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Public Service Staff Relations Act,
R.S.C. (1985), c. P-35 and the *Public Service Labour Relations Act* enacted by section 2 of the *Public Service Modernization Act,* S.C.2003, c.22Before the Chairperson and an adjudicator

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BETWEEN

LOUISE LAFRANCE

Grievor

and

TREASURY BOARD (Statistics Canada)

Other party to the grievance

Indexed as
Lafrance v. Treasury Board (Statistics Canada)

In the matter of individual grievances referred to adjudication

In the matter of applications to extend the time limit set out in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Georges Nadeau, Vice-Chairperson and adjudicator

For the Grievor: Bertrand Myre, Canadian Association of Professional Employees

For the Other party to the grievance: Simon Kamel, Counsel

Heard at Ottawa, Ontario,
January 18, 2006.
(P.S.L.R.B. Translation)

Individual grievances referred to adjudication and applications before the Chairperson

[1] Louise Lafrance is an employee of Statistics Canada in the Survey Operations Division. On March 21, 2005, she filed an initial grievance alleging that by refusing to return her to work and pay her salary, the employer contravened Article 27 of the collective agreement signed on November 29, 2004 between the Treasury Board and the Canadian Union of Professional Employees for the Economic and Social Sciences Group (Code: 208, 412). Statistics Canada's senior staff relations advisor was absent at the time the grievance was filed and acknowledged receipt of it on April 12, 2005, after the new *Public Service Labour Relations Act* (the "new *Act*") came into force.

[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*, the reference to adjudication of the first grievance must be dealt with in accordance with the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[3] On May 10, 2005, Ms. Lafrance filed a second grievance, this time alleging that the employer refused to offer her appropriate accommodations.

[4] After these two grievances were referred to adjudication, the employer raised two preliminary objections. The first was that both grievances were not filed within the time limit set out in the collective agreement. In light of this objection, files 568-02-28 and 29 were opened. Pursuant to section 45 of the new *Act*, the Chairman authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions in applying paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* (the "Regulations"), to hear and decide any matter relating to extension of the time period.

[5] The employer's second objection argued that section 64 of the PSMA does not allow an adjudicator to hear a grievance that raises an issue involving interpretation or application of the *Canadian Human Rights Act* (CHRA) with respect to facts that occurred prior to the coming into force of the new *Act*, without an explicit decision of the Canadian Human Rights Commission (CHRC) requesting that the grievor exhaust the applicable grievance process.

[6] After hearing the parties on these two questions at the oral hearing and reading the written arguments adduced by the parties, I decided to render a preliminary decision to deal with these two objections.

Summary of the evidence

[7] On May 18, 2004, Ms. Lafrance filed a complaint with the CHRC alleging that she was the victim of discrimination, essentially because of the employer's refusal to allow her to telework as of January 2004.

[8] Following mediation, the employer and Ms. Lafrance signed a memorandum of understanding resolving the complaint on November 10, 2004. This memorandum set out dispute resolution mechanisms in the event that a disagreement arose over its implementation. The memorandum of understanding was approved on November 29, 2005 by the CHRC.

[9] The memorandum of understanding stipulated that Ms. Lafrance would return to work once the assessment by her attending physician was completed. However, Ms. Lafrance claims that, despite the fact that the assessment by her physician was done, the employer did not reinstate her by refusing to allow her to telework, as her physician recommended on December 17, 2004.

[10] On March 21, 2005, Ms. Lafrance prepared her first grievance alleging that the employer contravened Article 27 of her collective agreement by refusing to return her to work and to pay her salary and benefits retroactive to December 17, 2004. This first grievance was submitted to the employer, which "due to absences", did not acknowledge its receipt until April 12, 2005.

[11] In its reply at the first level of the applicable grievance process, the employer dismissed this first grievance given that, in its opinion, it was not filed within the time limit set out in the collective agreement. Moreover, the employer is also of the view that it has not contravened Article 27 of the collective agreement.

[12] The reply at the second level of the applicable grievance process dismissed the first grievance because it was filed late and referred to the memorandum of understanding resolving Ms. Lafrance's complaint before the CHRC. The reply at the final level of the grievance process, dated June 24, 2005, was along the same lines.

