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File: 566-34-2174

Citation: 2008 PSLRB 99

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JUNE MALETTE

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Malette v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Jean-François Prégent, Professional Institute of the Public Service of Canada

For the Employer: Peter Cenne, Canada Revenue Agency

Decided on the basis of written submissions
filed July 21, August 18 and September 5 and 25, 2008.

I. Individual grievance referred to adjudication

[1] This decision addresses the objection of the Canada Revenue Agency ("the employer") to the jurisdiction of an adjudicator to hear an individual grievance referred to adjudication by June Malette ("the grievor").

[2] The grievor filed her grievance at the first level of the grievance procedure on September 26, 2007. She stated the details of her grievance and requested corrective action as follows:

> *I grieve the Selection Board decision not to allow me to re-enter Selection process #2006-4916-HQ-2424-0200. I was not given the opportunity to rewrite the WST until almost 1 year after my initial writing, despite the fact that I requested to rewrite the test through voluntary assessment as soon as I became eligible (ie, the retest period had expired) This lengthy delay in being able to write the test has had a negative impact on my career.*
>
> [corrective action]
>
> *I rewrote the WST on August 30, 2007 and attained the required level 3. These results have been entered into CAS.*
>
> *As corrective action I want to be re-admitted to the CS-03 process, which, as of this date has not been finalized. As per the status page on the web-site, placement has not yet begun due to delays scheduling language tests. Furthermore, the recent HRSC newsflash also indicates that this process is still in the assessment phase. In addition, I would like all other appropriate corrective actions.*

[3] Unsuccessful at each of the three levels of the grievance procedure, including the final level, the grievor referred the matter to the Public Service Labour Relations Board ("the Board") on June 30, 2008, with the support of her bargaining agent, the Professional Institute of the Public Service of Canada.

[4] The grievor used Form 20 to file her grievance, signifying that its subject matter is the interpretation or application of a provision of a collective agreement and that the reference to adjudication falls under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 2 ("the *Act*"). In the body of Form 20, the grievor identified the provisions at issue as "article 5.01, and others, of the AFS collective agreement with CRA."

[5] The collective agreement for the Audit, Financial and Scientific (AFS) Group ("the collective agreement") expired on December 21, 2007. Clause 5.01, to which the grievor refers, reads as follows:

> ***5.01*** *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*

[6] On July 21, 2008, the employer filed an objection to the jurisdiction of an adjudicator to hear the grievance on two grounds: first, the subject matter of the grievance concerns matters that are under the purview of the employer's staffing program and thus fall outside the *Act*; and second, the grievor's reference to adjudication modifies the original grievance by stating that its subject concerns the provisions of a collective agreement. Such a change offends the principle established in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[7] The Chairperson of the Board has assigned to me as an adjudicator to hear and determine the matter based on the written submissions received by the Board.

II. Summary of the arguments on jurisdiction

A. For the employer

[8] The employer contends that management informed the grievor at every step of the grievance process that her grievance concerns matters that fall under the purview of the employer's staffing program. Such matters, according to the employer, are not among the subjects that may be referred to adjudication under the *Act*.

[9] The employer noted clause 34.04 of the collective agreement which reads, in part, as follows:

. . .

> *(a) where there is another administrative procedure provided by or under any Act of Parliament to deal with his specific complaint such procedure must be followed,*

. . .

[10] Subsection 54(2) of the *Canada Revenue Agency Act*, S.C. 1999, c. 17, also stipulates that the collective agreement may not deal with matters governed by the

staffing program. Recourse in a case involving staffing must follow the procedures outlined in the *Canada Revenue Agency Act*. The grievance addresses a selection process that is clearly covered by the staffing program. Therefore, the *Public Service Labour Relations Act* is not the appropriate forum for resolving the grievor's concerns.

[11] The employer argued that the wording of the grievor's reference to adjudication substantially changes the grievance. The original grievance did not refer to any provision of the collective agreement, yet the reference to adjudication alleges violations of clauses 5.01 and others of that agreement. The change constitutes an attempt to modify the grievance in a fashion that offends the principle established in *Burchill*.

[12] The adjudicator should dismiss the reference to adjudication without a hearing.

