boutilier v. Canada*, at para [45], Justice J. McGillis after reviewing other decisions namely, *Chopra v. Canada (Treasury Board)*, [1995] 3 F.C. 445 (T.D.)

“My review of the relevant legislative provisions and the jurisprudence has therefore led me to conclude that the Canadian Human Rights Act provides an “administrative procedure for redress”, within the meaning of subsection 91(1) of the Public Service Staff Relations Act, for a grievance based on a discriminatory practice arising from an employer’s interpretation of a provision in a collective agreement”.

O’Hagan v. Canada (Treasury Board) [1999] F.C.J. No. 32

At para [21], Justice J. Weston states,

“There is little doubt that in the case at bar the subject matter of the grievance is sexual harassment as contained in Article 43. In *Boutilier*, there is little doubt that the entire substance of the grievance dealt with discrimination based on the denial of an employee benefit directly related to Mr. Boutilier’s sexual orientation. It was held that the allegation of discrimination “underlies and forms central and indeed the only issue in the grievance.” In the case before me it is clear that the subject matter is sexual harassment which likewise forms the central and indeed the only issue in the grievance. Section 14 of the CHRA recognizes sexual harassment to be a prohibited ground of discrimination. As indicated previously, the Tribunal is also afforded broad remedial powers pursuant to subsection 53 (2) of the CHRA.”

Further on *O’Hagan (supra)* Justice Weston concludes,

“[28] As, such and on a balance, I cannot find any principle, approach or precept that would cause me to find differently that previous judges of this Court. It is my opinion that, where possible. Like cases should be treated alike. This obviously should be a fundamental

goal of the law. [29] Accordingly, the application for judicial review is dismissed.”

Both Boutilier and Hogan (supra) as well as Mohammed v. Canada (Treasury Board) (1998), 148 F.T.R. 260, were referred to the Appeal Court and subsequently dismissed. Leave to appeal to the Supreme Court of Canada was sought but the applications were dismissed with reasons.

Therefore, Mr. Guindon, it seems abundantly clear that the courts have determined that the appropriate “administrative procedure” of grievances that allege discrimination against the prohibited grounds is the Canadian Human Rights Act.

For these reasons, I would ask that you render a decision that the Board has no jurisdiction in this matter.

...

[Sic throughout]

[Underline in the original]

[10] The employer agreed with the grievor’s submissions and requested that I dismiss the grievance for lack of jurisdiction.

Reasons on the issue of jurisdiction

[11] In the present file, the grievor alleged that her employer discriminated against her in failing to find her an accommodated work assignment. She requested that a suitable employment within the DND be offered.

[12] The grievor also filed a complaint with the CHRC, which notified her on March 24, 2005, of its decision not to deal with the complaint pursuant to paragraph 41(1)(b) of the CHRA because it could more appropriately be dealt with according to a procedure provided for under another Act of Parliament. The grievance process provided in the former Act was the one considered in the CHRC’s Investigator’s Report (on file). At the termination of that procedure the CHRC may exercise its discretion to deal with the complaint at the complainant’s request.

[13] These circumstances are similar to the ones in *Djan v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 60. The CHRC notified Ms. Djan that she ought to exhaust the grievance process by a decision rendered pursuant to paragraph

41(1)(a) of the CHRA. The CHRC's decision in the grievor's complaint is of the same effect as in *Djan*, notwithstanding a different wording. As in *Djan*, the grievor alleged a failure on the part of the employer to accommodate her disability and she first attempted to have the matter resolved through a complaint filed with the CHRC.

[14] In *Djan*, the adjudicator came to the conclusion that, when the CHRC determined that the grievance process ought to be exhausted in the exercise of its discretion under paragraph 41(1)(a) or 44(2)(a) of the CHRA, the grievance was able to proceed under the provisions of the former Act. The reasons stated by the adjudicator are as follows:

...

97 *Clearly the CHRC has no authority to order the PSSRB to undertake any proceeding. Paragraph 41(1)(a) provides the CHRC with a discretion in that it may, after examining the information relating to a complaint, advise the alleged victim that he/she ought to first exhaust the available grievance procedure. This is what was done in the instant case. Notwithstanding what was alleged by the employer, I am satisfied, in the circumstances, that the CHRC's letter of May 19, 2000, to Ms. Djan constitutes an adequate exercise of the CHRC's discretion under paragraph 41(1)(a) of the CHRA.*

