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File: 566-32-1403

Citation: 2008 PSLRB 5

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FRED J. LEE

Grievor

and

DEPUTY HEAD
(Canadian Food Inspection Agency)

Respondent

Indexed as
Lee v. Deputy Head (Canadian Food Inspection Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Himself

For the Respondent: Karen Clifford, counsel

Decided on the basis of written submissions
filed November 7, 21 and 28, 2007.

I. Individual grievance referred to adjudication

[1] Fred J. Lee ("the grievor") works for the Canadian Food Inspection Agency ("the employer" or "CFIA"') in Grand Falls-Windsor, Newfoundland and Labrador. His position is excluded from collective bargaining.

[2] On May 6, 2005, the grievor submitted a grievance as follows:

. . .

> (Details of grievance)
>
> *On April 8, 2005, I was formally advised that an appropriate classification of my position had been assigned effective April 1, 2005. This may be an acceptable classification; however, I have been fully performing the duties of the Inspection Manager's position both prior to and after the creation of the Agency. This does not address the work which was performed during the period that the matter was under review.*
>
> (Corrective action requested)
>
> *Give full compensation calculated using one of the several available classification groups/levels which are at an equivalent salary level to the current IM pay scale, including relevant economic and increment adjustments, from June 30, 1997 to March 31, 2005. Placement on the IM pay scale and superannuation would also reflect these salary adjustments.*

. . .

[3] Following an unfavourable decision at the final level of the grievance procedure, the grievor referred the matter for adjudication to the Public Service Labour Relations Board ("the Board") on July 27, 2007, using the form prescribed by the Board for grievances that relate to the interpretation or application of a provision of a collective agreement or arbitral award (Form 20).

[4] The Board's Director of Registry Operations and Policy wrote to the grievor to inform him that a grievance concerning the interpretation or application of a collective agreement or arbitral award can only be referred to adjudication when the appropriate bargaining agent signifies its approval of the reference and its willingness to represent the grievor in the adjudication proceedings. Noting that the grievor had identified himself as an excluded employee, the Director informed him that, were he in fact

unrepresented, he was precluded from pursuing a reference to adjudication under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). The relevant provisions of the *Act* read as follows:

. . .

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> . . .
>
> *(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

. . .

[5] The Board returned the reference to adjudication documents to the grievor.

[6] The grievor referred his grievance to adjudication for a second time on August 16, 2007, citing a different provision of the *Act*:

. . .

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> . . .

[7] In a covering letter accompanying the reference to adjudication, the grievor confirmed that he was an unrepresented, excluded employee and stated that ". . . [t]he

refusal to pay me back-pay for services rendered is de facto a disciplinary measure. The financial penalty incurred is the substance of my grievance. . . ."

[8] The employer's representative responded to the reference to adjudication by taking the position that an adjudicator had no jurisdiction to consider the matter under the *Act*:

. . .

> *The employer is requesting that this grievance be dismissed and not scheduled for a hearing as the PSLRB has no jurisdiction to hear it. The grievor is an Inspection Manager who is unrepresented by a bargaining agent. His grievance involves the effective date of the implementation of a new classification standard (the IM group) at the Agency and compensation for duties performed as an Inspection Manager prior to the implementation of this standard on April 1, 2005. It does not involve an interpretation of a collective agreement or disciplinary action resulting in a suspension, financial penalty or termination of employment. In addition, there was no allegation of disciplinary action put forward by the grievor at any level of the grievance process nor has the employer taken any disciplinary action against the grievor.*

. . .

[9] A Board registry officer requested that the grievor provide his position in response to the question of jurisdiction raised by the employer. The grievor replied on September 14, 2007:

. . .

> *Previously, there has been no allegation of disciplinary action by me. On review of the matter, I am left to conclude that I am being subject to a de facto disciplinary measure.*
>
> *I was notified that the matter of my remuneration (classification) had finally been settled. This considered response (cf. Q&A attached) of April 8th, 2005 indicates I had not been performing these assigned duties in my position.*
>
> *This behaviour, were it true, would be misconduct; hence, the grievance against withholding full pay (the imposition of an unwarranted financial penalty).*

. . .

