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Citation: 2010 PSLRB 130

Public Service
Labour Relations Act
and Canada Labour Code

Before an adjudicator and the
Public Service Labour relation Board

BETWEEN

ZABIA CHAMBERLAIN

Grievor and Complainant

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer and Respondent

Indexed as
Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication and complaints made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: George Filliter, adjudicator and Board Member

For the Grievor and Complainant: Herself and Hind Mali, counsel

For the Employer and Respondent: Caroline Engmann, counsel

Heard at Ottawa, Ontario
July 26 to 30, 2010.

I. Individual grievance referred to adjudication and complaints before the Board

[1] Zabia Chamberlain ("the grievor") filed a grievance on December 3, 2008, to which she attached a lengthy document detailing the nature of her allegations. On February 19, 2009, the Acting Assistant Deputy Minister of the Department of Human Resources and Skills Development ("the employer") denied the grievance at the final level of the grievance process.

[2] On March 11, 2009, the grievor referred her grievance to adjudication pursuant to paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* (*PSLRA*). On January 10, 2010, the employer raised a preliminary objection to the referral, submitting that no disciplinary action had been taken that would have allowed the grievor to refer the matter to adjudication.

[3] In addition to the grievance, the grievor filed four complaints under section 133 of the *Canada Labour Code, R.S.C, C.L-2* (*CLC*). The complaints were dated April 23, October 13, October 29 and December 10, 2009, respectively. The employer also raised a preliminary objection to the referral of the complaints.

[4] Because of the similarity of complaints between the complaints and the grievance, the Public Service Labour Relations Board (PSLRB) combined them for the purposes of a hearing.

II. The hearing

A. Preliminary Process

[5] The PSLRB attempted to assist the parties in expediting a hearing, but its efforts were affected by the grievor's lengthy, often repetitive demands. The large number of emails sent by the grievor was of little assistance to the process and most likely caused delays. Although the grievor wanted me to consider the emails as evidence, in pursuing a fair hearing, I advised the grievor that I could not.

[6] Initially, this matter was to be heard during the first week of March 2010. In an attempt to expedite the process, outline some procedural matters and hopefully eliminate or reduce the lengthy email correspondence that was initiated by the grievor, I chaired a pre-hearing conference on January 8, 2010.

[7] The grievor was represented by legal counsel at the conference. Additionally, the grievor requested permission to have her medical doctor and psychologist sit beside for emotional support. The employer did not object to this request and I granted the request.

[8] A letter containing the results of the conference was sent on January 8 , 2010.

[9] Unfortunately, due to unforeseen circumstances, the hearing initially scheduled for March 1 to 5, 2010 had to be postponed. I made the decision to postpone the hearing over the objections of the grievor. My decision was based on the fact that counsel for the employer was unable to attend due to an unfortunate and untimely personal issue. No replacement was available, given the short notice.

[10] The hearing was rescheduled for July 26 to 30, 2010. On July 2, 2010, I conducted another pre-hearing conference, this time by teleconference. During the call, the grievor advised that she was no longer represented by legal counsel but that she had a different lawyer providing legal advice. The grievor also had other individuals with her during the teleconference for emotional support. I allowed the grievor the opportunity to be accommodated to the full extent of her requests.

[11] On July 2, 2010, I made several procedural rulings which were confirmed with the parties by a letter dated July 2, 2010.

B. Purpose

[12] The employer had raised a preliminary objection to my jurisdiction at an early stage in the process. During the pre-hearing conferences, I ruled that the preliminary jurisdictional arguments would be considered at the commencement of the hearing as there would likely be the need for evidence.

[13] I also ruled, after listening to the arguments of both parties about my jurisdiction, that I would decide whether I would commence the hearing on the merits of the matters before me at the hearing. In fact, the jurisdiction arguments lasted for the entire week, so there was no need for me to determine whether to allow evidence.

C. Procedure

[14] It is useful to review the procedure followed in this case. At the commencement of the hearing, the employer challenged four of the summonses issued by the PSLRB at the request of the grievor. The challenges consumed about half a day.

[15] After the challenges were dealt with, the employer presented, with the grievor's consent, many documents necessary to its argument about my jurisdiction. The grievor was asked to present her evidence, and she presented some documents. She also called Renata Borysewicz as a witness. That took another two hours. Thus, counsel for the employer commenced her submissions in the middle of the afternoon of the first day.

[16] The employer's argument continued for the remainder of the first day and well into the second day. At the conclusion of the employer's submissions and at the request of the grievor, we adjourned until the third day of the hearing to allow the grievor the opportunity to prepare.

[17] At the commencement of the third day, the grievor suddenly, and without notice, requested that she be allowed to present more documents as exhibits. Despite the employer's objection, I allowed her request, with the understanding that the employer would have the opportunity to respond if it felt it necessary. Throughout the entire third day, the grievor organized her documents and consulted with counsel for the employer. Eventually, at the end of the day, the grievor presented a number of additional documents with the employer's consent.

[18] The grievor presented further documents to which the employer did not consent. I ruled on their admissibility individually. Each ruling was premised on whether the document would assist me in considering the employer's preliminary jurisdictional arguments. Most of the documents were admitted, but those that were not had no relevance to the employer's objection. This process took the entire third day of the proceedings.

[19] During the fourth and fifth days of the hearing, the grievor presented her submissions with a lawyer sitting next to her. Before she presented any submission or responded to any of my questions, she consulted at length with her legal advisor. Additionally, throughout the week, the grievor had many different persons, including friends, family members, her physician and her psychologist, sitting with her and providing emotional support.