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[13] On May 10, 2005, Ms. Lafrance filed a second grievance, this time contesting the employer's refusal to comply with the recommendations of her attending physician who, in her opinion, indicated on December 17, 2004 that she was capable of returning to work in a telework situation on a full-time basis.

[14] The decision at the first level of the applicable grievance process makes no mention of failure to comply with the time limit. Rather it refers to the fact that full-time telework is not a viable option for Ms. Lafrance's substantive position. The decision at the second level of the applicable grievance process reiterates the reasons for dismissal, without mentioning the issue of time limits or receivability.

[15] The decision at the final level of the applicable grievance process mentions that Statistics Canada is trying to implement the memorandum of understanding approved by the CHRC and dismisses this second grievance, mentioning that the employer's actions comply with the collective agreement. There is no mention of a time issue in this decision.

[16] On July 19, 2005, Ms. Lafrance referred her two grievances to adjudication. As for the second grievance, on September 26, 2005, Ms. Lafrance informed the CHRC of the referral to adjudication of a grievance that raises an issue relating to the interpretation or application of the CHRA. The CHRC did not inform the Executive Director of the Public Service Labour Relations Board (the "Executive Director") that it intended to make submissions with respect to Ms. Lafrance's second grievance.

[17] In the fall 2005, Ms. Lafrance took action to have the memorandum of understanding approved by the CHRC recognized as an order of the Federal Court. On November 29, 2005, the Federal Court gave the memorandum of understanding the force of one of its orders.

[18] On October 25, 2005, the employer filed its objections to the grievance with the Executive Director.

Summary of the arguments

[19] In the case of the first grievance, the employer argues that the grievance was filed after the expiration of the 25-day time period set out in the collective agreement, excluding Saturdays and holidays. The employer also challenges the jurisdiction of an

adjudicator alleging that the underlying subject of the first grievance is an allegation of violation of human rights. The employer argues that this allegation has already been the subject of a complaint before the CHRC and of a settlement between the parties. It adds that the CHRC did not make a decision that Ms. Lafrance should exhaust the applicable grievance process, which would give an adjudicator the jurisdiction to hear the first grievance. The employer further claims that the Federal Court incorporated in one of its orders the memorandum of understanding agreed to by the parties and approved by the CHRC.

[20] With respect to the second grievance, the employer argues that this grievance alleges exactly the same circumstances as the first grievance, specifically, that Ms. Lafrance has not been paid her salary and benefits since December 17, 2004. It is the employer's opinion that this second grievance was not filed within the time limit and that Ms. Lafrance was informed accordingly in the replies given to the first grievance. The employer is also of the opinion that section 64 of the PSMA prevents an employee from filing a grievance of discrimination based on facts that occurred prior to the coming into force of the new *Act*. The new *Act* came into force on April 1, 2005.

[21] With respect to the question of the time limit, Ms. Lafrance replied that on December 17, 2004, her attending physician declared her fit to return to a telework situation. It was after repeated requests for clarification to this physician that Ms. Lafrance realized that the employer would not pay her salary. The employer never clearly informed her of its refusal to pay her. Furthermore, the employer's refusal to pay Ms. Lafrance is an ongoing matter.

Reasons

[22] With respect to the time limit for presentation at the first level of the applicable grievance process, it is my view that the grievances were filed in both cases within the period set out in the collective agreement given that these grievances are essentially grievances against an ongoing situation. The failure to ensure payment of her salary and the failure to make appropriate accommodations are occurring day after day. Adjudication case law has long recognized an employee's right to file a grievance against a recurring situation.

[23] Furthermore, with respect to the second grievance, the provisions of the Regulations could not be clearer. The employer must deal with any question of time limit at the outset (section 63 of the Regulations). However, neither the decision at the first level of the applicable grievance process, nor any subsequent decisions, makes mention of such a matter. Pursuant to section 95 of the Regulations, the employer may only raise at the adjudication level an objection regarding the time limit for the presentation of a grievance if the grievance was rejected for that reason at the first opportunity and at all subsequent levels of the applicable grievance process. In addition, such an objection must be raised within 30 days of receipt by the employer of notice of reference of the grievance to adjudication, which was not done in these circumstances. I therefore find that the employer renounced any question that might relate to the time limit for the presentation of the second grievance.