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

[13] The grievor states in her submission that an adjudicator's jurisdiction to consider the grievance depends on whether the grievor had recourse under the staffing program to address the substance of her complaint. According to the grievor, if she did have such recourse under the staffing program, that ". . . recourse might be considered an available 'administrative procedure for redress' within the meaning of s.208(2) of the *Public Service Labour Relations Act* and Article 34.04(a) of the collective agreement . . . ." However, the grievor did not have access to recourse.

[14] The grievor alleges that the employer originally told her that there was no recourse in her case. That direction led the grievor not to seek "individual feedback" on a timely basis. The employer indicated to her that recourse was available only once per stage of the selection process and that the grievor had already sought individual feedback when she challenged her rating on the Writing Skills test.

[15] The grievor's complaint that she was not provided the option of a retest on a timely basis falls outside the scope of recourse under the staffing program. Similarly, her complaint that she should have been readmitted to the selection process is not governed by the staffing program. The employer considered and denied her request to be readmitted before any assessment of prerequisites took place for the reason that the length of time that the grievor took to retest her writing skills precluded her re-entry into the selection process. The employer's decision not to allow her to re-enter

the selection process was not a decision "within the selection process" and thus not a matter for which recourse to individual feedback is available.

[16] In *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.), the Federal Court concluded that an employee may be disentitled from presenting a grievance only if there is another procedure for redress where a "real" remedy is available. In *Byers Transport Limited v. Kosanovich*, [1995] 3 F.C. 354 (C.A.), at para 20, the Federal Court of Appeal stated that the administrative procedure for redress ". . . must be capable of producing some real redress which could be of personal benefit to the . . . complainant."

[17] Before subsection 208(2) of the *Act* applies to deprive the grievor of her right to file a grievance, she must have had the opportunity to obtain a "real" remedy that could deal meaningfully and effectively with the substance of her grievance and that could be of "personal benefit" to her. There was neither a "real" remedy nor any other remedy available at all. Subsection 208(2) ensures that the right to grieve is invoked only in situations where an employee has no other meaningful recourse rights. It was not intended to leave employees entirely without recourse rights.

[18] The grievor concedes that she did not refer to the management rights provision of the collective agreement in her original grievance. She contends nonetheless that her reference to adjudication merely points out which collective agreement provision was breached by the employer. Merely pointing out the breached provision did not result in a fundamental change to the nature of her grievance, according to the appropriate test that should be applied: *Haslett v. Treasury Board (National Defence)*, PSSRB File No. 166-02-20737 (19910212). The law is clear that a reference to adjudication should not be defeated simply because the original grievance did not mention a specific clause of the collective agreement that has been breached, as long as the essence of the dispute was set out in the grievance; *Canadian National Railway Co. v. UTU* (2005), 136 L.A.C. (4th) 270; Brown and Beatty, *Canadian Labour Arbitration*, at para 2:3122.

[19] The grievor referred me to a number of authorities that support the proposition that she may rely on an implied term in the management rights clause of the collective agreement that management rights must be exercised in a manner that is fair and reasonable or, alternatively, in a manner that is not arbitrary, discriminatory or in bad faith.

C. Employer's rebuttal

[20] The employer stressed that Parliament vested the Canada Revenue Agency with the authority to create an exclusive regime to deal with all staffing matters. The employer's staffing program, mandated by section 54 of the *Canada Revenue Agency Act*, provides the recourse mechanism within that regime. It is an administrative process for recourse that provides three types of redress: individual feedback, decision review and independent third-party review.

[21] The grievor is attempting to obtain redress for her concern about staffing through a process other than the mechanism authorized by subsection 54(1) of the *Canada Revenue Agency Act*. In *Dhudwal et al. v. Canada Customs and Revenue Agency*, 2003 PSSRB 116, at para 23 to 28, the Public Service Staff Relations Board determined that the staffing program does provide an administrative procedure for redress, a finding reinforced by the Federal Court in *Professional Institute of the Public Service of Canada v. Canada Customs and Revenue Agency and Public Service Alliance of Canada*, 2004 FC 507.

[22] The principle established in *Burchill* applies. Accepting jurisdiction to hear the grievance would allow the grievor to change the grounds upon which the grievance was originally submitted.

D. Grievor's additional comments

[23] The grievor stated that, at the final-level hearing on April 10, 2008, she pointed out to the employer's representative that the employer had breached clause 5.01 of the collective agreement. The employer had an opportunity in its final-level reply to address the alleged breach but chose not to.

