Date: 20131029

File: 566-02-6260

Citation: 2013 PSLRB 132

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

RUHAINA REMTULLA

Grievor

and

TREASURY BOARD
(Public Health Agency of Canada)

Employer

Indexed as
Remtulla v. Treasury Board (Public Health Agency of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievor: Alayna Miller, counsel

For the Employer: Joshua Alcock, counsel

Decided on the basis of written submissions,
filed October 18 and 31 and November 14, 2012 and October 1 and 9, 2013.

I. Individual grievances referred to adjudication

[1] Ruhaina Remtulla ("the grievor") was employed as an emergency services educator by the Public Health Agency of Canada ("the employer"). On March 22, 2011, the employer terminated the grievor's employment during her probationary period. On April 11, 2011, the grievor filed two grievances alleging violations by the employer of article 18 ("Leave General") of the collective agreement concluded between the Treasury Board and the grievor's bargaining agent, the Public Service Alliance of Canada ("the bargaining agent") on behalf of the Education and Library Science Group, which expired on June 30, 2011 ("the collective agreement"). It is not disputed that while the grievor had referred to article 18, as is clear from the details of one of the grievances and as acknowledged by the employer in the level 3 grievance reply and subsequent correspondence, she had intended to refer to article 16 ("No Discrimination") of the collective agreement.

[2] In one of her grievances, the grievor stated the following: "I wish to grieve under the collective [*sic*] article 18.01 and all other articles applicable to the duty to accommodate persons with disabilities." As corrective action, the grievor requested the following:

> *I would like to be restored to my position with full benefits at the same level of the position from the date of the dismissal retroactively. To have accommodation requests implemented and any other benefits that may be within my rights.*

[3] In her second grievance, the grievor stated as follows: "I wish to grieve under the collective [*sic*] article 18.01 and all other articles applicable for wrongful dismissal." As a corrective measure, the grievor sought to be reinstated to her position and to be paid all benefits retroactively.

[4] Both grievances were referred to adjudication on November 9, 2011, under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* (*PSLRA*), which deals with disciplinary action resulting in termination, demotion, suspension or financial penalty.

[5] As the grievor also alleged a breach of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (*CHRA*), she filed a notice with the Canadian Human Rights Commission (CHRC) pursuant to subsection 210(1) of the *PSLRA*, which reads as follows:

> ***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.*

[6] As appears from the covering letter to the CHRC from the grievor's counsel, the grievor had previously contacted the CHRC concerning her allegations, and the employer had been advised by the CHRC of the grievor's allegations that it had discriminated against her on the ground of disability. On November 17, 2011, the CHRC advised the Board that it did not intend to make submissions in this matter.

II. Employer's preliminary objection, and background

[7] The Public Service Labour Relations Board ("the Board") set this matter down for hearing on November 26 to 28, 2012. In a letter to the Board's registry dated October 18, 2012, the employer raised a preliminary objection to the Board's jurisdiction to hear the matter on the ground that the grievor's rejection on probation was administrative and not disciplinary in nature. The employer submitted further that while the grievor had alleged a violation of the collective agreement, since she did not have the approval of her bargaining agent, as required by subsection 209(2) of the *PSLRA*, she was precluded from referring her grievances to adjudication.

[8] In a letter dated October 31, 2012, counsel for the grievor stated that the grievor's position was that her rejection on probation breached her human rights and that the employer did not appropriately accommodate her disability in the workplace. Counsel referred to the judgment of the Federal Court in *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027 (*Chamberlain FC*), on judicial review of a decision of one of the Board's adjudicators, in *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 130 (*Chamberlain 2010*).

[9] In its decision, the Court partially granted the judicial review application and remitted the applicant's grievance back to the adjudicator for determination as to whether an adjudicator under the *PSLRA* has jurisdiction to consider a grievance solely on the basis of the fact that the grievor raised allegations of a violation of the *CHRA*.

[10] At my direction, a pre-hearing teleconference with the parties was held on November 8, 2012. Subsequently, in a letter to the Board dated November 14, 2012, counsel for the employer and counsel for the grievor jointly acknowledged that as the

grievor had not raised an allegation of disciplinary action during the grievance process, and given her inability to raise such an issue later in the process, she was precluded from arguing disciplinary action at adjudication. Both counsel further jointly acknowledged that as the grievor does not have the support of her bargaining agent, the *PSLRA* bars her grievances alleging violations of the collective agreement from adjudication. Counsel jointly requested the cancellation of the scheduled hearing dates and that a decision on jurisdiction be issued based on the record before me.

[11] A second pre-hearing teleconference was held on November 19, 2012, during the course of which it was discussed that the adjudicator in *Chamberlain 2010* would be deciding the issue of the adjudicability of alleged violations of the *CHRA* under the *PSLRA*. As that decision would have a bearing on the grievor's grievances, counsel for the grievor requested that the hearing of the grievances be adjourned until such time as the other adjudicator's decision was issued. Counsel for the employer agreed, and accordingly, I adjourned the hearing on that basis.

