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File: 566-02-3045

Citation: 2013 PSLRB 85

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ELEITHA HAYNES

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Haynes v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Patricia Harewood, Public Service Alliance of Canada

For the Employer: Allison Sephton, counsel

Decided on the basis of written submissions,
filed September 21, 2011 and April 25, May 11, June 25 and July 16, 2013.

I. Individual grievance referred to adjudication

[1] On March 14, 2008, Eleitha Haynes ("the grievor") grieved the decision of the Canada Border Services Agency ("the employer" or CBSA) not to offer her the acting position of Regional Program Officer at the FB-04 group and level. The grievor's substantive position was classified at the FB-03 group and level. The grievor stated in her grievance that the employer violated the no-discrimination clause of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group bargaining unit (expiry date: June 20, 2007) ("the collective agreement").

[2] The grievance details and the corrective action requested read as follows:

> ***Grievance details***
>
> *I grieve my employer, the Canada Border Services Agency (CBSA), has contravened my rights under Article 19 of the Collective Agreement between the CBSA and the Public Service Alliance of Canada (PSAC).*
>
> *The CBSA Regional Director has come to the conclusion that it was impossible to offer me the acting position of Regional Program Officer (Immigration) FB-04 without preventing situations that could give rise to an apparent or potential conflict of interest and this, after I was being identified as first choice in the selection process.*
>
> . . .
>
> ***Corrective action requested***
>
> *I request that the employer respect the provisions of the [sic] Article 19 of the Collective Agreement between the CBSA and the PSAC.*
>
> *I request that a review of my Confidential Report be made.*
>
> *I request that the employer provide me with any other remedies that may be reasonable in this circumstance and that I be made whole.*

[3] The employer denied the grievance at each level of the grievance procedure. The bargaining agent referred the grievance to adjudication on August 12, 2009. It also gave notice to the Canadian Human Rights Commission (CHRC) that the grievor had the intent to raise an issue involving the interpretation or application of the *Canadian*

Human Rights Act, R.S.C. 1985, c. H-6 ("the *CHRA*"). On September 17, 2009, the CHRC advised by letter that it did not intend to make submissions on the matter.

[4] After being informed that the grievance was referred to adjudication, the employer objected to that referral on the basis that an adjudicator under the *Public Service Labour Relations Act,* S.C. 2003, c.22, s.2 ("the *Act*"), has no jurisdiction to hear the grievance because it deals solely with staffing. After being assigned to this case, I decided to deal with the employer's objection on the basis of written submissions.

II. Summary of the facts as submitted by the parties

[5] In her submissions, the grievor stated that she was encouraged by her managers to submit her application for the acting position of regional programs officer. She submitted her application, placed first in the selection process and was informally advised that she would be appointed. However, the grievor never acted in the position. The CBSA Regional Director decided not to offer her the acting position to prevent situations that could give rise to an apparent or potential conflict of interest.

[6] The grievor's common-law spouse is an immigration lawyer and the employer felt that if the grievor was appointed acting Regional Programs Officer, there would be significant probabilities that she and her spouse would work on the same files. In addition, the grievor could have to advise the government on immigration files and policies with which her spouse was involved as opposing counsel.

[7] The acting appointment at issue was for four months less one day. The same day that the grievor filed her grievance, she also filed a complaint with the Public Service Staffing Tribunal (PSST). On April 16, 2008, the PSST concluded that it did not have jurisdiction to hear the complaint because it dealt with an acting appointment. The PSST based its ruling on subsection 14(1) of the *Public Service Employment Regulations* ("the *PSER*"), SOR/2005-334, which specifies that acting appointments of less than four months are excluded from the application of the merit principle and from complaints to the PSST.

III. Summary of the arguments

A. For the employer

[8] The employer argued that the adjudicator does not have jurisdiction to hear the grievance because it relates solely to staffing, which cannot be the subject of a reference to adjudication pursuant to the *Act*. For the employer, this is plainly a staffing dispute, not a dispute over the application of a stand-alone provision of the collective agreement in the labour relations context. The employer argued that it was Parliament's intent that the *Public Service Employment Act,* R.S.C. 2003, c.22, ss. 12, 13 ("the *PSEA*"), be a complete code with respect to staffing. In this case, the PSST dismissed the complaint for a lack of jurisdiction as it was Parliament's intent that there be no recourse before the PSST for acting appointments of less than four months. It was never Parliament's intent for the Public Service Labour Relations Board (PSLRB) to have jurisdiction over staffing issues, and a grievor cannot disguise a staffing issue as a collective agreement dispute.