III. Reasons

[24] I am satisfied that I can decide the jurisdictional objection based on the written submissions of the parties. An adjudicator's authority to determine a matter without an oral hearing is recognized under section 227 of the *Act*, which reads as follows:

> ***227.*** *An adjudicator may decide any matter referred to adjudication without holding an oral hearing.*

[25] The grievor filed her reference to adjudication under paragraph 209(1)(*a*) of the *Act*, which reads 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;*

[26] For the grievor's reference to adjudication to be properly within the jurisdiction of an adjudicator, its subject matter must fall within the ambit of paragraph 209(1)(*a*) of the *Act*. In Form 20, the grievor identified clause 5.01 "and others" as the applicable provisions of the collective agreement underlying the dispute. Her submissions do not reveal to which clauses the phrase "and others" is meant to refer. This analysis is thus limited to assessing jurisdiction with respect to the grievor's allegation that the employer violated clause 5.01, which reads as follows:

> ***5.01*** *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*

[27] In her submissions, the grievor seeks to enforce an implied obligation on the employer to exercise the management rights recognized by the bargaining agent under clause 5.01 of the collective agreement in a manner that is not arbitrary, discriminatory or in bad faith. She rejects the employer's argument that the subject matter of the grievance concerns staffing and that an adjudicator may not consider an issue relating to staffing because another "administrative procedure for redress" exists for staffing disputes under the employer's staffing program. The grievor also denies that invoking clause 5.01 in her reference to adjudication changed the nature of her original grievance in a fashion that violated the Federal Court of Appeal's direction in *Burchill*.

[28] I begin with the latter issue; that is, the employer's contention that the grievor's reference to adjudication offends the principle enunciated in *Burchill*. By casting the subject matter of her reference to adjudication as clause 5.01 of the collective agreement, did the grievor change the essential character of the grievance and, by doing so, run afoul of *Burchill*?

[29] The *Burchill* decision has been canvassed in many adjudication decisions under the *Act* and under the *Public Service Staff Relations Act*. In *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5, for example, the adjudicator summarized the decision and its significance as follows:

> . . .
>
> *[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.*
>
> . . .

[30] The wording of the original grievance in this case leaves little room for misinterpretation. The grievor contests the decision of ". . . the Selection Board . . . not to allow [her] to re-enter Selection process #2006-4916-HQ-2424-0200. . . ." She alleges further that she was not given the opportunity to rewrite the Writing Skills Test soon enough and that the delay in writing the test had a negative impact on her career. As corrective action, she seeks ". . . to be re-admitted to the CS-03 process . . . ."

[31] Those references, in my view, unequivocally establish that the essential problem for which the grievor seeks redress through the grievance process concerns a staffing matter. Nothing in the original statement of grievance alerts the employer to the allegation in the grievor's reference to adjudication that the employer violated a provision of the collective agreement. I cannot find in the original grievance any reference, direct or indirect, that can be reasonably interpreted as charging management with acting in an arbitrary or discriminatory manner or in bad faith — that is, that it violated the obligation that the grievor argues must be inferred from clause 5.01 of the collective agreement. Such a charge is serious in itself. If that is what the grievor intended to allege as the basis for her grievance, I believe that it is reasonable to expect the grievor either to have said so explicitly or to have used words that would have reasonably conveyed that sense to the receiving officer.

[32] The grievor submits as follows:

> . . .
>
> . . . *The nature of* [the grievor's] *complaint . . . was clearly set out in her grievance. In her referral to adjudication, she merely points out which collective agreement provision has been breached as a result of the employer's conduct as identified in her grievance. Merely pointing out the collective agreement provision breached did not result in a fundamental change to the nature of* [her] *grievance, which in our view is the appropriate test to apply.*
>
> . . .

[33] I respectfully suggest that the word "merely" inappropriately discounts the significance of the difference between the original grievance and what the grievor contests in her reference to adjudication. By "merely pointing" to clause 5.01 of the collective agreement in her reference to adjudication, the grievor claims that she has substantially imported into her grievance, regardless of its explicitly stated subject matter, the substance of a collective agreement violation sufficient to trigger jurisdiction under paragraph 209(1)(*a*) of the *Act*. Her approach, if accepted, would effectively endorse the proposition that clause 5.01 can be at issue whether or not there is some reasonable basis for finding that the written grievance itself discloses subject matter falling under clause 5.01. It would permit a grievor to overcome a jurisdictional prohibition — in this case, one against adjudicating a grievance that concerns staffing — and also to circumvent *Burchill* by claiming that a violation of clause 5.01 was inherent to the grievance allegation all along. In my view, the proposition advanced by the grievor is unfounded.