[20] At the conclusion of the grievor's two days of submissions, the employer briefly responded.

[21] At the conclusion of the fifth day, I asked the grievor if she had anything else to submit, and she declared that she had nothing further to add. Furthermore, I asked if she felt that she had received a full and fair hearing on the issue of jurisdiction. She confirmed that she had.

D. Summonses

[22] As noted, before the hearing, the grievor had requested a large number of summonses, some about the jurisdictional challenge raised by the employer. At the commencement of the hearing, the employer challenged the summonses issued to the following four individuals: Gina Rallis, Maureen Grant, Lynn McLewin and Sarah Gaumont.

[23] With respect to Ms. Rallis, counsel for the employer provided me with a copy of an invoice showing that, on February 13, 2010, she had purchased a ticket for travel to Europe. The itinerary had her departing on July 24, 2010, and returning on August 21, 2010. As far as Ms. Grant is concerned, counsel provided me with a document that indicated that this witness was on sick leave on July 20, 2010, and that she was scheduled to return to work only on August 16, 2010.

[24] Without making a ruling on the validity of the summonses issued to Ms. Grant and Ms. Rallis, the grievor indicated her willingness to proceed in their absence on the issue of jurisdiction raised by the employer.

[25] Furthermore, after considering the matter, the grievor consented to the quashing of the summons to Ms. McLewin.

[26] The employer challenged the summons issued to Ms. Gaumont, a compensation advisor, on the grounds that her testimony would concern only compensation and that it was therefore not necessary or indeed relevant, certainly, with respect to the preliminary jurisdiction objection. On that point, counsel submitted that, generally, a court, or in this case an administrative tribunal, will not allow a fishing expedition, meaning that the evidence must be relevant and significant (see *Zundel (Re)*, 2004 FC 798, which refers to *Jaballah (Re)*, 2001 FCT 1287, and to *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294 (T.D.)(QL))).

[27] The grievor indicated that Ms. Gaumont's evidence was in fact relevant as it related to whether the grievor's leave had been approved during the relevant period.

[28] I ruled that the evidence that Ms. Gaumont could offer was not relevant to the jurisdictional issue raised by the employer. I concluded that the grievor herself was able to establish that her leave was retroactively granted, without calling Ms. Gaumont to testify. Consequently, I quashed the summons on the understanding that, later in the proceedings, she could then request another summons.

E. Post Hearing

[29] On October 26, 2010, an individual purporting to speak on behalf of the grievor submitted an email to the staff at the PSLRB. Subsequently, the grievor emailed the PSLRB and requested that I be provided with a copy of this submission in order to consider it. Not surprisingly, counsel for the employer objected to this and I determined that I would not receive, review or consider this document. In making this decision I took into account the fact that the grievor at the conclusion of the hearing confirmed that there was nothing else that she wanted to add. Since then the grievor and this individual submitted further submissions by email none of which I reviewed.

III. Relevant facts

[30] As noted, the employer and the grievor consented to a large number of documents. I also allowed the admission of a number of documents from the grievor. Additionally, the grievor called Ms. Borysewicz as her only witness. Despite the amount of evidence adduced with respect to the jurisdictional objection, counsel for the employer provided a very good summary of the essential facts, which I accept and will summarize. In fact, the grievor in her submission thanked counsel for the employer for her rendition of the facts.

[31] It is uncontested that the grievor is a long-time employee. Her substantive position is in the Strategic Policy and Research Branch (SPR) of the employer. She is classified ES-07. At all relevant times, she was under the supervision of Serge Bertrand.

[32] In 2006, the grievor was placed in an acting EX-01 position in the Skills and Employment Branch (SEB) under the supervision of another individual, whom I will refer to as "JA". It is not in dispute that an EX-01 position is considered a higher

classification than an ES-07 position. Thus while acting in the position, the grievor received a higher level of pay.

[33] Between June 2007 and April 2008, the grievor was subjected to the management style of her supervisor at the SEB. The grievor described it as aggressive. She stated that, as a result, she had incurred "injured health, harassment and human rights risks."

[34] The grievor drafted a lengthy email on April 22, 2008 to Karen Jackson, Senior Assistant Deputy Minister. Both parties agree that this email is important. However, it is important to note that each party has its own interpretation of its significance and meaning (see Exhibit 5, Tab 1).

[35] In any event, Ms. Jackson responded the same day and suggested that a meeting would be the preferred way to discuss the contents of the email (see Exhibit 5, Tab 1).

[36] The grievor responded to Ms. Jackson's email on April 30, 2008. She thanked Ms. Jackson for the willingness to meet but suggested that she was not comfortable attending a meeting. She then made several requests, including dealing with her supervisor's management style, requesting 20 days of either compensatory or other special circumstances leave and requesting 10 days of French language training and permanent appointment to an EX-01 position (see Exhibit 5, Tab 2).

[37] After the grievor and Ms. Jackson exchanged a number of e-mails, the grievor emailed Ms. Jackson again on May 25, 2008. She referred to her email of April 22, 2008, and, in fact, restated a portion of it. The restated portion reads as follows (see Exhibit, Tab 4):

> *"I request immediate action from SEB and SPR for my safe and risk-free placement apart from the AEM directorate and from "JA" in a way that inflicts on me no further pain, suffering or loss, and in a way that does not deprive me of the opportunity to continue to serve this department in the capable, productive and respectful way that I have been serving."*

[38] Ms. Jackson responded to the grievor's May 25, 2008 email by a letter dated May 28, 2008. Ms. Jackson alluded to the fact the grievor had not agreed to mediation and indicated that, therefore, she would conduct an investigation into the grievor's

allegations during the three weeks of the grievor's leave. The leave was as a result of an opinion of the grievor's physician (see Exhibit 7, Tab 5).

