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*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

CATHERINE LOVELL AND MICHAEL PANULA

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as

*Lovell and Panula v. Canada Revenue Agency*

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** [Ian R. Mackenzie, adjudicator](#)

***For the Grievors:*** [Nathalie St-Louis, Public Service Alliance of Canada](#)

***For the Employer:*** [Michel Girard, counsel](#)

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Decided on the basis of written submissions  
filed May 27 and June 17 and 22, 2010.

## REASONS FOR DECISION

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### **I. Individual grievances referred to adjudication**

[1] Catherine Lovell and Michael Panula (“the grievors”) grieved that their terminations of employment for incapacity from the Canada Revenue Agency (CRA or “the employer”) were discriminatory, contrary to both their collective agreement and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). Both grievors are subject to the collective agreement between the Public Service Alliance of Canada and the CRA (expiry date: October 30, 2010; “the collective agreement”).

[2] The Canadian Human Rights Commission (CHRC) was provided notice of these references to adjudication, and it advised that it did not intend to make submissions.

[3] The employer objected to the jurisdiction of an adjudicator to hear these grievances on the basis that, for each grievor, the termination of employment was non-disciplinary. The employer also submitted that the Independent Third Party Review (ITPR) process at the CRA was the appropriate recourse mechanism for the grievors.

[4] The two grievances were joined for the purposes of deciding the jurisdictional objection. The objection has been decided on the basis of written submissions. Those submissions are summarized later in this decision.

### **II. Background**

[5] Ms. Lovell's employment was terminated on January 05, 2009, for reasons of incapacity. She had been unable to attend work on a regular basis for a number of years. Mr. Panula's employment was terminated for incapacity on March 18, 2009. He had been absent from the workplace on sick leave without pay since March 26, 2002.

[6] In both cases, the grievors' employment was terminated for non-disciplinary reasons on the basis of paragraph 51(1)(g) of the *Canada Revenue Agency Act*, S.C. 1999, c. 17. Under subsection 209(1) of the *Public Service Labour Relations Act (PSLRA)*, a non-disciplinary termination of employment for some separate employers, such as the CRA, cannot be referred to adjudication.

[7] Each grievor filed a grievance against the termination of his or her employment. Each alleged that his or her termination of employment for incapacity constituted discrimination contrary to the collective agreement and the *CHRA*. The no-discrimination clause in the collective agreement reads as follows:

...

**19.01** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status, or a conviction for which a pardon has been granted.*

...

[8] The employer dismissed both grievances at the final level of the grievance process.

[9] Recourse for a non-disciplinary termination of employment at the CRA is available through the ITPR process, established by the employer. Both grievors submitted requests for the ITPR process.

[10] The ITPR process and the authority of the reviewer are set out in the ITPR Processing Directive (effective May 1, 2005). This directive states that an employee cannot request an ITPR if he or she has “. . . sought remedy through administrative recourse under a federal Act, with the exception of the Canadian Human Rights Act.” A reviewer is prohibited from ruling on “. . . issues relating to the interpretation or application of the Canadian Human Rights Act.”

[11] The grievances were referred to adjudication on February 12 and 26, 2010, respectively. In each case, the grievors alleged a breach of the collective agreement under paragraph 209(1)(a) of the *PSLRA*.

[12] Mr. Panula also filed a complaint with the CHRC.

[13] The following provisions of the *PSLRA* are relevant to the jurisdictional objection:

...

**208.** (1) . . . *an employee is entitled to present an individual grievance if he or she feels aggrieved*

*(a) by the interpretation or application, in respect of the employee, of*

...

(ii) a provision of a collective agreement or an arbitral award . . . .

...

(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.

...

**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;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

*210. (1) When an individual grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the Canadian Human Rights Act, that party must, in accordance with the regulations, give notice of the issue to the Canadian Human Rights Commission.*

...

*226. (1) An adjudicator may, in relation to any matter referred to adjudication,*

...

*(g) interpret and apply the Canadian Human Rights Act and any other Act of Parliament relating to employment matters ... whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*

*(h) give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the Canadian Human Rights Act;*

...

### **III. Summary of the arguments**

#### **A. Submissions for the employer**

[14] The employer's submissions read in part as follows:

...

