Date: 20080823

File: 166-02-35364

Citation: 2006 PSLRB 100

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

PAMELA CHIASSON

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Chiasson v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Stéphane Hould, counsel

Heard at Ottawa, Ontario,
April 7, 2006.

Grievance referred to adjudication

[1] Pamela Chiasson (the "grievor") has grieved the failure of the employer, the Treasury Board, to grant her back pay following a reclassification and a promotion to an OM-04 position from her AS-04 position in the Department of National Defence (DND). Her grievance was filed on September 7, 2003. It reads as follows:

. . .

> *(1) I grieve management's decision to not grant backpay that I feel is owed to me resulting from a reclassification upgrade and promotion to OM04 from AS04, effective date 01 Sept 02, while I was on maternity leave.*
>
> *(2) I grieve the discriminatory method used to access remuneration to myself. My point being: if I was at work I would have received the backpay, but because I had a baby and was at home on maternity leave I was deemed ineligible. No clear policy directive was provided to me and it seems I'm being punished for giving birth and using the leave PSAC bargained for.*
>
> *Corrective Action Requested*
>
> *(1) Full remuneration back to the effective date of reclassification 01 Sept 02, Article 38.02, Para 1.*
>
> *(2) Full redress. By this I mean a clear and indisputable policy statement from Treasury Board.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[2] 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. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

Objection to jurisdiction

[3] This grievance was referred to adjudication on November 10, 2004. On March 31, 2006, the employer advised the Executive Director of the Public Service Labour Relations Board of its intention to raise an objection to the adjudicator's jurisdiction to hear this matter, based on the following:

. . .

> *Grievor is not a member of a bargaining unit*
>
> *Although the Public Service Alliance of Canada is representing the grievor, it is the employer's position that the grievor is not a member of any bargaining unit. The grievor's position was reclassified to the OM-04 group and level effective September 1, 2002. The present grievance was filed on September 17, 2003. The Organization and Methods (OM) group is unrepresented.*
>
> *Therefore, the grievor is not entitled to refer any grievance to adjudication under s. 92(1)(a) of the former* Public Service Staff Relations Act (PSSRA). *In addition, the grievance does not deal with either disciplinary action resulting in suspension or a financial penalty or a termination of employment.*
>
> *Consequently, this grievance is not one that can be referred to adjudication under* PSSRA *s. 92.*
>
> *The grievance alleges discrimination*
>
> *The grievor alleges that she has been discriminated against on the basis of her pregnancy and the birth of her child and the manner in which her maternity and parental allowances were calculated.*
>
> *On the face of it, the heart of the grievance deals with an issue of discrimination, based on sex, which is clearly covered by the* Canadian Human Rights Act (CHRA). *As such, the grievor is barred by* PSSRA *s. 91(1) from filing a grievance as the* CHRA *contains an administrative procedure for redress. This position was confirmed by the Federal Court of Appeal in* Canada (Attorney General) v. Boutilier, *[2003] 3 F.C. 27 (C.A.).*
>
> *There is no record that any human rights complaint has been filed or that any "kick-back" from the CHRC to the grievance process has been made. Consequently, as there is no legal right to grieve this matter, there is no right to refer it to adjudication.*

> *For both of the above reasons, the employer respectfully requests that the grievances* [*sic*] *be dismissed without a hearing.*

. . .

[4] At the outset of the hearing, the employer argued that an adjudicator appointed under the former *Act* does not have jurisdiction to decide on a grievance relating to a human rights issue, by virtue of subsection 91(1) of the former *Act*, which reads as follows:

. . .

> ***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.

. . .

[5] The employer viewed the grievance as clearly stating that its decision not to readjust the grievor's maternity leave allowance is discriminatory on the basis of sex, as a result of her pregnancy. As the substance of the grievance would be a human rights issue, another procedure for redress exists under the *Canadian Human Rights Act* (*CHRA*), R.S.C., 1985, c. H-6, and an adjudicator appointed under the former *Act* is without jurisdiction under subsection 91(1) of the former *Act* to hear the grievance.

[6] In support of its argument, the employer cited the following decisions: *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.); *Audate v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-27755 (1999) (QL); *Cherrier v. Treasury Board (Solicitor General – Correction Services)*, 2003 PSSRB 37; and *Sincère v. National Research Council of Canada*, 2004 PSSRB 2.

