Date: 20061013

File: 166-02-31313 and
32584 to 32586

Citation: 2006 PSLRB 112

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

ANNA CHOW

Grievor

and

TREASURY BOARD
(Statistics Canada)

Employer

Indexed as
Chow v. Treasury Board (Statistics Canada)

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Herself
Harry Kopyto, legal agent
John R.S. Westdal, counsel
Richard Mercier, counsel

For the Employer: Drew Heavens, Treasury Board Secretariat
Karl Chemsi, counsel

Heard at Ottawa,
February 20 and 21 and April 10, 2006.
(Written submissions dated June 28, July 5, 11 and 26 and August 25, 2006).

Grievance referred to adjudication

[1] Prior to termination of her employment, Ms. Chow (the "grievor") was employed at Statistics Canada, at the Tunney's Pasture location in Ottawa, as a multi-establishment analyst at the CR-05 group and level. On April 11, 2002, the grievor received a final-level reply from her employer to 84 grievances (where reference is made in this decision to a numbered grievance, the number cited corresponds with the identifier that was assigned by the grievor and that appears in the final-level reply on file).

[2] On May 3, 2002, the grievor referred 84 grievances to adjudication. The Public Service Staff Relations Board (the "former Board") indicated by letter dated May 21, 2002, that it was unable to process these grievances, as the information submitted on the Form 14 ("Reference to Adjudication") was incomplete. The former Board returned the grievances to the grievor.

[3] On May 22, 2002, the grievor referred seven grievances (Nos. 4, 15, 24, 66, 68, 69 and 77) to adjudication pursuant to subparagraph 92(1)(*b*)(i) of the *Public Service Staff Relations Act,* R.S.C., 1985, c. P-35 (the "former *Act*").

[4] In a letter dated June 17, 2002, the former Board declined to process three of the grievances referred to adjudication by the grievor as they appeared to be outside the jurisdiction of an adjudicator under subparagraph 92(1)(*b*)(i) of the former *Act.* The four remaining grievances were consolidated by the former Board under PSSRB File No. 166-02-31313. They read as follows:

> ***GRIEVANCE 4***
> *I grieve that my employer has in effect suspended me since July 1, 2001, under the pretense of illness or disability issues, and thereby having violated Article 17, Discipline, of my Collective Agreement by not having followed proper procedures.*
>
> *Therefore I allege disguised discipline.*
>
> . . .
>
> ***GRIEVANCE 66***
> *I grieve that my employer had finally penalized me by not allowing me to return to work for no just cause since July 1, 2001.*
>
> . . .

> ***GRIEVANCE 68***
> *I grieve that my employer had financially penalized me by not allowing me to return to work since July 1, 2001.*
>
> . . .
>
> ***GRIEVANCE 77***
> *I grieve that my employer has in effect suspended me since July 1, 2001, under the pretence of Occupational Safety and Health Codes.*
>
> *Therefore I allege disguised discipline including a financial penalty.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the originals]

[5] On August 23, 2002, the former Board wrote to the parties to advise them that it had scheduled a hearing for PSSRB File No. 166-02-31313 for October 15, 2002. The grievor replied on September 4, 2002, and requested that the former Board hold the scheduled hearing in abeyance until the Canadian Human Rights Commission (CHRC) issued a decision ". . . for the reason that my grievances relate to a prohibited ground of discrimination . . . ." The employer did not oppose the request, which was subsequently granted by the former Board.

[6] The grievor referred further grievances to adjudication on August 6, 2002. The former Board indicated by letter dated September 30, 2002, that it was unable to process these grievances, as the information submitted on the Form 14 ("Reference to Adjudication") document was incomplete. The former Board returned the grievances to the grievor.

[7] On December 19, 2002, the grievor referred 33 grievances to adjudication (Nos. 94 to 110, 113, 114, 116 to 128 and 130). The date of the employer's final-level reply to these grievances, as well as to 13 others (together Nos. 85 to 130), was August 1, 2002.

[8] On June 3, 2003, the grievor wrote to the former Board to inquire as to the status of the grievances referred to adjudication in December 2002. On July 25, 2003, the former Board replied that it had opened files for 16 of the grievances referred to adjudication on December 19, 2002. The former Board returned 17 grievances to the

grievor as they appeared to be outside the jurisdiction of an adjudicator pursuant to subparagraphs 92(1)(*b*)(i) and (ii) of the former *Act*. The former Board consolidated the 16 remaining grievances referred to adjudication as three files, as follows:

> [PSSRB File No. 166-02-32584 (termination of employment)]
>
> ***GRIEVANCE 94***
> *I grieve against the termination of my employment as explained in the letter dated May 22, 2002 that was signed by Mr. Richard Barnaby.*
>
> ***GRIEVANCE 95***
> *I grieve that the termination of my employment which was due to disciplinary measures.*
>
> *Therefore I allege disguised discipline including a financial penalty.*
>
> ***GRIEVANCE 96***
> *I grieve against the termination of my employment which in actuality constitutes disguised discipline.*
>
> ***GRIEVANCE 97***
> *I grieve that Mr. Richard Barnaby and my employer have wrongfully terminated my employment for no just cause.*
>
> ***GRIEVANCE 98***
> *I grieve that the termination of my employment is wrongful as my employer has executed constructive dismissal.*
>
> ***GRIEVANCE 120***
> *I grieve that the grounds for termination of my absence from work is wrongful, as stated in the letter of May 22, 2002, as I had provided fit to work medical notes from my physician.*
>
> ***GRIEVANCE 121***
> *I grieve that the grounds for termination of my employment due to my absence from work is wrongful, as stated in the letter of May 22, 2002, as my employer had falsified personal information with respect to my behavior to justify and legitimize having continued to deny me access to the workplace to perform my duties.*
>
> ***GRIEVANCE 122***
> *I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' to complete the medical assessment with Health Canada by not having attended several prearranged physician's appointments, as I have attended all of these appointments (two).*

GRIEVANCE 123
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' to complete the medical assessment with Health Canada by having failed to sign the required consent form at one appointment which authorizes the physician to release the fitness to work assessment to the Employer, as my employer had falsified and fabricated information about me in the referral letter that was provided to me by the physician at the appointment.

GRIEVANCE 124
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as I had provided this statement for all of the reasons of harassment by my employer as stated in my grievances.

GRIEVANCE 125
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as the consent to undergo the medical assessment is voluntary as my employer was informed in writing twice by Dr. Lisa Taris of Health Canada.

GRIEVANCE 126
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as I had informed in writing to my employer that I would full cooperate by participating in the medical assessment and sign all required documents as required by the medical assessment.

GRIEVANCE 127
I grieve my employer's reason for termination of my employment is wrongful, as I was verbally provided fully satisfactory work performance appraisals by my supervisors Christiane Leclair and Kathy Piening Faris, as well as an excellent letter of recommendation from Ms. Leclair for my work in OID; I had met the deadline and overall objective (as agreed upon by my supervisor and I) for my two month assignment in MCED; and my employer had falsified and fabricated my personal information of behavior problems in documents to Health Canada.

[PSSRB File No. 166-02-32585 (suspension)]

GRIEVANCE 103
I grieve against my employer's actions of having denied me access to the workplace to perform my duties, which originally done for the sole reason of coercing me to undergo the fit to work evaluation with Health Canada and sign all documents as required by the Health Canada medical assessment, with the real objective to release me for incapacity in order to place me on disability.

[PSSRB File No. 166-02-32586 (financial penalty)]

GRIEVANCE 106
I grieve that my employer has wrongfully initially denied me access to the workplace to perform my duties for no just cause.

Therefore I allege disguised discipline including a financial penalty.

GRIEVANCE 107
I grieve that my employer has wrongfully continued to deny me access to the workplace to perform my duties for no just cause, despite having provided several fit to work medical notes from my physician.

Therefore I allege disguised discipline including a financial penalty.

[*Sic* throughout]

[Emphasis in the originals]

[9] On August 6, 2003, the employer indicated by email to the former Board that it was challenging an adjudicator's jurisdiction to hear PSSRB File Nos. 166-02-32584 to 32586 on the grounds that these matters were not referred to the former Board within the time frame prescribed in the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* (the "former *Regulations*").

[10] On August 11, 2003, the grievor requested that PSSRB File Nos. 166-02-32584 to 32586 also be held in abeyance pending a decision by the CHRC. The former Board granted this request on August 28, 2003, and indicated that the grievor should inform the former Board once she was prepared to proceed.

[11] On March 31, 2004, the employer submitted a detailed written objection to the jurisdiction of an adjudicator to hear all of the references to adjudication, and asked that they be dismissed. In summary, the employer advanced three objections: 1) All of

the issues raised in the grievances are inextricably linked to the discrimination allegations in the grievor's human rights complaint. As such, they fall outside the jurisdiction of an adjudicator under section 92 of the former *Act* and cannot be heard by an adjudicator unless the CHRC decides that the grievor ought to exhaust the grievance process pursuant to the *Canadian Human Rights Act* (*CHRA*), R.S.C., 1985, c. H-6,. 2) In respect of the alleged suspension and financial penalties raised in PSSRB File Nos. 166-02-31313, 32585 and 32586, no discipline ever occurred and there is no indication that any of the grievances allege a violation of the collective agreement. As a consequence, the requirements of section 92 of the former *Act* have not been met. 3) Concerning PSSRB File Nos. 166-02-32584 to 32586, the grievor referred her grievances to adjudication well beyond the time limits specified in the former *Regulations*.

[12] On May 19, 2004, Mr. Kopyto, then legal agent for the grievor, filed a reply that argued against the employer's objections to jurisdiction. The reply was referred to the employer for a response, and the former Board took the matter under consideration.

[13] On July 19, 2004, the former Board wrote to the parties to indicate that it had decided to hold the references to adjudication in abeyance until the former Board was informed that the CHRC had ruled on the grievor's complaint. On November 4, 2004, the grievor advised the former Board that the CHRC had rendered its decision.

[14] On November 15, 2004, the employer provided the former Board with a copy of the CHRC's decision, which dismissed the grievor's complaint. The employer maintained its position outlined in its letter of March 31, 2004, and noted that the CHRC had not decided that the grievor ought to exhaust the grievance process. In the employer's submission, the matters raised by the grievor were dealt with through the CHRC complaint process, and an adjudicator accordingly lacked jurisdiction to entertain the grievor's references to adjudication. The employer again asked that the former Board dismiss all grievances.

[15] The grievor filed a response to the employer's submission on January 7, 2005. She argued that the issues raised in her grievances were not all inextricably linked to the discrimination allegations that were the subject of her CHRC complaint, nor did the CHRC consider all of the issues raised by her complaint. Separate issues remained to be decided. The grievances involve a suspension and financial penalties, and grievance No. 4 does cite a violation of the collective agreement. Due to faults in the

CHRC investigation, ". . . there was a denial of natural justice . . . ." by the CHRC. Thus, an adjudicator should have jurisdiction to hear the references to adjudication.

[16] On February 7, 2005, the employer confirmed in writing its continuing objections to jurisdiction for the reasons previously cited. Regarding the grievor's contention that there was a violation of the collective agreement in one of her grievances, the employer argued that the grievor had not filed a reference to adjudication under paragraph 92(1)(*a*) of the former *Act*, and that, contrary to what is required where a reference to adjudication concerns the application or interpretation of the collective agreement, she had not indicated that her bargaining agent had provided the necessary support for such a reference. The employer again asked the former Board to exercise its authority under the former *Regulations* to dismiss all matters.

[17] On February 9, 2005, the former Board advised the parties that it had decided to schedule a hearing on June 27 and 28, 2005, to determine the issue of jurisdiction.

[18] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force.

[19] The grievor applied on June 6, 2005, to postpone the hearing to secure counsel. The Chairperson of the Public Service Labour Relations Board (the "new Board") granted the application on June 14, 2005, on objection by the employer, and required the grievor to provide the coordinates of her counsel no later than July 5, 2005. The Chairperson set down PSSRB File Nos. 166-02-31313 and 32584 to 32586 for hearing "peremptorily" in August or September 2005.

[20] In an email sent at 9:58 p.m. on July 5, 2005, the grievor stated that she was unable to provide the coordinates of her counsel because Legal Aid Ontario had not yet replied to her request for assistance. The staff of the new Board immediately asked the grievor if she was requesting an extension of time. Three weeks later, on July 27, 2005, the grievor requested an extension of time, giving as her reason the uncertain time frame for her efforts to secure counsel.

[21] On September 25, 2005, the grievor, indicating that she was still searching for counsel, asked the Chairperson of the new Board to postpone the hearing, both until she received a response to her request for representational assistance from Legal Aid

Ontario and until such time as the Federal Court rendered a decision on an application that she had submitted to review the CHRC's dismissal of her human rights complaint. The employer opposed the grievor's request. On October 18, 2005, the Chairperson denied the grievor's request and set February 20 to 22, 2006, as hearing dates.

[22] On February 14, 2006, John R.S. Westdal indicated that he had been retained as counsel by the grievor earlier that day. Mr. Westdal requested a postponement of the hearing to allow counsel to consult and prepare. The employer opposed this request. In response to Mr. Westdal, the staff of the new Board outlined the record of applications from the grievor for postponements, and reported that the Chairperson of the new Board had denied Mr. Westdal's request (on file). On February 17, 2006, Mr. Westdal advised that the grievor no longer retained him as counsel.