[12] The adjudicator's decision was issued on September 23, 2013; see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 (*Chamberlain 2013*). At my direction, the Board's registry sent a letter to both counsel enclosing a copy of the decision and requesting the parties' representations as to why I should not exercise my jurisdiction under section 227 of the *PSLRA* to issue a decision based on the record before me, including but not limited to making findings of fact and law. Both counsel submitted that I should consider the employer's preliminary objection and render a decision based on the material before me.

III. Positions of the parties

[13] This matter is unusual in that both parties agree that I lack jurisdiction to hear these grievances.

[14] In her submission, the grievor stated that her grievances are not adjudicable under paragraph 209(1)(*b*) of the *PSLRA*, as she did not raise an allegation of disciplinary action during the grievance process, and further that her bargaining agent did not support her allegations of a violation of the collective agreement.

[15] The grievor further submitted that her grievances allege that the employer failed to accommodate her disability and that her dismissal was discriminatory, thus

violating the *CHRA*. The grievor stated that the facts in this matter are similar to those in *Chamberlain 2013* in that in both cases, the grievances are not adjudicable and allege breaches of the *CHRA*. The grievor submitted that should I order her file closed, she would proceed with her complaint previously filed with the CHRC. In this regard, the grievor's submissions confirmed that she ". . . has secured her ability to continue her complaint with the CHRC from a timeliness perspective."

[16] In its submission, the employer shared the grievor's view that the Board does not have jurisdiction over the grievor's reference to adjudication. The employer reiterated the joint agreement between the parties previously articulated in the letter to the Board dated November 14, 2012, namely, as an allegation of discipline was not raised by the grievor at any point in the grievance process, she could not raise one later in the process as the principle set out by the Federal Court of Appeal in *Burchill v. Attorney General of Canada*, [1981] F.C. 109 (C.A.), applies to this matter. Furthermore, as the substance of the grievor's allegations throughout the grievance process was discrimination and a failure to accommodate, in alleged violation of the no-discrimination clause of the collective agreement, given that she does not have the support of her bargaining agent, she is precluded from referring the grievances to adjudication under paragraph 209(1)(*a*) of the *PSLRA*. The employer also stated as follows that the grievances do not come within any of the other provisions of section 209 of the *PSLRA*:

> *This grievance does not raise an allegation related to either section 209(1)(c)(i) or (ii) of the* [PSLRA] *as it does not allege a demotion or termination under paragraph 12(1)(d) or (e) of the* Financial Administration Act *or a deployment, without the employee's consent, under the* Public Service Employment Act. *Nor does this grievance raise an allegation under section 209(1)(d) of the* [PSLRA] *as the Public Health Agency of Canada is not a separate employer as contemplated by section 209(3).*

IV. <u>Reasons</u>

[17] Section 209 of the *PSLRA* 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;*
>
> *(*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*).*

[18] As this matter had been held in abeyance pending the decision in *Chamberlain 2013*, I turn now to the analysis set out in that decision. It should be noted at the outset that in *Chamberlain 2010,* the adjudicator had determined that the grievor had not established a *prima facie* case that disciplinary action had been taken by the employer against her. That finding was determined reasonable in *Chamberlain FC*.

[19] At paragraph 75 of *Chamberlain 2013*, the issue to be determined is set out as follows:

> *[75] This decision will determine whether the* PSLRA *provides a right to an employee to refer a grievance alleging a violation of the* CHRA *arising independently of a collective agreement. Is a grievance adjudicable on the sole basis it alleges a violation of the* CHRA *and in the absence of a factual determination that would give rise to adjudication pursuant to paragraph 209(1)(*b*) of the* PSLRA*?*

[20] The matter was thoroughly canvassed by the adjudicator, who dealt with each of the issues raised by the Federal Court in *Chamberlain FC*. The thrust of his reasoning may be found in the following extracts from *Chamberlain 2013*:

> . . .
>
> *[82] Then, at paragraphs 74 and 75 of the decision, the Federal Court refers to paragraphs 226(1)*(g) *and* (h) *of the* PSLRA *and suggests that those paragraphs may provide an adjudicator the power to interpret and apply the* CHRA. *With great respect, I must disagree.*
>
> *[83] In my view, subsection 226(1) of the* PSLRA *applies only to an adjudicator appointed to hear and determine grievances that have first been found adjudicable under subsection 209(1) of the* PSLRA. *These powers, which include the ability to interpret and apply the* CHRA, *are available to the adjudicator only when the matters referred to adjudication are contemplated in subsection 209(1) of the* PSLRA. *This means subsection 209(1) is a threshold determination before the exercise of powers pursuant to subsection 226(1).*
>
> *[84] As noted earlier, subsection 226(1) of the* PSLRA, *in my view, is limited to matters properly before the adjudicator in the first place. It reads in part as follows:*
>
> > **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, other than the provisions of the *Canadian Human Rights Act* related to the right to equal pay for work of equal value, 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* . . . .
>
> [Emphasis in the original]

[85] I am of the view there is no jurisdiction solely based on the words of subsection 226(1) of the PSLRA. *The words "to any matter referred to adjudication" must mean something. I am of the belief they mean for an adjudicator to apply subsection 226(1) of the* PSLRA *there must be a matter that can properly referred [sic] under subsection 209(1) of the* PSLRA.