[39] On May 30, 2008, the grievor again emailed Ms. Jackson. The grievor indicated that, although she appreciated the offer of a one-week management leave followed by a two-week French training leave, she had been advised by her physician to go on sick leave. Furthermore, the grievor confirmed that the proposed mediation was not an option as her physician had advised against it. The grievor indicated that after sick leave, she would return to her home branch, the SPR (see Exhibit 7, Tab 7).

[40] In response to Ms. Jackson's decision to conduct an investigation, the grievor sent an email dated June 5, 2008. The grievor outlined in point form a number of allegations describing the behaviour of her supervisor at the SEB that she felt should be investigated (see Exhibit 7, Tab 8).

[41] After conducting the investigation, Ms. Jackson released her findings in writing to the grievor on July 4, 2008. Without going into detail, it is clear that Ms. Jackson's findings of concluded that the grievor's supervisor at the SEB had not conducted himself properly. In fact, Ms. Jackson concluded that she would take corrective action with the supervisor (see Exhibit 5, Tabs 18 and 19).

[42] As was evidenced by a series of emails, it was obvious that Ms. Jackson's report was not well received by the grievor. The grievor, in three lengthy emails, requested clarification or action. On August 1, 2008, the grievor sent Ms. Jackson an eight page email. On August 6, 2008, she sent another two page email and a further three page email. On August 12, 2008, the grievor sent yet another three page email. Each email either took issue with Ms. Jackson's conclusions or raised other concerns (see Exhibit 5, Tabs 22 to 24).

[43] Those emails resulted in yet another email exchange between Ms. Jackson and the grievor in mid-August 2008. On August 13, 2008, Ms. Jackson responded to the concerns raised by the grievor on August 6 and 12, 2008. The grievor sent an email in which she accepted a correction to her medical leave commencing June 2, 2008, requested French language training from September 22 to October 3 and requested a new work location (see Exhibit 7, Tab 9).

[44] Ms. Jackson responded on September 4, 2008, by email, and confirmed that the grievor's acting assignment as an EX-01 in the SEB would end on October 6, 2008. Additionally, she authorized leave from June 6 to October 6, 2008 as other paid leave. The grievor then sent a four page email to Ms. Jackson on September 8, 2008 in which she revisited many of the issues raised in her previous emails. However, the grievor also raised some issues with respect to new office arrangements on the fourth floor of her office building, as proposed by Ms. Jackson (see Exhibit 7, Tab 11).

[45] After the email exchange between Ms. Jackson and the grievor in September 2008, the grievor emailed her supervisor in the SPR (Mr. Bertrand) explaining in general terms the circumstances of her return to work. Mr. Bertrand responded and indicated that her office was going to be on the third floor and not on the fourth (see Exhibit 6, Tab 1). The grievor did not accept the placement of her office on the third floor and on September 22, 2008, she proposed that she be placed on the second floor (see Exhibit 6, Tab 2).

[46] Ms. Jackson and the grievor exchanged emails again in late September 2008. It was clear that the grievor was no longer working in the SEB and that she was to be reintegrated into the SPR (see Exhibit 7, Tabs 12 and 14). The grievor took issue with Ms. Jackson's response on September 29, 2008. In a three-page reply email, the grievor claimed that her complaints had not been handled properly and further asked that a more formal process be put in place to resolve her concerns (see Exhibit 7, Tab 16).

[47] In early October 2008, Ms. Jackson and the grievor began yet another exchange of emails. The exchange was initiated by another invitation from Ms. Jackson for a face to-face-meeting. The grievor responded by suggesting an ". . . external 3rd party mediation process through the PSLRB." That email contained an allegation by the grievor that the posting of the job in which she had been acting for almost two years was ". . . a hostile wilful act of malice or a wholly disregardful [*sic*] act of public disrespect for me" (see Exhibit 7, Tab 17).

[48] The grievor's acting assignment concluded on October 6, 2008. After her leave, she was to return to her substantive position in the SPR. Between October 2 and 10, 2008, the grievor exchanged more emails with her substantive supervisor, Mr. Bertrand, about the location of her office. The grievor expressed concerns about some of the proposals. Mr. Bertrand responded by suggesting a "…gradual re-integration

into the workplace." Additionally, Mr. Bertrand indicated that he would "… continue the search for a suitable workstation in line with your needs" (see Exhibit 6, Tabs 3 and 4).

[49] On October 9, 2008, the grievor requested that her other leave (special circumstances), be extended until December 12, 2008 (see Exhibit 6, Tab 6). The grievor's doctor explained the grievor's absence in a number of notes. In each note, the doctor stated that the grievor would likely be able to return to work, initially on November 3, 2008, and then on January 5, 2009 (see Exhibit 4, Tabs 3 and 4).

[50] However, it is uncontested that the grievor had not returned to the workplace when she filed her grievance on December 2, 2008. In fact, the grievor had not returned to work as of the date of this hearing.

[51] All of the complaints filed are pursuant to section 133 of the PSLRA, thus invoking certain provisions of the *Canada Labour Code*. They were filed in 2009, at a point in time when the grievor was not at work.