[24] Accordingly, as I find that both grievances were presented within the time limit set out in the collective agreement, there is no reason to extend said time limit and I order that files 568-02-28 and 28 be closed.

[25] The employer's objection that the first grievance deals with a human rights matter is, in my view, with foundation.

[26] First, it is useful to note that given the provisions of the former *Act*, in force at the time, Ms. Lafrance used the correct administrative remedy by filing a complaint on May 18, 2004 with the CHRC, essentially against the employer's refusal to make accommodations for her. The CHRC decided this complaint by approving the memorandum of understanding signed by the parties in November 2004.

[27] The evidence adduced convinces me that the problem raised by Ms. Lafrance in her first grievance in March 2005 is one that involves application of the memorandum of understanding approved by the CHRC, aimed at resolving a human rights issue. The employer is refusing to implement the telework recommendations arising from the assessment of the complainant by her attending physician and consequently is refusing the accommodations suggested by said physician. In addition, the memorandum of understanding adduced before me (Exhibit E-4) contains a dispute resolution mechanism that the parties must use to resolve any disputes around its implementation.

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[28] The Federal Court has already ruled in *Canada (Attorney General) v. Boutilier*, [1991] 1 F.C. 459 (Trial Division), confirmed by *Canada (Attorney General) v. Boutilier*, [2000] 2 F.C. 27, that under the former *Act*, "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 CHRA apply and govern the procedure to be followed." The Court adds that "The matter may only proceed as a grievance […] in the event that the [CHRC] determines […] that the grievance procedure ought to be exhausted." In other words, the legislative provisions in force, at the time that the first grievance was filed, dictated that it could not proceed as a grievance without an explicit decision by the CHRC to that effect. No decision of that nature has been rendered.

[29] With respect to the objection relating to the second grievance, it is important to note that the provisions of the new *Act* differ from those of the former *Act*. My earlier comments do not apply to the second grievance. Since April 1, 2005, a grievance alleging a human rights violation can be presented to the employer and an adjudicator now has jurisdiction to hear allegations of human rights violations, among others.

[30] The employer objected to an adjudicator's jurisdiction to hear Ms. Lafrance's second grievance arguing that the second grievance is the same as the first. I am not of the view that this argument has merit. The first grievance is based on Article 27 of the collective agreement to claim payment of Ms. Lafrance's salary since December 17, 2004. The second grievance alleges that the employer is refusing to make appropriate accommodations for Ms. Lafrance. Although they may appear to be similar, these grievances are not identical and were not presented in the same legislative context.

[31] The employer argues, with reason, that I do not have jurisdiction to hear Ms. Lafrance's second grievance relating to facts that occurred prior to the coming into force of the new *Act*. The transitional provisions arising from passage of the new *Act* provided in section 64 of the PSMA are unequivocal. However, because the second grievance is contesting a recurring situation, namely, the repeated refusal day after day to make appropriate accommodations for Ms. Lafrance, the provisions of the new *Act* and the transitional provisions of the PSMA do not restrict in any way my jurisdiction

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to hear the second grievance with respect to the period beginning on April 1, 2005, the date that the new *Act* came into force.

[32] I must add that the right of an employee to receive accommodations remains as long as there is an employment relationship. This right may change over time depending on the information available, the employee's health and the employer's efforts. It is not an unlimited right and the employer is not held to excessive constraints. The hearing of Ms. Lafrance's second grievance will therefore deal with the employer's obligation, if applicable, to provide accommodations to Ms. Lafrance with respect to the period beginning April 1, 2005.

[33] For the above reasons, I make the following order:

(The Order appears on the next page)

Order

[34] I declare that Ms. Lafrance presented both of her grievances within the time limit set out in the collective agreement and that the employer renounced any question with respect to the time limit for the presentation of the second grievance. I order that files 568-02-28 and 29 be closed.

[35] I declare that I do not have jurisdiction to hear Ms. Lafrance's first grievance and I order that file 566-02-3 be closed.

[36] I declare that I have jurisdiction to hear Ms. Lafrance's second grievance for the period beginning on April 1, 2005.

[37] I order the Director, Registry Operations and Policy of the Public Service Labour Relations Board to contact the parties to set a date for the resumption of the hearing.

May 16, 2006.

P.S.L.R.B. Translation

Georges Nadeau,
Vice-Chairperson and adjudicator