[86] Subsection 226(1) of the PSLRA *does grant broad power to adjudicators with respect to the* CHRA *but only with respect to grievances or matters referred to adjudication under subsection 209(1) of the* PSLRA.

[87] In other words, the condition precedent for an adjudicator to consider a remedy under subsection 226(1) of the PSLRA *requires him or her to first conclude the matter was referred to adjudication under subsection 209(1) of the* PSLRA.

. . .

[93] I am of the view subsection 226(1) of the PSLRA *must be interpreted contextually, having regard to the particular facts of each case. An interpretation of subsection 226(1) of the* PSLRA *that would grant adjudicators the power to interpret and apply provisions of the* CHRA, *even if there is no grievance referable pursuant to subsection 209(1) of the* PSLRA, *would have the effect of barring federal employees from resorting to recourses under the* CHRA *(with the exception of pay equity issues).*

[94] More directly, such an interpretation would have the effect of "reading in" a basis for a referral to adjudication that is not present in subsection 209(1) of the PSLRA.

[95] In my view, both results could not have been intended by Parliament without clear language.

. . .

[121] I conclude that had Parliament desired to have all disputes involving employment matters and allegations of discrimination decided by reference to adjudication pursuant to subsection 209(1) of the PSLRA, *clear language was required. In other words, if it were the desire of Parliament to have any employee covered by the* PSLRA *adjudicate his or her rights under the* CHRA *(a piece of legislation that has been given quasi-constitutional status) before an adjudicator appointed pursuant to the* PSLRA, *regardless of whether these rights are otherwise adjudicable pursuant to subsection 209(1) of the* PSLRA, *the language would have to be clear and unambiguous.*

. . .

[21] The adjudicator then referred to the submission by the CHRC as follows:

> *[122] I can say it no better than counsel for the CHRC, who stated as follows and with which I agree:*
>
> > Section 209(1) of the *PSLRA* expresses Parliament's intent that only some individual grievances can be referred for adjudication. Read in context, s. 226(1) of the *PSLRA* does not expand the list of adjudicable disputes. Instead, it describes the powers that an adjudicator may exercise, when considering a matter that has properly been referred for adjudication.
> >
> > In practical terms, where an employee alleges discrimination in a factual context that falls within s. 209(1), the claim could be pursued either by way of adjudication under the *PSLRA*, or by way of a human rights complaint under the Canadian Human Rights Act (the "*CHRA*"). In other words, there is concurrent jurisdiction. However, in such circumstances, the Commission has exercised its discretion under s. 41(1)(*b*) of the *CHRA* to require that the employee proceed first before an adjudicator, who would have the authority under s. 226(1) of the *PSLRA* to apply the *CHRA* and award certain remedies thereunder.
> >
> > Where an employee files a grievance that included human rights allegations, but arises in a factual context that does not fall within s. 209(1), the *PSLRA* does not give the adjudicator jurisdiction to hear the grievance. However, this does not leave the employee without access to independent adjudication. In such circumstances, the employee may file a human rights complaint with the Commission, to be processed under the *CHRA*.

[22] The adjudicator concluded that he had no jurisdiction to hear the grievance, as although it had been referred to adjudication under paragraph 209(1)(*b*) of the *PSLRA*, the employer had not taken any disciplinary action. He further concluded that he lacked jurisdiction because the grievance was based solely on allegations of a violation of the *CHRA*.

[23] I agree with the adjudicator that ". . . subsection 209(1) is a threshold determination before the exercise of powers pursuant to subsection 226(1)."

[24] I turn now to the application of *Chamberlain 2013* to the matters before me.

[25] The grievor referred her grievances under paragraph 209(1)(*b*) of the *PSLRA*, which deals with disciplinary action or a financial penalty. The parties jointly agreed that the grievor did not raise an allegation of discipline at any point during the grievance process, and that is reflected in the record before me. Based on the principle established in *Burchill*, the grievor cannot alter her grievances when referring them to adjudication. Accordingly, the grievances are not adjudicable on that basis.

[26] The grievor also alleged a violation of article 16 ("No Discrimination") of the collective agreement based on discrimination and a failure to accommodate. However, she did not have the approval of her bargaining agent as required by subsection 209(2) of the *PSLRA*. Consequently, her grievances are not referable under paragraph 209(1)(*a*) of the *PSLRA* and therefore not adjudicable.

[27] Accordingly, I find that I am without jurisdiction to hear the grievances of the grievor, as they were not referred to adjudication in accordance with the requirements set out in section 209 of the *PSLRA*.

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

(The Order appears on the next page)

V. Order

[29] I order the file closed.

October 29, 2013.

Steven B. Katkin,
adjudicator