[23] On February 16, 2006, Richard Mercier notified the new Board that the grievor had contacted him on February 15, 2006, and that he now represented her interests. He requested a postponement of the hearing. The Chairperson of the new Board considered this request and denied it. The staff of the new Board provided Mr. Mercier with information about the record of applications from the grievor for postponements (on file).

[24] On February 17, 2006, the grievor wrote directly to ask that the Chairperson of the new Board reconsider his decision to deny her request for postponement of the scheduled hearing. In her submission, the grievor also raised procedural questions concerning the timing and admissibility of the employer's jurisdictional objections, and the decision to hold a hearing on the jurisdictional issues. She also inquired into the possibility of conducting the hearing on jurisdictional matters in writing through counsel. The staff of the new Board forwarded the grievor's submission to her counsel and indicated that these issues could be raised before the adjudicator at the outset of the scheduled hearing.

[25] Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the former *Act*.

II. Objections before me

[26] Some of the preliminary issues in this case have already been decided. In *Chow v. Treasury Board (Statistics Canada)*, 2006 PSLRB 71, I issued five rulings. The first ruling denied the grievor's request of February 20, 2006, for a postponement of the

hearing scheduled for February 20 and 21, 2006. The second ruling denied the grievor's request of February 20, 2006, to proceed on the employer's jurisdictional objections by way of written arguments, but reserved my discretion to revisit that ruling during the course of the hearing, where appropriate. The third ruling denied the grievor's request for recusal. The fourth ruling set time limits for the filing of written arguments on the grievor's objection to the timeliness and admissibility of the employer's jurisdictional objection. The fifth ruling revisited my second ruling and set time limits for the filing of written arguments on the employer's objection to jurisdiction concerning human rights.

[27] I also reported in 2006 PSLRB 71 that the employer had withdrawn its initial objection to the timeliness of Ms. Chow's grievances during the hearing on February 20, 2006.

[28] In this decision, I consider two of the three remaining preliminary matters that have been raised by the parties to date: 1) the grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections; and 2) the employer's objection to jurisdiction concerning human rights.

[29] The third preliminary matter is the employer's jurisdictional objection on the subject of discipline. This matter is held in abeyance pending the rulings on the previous two matters.

A. Grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections

1. Summary of the evidence (hearing of February 20, 2006)

[30] In her oral submission at the hearing, the grievor relied on three documents. In chronological order, the first is a letter dated September 6, 2002, from the employer to the former Board. In this letter the employer stated that it did not oppose the grievor's request to hold PSSRB File No. 166-02-31313 in abeyance pending a decision of the CHRC on a complaint submitted by the grievor. The second document is an email sent by the employer to the former Board on August 6, 2003. In this email the employer indicated that it understood that the former Board would also hold PSSRB File Nos. 166-02-32584 to 32586 in abeyance pending a decision by the CHRC on the same complaint. The third document is dated May 19, 2004, and contains written arguments

submitted by the then legal agent for the grievor, opposing the employer's written statement of jurisdictional objections submitted on March 31, 2004.

[31] For its part, the employer relied on several documents: the grievor's complaint to the CHRC dated May 8, 2003; the CHRC investigator's report (resubmitted as Exhibit E-1); the letter of appointment of the CHRC investigator (Exhibit E-3); and the CHRC decision on the grievor's complaint (resubmitted as Exhibit E-4).

2. Summary of the oral arguments (hearing of February 20, 2006)

a. For the grievor

[32] The employer's letter of September 6, 2002, and email of August 6, 2003, prove that the employer "consented" to holding the grievor's references to adjudication in abeyance until the CHRC rendered a decision on her human rights complaint. The first time that the employer raised an objection to jurisdiction was on March 31, 2004, significantly after the parties had "agreed" to hold the grievances in abeyance.

[33] The grievor questioned whether, in view of the "agreement" to hold her grievances in abeyance, the employer had the right to file jurisdictional objections until such time as the CHRC had issued its decision. She also argued, as a separate point, that the employer should not have been permitted to raise jurisdictional objections as late as it did.

[34] The grievor quoted from the written arguments submitted by her then legal agent:

. . .

> *It is to be noted . . . that the employer is raising concerns regarding the jurisdiction of the Board at the basis of the Commission's deliberations at a relatively late stage. It is trite to observe that there is a long tradition of judicial decisions which place an onus upon a party seeking to raise jurisdictional issues to do so ab initio. The employer did not do so. It raised its concerns about the jurisdiction of the Board for the first time in its correspondence of March 31, 2004. The failure to raise the jurisdictional issue at the time when the employer first became aware of it will result in prejudice to the worker and is inconsistent with proper practice. It is therefore submitted that such delay is fatal to the Board's jurisdictional argument.*

. . .

b. For the employer

[35] The employer submitted that the practice of holding references to adjudication in abeyance pending the outcome of a separate legal proceeding is standard. The actual decision to hold the grievances in abeyance was made by the former Board, not the employer. The "agreement" of the parties to hold the grievances in abeyance did not, in this sense, mean anything. The employer's correspondence, cited by the grievor, was carefully worded. In the letter of September 6, 2002, the employer ". . . [did] not oppose Ms. Chow's request to have the above cited reference held in abeyance . . . ." In the email of August 6, 2003, the employer ". . . [understood] that these cases . . . will be held in abeyance . . . ."

[36] A decision to hold grievances in abeyance is not a bar to raising jurisdictional issues, especially where the jurisdictional issue pertains to human rights matters.

[37] Adjudicators operating under the former *Act* have jurisdiction over grievances with human rights content on one condition: that the CHRC exercise its statutory discretion to request the complainant first exhaust the grievance process. The CHRC can do so under the authority of paragraph 41(1)(*a*) of the *CHRA*:

. . .

> **41***(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> *(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;*

. . .

[38] The CHRC can also request that a complainant first exhaust the grievance process pursuant to subsection 44(2) of the *CHRA*:

. . .

> **44***(2). If, on receipt of a report referred to in subsection (1), the Commission is satisfied*
>
> *(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available . . . . it shall refer the complainant to the appropriate authority.*

. . .

[39] In this case, the CHRC, if it had considered it appropriate, could have requested that the grievor first exhaust the grievance process. If this had happened, an adjudicator operating under the former *Act* would have jurisdiction to consider the human rights issues raised by the grievor. The former Board's decision to hold the references to adjudication in abeyance was directly linked to this possibility.

[40] The jurisdiction of an adjudicator operating under the former *Act* to hear a grievance is framed by the definition of the proper subject matter of a grievance, as outlined in subsection 91(1) of the former *Act*:

. . .

> ***91.*** *(1) Where any employee feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> > *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
> >
> > *(ii) a provision of a collective agreement or an arbitral award, or*
>
> *(*b*) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (*a*)(i) or (ii),*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*

. . .

[41] The intent of subsection 91(1) of the former *Act* is to deprive an employee of access to the grievance process where there is another ". . . administrative procedure for redress . . . provided in or under an Act of Parliament . . . ." In this case, the appropriate administrative redress procedure fell within the ambit of the *CHRA*.

[42] A party may raise an objection to jurisdiction at any time prior to a hearing, or during a hearing. Adjudication pursuant to the former *Act* is a new, fresh consideration of the case, at which time a party may raise a jurisdictional objection.

[43] The Federal Court of Appeal has held that the parties should try to resolve jurisdictional questions early in the grievance process, but that it is fundamental, at least, to address jurisdiction as part of a hearing. In *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 the Federal Court of Appeal found:

. . .

> *25. An adjudicator must, therefore, grapple with these jurisdictional matters before or during hearings but, hopefully, most of them can be resolved at the commencement of the grievance proceedings.*

. . .

Boutilier also supports the right of a party to raise a jurisdictional issue after an adjudication hearing.

[44] The adjudicator's decision in *Audate v. Treasury Board (Veterans Affairs Canada)*, PSSRB File No. 166-02-27755 (1999) (QL) indicates that once an adjudicator hears an allegation of "discrimination" the fundamental question of jurisdiction arises:

. . .

> *During her testimony, Ms. Audate claimed that the disciplinary measure imposed on her constituted a discriminatory practice based on her race, colour and ethnic origin.*
>
> *As a result of this statement, and given the recent decision of McGillis J. in Canada v. Boutilier, [1999] 1 F.C. 459 (Trial Division), I asked the representatives of the parties to submit written submissions to me on the question of the jurisdiction of an adjudicator to hear the referral of a disciplinary measure when, as is the case herein, the grievor claims that the measure imposed constitutes a discriminatory practice in contravention of the provisions of the Canadian Human Rights Act (CHRA), R.S.C. (1985), c. H-6.*

. . .

[45] The jurisprudence, in summary, holds that a party should ideally raise a jurisdictional objection at the beginning of the process, but there is no strict requirement to do so, as long as the party raises the question before or during the hearing. As indicated in *Boutilier*, a party may also raise a jurisdictional objection after a hearing.

[46] The employer raised its jurisdictional objection on March 31, 2004, almost two years before the hearing. The CHRC notified the employer on December 4, 2003 (Exhibit E-3), that it had appointed an investigator in relation to the grievor's complaint. The investigator issued his report on March 18, 2004 (Exhibit E-1). The investigator could have, but did not, recommend that the grievor first exhaust the grievance process. It is logical, in retrospect, though not determinative, for the employer to have submitted its jurisdictional objections on March 31, 2004, following the investigator's report, when it became apparent that the CHRC would deal with the grievor's complaint.

[47] On October 6, 2004, the CHRC dismissed the grievor's complaint (Exhibit E-4). The CHRC did not request that the grievor first exhaust the grievance process. In these circumstances, an adjudicator operating under the former *Act* has no jurisdiction to hear the grievor's human rights issues. The employer's jurisdictional objection and the timing of this objection were appropriate.

3. Written arguments

a. Grievor's rebuttal

[48] On June 28, 2006, the grievor filed the following written rebuttal arguments:

. . .

> *. . . the grievor respectfully submits that the employer's objection to jurisdiction concerning human rights is inadmissible and that the objection concerning the disciplinary nature of the grievances must, as for that matter, be taken under reserve.*
>
> *The objection to jurisdiction concerning human rights is inadmissible since, during the hearings of February 20th and 21st 2006, the employer did not raise it* in limine litis *and is therefore foreclosed from raising it henceforth.*
>
> *This kind of objection raises the relative incompetency [1977] C.A, p.543 and was qualified as a* "preliminary issue" *by the*

Supreme Court [1980] 2 R.C.S., p. 1073 and following. Also, when the tribunal is faced with such an objection, it must make sure not to usurp "the initial jurisdiction of an another forum"

Failure to raise the objection regarding the tribunal's relative incompetency in limine litis *entails the foreclosure to raise it later. This failure being interpreted as an implicit waiver to raise it. Moreover, the tribunal can raise the question of its initial jurisdiction* proprio motu.

According to the evidence, neither the tribunal nor the employer deemed it appropriate to raise the objections of in limine litis *or* proprio motu. *On the contrary, on February 20th and 21st 2006, they proceeded on the objection concerning the disciplinary aspect of the grievance by hearing a first witness presented by the employer and subsequently cross-examined by the grievor. This matter is not a preliminary issue.*

By proceeding this way, the tribunal has recognized that it has the necessary competency to possess itself of the hearing, having deemed, evidently, that it was not encroaching the jurisdiction of the Canadian Human Rights Commission. Besides, the employer, by accepting to proceed as such, has waived, on his part, the right to raise the objection in due time and has therefore recognized the jurisdiction of the tribunal to hear the merits of the case.

Moreover, we submit that the objection concerning the disciplinary aspect of the grievances is more a ground for defence on merit than a preliminary objection. This kind of objection is most often taken under reserve by referees and is settled in the end, after the hearing of the merits of the case is over.

In conclusion, we respectfully submit that the objection on the jurisdiction of the present tribunal concerning "human rights" is inadmissible because it was not examined by the tribunal at the first possible occasion and that this silence and this will not to study the objection constitute an implicit judgment to the effect that this objection is not relevant in the present case and is therefore dismissed. Not only was it not raised in due time, but the tribunal did not deem it appropriate to possess itself proprio motu.

. . .

[*Sic* throughout]

b. Employer's comments on the grievor's submission

[49] On July 12, 2006, the employer filed the following written comments on the grievor's submissions:

. . .

> *With respect to the grievor's argument that the employer did not raise the objection concerning human rights* in limine litis *and is therefore foreclosed to raise it, we would like to make the following comments:*
>
> *The employer raised the objection on jurisdiction as early as March 31, 2004, almost two years before the hearing of February 20, 2006. Furthermore, the employer reiterated its objection to jurisdiction on November 15, 2004, and on February 7, 2005.*
>
> *On February 9, 2005, the former Board advised the parties that it had decided to schedule a hearing to determine the issue of jurisdiction only. Therefore, the specific purpose of the February 20, 2006, hearing was to address that very issue. The grievor's statement that "neither the Tribunal nor the employer deemed it appropriate to raise the objections of* in limine litis *or* proprio motu*" (sic) is simply without merit.*
>
> *As presented orally in its arguments, the employer would like to reiterate that jurisdiction of the Board derives from the Canada Statutes (section 91(a)(ii) of the* Public Service Staff Relations Act*) and, therefore, cannot be waived or even agreed on by the parties.*

. . .

4. Reasons

[50] At the hearing of February 20, 2006, the grievor challenged the timeliness and admissibility of the employer's jurisdictional objections in view of the August 6, 2003, "agreement" of the parties to hold her references to adjudication in abeyance pending the results of the CHRC complaint. Her then legal agent had also contended that the employer's omission to raise jurisdictional objections until March 31, 2004, was ". . . fatal to the Board's jurisdictional argument".