[7] The grievor submitted that the employer did not raise the jurisdictional issue during the grievance process. By not doing so, the employer would have waived its right to raise that issue at adjudication.

[8] Furthermore, the grievor requests a readjustment of her remuneration as a result of the reclassification of her position. It is an issue that arose from the collective agreement interpretation and that is adjudicable pursuant to section 92 of the former *Act*. In *Ladouceur v. Treasury Board (Environment Canada)*, 2000 PSSRB 90, the adjudicator stated that the essence of the grievance related to a contract interpretation, as the grievor was contesting the employer's interpretation of clauses relating to maternity and parental allowances. In the present case, the grievor requests that the reclassification of her position be taken into consideration to readjust her maternity and parental allowances. The grievance is basically raising an issue of collective agreement interpretation and not one of discrimination. The adjudicator has jurisdiction to hear the issue.

[9] In rebuttal, the employer submitted that a jurisdictional issue can be raised at any stage during the grievance process, and cannot be waived or agreed to by the parties. The human rights nature of the grievance is clear in its wording.

Ruling on the objection to the adjudication of a human rights issue

[10] The concept of "waiver" argued by the grievor can only receive application for procedural irregularities. Such irregularities can be distinguished from the adjudicability of the grievance, which has to be regarded as a fundamental issue of jurisdiction. In the present case, the alleged discriminatory method used by the employer to deny readjustment of the grievor's maternity leave allowance raises the question as to whether the matter is subject to adjudication pursuant to subsection 92(1) of the former *Act*. That issue is substantive rather than procedural, and omitting to raise it at the first opportunity does not waive the right to do so later on. The case law on this issue is to the effect that adjudicators cannot create their own jurisdiction;

their jurisdiction must be derived from legislation or the collective agreement. The principle that an objection to the adjudicability of a grievance can be raised at any stage during the grievance process is also acknowledged by courts and tribunals (*Re United Automobile Workers and DAAL Specialties Limited* (1967), 18 L.A.C. 141). *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.), at paragraph 49 (affirmed by *Canada (Treasury Board) v. Boutilier*, [2000] 3 F.C. 27 (C.A.) is to the same effect. Therefore, I found that this principle should receive application in the present case and that the employer can raise at the hearing an objection to the jurisdiction.

[11] I emphasized to the parties that the wording of the grievance specifies two bases of contention. The first one relates to a collective agreement interpretation for readjustment of the maternity and parental leave allowances resulting from the reclassification of the grievor's position. The second one alleges a discriminatory practice of the employer while the grievor was on maternity leave. The two issues can be considered separately; the grievor can proceed with the issue relating to the collective agreement interpretation without referring to discrimination.

[12] On the alleged discriminatory practice of the employer, I found that I do not have jurisdiction to hear the grievance pursuant to paragraph 91(1) of the former *Act,* because another administrative procedure for redress is available under the *CHRA*. An adjudicator has no jurisdiction pursuant to the former *Act* to proceed with the examination of a grievance when another act provides for redress, as stated in *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354 (C.A.). The decisions rendered in *Boutilier*, *Audate*, *Cherrier* and *Sincère* are consistent and state that an adjudicator does not have jurisdiction under the former *Act* to hear a grievance based solely on allegations of discrimination by the employer.

[13] To have jurisdiction under the former *Act*, an adjudicator must be faced with a grievance challenging the interpretation of the collective agreement and not with allegations to the effect that the actions of the employer are a discriminatory practice.

[14] At the resumption of the hearing after a short adjournment, the grievor advised me that she was withdrawing her allegation of discriminatory practice. Accordingly, I ruled that I would proceed to hear the issue of the interpretation and application of the collective agreement's clauses on maternity and parental leave allowances, but subject to further evidence. I ordered the parties to proceed with their evidence, under

reserve of the employer's objection that those issues cannot be referred to adjudication pursuant to subsection 92(1)(*a*) of the former *Act*.

Summary of the evidence

[15] The grievor has worked at the Department of National Defence in various positions since 1989. She performed work as an AS-04 since January 15, 2001. Employees occupying positions classified in the Administrative Services (AS) group are covered by the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Program and Administration Services Group (Exhibit G-1).