IV. The preliminary objection

A. For the employer

1. The grievance

[52] The employer submitted that the grievance was referred to adjudication under paragraph 209(1)(*b*) of the *PSLRA*. As such, the employer noted that the grievor is alleging that she was disciplined. Counsel for the employer submitted that the onus is on the grievor to establish that the employer's action was disciplinary (see *Wong v. Deputy Head (Canadian Security Intelligence Service),* 2010 PSLRB 18).

[53] The employer maintained that the grievance is not adjudicable since in reality it is a challenge to Ms. Jackson's internal harassment investigation. The employer submitted that, on the face of the grievance, no allegation is made of a disciplinary action.

[54] Counsel for the employer also noted that it is well established that a grievor cannot alter or change the nature of the grievance in his or her referral to adjudication. Therefore, it was submitted that I have no jurisdiction to deal with the

grievance as presented. The employer submitted that the grievor had the opportunity to seek judicial review of the investigation and that it is not an empty remedy (see *Burchill v. Canada (Attorney General)* [1981] 1 F.C. 109 (C.A), and *Thibault v. Treasury Board (Solicitor General of Canada — Correctional Service)* Board File No. 166-02-26613(19960909).

[55] The employer submitted that I must consider whether any underlying reason exists that would support the allegation that a disciplinary sanction was imposed. On that point, the employer submitted that, despite the grievor's allegations, Ms. Jackson's investigation report was not disciplinary (see *Stevenson v. Canada Revenue Agency,* 2009 PSLRB 89).

[56] Counsel for the employer submitted that evidence is needed that the grievor was guilty of some form of voluntary malfeasance or misconduct of some kind. The employer asked the rhetorical question, "What did the grievor do?" Specifically, the employer submitted that there was no evidence of underlying culpable behaviour on the part of the grievor. Nor was there any evidence that the employer's actions were meant to be disciplinary in nature (see, Brown and Beatty, 7:4210, *Canada (Attorney General) v. Frazee*, 2007 FC 1176, and *Robertson v. Department of National Revenue*, PSSRB File No. 166-02-454 (19710628)).

[57] Counsel for the employer also submitted that, even if I were to find that the employer's actions were disciplinary, I am obliged to determine whether the employer's intention was to punish the grievor (see *Canada (Attorney General) v. Basra*, 2008 FC 606, (upheld in 2010 FCA 24), and *Sharaf v. Deputy Head (Public Health Agency of Canada)* 2010 PSLRB 34 and 2010 PSLRB 79).

[58] It was submitted that a decision not to continue an employee's second language training is not discipline (see *Wong v. Canada Revenue Agency,* 2006 PSLRB 133). Additionally, counsel for the employer submitted that the requirement that the grievor use her sick leave benefits would not be considered discipline, but rather inevitable (see *Rogers v. Canada Revenue Agency,* 2008 PSLRB 94, upheld in 2009 FC 1093 and 2010 FCA 116).

[59] Finally, counsel for the employer submitted that, for the grievor to be successful, she must convince me that it intended to discipline her and that it did discipline her after the harassment investigation, the results of which were favourable

to her. It was submitted that the grievor failed to discharge that burden (see *Synowski v. Treasury Board (Department of Health)*, 2007 PSLRB 6).

[60] Therefore, counsel for the employer submitted, that the grievance does not fall within the parameters of paragraph 209(1)(*b*) of the *PSLRA*. Counsel for the employer suggested that the employer's actions did not result in a financial penalty to the grievor. Even if the grievor was affected financially, there was no discipline.

2. <u>The complaints</u>

[61] The employer submitted that a complaint made under the provisions of the *CLC* is not a vehicle to redress any and all workplace issues (see *Boivin v. Canada Customs and Revenue Agency,* 2003 PSSRB 94).

[62] The employer also submitted that, during the grievor's time at the workplace, (until May 30, 2008), there was no evidence that a danger existed (see *Boivin).*

[63] The employer submitted that the right to refuse to work is contained in paragraphs 128(1)(*b*) and (*c*) of the *CLC*. It referred me to the case law that concluded that, for an employee to exercise that, he or she must satisfy the condition in the legislation, which is that the employee must make the complaint "while at work" (see *Saumier v. Treasury Board (Royal Canadian Mounted Police),* 2008 PSLRB 1, *Gaskin v. Canada Revenue Agency,* 2008 PSLRB 96, and *Vallée v. Treasury Board (Royal Canadian Mounted Police),* 2007 PSLRB 52).

[64] Therefore, the employer submitted, the dates on which the complaints were filed are relevant. The first complaint was referred to adjudication on April 23, 2009, the second on October 13, 2009, the third on October 30, 2009, and the fourth on December 10, 2009.

[65] It was noted by the employer that the grievor alleged that she exercised her right to refuse to work on April 22, 2008 (Exhibit 5, Tab 1). The employer's position is that, on that day and for about five to six more weeks, the grievor was in her workplace. Additionally, on May 30, 2008, when the grievor submitted a leave request, she indicated that she would be returning to work (see Exhibit 10, Tab 7). The employer submitted that those facts are inconsistent with the grievor's allegation that she refused to work on April 22, 2008.

[66] As for the complaints filed with the PSLRB under section 133 of the *CLC,* the employer submitted that the evidence established that, on May 30, 2008, the grievor submitted a leave form and that, from that date, she did not return to the workplace (see Exhibit 5, Tab 3). The employer's position was that, because the grievor was not at the workplace on the dates on which she filed her four complaints, and I have no jurisdiction to hear them.