[10] A Board registry officer acknowledged the grievor's submission on jurisdiction and informed both parties that the matter should be raised at the outset of an adjudication hearing to be scheduled. The employer's representative wrote once more to the Board on October 17, 2007, to reiterate the employer's objection to jurisdiction and to repeat its request that the Board dismiss the grievance without a hearing.

[11] The Chairperson of the Board considered the situation and directed that the parties provide written submissions on the following issues:

- Does this matter fall within the parameters of the *Burchill* decision?, and if yes;
- Does the Board have discretion to accept this case based on the application of the *Burchill* decision, and if yes, should it do so?

Burchill v. Attorney General of Canada, [1981] 1 F.C. 109.

[12] The Chairperson has assigned me to determine this matter as an adjudicator, on the basis of the written submissions received from the parties in response to his request.

II. Written Submissions

A. For the employer

[13] Counsel for the employer argued as follows:

. . .

> ***Issue #1:*** **Does this matter fall within the parameters of the *Burchill* decision?**
>
> *This question is answered in the affirmative.*
>
> *The grievance filed in this case makes no reference to disciplinary action. At no point during the grievance process was there any suggestion that there had been disciplinary action imposed upon the grievor. The Board has previously been provided with a copy of the grievance and the replies at the respective levels; they are attached for ease of reference.*
>
> *The grievance is essentially a grievance as to the effective date of conversion to the IM group and/or classification level for a time frame that pre-dates the existence of the IM group. The corrective action sought relates to the pay rate for the employees converted to the new IM group. The matter being*

grieved related to a new classification for a group of employees; there is no indication of any disciplinary measure having been imposed upon the grievor as a result of these systemic changes.

The grievor was unsuccessful at final level. As an excluded manager, he was unable to refer the grievance to the Board pursuant to the provisions of s. 209 of the Public Service Labour Relations Act *(hereinafter, "*PSLRA*"). Upon his being advised of this by the Board, the grievor re-filed his grievance using Form 21, and alleged in his cover letter that he had been subject to "a de facto disciplinary measure".*

As a result, the present situation accords with that addressed by the Federal Court of Appeal in Burchill*. As stated at p. 110 of that decision:*

> In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1) (a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.

In the case at hand, the only grievance that was presented and dealt with was a grievance that contained no suggestion of disciplinary action. Therefore, the grievance was not structured as one that would have been referable to the Board under s. 209 of the PSLRA*, and the provisions of s. 214 of the* PSLRA *apply as to the binding effect of the final level response for this grievance:*

> If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 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 on it.

It is the employer's submission that it is not open for the grievor to now attempt to re-configure his grievance in order

to bring it before the Board. The matter was already addressed in accordance with provisions that are final and binding. The grievor's claim of "de facto disciplinary action" is, by his own admission, not a claim that was ever previously alleged by him. It would be an abuse of process and contrary to the intent of the PSLRA to allow the grievor to now present an entirely different case to the Board. To paraphrase the quote from Burchill*, above, the foundation for clothing the Board with jurisdiction to hear a disciplinary matter was not laid. The recent application of* Burchill *in the* Babiuk *case reinforces this point. At paragraph 51, Adjudicator Done states as follows:*

> In order that the internal grievance procedures are allowed to work to resolve complaints quickly and informally in the workplace, and in order to foster sound labour relations, it is fundamental that the subject matter that gave rise to the grievance be made perfectly clear. How can the parties move forward if they present one case to the employer and a different case, yet unanswered, to an adjudicator?

Therefore, this matter clearly falls within the parameters of Burchill*, such that the Board does not have jurisdiction over the grievance.*

Issue #2: **Does the Board have discretion to accept this case based on the application of the *Burchill* decision, and if yes, should it do so?**

This question is answered in the negative.