*6. The PSLRA places a limit on the types of grievances that employees can refer to adjudication.*

*7. Paragraph 209(1)(a) of the PSLRA could not apply to the present matter because the underlying action that led to Ms. Lovell and Mr. Panula's grievances is the fact that they were terminated for non-disciplinary reasons pursuant to paragraph 51(1)(g) of the CRAA. As will be explained below, the CRA has an Independent Third Party Review process that provides the correct recourse mechanism for non-disciplinary terminations.*

*8. Only paragraph 209(1)(b) of the PSLRA, which deals specifically with disciplinary terminations, could possibly apply to the grievors' grievances.*

*9. Pursuant to paragraph 209(1)(b), the PSLRA recognizes that, in the case of a separate employer such as*

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the CRA, only disciplinary action resulting in termination, demotion, suspension or financial penalty can be referred to adjudication. With this being said, the grievors were terminated for incapacity, which is a non-disciplinary matter.

10. Further, neither of the grievors has alleged that their terminations were the result of disguised discipline.

11. Paragraph 209(1)(c) of the PSLRA could not apply to the present matter because employees of the CRA are not part of the core public administration given that the CRA is a separate agency.

12. There is an exception provided in the PSLRA, pursuant to paragraph 209(1)(d) and subsection 209(3), for those separate agencies designated by the Governor in Council. ... CRA has not been designated by the Governor in Council and therefore the exception outlined in paragraph 209(1)(d) and subsection 209(3) does not apply to the present matter.

13. Given that the grievors were terminated for incapacity, which is a non-disciplinary reason, and given that the CRA is not designated under subsection 209(3) of the PSLRA, the PSLRB cannot adjudicate their respective matters.

#### INDEPENDENT THIRD PARTY REVIEW

14. Both Ms. Lovell and Mr. Panula have commenced the ITPR process for their respective grievances and the following information will illustrate that this is the appropriate recourse mechanism.

15. Section 50 of the CRAA establishes that the CRA is a separate agency. Paragraph 51(1)(g) states that the CRA may “provide for the termination of employment [...]for reasons other than breaches of discipline or misconduct”. Pursuant to section 54 of the CRAA, the CRA has established the ITPR process which provides a recourse mechanism for those employees terminated for non-disciplinary reasons.

16. The CRA ITPR processing directive sets out the authority of the Independent Third Party Reviewer and the corrective measures that may be prescribed.

#### ALLEGED VIOLATION OF THE COLLECTIVE AGREEMENT

17. Both Ms. Lovell and Mr. Panula are alleging a violation of clause 19 (the no discrimination clause) of the collective agreement between the CRA and the Public Service Alliance of Canada. The underlying action that led to their respective grievances, however, is the fact that they were terminated for non-disciplinary reasons pursuant to paragraph 51(1)(g) of the CRAA.

18. By referring the grievances to the PSLRB under paragraph 209(1)(a) of the PSLRA as a collective agreement violation, PSAC is attempting to circumvent the ITPR process, which is the proper redress forum for this type of dispute. The ITPR process was established by the CRA pursuant to section 54 of the CRAA and specifically provides a means of redress for non-disciplinary terminations, which is the case at hand.

#### CONCLUSION

19. The legislative intent of paragraph 209(1)(b) and 209(1)(c) of the PSLRA is clear; the PSLRB does not have jurisdiction to adjudicate non-disciplinary terminations for separate agencies such as the CRA. Further, pursuant to subsection 54(1) of the CRAA, the CRA has established recourse in the form of an Independent Third Party Review for non-disciplinary terminations. Both grievors have formally requested ITPR, which the employer submits is the appropriate redress forum for their respective grievances. If the PSLRB were to hear these grievances, it would be acting outside of its jurisdiction.

...

#### **B. Reply of the grievors**

[15] The reply for the grievors reads in part as follows:

...

. . . The inability of a reviewer to interpret the CHRA has been confirmed by the CRA.

Ms. Lovell and Mr. Panula grieved that the termination of their employment was discriminatory, and contrary to their collective agreement and the CHRA. . . .

...

#### **INDEPENDENT THIRD PARTY REVIEW (ITPR)**

2. . . . the ITPR process was established pursuant to section 54 of the CRAA. This process “provides a recourse mechanism for those employees terminated for non-disciplinary reasons.” The Employer submits that the ITPR process is the appropriate redress forum for the grievances of Ms. Lovell and Mr. Panula.

