Date: 20090611

Files: 566-34-2105 and 2106

Citation: 2009 PSLRB 73

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GORDON SWAN AND DAVID JOHN McDOWELL

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Swan and McDowell v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievors: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Peter Cenne and Tracey O'Brien

Decided on the basis of written submissions
filed July 4, 2008 and March 11, April 16 and 29, 2009.

I. Individual grievances referred to adjudication

[1] Gordon Swan and David John McDowell ("the grievors") referred individual grievances to adjudication on June 12, 2008 under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* ("the *Act*" or *PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. Both grievors identified a breach of article 1 (Purpose of Agreement) of their collective agreement as the subject matter of the dispute. In the case of Mr. Swan, he alleged that the Canada Revenue Agency ("the Agency" or "the employer") has ". . . acted in bad faith and arbitrarily by not providing recourse. No other recourse is available." Mr. McDowell similarly wrote that ". . . [the] Employer has acted in bad faith and in an arbitrary fashion regarding its staffing policy."

[2] The collective agreement in question is for the Audit, Financial and Scientific bargaining unit represented by the Professional Institute of the Public Service of Canada ("the bargaining agent"). Its expiry date was December 21, 2007.

[3] Mr. Swan originally stated the details of his grievance as follows when he filed it at the first level of the grievance process:

> *On September 16, 2006 I requested Individual Feedback in accordance with the Staffing Program Annex E pertaining to Selection Process Number 2005-4041-SOR-1214-3066. I was offered informal review on September 21, 2006 with no further recourse that is not part of the policy. At the assessment stage of the staffing process I was previously determined to be treated in an arbitrary manner and the corrective action has apparently been completed. The limited information that has been provided to me does not appear to address the Decision of the Responsible Manager Mr. Tony Prosia. . . .*
>
> [corrective action]
>
> *That I be granted the Individual Feedback and opportunity for Decision Review pertaining to Selection Process Number 2005-4041-SOR-1241-3066.*

[4] Mr. McDowell originally outlined his grievance as follows:

> *Contrary to the CRA staffing programme and principles I have been inappropriately denied formal recourse on Staffing process #2005-4041-SOR-1214-3066/2005-4047-SOR-1216-3005.*

> *In the assessment phase of staffing, I have the right to formal feedback. If unhappy with feedback, and I have claims of being treated arbitrarily, I have the right to further recourse – decision review. If changes, as a result of recourse (as in this case) or otherwise, are made to the assessment tools and those changes are substantive and result in influencing my appointment (or non-appointment as in this case), I am entitled to recourse under the assessment stage of the staffing program.*
>
> [corrective action]
>
> *I be allowed formal feedback and decision review in selection process #2005-4041-SOR-1214-3066/2005-4047-SOR-1216-3005.*

[5] On June 25, 2008, the employer objected to the jurisdiction of an adjudicator to consider the grievances and asked the Public Service Labour Relations Board ("the Board") to dismiss them without a hearing.

[6] This decision addresses the employer's preliminary objection.

II. Preliminary objection

[7] The employer cited several grounds for its jurisdictional objection. It argued that the grievances concern matters that are governed by the Agency's staffing program, developed under the authority of section 54 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17 *(CRAA)*. According to the employer, the staffing program constitutes an administrative procedure for redress within the meaning of subsection 208(2) of the *PSLRA*, which reads as follows:

> *(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.

The employer submitted that that subsection operates to preclude an employee from grieving a matter related to the staffing program, as is the case with the grievances at issue.

[8] Subsection 54(2) of the *CRAA* states that no collective agreement may deal with matters governed by the staffing program. As a result, the employer maintains that the staffing program does not, and cannot, form part of the collective agreement that governs the parties in this case. On that basis, the grievors do not have a dispute with

their employer that has as subject matter a provision of the collective agreement and that may properly be referred to adjudication under paragraph 209(1)(*a*) of the *Act*. That provision 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;*

[9] As confirmed by the decision of the Federal Court in *Canada (Attorney General) v. Gagnon*, 2006 FC 216, the Agency's staffing program has the force of law. As such, the employer asserted that the grievors could have contested issues related to the staffing program through an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[10] The bargaining agent replied to the employer's preliminary objection on behalf of the grievors on July 4, 2008. The bargaining agent representative argued as follows:

> . . .
>
> *In the reference to adjudication, it was pointed out that these grievors will be referring to Article 1.01 of the collective agreement and that this is an issue of bad faith. This in itself should give jurisdiction to the board. Because the occurrence of bad faith in this case happens to be in regard to a staffing situation makes it no less a matter of bad faith. In our view, it is a further act of bad faith to attempt to shelter unreasonable actions beneath the cover of the staffing programme.*
>
> *Article 1.0* [*sic*] *and bad faith were not referred to in the grievance because the grievors had no way of knowing that the employer would display bad faith during the grievance process. This they did in their response at level 3. That response is at the board and I take it has been reviewed by Mr. Cenne.*
>
> *The issue of dealing in good faith and the comments made in the 1st and 3rd level responses were brought to the employer's attention at the final level of the grievance process. This is not a new issue.*

> *The question of whether an employer acted in bad faith, unreasonably or arbitrarily in dealing with their employees is a question which the board has jurisdiction to deal with. This principle is enunciated and agreed to in Article 1.0* [*sic*] *of the Collective agreement. Section 209(1) of the PSLRA is applicable.*
>
> *Bad faith and the conduct of the employer in dealing with its employees is not an issue governed by the staffing program.*
>
> . . .

[11] The Chairperson of the Board subsequently appointed me as an adjudicator to hear and determine these matters. After reviewing the record, I decided to rule on the jurisdictional objection as a preliminary matter and to do so based on written submissions, under the authority of section 227 of the *Act*, which reads as follows:

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

[12] To assist my consideration of the preliminary matter, the Registry of the Board, on my direction, sought further written submissions from the parties on the following questions:

> *1. Have the grievors raised within the individual grievance process any allegation that the employer has breached clauses 1.01 and 1.02 of the applicable collective agreement?*
>
> *2. If the answer to question 1 is in the affirmative, does such an allegation enable an adjudicator to take jurisdiction over issues relating to the interpretation or application in respect of the grievors of a provision of the Canada Revenue Agency's* Staffing Program*?*
>
> 3. *What application, if any, do adjudication decisions such as* Malette v. Canada Revenue Agency, *2008 PSLRB 99*, Hureau v. Treasury Board (Department of the Environment), *2008 PSLRB 47, and* Dhudwal et al. v. Canada Customs and Revenue Agency, *2003 PSSRB 116, and Federal Court decisions such as* Professional Institute of the Public Service of Canada v. Canada Customs and Revenue Agency, *2004 FC 507, and* Canada (Attorney General) v. Gagnon, *2006 FC 216, have to the present grievances?*
>
> . . .

III. Summary of the arguments

A. For the employer

[13] The employer reiterated its position that the Agency's staffing program is an administrative process for redress as required by the *CRAA*: see *Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency),* 2004 FC 507. It has the force of law and binds the parties: see *Canada (Attorney General) v. Gagnon*, 2006 FC 216. The appropriate recourse for an alleged violation of the staffing program is a judicial review application to the Federal Court.

[14] The bargaining agent and the employer have recognized and agreed in clause 34.04 of the collective agreement that employees may not present grievances concerning matters in respect of which another procedure for redress is provided under an Act of Parliament. Clause 34.04 states as follows:

> ***34.04*** *Subject to and as provided in Section 91 of the* Public Service Staff Relations Act*, an employee who feels that he has been treated unjustly or considers himself aggrieved by an 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 34.02, except that:*
>
> *(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.*
>
> . . .

Therefore, the collective agreement bars employees from pursuing grievances concerning the staffing program — for which there is another statutory redress process — as does subsection 208(2) of the *PSLRA*.

[15] Furthermore, the grievances do not involve a subject matter listed under subsection 209(1) of the *Act* and, specifically, do not involve the interpretation or application of a provision of the collective agreement as is required for a grievance referred to adjudication under paragraph 209(1)(*a*).

[16] The employer maintains that neither the grievors nor the bargaining agent alleged a violation of article 1 (Purpose of Agreement) of the collective agreement at any step of the grievance process. By citing article 1 in their references to adjudication,

the grievors are attempting to modify their grievances to comply with paragraph 209(1)(*a*) of the *Act* and, in doing so, are offending the principle established in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[17] In *Canada (Attorney General) v. Lâm*, 2008 FC 874, the Federal Court reviewed an adjudicator's finding that Article 1 of the collective agreement gave him jurisdiction to consider the application of a Treasury Board policy — on harassment, in that instance. The Federal Court found that "[a]rticle 1 of the collective agreement is a general clause, an introduction or a preface that does not grant any substantive right to employees." According to the Federal Court, the adjudicator exceeded his jurisdiction and misinterpreted article 1. In this matter, the employer similarly submits that there is nothing in the collective agreement to support a contention that article 1 was meant to encompass staffing matters.