Given that Burchill *is of direct application to this case, there can be no basis for discretion because the Board is entirely without jurisdiction to hear the matter. The Federal Court of Appeal in* Burchill *was unequivocal on the point of jurisdiction for situations where a grievor attempts to re-characterize his grievance; there is nothing in the* Burchill *decision that would grant discretion to the Board in this case.*

In the alternative, if the Board were to find that it has any discretion to accept this case, it is the employer's submission that this would not be a proper case for the exercise of such discretion because the grievor's re-filing of the grievance under the circumstances amounts to an abuse of process.

Conclusion

The principles established in Burchill *apply to this case. There is absolutely no evidence that there was any disciplinary action against the grievor such as would bring the matter within the scope of s. 209 (1) (b) of the* PSLRA*. That being the case, the Board is without jurisdiction to hear the matter.*

> *Further, s. 214 of the PSLRA applies in that there has been a final and binding decision taken at final level on the issues raised in the grievance. For the grievor to now attempt to re-configure the issues so as to bring them within the Board's jurisdiction is contrary to both* Burchill *and the* PSLRA.
>
> *The employer submits that the PSLRB is without jurisdiction in this matter and that the grievance should be denied.*
>
> . . .

B. <u>For the grievor</u>

[14] The grievor replied to the employer's submission:

> . . .
>
> ***<u>Question of Parameters… No</u>***
>
> *The necessity for the tort to have a disciplinary component is required to give the Board jurisdiction to hear the matter. From the proceedings it appears that there was no bona fide tort. Ruling of the Board was coloured by the determinations:*
>
> (1) "In a very real sense Mr. Burchill is the author of his present difficulties", p. 41, s. 70.
>
> (2) "I do not find Mr. Burchill's lay-off to have been a disguise for disciplinary action", p. 41, s. 71.
>
> *Had it been shown that the griever had grounds for his complaint, the ruling might have been otherwise.*
>
> *In proceedings to date, my focus is not ascribing motive or blame. I suffered a financial penalty which should be rectified.*
>
> *My failure to characterize, ascribe motive or blame earlier in the process does not negate the disciplinary aspect of the tort or the Board's right to adjudicate the matter. Belatedly, I became aware that there was a need to do so. The grievance was not described other than a tort until I did so on September 14, 2007.*
>
> *I have attempted to work out the problem with the employer. The response has been to wrongly maintain the financial penalty for my perceived non-performance of assigned duties. My conduct of duty as an Inspection Manager is the essence of the dispute.*
>
> > *Since 1997, and certainly from October 1, 1999, I have fully carried out my assigned duties as an Inspection Manager. In the period, October 1, 1999 to April 1, 2005, I was underpaid. I was performing the*

> *full range of duties; yet, some misconduct must have been wrongfully ascribed as I received no back-pay, which is a financial penalty.*
>
> *My complaint has been treated in a perfunctory manner, i.e., "it had no merit because the practice had been to refuse back-pay for conversion situations". The responses confirm the financial penalty.*

My referral to the Board is not a re-clothing of the matter. I iterate, to date my focus has been to have the tort satisfactorily resolved and this continues to be my purpose.

The nature of my grievance has not changed. I have incurred a financial penalty by the misapplication of a management practice as applied to my particular circumstance. The remedy required is unchanged – adequate back-pay for services rendered.

Question of Discretion… Yes

Categorizing my attempt to get fair-play as an abusive process or manipulative is troubling for me personally. I do not have expertise in staff relations or the adjudication process, nor in this situation could I get or afford to buy any professional help. Any appearance of disrespecting the process on my part is a reflection of my personal ignorance, not a manipulation of the facts.

Not explicitly describing the nature of the tort earlier was not a deliberate oversight; the focus was to make the point that back-pay was owed me. Even the fallacy that the Regulations Respecting Pay on Reclassification or Conversion prohibited the paying of back-pay on a conversion was initially accepted by me. Notice the statement of corrective action on the grievance form.