[16] The grievor commenced maternity leave on July 25, 2002. She received a maternity allowance based on the weekly rate of pay to which she was entitled on the day immediately preceding the commencement of her maternity leave without pay, pursuant to paragraph 38.02(f)(i) of the collective agreement. The amount of her allowance was based on her AS-04 salary (Exhibit G-7).

[17] Her position was reclassified to the OM-04 group and level (Organization and Methods (OM) Group) on March 4, 2003, with an effective date of September 1, 2002 (Exhibit G-2). On April 7, 2003, the grievor was notified of the reclassification of her position, and of her promotion to the OM-04 group and level. She signed the notification letter on May 21, 2003, without indicating whether she accepted or declined the offer (Exhibit G-2). On April 7, 2003, the employer advised the grievor as follows (Exhibit G-3):

. . .

> *Your salary on appointment will be calculated in accordance with Sections 22 and 23 of the Public Service Terms and Conditions of Employment Regulations, the rates of pay for certain and unrepresented employees of the Organization and Methods Group and other applicable Treasury Board Directives. Retroactive salary adjustments will be made as necessary.*
>
> *The classification and salary of this position may change as a result of Classification Reform.*
>
> *Terms and conditions of your employment are determined in large part by the provisions of the Organizations and Methods Group.*

. . .

[18] Employees occupying positions in the OM group are part of no bargaining unit and are represented by no bargaining agent. Employees occupying positions in the OM group are not covered by the collective agreement signed between the Treasury Board and the PSAC for the Program and Administration Services Group (Exhibit G-1).

[19] After the termination of her maternity leave, the grievor did not return to work, and she benefited from a parental leave starting on November 24, 2002. She received a parental allowance calculated by the employer on the basis of the weekly rate of pay that she received on the day immediately preceding the commencement of her maternity leave. That rate of pay is the one to which she was entitled as an AS-04, pursuant to paragraph 40.02(f)(i) of the collective agreement.

[20] In a letter dated August 27, 2003, the grievor requested that the employer readjust her allowances based on her salary as an OM-04 (Exhibit G-4). Her understanding of the Treasury Board Secretariat's *Maternity and Parental Benefits Guide* (Exhibit G-6) was that her maternity and parental leave allowances should be adjusted retroactively to the date of her reclassification (September 1, 2002), at the OM-04 salary (Exhibits G-2 and G-7). The *Maternity and Parental Benefits Guide* provides for the following (Exhibit G-6):

> ***Maternity and Parental Allowance Paid by the Employer***
>
> ***Basic Provisions***
>
> *Collective agreements specify the eligibility requirements for the maternity and parental allowances.*
>
> *To qualify for these allowances, employees must have at least six months' continuous employment in the federal Public Service before the commencement of leave without pay, be on maternity or parental leave without pay, apply for and receive EI maternity or parental benefits, and sign an agreement concerning their return to work.*
>
> *During the two-week waiting period for EI maternity or parental benefits, if there is one, the employer will pay the employee an allowance equivalent to 93 per cent of his or her weekly rate of pay.*
>
> ***After the waiting period**, in the case of maternity leave without pay, depending on the length of entitlement to EI maternity benefits, the employer will pay a maternity*

> *allowance based on the difference between 93 per cent of the employee's weekly rate of pay and the gross amount of her EI maternity benefits for a maximum of 15 weeks. In the case of parental leave without pay, the employer will pay the parental allowance for a maximum of 35 weeks based on the number of weeks EI parental benefits are paid.*
>
> *The parental allowance is also calculated by deducting the gross amount of EI parental benefits from 93 per cent of the employee's weekly rate of pay.*
>
> . . .
>
> *Any salary increment or economic increase to which the employee would normally be entitled that comes into effect while the employee is in receipt of maternity or parental benefits will be reflected automatically in the maternity or parental allowance.*
>
> . . .

[21] The grievor explained during her testimony that her pay increase, which came into effect on September 1, 2002, should be considered as "[a]ny salary increment or economic increase. . . ." as provided in the *Maternity and Parental Benefits Guide* and should ". . . be reflected automatically. . . ." in her allowances.