[67] Finally, counsel for the employer submitted that, since no evidence was adduced of a reprisal, in the form of a dismissal, suspension, lay off or demotion as envisioned by section 147 of the *CLC*, I am without jurisdiction to hear the complaints.

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

1. <u>The grievance</u>

[68] The grievor submitted that, because my jurisdiction falls under paragraph 209(1)(*b*) of the *PSLRA*, I have to find that the employer either imposed discipline or imposed a financial penalty on her. The grievor contended that on either April 22 (see Exhibit 5, Tab 1) or May 25, 2008 (see Exhibit 7, Tab 4), she exercised her right to refuse to work and that, as a result, the employer imposed disguised discipline on her.

[69] The grievor submitted that her acting assignment in the EX-01 position expired on October 6, 2008 and that, because it was not extended or otherwise offered to her permanently, the employer imposed a financial penalty on her because she had exercised her right to refuse to work earlier that year. When asked, the grievor pointed me to paragraphs 5 and 7 of her grievance details (see Exhibit 3, Tab A-1) as proof that she alleged discipline in her grievance.

[70] The grievor noted that, in paragraph 5 of her grievance details she stated that the employer made the decision of ". . . choosing not to proactively accommodate my EX salary which had been continuous for nearly 30 months and choosing to not engage or even contact me." The grievor submitted that this statement was an allegation of disguised discipline.

[71] Further, the grievor noted that paragraph 7 of her grievance details states as follows:

> *7) Disregarded the damage to my established career path caused by the DG's active misleading of me on a permanent EX appointment and by his exploiting of my EX-01 eligibility status for the benefit of filling a crucial SEB vacancy and by his exploiting of me personally with the pressures to take on additional long-term policy duties & with other proven forms of "questionable management behaviours". I grieve that these actions caused me to lose my workplace confidence and French level, be treated with open-disregard, be denied normal career development opportunities, lose my acting salary October 3, 2008 and caused me to be excluded from job advertisements (posted September 30, 2008 by the DG who aggressed and harassed me) for the EX position that is now experiencing a reduced & easier set of Gs & Cs and policy responsibilities. (an EX performance cheque (for having met objectives) was sent to me in late August 2008 without advance notice).*

[72] The grievor's position was that, the paragraph alleged that she had received disguised discipline and a financial penalty.

[73] In support of her position, the grievor referred me to the following cases: *Gibson v. Treasury Board (Department of Health)* 2008 PSLRB 68; *Thibault*; *Peters v. Treasury Board (Department of Indian Affairs and Northern Development),* 2007 PSLRB 7; *Bilton v. Deputy Head (Correctional Service of Canada),* 2010 PSLRB 39; *Gill v. Treasury Board (Department of Human Resources and Skills Development),* 2009 PSLRB 19; and *Robitaille v. Deputy Head (Department of Transport),* 2010 PSLRB 70.

2. <u>The complaints</u>

[74] The grievor submitted that my jurisdiction to hear her complaints is found in section 240 of the *PSLRA*.

[75] The grievor then reviewed the different provisions of the *CLC* and its regulations. She noted specifically that it imposes several duties on the employer. She submitted that subsection 122(1) and section 122.1 define "danger" and describe the purpose of Part 2 respectively. The grievor described section 124 as defining the employer's duty to ensure a healthy and safe workplace.

[76] The grievor then noted that subsection 125(1) of the *CLC*, specifically paragraph (*y*) and (*z.16*), imposes a duty on the employer to ensure a safe and healthy work environment. If an employer does not satisfy its legislative obligations, the grievor submitted that an employee can either report it to his or her employer, in accordance

with subsection 126(1), or complain to his or her supervisor under to section 127.1. Either way the employer and the employee are to work towards a resolution. Failing that, the employee may refuse to work, in accordance with section 128.

[77] The grievor submitted that she voiced her concerns about her supervisor's management style when she wrote the email on April 22, 2008 (see paragraph 34 of this decision and Exhibit 5, Tab 1). The grievor took the position that the email was her invocation of her right to refuse to work as set forth in paragraph 128(1)(*b*) and (*c*) of the *CLC*. She acknowledged that the email does not contain, as she referred to them, the "magic words" and that she continued to report to work until May 30, 2008.

[78] In addition, the grievor noted that her email of May 25, 2008 (Exhibit 7, Tab 4) was another invocation of her right to refuse to work, as envisioned by the *CLC*. Again, she acknowledged that the magic words did not appear in that email either and that she reported to work for at least another week.

[79] The grievor then reviewed the evidence that she had submitted as representing disguised discipline contravening the *CLC* and that resulted in her four complaints. She described the employer's actions in the following general terms: lack of procedural fairness, lack of transparency and lack of good faith. She submitted that the financial penalty that she incurred was the termination of her acting assignment on October 6, 2008. She acknowledged that that date was in fact the date on which her acting assignment would have concluded in any event.

[80] Specifically, the grievor argued that the employer acknowledged that she had been subjected to workplace aggression and that it had failed to respond (she referred me to Exhibit 3, Tab B-2, and to Exhibit 19). In her submission, the grievor stated that the employer's efforts to relocate her within the building did not address her concerns. She further submitted that the "Reintegration Plan", finalized on September 30, 2009 (see Exhibit 13, Tab 14), was not a plan of accommodation and that it should have been offered in spring 2008. The grievor considered the failure to provide it in a timely way as both a penalty and disguised discipline.