3. The ITPR Directive contains the following sections:

*Objective: The objective of the directive is to provide a framework that allows an employee dispute to be reviewed fairly, expeditiously and cost effectively (Paragraph C at page 1)*

*An employee cannot request an Independent Third Party Review (ITPR) if he or she has sought remedy through administrative recourse under a federal Act, with the exception of the Canadian Human Rights Act (page 2).*

*The reviewer conducts the process bearing in mind that it is an administrative review with no legal requirements such as swearing in of witnesses, rules of evidence, subpoena individuals, the production of documents, or cross-examination (Paragraph 17 at page 9).*

*The reviewer complies with the laws, policies and directives governing the Agency and its employees (paragraph 18).*

*The reviewer specifies which of the following corrective measures apply [“for lay-off or demotion for any reason other than lack of discipline or misconduct”] (Paragraph 28 at page 10):*

...

[Order an employee’s reintegration or return to the previous classification group and level. **The reviewer may not rule on issues relating to the interpretation or application of the *Canadian Human Rights Act*** (our emphasis). Order payment of lost pay and benefits].

#### **REMEDIAL LIMITATIONS OF THE ITPR**

4. *Contrary to what the Employer claims, the PSAC is not attempting to circumvent the ITPR process by referring the grievances to adjudication. In fact, the PSAC is referring these grievances to adjudication as this is the only procedure where the grievors can obtain proper recourse.*
5. *The PSAC states that the ITPR has remedial limitations which are detrimental to the grievors.*
6. *In *Johal v. Canada (Revenue Agency)* 2008 FC 1397, Justice Frenette dismissed an application for judicial review of the grievance process because the CRRA provided an avenue for redress. In his decision, he commented on remedy:*

25 The applicants refer to the decision of the Federal Court of Appeal in *Canada (Treasury Board) v.*

*Boutilier*, [2000] 3 F.C. 27, leave to appeal to the S.C.C. denied, [2000] S.C.C.A. No. 12.

26 In this decision, the Court of Appeal concluded that an aggrieved employee will only be disentitled from presenting a grievance because another redress is provided if a “real remedy” is not available to the grievors. At paragraph 23, **the Court of Appeal states that there must be a remedy that can deal “meaningfully and effectively with the substance of the employee’s grievance.”** (*our emphasis*).

27 In an earlier decision, *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354, at paragraph 20, the Court of Appeal reasoned that **an administrative procedure in redress “must be capable of producing some real redress which could be of personal benefit to the same complainant.** (*our emphasis*)

#### **PRIMACY OF HUMAN RIGHTS LEGISLATION**

7. *By imposing the ITPR process pursuant to the CRAA, the Employer is attempting to [extract] itself from its obligations under the Canadian Human Rights Act.*
8. *The PSAC submits that Ms. Lovell and Mr. Panula were discriminated against based on a disability. Therefore, their grievances are properly before the Board who has had the power to interpret the Canadian Human Rights Act since April 1, 2005.*
9. *. . . the primacy of human rights legislation over other legislation [has been noted in the jurisprudence, see Insurance Corp. of British Columbia v. Heerspink 1982 CanLII 27 (SCC)].*

#### **CONCLUSION**

*In light of the foregoing, a Board-appointed adjudicator must take jurisdiction to hear the grievances of Ms. Lovell and Mr. Panula. These grievances might include elements of discrimination based on disability, which if found, would be contrary to the Canadian Human Rights Act and potentially give rise to remedies under the same Act. As previously raised, a reviewer selected under the ITPR process cannot interpret the CHRA and cannot grant related corrective measures. Therefore, the Bargaining Agent states that a decision to decline jurisdiction would deprive the grievors of potential corrective measures which could be granted by a Board-appointed adjudicator as per its powers under section 226 (1) (g) and (h).*

[Sic throughout]

[Emphasis in the original]

### **C. Rebuttal of the employer**

[16] The employer's rebuttal reads as follows:

...

1. *PSAC submits that Ms. Lovell and Mr. Panula were discriminated against based on a disability. As such, a Public Service Labour Relations Board ("PSLRB") adjudicator must take jurisdiction because a reviewer selected under the Independent Third Party Review ("ITPR") process cannot interpret the Canadian Human Rights Act ("CHRA") and cannot grant related corrective measures.*
2. *The Employer, however, has previously stated that the grievors were terminated on the basis of incapacity to perform their duties due to illness. As such, the grievors were terminated for non-disciplinary reasons. The legislative intent of paragraph 209(1)(b) and 209(1)(c) of the Public Service Labour Relations Act ("PSLRA") is clear; the PSLRB does not have jurisdiction to adjudicate non-disciplinary terminations for separate agencies such as the CRA. Further, pursuant to subsection 54(1) of the CRAA, the CRA has established recourse in the form of an Independent Third Party Review for non-disciplinary terminations. The Employer submits that the ITPR is the appropriate redress forum for Ms. Lovell and Mr. Panula's respective grievances. Furthermore, both Ms. Lovell and Mr. Panula have commenced the ITPR process for their respective grievances. If the PSLRB were to hear these grievances, it would be acting outside of its jurisdiction.*
3. *This matter deals with non-disciplinary terminations and not with discrimination based on disability. Regardless, the grievors are not without recourse regarding alleged discrimination. Both have the option of submitting a complaint to the Canadian Human Rights Commission. On this point, it should be noted that Mr. Panula has submitted a complaint to the Canadian Human Rights Commission.*

...