[51] In her written submissions of June 28, 2006, the grievor argued that the failure of the employer to raise the objection to jurisdiction concerning human rights at the outset of the hearing had the effect of foreclosing or waiving the employer's right to raise it later. Similarly, the grievor alleged that the failure of the adjudicator to address

this objection on his own initiative at the outset of the hearing amounted to his acceptance of jurisdiction over the grievances.

[52] The grievor also contended that the employer's jurisdictional objection on the subject of discipline is not a preliminary issue, but, rather, forms part of a defence on the merits.

a. Significance of holding the grievances in abeyance

[53] It is important to clarify at the outset that the decision to hold the grievor's references to adjudication in abeyance was taken by the former Board. It is true that, on both occasions when the grievor asked the former Board to hold her grievances in abeyance, the former Board canvassed the views of the employer and found that it did not oppose the requests. In this sense, the former Board faced no dispute between the parties on the proposed approach. The former Board was not, however, bound by the views of the parties, and could have denied the grievor's requests if it had considered it appropriate in the circumstances.

[54] As it was the former Board that decided to hold the grievances in abeyance, not the employer, no question arises of any real "agreement" between the parties, nor of an inference that the employer waived its right to object to an adjudicator's jurisdiction at a later date by "agreeing" to the procedure suggested by the grievor. I note, in this regard, the wording of the employer's responses to the former Board. On September 6, 2002, the employer ". . . [did] not oppose Ms. Chow's request to have the above cited reference held in abeyance . . . ." Also, on August 6, 2003, the employer ". . . . [understood] that these cases . . . will be held in abeyance . . . ." The employer avoided words that conveyed a sense that it had "agreed" to the grievor's requests, but nothing, ultimately, depends on this wording. Even with different words evoking a clearer sense of "agreement" by the employer, the fact would remain that the decision on the procedural issue of abeyance was made by the former Board, not the employer. Accordingly, the grievor cannot infer, from the employer's lack of opposition to her requests to hold her grievances in abeyance, support for her objection to the admissibility of the employer's jurisdictional objections.

[55] Has the grievor otherwise demonstrated that there was a prohibition against submitting a jurisdictional objection once the former Board made its decision to hold

the grievances in abeyance? I find that she has not shown that such an impediment exists.

[56] The grievor has neither cited case law that substantiates her proposition nor revealed any feature in the former *Act* or in the former *Regulations* that justifies disallowing a jurisdictional objection filed while a matter is held in abeyance. My own review of the former *Act* and the former *Regulations* finds nothing that prevented the employer from objecting to the grievor's references to adjudication in March 2004. Without any foundation in the governing authorities, this aspect of the grievor's argument fails.

[57] As a practical matter, filing a jurisdictional objection while a grievance is held in abeyance has few, if any, consequences for the process. Such an objection will be moot if the grievor subsequently withdraws the reference to adjudication. If the case is later scheduled for hearing, the fact that a jurisdictional objection has been filed in the interim causes no additional prejudice to the grievor. If anything, filing during the period of abeyance affords the grievor extra time to understand the employer's jurisdictional objection and to prepare to oppose it.

b. Employer's "delay" in filing its jurisdictional objections

[58] Are the employer's jurisdictional objections untimely in these cases? Here, too, I am not persuaded by the grievor's argument.

[59] The former *Act* and the former *Regulations* do not contain provisions that specifically address the filing of jurisdictional objections.

[60] Standing against the grievor's position that the employer's jurisdictional objections are fatally flawed because of their "late" filing is the jurisprudence offered by the employer. The thrust of this jurisprudence is that there may be good policy reasons to require a party to file jurisdictional objections as early as possible, but that there is no legal necessity to do so. The case law holds that a jurisdictional objection made before, or even at the outset of, a hearing is properly before an arbitrator. Messrs. Brown and Beatty (*Canadian Labour Arbitration*, 4th ed., at para 3:2100) observed that "Customarily, an objection to the arbitrability of a grievance, or to the jurisdiction of the board of arbitration, or any other preliminary or collateral objection that may affect the merits of the grievance, is raised at the commencement of the hearing . . . ."

[61] More importantly, the Federal Court of Appeal's determination in *Boutilier* goes even further in this regard. In that case, the Court found no reason to dismiss a jurisdictional objection where it was raised for the first time at judicial review, once the adjudicator had rendered his decision. On this issue, *Boutilier* follows the same line of reasoning as that in *Byers Transport Limited v. Kosanovich*, [1995] 3 F.C. 354, where the Federal Court of Appeal found that the parties cannot, by their silence, clothe an adjudicator with a jurisdiction that she or he would not possess otherwise, and that an adjudicator has an obligation to determine her or his own jurisdiction. On the basis of those decisions, fault cannot be found with the timing of an objection raised months or years before the hearing took place.

[62] As an aside, I do not believe that the timing of the jurisdictional objections in these cases has negatively affected the grievor's ability to argue her position in any way. The employer's objection to jurisdiction concerning human rights will stand or fall for reasons that will be argued irrespective of its filing date. Similarly, disposition of the employer's jurisdictional objection on the subject of discipline will depend on the evidence and the arguments of the parties on the merits, all of which appear to be unaffected by the timing of the objection. Had the employer's two remaining jurisdictional objections been filed at an earlier date, I believe that nothing in the subsequent course of the grievor's references to adjudication would have substantially changed. This said, the grievor has not established before me a justification for rejecting the employer's jurisdictional objection on the basis of timeliness.

c. Failure to raise or address the employer's objection to jurisdiction concerning human rights at the outset of the hearing

[63] I have already addressed part of this issue in 2006 PSLRB 71, at ¶ 160–162. My comments then dealt with issues related to my management of the hearing, in the context of the grievor's recusal request. My ruling on this point was as follows:

. . .

> *3. The adjudicator failed to rule on the jurisdictional objection concerning human rights at the beginning of the hearing. The adjudicator failed to find that the employer, by opening debate on its jurisdictional objection concerning discipline, renounced its jurisdictional objection concerning human rights.*
>
> [160] *I find no compelling basis to the argument that an adjudicator must determine a jurisdictional objection*

> *concerning human rights first in preference to any and all other preliminary matters. This is a question of process and/or law and not one of reasonable apprehension of bias. At the February hearing, the employer maintained two jurisdictional objections, one regarding discipline and the other human rights. Both objections were predicated on the employer's interpretation of the grievance procedure and the mandate of an adjudicator under sections 91 and 92 of the former* Act. *Nothing in the former* Act *stipulates that an adjudicator must dispose of one before considering the other. Further, given an adjudicator's authority to determine procedure for a hearing, an adjudicator could, for example, chose* [*sic*] *to hear a human rights jurisdictional objection first, reserve a decision on this issue, and move forward at a hearing to receive evidence and arguments on another jurisdictional challenge. The choice is ultimately a practical matter reflecting the context of the case before the adjudicator. The reality is that a correct decision must be made on the human rights question at some point. That it may not be the first of the jurisdictional decisions rendered does not by this fact alone introduce the possibility of bias.*
>
> [161] *The grievor also alleges that the employer waived its right to argue its human rights jurisdictional objection by being party to a process that turned first to other issues. If there is any support for this proposition, of which I am dubious, I cannot see how a reasonable person would find in this point a logical link to the issue of reasonable apprehension of bias here in question.*
>
> [162] *In any event, under my procedural ruling at the end of the day on February 21, 2006, I will be ruling on the human rights issue before the employer's jurisdictional objection concerning discipline.*
>
> . . .

[64] The grievor is now asking me to determine whether the employer's failure to raise its objection to jurisdiction concerning human rights at the outset of the hearing had the effect of foreclosing or waiving the employer's right to raise it later. In support of her oral arguments of April 10, 2006, and her written submissions, the grievor referred me to *Quebec (Attorney General) v. Labrecque et al.*, [1980] 2 S.C.R. 1057.

[65] *Labrecque et al.* does not convince me of the validity of the grievor's stand on this point. The principal issue addressed in *Labrecque et al.* concerned the jurisdiction of the Quebec Provincial Court to determine whether it could hear the claim of a casual employee of the Quebec provincial public service for certain collective agreement benefits. That decision is, in my view, of questionable relevance to the matters before

me. It does not address the statutory framework within which the grievor has launched her grievances and that defines my own jurisdiction. Finally, there is nothing in that decision that touches substantially upon the question of the timeliness of a jurisdictional objection. With the much more recent and relevant precedent of *Boutilier*, the usefulness of *Labrecque et al.* in support of the grievor's position is minimal at best.

[66] Setting aside the jurisprudence cited by the grievor, the main thrust of her argument remains that the employer waived its right to pursue its human rights jurisdictional objection by failing to raise and address this objection at the outset of the hearing, and/or that the adjudicator implicitly accepted jurisdiction to consider her grievances by embarking on a process that did not immediately open and decide the human rights issue.

[67] As discussed earlier, the evidence is clear that the employer's jurisdictional objection was raised before the hearing and was deemed by the former Board to have been properly received more than two years before the hearing took place. This objection was indisputably before me at the hearing. It was one of the principal reasons for the hearing. When the grievor uses the expression "failure to raise the objection" to describe what happened at the hearing, she is, in my view, mistaken in her choice of words. What she can assert factually is that the objection was not considered and determined as the first matter of business at the hearing. This, then, becomes the real point at issue. Were the parties and the adjudicator bound to deal with the human rights objection at the start of the procedure?

[68] The first items actually addressed at the hearing were the three preliminary matters raised by the grievor herself: her request for a postponement of the hearing scheduled for February 20 and 21, 2006; her request to proceed on the employer's jurisdictional objections by way of written arguments; and her objection to the timeliness and admissibility of the employer's jurisdictional objections. I understand that the grievor is not asking me to find that, by accepting to consider her own preliminary matters at the outset of the hearing of February 20, 2006, I precluded, by this reason alone, any subsequent consideration of the employer's human rights objection. To argue thus would, in my view, be an entirely perverse outcome, at odds with what the grievor herself wanted and tried to accomplish, by which I would have been compelled to require the grievor to hear and defend against the employer's

human rights objection before anything else, since failure to do so would necessarily lead to the legal consequences alleged by the grievor. In my view, this cannot be the case.

[69] It must, then, be the fact that I opened the evidence phase on the employer's disciplinary objection before consideration of the human rights issue that drives the grievor's argument.

[70] I have described in detail in 2006 PSLRB 71 why I conducted the hearing of February 20 and 21, 2006, in the order that I did. The grievor now, in effect, claims that the adjustment of the procedure in recognition of her discomfort with legal arguments should be taken to indicate that the employer, by acceding to the new procedure, waived its right to objection to my jurisdiction concerning human rights, or that I, by taking this step, must be deemed to have accepted jurisdiction over the grievances before me. If there is a procedural fault here — which I do not believe to be the case — it would certainly not be the responsibility of the employer. The employer did not determine my conduct of the hearing. It did not, in my view, by act or deed waive its right to pursue its objection to jurisdiction concerning human rights.

[71] Also, on the basis of *Byers Transport Limited* and *Boutilier*, I believe that the employer is on sound ground when it argues that it could not waive this issue. The obligation of determining jurisdiction over a grievance is inherent to the task of an adjudicator, and will be before the adjudicator if the content of the case so demands, regardless of the arguments of the parties. Similarly, the adjudicator cannot, in a determination regarding the order of proceedings, be deemed to have conclusively disposed of a question of jurisdiction. The adjudicator must turn his or her mind directly to the question at some point, afford the parties a full and fair opportunity to present evidence and arguments on the question, and then render a reasoned decision. None of this happened on February 20 and 21, 2006, and the employer's jurisdictional objections are still, at this stage, fully before me.

[72] I do believe that, in the logic of the analysis, it is preferable to decide the human rights objection prior to the disciplinary objection. The first speaks to the right of an employee to file and pursue a grievance; the second focuses on whether the subject matter of the employee's grievance is among those that can be properly referred to adjudication. I do not believe, however, that there is a legal requirement that the first must be conclusively disposed of before any hearing time can be devoted to the

second. It is open to an adjudicator operating under the former *Act* to dispose of a jurisdictional objection on the subject of discipline in its entirety before turning to objection to jurisdiction concerning human rights. The ultimate requirement is that the adjudicator decide on both. If I am wrong on this point, it is worth noting that in these cases I am, in fact, determining the employer's human rights objection before its disciplinary one. This fundamental ruling will be made before proceeding to consider any further jurisdictional matter, and well before turning to the merits of the grievances themselves.

d. Status of the employer's objection on the subject of discipline as a preliminary matter

[73] The grievor states that ". . . the objection concerning the disciplinary aspect of the grievance . . . is not a preliminary issue". As further consideration of the issue of discipline is held in abeyance pending this decision, I will not comment here on the grievor's statement. She will have an opportunity to offer her perspectives on the status of the employer's jurisdictional objection on the subject of discipline if and when consideration of this objection resumes.

[74] For the reasons stated, I dismiss the grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections.