[18] In *Dhudwal et al. v. Canada Customs and Revenue Agency*, 2003 PSSRB 116, the Board considered complaints about the adequacy of recourse provided under the Agency's staffing program. It found as follows:

. . .

> ***[27]*** *The remedy that the grievors are seeking does not lie with adjudicators appointed under the PSSRA, but rather in the Federal Court. Indeed, there have been several requests for judicial review as found in the case law submitted by the employer where the Federal Court did review the staffing recourse of the CCRA and individual cases.*

. . .

[19] According to the employer, the decision in *Hureau v. Treasury Board (Department of the Environment)*, 2008 PSLRB 47, can be distinguished. In that decision, the adjudicator assumed jurisdiction over the narrow issue of a violation of the "Employment References" article of the applicable collective agreement that was explicitly referenced in the original grievance. In these references to adjudication, the original grievances did not allege a breach of the collective agreement and clearly concern only the employer's staffing program as well as a selection process governed by the employer's staffing program, matters over which an adjudicator lacks jurisdiction.

[20] In *Malette v. Canada Revenue Agency*, 2008 PSLRB 99, the adjudicator observed, at para. 30, that "[t]he wording of the original grievance in this case leaves little room for misinterpretation." The employer maintains that the same can be said about these grievances. Accepting jurisdiction over them on the basis of an alleged violation of clauses 1.01 and 1.02 of the collective agreement that did not form part of their original grievances would amount to permitting the grievors to overcome a statutory bar. As in *Malette*, an adjudicator simply has no jurisdiction to consider the references to adjudication because their essential subject matters concern staffing.

[21] In summary, the employer submits that the Board does not have jurisdiction to consider the references to adjudication and that it must dismiss the grievances.

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

[22] The bargaining agent provided the following summary of the events that led to these grievances:

> . . .
>
> [The grievors] *were applicants in Selection Processes # 2005-4041-SOR-1214-3066/2005-4047-SOR-1216-3005.*
>
> *They were unsuccessful in the assessment phrase* [*sic*] *of the staffing process and consequently were notified they would not be in the pool for placement.*
>
> *They asked for and received Individual Feedback followed by Decision Review regarding certain aspects of the marking. Their allegations said that they were treated arbitrarily.*
>
> *Mr. Tony Prosia, the decision reviewer, agreed that they had been treated arbitrarily in the process . . . and so ordered in his notice of decision review that various aspects of the assessment be done again, including global marking.*
>
> *Nine months later the results of the remarking came out and neither of the two original applicants were placed in the pool.*
>
> *It was apparent to the applicants that not all of the recommendations Mr. Prosia had made were in fact implemented.*
>
> *They asked for Individual feedback as per the Staffing program policy.*
>
> *They were denied Individual Feedback.*

> *Instead of Individual feedback they were offered "informal feedback". No known or identified part of the staffing program allows for what was referred to as "Informal" feedback. And the employer was clear that this was not a form of recourse.*
>
> *The applicants declined informal feedback as it wasn't part of the staffing program and in their view its offer was illegitimate.*
>
> [The grievors] *questioned why they would be denied recourse and attempted to reason with the CRA regarding the staffing program and how Annex "E" . . . contemplated the recourse they were asking for.*
>
> *Ms. Dianne Kemp of Human Resources responded to Mr. Swan on September 20th,2006 saying: " In keeping with the intent of the staffing program directives , no further recourse is given after corrective measures" . . .*
>
> *On September 22 ,2006 Mr. Gauthier, PIPSC union steward Hamilton , sent a response . . . to Ms. Kemp and the Director of the Hamilton TSO at that time, Ms. Charlton. In his email, Mr. Gauthier raises issues of fairness and transparency as well as the failure of CRA to follow their own policies.*
>
> *On October 10, 2006 the two individuals filed a grievance stating that they had been denied access to their statutory rights under the staffing Program.*
>
> . . .