[9] The employer argued that the exclusive authority over staffing rests with the Public Service Commission (PSC) pursuant to section 29 of the *PSEA*. The PSC delegates that authority to the deputy heads in the core public administration, not the Treasury Board. As such, the Treasury Board, as the employer, has no power over staffing matters. Furthermore, those matters are precluded by section 113 of the *Act* from the realm of collective bargaining.

[10] The employer also argued that the fact that there is no administrative recourse for redress for this particular staffing issue does not give the adjudicator jurisdiction over this grievance or cause unfairness. The proper recourse for this grievance was to file an application for judicial review of the employer's decision by the Federal Court. Another available option for the grievor would be to pursue processes available to employees with the CHRC or the Canadian Human Rights Tribunal.

[11] The employer referred me to *Canada (House of Commons) v. Vaid*, 2005 SCC 30; *Pelletier et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 117; *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73; *Hureau v. Treasury Board (Department of the Environment),* 2008 PSLRB 47; *Canada (Attorney General) v. Assh,* 2005 FC 734; *Spencer v. Deputy*

Head (Department of the Environment), 2007 PSLRB 123; and *Veillette v. Canada Revenue Agency*, 2010 PSLRB 32.

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

[12] The grievor argued that the "pith and substance" of the grievance is related to family status discrimination and not to staffing. The grievance relates to the application and interpretation of the no-discrimination clause of the collective agreement. The grievor argued that the case law confirmed that a grievance that raises a human rights issue is a grievance related to employment or labour relations. She also argued that the case law provided by the employer could be distinguished from the present case. Consequently, the employer's objection should be dismissed.

[13] Subsection 208(2) of the *Act* is not a bar for the grievor since there was no recourse available before the PSST. The *PSER* specifies that acting appointments of less than four months are excluded from complaints to the PSST. When she filed her grievance, there was no other administrative process available to the grievor other than a complaint under the *CHRA*. Limiting the grievor to a complaint before the CHRC would be impractical and contrary to the very goal of the *Act,* whose purpose is to provide a labour relations framework for the efficient resolution of disputes that arise out of collective bargaining and collective agreements.

[14] The grievor pointed out that the employer was unable to cite any provision of the *Act* or the *PSEA* that barred the grievor from challenging discrimination on the basis of family status. Since April 1, 2005, it argued that adjudicators have the express authority under the *Act* to adjudicate human rights matters.

[15] The grievor argued that she raised the discrimination issue at the outset of her grievance and that the employer had addressed this issue in its response to the grievance. The wording and the substance of the grievance reveal that it is a human rights grievance, not a staffing grievance. The fact that the grievor's allegation of illicit discrimination is linked to an acting appointment does not extricate those issues from the collective agreement.

[16] The grievor referred me to *Veillette*; *Brown v. Attorney General of Canada*, 2011 FC 1205; *Brown v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 127; *Hureau*; *Parry Sound (District) Social Services Administration Board v.*

Ontario Public Service Employees Union, Local 324, 2003 SCC 42; *Johal and Stasiewski v. Canada Revenue Agency and Mao,* 2009 FCA 276; and *Amos v. Attorney General of Canada,* 2011 FCA 38.

IV. Reasons

[17] This decision is solely to determine whether I have jurisdiction to hear this grievance. If I do, a hearing will take place to hear the parties on the merits of the grievance. If I do not, the grievance will be dismissed for lack of jurisdiction.

[18] This grievance involves an allegation of discrimination resulting from the employer's decision not to offer the grievor a short-term (less than four months) acting appointment. According to the grievor's submissions, she was told that she was the best candidate for the position. She was not offered it because of the potential conflict of interest that could occur with her common-law spouse's professional situation. The employer did not deny that the grievor would have been offered the position otherwise.

[19] The legal framework to decide the jurisdictional objection raised by the employer is the following:

> *Public Service Labour Relations Act*
>
> ***208.*** *(1) Subject to subsections (2) to (7), 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*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> (b) *as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

(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*

. . .