As an excluded employee, but subject to bona fide collective agreements, I had hoped some formal due process had been followed. Attempts to speak to the punishment of withholding back-pay were met with inaction; please note the attached correspondence, (1 - 7). The adversarial process only was made available to me.

The employer has refused the validity of the position, in my particular case, that the Regulations were misapplied and that previous practice was voided by other factors. The considered response was that the financial penalty is to be endured. This intransigence itself obviates Burchill.

Further, in recent years there have been some fundamental changes governing the federal workplace and are reflected in legislation. This has weakened precedence such as **Burchill**

and gives the Board wider discretion. The Public Service Modernization Act, Public Service Labour Relations Act and commensurate management initiatives have enabled our institutions to exercise more flexibility for the betterment of all parties.

We have moved from a literal, prescriptive, bureaucratic process to allow for fair-play, natural justice, principle based versus rule based decisions. Specifically, from the preamble of the PSLRA:

* *Effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest.*

* *The Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment.*

It is suggested that when a financial penalty is levied with or without malice, the Board should have the opportunity to hear the matter. A penalty has a connotation of wrong doing/discipline. The Board has the right and responsibility under our new framework to ensure all employees are treated justly and fairly. The new legal paradigm gives the Board more flexibility to ensure the intent of the legislation governing Federal employees is being applied correctly.

Summary

The behaviour of the Agency may not conform to all details described in its Discipline Policy. The essential elements, misconduct (tacitly assumed) and penalty are extant.

The ruling not to grant back-pay was clothed as a classification matter by the Agency. The reach of the new PSLRA does not demand that the Agency's Discipline Policy be employed per se. The fact that a bona fide disciplinary action occurred enables the Board to hear and rule in this matter.

There are several things which contribute to the tort grieved, including wrongful discipline. I did not characterize the nature of the grievance during the proceedings. When I became aware it was necessary to do so, I did.

. . .

[Underlining and emphasis in original]

[*Sic* throughout]

C. Employer's rebuttal

[15] Counsel for the employer submitted the following rebuttal argument:

> ***Response to the grievor's submissions with respect to Issue #1: the parameters of the* Burchill *decision***
>
> *In his submissions, the grievor has confirmed that the nature of his grievance relates to a claim for: "adequate back-pay for services rendered".*
>
> *Therefore, his grievance does not encompass "a disciplinary action resulting in termination, demotion, suspension or financial penalty" within the meaning of s. 209(1)(b) of the* PSLRA.
>
> *The grievor has not provided any evidence of a disciplinary action; indeed, the attachments to his letter of November 18, 2007 reinforce the point that his grievance has always been about the issue of back-pay for the group impacted by conversion. The complete absence of any disciplinary action is reflected in the background and context of the grievance. For the grievor to refer his grievance on the grounds of 209(1)(b) at this juncture is completely contrary to the jurisprudence established by* Burchill.
>
> *Further, the issue of a tort is a non-starter. The language of the* PSLRA *is very clear: not every perceived wrong in the workplace can be referred to adjudication, only those matters that fall within the specific wording of s. 209(1) may be so referred.*
>
> *Lastly, it is precisely the type of situation illustrated by this grievance that s. 214 of the* PSLRA *addresses when it specifies the finality and binding effect of grievances that were presented up to and including the final level in the grievance process.*
>
> ***Response to the grievor's submissions with respect to Issue #2: Board discretion***
>
> *The employer respects the underlying principles of the* Public Service Modernization Act *and the* PSLRA *to which the grievor makes reference.*
>
> *It should be noted that the* PSLRA *uses very specific language in terms of the scope and ambit of what may be referred to the PSLRB. Accordingly, the PSLRB does not have jurisdiction over grievances unless they are referable to adjudication under the terms of s. 209(1) of the* PSLRA.