[23] The bargaining agent maintains that it presented the issue of the employer's conduct, including manipulation, bad faith and retroactive application of non-existent policies, at the fourth level of the grievance process. The employer's fourth-level response failed to address those issues.

[24] The grievors referred their grievances to adjudication on the basis of bad faith. Reference was made to clauses 1.01 and 1.02 of the collective agreement as they were the signposts for "good faith" dealing. It is obvious that no direct mention is made of clauses 1.01 and 1.02 in the grievances themselves, but the principles in those two provisions were in play from the start.

[25] No attempt has been made to change the characters or natures of the grievances. The bargaining agent consistently raised the issues identified in the references to adjudication before, during and after the grievance process.

[26] The bargaining agent argues that it is clear that clauses 1.01 and 1.02 of the collective agreement are not there to provide substantive rights as tangible as pay or benefits but that they do serve the legitimate and valuable purpose of providing a general guide to behaviour and conduct in the relationship of the parties. They are the only clauses that do so. As such, they should not be rendered meaningless.

[27] Clause 1.01 of the collective agreement states that "[t]he purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Institute . . . . [emphasis added]" That statement does not exclude conduct between the employer and employees about promotions or any other area of interest.

[28] Clause 1.02 of the collective agreement states as follows:

> ***1.02*** *The parties to this agreement share a desire to improve the quality of the Canada Customs and Revenue Agency, to maintain professional standards, and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish within the framework provided by law, an effective working relationship at all levels of the Canada Customs and Revenue Agency in which members of the bargaining units are employed.*
>
> [Emphasis added]

[29] It can be inferred from the fact that the parties signed off clauses 1.01 and 1.02 of the collective agreement that they intended to follow them. It can also be inferred that actions taken in bad faith would not be acceptable under those provisions. Bad faith does not lead to effective working relationships, nor does it lead to ". . . harmonious and mutually beneficial relationships . . . ."

[30] Even if the adjudicator rejects the grievors' arguments about the validity of referencing article 1 of the collective agreement, the bargaining agent contends that the employer's actions constitute bad faith and that bad faith, in and of itself, is an issue that an adjudicator has jurisdiction to consider.

[31] The grievors are not asking the adjudicator to determine whether they should be appointed. They are not asking the adjudicator to enter into the staffing discourse. They are asking for a hearing to examine why the employer denied them access to

redress. They are asking the adjudicator to inform the employer that it cannot act in bad faith just because the issue stems from staffing.

[32] The bargaining agent submits that the situation before the adjudicator is similar to a rejection-on-probation grievance. Normally, an adjudicator would not accept jurisdiction to consider a rejection on probation but would examine the situation if there were allegations of bad faith. In that situation, the adjudicator is not revisiting the employer's decision but is delving into it to ensure that it was made in good faith.

[33] The grievors' position is that the employer is attempting to use the staffing program as a shield to protect itself against the consequences of its improper conduct. That could not have been Parliament's will. The employer's conduct constituted bad faith and a deliberate manipulation of the rights of employees.

[34] The bargaining agent maintains that the staffing program itself and the recourse that it provides is not ". . . an administrative procedure for redress. . ." in this case because the employer decided that there would be no recourse. There is no ". . . administrative procedure for redress. . ." in place if redress is denied when it clearly is intended to be available. It is true that the employer provided an option for "informal feedback," but "informal feedback" is not true recourse and is not found within the bounds of the staffing program. The very fact that that would be offered at all indicates that there was no ". . . administrative procedure for redress. . ." in place, according to the Agency.

[35] The grievors were misled into believing that they had access to recourse under the staffing program. The employer's response at the third level of the grievance process said two things. First, no person taking an objective view of the policy could logically dispute that they were entitled to recourse. Second, that right to recourse can be arbitrarily withdrawn on a whim. It turns out that recourse under the staffing program was not based on what the program said but, rather, on what the employer said, at any given time, the intent of the program should be [emphasis in the original].

[36] In the circumstances faced by each grievor, there is no other ". . . administrative procedure provided by or under any Act of Parliament to deal with his specific complaint. . . . [emphasis added]". The grievors respectfully submit that the employer's conduct as described was willful, arbitrary and in bad faith. They request a hearing to prove the merits of their case.

[37] The bargaining agent offered the following comments on the case law.