[22] Lise Pelletier, Policy Officer, Collective Bargaining Sector, Treasury Board Secretariat, testified on behalf of the employer to the effect that the salary of an employee who is reclassified to a higher group and level is adjusted only on the day on which the employee returns onto the pay list. Ms. Pelletier stated that the grievor was not entitled to pay or to a pay revision while she was on maternity and parental leave, which is considered leave without pay. For the employer, the grievor was entitled to reclassification back pay only from July 28, 2003, onwards after her return to work at the end of her maternity and parental leave.

[23] Furthermore, according to Ms. Pelletier, the grievor's request for readjustment of her maternity and parental leave allowances is based on subclauses 38.02(i) and 40.02(i) of the Program and Administration Services Group collective agreement, which read as follows (Exhibit G-1):

> *38.02*
>
> *(i) Where an employee becomes eligible for a pay increment or pay revision while in receipt of the maternity allowance, the allowance shall be adjusted accordingly.*

> *40.02*
>
> *(i) When an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*

[24] According to Ms. Pelletier, the terms used in the *Maternity and Parental Benefits Guide* are defined in the "Glossary of terms and definitions" contained at chapter 2 of the *Treasury Board Manual*, Personnel Management, Pay Administration, as follows (Exhibit E-2):

> ***CHAPTER TWO***
>
> ***Glossary of terms and definitions***
>
> . . .
>
> ***increment*** *is where there are intermediate steps, a progression from one step to the next higher step in any range of pay rates (augmentation);*
>
> . . .
>
> ***revision*** *is a change in the rate or rates of pay applicable to an occupational group and level (révision);*
>
> . . .
>
> ***reclassification*** *is change in the group and/or level of a position or positions resulting from a review or audit (reclassification).*
>
> . . .

[25] The Treasury Board Secretariat's *Terms and Conditions of Employment Policy* provides as follows (Exhibit E-1):

> ***Policy statement***
>
> *The terms and conditions of employment of employees, including casuals, terms, part-time workers and excluded and unrepresented employees, are as set out in the relevant collective agreement and as supplemented in the* Public Service Terms and Conditions of Employment Regulations *(Appendix A) and other relevant policies.*
>
> . . .
>
> ***relevant collective agreement*** *means the collective agreement for the bargaining unit to which the employee is*

> *assigned or would be assigned were the employee not excluded. For the Personnel Administration Group, the Organization and Methods Group and the Management Trainee Group, the relevant collective agreement is that applying to the Program Administration Group. The relevant collective agreement for employees who are students participating in a formal cooperative or work experience program, or who are employed under a summer employment program shall be the collective agreement of the predominant group whose duties are being understudied or performed during the work term (convention collective applicable);*
>
> . . .
>
> [Emphasis added]

Summary of the arguments

For the grievor

[26] The grievor is entitled to an adjustment of her maternity and parental leave allowances pursuant to subclauses 38.02(i) and 40.02(i) of the collective agreement signed between the Treasury Board and the PSAC for the Program and Administration Services Group. The increase in pay following the grievor's reclassification has to be considered a pay increment or a pay revision pursuant to subclauses 38.02(i) and 40.02(i) of that collective agreement.

[27] The purpose of the *Maternity and Parental Benefits Guide* is to ensure that employees on maternity or parental leave will not suffer a financial loss because of their situation. This principle was recognized in *Thériault and Arseneau v. Treasury Board (Employment and Immigration)*, PSSRB File Nos. 166-02-14508 and 14509 (1984) (QL), and dismissing such grievances would lead to problems for some employees because those at work would receive their salary increase while those on maternity leave would receive the rate of pay in effect before their maternity leave.

[28] In this case, the grievor is entitled to parental leave on the basis of the collective agreement for the Program and Administration Services Group because she did not return to work at the end of her maternity leave. To the contrary, she agreed that, if she returned to work at the end of her maternity leave, her OM-04 classification would apply and, consequently, the collective agreement for the Program and Administration Services Group would not receive application and the adjudicator would not have jurisdiction in that event. Pursuant to the Program and Administration Services Group

collective agreement, the grievor is entitled to a readjustment of her parental leave allowance on her pay revision as of the effective date of her reclassification.