B. Employer's objection to jurisdiction concerning human rights

1. Written arguments

a. For the employer

[75] The following is the employer's written argument filed on July 6, 2006, in support of its objection to jurisdiction concerning human rights:

> ***Preliminary remarks***
>
> *1. These submissions are presented following the adjudicator's order in a decision dated June 7, 2006 (2006 PSLRB 71).*
>
> > **Anna Chow v. Treasury Board (Statistics Canada),** *2006 PSLRB 71. . . .*
>
> *2. The current grievances were presented prior to the coming into force of* the Public Service Labour Relations Act *and therefore fall under the* Public Service Staff relations Act *("*PSSRA*").*

Issue

3. The issue in this case is whether an adjudicator appointed to hear these grievances under section 92 of the PSSRA *has jurisdiction to do so.*

4. The employer respectfully submits that an adjudicator under the PSSRA *does not have jurisdiction to hear grievances dealing with human rights issues as there is another administrative procedure for redress under the* Canadian Human Rights Act ("CHRA")*.*

Argument

Another statutory administrative procedure for redress exists

5. Subsection 91(1) of the PSSRA *sets out a specific bar to the right of an employee to present a grievance. The grievance cannot relate to a matter in respect of which an administrative procedure for redress is provided in or under an Act of Parliament:*

> *91.(1) Where any employee feels aggrieved*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award, or*
>
> *(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii)*

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

Public Service Staff Relations Act, *R.S.C. 1985, c. P-35, section 91*

6. In other words, where an administrative procedure is provided in an Act of Parliament under which the substance of an employee's grievance may be redressed, the aggrieved

employee is barred from pursuing the grievance and adjudication procedures set out in sections 91 and 92 of the PSSRA*. Instead, the employee must submit her complaint to the authority that has, under the appropriate statute, the power to deal with it.*

7. It is trite law that the procedure for redress provided under the CHRA *constitutes "another administrative procedure for redress" for the purpose of subsection 91(1) of the* PSSRA*. In the* Chopra *case, Simpson J. addressed this issue as follows:*

> *…as long as the* CHRA *has jurisdiction to deal meaningfully and effectively with the substance of the employee's grievance, then it can provide redress… [emphasis added].*
>
> **Chopra v. Canada (Treasury Board),** *[1995] F.C.J. No. 1161. . . .*
>
> *See also:*
>
> **Mohammed v. Canada (Treasury Board),** *[1998] F.C.J. No. 845. . . .*
>
> **O'Hagan v. Canada (Treasury Board),** *[1999] F.C.J. No. 32. . . .*

8. In Boutilier*, the Federal Court of Appeal concurred with McGillis J.'s trial division decision that the Board does not have jurisdiction over human rights issues unless the Canadian Human Rights Commission ("CHRC") orders the matters to be referred back to the grievance process:*

> *In other words, where the operation of a limitation contained in either subsection 91(1) or (2) deprives an employee of his qualified right to present the grievance, the employee cannot subsequently purport to refer the grievance to adjudication under subsection 92(1). In the event that an employee purports to refer such a grievance to adjudication, the adjudicator has no jurisdiction to entertain it.*
>
> *[…]*
>
> *Parliament also chose, by virtue of subsection 91(1) of the* Public Service Staff Relations Act*, to deprive an aggrieved [page41] 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) or 44(2)(a) of the Canadian Human Rights Act, that the grievance procedure ought to be exhausted.*
>
> **Canada (Attorney General) v. Boutilier *(C.A.),*** *[2000] 3 F.C. 27. . . .*

9. The evidence before the Board shows that Ms. Chow filed a human rights complaint where she alleged the following:

> *Statistics Canada has discriminated against me by treating me in an adverse differential manner in employment and by terminating my employment by reason of perceived disability (mental disability), contrary to section 7 of the* Canadian Human Rights Act.
>
> *CHRC complaint form (May 8, 2003). . . .*

10. The Canadian Human rights Commission decided to deal with the complaint and appointed an investigator. The investigator conducted an investigation and recommended that the complaint be dismissed. The CHRC followed this recommendation and dismissed Ms. Chow's complaint.

> *Investigator's Report (March 18, 2004) . . . .*
> *CHRC decision (October 6, 2004) . . . .*

11. It is crucial to note that the CHRC did not determine, in the exercise of its discretion under paragraphs 41(1)(a) or 44(2)(a) of the CHRA, *that the grievance procedure ought to be exhausted. As emphasized in* Boutilier, *this would have been the only way the matter could procede as a grievance under the provisions of the* PSSRA.

12. The evidence also shows that the grievor filed an application for judicial review of the CHRC decision. The application was dismissed on January 5, 2006.

> Chow v. Attorney General of Canada, *order of Madam Prothonotary Tabib dated January 5, 2006. . . .*

13. The employer wishes to add that the dismissal of the human rights complaint and the dismissal of the judicial review application are not determinative of the jurisdiction

question of the Board. The analysis with respect to jurisdictional issue should be restricted to the question as to whether or not another administrative procedure for redress exists to provide a remedy. The fact that Ms. Chow was unsuccessful before the CHRC and the Federal Court does not provide the Board with jurisdiction under subsection 91(1) of the PSSRA. *An analogous situation occurred in the* Price *case, where the employee did not avail himself of the procedure under the* CHRA. *Adjudicator Gordon stated the following:*

> *The jurisdictional issue under subsection 91(1) of the former Act does not turn on whether an employee actually takes advantage of an available administrative procedure for redress in a timely manner. Rather, the issue is whether an administrative procedure for redress under an Act of Parliament is available to provide a real remedy for an employee. Here, the evidence does not illuminate why the grievor failed to pursue a complaint with the CHRC despite his understanding that the specific type of discrimination he alleged fell within that tribunal's jurisdiction. His failure to avail himself of that administrative procedure for redress does not provide a basis for this adjudicator to exercise authority under subsection 92(1) of the former Act.*
>
> **Price v. Treasury Board (Correctional Service of Canada),** *2006 PSLRB 47. . . .*

14. The employer's position that the Board is without jurisdiction rely also on the fact that the essence and the substance of the grievances are a human rights issue that has been dealt with through the independent CHRC complaint process.

The nature of Ms Chow's grievance

15. In deciding whether or not s/he has jurisdiction to hear a grievance, an adjudicator should determine the subject matter of that grievance. In Kehoe, *Chairperson Tarte had to examine the nature of the grievance and concluded as follows:*

> *The only logical conclusion to which one may come when examining Ms. Kehoe's grievance is that its essence relates to fundamental human rights issues, i.e. discrimination and harassment on the basis of disability. These issues are not merely accessory to the grievance, but rather form its very pith and substance. When one tries to determine the scope of the grievance while making abstraction of those*

> *issues, all that remains is an unparticularized allegation of constructive dismissal.*
>
> *[…]*
>
> *In the circumstances of the case at hand, as Ms. Kehoe's grievance raises issues which can be pursued through the complaint process set out in the* CHRA, *and in light of the decision which the Federal Court of Appeal rendered in* Boutilier *(C.A.), supra, I find that, on the face of the record before the Board, Ms. Kehoe's grievance is not one which may be presented pursuant to subsection 91(1) of the Act and, as such, cannot be referred to adjudication pursuant to subsection 92(1).*
>
> **Kehoe v. Treasury Board (Human Resources Development Canada),** *2001 PSSRB 9. . . .*

16. It is the employer's submission that a human rights issue form the pith and substance of Ms. Chow's grievances for the reasons below.

17. On May 3, 2002, Ms. Chow filed numerous grievances. Twenty grievances were referred to adjudication and were regrouped by the Board as four files: 166-2-31313, 166-2-32584, 166-2-32585 to 32586. These grievances deal essentially with three subject matters: termination, suspension and financial penalty.

18. More specifically the grievances relate to the following main allegations:

- That the employer improperly suspended the grievor or financially penalized her by not allowing her to return to work unless she was medically cleared to do so;

- That the employer terminated her employment without cause due to her medical condition and her lack of cooperation with Health Canada in properly assessing her medical condition;

- That the employer denied her access to the workplace as a mean of coercing her to undergo a fitness to work evaluation;

- That the employer wrongfully denied her access to the workplace despite having provided several fit to work medical notes from her physician.

19. It is important to note that the way the grievances are drafted is not determinative as to whether or not the essence of the grievances relate to human rights issues. In Cherrier,

the adjudicator had to assess the nature of the grievance presented in order to be able to address the question of jurisdiction. He noted:

> *The dismissal is contested by grievance on the basis that it constitutes an excessive disciplinary measure in response to the actions alleged against the employee. The wording of the grievance does not give reasons in its support and thus can be thought to be essentially disciplinary in nature.*
>
> *[…]*
>
> *Although Mr. Cherrier's counsel undertook not to submit any elements of evidence relating to human rights at the hearing on the merits of the grievance, it does not change the fact that there is nevertheless a conflict or overlap between the two procedures for redress.*
>
> *[…]*
>
> *Accordingly, the grievance is dismissed for want of jurisdiction, under reserve of a possible referral to the PSSRB by the CHRC pursuant to paragraph 44(2)(a) of the CHRA.*
>
> **Cherrier v. Treasury Board (Solicitor General – Correctional Services),** *2003 PSSRB 37. . . .*

20. The employer submits that all allegations with respect to termination, suspension and financial penalty found in Ms. Chow's grievances are also covered in the human rights complaint. In fact, as examples, we can highlight some events and circumstances giving rise to her human rights complaint as follows:

> *"On June 14, 2001, Mr. Jones told me that I could not return to work without an assessment of my fitness to work by Health Canada. A referral letter was sent on June 14, 2001, to Health Canada falsely implying that I had a continuing incapacity to work because of my mental state."*
>
> *"I believe the assessment was a pretext for having me declared disabled. Following the assessment I telephoned the respondent's human resources officer, Johanne Grégoire, to arrange to review my file with her. The officer told me that if I did not sign the form, I would not be paid."*
>
> *"Around October 22, 2001, the director of the division, Mr. Mel Jones sent me a letter in which he falsely implied*

that I have been absent on two-years sick leave with the exception of a two-month assignment. He used this reason to mandate that I complete the medical assessment with Health Canada. In this letter, he threatened to terminate my employment should I fail to complete the medical assessment and sign all required documents. This event revealed that the respondent fabricated the false reason of two years absence of sick leave to require that I complete the medical assessment, and that the respondent used the assessment as a vehicle to coerce me onto disability or terminate my employment."

"She then manipulated me to fraudulently change all of my leave codes up to the present to sick leave. She lied that my access to updated leave records required the submission of leave applications requesting changes to all of my leave codes to that of sick leave, and a medical note from my physician indicating my absence from work up to the present was for reasons of sick leave."

"In October 2001, I provided a 'fit to work' [note] from my physician to the respondent, but the respondent refused to allow me to return to work without a medical assessment by Health Canada."

"In the end, Ms. Lys ended up seriously harassing me herself by fabricating and sending this letter to Health Canada in order to conceal and absolve the respondent's discriminatory actions of having denied my access to work."

"The director, Mr. Jones, did not prohibit my return to work for reasons of safety. In truth, he did not allow me to return to work in order to withhold pay to coerce me to complete the assessment with the intention to use this evaluation to place me on disability."

"On April 29, 2002, the Assistant Chief Statistician, Mr. Richard Bamaby, sent me a letter giving me the choice either to sign a document indicating that I agreed voluntarily to undergo the assessment by Health Canada, or to have my employment terminated."

"On May 22, 2002, I was advised by letter that my employment was terminated because of my refusal to cooperate with the respondent's attempts to reintegrate me into the workplace. I have since filed grievances relating to the termination of my employment."

"Around July 4, 2002, the respondent sent me a document entitled "Notice of termination and option for benefit." In this document, the respondent lied about the

> *reasons for my termination of employment. The respondent lied that my employment was terminated for the reasons of two-years absence of sick leave, and my being incapacitated. The respondent made up these reasons in order to conceal their discriminatory actions of having denied my access to the workplace to coerce me onto disability, and ultimately having terminated my employment."*
>
> ***CHRC complaint form (May 8, 2003)**. . . .*

21. The employer submits that not only all the issues raised in the grievances are encompassed in the human rights complaint but also that her complaint is even broader and deal with numerous other aspects of her termination. Ultimately, all allegations raised in the grievances and in the complaint originate from the same circumstances. In Price, *Adjudicator Gordon had to deal with a similar question and noted the following:*

> *The complaint further clarifies that a human rights issue lies at the heart of the grievance. Both the grievance and the complaint arise out of the same set of circumstances, and both focus on the same alleged conduct or inaction by the same individuals. The complaint reinforces the conclusion that the essence of the grievor's allegation under the collective agreement is harassment and discrimination by the employer due to the grievor's physical disability. Indeed, the grievor expressly ties his complaint to the jurisdiction of the CHRC under the* CHRA.
>
> **Price v. Treasury Board (Correctional Service Canada),** *2006 PSLRB 47. . . .*

22. Furthermore, one of the crucial factors that should be taken into consideration in the analysis is the grievor's own assessment of the essence of the issues. In fact, on September 4, 2002, Ms. Chow wrote to the Board and clearly confirmed that the substance of her grievances is a human rights issue. In her letter, she expressed herself as follows:

> *"[…] Please be advised that I have filed a complaint with the Human Rights Commission […]. Thus, for the reason that my grievances relate to a prohibited ground of discrimination code of the Canadian Human Rights Commission, I request that the hearing be placed in abeyance pending a decision of these matters by the commission" [emphasize added]*
>
> ***Anna Chow's letter to the PSSRB, dated September 4, 2002**. . . .*

23. In the Price *case, adjudicator Gordon considered the bargaining agent's argument that eventhough the grievor invoked a discrimination issue in a correspondence, the substance of the grievance was really about the way the grievor was treated by management, the time it took to implement his return, management's failure to follow policies etc. In his decision, the adjudicator noted:*

