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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

MARCELLE GIROUX

Grievor

and

**TREASURY BOARD
(Canada Border Services Agency)**

Employer

Indexed as

Giroux v. Treasury Board (Canada Border Services Agency)

In the matter of grievances referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievor: Krista Devine, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Decided on the basis of written submissions
filed January 2 and 30 and February 6, 2009.

REASONS FOR DECISION

I. Grievances referred to adjudication

[1] On December 3, 2008, my decision (2008 PSLRB 102) concerning the merits of these two grievances was issued to the parties. In both cases, Marcelle Giroux (“the grievor”) was successful. For reasons outlined in that decision, I strongly encouraged the parties to fashion a remedy for themselves, failing which I would remain seized for a period of 30 days to determine an appropriate remedy, after considering the parties’ submissions. The parties were unable to reach an agreement.

[2] On April 1, 2005, the *Public Service Labour Relations Act (PSLRA)*, 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*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”).

[3] On January 5, 2009, the Canada Border Services Agency (“the employer”) requested additional time to provide submissions. The request was granted, and new time frames were provided to the parties, which were to conclude with the receipt of the rebuttal from the Public Service Alliance of Canada (“the bargaining agent”) which was received in the first week of February 2009.

[4] A further delay occurred because I was out of the country until the first week of March 2009. I have now had the opportunity to consider the points of argument and the supporting jurisprudence, and my findings on remedy follow.

II. Summary of the evidence

[5] A useful starting point is reviewing the facts to which the parties were able to agree as follows:

1. The effective date of reinstatement is August 30, 2004, the date on which the grievor was terminated.
2. The principle of mitigation applies. The employer will deduct from retroactive wages any and all monies received by the grievor during the retroactive period.
3. The employer requires (and the bargaining agent has agreed) to the request that the grievor provide income tax statements for the retroactive period and “statements concerning the exact nature, amount and dates upon which benefits (from employment insurance,

the *Superannuation Act* and the Canada Pension Plan) were provided.”
(bargaining agent submissions January 2, 2009 p.3)

III. Reasons

A. Issues to be determined

[6] Unfortunately, a number of issues remain on which the parties were not able to agree. I will deal with them in the order in which they were raised.

1. Request for interest on monies owed to the grievor

[7] I know of no decision rendered by an adjudicator under the *PSSRA* awarding interest on salary as a result of retroactive reinstatement. I note that the employer did not deal with this issue.

[8] These references to adjudication were made under the *PSSRA*. Under that *Act*, the jurisprudence states that an adjudicator has no authority to award interest (*Canada (Attorney General) v. Nantel*, 2008 FC 84, upheld in 2008 FCA 351). This is in contrast to the provision found at paragraph 226(1)(i) of the *PSLRA*.

[9] The only jurisprudence cited by the bargaining agent deals with three cases providing interest on damages awarded for violation of human rights legislation. For reasons I will explain below, those cases don't apply. In any case, I believe the remedy provided fully addresses the grievor's request to be made whole.

2. Request for restoration of leave credits from May 13 to May 28, 2002

[10] The evidence is clear that the grievor was involuntarily placed on leave. I had previously decided that that leave was neither necessary nor done in good faith. On May 14, 2002, the grievor grieved that action and others that she believed had violated her human rights. For her to be made whole or to be restored to the position in which she would have been had those violations not occurred, the employer must restore any leave credits used during that period.

3. Claim for damages under the *Canadian Human Rights Act*

[11] The grievor requests damages totalling \$40,000 under paragraph 53(2)(e) and section 53(3) of the *Canadian Human Rights Act (CHRA)*. The damages are meant to compensate her for pain and suffering incurred because of the employer's

discriminatory practices and its willful and reckless disregard of the grievor's human rights.

[12] The employer submits that I have no jurisdiction to award damages. As previously stated, the grievances were filed under the former *Act*, the *PSSRA* and not the new *Act*, the *PSLRA*. The former *Act*, the employer argues, makes no provision for an adjudicator to award damages under the *CHRA*.

[13] I agree with the employer. Indeed, section 61 of the *Public Service Modernization Act* dictates that these two references to adjudication must be dealt with in accordance with the provisions of the former *Act*.

4. Entitlement to representation costs

[14] I have no evidence of the nature of the grievor's representation costs. Nor do I have evidence explaining why the grievor consulted a labour lawyer rather than her bargaining agent following her termination. In any case, I have already decided that I have no authority to award damages under the *CHRA*.

5. Restricting the retroactive period to end in April 2007

[15] I see no merit in this request. It is the employer who discriminated against the grievor. It is the employer who terminated her employment in haste and without proper consideration of the duty to accommodate. So far the grievor has borne the brunt of those actions, and she can least afford to assume the costs.

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

IV. Order

[17] The grievor is to be reinstated, effective August 30, 2004.

[18] The grievor will provide documentation to the employer showing all monies received during the retroactive period.

[19] The employer will pay the grievor an amount reflecting salary and benefits due from August 30, 2004, minus statutory deductions and monies received from pensions and other work as evidenced by the documentation provided pursuant to paragraph [18] of this decision.

[20] The employer will restore any leave credits that the grievor used to cover her involuntary leave from the workplace from May 13 to 28, 2002.

April 9, 2009

**Barry D. Done,
adjudicator**