[34] Were it not for a further consideration to which I will shortly turn, I would accept the employer's *Burchill* objection based on the foregoing analysis.

[35] I wish to address in passing two decisions offered by the grievor in defending against the *Burchill* objection. The grievor asks me to consider *Haslett* for support for the position that *Burchill* applies only where there is ". . . a fundamental change in the nature of the grievance referred to adjudication. . . ." I agree with that general position but disagree that *Haslett* assists the grievor's argument. In *Haslett,* the adjudicator invoked *Burchill* to find that the grievor in that case improperly changed the fundamental nature of his grievance by alleging harassment based on national origin in his reference to adjudication. The original grievance in *Haslett* clearly stated harassment as its subject matter but neglected to link that harassment to a prohibited ground of discrimination. By taking the further step of associating the alleged harassment with the grievor's national origin in the reference to adjudication, the adjudicator found that the grievor improperly altered the case that the employer was called upon to answer during the grievance procedure.

[36] In comparison with *Haslett*, the grievor's introduction of an element alleging a violation of the collective agreement in her reference to adjudication would appear to comprise a more obvious and substantial change to the original grievance. In *Haslett*, the grievor did at least refer to discrimination in the form of harassment in his

grievance, although he neglected to specify that the disputed harassment constituted discrimination based on national origin. In the case before me, the manner in which the grievor described her grievance in the reference to adjudication bears no resemblance at all to the wording of the original grievance. Looking at the wording of the reference to adjudication, the reader can have no appreciation whatsoever that the grievor's concern is for something that happened in connection with, or as part of, a selection process.

[37] The grievor also asks me to consider *Canadian National Railway Co.* I do not find that decision to be very helpful. It raises a substantially different issue under a different statute, described by the arbitrator as follows at 276:

. . .

> *The issue in these proceedings is whether this Office, or any board of arbitration, can seize jurisdiction of a grievance which cites violations of work related statutes, and makes no reference to any article of the collective agreement as being allegedly violated. Intrinsic to the analysis of the issue are the provisions of section 60(1)(a.1) and 60.1(b) of the* Canada Labour Code *which provide as follows:*
>
> > *60(1) - An arbitrator or arbitration board has*
> >
> > . . .
> >
> > *(a.1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statue* [*sic*] *and the collective agreement;*
> >
> > . . .
> >
> > *(b) power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable.*
>
> . . .

[38] After surveying governing decisions of the Supreme Court of Canada, the arbitrator found at 280 that ". . . a grievance alleging little more than the violation of a work related statute is properly arbitrable. . . ." The main focus of the decision was not whether the grievor at some point changed the nature of his grievance — the situation to which *Burchill* applies — but, rather, whether an allegation of a breach of a work-related statute and the implied violation of the collective agreement that the union

associated with that breach was sufficient to establish the arbitrator's jurisdiction under the collective agreement. Both the facts in *Canadian National Railway Co.* and the debate can thus be distinguished.

[39] Returning to the "further consideration" mentioned above, the following brief reference appears in a supplementary email sent by the grievor to the Board after the employer submitted its rebuttal arguments on jurisdiction:

. . .

> *. . . on April 10, 2008, at the Final level hearing/consultation, the Institute pointed out to the employer's representative . . . that Article 5.01 of the AFS Group Collective Agreement was the provision breached as a result of the employer's conduct;*

. . .

[40] I find it somewhat troubling that the grievor said nothing about raising clause 5.01 of the collective agreement during the grievance process in her principal arguments, and only made that point after completion of the normal exchange of submissions in a supplementary email to the Board, albeit one that was copied to the employer's representative. How a grievance has been argued during the internal grievance procedure can be an important consideration in determining whether the principle enunciated in *Burchill* has been breached. The grievor, in my opinion, should have raised the reference to what happened at the final level hearing in her main written submission — instead of doing so almost as an after-thought — so that the employer could have addressed that point in its written rebuttal. As it is, the alleged fact that the grievor argued clause 5.01 at the final level is now before me and has not been contradicted. Without evidence to support a different finding of fact, I must accept the grievor's statement as true for the purpose of this preliminary determination. Does the statement change the situation?