> *It is the case that these matters are mentioned in the complaint; the grievor relies on certain events and/or conduct in this regard to substantiate his view that the employer harassed him and discriminated against him on the basis of his disability. However, the grievor's reference to such events/conduct to substantiate his allegations of harassment and discrimination does not transform the essence or substance of the grievance into anything other than a human rights issue. A consideration of management's conduct in relation to other provisions of the collective agreement may be appropriate in determining whether the grievor's human rights have been contravened. However, I am persuaded that such issues must be viewed as accessory to the substance of the grievance.*

More importantly, he stated the following:

> *Just as employers are generally restricted from fundamentally altering the substance of the grounds for discipline at the adjudication hearing, employees who have identified the essence of their grievance, as the grievor has done here, ought to be similarly restricted from altering the substance of their allegations against the employer under the collective agreement.*
>
> **Price v. Treasury Board (Correctional Service Canada),** *2006 PSLRB 47. . . .*

24. In the Audate *decision, a grievance was filed against a 10-day suspension. The case proceeded on its merits without the issue of human rights being raised. It was only when the grievor testified that she raised the issue of racism, alleging that the true motive for the suspension was racially motivated. The Adjudicator, Yvon Tarte, adjourned the hearing and invited submissions on his jurisdiction. He ultimately concluded that he was without the necessary jurisdiction to decide the case since there is another administrative procedure for redress under another Act of Parliament.*

Audate v. Treasury Board (Veterans Affairs), *35 PSSRB 37. . . .*

> *25. When a comparison is made between the human rights complaint and Ms. Chow's grievances, one must necessarily come to the conclusion that all the allegations raise the same issues and that they all focus on the same alleged conduct by the employer. The issues raised in the grievances are clearly linked to the discrimination allegations presented in the human rights complaint. Moreover, the substance of the grievances was clearly identified by Ms. Chow herself as being a human rights issue.*
>
> ***Conclusion***
>
> *26. It is respectfully submitted that an adjudicator appointed to hear this matter under section 92 of the* PSSRA *is without jurisdiction to do so.*
>
> *27. The substance of Ms. Chow's grievances is within the scope of the* CHRA *to remedy. In accordance with the instruction of the Federal Court of Appeal in* Boutilier *and other decisions presented, the employer respectfully requests that the matter be dismissed for lack of jurisdiction.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[76] The employer included in its submissions a series of documents. Three of these documents were previously admitted as exhibits: the CHRC investigator's report of March 18, 2004 (Exhibit E-1); a letter of October 6, 2004, reporting the CHRC's decision (Exhibit E-4); and the order of the prothonotary, dated January 5, 2006, in Ms. Chow's judicial review application to the Federal Court (Exhibit E-2). The employer also included in its submissions Ms. Chow's complaint to the CHRC dated May 8, 2003. Admission of this document was not subsequently challenged by the grievor, and it, thus, also forms part of the record.

b. Grievor's argument and response

[77] The grievor filed her written arguments on jurisdiction on July 26, 2006. They read as follows:

> ***PRELIMINARY REMARKS***
>
> *The grievor agrees with both preliminary remarks of the employer's written arguments on jurisdiction (Human rights).*

ISSUE

We respectfully submit that the question the hereby objection poses is the following : Is the fact that the CHRC rejected Mrs. Chow's discrimination complaint, in conformity with section 44(3)(b) of the CHRA takes away any jurisdiction the present arbitration tribunal had on the grievances submitted by her?

ARGUMENT

The answer to this question is evidently no. Besides, it is interesting to note that Mr. Drew Heavens himself recognized that the Board does not automatically lose jurisdiction on grievances because a complaint for discrimination was submitted to the CHRC. Here is what he wrote on the subject in his March 31st 2004 letter contesting the jurisdiction of the Board well after Mrs. Chow's complaint to the CHRC was submitted on May 8th 2003:

> *"A comparison must be made between the human rights complaint and the grievances.*
>
> *The employer agrees that the Board's jurisdiction is not automatically ousted to hear a grievance when the Commission seizes itself of complaint for the purposes of investigation pursuant to subsection 41(1) of the CHRA. Instead, as Adjudicator Guindon ruled in Cherrier (Board file : 166-2-31767) at paragraph 47 :*
>
> *An adjudicator must evaluate the nature and the scope of the redress used by the grievor to determine whether a human rights element is at the heart of the grievance and whether there is a conflict or overlap between the grievance and another administrative procedure of redress provided for in some other federal Act.* ***The fact that the CHRC proceeded with an evaluation of the complaint filed with it and that it decided with that complaint, pursuant to its incorporating legislation (CHRA), cannot oust the adjudicator to determine his jurisdiction pursuant to his own incorporating legislation."***

This said, the question put before the present tribunal is to know how it can decide of its competency or its non competency regarding the grievances submitted before it.

The Supreme Court of Canada had to make a decision on this question of competency repeatedly.

Thus, in Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général), *[2004] 2 R.C.S. 685, Chief Justice McLachlin in writing the opinion of the majority recalled that it was in* Weber c.

Ontario Hydro, *[1995] 2 R.C.S. 929 that the Supreme Court ruled that there existed three possible avenues as to the partition of competency when two tribunals are susceptible of settling a matter in matters of labour relations when the law seems to attribute competency at both points.*

It appears from the reading of the Chief Justice's motives that the criteria of the factual matrix is the only one applicable as stress out in the Weber case.

It is what the Chief Justice writes in paragraph 11 of the judgment:

> *"Weber holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix."*

In the present case, we submit that the factual matrix is an has always been a disciplinary one related to labour relations only for the reason hereafter exposed:

In a letter of April 29th 2002, Mr. Barnabé wrote to Mrs. Chow concerning his request for her to undergo a fitness to work examination with Health Canada. Here is an example of the terms used:

> *" On two previous occasions, we have scheduled appointments for the evaluation but to date you have not signed the consent form to permit the Health Canada doctors to inform the department of the results of this examination. We have stressed in our communications to you the importance of your cooperation in this process.*
>
> *[…]*
>
> *Addressed stamped envelopes are also enclosed. <u>Failure to comply with this request and to undergo the medical evaluation will result in management taking action to terminate your employment with Statistics Canada</u>."*

On May 22nd 2002, Mr. Richard Barnabé wrote again to Mrs. Chow but this time to let her know that he decided to sever her employment relationship with Statistics Canada. Her are some wording used by Mr. Barnabé in his letter:

> *" Our records reflect that you failed to meet several prearranged physician's appointments and on the single occasion you did attend you chose not to sign the required consent form which authorizes the physician to release the fitness to work assessment to the Employer."*

> *" You have continued to thwart management's initiatives and failed to co-operate."*
>
> *" In my letter of April 29, 2002 you were advised that your continued reluctance to cooperate would result in a decision to terminate your employment. Your reply continued to demonstrate a lack of cooperation."*
>
> *" I have concluded, based on your absence record to date, that your continued absence form work is of an indefinite duration. On the basis of the foregoing, I have determined that the on-going employment relation is no longer viable."*

In the light of these letters, the factual matrix can therefore be summarized as follows. Although Mrs. Chow says she is in a justified absence, the employer doubts this justification and wants to have the foundation of her absence verified by forcing her to consult a doctor chosen by the employer. Mrs. Chow, at first, does not seem to cooperate and the employer threatens to terminate her employment if she does not comply with his demands. These absences, as Mr. Barnabé notes, in his letters are therefore considered without justification and Mrs. Chow is consequently fired more, nothing in these letters is related to human rights issue. This factual context is definitely and strictly disciplinary and enters in the boundary of labour relations. It is known and acknowledged that the measures taken by the employer regarding an attitude or behaviour of its employee he deems at fault is of a disciplinary nature.

No one will contest that the Board is competent to deal with matters involving disciplinary action resulting in suspension or financial penalty (paragraph 92 (1)(b)(i) of the Act) and termination or demotion (paragraph 92(1)(b)(ii) of the Act).

In this regard, it is interesting to note that the Registry Officer, Mr. Dennis J.A. Dumoulin, differs in opinion with Mr. Heavans regarding the grievances that can fall under the Board's jurisdiction. Evidently, Mr. Dumoulin has confided in his letters of June 17th 2002 and July 25th 2003 to a preselection and put into order the grievances for which the Board is prepared to accept the grievances involving disciplinary action resulting in suspension or financial penalty and termination or demotion.

Note that Mr. Dumoulin did not hesitate to refuse the grievances he deemed to be outside the jurisdiction of the Board. For example, here is how he justifies the refusal of grievance 99 in his letters of July 25th 2003: " The following grievance dealing with human rights issues cannot be processed pursuant to paragraph 92(1)(b)(ii) of the Act. This grievance in therefore return to you. "

Contrary to what my confrère and Mr. Heavans claim in his letter of March 31st 2004, an attentive exam of the grievances before the Board shows that all of these grievances have nothing to do with the discrimination complaint and fall under the jurisdiction of the Board.

Board file 166-2-31313 encompasses grievances no. 4, 66, 68 and 77. Note that the grivances no. 15, 24 and 69 were refused by the regisrty Officer for lack of jurisdiction. Grievance no.4 alleges disguised discipline. Grievance no.66 alleges a punishment and disciplinary measures from the employer. Grievance no.68 alleges a financial penalty. As for no.77, it alleges a suspension, a disguised discipline and a financial penalty. Please note that never did Mr. Heavans clearly explain in what the grievances before the Board are covered in the human rights complaint. His statement is vague imprecise and unfounded.

Board file 166-2-32584 deals with grievances no. 94, 95, 96, 97, 98, 120, 121, 122, 123, 124, 125, 126 and 127. Note that grievances 100, 101, 102, 104, 105, 108, 109, 110, 119, 99, 113, 114, 128, 130, 116, 117 and 118 were refused for lack of competency. All grievances before the Board make a reference to disciplinary questions of which the outcome depends, unquestionably, on the jurisdiction of the Board.

Board file 166-2-32585 deals with grievance no. 103. This grievances, without a doubt, has the flavour and the texture of a disciplinary grievance, if only, because of the use of the word "coercing" which implies the idea of obeying an order from the employer or, a contrario *to the idea of insubordination on the part of the employee.*

Board file 166-2-32586 deals with grievances no. 106 and 107. These two grievances were very clear and do not lend themselves to an interpretation. They are grievances of a clearly disciplinary nature which depend on the jurisdiction of the Board.

We respectfully submit that, in light of what precedes, a discrimination complaint to the CHRC in no way takes away the Board's jurisdiction on grievances submitted and it has the duty to proceed with a scrupulous exam to decide if the grievances or some of them fall under its jurisdiction. In the present case, we submit that the Board has jurisdiction to hear all grievances before it because by their nature and essence, they have nothing to do with the questions raised in the discrimination complaint deposited before the CHRC and there is no conflict between the jurisdiction of both tribunals, no more than there is a rival jurisdiction.

With this said, to be even more convinced, let us see the real nature of the recourses undertaken by Mrs. Chow more closely.

Firstly, it is good to remember that Mrs. Chow introduced two distinct recourses regarding the termination of her employment. A first recourse was exercised, as we have just seen, by depositing many grievances alleging namely the violation of section 17 of the collective convention of disguised discrimination measures taken against Mrs. Chow, of financial penalty and of suspension.

A second recourse was subsequently introduced before the CHRC an dit was a personnal complaint alleging that the employer had shown discrimination towards her, contrary to section 7 of the Canadian Human Rights Act.

The Boutillier *case (C.A.) (2000) 3 F.C. 27 is clear on this subject, all grievance or complaint, which alleges discrimination depend on the CHRC's jurisdiction. This is all the more true that the grievances were alleging discrimination in violation of anti-discrimination provision provided for in the collective convention were deemed to depend, all the same, from the exclusive competency of the CHRC.*

In the case regarding Mrs. Chow's complaint, the CHRC has rejected it in conformity with section 44(3)(b) of the CHRA, the whole as it appears from the investigator, Rod Grainger's, report dated March 18th 2004. It is not specified if it is according to sub-paragraph (i) or (ii) of section 43(3)(b) that Mrs. Chow's complaint was rejected. But in reading the investigator's recommendations on page 11 of his report, we notice that in light of the proof he had at his disposal, nothing could suggest that Mrs. Chow had been a victim of discrimination from her employer.

In our opinion, he even exceeded his jurisdiction by allowing himself a conclusion which required a more elaborate proof than a simple, non verified declaration from the employer to the effect that: " The respondent states that the termination of the complainant's employement was not the result of disciplinary action an " incapacity " was the closest fitting description from amongst the choices offered on the Public Works and Government Services Canada form. " (pages 9 and 10 of the investigator's report)

Indeed, basing himself on this simple declaration from the employer, the investigator concludes:

> *"The evidence shows that the respondent terminated the complainant's employment because she refused to undergo a fitness to work assessment by Health "*

With respect, this conclusion does not depend on the CHRC's jurisdiction but rather from the arbitration tribunal's. As it is alleged in Mrs. Chow's grievances that she has been a victim of disguised disciplinary measures, it is to the arbitration tribunal that the competency falls to qualify as disciplinary or not the measure taken by the employer against Mrs. Chow.

Be that as it may, it appears clear that the grievor's grievances speak of disciplinary measures. This is so true that the employer made a objection on the disciplinary issue.

To end with the investigator's report, we submit that there is, in the terms used for the conclusion hereafter reproduced, words that point to a conclusion of a disiplinary type, rather than administrative. Indeed, to explain the end of employment because she REFUSED, implies disobedience towards the employer, an individual faulty behavior. Besides, jurisprudence has treated with this type of failure in a disciplinary manner, with reason.