[38] *Dhudwal et al.* can be distinguished. The adjudicator states the following at paragraph 26: "Because [the grievors] were not satisfied of the result of the staffing recourse, they filed their grievances and the employer replied that this was not a grievable matter." In this case, the grievors are not complaining about the unsatisfactory nature of the results of the staffing procedure recourse. They are reacting to the fact that they were given no opportunity for recourse. They do not seek to correct an unsatisfactory staffing decision. Instead, they seek to examine the capricious reasoning behind the decision not to provide recourse.

[39] Contrary to the situation described in *Malette*, the bargaining agent in this case raised the issue of bad faith at the fourth level of the grievance process. Once the third-level response confirmed the grievors' position, but denied the remedy, the issue was clearly separate from staffing. It became an issue of conduct and of the deliberate manipulation of the staffing program.

[40] In *Malette*, the adjudicator found, at paragraph 42, that "[t]he 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 bargaining agent suggests that a distinction can be made in this case. The grievors are not arguing about a staffing decision that came down as a result of recourse. They are arguing that <u>they are not allowed a decision</u> under the staffing program's provisions for recourse.

[41] The grievors contend that, contrary to the finding at paragraph 43 of *Malette*, the details of their dispute <u>can</u> be understood outside the context of the operation of a staffing procedure. Their argument could apply to any number of situations and policies outside of staffing.

[42] In summary, the grievors contend that decisions made by management, staffing or otherwise, must be sound, rooted in good business sense and in good faith, and aligned with the purpose of the collective agreement. The grievors recognize that they must prove all their allegations about the employer's actions. They request the opportunity of a hearing to substantiate the merits of their claims and ask the adjudicator to reserve his decision on the jurisdictional question pending that hearing.

C. Employer's rebuttal

[43] In its rebuttal submissions, the employer referred me to *Johal v. Canada (Revenue Agency)*, 2008 FC 1397, in which the Federal Court found as follows:

. . .

> *38. . . . in creating the* Canada Revenue Agency Act*, Parliament intended to provide this Agency with exclusive authority to create a complete regime to deal with all staffing matters. Recourse relating to staffing matters is provided to every Canada Revenue Agency's employee in every foreseeable situation relating to the full spectrum of employer-employee relationship.*

. . .

[44] The bargaining agent submitted that the adjudicator should hear the evidence before making a decision on jurisdiction because it is alleged that the employer has acted in bad faith. The original grievances make no allegations of bad faith. The employer has at no time been capricious, manipulative and unfair or demonstrated bad faith or improper conduct in its dealings with the grievors, as alleged by the bargaining agent. The grievors accessed recourse under the staffing program and, as a result, corrective measures were undertaken. As indicated by the bargaining agent, the employer advised the grievors, immediately and transparently, that they were not able to access further individual feedback after any corrective measures had been made. The grievors were offered informal feedback, which they declined. From the outset, the employer explained to the grievors, in good faith, that it was never the intent of the staffing program to allow for individual feedback following corrective measures. There has been no attempt by the employer to apply a policy retroactively, as alleged by the bargaining agent.

[45] As a matter of law, the employer submits that an adjudicator could not assume jurisdiction over these grievances even if there existed evidence of bad faith on the part of the employer. The grievors could have properly pursued their concerns by means of an application for judicial review under section 18.1 of the *Federal Courts Act.*

IV. Reasons

[46] The first question that the Registry of the Board posed to the parties on my behalf was the following: "Have the grievors raised within the individual grievance process any allegation that the employer has breached clauses 1.01 and 1.02 of the applicable collective agreement?"

[47] Article 1 (Purpose of the Agreement) of the collective agreement reads as follows:

> ***1.01*** *The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Institute, to set forth certain terms and conditions of employment relating to remuneration, hours of work, employee benefits and general working conditions affecting employees described in the certificate issued by the Public Service Staff Relations Board on December 12, 2001, and as amended on July 29, 2005 covering employees of the Audit, Financial and Scientific bargaining unit.*
>
> ***1.02*** *The parties to this Agreement share a desire to improve the quality of the Canada Customs and Revenue Agency, to maintain professional standards and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish within the framework provided by law, an effective working relationship at all levels of the Canada Customs and Revenue Agency in which members of the bargaining units are employed.*

[48] It is clear that the grievances filed at the first level of the grievance process by the grievors did not specifically refer to a breach of article 1 of the collective agreement. Furthermore, nothing in the submissions made on behalf of the grievors established that they, or their bargaining agent, modified the grievances at any subsequent level of the grievance process to clearly specify that the employer had violated article 1. Instead, the bargaining agent asserts that it raised charges of manipulation, bad faith and retroactive application of non-existent policies at the fourth level of the grievance process based on the employer's third-level response. It maintains that such conduct — summarized as "actions taken in bad faith" — would not be acceptable under article 1. It posits that bad faith does not lead to the ". . . harmonious and mutually beneficial relationships . . ." or to the "effective working relationships" that article 1 embraces. In its view, article 1 thus expresses the

"signposts" for "good faith" dealing. By that measure, clauses 1.01 and 1.02 were in play from the start of the grievance process even though they are not mentioned in the grievances themselves.