Public Service Employment Act

29. *(1) Except as provided in this Act, the Commission has the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment there is no authority in or under any other Act of Parliament.*

(2) The Commission's authority under subsection (1) may only be exercised at the request of the deputy head of the organization to which the appointment is to be made.

(3) The Commission may establish policies respecting the manner of making and revoking appointments and taking corrective action.

. . .

> ***77.*** *(1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of*
>
> (a) *an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);*
>
> (b) *an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or*
>
> (c) *the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).*
>
> . . .
>
> *Public Service Employment Regulations*
>
> ***14.*** *(1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the* Act.
>
> . . .
>
> *Article 19 of the collective agreement*
>
> ***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 or ethnic 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.*

[20] I agree with the grievor that section 208 of the *Act* did not prevent her from filing her grievance. The matter at issue clearly involves the grievor's terms and conditions of employment and, it could be argued, a provision of the collective agreement. It falls under the type of issues that can be grieved under subsection 208(1) of the *Act*. In addition, the grievor was not barred from filing this grievance on the basis of the restriction included in subsection 208(2) of the *Act*, since there was no administrative procedure of redress available to her under any Act of Parliament other

than the *CHRA* to challenge the employer's decision. The grievor filed a complaint with the PSST, but the PSST concluded that it had no jurisdiction to consider the matter on the basis of subsection 14(1) of the *PSER*.

[21] The employer argued that I have no jurisdiction to hear the grievance because it deals with staffing. According to the employer, there are two mutually exclusive schemes of staffing and labour relations and that the *PSEA* is a complete code with respect to staffing issues such that it was Parliament's intention that there be no recourse for short-term acting appointments. It argued that it was not Parliament's intent that adjudicators have jurisdiction over staffing issues.

[22] I agree with the employer that it was Parliament's intent not to give adjudicators jurisdiction over staffing such that they have the jurisdiction to review appointments for compliance with the *PSEA*, employer policies, the merit principle or allegations of abuse of authority. In that sense, the employer is correct in pointing out that the PSST is the proper forum for complaints related to staffing. However, that alone does not necessarily mean that an adjudicator loses jurisdiction over a grievance alleging a violation of the collective agreement's no-discrimination clause in the event that the allegation of discrimination also arises in the context of a staffing action over which the employee has no recourse under the *PSEA*.

[23] The PSST, which has jurisdiction over stand-alone staffing disputes, dismissed the complaint on the basis that acting appointments of less than four months are not subject to the merit principle. There is therefore no question of competing jurisdictions between the Board and the PSST in this case. Further, as there is no recourse to the PSST, its procedures cannot represent "another administrative procedure for redress" in accordance with section 208's bar on the types of grievances which can be filed with the employer. As the grievor did not have recourse before the PSST, section 208 did not present a bar to the filing of her grievance, and as her grievance was properly filed, she in turn was able to avail herself of section 209 in referring it to adjudication once it had reached the final level of the grievance procedure and not been dealt with to her satisfaction.

[24] The employer argued that it was Parliament's intention that no recourse would be available for employees who wish to contest short-term acting appointments on the basis of discrimination. It does not argue, however, that appointments over which the PSST does have jurisdiction are not reviewable on the basis of a violation of human

rights. Indeed, the PSST has issued many decisions in which it has considered arguments of discrimination as part of an allegation of abuse of authority. Surely it cannot have been the intention of Parliament to enforce human rights obligations only in cases of appointments of four months or more, leaving those of shorter duration open to human rights abuses.

[25] The employer points to the grievor's right to have filed a complaint before the CHRC and taken it to the CHRT. Since 2005 and the implementation of the *Act*, it is clear that adjudicators of the Board have jurisdiction to consider grievances which allege violations of the *CHRA*. In *Chamberlain v. Attorney General of Canada*, 2012 FC 1027, Madame Justice Gleason wrote the following:

…

> *[73] In this regard, subsection 208(2) of the* PSLRA *specifically contemplates grievances being filed that allege violations of the* CHRA*. Subsection 209(1) of the* Act *purports to limit the types of human rights claims that may be referred to adjudication as being those:*
>
> > *(*a*) which relate to the interpretation or application of a collective agreement provision (for which the bargaining agent must provide its support in accordance with subsection 209(2) of the* PSLRA*);*
> >
> > *(*b*) which relate to disciplinary action resulting in termination, demotions, suspension or financial penalty; or*
> >
> > *(*c*) in the case of an employee in a federal department, demotion or termination for unsatisfactory performance or for any other reason that does not relate to a breach of discipline or misconduct.*
>
> *[74] However, section 210 of the* PSLRA *contemplates that grievances alleging violations of the* CHRA *may be referred to adjudication (and that notice of such claims should be provided to the Canadian Human Rights Commission by the party advancing the claim). Paragraph 226(1)(g) of the* PSLRA *moreover provides PSLRB adjudicators with the power to "interpret and apply the [*CHRA*] and any other Act of Parliament relating to employment matters", other than provisions of the* CHRA *related to pay equity, "whether or not there is a conflict between the Act being interpreted and applied in the collective agreement, if any", and paragraph 226(1)(*h*) enables PSLRB adjudicators to grant relief in*

> *accordance with paragraph 53(2)*(e) *or subsection 53(3) of the* CHRA.
>
> …
>
> *[78] These decisions are very much in keeping with the direction in which modern labour law has progressed, which has been to extend the jurisdiction of labour tribunals to hear all workplace disputes. Thus, claims that arise directly or inferentially from an alleged breach of a collective agreement must be determined by a labour tribunal and not by the courts (see e.g.* Weber v Ontario Hydro, *[1995] 2 SCR 929, 125 DLR (4th) 583, and the multitude of other cases that have applied* Weber*).*
>
> …

[26] I therefore find that, in keeping with both modern labour law principles and the wording of the *PSLRA*, the filing of a grievance and its referral to adjudication, and not the filing of a complaint before the CHRC, is the appropriate administrative procedure for redress in this case.

[27] The employer cited the Federal Court's decision in *Assh* in which case the Court found that for non-adjudicable grievances, grievors could seek judicial review of the final-level decision and that such recourse was not "an illusory remedy". Evidently, I agree with the Court's statement. However, in the case before me, the grievance is clearly adjudicable on the basis that it meets the requirements of section 209 and that its pith and substance (I will return to this subject later in the decision) is clearly that of human rights.

[28] As the grievor pointed out, there is no specific bar to the adjudication of human rights disputes that also involve staffing. Such a provision could easily have been inserted into the *Act*, but it was not. There are therefore "competing provisions" at play in this particular case, one of which involves staffing and the other of which involves human rights. If preference is to be given to one or the other, it should be given to the provision which protects human rights, given that such matters are of great importance to the legal system as a whole and quasi-constitutional in nature.

[29] In *Johal and Stasiewski*, the Federal Court of Appeal decided that, pursuant to the *Act*, grievances could be filed by employees of the Canada Revenue Agency on staffing issues if they had no recourse under that employer's staffing program. It based its decision on a review of several provisions of the *Canada Revenue Agency Act,*

S.C. 1999, c.17, that are almost identical to the *PSEA* provisions cited earlier in this decision. On an argument made by the employer on the proper recourse being to file an application for judicial review by the Federal Court, the Court wrote as follows at paragraph 37:

> *[37] The scheme of the* PSLRA *favours the internal, expeditious, and informal administrative resolution of workplace grievances. It would be inconsistent with this statutory objective to interpret subsection 208(2) as providing that an application for judicial review is the only recourse open to the appellants for dealing with their allegation that Ms Mao should not have been appointed to the MG-05 position by virtue of a preferred status to which she was not entitled.*

[30] I agree with the grievor that the pith and substance of the grievance is family status discrimination. That does not mean that I believe that there was discrimination. It simply means that this is a discrimination grievance. The wording of the grievance is clear: the grievor alleged that the employer contravened article 19 of the collective agreement. As the first corrective action, she asked that the employer respect the provisions of article 19 of the collective agreement. She did not ask in her grievance for an order to appoint her to the position or to cancel the appointment made by the employer. I would not have jurisdiction to make such an order. If I were to allow the grievance, my jurisdiction would, quite possibly, be limited to a declaration that the employer violated the collective agreement, an order for the employer to cease violating the collective agreement and possibly an order for relief, in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *CHRA*.