Moreover, let's remember that, during the hearing of February 21st 2006 according to Mrs. Chow's manuscript notes, while the Board was proceeding on the disciplinary objection, the tribunal was indicating to Mrs. Chow that she should bring proof that the measure taken by the employer was of a disciplinary nature. Mrs. Chow, at that moment, explained that she had in her possession audio tapes that demonstrate that the problems alleged by the employer in different letters did not happen. The reaction of the present tribunal was revealing in that it declares straight out: " Ìf problem did not occur, if documents are a fabrication, I am characterising this as disquised discipline. "

We see it, this question of qualifying the measure taken by the employer against Mrs. Chow of a disciplinary or administrative measure depend on the exclusive jurisdiction of the arbitration tribunal.

Actually, and this said with much regard for our confrère, he bases his reasoning on a false premise. If we have well grasped our confrère's reasoning, he claims that the present arbitration tribunal does not have jurisdiction to hear Mrs. Chow's grievances since the CHRC, in accordance with his discretionary power, did not delegate it, the later having simply rejected Mrs. Chow's complaint.

Many remarks are necessary regarding this wrongfully founded reasoning. Firstly, to accept such reasoning is claiming that the arbitration tribunal receives its jurisdiction from the Commission rather than its enabling law. It is also interpreting the Commission's jurisdiction of the arbitration tribunal at all times. It is finally confusing the different

> *discretionary powers that are at the Commission's disposal in the treatment of discrimination complaints.*
>
> *In the case that occupies us and, as it had the power to do so, the Commission simply rejected Mrs. Chow's discrimination complaint. The Commission didn't deem it appropriate to delegate or share its jurisdiction on discrimination complaints with the Board.*
>
> *Now that the Commission rejected the said complaint, the Board still needs to look at the grievances that, evidently, raise disciplinary questions which are at the heart of the Board's jurisdiction.*
>
> *For all of these motives, we submit that the employer's preliminary objection concerning human rights should be rejected.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

c. Employer's comments on the grievor's submission

[78] The employer requested an extension of time to file its comments on the grievor's submission. I granted the employer until August 25, 2006, to do so. The employer filed its comments on the grievor's submission on August 25, 2006. They read as follows:

> . . .
>
> *We respectfully submit that the grievor has improperly characterized the issue to be determined by the Board. As a result, the arguments submitted by the grievor pursue a line of reasoning irrelevant to the determination of this matter.*
>
> *The jurisdiction of the Board is provided by subsection 91(1) of the* PSSRA. *The two questions for the Board to determine are therefore whether,*
>
> *1) the substance of the grievance is fundamentally in relation to human rights, and*
>
> *2) is there another administrative procedure for redress that exists under an Act of Parliament.*
>
> *The fact that the CHRC has rejected the human rights complaint of the grievor is irrelevant to the matter before the Board.*

> *For the reasons presented in our written arguments, we respectfully submit that the grievance should be dismissed for lack of jurisdiction.*
>
> . . .

2. Reasons

[79] The employer submits that the subject matter of the grievances before me, in pith and substance, involves human rights issues. As such, the employer argues that there exists under the *CHRA* another administrative procedure for redress, where the grievor could pursue those issues. The employer is asking me to recognize that the existence of that other administrative procedure for redress deprives the grievor of access to the grievance process and, by extension, to adjudication under section 92 of the former *Act*.

[80] For her part, the grievor submits that the factual matrix of her case ". . . is an [*sic*] has always been a disciplinary one related to labour relations only . . . ." She argues that the adjudicator is bound to analyze the grievances before him to determine whether they reveal, in their nature and essence, questions that fall within his jurisdiction, regardless of the CHRC complaint pursued by the grievor. According to the grievor, her grievances, in fact ". . . have nothing to do with the questions raised in the discrimination complaint deposited before the CHRC and there is no conflict between the jurisdiction of both tribunals, no more than there is a rival jurisdiction". The grievor is asking me to find that the fact that the CHRC rejected her human rights complaint does not take away the adjudicator's jurisdiction to hear her grievances.

a. Preliminary comments

[81] Before proceeding to consider the arguments of the parties, I wish to comment on three passages in the grievor's submission that, for different reasons, raise issues.

i. Involvement of the registry officer of the former Board

[82] In the first passage, the grievor refers to the involvement in these files of a registry officer of the former Board. The grievor alleges the following in her written submission:

> . . .
>
> *In this regard, it is interesting to note that the Registry Officer, Mr. Dennis J.A. Dumoulin, differs in opinion with*

> *Mr. Heavans regarding the grievances that can fall under the Board's jurisdiction. Evidently, Mr. Dumoulin has confided in his letters of June 17th 2002 and July 25th 2003 to a preselection and put into order the grievances for which the Board is prepared to accept the grievances involving disciplinary action resulting in suspension or financial penalty and termination or demotion.*
>
> *Note that Mr. Dumoulin did not hesitate to refuse the grievances he deemed to be outside the jurisdiction of the Board. For example, here is how he justifies the refusal of grievance 99 in his letters of July 25th 2003: " The following grievance dealing with human rights issues cannot be processed pursuant to paragraph 92(1)(b)(ii) of the Act. This grievance in therefore return to you. "*

. . .

[83] The only grievances before me are those included in the matters for which I am seized (PSSRB File Nos. 166-02-31313 and 32584 to 32586). I am aware of the existence of other grievances filed by the grievor, which she wanted to refer to adjudication. I am also aware that they were returned to the grievor, and that reasons were given for their return. Those events are reported at the beginning of this decision. I am, nonetheless, not mandated to examine any of those other grievances as part of the formal record of these cases, nor can I draw any inference from their existence or manner of disposition in determining the question before me. Equally, the administrative determination of the former Board's registry office to consolidate the twenty remaining grievances in the four files before me does not influence me in evaluating their adjudicability. This is a decision that I must make here anew. For purposes of the question of jurisdiction, accordingly, I draw no inference from Mr. Dumoulin's interventions.

ii. Investigation of the grievor's human rights complaint by the CHRC

[84] In a second passage of her written submissions, the grievor offers comments that appear to impugn the CHRC's investigation of her human rights complaint. Her comments are as follows:

. . .

> *In our opinion,* [the CHRC's investigator] *even exceeded his jurisdiction by allowing himself a conclusion which required a more elaborate proof than a simple, non verified declaration from the employer to the effect that: " The respondent states that the termination of the complainant's employement was not the result of disciplinary action an*

> *" incapacity " was the closest fitting description from amongst the choices offered on the Public Works and Government Services Canada form. " (pages 9 and 10 of the investigator's report)*
>
> . . .
>
> [*Sic* throughout]

[85] It would be inappropriate for me to take a position on whether or not the CHRC's investigator acted outside his jurisdiction, and I will not do so. However, I note that the grievor did seek judicial review of the CHRC's decision that dismissed her human rights complaint, and was unsuccessful.

iii. Management of the hearing

[86] In a third passage the grievor remarks on the management of the hearing of these cases. She states the following:

> . . .
>
> *Moreover, let's remember that, during the hearing of February 21st 2006 according to Mrs. Chow's manuscript notes, while the Board was proceeding on the disciplinary objection, the tribunal was indicating to Mrs. Chow that she should bring proof that the measure taken by the employer was of a disciplinary nature. Mrs. Chow, at that moment, explained that she had in her possession audio tapes that demonstrate that the problems alleged by the employer in different letters did not happen. The reaction of the present tribunal was revealing in that it declares straight out: "Ìf problem did not occur, if documents are a fabrication, I am characterizing this as disquised discipline."*
>
> . . .
>
> [*Sic* throughout]

[87] This passage asserts that the adjudicator told the grievor that she ". . . should bring proof that the measure taken by the employer was of a disciplinary nature. . . ." I do not recall making this statement, though it is not impossible that I indicated at some point that, in a grievance where the grievor is alleging disguised discipline, the onus is on the grievor to establish that a disciplinary action was taken. The hearing proceeded on February 21, 2006, with the employer required to lead evidence first - a procedure consistent with assigning an initial onus, at least, to the employer. Whether

and how the onus might then shift to the grievor would depend on the subsequent course of the evidence.

[88] I do stipulate that I did not say any words to the effect that ". . . Ìf problem did not occur, if documents are a fabrication, I am characterising this as disquised discipline [*Sic* throughout]". The grievor says that she relies on "manuscript notes" as evidence of what was said at the February 21, 2006, hearing. Those notes were not placed in evidence and, as a result, their accuracy and completeness cannot be tested. As reported in 2006 PRLSB 71, however, there was testimony at the recusal hearing of April 10, 2006, that tended to cast in question the extent and completeness of the contemporaneous notes taken by the grievor. I make no further comment here on this point, other than to say that I cannot give weight in this decision to a statement that was never made.

b. Statutory framework

[89] The employer's jurisdictional objection is founded in the interpretation of sections 91 and 92 of the former *Act*. Pursuant to subsection 91(1), an employee may not pursue as a grievance a matter for which another ". . . administrative procedure for redress is provided in or under an Act of Parliament . . . ." Subsection 92(1) of the former *Act* provides for reference to adjudication of some grievances presented under section 91:

> *91.(1) Where any employee feels aggrieved*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> > *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
> >
> > *(ii) a provision of a collective agreement or an arbitral award, or*
>
> *(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii)*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present*

> *the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*
>
> …
>
> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

[90] The impact of these provisions has been canvassed by a number of adjudicators in cases where grievances have been alleged to reveal human rights issues. In the wake of *Boutilier*, adjudicators have generally found that an allegation of discriminatory practice based on a ground prohibited under the *CHRA* cannot properly be the subject matter of a grievance under section 91 of the former *Act*, because there is another "... administrative procedure for redress ...." available under the *CHRA* to handle such an allegation. In turn, adjudication under section 92 is not available in these circumstances, as there is no properly constituted grievance that can be presented up to the final level of the grievance process pursuant to the former *Act*, unless the CHRC itself has requested that the employee exhaust the grievance process.

[91] Paragraphs 41(1)(*a*) and 44(2)(*a*) of the *CHRA* describe circumstances under which the CHRC may decide not to deal with a complaint because there are

". . . grievance or review procedures otherwise reasonably available . . ." These paragraphs read as follows:

> 41. *(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
>
> *(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;*
>
> . . .
>
> 44. *(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied*
>
> *(*a*) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available. . .*
>
> *it shall refer the complainant to the appropriate authority.*

Where an employee of the Public Service alleges discrimination, she or he may file a grievance with her or his employer, which constitutes the "appropriate authority" mentioned in subsection 44(2) of the *CHRA*.

[92] In the cases before me it is uncontested that the CHRC did not refer the grievor to the grievance process pursuant to either paragraphs 41(1)(*a*) or 44(2)(*a*) of the *CHRA*.

[93] The grievor notes that, although the CHRC dismissed her complaint on the basis of paragraph 44(3)(*b*) of the *CHRA*, it did not mention on which ground her complaint was dismissed. The significance of this distinction to the grievor's argument is not entirely clear. I do note, however, that there is, at minimum, no indication in the CHRC's decision that it found that the complaint was beyond its jurisdiction.

3. Issues before me

[94] The employer has urged me to frame the issues raised in its jurisdictional objection as follows: Are human rights issues the subject matter of the grievances? If so, is there an administrative procedure for redress for these matters under the *CHRA* that deprives me of jurisdiction? For her part, the grievor has posed the issue in a different way: Does the CHRC's rejection of the grievor's complaint take away my jurisdiction to consider her grievances?

[95] I find the grievor's formulation of the question somewhat awkward, but it serves, nonetheless, to draw attention to an aspect of this case that arguably distinguishes it from most others that have come before adjudicators operating under the former *Act*: i.e. the fact that the grievor did pursue a human rights complaint under the *CHRA* to its conclusion, and that the CHRC dismissed it. While the basic issue in the jurisdictional objection remains, in my view, as posed by the employer — Are human rights issues the subject matter of the grievances? — I must also consider whether it is relevant and significant to this issue that the CHRC investigated and turned down the grievor's complaint. I turn to this aspect first.

a. What is the relevance and significance of the CHRC's denial of the grievor's complaint?

[96] As cited by the grievor, the adjudicator in *Cherrier v. Treasury Board (Solicitor General – Correctional Service)*, 2003 PSSRB 37 ruled that neither the existence of a CHRC complaint nor the fact that the CHRC accepted to deal with the complaint relieved an adjudicator of the obligation to assess whether human rights issues lay at the heart of a grievance. That adjudicator found as follows:

. . .

> *[47] I cannot accept the argument of counsel for the employer by which the adjudicator assigned by the PSSRB is automatically ousted from jurisdiction to hear a grievance when the CHRC seizes itself of a complaint for the purposes of investigation pursuant to subsection 41(1) of the CHRA. The decisions and judgments cited in the instant case clearly show that an adjudicator must evaluate the nature and the scope of the redress used by the grievor to determine whether a human rights element is at the heart of the grievance and whether there is a conflict or overlap between the grievance and another administrative procedure of redress provided for in some other federal Act. The fact that the CHRC proceeded with an evaluation of the complaint filed with it and that it decided to deal with that complaint, pursuant to its incorporating legislation (*CHRA*), cannot oust the adjudicator assigned to the grievance from his responsibilities to determine his jurisdiction pursuant to his own incorporating legislation (PSSRA).*

. . .