[49] I have no reason to question the bargaining agent's contention that it introduced issues related to alleged manipulation, bad faith and retroactive application of a policy at the fourth level of the grievance process. The employer, for its part, did not challenge the bargaining agent's account in rebuttal. However, I do not accept that what the bargaining agent said at that hearing — presumed to be true — had the effect of putting article 1 of the collective agreement on the table.

[50] The effect of the bargaining agent's submission is that article 1 must be read as establishing an obligation on the employer to act in good faith and that that obligation, as a matter of collective agreement interpretation and application, is triggered whenever a party alleges elements of bad faith in discussions during the grievance process, regardless of the details of the grievance at issue.

[51] The bargaining agent's submission in that regard fails for the following reason: The words "good faith" and "arbitrary" (the other term used by the grievors in their references to adjudication) do not appear in article 1 of the collective agreement. The phrases that do appear, such as ". . . harmonious and mutually beneficial relationships . . ." and ". . . an effective working relationship . . .", suggest laudable intentions shared by the parties but nothing more about the specific behaviours or standards required of the parties to realize those objectives. Certainly, the bargaining agent has not offered any proof that the parties intended that the words in article 1 establish a binding obligation on the employer to act in good faith and in a non-arbitrary fashion in its interactions with employees. The existence of such an obligation is an inference — perhaps not unreasonable — but an inference nonetheless. In my view, a much clearer foundation for that inference would be required in the actual words used by the parties in article 1 to sustain the argument that the application of article 1 is a live issue and an integral part of a grievance whenever a party alleges bad faith or arbitrary conduct on the employer's part at some stage of the grievance process.

[52] Therefore, I rule that the grievors did not properly raise a violation of article 1 of the collective agreement as part of their grievances during the grievance process. In the employer's submission, the doctrine stated in *Burchill* applies as a result. I agree.

The underlying purpose of the ruling in *Burchill* is to prevent a party from modifying the basis of a grievance at the stage of referring it to adjudication. In practice, the *Burchill* doctrine requires that the basis of a grievance must be fairly revealed to the employer in its original wording or as argued during the grievance process so that the employer has the opportunity to respond to the issues raised. When the grievor changes the basis of the grievance on referring it to adjudication, it undermines the purpose and effectiveness of the grievance process — resolving the actual issue as originally grieved. Moreover, when the effect of the change is to recast a grievance so as to improve the possibility that it will be found to fall within the proper subject matter of a reference to adjudication, the nature of the underlying concern becomes even more apparent.

[53] While my ruling that the grievors did not raise article 1 of the collective agreement in their grievances or during the grievance process provides sufficient grounds to dismiss the grievances for lack of jurisdiction, the grievances would fail for other reasons, even if article 1 were properly before me. I wish to offer several further comments about those reasons, including comments that address the other two questions submitted to the parties by the Board's Registry on my behalf (see paragraph 12 of this decision).

[54] In the first place, I find the ruling in *Canada (Attorney General) v. Lâm*, cited by the employer, highly persuasive. The Federal Court examined the following clauses of the collective agreement:

. . .

> *1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the Alliance and the employees and to set forth herein certain terms and conditions of employment for all employees described in the certificate issued by the Public Service Staff Relations Board on June 7, 1999 covering employees in the Program and Administrative Services Group.*
>
> *1.02 The parties to this Agreement share a desire to improve the quality of the Public Service of Canada and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and efficiently served. Accordingly, they are determined to establish, within the framework provided by law, an effective working*

> *relationship at all levels of the Public Service in which members of the bargaining units are employed.*
>
> . . .

