Date: 20060503

File: 166-02-32537

Citation: 2006 PSLRB 47

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MIKE PRICE

grievor

and

TREASURY BOARD
(Correctional Service of Canada)

employer

Indexed as
Price v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Joan M. Gordon, adjudicator

For the grievor: Corrinne Blanchette, counsel, UNION OF CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

For the employer: Harvey Newman, counsel

Heard at Abbotsford, British Columbia,
March 8, 2006.

Grievance referred to adjudication

[1] The hearing on March 8, 2006, dealt solely with the employer's preliminary objection to my jurisdiction to determine grievance no. 166-02-32537 (the "grievance").

[2] The grievor testified at the hearing in relation to one disputed fact -- i.e., his receipt of a memo dated October 17, 2002, from Alphonse Cormier, Deputy Commissioner, Pacific Region. The remainder of the evidence was submitted in documentary form.

[3] At the conclusion of the parties' submissions, and following a thorough consideration of all of the materials provided to me, I issued an oral decision that I do not have the jurisdiction to determine the grievance. This decision records the reasons for that ruling.

[4] There are two issues to be decided: 1) what is the substance or essence of the grievance?; and 2) is my jurisdiction ousted by subsection 91(1) of the *Public Service Staff Relations Act* (the "former *Act*") because another administrative procedure for redress is available under an Act of Parliament?

[5] 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.

Summary of the evidence

[6] On April 17, 2002, the grievor filed the grievance, the relevant excerpts of which are as follows:

> *DETAILS OF GRIEVANCE*
>
> *I grieve that under Article 37.01 of the UCCO-SACC-CSN Collective Agreement with CSC that I have been subjected to harassment, interference and restrictions in regards to my WCB claim, my return to work, and the overall manner in which my health concerns were addressed. This contravention of Article 37.01 has occurred due to the actions of management at Matsqui Institution acting as representatives for the Correctional Service.*

> *CORRECTIVE ACTION REQUESTED*
>
> *1- That all of my sick, annual and family related leave that was used and advanced to myself for the duration of this period in question is returned to me.*
>
> *2- That I receive monetary compensation in full for all of the salary income that I would be receiving if this situation had been remedied sooner.*
>
> *3- That I receive and* [*sic*] *averaging of all the possible overtime worked and Statutory holidays that I missed due to management's inaction.*
>
> *4- That my wife and I are financially compensated for the emotional and psychological stress that management's inaction has caused our family and myself.*
>
> *5- That all policies, procedures and professional medical opinions applicable to my case are taken into account to arrive at the best solution for my medical restrictions.*
>
> *6- That I receive a verbal and written apology from the management responsible at Matsqui Institution.*
>
> *7- That I am provided with meaningful employment in a harassment free workplace.*
>
> *8- That the first level of this grievance be skipped (Article 37.02 subsection 'a') and be transmitted directly to second level.*
>
> *9- That I have a union representative(s) of my choice at any and all meetings with management regarding this grievance.*

[7] The employer's response, dated June 7, 2002, at the second level of the grievance procedure was this:

> *Your grievance with respect to Article 37.01 of the UCCO Collective Agreement has been thoroughly reviewed at the second level of the grievance procedure.*
>
> *I am not in agreement that we have contravened Article 37.01 of the Collective Agreement as you assert. Management is obligated to work with the WCB when it comes to workplace injuries and the Chief of Personnel would have been remiss had she not advised that the Return to Work plan had not been successful.*
>
> *I am confident that the Warden and Chief of Personnel have acted in good faith in planning and implementing your*

> *return to work. The accommodation that has been made in your case has been done in consultation with both Health Canada and the WCB as required. It is our belief that the post assignment is reasonable and within the parameters of your physical restrictions.*
>
> *Accordingly, I am not prepared to grant your requested corrective actions and am denying your grievance.*

[8] On June 4, 2002, the grievor presented a harassment complaint (the "complaint") to Pauline Guenette, Anti-Harassment Coordinator, Pacific Region. The grievor summarized the events forming the backdrop for his complaint at pages 3-4 of that document:

> *Background to my complaint*
>
> . . .
>
> *[5] In May 2000 I was injured at work while moving equipment in the ERT team room located at the Regional Health Centre (RHC). While working in that room an equipment bag fell on top of me and in the process pulled both of my arms behind my back. At the time I did not realize what effects this accident would have on my physical health. Later, this accident had major health ramifications and resulted in a physical disability that left me unable to perform my job functions as a Correctional Officer in its entirety.*
>
> *[6] After the accident I met with my family doctor and needed to be placed on Workers Compensation for my injury, as I could no longer work due to the type and nature of the injury that I had sustained.*
>
> *[7] I remained on Compensation until July 23rd, 2001. At that time, I was informed by Mrs. Susan McKenzie (Chief of Personnel Matsqui Institution) by phone that my compensation would be discontinued and if I did not return to work I would be forced to use my accumulated sick time. I found out later that Mrs. McKenzie had informed a WCB representative that I did not complete my scheduled shift of orientation, did not attempt my assigned work duties and refused to work. This statement by Mrs. McKenzie is false as I had been instructed by Mrs. McKenzie to go home and at no time did I refuse to perform my duties. At the time that my Workers' Compensation claim had been discontinued my Orthopedic Specialist, Dr. Sweeting, had advised me that I would be unable to return to my former occupation as a Correctional Officer due to the limitations that my shoulder injury had caused. Not wanting to return to work against my specialist's instructions, I was forced to use my*

> *accumulated sick leave while I waited for Health Canada to assess my condition, a request that I had made almost a year previously to my compensation claim being discontinued.*
>
> *[8] I have been back at work at Matsqui Institution and have been placed in the CO-1 position of Count Desk. I have stated many times previously (based on the information and letters provided by two separate doctors) concerning my return to work that this post is not suitable for me because of my injury. This post is not ergonomically compatible with the restrictions that my injured shoulder limits me to. My incompatible workstation and the duties that it comes with have caused me further pain and aggravation to my shoulder injury. As I have no sick leave remaining (because I used it previously to prevent my early return to work) I am forced to come to work even though the continued pain in my shoulder can be almost unbearable. When I inquired to Mrs. Susan McKenzie as to what options I would have if I became sick and re-injured my shoulder, she replied saying "you can always file another WCB claim."*

[9] The grievor then identified these six allegations of harassment: "disregarding Dr. Sweeting's letters and memos"; "attacking my work ethic and sense of professionalism"; "disregarding Dr. Hilliard's Health Canada assessment"; "attempt at mediation to provide a resolution"; "lack of effort to contact myself or find appropriate employment"; and "Commissioner's directives regarding harassment". Under the latter heading, the grievor stated in part as follows:

> . . .
>
> *[21] According to our Commissioner's Directives, the actions of Mr. John Costello and Mrs. Susan McKenzie fulfill the requirement of harassment. I quote the following from the CSC's CD 255 on Harassment and other forms of Discrimination in the Workplace.*
>
> [Harassment definition quoted]
>
> *[22] The actions of Mrs. McKenzie and Mr. Costello have endangered my health and potentially the health of other staff that I work with, threaten my economic livelihood, created obvious discrimination due to my physical disability and unfavourably influenced my career with CSC. Neither of these managers seems to care or wants to make any effort to come to any resolution that involves a mutually agreeable solution that takes into account my physical limitations.*
>
> . . .
>
> [Emphasis added]

[10] And significantly, the Summary section of the complaint provided in part as follows:

> *[24] . . . I strongly feel that because of my physical limitations, I am being unfairly harassed and discriminated against at my place of employment. While I do not wish to pursue this option yet I feel that under the Canadian Human Rights Act regarding the Duty to Accommodate and the Dignity of the Individual I feel I have been wronged. In no way has the decision of both Mrs. Susan McKenzie and Mr. John Costello taken my physical limitation or sense of dignity into account.*
>
> . . .
>
> [Emphasis added]

[11] By letter dated July 12, 2002, Mr. Cormier advised the grievor his complaint would not be accepted.

[12] On September 16, 2002, the grievor responded to Mr. Cormier in these terms:

> . . .
>
> *This ongoing harassment from the particular managers at Matsqui has resulted in the further deterioration of my physical injury. As a result of my being forced to work in an unsuitable post when I was physically unable to do so, my injury has become a permanent disability. There continues to be little to no effort on behalf of the previously-mentioned managers to help facilitate my return to work. In fact, I feel that because of my now permanent physical disability that resulted from an injury on duty, I am now being discriminated against.*
>
> *As a result of this past harassment and now current discrimination by the said managers and the lack of response from the Correctional Service at the Regional level, I am left with few alternatives. I now regretfully feel that I have to consult with the Canadian Human Rights Commission as this specific type of discrimination falls under their jurisdiction.*
>
> . . .
>
> [Emphasis added]

[13] There was no evidence the grievor had ever initiated a complaint with the Canadian Human Rights Commission (the "CHRC") under the *Canadian Human Rights Act* (*CHRA*).