**IV. Reasons**

[17] Each grievor filed a grievance alleging that the non-disciplinary termination of their employment was a breach of the no-discrimination provision of the collective agreement and a breach of their rights under the *CHRA*.

[18] There is no dispute that an adjudicator does not usually have jurisdiction over non-disciplinary terminations of employment by the CRA. However, the question here is whether an adjudicator has jurisdiction over grievances that relate essentially to an alleged breach of the collective agreement and alleged discrimination contrary to the *CHRA*. For the reasons set out in the following paragraphs, I have concluded that an adjudicator does have jurisdiction over the grievances.

[19] It is clear that the ITPR process does not allow for any consideration of the *CHRA* (section F, paragraph 28 of the ITPR Processing Directive). It is also clear that the ITPR process cannot address alleged breaches of the collective agreement. The employer suggested that the appropriate mechanism for addressing claims of discrimination is a complaint with the CHRC.

[20] The first step in determining the jurisdiction of an adjudicator is to examine the statute. Paragraph 209(1)(a) of the *PSLRA* clearly states that a grievance related to the application of a provision of a collective agreement can be referred to adjudication. The only limitation on such a referral is that the grievor must obtain the approval of his or her bargaining agent: subsection 209(2). Both grievors have clearly stated in their grievances that they are grieving a matter related to a provision of in their collective agreement. I agree with *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, which decided that the no-discrimination clause in a collective agreement grants substantive rights to employees and that it can be used as the basis for a grievance. As stated at paragraph 126 of *Souaker*, “[t]he legislator certainly did not intend for a violation of the collective agreement to escape review by an adjudicator.” Accordingly, I find that an adjudicator has jurisdiction over grievances alleging a breach of the no-discrimination clause of the collective agreement.

[21] The intention of Parliament to give an adjudicator jurisdiction over human rights complaints is also clear. Subsection 208(2) of the *PSLRA* states that an individual cannot present a grievance “. . . in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human*

*Rights Act*. [emphasis added]” In passing, I note that the employer accepted receipt of the grievances and that it replied at the final level of the grievance process without disputing that the grievors had a right to present grievances. The *PSLRA* also gives an adjudicator the jurisdiction to interpret and apply the *CHRA* and to give relief under that Act: paragraphs 226(1)(g) and (h).

[22] Further, it is clear from the statutory provisions that it was not intended that employment matters in the federal public service be needlessly bifurcated.

[23] Accordingly, I have determined that an adjudicator has jurisdiction over the claim of a breach of the *CHRA* in the grievances at hand.

[24] The question then arises as to the scope of the jurisdiction of an adjudicator in these grievances, given that they relate to non-disciplinary actions by the employer. *Souaker*, at paragraph 129, was addressing a rejection on probation and noted that an adjudicator’s jurisdiction was limited to determining whether the rejection on probation was made in a discriminatory manner. Given that the terminations of employment in the present grievances relate to lengthy leaves of absence for illness, it is likely that the discrimination allegations will touch on the merits of the terminations of employment. An adjudicator will have jurisdiction to examine whether the terminations of employment was as a result of the alleged discriminatory conduct.

[25] Although the grievors requested the ITPR process, there does not appear to be any need for concern about contradictory findings, duplication or overlap. The ITPR Processing Directive clearly states that an employee cannot use the ITPR process if he or she has sought a remedy “. . . through administrative recourse under a federal Act . . . .” In a footnote, it notes as follows that the CRA wishes to avoid the duplication of recourse: “e.g., an employee appears before the Public Service Staff Relations Board and requests an ITPR for the same issue.”

[26] In conclusion, the objection of the employer is dismissed. The grievances will now be scheduled, individually, for hearings.

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

*(The Order appears on the next page)*

**V. Order**

[28] The objection of the employer is dismissed.

[29] The grievances will be scheduled for separate hearings.

August 20, 2010.

**Ian R. Mackenzie,  
adjudicator**