Allowing for differences in the specific identifying references, the foregoing provision is virtually identical to article 1 of the collective agreement in this case. The Federal Court's assessment of the provision at paragraph 28 was concise and powerful. It stated the following: "Article 1 of the collective agreement is a general clause, an introduction or a preface that does not grant any substantive right to employees." Ms. Lâm had alleged that her employer had failed to comply with its personal harassment policy. When the adjudicator accepted to review her case as a matter involving the letter and spirit of article 1, he committed a reversible error, according to the Federal Court. The Court wrote as follows at paragraph 27:

> *. . . by deciding that the Treasury Board harassment in the workplace policy is consistent with the objectives of article 1 of the collective agreement, he misinterpreted the article and exceeded his jurisdiction. Furthermore, his decision is unreasonable.*

[55] In my view, the same finding applies in the circumstances of this case. The true effect of the bargaining agent's argument, if accepted, would be to bring the employer's compliance with its staffing program under scrutiny as a matter involving the spirit and intent of article 1 of the collective agreement. As the Federal Court found in *Canada (Attorney General) v. Lâm*, however, article 1 creates no enforceable rights and does not empower an adjudicator to review an employer policy that lies outside the bounds of the collective agreement. Were I to accept jurisdiction over the grievances in this case as a matter involving the interpretation and application of article 1, I believe that I would commit the same error identified by the Federal Court.

[56] The bargaining agent maintains that this case is analogous to the situation where an adjudicator agrees to examine an employer's decision to reject an employee on probation — a subject matter that, on its face, lies outside his or her jurisdiction — for evidence of bad faith. On that basis, the bargaining agent submits that I should conduct a hearing and receive evidence about the employer's alleged bad faith in dealing with the grievors.

[57] The primary purpose of evidence in a case involving a rejection on probation is to allow an adjudicator to satisfy himself or herself that the subject matter of the

grievance is, in fact, a rejection on probation. As verified by what has now become a substantial body of case law, once the adjudicator is satisfied that the employer acted for a *bona fide* employment-related reason in rejecting an employee on probation, his or her jurisdiction comes to an end: see, for example, *Canada (Attorney General) v. Leonarduzzi,* 2001 FCT 529; *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; and *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.). The issue of bad faith arises to the extent that proof of bad faith conduct may justify a conclusion that there was no *bona fide* employment-related reason for the rejection, that the decision to reject masks something else and that that "something else" — an intent to discipline, for example — falls within the adjudicator's jurisdiction. When an adjudicator accepts jurisdiction over a grievance that, on its face, involves a rejection on probation, it does not signify that the "bad faith" of the rejection on probation is adjudicable *per se*, but rather that the employer's decision has been revealed in its essential character to involve a subject matter that can properly be referred to adjudication under the *Act*. From that perspective, "good faith/bad faith" is not a catch-all criterion that allows an adjudicator to reach into subject matter that is otherwise outside his or her authority. The search for "bad faith" is a search for evidence of motives that betray the real subject matter of a grievance — subject matter that is defined by the *Act* as adjudicable.

[58] For example, in *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (QL), the Federal Court found that the adjudicator acted within her authority when she examined whether a decision by an employer to abolish an employee's position and to lay off that employee was contrived or in bad faith — but the specific purpose was to determine whether the decision disguised an act of discipline that was within her jurisdiction. Following *Rinaldi*, the bargaining agent in this case would have to have proven not only that the employer acted in bad faith but also that the true nature of its actions, tainted by the bad faith, comprises subject matter that an adjudicator may consider under section 209 of the *Act*. I find no indication in the bargaining agent's submission that it takes the position that the true subject matter of the grievances before me falls under section 209, beyond its contention that article 1 of the collective agreement is at issue. For the reason stated earlier, I have ruled that the latter is not the case.

[59] At the heart of the matter in many jurisdictional challenges is the need to determine the essential character of a dispute. Examining the wording of the original

grievances in this case, as well as the facts cited by the bargaining agent in its submissions, I have no hesitation in concluding that the dispute essentially involves staffing and the employer's staffing program.

[60] The circumstances stated in Mr. Swan's original grievance focused exclusively on his treatment in the aftermath of selection process number 2005-4041-SOR-1241-3066. He specifically asserted that he believes that he is ". . . entitled to Individual Feedback and Decision Review in accordance with the Policy." Mr. McDowell stated the details somewhat differently, but the sense is the same. He argued specifically as follows:

. . .