[14] In a memo dated October 17, 2002, Mr. Cormier repeated that the grievor's complaint did not meet the criteria set out in the Treasury Board's policy on the *Prevention of Harassment in the Workplace*. Mr. Cormier further informed the grievor that: "[i]n regard to the Canadian Human Rights Commission, every employee has the right to file a complaint with the Commission in accordance with the [*CHRA*]." The grievor's evidence at the hearing was that he "may" have received Mr. Cormier's memo and "may" have responded to it but he does not "recall" receiving or responding to such a memo and has no record of either event.

[15] The grievor is no longer an employee of the Correctional Service of Canada. He retired some time after the events giving rise to the grievance and is currently in receipt of an annuity under the *Public Service Superannuation Act*.

Summary of the arguments

[16] The employer submits the purported grievance is not a valid grievance that can be referred to adjudication. In the employer's view, a complaint under the *CHRA* is a complaint in respect of which an administrative procedure for redress is provided in or under an Act of Parliament for the purposes of subparagraph 91(1)(*a*)(ii) of the former *Act* and clause 20.02 of the parties' collective agreement. The employer emphasizes that the grievor alleges a violation of clause 37.01 of the collective agreement, which is the "No Discrimination" provision. The employer says it is apparent on the face of the grievance that the subject matter of the grievor's concern is that management has discriminated against him on a prohibited ground under the *CHRA* -- i.e., mental or physical disability. As such, the substance of the grievance could form the basis for a complaint to the CHRC, a specialized administrative tribunal capable of providing the grievor with a real remedy.

[17] In advancing its argument that the grievance is in substance a human rights complaint that is not amenable to adjudication under the former *Act*, the employer relies on the following authorities: *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (FCA) (application for leave to appeal dismissed without reasons on August 31, 2000); *Cherrier v. Treasury Board (Solicitor General - Correctional Service)*, 2003 PSSRB 37; and, *Audate v. Treasury Board (Veterans Affairs Canada),* PSSRB File No. 166-2-27755 (1999) (QL).

[18] The employer urged me to follow the admonition of the Federal Court of Appeal in *Boutilier* and decide this preliminary objection prior to the presentation of evidence relating to the merits of the grievance. The bargaining agent urged me either to summarily reject the employer's preliminary objection or to reserve my decision until I had heard the evidence on the merits of the grievance.

[19] The bargaining agent says the essence or heart of the grievance is not a human rights issue. Rather, it is a complaint about the way the grievor was treated by management, the time it took to implement his return to work program, management's failure to follow policy, and harassment. In this regard, the bargaining agent points to Mr. Cormier's response at the second level of the grievance procedure wherein the issue of "good faith" conduct is mentioned. In the bargaining agent's view, as all of these matters fall within the purview of the collective agreement, the grievance should be heard and determined on its merits.

[20] The bargaining agent further says the interests of justice dictate a hearing of the grievance on its merits. The bargaining agent relies on the following factors which it says constitute prejudice to itself and the grievor: the employer's failure to raise its jurisdictional objection three years ago when the matter was referred to the then Public Service Staff Relations Board; the employer's failure to notify the bargaining agent and the grievor of its preliminary objection until the day before the hearing; and the disruption and expense incurred by the grievor and the bargaining agent to attend the hearing. Relying on *Boutilier*, the bargaining agent says if the employer had raised its jurisdictional objection in a timely manner, the grievor could have filed a complaint with the CHRC. As it may now be too late for him to do so, the employer's delay should be viewed as an exceptional circumstance entitling this adjudicator to assume jurisdiction over the merits of the grievance. See *Cherrier*. Finally, the bargaining agent submits the grievor's evidence on the merits of the grievance should be heard in these proceedings because, after 30 years' employment, he still feels aggrieved by management's conduct toward him.

[21] In reply, the employer acknowledges the grievor was always viewed as a valued employee who suffered an unfortunate workplace injury. At the same time, the employer emphasizes that management addressed the grievor's issues in an appropriate manner. In these circumstances, the employer says it is not a proper role

for this adjudicator to provide the grievor with a "soap box" for publicly airing his views about the employer.