[81] At the conclusion of her submission, the grievor withdrew her allegations that the employer's decision to keep her in an excluded position resulted in a financial penalty or that it was disguised discipline. Those allegations were set out in her grievance and her complaints. However, when she made her concession the grievor

submitted that the reprisals contemplated in section 147 of the *CLC* are broader than simple disciplinary sanctions.

[82] The grievor submitted that the employer failed to comply with the *CLC* and its regulations and that, therefore, I have the jurisdiction to consider her complaints. In support of her submissions, the grievor referred me to the following case law: *Gaskin* ; *Boivin*; *Pruyn v. Canada Customs and Revenue Agency,* 2002 PSSRB 17; *Sainte-Marie v. Canada Revenue Agency,* 2009 PSLRB 35; *Leclair v. Treasury Board (Correctional Service of Canada),* 2010 PSLRB 49; and *Tench v. National Defence — Maritime Forces Atlantic, Nova Scotia, 2009 LNOHSTC 1*. Additionally, the grievor referred me to the *Canada Labour Code*, annotated by Ronald M. Snyder (Carswell).

V. Reasons

A. Issues

[83] First, does the grievance allege that the employer imposed a disciplinary sanction on the grievor or that it otherwise caused her to incur a financial penalty? If so, did the grievor establish a *prima facie* case that discipline was imposed or that she suffered a financial penalty?

[84] Second, do I have jurisdiction to consider the four complaints?

B. Jurisdiction

1. The Grievance

[85] My authority is found in paragraph 209(1)(*b*) of the *PSLRA*, which states the following:

> ***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;*

[86] The law is clear: a grievor cannot alter his or her grievance when referring it to adjudication (see *Burchill*).

[87] Given this clear state of the law, the first thing that I must do is determine whether the grievance alleges disciplinary action or a financial penalty. Having reviewed the grievance details in their entirety, I am not convinced that the grievor alleged that she had been subjected to disciplinary action or that she had suffered a financial penalty (see Exhibit 3, Tab A-1).

[88] To be certain of the grievor's position I asked her to specifically identify the portions of the grievance that allege disciplinary action or a financial penalty. She identified paragraphs 5 and 7 of the grievance details and I have set out the pertinent provisions of those paragraphs in paragraphs 70 and 71 of this decision.

[89] In my view, those paragraphs, although somewhat confusing, do not set out a claim that the grievor was subjected to any disciplinary action or that she suffered a financial penalty. The paragraphs, and in fact the grievance itself submit that the grievor should continue to be paid at the EX-01 level. The evidence is undisputed that the grievor was in an acting EX-01 position that expired on October 6, 2008, and until then, she was paid at the EX-01 level.

[90] On September 30, 2008, as the grievor acknowledged in paragraph 7 of her grievance details, her position was posted as available, she decided not to apply. Although the grievor alleged in her grievance that she was "excluded from job advertisements," no evidence was adduced before me that would allow me to agree with that allegation. Therefore, I conclude that the grievance does not allege either disciplinary action or a financial penalty.

[91] In case I am in error as to the nature of the grievance, for me to have jurisdiction, the grievor must demonstrate that there is a *prima facie* case that the employer imposed discipline on her, either directly or in the form of disguised discipline, or alternatively that she suffered a financial penalty.

[92] To be certain that I understood the grievor's position, I asked her to identify all the documents that predate the grievance on which she relied to support her contention that she was disciplined or that she suffered a financial penalty. For the purposes of this decision, it is worthwhile that I review as follows each document:

1. Exhibit 4, Tab 8 — This is a copy of correspondence from Dr. J. Goldstein, the grievor's physician, dated June 3, 2009. This letter does not predate the grievance and is of no assistance in determining whether the grievor was disciplined or suffered a financial penalty. Additionally, the letter simply provides an opinion of some of the grievor's accommodation needs as of its date, so its contents do not assist the grievor in establishing that she was disciplined or that she suffered a financial penalty.

2. Exhibit 12 — This exhibit contains emails to and from the grievor and the employer dated August 11 and 12, 2009. Aside from the fact that they are dated after the grievance was filed and that they therefore cannot relate to an alleged disciplinary action, the contents of the emails deal with the requirement to complete certain forms. In my view, even if the emails predated the grievance, which they do not, they do not establish that any discipline was imposed or that the grievor suffered a financial penalty.

3. Exhibit 16 — This is an email from Ms. Jackson to the grievor dated August 13, 2008. Although the grievor submitted that this email constituted disguised discipline, it is, in my view, a response to queries from the grievor. Ms. Jackson concluded that her investigation was completed. The grievor submitted that this email proved that she was financially penalized because at that time she was not aware of the status of her leave. However, it was evident that it had been established that, until September 15, 2008, the employer considered her on paid leave. At this time the grievor was still being paid. Additionally, I note that, on September 15, 2008, the grievor's leave was "corrected" (to use her words) as being special leave rather than sick leave.

4. Exhibit 17 — This document contains emails exchanged by the grievor and Marilyn Dingwall between October 17 and 22, 2008 that deal with the grievor's request to have ". . . a neutral external party to lead a neutral resolution & closure that helps . . . respond to me on the transition & barriers that I now face." In my view, despite the submission of the grievor, this series of emails do not demonstrate inaction on the part of the employer but rather show its willingness to become involved in a process that grievor had requested. More to the point, these emails, in my view, do not establish that the grievor had been disciplined or suffered a financial penalty.