> *In the assessment phase of staffing, I have the right to formal feedback. If unhappy with feedback, and I have claims of being treated arbitrarily, I have the right to further recourse – decision review. If changes, as a result of recourse (as in this case) or otherwise, are made to the assessment tools and those changes are substantive and result in influencing my appointment (or non-appointment as in this case), I am entitled to recourse under the assessment stage of the staffing program.*

There is nothing concealed in those words. The grievor stated his issue directly and without equivocation. He was upset that the employer did not grant him access to decision review under the staffing program, and he asserted his entitlement to that recourse.

[61] The corrective action sought by the grievors is equally telling. In the case of Mr. Swan, he specified the following remedy:

> *That I be granted the Individual Feedback and opportunity for Decision Review pertaining to Selection Process Number 2005-4041-SOR-1214-3066.*

Mr. McDowell echoed that objective, as follows:

> *I be allowed formal feedback and decision review in selection process #2005-4041-SOR-1214-3066/2005-4047-SOR-1216-3005.*

The remedies sought by the grievors indisputably represent a claim to a procedural entitlement under the staffing program to "Individual Feedback" or "formal feedback" as well as to "Decision Review." The question of whether the grievors do enjoy, or

should enjoy, those procedural entitlements necessarily involves the staffing program. It is intelligible only in that context. It demands a review of that policy to determine the employer's compliance with its requirements in the circumstances encountered by the grievors.

[62] If there were any remaining doubt on the nature of the grievors' concerns, it is amply removed, in my opinion, by the bargaining agent's own statement of the facts. In the following, I have highlighted all the references in that summary that relate to staffing or to the staffing program as either the context of the dispute or as the subject of the dispute itself:

. . .

> [The grievors] *were applicants in Selection Processes # 2005-4041-SOR-1214-3066/2005-4047-SOR-1216-3005.*
>
> *They were unsuccessful in the assessment phrase of the staffing process and consequently were notified they would not be in the pool for placement.*
>
> *They asked for and received Individual Feedback followed by Decision Review regarding certain aspects of the marking. Their allegations said that they were treated arbitrarily.*
>
> *Mr. Tony Prosia, the decision reviewer, agreed that they had been treated arbitrarily in the process . . . and so ordered in his notice of decision review that various aspects of the assessment be done again, including global marking.*
>
> *Nine months later the results of the remarking came out and neither of the two original applicants were placed in the pool.*
>
> *It was apparent to the applicants that not all of the recommendations Mr. Prosia had made were in fact implemented.*
>
> *They asked for Individual feedback as per the Staffing program policy.*
>
> *They were denied Individual Feedback.*
>
> *Instead of Individual feedback they were offered "informal feedback". No known or identified part of the staffing program allows for what was referred to as "Informal" feedback. And the employer was clear that this was not a form of recourse.*

> *The applicants declined informal feedback as it wasn't part of the staffing program and in their view its offer was illegitimate.*
>
> [The grievors] *questioned why they would be denied recourse and attempted to reason with the CRA regarding the staffing program and how Annex "E" . . . contemplated the recourse they were asking for.*
>
> *Ms. Dianne Kemp of Human Resources responded to Mr. Swan on September 20th ,2006 saying: " In keeping with the intent of the staffing program directives , no further recourse is given after corrective measures" . . .*
>
> *On September 22 ,2006 Mr. Gauthier, PIPSC union steward Hamilton , sent a response . . . to Ms. Kemp and the Director of the Hamilton TSO at that time, Ms. Charlton. In his email, Mr. Gauthier raises issues of fairness and transparency as well as the failure of CRA to follow their own policies.*
>
> *On October 10, 2006 the two individuals filed a grievance stating that they had been denied access to their statutory rights under the staffing Program.*
>
> . . .
>
> [Emphasis added.]

[63] I find without reservation that the essential character of the grievances involves staffing and the employer's staffing program. Given that finding, the case law — examples of which were cited in the third question put by the Board's Registry to the parties on my behalf (see paragraph 12 of this decision) — consistently precludes an adjudicator under section 209 of the *Act* from taking jurisdiction. The following conclusions that I stated in *Malette* are no less valid in the case before me:

> . . .
>
> ***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.*
>
> . . .
>
> [Emphasis in the original]

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

(The Order appears on the next page)

V. Order

[65] The employer's objection to jurisdiction is allowed.

[66] The grievances are denied.

June 11, 2009.

Dan Butler,
adjudicator