[31] In *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, the grievance related to a rejection on probation. However, the grievor referred his grievance to adjudication under paragraph 209(1)(*a*) of the *Act,* alleging a violation of the no-discrimination clause of the collective agreement. Adjudicator Bédard (now Justice Bédard) concluded that a no-discrimination clause of a collective agreement, similar to the one in this collective agreement, gives substantive rights to employees. She wrote the following:

> . . .
>
> *[124] I agree that an employee's right to refer a grievance to adjudication must originate in the* Act *and not the collective agreement. In section 209 of the* Act*, the legislator*

expressly and narrowly set out the matters that can be referred to adjudication and, in principle, a grievance against a rejection on probation is not adjudicable. However, in my opinion such a conclusion is not sufficient to resolve the issue of my jurisdiction. In addition to grievances filed against measures expressly noted in paragraphs 209(1)(b)*,* (c) *and* (d)*, the legislator also provided in paragraph 209(1)*(a) *that grievances involving the application or interpretation of a collective agreement are adjudicable. Mr. Souaker submitted that his termination violates article 6 of the collective agreement. Clause 6.01 reads as follows:*

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

That provision is clear: it provides that every employee has the right to equal treatment and to not be subject to discrimination. It imposes a corresponding duty on the employer to treat its employees equally and without discrimination. I do not see on what basis I could conclude that that clause does not grant substantive rights to employees and that it could not be used as the basis for a grievance.

[125] When an employee alleges in a grievance that a decision that affects his or her conditions of employment or that involves the very survival of his or her employment relationship was motivated by discriminatory considerations and that the collective agreement specifically provides for the absence of all discrimination in the workplace, it is, in my view, a grievance that involves the application of the collective agreement within the meaning of paragraph 209(1)(a) *of the Act. Therefore, an adjudicator has jurisdiction to decide on the allegation of discrimination.*

[126] Contrary to the employer's claims, I find that allowing the referral to adjudication, under paragraph 209(1)(a) *of the Act, of the rejection on probation of an employee who alleges that his or her termination was motivated by discriminatory considerations in violation of the collective agreement does not violate the intention of the legislator. The legislator certainly did not intend for a violation of the collective agreement to escape review by an adjudicator.*

. . .

[32] The grievor in the present case alleged that the employer's refusal to offer her the short-term acting appointment violated article 19 of the collective agreement. As stated in *Souaker*, the collective agreement provides that every employee should not be subject to discrimination. That is a substantive right given to employees by their collective agreement, and they are entitled to have it enforced by an adjudicator if no other administrative procedure for redress is provided under an *Act* other than the *CHRA*. The refusal of a promotion, even for a short period, affects an employee's conditions of employment, including status in the workplace and compensation. If that refusal is tainted by discrimination, and the collective agreement contains a no-discrimination clause, the grievor is fully entitled to grieve and to refer the grievance to adjudication. As did the adjudicator in *Souaker*, I do not believe that the legislator intended for a violation of the collective agreement to escape the adjudication process.

[33] In *Vaid*, the Supreme Court of Canada stated that a claim of a violation of the *CHRA* does not automatically steer the case to the CHRC because ". . . one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute . . . ." In this case, the fact giving rise to the dispute was the employer's decision not to offer an acting appointment to the grievor because of her common-law spouse's professional situation. Without that specific situation, there would have been no grievance. In my opinion, there is no doubt that this case is about alleged discrimination.

[34] In *Pelletier et al.,* the grievors alleged that a component of the selection process had not been conducted in accordance with the terms of the performance review clause of the collective agreement. The employer had, in the context of a selection process, decided to evaluate candidates via an "assessment tool" as opposed to an exam. The grievors alleged that this assessment tool violated the terms of article 38 of their collective agreement. The employer objected to the jurisdiction of an adjudicator to determine the grievances and argued that they related to staffing. The adjudicator found that the pith and substance of the grievances was indeed the staffing process and that he consequently had no jurisdiction to hear the staffing grievances as the legislation provided for two mutually exclusive spheres of labour relations and staffing. In this case, I find that the pith and substance of the present grievance is discrimination. In *Pelletier,* the grievors contested the employer's assessment of their

abilities by pointing to a clause in the collective agreement governing performance reviews. I agree with adjudicator Katkin's conclusion in that case that the grievances, at their core, contested the staffing process itself and the employer's decision regarding their suitability for the positions in question, which is an assessment that arises under the *PSEA* rather than the *PSLRA*. As I have stated earlier, it was not Parliament's intention to give adjudicators the jurisdiction to review "classic" appointment decisions. In the present case, the grievor does not contest the selection process itself but rather the employer's decision to withdraw her candidacy from that process on the basis of the application of a discriminatory condition.