[97] I concur with the reasons in *Cherrier*, at ¶ 47, and suggest that they may be taken one step further in the grievances before me. If the CHRC's handling of a complaint does not relieve an adjudicator of his or her responsibility to determine his

or her own jurisdiction, then it follows that the CHRC's handling of a complaint to its conclusion (i.e. rendering a decision) also does not necessarily relieve an adjudicator of the requirement to determine his or her own jurisdiction. Following this perspective, the fact that the CHRC denied the grievor's complaint in these cases should not be taken, in and of itself, as conclusive proof that the concerns raised by the grievor in her grievances are or are not human rights issues. Had, for example, the CHRC ruled instead that the grievor's complaint was beyond its jurisdiction, an important inference might have been drawn. This did not happen.

[98] The grievor does cite the text of the CHRC's decision to infer support for the counter argument that the reason for the termination of her employment was disciplinary, related to her refusal to submit to a health assessment. The grievor alleges the following:

. . .

> *To end with the investigator's report, we submit that there is, in the terms used for the conclusion hereafter reproduced, words that point to a conclusion of a disiplinary* [*sic*] *type, rather than administrative. Indeed, to explain the end of employment because she REFUSED, implies disobedience towards the employer, an individual faulty behavior. Besides, jurisprudence has treated with* [*sic*] *this type of failure in a disciplinary manner, with reason.*

. . .

[99] Elsewhere, there are cross-currents in what the grievor argues. In addition to questioning whether the CHRC's investigator ". . . exceeded his jurisdiction . . . .", the grievor also reacted to the investigator's conclusion by stating: "With respect, this conclusion does not depend on the CHRC's jurisdiction but rather from [*sic*] the arbitration tribunal's. . . ." If the grievor is saying here that the task of determining whether a disciplinary termination of employment has occurred falls within the expertise of an adjudicator operating under the former *Act*, rather than that of the CHRC, then I would strongly endorse the statement. Any CHRC conclusion as to the reasons for a termination of employment, beyond determining whether there has been a violation of the *CHRA*, cannot be taken as conclusive or even probative for adjudication purposes. The expertise for this finding lies with an adjudicator. This finding would be based on sworn evidence and the evidence presented at the adjudication hearing — which could differ from the information gathered by the

CHRC's investigator — and the other party would have had an opportunity to challenge it.

[100] Given these observations, I give no weight to the CHRC's conclusion on the reasons for the grievor's termination of employment. I also find that the CHRC's decision not to refer the grievor to the grievance process does not dispose of the jurisdictional issue before me. None of this means, however, that the CHRC's investigation and decision are irrelevant.

[101] While I may not depend on the fact of a CHRC's investigation or decision to determine the jurisdictional issue before me, I believe that I am entitled, where appropriate, to draw from the information used in the CHRC's process to assist me in deciding whether these grievances involve human rights issues. An example would be the grievor's own depiction of the workplace issues in her complaint to the CHRC.

[102] If the existence of a CHRC decision is not itself a bar to jurisdiction in the grievance process, is there a risk that grievors will be encouraged to keep their options open and pursue both processes — precisely the outcome that subsection 91(1) of the former *Act* intends to prohibit? I share the concern about avoiding overlapping redress mechanisms. There may, however, be situations where a grievor has a rightful claim to pursue a grievance despite having the CHRC handle a complaint in respect of the same or similar workplace events. There may, for example, be specific elements of a grievance within the broader terrain examined in a complaint that are fundamentally of an employment nature, and for which the human rights aspects might be secondary. Put in another fashion, the facts and the actors may be the same in a grievance and a human rights complaint, but there may be different issues, some of which, in their essence, may not be the province of the other ". . . administrative procedure for redress . . . ." contemplated in subsection 91(1).

[103] All of this reinforces the need for an adjudicator to examine grievances independently and carefully for an indication that human rights issues are the subject matter - the central question in the logic of *Boutilier* for determining whether there exists another ". . . administrative procedure for redress . . . ." within the meaning of subsection 91(1) of the former *Act*. The Board articulated in *Kehoe v. Treasury Board (Human Resources Development Canada)*, 2001 PSSRB 9, at ¶ 20, the important refinement that the subsection 91(1) bar applies where the human rights issues form the ". . . very pith and substance . . . ." of the grievance rather than being ". . . merely

accessory . . . .” thereto. The question here, then, is the following: does an examination of the grievances and of the records before me show that the matters pursued by the grievor focus on issues or actions that at their essence — in their “pith and substance” — involve human rights issues? Or, to use the words of *Cherrier*, at ¶ 47, does a “. . . human rights element [lie] at the heart of the grievance . . . ”?

b. Do the grievances reveal human rights issues as their subject matter?

[104] On their face, none of the grievances in these cases are expressed in a fashion that obviously suggests a human rights issue. All of them contain phrases that a reasonable person would recognize as part of the normal vocabulary of employment law: e.g. “financial penalty for no just cause”, “disguised discipline”, “wrongful termination”, “lack of co-operation” or “denied access to the workplace”.

[105] I note, before proceeding further, that grievance No. 4 in PSSRB File No. 166-02-31313 raises a matter which touches on the interpretation or application of the collective agreement. Grievance No. 4 reads as follows:

> ***GRIEVANCE 4***
> *I grieve that my employer has in effect suspended me since July 1, 2001, under the pretense of illness or disability issues, and thereby having violated Article 17, Discipline, of my Collective Agreement by not having followed proper procedures.*
>
> *Therefore I allege disguised discipline.*
>
> . . .
>
> [Emphasis in the original]

[106] To the extent that grievance No. 4 in PSSRB File No. 166-02-31313 alleges a violation of the disciplinary process outlined in article 17 of the grievor’s collective agreement, the grievor is not entitled to refer it to adjudication unless, as demanded by subsection 92(2) of the former *Act*, “. . . the bargaining agent for the bargaining unit, to which the collective agreement . . . applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings”. The record before me is clear on this point, and has been corroborated by the grievor’s testimony, as reported at 2006 PSLRB 71, at ¶ 34. She does not have the requisite support of her bargaining agent for this grievance. I find, accordingly, that grievance No. 4 has not been properly

referred to adjudication to the extent that it alleges a violation of the collective agreement, and that the relevant part of that grievance is dismissed for this reason without further consideration.

[107] Returning to that part of grievance No. 4 in PSSRB File No. 166-02-31313 that does not relate to an allegation of a violation of the collective agreement, and to the remaining 19 grievances, what information is available that is pertinent to determining their fundamental nature beyond their actual wording? This question leads us directly into the documentary records and, principally, the grievor's written representations to date on this matter.

[108] The former Board received the grievances that form PSSRB File No. 166-02-31313 on May 22, 2002. On September 4, 2002, the grievor advised the former Board that she had filed a complaint with the Canadian Human Rights Commission. She requested a postponement of the hearing scheduled to hear those grievances until the CHRC rendered a decision on her complaint.

[109] There may be some question as to the factual accuracy of the following statement contained in the letter that the grievor sent to the former Board on September 4, 2002: ". . . Please be advised that I have filed a complaint with the Human Rights Commission. . . ." The text of the grievor's CHRC complaint dates the complaint at May 8, 2003, over eight months later. On the other hand, the grievor does go on to state in her letter that her complaint ". . . will be finalized in the next few weeks." At this stage, however, nothing fundamental turns on this discrepancy.

[110] The letter that the grievor sent to the former Board on September 4, 2002, clearly stated the grievor's reason for her request:

. . .

> *Thus, for the reason that my grievances relate to a prohibited ground of discrimination code of the Canadian Human Rights Commission* [sic]*, I request that the hearing be placed in abeyance pending a decision of these matters by the commission.*

. . .

[111] The language used in the letter that the grievor sent to the former Board on September 4, 2002, is unequivocal. She specifically wrote that ". . . [her] grievances

relate to a prohibited ground of discrimination . . . .” She used the plural to refer to all of her grievances in PSSRB File No. 166-02-31313. She also stated that they relate to a human rights issue, not that they “may relate” or “relate in part” to a human rights issue. This depiction by the grievor must be taken as showing that she had formed the opinion in her own mind that the nature of her problem involved discrimination prohibited under the *CHRA*, and that she had acted, or intended to act, accordingly. At least in respect of the four grievances grouped under PSSRB File No. 166-02-31313, this history appears to stand squarely against the grievor’s current argument that “. . . the factual matrix is an [*sic*] has always been a disciplinary one related to labour relations only . . . .”

[112] Am I entitled to hold the grievor to her own words stating that the grievances grouped as PSSRB File No. 166-02-31313 “. . . relate to a prohibited ground of discrimination . . . .”? Is this, alone, a sufficient basis for finding that the fundamental subject matter of these grievances is a human rights issue? On reflection, my answer to both questions is in the affirmative.

[113] I interpret the grievor’s request of September 4, 2002, as having the same effect as refining the wording of the grievances in PSSRB File No. 166-02-31313 to specify that the employer’s actions in each case reflected or involved prohibited discrimination. This is, in my view, a situation broadly analogous to the circumstances in *Audate,* where the grievor, in testimony at a hearing, stated “. . . that the disciplinary measure imposed on her constituted a discriminatory practice based on her race, colour and ethnic origin”. On receiving this testimony, the adjudicator in *Audate* requested representations on his jurisdiction to continue hearing Ms. Audate’s grievance, and subsequently relied on her statement to find that her grievance did involve a human rights issue. He found as follows: “. . . the testimony of Ms. Audate was clear. . . . the disciplinary measure was imposed on her because she was black and of Haitian origin”.

[114] In the four grievances grouped in PSSRB File No. 166-02-31313, I believe that Ms. Chow’s statement that “. . . my grievances relate to a prohibited ground of discrimination . . .” has no less power and significance. I do not believe that I can assess the wording of her grievances now without reading into them the reference to discrimination in the grievor’s statement.

[115] The grievor's representation of September 4, 2002, must be given substantial meaning, unless to do so would be to give rise to a fundamental injustice. Key decisions in the adjudication process depend on the way in which the parties state their case. The effectiveness and integrity of the adjudication process require that the parties take care in the representations that they make and that, once made, the adjudicator may faithfully rely on them, as submitted. I do not believe that it is consistent with a sound and fair adjudication process to assess a party's case as if an earlier representation never occurred or now has no meaning. In this instance, I do not accept, in the face of the record, the grievor's argument in respect of the grievances in PSSRB File No. 166-02-313131 that ". . . the factual matrix is an [*sic*] has always been a disciplinary one related to labour relations only . . . ."

[116] I find, therefore, that an allegation of discrimination is fundamental to the grievances in the PSSRB File No. 166-02-31313 still under consideration. For these grievances, I find that another ". . . administrative procedure for redress . . . ." exists under the *CHRA*, and that I do not possess the jurisdiction to hear them pursuant to the former *Act*. I am, therefore, dismissing that part of grievance No. 4 in PSSRB File No. 166-02-31313 that does not relate to an allegation of a violation of the collective agreement, and the three other grievances grouped in that PSSRB File.

[117] My finding based on the grievor's representations of September 4, 2002, does not extend to the 16 other grievances grouped in PSSRB File Nos. 166-02-32584 to 32586, also before me. The effect of that finding is thus limited, and a substantial portion of the grievor's overall cases stands for further examination.

[118] In December 2002 the grievor referred to adjudication the 16 grievances grouped in PSSRB File Nos. 166-02-32584 to 32586. The best interpretation of the records that are available to me is that those grievances were referred to adjudication three months prior to the grievor submitting the finalized text of her complaint to the CHRC.

[119] A year after her original application to hold in abeyance the grievances grouped in PSSRB File No. 166-02-31313, the grievor wrote again to the former Board to request that PSSRB File Nos. 166-02-32584 to 32586 also be placed in abeyance pending a decision by the CHRC. Her second request read as follows:

. . .

> *I request that along with grievance bearing file number 166-2-31313, that grievances 166-2-32584 to 32586 also be held in abeyance pending a decision by the Canadian Human Rights Commission.*
>
> . . .

There is nothing explicit in the request from the grievor that conclusively states the reason for her application. No words in her request can be clearly interpreted as refining her 16 remaining grievances to specify prohibited discrimination as their subject. While it is hardly unreasonable to infer that those grievances were, in the grievor's mind, also related to a human rights issue, I am not prepared to make a finding to this effect on the basis of the grievor's second request in the absence of an unequivocal reference to prohibited discrimination or a human rights issue in that request.

[120] This brings me to the wording of the grievor's May 2003 complaint to the CHRC, in which she stated her allegation as follows:

> ***ALLEGATION***
>
> *Statistics Canada has discriminated against me by treating me in an adverse differential manner in employment and by terminating my employment by reason of perceived disability (mental disability), contrary to section 7 of the* Canadian Human Rights Act*.*

[121] On its face, the wording of this allegation suggests direct links between the 16 grievances grouped in PSSRB File Nos. 166-02-32584 to 32586 and the grievor's complaint to the CHRC. The first part of the allegation refers to employer discrimination by way of adverse differential treatment. This reference could be taken to encompass all of the subject matter of the 16 grievances grouped in PSSRB File Nos. 166-02-32584 to 32586, but it is expressed so generally that no credible inference should be drawn to this effect. The second part of the allegation is considerably more specific. By referring to her termination of employment as an act of prohibited discrimination by reason of perceived disability, the grievor herself has drawn a direct link between her complaint and the 13 grievances grouped in PSSRB File No. 166-02-32584, which attack the employer's decision to terminate her employment.

[122] The core statements in each of the 13 grievances grouped in PSSRB File No. 166-02-32584 read as follows:

GRIEVANCE 94
. . . termination of my employment. . . .