> *While the ultimate goal of the legislation is to promote and support good labour relations, there is no expressed intent that the* PSLRB *should exist as a "catch-all" for the adjudication of all labour relations disputes. In fact, the limiting language of s. 209(1) regarding what may be referred to adjudication is designed to encourage the parties to pursue other means for dispute resolution. The employer strongly disagrees with the grievor's suggestion that "when a financial penalty is levied with or without malice, the Board should have the opportunity to hear the matter." That would be contrary to the clear expressed language in s. 209 and s. 214 of the* PSLRA. *The PSLRB is a creature of statute and, accordingly, derives its jurisdiction from the statute.*
>
> ***Conclusion:***
>
> *Therefore, the employer respectfully requests that this grievance be denied on the basis that it fails for want of jurisdiction and that the applicability of the* Burchill *decision warrants the denial of this grievance.*
>
> . . .
>
> [Underlining and emphasis in original]

III. Reasons

A. Does this matter fall within the parameters of the *Burchill* decision?

[16] The grievor in *Burchill* was unsuccessful in challenging his termination of employment by layoff at the final level of the grievance procedure. He then referred his grievance to adjudication under the *Public Service Staff Relations Act* ("the former *Act*"). In an addendum attached to his reference to adjudication, the grievor alleged for the first time that the employer's decision constituted disciplinary action. Following a jurisdictional objection by the employer, the adjudicator found that there was no evidence that the layoff was disciplinary. For that reason, the adjudicator declared that he had no jurisdiction to proceed with the reference and dismissed the grievance: *Burchill v. Treasury Board (Anti-Inflation Board)*, PSSRB File no. 166-02-5298 (19790927).

[17] The grievor applied for judicial review of the adjudicator's decision at the Federal Court of Appeal. Dismissing the application, the Court delivered its reasons orally from the bench:

. . .

> *In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction . . . was not laid. Consequently, he had no such jurisdiction.*
>
> . . .
>
> Burchill, [1981] 1 F.C. 109.

[18] The 1981 Federal Court of Appeal decision in *Burchill* continues to figure prominently in the case law that guides Board adjudicators. In *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133, for example, the grievor had won a declaration from the adjudicator that the discipline imposed on her was void *ab initio* given the employer's failure to observe a substantive right in the discipline process. On application for judicial review, the Federal Court applied *Burchill*, reversed the adjudicator's decision, and found that the adjudicator had no jurisdiction to consider the grievor's argument about the violation of a substantive right in the disciplinary process because she had not referred to this violation in her original grievance nor argued it during the internal grievance procedure: *Attorney General of Canada v. Shneidman*, 2006 FC 381.

[19] Ms. Shneidman appealed the decision to the Federal Court of Appeal. The recent reasons for judgment in *Shneidman v. Attorney General of Canada*, 2007 FCA 192, reiterated the principle that a ". . . grievor must have given her employer notice of the specific nature of her complaints throughout the internal grievance procedure . . ." (para. 26) and cited with approval the *Burchill* principle that ". . . only those grievances that have been presented to and dealt with by all internal levels of the grievance process may subsequently be referred to adjudication . . . ." (ibid.) By upholding the

lower court ruling, the Federal Court of Appeal's decision has provided strong, renewed guidance to adjudicators about the importance and application of *Burchill*.

[20] As mentioned above, *Burchill* interpreted the provisions of the former *Act*, now replaced, as did the courts in *Shneidman*, 2006 FC 381 and 2007 FCA 192. In my opinion, however, *Burchill* continues to apply equally under the current *Act*. Its force flows from the stipulation under subsection 209(1) that an employee may only refer to adjudication an individual grievance ". . . that has been presented up to and including the final level in the grievance process . . . ." When a grievor fails to raise an issue until after the conclusion of the grievance process, the *Burchill* interpretation holds that the grievor has not in fact presented a grievance regarding the newly raised issue ". . . up to and including the final level in the grievance process . . . ." That failure constitutes a bar to adjudication under any paragraph of subsection 209(1), as it did under the comparable provisions of the former *Act*.

[21] The principle enunciated in *Burchill* persists in no small part because it makes good labour relations sense. The employer should be entitled to know the specifics of a grievor's complaint so that it may properly address the issues raised and, if possible, resolve them during the grievance process. When a grievance is recast or has new elements after the internal grievance procedure has ended, the very purpose of that procedure can be undermined.