[22] In terms of the bargaining agent's concern about the employer's delay in raising its jurisdictional objection, the employer accepts that its objection was advanced late in the process, but the employer submits that no prejudice has arisen from the delay. The employer notes that early on in the process the grievor was well aware of both the true nature of his complaint against management and the option of pursuing his concerns with the CHRC. The employer further maintains the bargaining agent was well aware of the reasons why short notice of the preliminary objection was given. The employer also submits that the bargaining agent's reliance on the *Cherrier* decision is misplaced. In that case, the issue of delay did not relate to the timing of the jurisdictional objection, but to delay by the alternate administrative tribunal.

[23] As to the bargaining agent's assertion that the essence of the grievance involves issues other than those expressed on its face, the employer strenuously objects to the bargaining agent's attempt to alter the nature of the grievance at this late stage in the proceedings. The employer notes that in the grievance, the grievor relies solely on one provision of the collective agreement, clause 37.01. Accordingly, says the employer, the grievor should not be permitted to "boot strap" other issues onto the central human rights issue at this stage of the proceedings. See *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (FCA).

[24] The employer reiterates that on its face the essence of the grievance is the grievor's complaint about discrimination based on mental or physical disability. That complaint, says the employer, constitutes a human rights matter clearly falling within the jurisdiction of the CHRC. Thus, this adjudicator's jurisdiction is ousted by subsection 91(1) of the former *Act*. The employer maintains the grievor's failure to proceed with a complaint to the CHRC is not fatal to the jurisdictional issue. The employer notes that the grievor was undoubtedly aware of his right to file such a complaint with the CHRC and that that tribunal proceeding falls within the language of subsection 91(1) of the former *Act*. Relying on the recent decision of the Supreme Court of Canada in *Vaughan v. Canada*, [2005] S.C.C. 11, the employer argues that the grievor's failure to choose the available alternate forum is not determinative of the jurisdictional question. In this regard the employer also notes the grievor had bargaining agent representation throughout.

Reasons

[25] The jurisdiction of an adjudicator appointed under the former *Act* originates in section 92 of the legislation:

> ***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,*
>
> *. . .*
>
> *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.*

[26] An employee's qualified right to present a grievance is governed by 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*
>
> *. . .*
>
> *(ii) a provision of a collective agreement . . . .*
>
> *. . .*
>
> *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 procedure provided for by this* Act.
>
> [Emphasis added]

[27] Clause 20.02 of the parties' collective agreement expresses the same intention as subsection 91(1) of the former *Act*:

> ***ARTICLE 20***
>
> ***GRIEVANCE PROCEDURE***
>
> *20.02* *Subject to and as provided in section 91 of the* Public Service Staff Relations Act, *an employee who feels*

> *that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 20.05 except that:*
>
> *(a) where there is another administrative procedure provided by or under any* Act *of Parliament to deal with the employee's specific complaint, such procedure must be followed.*
>
> . . .
>
> [Emphasis added]

[28] The test for an adjudicator's jurisdiction under subsection 91(1) of the former *Act* was succinctly discussed by Cullen J. in *Mohammed v. Canada (Treasury Board)*, [1998] F.C.J. No. 845 (FCTD) (QL), as cited in *Audate* at page 23:

> . . .
>
> *Cullen J. concluded that subsections 91(1) and 92(1) of the PSSRA did not confer exclusive jurisdiction on the adjudicator to hear all grievances. He ruled as follows at paragraph 27 of his decision:*
>
> > From the words of Mr. Justice Linden *[rather it was Strayer, J. in Byers, supra]* it appears that the administrative procedure for redress referred to in subsection 91(1) does not have to be identical to the grievance procedure mandated by the PSSRA. In addition, the remedies given in the two procedures do not have to be identical; rather the party should be able to obtain "real redress" which could be of benefit to the complainant. All that is required under subsection 91(1) is the existence of another procedure for redress, where the redress that is available under that procedure is of some personal benefit to the complainant.
>
> . . .
>
> [Emphasis added]

[29] In several other decisions discussed in *Audate* it was determined that the procedure for redress provided under the *CHRA* constitutes "another administrative procedure for redress" for the purposes of subsection 91(1) of the former *Act.* See *Chopra v. Canada*, [1995] 3 F.C. 445 (TD); *Mohammed*; and *O'Hagan v. Canada (Treasury Board)*, [1999] F.C.J. No. 32 (FCTD) (QL). This conclusion was also reached in

Boutilier where the Federal Court of Appeal endorsed McGilles J.'s decision and reiterated with approval the following reasons (page 40):

. . .