GRIEVANCE 95
. . . termination of my employment . . . due to disciplinary measures.

. . . disguised discipline including a financial penalty.

GRIEVANCE 96
. . . termination of my employment . . . constitutes disguised discipline.

GRIEVANCE 97
. . . wrongfully terminated my employment for no just cause.

GRIEVANCE 98
. . . termination of my employment is wrongful as my employer has executed constructive dismissal.

GRIEVANCE 120
. . . termination of my absence from work is wrongful . . . as I had provided fit to work medical notes from my physician.

GRIEVANCE 121
. . . termination of my employment due to my absence from work is wrongful . . . as my employer had falsified personal information with respect to my behavior to justify and legitimize having continued to deny me access to the workplace to perform my duties.

GRIEVANCE 122
. . . termination of my employment is wrongful, due to my 'lack of cooperation' to complete the medical assessment with Health Canada by not having attended several prearranged physician's appointments, as I have attended all of these appointments (two).

GRIEVANCE 123
. . . termination of my employment is wrongful, due to my 'lack of cooperation' to complete the medical assessment with Health Canada by having failed to sign the required consent form at one appointment which authorizes the physician to release the fitness to work assessment to the Employer, as my employer had falsified and fabricated information about me in the referral letter that was provided to me by the physician at the appointment.

GRIEVANCE 124
. . . termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as I had provided this statement

> *for all of the reasons of harassment by my employer as stated in my grievances.*
>
> ***GRIEVANCE 125***
> *. . . termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as the consent to undergo the medical assessment is voluntary as my employer was informed in writing twice by Dr. Lisa Taris of Health Canada.*
>
> ***GRIEVANCE 126***
> *. . . termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as I had informed in writing to my employer that I would full cooperate by participating in the medical assessment and sign all required documents as required by the medical assessment.*
>
> ***GRIEVANCE 127***
> *. . . termination of my employment is wrongful, as I was verbally provided fully satisfactory work performance appraisals by my supervisors Christiane Leclair and Kathy Piening Faris, as well as an excellent letter of recommendation from Ms. Leclair for my work in OID; I had met the deadline and overall objective (as agreed upon by my supervisor and I) for my two month assignment in MCED; and my employer had falsified and fabricated my personal information of behavior problems in documents to Health Canada.*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[123] The 13 grievances grouped in PSSRB File No. 166-02-32284 revolve around the employer's decision to terminate the grievor's employment in the context of at least six interrelated events or actions: the provision of medical notes to explain the grievor's absence; the alleged falsification of information; the allegedly denied access to the workplace; the alleged harassment; co-operation, or lack thereof, with respect to the medical assessment; and the appraisal of the grievor's work performance. I have reviewed the "Particulars" section of the grievor's CHRC complaint, and have found references that closely relate to all of these events or actions. Some of these have been identified by the employer in its written argument. The following is a selection of brief references to the "particulars" of the grievor's CHRC complaint that I find illustrative of linkages with her 13 grievances relating to the termination of her employment:

[Provision of medical notes to explain the grievor's absence]

. . . I applied for sick leave . . . and provided a note from my physician . . . .

. . .

. . . I provided a 'fit to work' from my physician to the respondent, but the respondent refused to allow me to return to work without a medical assessment . . . .

[Alleged falsification of information]

. . . in all likelihood the communication of false information about my work performance, created a hostile attitude towards me . . . .

. . .

. . . she fabricated incidents of problems to justify the poor appraisal . . . .

. . .

. . . [he] wrote in a letter that it is his unprofessional assessment that I have some very serious psychological problems . . . no basis for these statements, except lies that he had received . . . .

. . .

. . . A referral letter was sent . . . falsely implying that I had a continuing incapacity to work because of my mental state . . . completely fabricated problems and falsely stated all allegations about my mental fitness and poor work performance . . . .

. . .

. . . The respondent attempted to conceal from me their letters of fabricated evidences which they used in their attempts to place me on disability without my consent and knowledge . . . .

. . .

. . . the respondent fabricated the false reason of two-years absence of sick leave . . . .

[Allegedly denied access to the workplace]

. . . in order to conceal and absolve the respondent's discriminatory actions of having denied me access to work.

[Alleged harassment]

. . . [t]his event revealed that . . . the respondent used the Health Canada assessment as a vehicle to coerce me onto disability, and explained the actions of harassment by the Health Canada doctor respondent.

. . .

. . . I initially approached . . . to request her help with the respondent's actions of harassment. In the end, [she] ended up seriously harassing me herself . . . .

[Co-operation, or lack thereof, with respect to the medical assessment]

. . . he threatened to terminate my employment should I fail to complete the medical assessment . . . .

. . .

. . . the respondent used the medical assessment with Health Canada . . . as a vehicle to place me on disability or terminate my employment.

. . .

. . . I agreed to participate fully in the medical assessment . . . but sent a letter to the respondent indicating that my participation was not voluntary, given the repondent's actions, which I found harassing and discriminatory . . . .

. . .

. . . my employment was terminated because of my refusal to co-operate with the respondent's attempts to reintegrate me into the work place.

[Appraisal of the grievor's work performance]

. . . Ms. Leclair . . . lied that my work performance had been poor from the outset . . . .

. . .

My performance appraisal . . . characterized my work as good . . . .

. . .

. . . was informed . . . that I had not performed well on my two previous assignments . . . .

. . .

. . . [t]he problems described in this appraisal were completely fabricated.

. . .

> *. . . [t]his appraisal is completely fabricated and filled with non-existent problems.*
>
> [*Sic* throughout]

[124] I believe that the records before me clearly establish that the grievor's CHRC complaint and the 13 grievances grouped in PSSRB File No. 166-02-32584 concern the same facts and, by every indication, the same actors. The extent of the similarities, in my view, largely undermines the credibility of the grievor's argument that the grievances ". . . by their nature and essence . . . have nothing to do with the questions raised in the discrimination complaint . . . ." As the adjudicator put it at *Price v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 47, ¶ 40, ". . . Both the grievance and the complaint arise out of the same set of circumstances, and both focus on the same alleged conduct or inaction by the same individuals. . . ." The key question is whether the grievor's CHRC complaint and her 13 grievances grouped in PSSRB File No. 166-02-32584 concern the same issues, and whether these issues, at their heart, involve a human rights matter.

[125] The grievor argues that I should find that her 13 grievances grouped in PSSRB File No. 166-02-32584 pose fundamental employment issues separate and apart from the subject matter of her CHRC complaint. I accept that it is conceivable to approach the facts underlying her 13 grievances in a fashion that isolates employment dimensions. On the issue, for example, of her alleged "lack of co-operation" regarding the medical assessment sought by the employer, it might be argued that the events surrounding that assessment were a test of the grievor's willingness to obey instructions that the employer gave her. In such a theory of the case, the employer would have terminated the grievor's employment because she was, ultimately, insubordinate, thus opening to scrutiny the disciplinary intent and nature of the employer's actions. I might be prepared to follow this theory, and perhaps take a similar perspective on other aspects of the grievor's cases, were it not for the fact that the grievor herself, in her CHRC complaint, has woven the particulars of her allegation, which relate to the same facts as her 13 grievances, into a theory of the case that inextricably involves prohibited discrimination. Apart from the various references to discrimination and harassment found throughout her depiction of the case in her CHRC complaint, and apart from the wording of the main allegation itself, the grievor seems to best summarize her case at the very end of her CHRC complaint:

. . .

> *Around July 4, 2002, the respondent sent me a document entitled "Notice of termination and option for benefit." In this document, the respondent lied about the reasons for my termination of employment. The respondent lied that my employment was terminated for the reasons of two-years* [*sic*] *absence of sick leave, and my being incapacitated. The respondent made up these reasons in order to conceal their discriminatory actions of having denied my access to the workplace to coerce me into disability, and ultimately having terminated my employment.*
>
> . . .

[126] The theme unifying the 13 grievances grouped in PSSRB File No. 166-02-32584 and the grievor's CHRC complaint is that the reasons alleged by the employer to terminate her employment were ". . . made up . . . in order to conceal their discriminatory actions . . . ." Can the grievor make this statement in one administrative redress procedure and subsequently argue, for purposes of redress, under the former *Act* that this is not the case? I think not. When the grievor refers, in her written argument and response, to other documents in an effort to establish the "factual matrix" of discipline (e.g. the April 29 and May 22, 2002, letters of Richard Barnabé), I must examine these documents in the context of the records before me, which include her signed CHRC complaint alleging, in her own words, concealment and underlying discrimination. If I were to ignore this context, I would, in effect, permit the grievor to split her case to multiply proceedings for purposes of securing access to redress under the former *Act*. I do not believe that I can do so.

[127] The grievor's argument that the 13 grievances grouped in PSSRB File No. 166-02-32584 are directed at disciplinary measures is, thus, at odds with her CHRC complaint. I cannot disregard the grievor's own words in that document. A comparison of the "particulars" in her CHRC complaint with the wording of her 13 grievances reveals direct links between her grievances and the CHRC complaint. For this reason, I believe that I am entitled to use the content of the grievor's CHRC complaint to assess the fundamental subject matter of her 13 grievances. On this basis, I have reached the conclusion that the underlying essence of those grievances is a series of linked allegations that the employer concealed the real reasons for terminating her employment. In her words, her employment was terminated ". . . by reason of perceived disability (mental disability), contrary to section 7 of the *Canadian Human Rights Act*". Given this conclusion, I am satisfied, on a balance of the probabilities, that the issues raised in her 13 grievances relate mainly to human rights and, in these

circumstances, I must find that another ". . . administrative procedure for redress is provided in or under an Act of Parliament . . . ." for pursuing those issues - i.e. the complaint process set out in the *CHRA*. This deprives me of jurisdiction over the 13 grievances grouped in PSSRB File No. 166-02-32584 and I dismiss them accordingly.

[128] The three grievances grouped in PSSRB File Nos. 166-02-32585 and 32586 remain. An examination of the wording of these grievances reveals that they involve issues of denied access to the workplace, provision of "fit to work" certification, and/or coercion to undergo medical assessment. As they are not materially distinguishable from the 13 grievances grouped in PSSRB File No. 166-02-32584, I find, on the basis of the same reasons as those above, that there is another ". . . administrative procedure for redress . . . ." through which the grievor could pursue them. I therefore dismiss them for want of jurisdiction.

[129] I found earlier that the part of grievance No. 4 in PSSRB File No. 166-02-31313 that does not relate to an allegation of a violation of the collective agreement, and the three other grievances grouped in that PSSRB file, involve human rights subject matter by the sole virtue of the grievor's written specification of September 4, 2002, that ". . . my grievances relate to a prohibited ground of discrimination . . . ." In the event that I was wrong in making that finding, I find that the wording of these grievances relates, in essence, to the issue of denied access to the workplace that formed part of the fabric of discrimination depicted in the grievor's CHRC complaint. For the same reasons as those provided in relation to the 19 grievances grouped in PSSRB File Nos. 166-02-32584 to 166-02-32586, I would have also ruled that there is another ". . . administrative procedure for redress . . ." for pursuing the issues raised in that part of grievance No. 4 in PSSRB File No. 166-02-31313 that does not relate to an allegation of a violation of the collective agreement, and in the three other grievances grouped in that PSSRB file.

[130] Prior to concluding this decision, I wish to add a comment regarding the jurisprudence offered by the grievor. Apart from a brief reference in her written argument and response to *Boutilier*, the primary authority offered by the grievor is *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39. This decision examines the jurisdiction of the Quebec Human Rights Commission vis-à-vis an arbitrator operating under the *Labour Code* of Quebec. The grievor offers this case in support of the requirement to analyze the

"factual matrix" of a situation in order to decide a jurisdictional dispute. Chief Justice McLachlin wrote the following:

. . .

> *14 . . . the question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute.*
>
> *15. This question suggests two-related steps. The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator. The second step is logically necessary since the question is whether the legislative mandate applies to the particular dispute at issue. It facilitates a better fit between the tribunal and the dispute and helps "to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties", according to the underlying rationale of* Weber, supra*; see* Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, *[2000] 1 S.C.R. 360, 2000 SCC 14, at para. 39.*

. . .

[131] In my view, there is no conflict — nor does the grievor allege a conflict — between the approach outlined by Chief Justice McLachlin in *Quebec (Commission des droits de la personne et des droits de la jeunesse)* and the analytical framework used in the wake of *Boutilier* to determine the jurisdiction of an adjudicator operating under the former *Act* who is facing subject matter allegedly related to a human rights issue. *Boutilier* and subsequent adjudication decisions proceed from an analysis of the relevant legislation to an examination of the nature of the dispute (i.e. its "fact matrix"). The statutory context at play in *Boutilier* is obviously different from the legislative schemes examined in the jurisprudence offered by the grievor, but the fundamental logic remains the same. I believe that the findings in the case before me also result from the same approach.

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

(The Order appears on the next page)

III. Order

[133] The grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections is dismissed.

[134] That part of grievance No. 4 in PSSRB File No. 166-02-31313 that alleges a violation of the collective agreement is dismissed.

[135] That part of grievance No. 4 in PSSRB File No. 166-02-31313 that does not relate to an allegation of a violation of the collective agreement, and the three other grievances grouped in that PSSRB file, are also dismissed.

[136] Further, the 13 grievances grouped in PSSRB File No. 166-02-32584 are dismissed.

[137] Finally, the three grievances grouped in PSSRB File Nos. 166-02-32585 and 32586 are also dismissed.

October 13, 2006.

Dan Butler,
adjudicator