[22] In the case before me, the grievor has variously asserted that the subject matter of his grievance and his reference to adjudication was "de facto discipline," discipline in disguise or "a penalty whose connotation is disciplinary." Nothing in the wording of his original grievance or his specification of corrective action referred to that possibility:

. . .

> (Details of grievance)
>
> *On April 8, 2005, I was formally advised that an appropriate classification of my position had been assigned effective April 1, 2005. This may be an acceptable classification; however, I have been fully performing the duties of the Inspection Manager's position both prior to and after the creation of the Agency. This does not address the work which was performed during the period that the matter was under review.*

(Corrective action requested)

Give full compensation calculated using one of the several available classification groups/levels which are at an equivalent salary level to the current IM pay scale, including relevant economic and increment adjustments, from June 30, 1997 to March 31, 2005. Placement on the IM pay scale and superannuation would also reflect these salary adjustments.

. . .

[23] A reasonable person reading the grievor's words can readily discern classification and compensation issues in what the grievor wrote. His text, however, would not alert that person in any way to the possibility that the grievor considered himself to have been the subject of discipline, whether *de facto*, disguised or otherwise.

[24] For his part, the grievor conceded in argument that he failed ". . . to characterize, ascribe motive or blame earlier in the process . . . ." He stated that he ". . . [b]elatedly . . . became aware that there was a need . . ." to identify the disciplinary component of his grievance. Later, he wrote: ". . . I did not characterize the nature of the grievance during the proceedings. When I became aware it was necessary to do so, I did." Factor in the employer's uncontested claim that the grievor never mentioned the subject of discipline during the internal grievance procedure, and I cannot find other than that the grievor only introduced discipline into the process as a specific element well after the conclusion of the internal procedure.

[25] To be sure, the record makes it absolutely clear that discipline was not even an element when the grievor referred his grievance to adjudication for the first time. The first reference was not filed under paragraph 209(1)(*b*) of the *Act*, the provision covering discipline, but rather under paragraph 209(1)*(a*), the provision used where the subject matter of a grievance relates to the interpretation or application of a collective agreement or arbitral award. It was only when Board staff informed the grievor that he could not proceed under paragraph 209(1)*(a*) without the approval of, and representation by, the appropriate bargaining agent that he re-filed his reference to adjudication claiming discipline as the subject matter for the first time, switching from the Board's Form 20 (for collective agreement grievances) to Form 21 (for discipline cases).

[26] What was the grievor's motive for altering the specification of his grievance at so late a date? As he stated in the covering letter that accompanied his second attempt to refer his grievance to adjudication: ". . . I trust that now using Form 21, instead of 20, that the matter can be heard. . . ." With those words, it does not stretch the imagination very far to view the change in how the grievor specified his case between the first and second references to adjudication as essentially an expedient effort to overcome an unexpected hurdle in having his case heard.

[27] The circumstances before me, in my opinion, are consistent with those addressed in *Burchill*. As in *Burchill*, the grievor in this case was unsuccessful in challenging the employer's decision through the final level of the grievance procedure on the grounds stated in his original grievance. He changed how he specified his grievance in his (second) reference to adjudication. He did not argue those grounds during the internal grievance procedure.

[28] The grievor's effort to distinguish *Burchill* as not involving a "bona fide tort" is misguided. The issue here involves statutory interpretation, not the law of torts. The grievor in *Burchill* ultimately lost his case at judicial review not because he could not establish the grounds for his complaint, as the current grievor argues, but rather because he failed to assert those grounds during the internal grievance procedure, waited until his reference to adjudication to specify them, and thus failed to satisfy a necessary statutory criterion for establishing the adjudicator's jurisdiction.

[29] Based on the foregoing analysis, I find that the reference to adjudication before me does fall within the parameters of the *Burchill* decision.

B. Does the Board have discretion to accept this case based on the application of the *Burchill* decision, and if yes, should it do so?