For the employer

[29] The grievor was promoted to the OM-04 group and level effective September 1, 2002. On that date, she ceased to be a member of the Program and Administration Services Group for which the collective agreement applies. In *Janveau v. Treasury Board (Natural Resources Canada)*, 2002 PSSRB 2, the adjudicator concluded that, with the reclassification of his position, the grievor became a member of a bargaining unit for which the PSAC was certified. Consequently, the Computer Systems (CS) Group collective agreement signed by the Professional Institute of the Public Service of Canada no longer applied to him and he ceased to be entitled to the terminable allowance set out in the CS Group collective agreement. Upon judicial review of the adjudication decision (*Janveau v. Canada (Attorney General)*, 2003 FC 1337), the Federal Court concluded that the grievor did not remain part of the CS Group bargaining unit after the reclassification of his position and that there was no extension of rights to an employee reclassified to a position represented by a different bargaining agent.

[30] The employer restated its objection to the effect that the grievor is not entitled to refer her grievance to adjudication pursuant to paragraph 92(1)(*a*) of the former *Act* because she is no longer covered by the Program and Administration Services Group collective agreement.

[31] Furthermore, in *Harrison v. Canada Customs and Revenue Agency*, 2004 PSSRB 178, the issue was whether an adjustment to the parental leave allowance should be made if an employee is promoted during the period of leave without pay. The grievor was promoted to a position not covered by the collective agreement that applied to him at the commencement of his leave without pay, as in the present case. In *Harrison*, the adjudicator held that a promotion was neither a pay increment nor a pay revision. In the present case, the collective agreement for the Program and Administration Services Group has the same language as the one in *Harrison*. Consequently, the present grievance should be denied on the same basis.

Rebuttal for the grievor

[32] At the beginning of her maternity and parental leaves without pay, the grievor's position was classified in the AS group, to which the Program and Administration Services Group collective agreement applied. Her allowance was based on the salary that she received as an AS-04 and should be readjusted on the basis of the salary to which she is entitles retroactively to September 1, 2002, pursuant to the stipulations of the Program and Administration Services Group collective agreement.

[33] On the jurisdictional issue, the grievor submitted that, as an AS-04, she is entitled to refer a grievance to adjudication as an employee covered by the Program and Administration Services Group collective agreement.

Reasons

Objection to the adjudicability

[34] The issue of the adjudicability of the grievance is related to the grievor's terms and conditions of employment that prevailed on the date on which she filed her grievance. The grievor filed her grievance after her appointment to her reclassified position at the OM-04 group and level. The effective date of that reclassification was September 1, 2002, as stated in the employer's letter dated April 7, 2003. The employer advised the grievor that the terms and conditions of employment would be determined as follows (Exhibit G-3):

. . .

> *Your salary on appointment will be calculated in accordance with Sections 22 and 23 of the Public Service Terms and Conditions of Employment Regulations, the rates of pay for certain and unrepresented employees of the Organization and Methods Group and other applicable Treasury Board Directives. Retroactive salary adjustments will be made as necessary.*
>
> . . .
>
> *Terms and conditions of your employment are determined in large part by the provisions of the Organization and Methods Group.*
>
> . . .

[35] The *Terms and Conditions of Employment Policy* apply to unrepresented employees and the *Public Service Terms and Conditions of Employment Regulations*, published as Appendix A to the *Terms and Conditions of Employment Policy* apply to the employees occupying positions classified in the OM Group. The Policy provides as follows (Exhibit E-1):

> ***Policy statement***
>
> *The terms and conditions of employment of employees, including casuals, terms, part-time workers and excluded and unrepresented employees, are as set out in the relevant collective agreement and as supplemented in the* Public Service Terms and Conditions of Employment Regulations *(Appendix A) and other relevant policies.*
>
> [Emphasis added]
>
> . . .
>
> ***Appendix A – Public Service Terms and Conditions of Employment Regulations***
>
> *(Effective September 1, 1990)*
>
> ***Application***
>
> *1. These regulations apply to all non executive group employees whether they were appointed before or after these regulations came into force on March 13, 1967 (TB 665757). Exceptions made for certain senior level employees are contained Appendix A to these regulations.*
>
> ***Interpretation***
>
> . . .
>
> ***relevant collective agreement*** *means the collective agreement for the bargaining unit to which the employee is assigned or would be assigned were the employee not excluded. For the Personnel Administration Group, the Organization and Methods Group and the Management Trainee Group, the relevant collective agreement is that applying to the Program Administration Group. The relevant collective agreement for employees who are students participating in a formal cooperative or work experience program, or who are employed under a summer employment program shall be the collective agreement of the predominant group whose duties are being understudied or performed during the work term (convention collective applicable);*

. . .