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

[30] In *Chopra*, the Federal Court upheld adjudicator Chodos' decision that he was without jurisdiction to hear a grievance by virtue of subsection 91(1) of the former *Act* because the grievance was based solely on the "no-discrimination" clause in the collective agreement and the employee claimed the employer had acted in a discriminatory manner toward him due to his race. In upholding the adjudicator's decision the Court concluded that, if a grievance and a complaint are substantially the same in that they both raise issues of discrimination, an adjudicator's jurisdiction is ousted by subsection 91(1) of the former *Act* because the CHRC has jurisdiction to deal meaningfully and effectively with the grievance and can provide real remedies.

[31] Similarly, in *Mohammed,* an adjudicator appointed under the former *Act* found he was without jurisdiction to decide a grievance based solely on the "no discrimination" clause of the collective agreement. There, the employee alleged the employer had discriminated against her on the basis of her race and religion.

[32] In *O'Hagan*, an adjudicator appointed under the former *Act* determined that the subject matter of the grievance was sexual harassment as defined in a provision of the

collective agreement. The adjudicator held that, as the substance of the grievance was a complaint of discriminatory practice based on one of the prohibited grounds of discrimination under the *CHRA*, he lacked jurisdiction to decide it.

[33] In *Audate,* Yvon Tarte, Chairperson of the Public Service Staff Relations Board, determined that a grievance, which on its face complained about a disciplinary suspension, was more appropriately characterized as a complaint about a discriminatory practice based on the employee's race, colour and ethnic origin. This issue arose part way through the hearing when the employee testified that, in her view, the disciplinary measure imposed on her constituted a discriminatory practice based on her race, colour and ethnic origin. Following a discussion of the above-noted decisions, Chairperson Tarte concluded at page 27 that ". . . all of the courts agree on one point: an adjudicator is without jurisdiction to hear a grievance when the substance of the grievance can be dealt with under another procedure for redress." Chairperson Tarte noted that, under section 7 of the *CHRA*, it is a discriminatory practice to, directly or indirectly, refuse to employ or continue to employ any individual, or in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. As the employer emphasizes in the case at hand, the prohibited grounds of discrimination under the *CHRA* include "mental or physical disability."

[34] In *Cherrier,* the employee grieved his disciplinary dismissal under a collective agreement. He also filed a complaint with the CHRC alleging the employer had discriminated against him in contravention of section 7 of the *CHRA* by failing to make the necessary accommodations for his disability. In those circumstances, Board Member Guindon found another administrative procedure for redress was available within the framework of the *CHRA* for the employee to contest his dismissal. Board Member Guindon held that, as there was conflict or overlap between the two procedures for redress (i.e., the grievance procedure/adjudication and the complaint procedure under the *CHRA*), his jurisdiction was ousted by subsection 91(1) of the former *Act*. In making this determination he reviewed, among other decisions, the decision of Chairperson Tarte in *Kehoe v. Treasury Board (Human Resources Development Canada),* 2001 PSSRB 9.

[35] The reasoning in the *Kehoe* decision declining jurisdiction under subsections 91(1) and 92(1) of the former *Act* was summarized in the *Cherrier* decision as follows (par. 45):

. . .

> 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. . . .
>
> [. . .]
>
> 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). . . .
>
> . . .
>
> [Emphasis added]

[36] With these principles in mind, I turn to the issues for determination here.

[37] What is the substance or essence of the grievance?

[38] This first issue is a factual one. On the face of the evidence before me, I have no difficulty finding the substance of the grievance is a complaint of harassing and discriminatory treatment by management on the basis of the grievor's physical disability. The essence of the grievor's concern is that the way in which management has dealt with issues relating to his workplace injury and subsequent physical disability runs afoul of the proscription against discrimination in employment on the basis of physical disability and the duty to accommodate disabled employees under the *CHRA*. As in the *Chopra* case, I find the grievance and the complaint raise substantially the same issue -- harassing and discriminating treatment on the basis of physical disability.

[39] In the grievance, the grievor relies solely on an alleged breach of clause 37.01, the "no discrimination" provision of the collective agreement. Clause 37.01 provides as follows:

> ***Article 37***
>
> ***NO DISCRIMINATION***
>
> *37.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of . . . mental or physical disability . . . .*

As indicated above, the grievance was drafted in a manner that mirrors the language of clause 37.01. Management's alleged breach of clause 37.01 is more fully developed in the grievor's complaint, several relevant portions of which are excerpted above.