[30] Counsel for the employer argues that the provisions of the *Act* do not give an adjudicator discretion to accept jurisdiction when the *Burchill* ruling applies. As the parameters of *Burchill* are met in the case before me, counsel argues that I must decline jurisdiction.

[31] The grievor contends that some measure of flexibility in applying *Burchill* is appropriate given the evolution of the jurisdiction and the requirement to treat all employees justly and fairly:

. . .

> *. . . some fundamental changes governing the federal workplace . . . reflected in legislation . . . . [have] weakened precedence such as Burchill and [given] the Board wider discretion.*
>
> . . .
>
> *It is suggested that when a financial penalty is levied with or without malice, the Board should have the opportunity to hear the matter. A penalty has a connotation of wrong doing/discipline. The Board has the right and responsibility under our new framework to ensure all employees are treated justly and fairly. The new legal paradigm gives the Board more flexibility to ensure the intent of the legislation governing Federal employees is being applied correctly.*

. . .

[32] I believe that there is a defensible argument for discretion in determining jurisdiction in a case where the responding party argues the application of *Burchill* to secure dismissal of a grievance. The discretion available to an adjudicator, however, is not necessarily of the nature argued by the grievor and is most certainly limited. An adjudicator may appropriately exercise some discretion or flexibility, in my view, when he or she analyzes the wording of a grievance or the evidence of how a grievor argued his or her case during the grievance procedure in order to determine the nature of the claim made by that grievor. Grievors often have little or no experience in drafting grievances. Words used can be imprecise and may not always reveal the issues at play to the full satisfaction of a professional labour relations practitioner or a third party. The task of the adjudicator is to interpret the words used as well as the contextual evidence in a fashion that respects the overarching objective of the legislation to provide fair resolution of conflicts that arise. Where there is some ambiguity or imprecision in the wording of a grievance or some uncertainty about the arguments made by a grievor during the grievance procedure, it may be appropriate to prefer a somewhat more liberal interpretation of a grievor's claim than to insist upon precise specification where the latter would result in a decision to deny a grievor access to third-party adjudication on jurisdictional grounds. As always, the exercise of discretion depends on the circumstances and the evidence.

[33] The case law has established, nonetheless, that there are very real limits to that discretion. As in *Shneidman*, the courts may well find that an adjudicator has erred if

he or she has given too broad an interpretation to a grievance for purposes of determining the application of *Burchill*. Certainly, where the wording of the original grievance and the evidence about how the grievor argued the case during the grievance procedure leaves little doubt that a claim subsequently made in a reference to adjudication was never raised earlier, the discretion disappears. The adjudicator's duty is to apply section 209 of the *Act* faithfully and in keeping with the direction given by the courts in *Burchill*.

[34] I find that the circumstances of the case before me do not provide room for discretion. The grievor never pursued a claim about discipline during the grievance procedure. To borrow the grievor's own words, the issue was, and is, "adequate back-pay for services rendered."

[35] The grievor contends that the issue of jurisdiction has evolved in a fashion that has weakened the *Burchill* precedent. I do not believe that he is on firm ground in making that argument. As stated above, I believe that section 209 of the current *Act* has established a continuing basis for arguing the application of *Burchill*. I also do not accept the grievor's proposition that the Board should hear any claim that involves a financial penalty regardless of why the employer imposed the penalty. The wording of paragraph 209(1)(*b*) is specific and binding. It limits an adjudicator's jurisdiction to those financial penalties that result from disciplinary action. While it is not necessary to this decision that I rule on the nature of the financial loss the grievor allegedly sustained, there are nevertheless strong *prima facie* indications in the written submissions that it was not a disciplinary penalty.

[36] I find that there is no basis on which I can accept jurisdiction to consider the grievance given the ruling in *Burchill*. I uphold the employer's objection to my jurisdiction.

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

(The Order appears on the next page)

IV. Order

[38] The grievance is dismissed.

January 18, 2008.

Dan Butler,
adjudicator