5. Exhibits 14, 18 and 19 — Exhibit 14 contains emails exchanged by the grievor and Lina Berro, Health and Safety Advisor for Service Canada, between April 16 and 29, 2009. Exhibit 18 is a document entitled "Workplace Accommodation" and Exhibit 19 is a document entitled "Canadian Human Rights Commission – Resources." My first conclusion is that Exhibit 14 does not predate the grievance and therefore, does not assist me in determining whether the grievor was disciplined or suffered a financial penalty. That said, the grievor submitted that Exhibit 14 was not a plan of accommodation and that, therefore it was presumably discipline. After reviewing Exhibit 14, I was unable to draw the conclusions that the grievor submitted. That

exhibit can best be described as a response to a query from the grievor concerning the completion of a form requesting reimbursement.

6. Exhibit 21 — This is an email from Mr. Bertrand requesting input for the wording of a possible communication to the grievor. Again, it is dated April 2, 2009, and is of no use in my quest to determine whether the grievor was disciplined or suffered a financial penalty. Furthermore, although the proposed communication is only in draft form, it does seem to indicate that management was disposed to address some if not all of the grievor's requests. I would ask the rhetorical question, how can it be considered discipline?

7. Exhibits 22 and 24 — These documents contain an email exchange between several members of management concerning the grievor's request to be placed on leave for special circumstances from October 7, to December 5, 2008. The emails were exchanged between October 23, 2008, and November 12, 2008. The grievor submitted that the exchange confirms that there was a delay in granting her leave and that it was a form of disguised discipline. After reviewing the exchange, it was clear to me that management officials were considering the request, but I do not conclude that it proved that there was a delay. The grievor's request for leave due to special circumstances required diligent consideration by the employer. The parties agree that the leave was eventually granted, but in the meantime, the grievor was still paid. I fail to see how it can be considered disguised discipline.

8. Exhibits 23 and 25 — Exhibit 23 contains leave forms for the grievor. The first one is dated February 25, 2010 and signed by Stephen Johnson. It shows that, from October 19, 2009, to October 19, 2010, the grievor was on sick leave without pay. Exhibit 25 contains emails between management representatives that appear to have led to the drafting and execution of the leave forms in Exhibit 23. As noted earlier in this decision about many of the documents referred to by the grievor, the emails do not pre-date the grievance and are of no use to me in reviewing the grievor's allegations.

9. Exhibits 26 and 27 — These documents are dated October and November 2009. Aside from the fact that they do not predate the grievance and are therefore of no assistance to me in considering the grievor's discipline allegations, it is interesting to note that these documents are about the grievor's reintegration into the workplace and specifically the location of a new workstation for the grievor on her return to her substantive position.

10. Exhibit 31 — This document consists of several emails, dated in 2010, all relating to what appears to be a significant overpayment to the grievor in 2009 and a request for reimbursement. Again, none of the emails predate the grievance and all are of no help in determining whether the grievor was disciplined or suffered a financial penalty.

[93] Continuing to address the grievor's submissions, I do not conclude that the employer's decision not to extend the grievor in her acting assignment as an EX-01 at the end of her term was discipline. In the same vein, I am of the view that the employer's decision to post the EX-01 position to fill it permanently basis cannot be considered discipline.

[94] The grievor bears the onus of establishing, on a balance of probabilities; she was disciplined or suffered a financial penalty (see *Wong*). In my view, she did not discharge that burden.

[95] The case law confirms that writing an investigation report is not discipline (see *Stevenson*). Furthermore, the grievor failed to establish an underlying culpable behaviour as required (see *Frazee* and *Robertson*).

[96] Additionally, the evidence did not satisfy me that the employer had any intention to punish the grievor, which the grievor bears the onus of establishing (see *Basra* and *Sharaf*). The grievor also did not establish on a balance of probabilities that the employer intended to discipline her, which is required of her (see *Synowski, supra*).

[97] I am further satisfied that requiring an employee to use his or her sick leave is not discipline (see *Rogers*). Additionally, refusing to allow an employee to participate in second language training, absent other evidence, is not discipline (see *Wong,*).

[98] In summary, I conclude that I am without jurisdiction to hear the grievance. I reiterate that in my opinion the grievance referred to adjudication did not allege a disciplinary action or a financial penalty. The case law is clear that a grievor cannot alter his or her grievance when referring it to adjudication (see *Burchill*). Even if I am in error, I conclude that there is no *prima facie* evidence of discipline before me that would give me the jurisdiction to hear the grievance.

2. The complaints

[99] My jurisdiction to hear complaints under the *CLC* is provided in section 240 of the *PSLRA* , which states as follows:

> ***240.*** *Part II of the Canada Labour Code applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or*

> *business referred to in that Part except that, for the purpose of that application,*
>
> *(a) any reference in that Part to*
>
> *(i) "arbitration" is to be read as a reference to adjudication under Part 2,*
>
> *(ii) the "Board" is to be read as a reference to the Public Service Labour Relations Board,*
>
> *(iii) a "collective agreement" is to be read as a reference to a collective agreement within the meaning of subsection 2(1),*
>
> *(iv) "employee" is to be read as a reference to a person employed in the public service, and*
>
> *(v) a "trade union" is to be read as a reference to an employee organization within the meaning of subsection 2(1);*
>
> *(b) section 156 of that Act does not apply in respect of the Public Service Labour Relations Board; and*
>
> *(c) the provisions of this Act apply, with any modifications that the circumstances require, in respect of matters brought before the Public Service Labour Relations Board.*