[Emphasis added]

[36] I agreed with *Janveau v. Treasury Board (Natural Resources Canada)*, 2002 PSSRB 2, which found that Mr. Janveau ceased to be covered by his previous collective agreement on the date on which his position was reclassified. That decision should receive application in the present file. The Federal Court has concluded that that decision was correct (*Janveau v. Canada (Attorney General)*, 2003 FC 1337). In the present file, the grievor's position was reclassified in the OM group on the effective date of September 1, 2002. Consequently, Ms. Chiasson ceased to be an employee in the Program and Administration Services Group bargaining unit on the date of the reclassification of her position and she cannot now rely on rights provided for in the Program and Administration Services Group collective agreement.

[37] Employees occupying positions classified in the OM Group are not part of a bargaining unit, as no employee organization has been certified as their bargaining agent. Therefore, no collective agreement has been negotiated on their behalf with the employer. Employees occupying OM positions are unrepresented and their terms and conditions of employment are contained in no collective agreement that is binding on them; their terms and conditions of employment are determined by the employer.

[38] The terms and conditions of employment of the grievor, whose position was reclassified at the OM-04 group and level, are now set out in the *Terms and Conditions of Employment Policy*. Subparagraph 91(1)(*a*)(i) of the former *Act* defines as follows an employee's right to present a grievance relating to his or her terms and conditions of employment:

. . .

> ***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*
>
> . . .

[39] In the present case, the grievor's terms and conditions of employment are governed by an ". . . instrument made or issued by the employer. . . ." and not by a provision of a collective agreement for the purpose of the former *Act*. The former *Act* defines a "collective agreement" as follows:

> *"collective agreement" means an agreement in writing, entered into under this Act between the employer and a bargaining agent, containing provisions respecting terms and conditions of employment and related matters"*

[40] Also, section 50 of the former *Act*, sets out that a "collective agreement" is negotiated by a bargaining agent on behalf on the employees in the bargaining unit that it represents. Subsection 58(1) of the former *Act* specifies that "[a] collective agreement has effect in respect of a bargaining unit. . . ." Finally, section 59 of the former Act provides that "[a] collective agreement is . . . binding on the employer, on the bargaining agent that is a party thereto . . . and on the employees in the bargaining unit in respect of which the bargaining agent has been certified. . . ."

[41] As the grievor's terms and conditions of employment are set out in an ". . . instrument made or issued by the employer. . . .", she was entitled to present a grievance, pursuant to subparagraph 91(1)(*a*)(i) of the former *Act*, to challenge the employer's interpretation or application of her maternity and parental allowances. It is important to emphasize that the grievor could not present her grievance on the basis of subparagraph 91(1)(*a*)(ii) of the former *Act*, because those terms and conditions of employment are not provided for in a collective agreement bargained for employees in OM positions.

[42] The grievor's right to refer her grievance to adjudication is limited by the provisions of subsection 92(1) of the former *Act* which provides a right of reference to adjudication 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,*
>
> . . .
>
> [Emphasis added]

[43] Subsection 92(1) of the former *Act* does not allow the reference to adjudication of a grievance with respect to an ". . . instrument made or issued by the employer, dealing with terms and conditions of employment. . . ." Consequently, the grievor is not entitled to refer her grievance to adjudication.

[44] In these circumstances, clause 96(3) of the former *Act*, which deals with jurisdiction of the adjudicator, states the following:

> . . .
>
> *(3) Where a grievance has been presented up to and including the final level in the grievance process and it is not one that under section 92 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this* Act *and no further action under this* Act *may be taken thereon.*
>
> . . .

[45] Consequently, I am without jurisdiction to hear the present grievance on its merit.

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

(The Order appears on the next page.)

Order

[47] The grievance is denied.

August 23, 2006.

Léo-Paul Guindon,
adjudicator