[41] The fact that the grievor mentioned clause 5.01 of the collective agreement at the final level hearing does open the possibility of an arguable defence against the employer's objection based on *Burchill*. Assuming that the employer did come to know during the course of the internal grievance procedure — even if only at the final level — that the grievance included an allegation related to clause 5.01, it can be argued that there was an opportunity for the employer to consider the allegation and respond to it during that procedure and before the matter was referred to adjudication. In that

sense, the underlying problem that the *Burchill* decision is intended to prevent could be said to have been allayed. The wording of the grievor's reference to adjudication may not have raised a dimension that was new to the employer and may not have changed how the grievance was argued. Granting the grievor that possibility, I find that it would be inappropriate to sustain the employer's objection to jurisdiction based on *Burchill* alone.

[42] A fundamental problem nonetheless remains. Accepting that clause 5.01 of the collective agreement could have formed part of the grievance procedure dialogue between the parties does not change the reality that the essential problem addressed by the grievance concerns a staffing matter. The grievor disagrees with a decision taken by the employer about the conduct of a staffing process and with her treatment as a participant in that process. The grievor's own submissions include references that reconfirm that the fundamental subject matter of her grievance was, and remains, staffing. The following extracts from the grievor's submissions, in my view, illustrate the point:

> . . .
>
> *. . . Ms. Malette, is grieving both the employer's failure to allow her to re-enter a selection process and the fact that she was not given the opportunity to rewrite a test on a timely basis.*
>
> . . .
>
> *. . . in this case we submit that Ms. Malette's request to re-enter the competition process was considered and denied before any assessment of pre-requisites, etc. took place. . . .*
>
> . . .
>
> *. . . In this case, Ms. Malette's complaint concerning the refusal of the CRA to permit her to re-enter the competition process is not related to conduct "within the selection process", but instead is related to conduct outside of the selection process (i.e. namely the decision as to whether to permit her to enter the selection process, after which any complaints would then be considered "within the selection process").*
>
> . . .

[43] The grievor argues that clause 5.01 of the collective agreement obligates the employer to exercise management rights in a manner that is fair and reasonable or, alternatively, in a manner that is not arbitrary, discriminatory or in bad faith. Without ruling whether clause 5.01 does in fact create that obligation, it is clear that the management rights whose exercise are at issue are management rights concerning staffing. The grievor wants to litigate her case as a matter involving the interpretation or application of clause 5.01 so that she can secure corrective action regarding the staffing process. In her words, ". . . I want to be re-admitted to the CS-03 process . . . ." The grievor argues that the actions of the employer that she challenges are not related to conduct "within the staffing process" but such a distinction has very little significance, in my view, when it is clear that the essential nature of the redress sought by the grievor involves staffing. The details of the dispute cannot be understood outside the context of the operation of a staffing procedure. For example, the writing test that the grievor allegedly could not take "soon enough" was an evaluation procedure whose results were to be used in a selection process. To the extent that the employer may have acted arbitrarily or in bad faith or discriminated against the grievor regarding the writing test or any other similar element — a possibility on which I make no finding — those actions by any reasonable assessment cannot be divorced from the context of the staffing competition that the employer conducted.

[44] Paragraph 209(1)(*a*) of the *Act* does not provide for recourse vis-à-vis staffing. As recently as the decision in *Hureau v. Treasury Board (Department of the Environment)*, 2008 PSLRB 47, an adjudicator has confirmed at para 27 that ". . . any argument or any remedy requested by the grievor that involves the staffing process will be considered as being outside [an adjudicator's] jurisdiction." The decision in *Hureau* was based in part on subsection 208(2) of the *Act* which reads as follows:

> ***208.*** *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.*

Dhudwal et al and the Federal Court's decision in *Professional Institute of the Public Service*, cited by the employer, represent substantial confirmation that the employer's staffing program constitutes an "administrative procedure for redress" — the appropriate redress mechanism where the essential nature of the dispute involves staffing. While both decisions dealt with the issue in the context of the former *Public*

Service Staff Relations Act, R.S., c. P-35, s. 1, the determination remains germane under the *Act*, as verified in *Hureau*.

[45] I find that I have no jurisdiction to consider the grievance because its essential subject matter concerns staffing.

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

(The Order appears on the next page)

IV. Order

[47] The employer's objection to the jurisdiction of an adjudicator to hear the grievance is allowed.

[48] The grievance is dismissed.

November 25, 2008.

Dan Butler,
adjudicator