[40] As Board Member Guindon found in *Cherrier*, I find the complaint and surrounding correspondence between the parties of assistance in determining the essence of the grievance. 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.* As well, the corrective action requested in the grievance is similar, and in some instances identical, to the corrective action requested in the complaint.

[41] In my view, the circumstances of the case at hand bear a strong similarity to those involved in the *Kehoe* case. In both cases, the essence of the grievances involves fundamental human rights issues -- i.e., discrimination and harassment on the basis of disability.

[42] Any lingering doubt about the substance of the grievor's complaint against management is removed when his September 16, 2002 letter is considered. The relevant excerpt of that correspondence is repeated here for ease of reference:

. . .

> *As a result of this past harassment and now current discrimination by the said managers and the lack of response from the Correctional Services at the Regional level, I am left with few alternatives. I now regretfully feel that I have to consult with the Canadian Human Rights Commission as this specific type of discrimination falls under their jurisdiction.*
>
> . . .
>
> [Emphasis added]

[43] Despite the grievor's clear identification of the essence of his concern, the bargaining agent asserts that the substance of the grievance is a complaint about the way the grievor was treated by management, the time it took to implement his return to work program, management's failure to follow policy, and harassment. The bargaining agent further maintains that, in order to determine the essence of the grievance, the evidence on the merits of the grievance must be heard.

[44] 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.

[45] It is true, as the bargaining agent notes, that the employer referred to "good faith" conduct in its second level response during the grievance procedure. However, management's choice of that term to describe the way in which it attempted to accommodate the grievor's physical restrictions does not transform the essence of the grievance into anything other than a human rights complaint of harassment and discrimination based on physical disability.

[46] As emphasized earlier, the only provision of the collective agreement referred to in the grievance is clause 37.01, the "no discrimination" provision. 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.

[47] Turning to the second issue for determination, and applying the reasoning in the above-noted decisions (more particularly *Chopra*, *Mohammed, O'Hagan*, and *Kehoe*), I find my jurisdiction is ousted by subsection 91(1) of the former *Act* because an administrative procedure for redress exists under the *CHRA* and the redress available under that procedure is of some personal benefit to the grievor.

[48] In the *Kehoe* decision, Chairperson Tarte thoroughly reviewed the administrative procedure for redress under the *CHRA* as well as the remedial authority of the CHRC. My review of that same administrative procedure for redress and remedial authority in the context of this grievance satisfies me that my jurisdiction is ousted by subparagraph 91(1)(*a*)(ii) of the former *Act*.

[49] As recognized by the employer in its submissions at the hearing, it is unfortunate that the preliminary jurisdictional objection was not raised in a more timely manner. Nonetheless, on the evidence before me, it cannot be said that the grievor's ability to file a complaint and avail himself of the administrative procedure for redress under the *CHRA* was prejudiced by the delay. The grievor undoubtedly knew, as early as June 4, 2002, that his concerns could have been advanced under the *CHRA*. In his letter of that date to the employer, the grievor advised that he did not wish to pursue that option "yet." Then, in his letter dated September 16, 2002, to Mr. Cormier, the grievor advised that he intended to consult with the CHRC because the specific type of discrimination he alleged against the employer "falls under their jurisdiction."

[50] 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*.

[51] It is unfortunate that the grievor was inconvenienced by the trip from his home to the hearing location. However, as a case like *Audate* establishes, the question of jurisdiction may arise part way through an adjudication hearing. Thus, the unfortunate inconvenience and expense of attending the hearing does not provide a basis for avoiding the operation of subsection 91(1) of the former *Act*.

[52] As to the bargaining agent's submission that the grievor should be given an opportunity to express his views about the way management dealt with the consequences of his workplace injury and resulting disability, I find the employer's response to be persuasive. It is not the proper function of this adjudicator to provide the grievor with a forum for expressing his views. Where, as here, a finding is made that subparagraph 91(1)(*a*)(ii) of the former *Act* applies to oust my jurisdiction, I am unable to nonetheless exercise my statutory jurisdiction on an equitable basis such as that for which the bargaining agent contends here -- i.e., in the interest of justice. I either have jurisdiction to hear and determine the grievance, or I do not. I have determined that I do not, and I was referred to no provision in the legislation providing for an exception, on any equitable basis, to the operation of subparagraph 91(1)(*a*)(ii) of the former *Act*.

[53] For the foregoing reasons, I confirm my earlier oral ruling that I am without jurisdiction to determine the grievance.

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

(The Order appears on the next page)

Order

[55] This grievance is denied.

May 3, 2006.

Joan M. Gordon,
adjudicator