[100] Subsection 133 of the *CLC* states the following:

> *Complaint to Board*
>
> ***133.*** *(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

[101] Section 147 prohibits an employer from taking reprisal actions against an employee:

> *General prohibition re employer*
>
> *147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*

> *(*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> *(*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
>
> *(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[102] The PSLRB's jurisprudence clarifies what it considers reprisal actions, as shown in the following examples. Failing to pay overtime for time spent outside work hours cooperating with a safety officer does not constitute a breach of paragraph 147(*a*) of the *CLC* (see *O'Neil et. al. v. Treasury Board (Solicitor General Canada-Correctional Service),* PSSRB file No. 160-02-55 to 60 (19980714)). Maintaining a complainant's isolation from his co-workers constituted a penalty and created a high level of stress, resulting in the complainant using sick leave and annual leave credits (see *Pruyn*). A refusal to pay travel expenses incurred by an employee to attend a health and safety committee meeting is not considered a penalty or reprisal (see *Tanguay v. Statistical Survey Operations,* 2005 PSLRB 43). Finally, an employer's action need not be financial to be a reprisal (see *Chaves v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 45).

[103] First, what rights did the grievor invoke under the *CLC*? She alleged that she refused to work by virtue of her emails of April 22, (Exhibit 5, Tab 1) and May 25, 2008 (Exhibit 7, Tab 4). Reviewing those two emails makes it clear that the grievor does not specifically refuse to work or refer to the *CLC*.

[104] The grievor confirmed that she continued to report to work until May 30, 2008, when she commenced medical leave (see Exhibit 7, Tab 7).

[105] For those reasons, I conclude that the emails that the grievor relied on to support her contention that she invoked her right to refuse to work did not provide the employer with the necessary notice. Therefore, I conclude that those two emails cannot be considered notice under section 128 of the *CLC*.

[106] It may be that the emails of April 22 and May 25, 2008 served to provide the employer with notice from the grievor under section 124 of the *CLC.* That section requires the employer to provide a healthy and safe work environment.

[107] But the following question remains: Do I have jurisdiction to entertain the complaints filed in 2009 even if they were filed under section 124 of the *CLC*? To answer that question, I have to re-examine section 133 of the *CLC* and section 240 of the *PSLRA,* which define my jurisdiction. A noted, the grievor must establish that a form of reprisal occurred.

[108] In my rationale set out in paragraphs 94 to 99 of this decision, I concluded that the employer did not discipline the grievor and that she did not suffer a financial penalty. The grievor offered no further submissions with respect to her allegation that the employer had taken reprisals against her. Thus, I draw the same conclusion that there was no *prima facie* evidence of reprisal that would relate to the grievor's emails of April 22 and May 25, 2008, at least until the date of the grievance. For that reason alone, I would dismiss all four complaints, as they relate to those two emails.

[109] Additionally, I note that the complaints were filled well beyond the 90 day time limit set out in section 133 of the *CLC*, as the first complaint was dated April 23, 2009, a full year and a day after the April 22, 2008 email and almost 11 months after the May 25, 2008 email.

[110] Therefore, I have no jurisdiction to consider any of the four complaints since they relate to alleged actions of the employer before January 23, 2009 in response to the purported refusal to work that the grievor set out in her emails of April 22 and May 25, 2008.

[111] However, that does not entirely answer the question of my jurisdiction to consider the four complaints. They are very awkwardly worded and are convoluted. In fact, in my view they contain many confusing, if not contradictory statements. Therefore, it is very difficult to fully understand what the grievor states in each complaint.

[112] That said, I conclude that the complaints cannot allege a violation of section 126 or 128 of the *CLC*. The grievor had to be at work to invoke her right to refuse to work

or to make a claim under section 126. The evidence is clear that, the grievor has not been present in the workplace since May 30, 2008.

[113] However, the grievor appears to allege a reprisal in, among other things, the employer's alleged refusal to accommodate her health needs.

[114] In my view, I have very limited jurisdiction to hear the four complaints. I conclude that I can hear them, but only as they relate to allegations of reprisals to the grievor's exercise of her rights under the *CLC* that took place in the 90 days before the first complaint was filed. In other words, I have no jurisdiction to consider any complaint about any alleged reprisal that occurred before January 23, 2009, 90 days before April 23, 2009.

[115] To be clear, the grievor will be able to adduce evidence and make submissions about allegations of reprisals that occurred on or after January 23, 2009 under sections 133 and 147 of the *CLC*. She will be entitled to present her case, but only as it relates to her allegations that the employer, as specified in subsection 133(1), "has taken action against" her "in contravention of section 147" on or after January 23, 2009.

[116] In conclusion, I wish to remind the parties that the Board has determined that a *CLC* complaint is not a vehicle to address all workplace issues (see *Boivin.)* In reaching that conclusion, I have determined that my jurisdiction is quite restricted as specified in paragraph 114 of this decision.

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

(The Order appears on the next page)

VI. Order

[118] The grievance is dismissed for want of jurisdiction.

[119] The PSLRB will schedule a continuation of the hearing to consider the four complaints filed under section 133 of the *CLC* but only as they relate to allegations of actions of reprisal taken by the employer on or after January 23, 2009 as a result of the exercise of the grievor's rights under the *CLC*.

December 13, 2010.

George Filliter,
adjudicator and Board Member