98 *Clearly, Ms. Djan's grievance raises a human rights issue and, as was confirmed by the Federal Court of Appeal in Boutilier (supra), an adjudicator appointed under the PSSRA prima facie has no jurisdiction to entertain such a grievance as the CHRA provides another administrative procedure for redress within the meaning of subsection 91(1) of the PSSRA.*

99 *McGillis J. of the Federal Court, Trial Division, in her decision in Boutilier (supra) stated the following at paragraphs 32 and 33:*

[32] Paragraphs 41(1)(a) and 44(2)(a) of the Canadian Human Rights act [sic] constitute important discretionary powers in the arsenal of the Commission, as it performs its role in the handling of a complaint, and permit it, in an appropriate case, to require the complainant to exhaust grievance procedures. Paragraphs 41(1)(a) and 44(2)(a) also indicate that Parliament expressly considered that situations would arise in which a conflict or an overlap would occur between legislatively mandated grievance procedures, such as that provided for in the Public Service Staff Relations Act, and the legislative powers and procedures in the Canadian Human

Rights Act for dealing with complaints of discriminatory practices. In the event of such a conflict or overlap, Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(a) and 44(2)(a), to determine whether the matter should proceed as a grievance under other legislation such as the Public Service Staff Relations Act, or as a complaint under the Canadian Human Rights Act. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.

[33] Parliament also chose, by virtue of subsection 91(1) of the Public Service Staff Relations Act, to deprive an aggrieved employee of the qualified right to present a grievance in circumstances where another statutory administrative procedure for redress exists. Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the Canadian Human Rights Act apply and govern the procedure to be followed. In such circumstances, the aggrieved employee must therefore file a complaint with the Commission. The matter may only proceed as a grievance under the provisions of the Public Service Staff Relations Act in the event that the Commission determines, in the exercise of its discretion under paragraphs 41(1)(a) and 44(2)(a) of the Canadian Human Rights Act, that the grievance procedure ought to be exhausted.

100 In dismissing the employee's appeal of the decision of McGillis J., the Federal Court of Appeal specifically endorsed her decision and her reasons therefor.

101 The CHRC did exercise its discretion under paragraph 41(1)(a) of the CHRA in relation to Ms. Djan's complaint and, quite clearly, it had the right to do so. . . .

. . .

[Sic throughout]

[15] I agree with the reasons stated by the adjudicator in *Djan*. That reasoning can receive application in the present grievance and it is clear, from the conclusion stated by Madame Justice McGillis in *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.) (affirmed by *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.)), that an adjudicator appointed under the former Act has jurisdiction to deal with a grievance raising a human right issue in the event that the CHRC determines, in the

exercise of its discretion under paragraphs 41(1)(a) and 44(2)(a) of the *CHRA*, that the grievance process ought to be exhausted as it did in the present case. In the circumstances of the present grievance, and on the basis of the decision rendered by the CHRC, I have come to the conclusion that no other administrative procedure for redress is available to Ms. Witherspoon within the meaning of subsection 91(1) of the former *Act*.

[16] I agree with the arguments of the parties stating that, as an adjudicator, I do not have authority to make appointments to the public service. That authority is reserved for the Public Service Commission and their delegates under sections 29 and 15 of the *Public Service Employment Act*, enacted by sections 12 and 13 of the *Public Service Modernization Act*, but those statements do not mean that an adjudicator does not have jurisdiction to hear the grievance on its merit and render a final and binding decision related to the corrective action requested by the grievor in her grievance. In the present grievance, it would be inside an adjudicator's jurisdiction to order the employer to offer the grievor a suitable employment within the DND, adapted to her disability, if the evidence establishes the failure of the employer to do so and if the employer can proceed to it without undue hardship.

[17] In proceeding to a hearing on the merits of the case and in rendering the proper order, I will assume my adjudicator's jurisdiction. I will also act in a way to exhaust the grievance procedure provided in the former *Act*. Consequently, upon a decision on the merits of the grievance, the grievor will be able to request the CHRC to deal with her complaint if she is not satisfied with the result.

[18] The arguments of the parties, in relation with other corrective actions that can be requested by the grievor in relation to damages, can be considered in the final decision to be rendered on the merits of the case, if it is necessary at that stage.

[19] Consequently, the Board's Director, Operations Registry and Policy, will arrange through the normal process, a date for a continuation of the hearing on the merits of the grievance in front of me.

[20] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[21] I declare that an adjudicator has the jurisdiction to hear this grievance.

[22] I order that this grievance be scheduled for a hearing on the merits in front of me on the earliest date that can be arranged by the Board's Director, Operations Registry and Policy.

August 31, 2006.

**Léo-Paul Guindon,
adjudicator**