[35] In *Gibson v. Treasury Board (Department of Health),* 2008 PSLRB 68, the grievor contested the non-renewal of a term appointment on the basis that it had been tainted by discrimination. In response to the preliminary objection of the employer to the jurisdiction of an adjudicator to hear and decide the grievance, the adjudicator wrote the following:

…

> *[10] Counsel for the employer suggested that I rule on the issue of his objection to my jurisdiction before hearing evidence and arguments on the merits of the grievance. Therefore, at the close of argument I briefly adjourned to consider the issues raised. At the resumption of the hearing, I read the following:*
>
> > Having considered the preliminary objection advanced by the employer in this matter, and having reviewed more fully the cases provided to me by both sides and the very competent arguments advanced by both representatives, I am of the view that I do have jurisdiction in this matter to hear evidence and argument on the merits.
> >
> > Although I will fully articulate my reasons for this conclusion when I render my decision, I think that it is appropriate to indicate that subsection 226(1)(*g*) of the [new *Act*] was important in my deliberations. In coming to this conclusion I want also to point out that the grievance itself refers to article 43 of the collective agreement and in the first level reply the employer indicates that the non-renewal of the term of employment was not only for budgetary reasons but also for issues relating to performance and attendance.

> Accordingly, I wish to hear evidence that ties in the allegations of discrimination to the reasons for non-renewal enunciated by the employer in the first-level reply. Failure to do so may be fatal to the grievance. However, I will hear arguments on this if need be.
>
> Also, on the issue of remedy, I would like to hear representations, at the end of the day, on what is my remedial power. In particular, given the conclusion of adjudicators under the [former *Act*], that being that non-renewal of a term of employment is not a termination, what is my power to order that the term employment be renewed or that payment be made for lost wages as a result of it not being renewed? In other words, is my remedial power limited to awarding damages?

[11] Having had the benefit of further reflection, it is my continued view that an adjudicator has jurisdiction to inquire into the allegation in this grievance. Where an individual whose specified term of employment has not been renewed alleges that it was as a result of a discriminatory practice in contravention of the CHRA*, an adjudicator has authority to inquire further into the matter. All of the cases submitted by counsel for the employer in support of this objection were decided under the auspices of the former* Act*. On April 1, 2005, the new* Act *was proclaimed as law and replaced the former* Act*.*

[12] In addition to the jurisdiction of an adjudicator specified in section 209 of the new Act*, which echoes section 92 of the former* Act*, Parliament, in its wisdom, included a new provision granting further "powers" to adjudicators. Paragraph 226(1)(*g*) of the new* Act *indicates that an adjudicator has the power to interpret and apply the* CHRA*. This newly enunciated power is linked to article 43 of the collective agreement prohibiting discrimination.*

*[13] Although paragraph 226(1)(*g*) of the new* Act *has not been specifically interpreted, I am persuaded by the obiter comments of the adjudicator in* Sincère*:*

…

> [44] The adjudicator would have jurisdiction if the reasons why the [term of employment] was not renewed had disciplinary elements or elements independent of the [term of employment]. This is where the whole issue of the [adjudicator]'s jurisdiction over matters of human rights comes into play, since reasons

> related to human rights are the only ones alleged by the grievor.
>
> …
>
> *[14] For the reasons stated above, it is my view that the new* Act*, in particular under paragraph 226(1)*(g)*, grants authority to an adjudicator to hear the merits of a grievance involving the decision not to renew a specified term of employment where it is alleged that the reasons for the decision are prohibited discriminatory practices of the employer.*
>
> …

[36] I am in agreement with the decision of the adjudicator in the above-cited matter and my decision in this matter is consistent with it. My decision is also consistent with the decision rendered in *Lovell and Panula v. Canada Revenue Agency*, 2010 PSLRB 91 in which the grievors grieved that the termination of their employment for incapacity was discriminatory and that it was in violation of their collective agreement and the *CHRA*. The employer objected to the jurisdiction of an adjudicator, alleging that the termination of the grievors' employment was non-disciplinary and that their grievances could be dealt with through its independent third-party review process. The adjudicator held that although an adjudicator does not usually have jurisdiction over a non-disciplinary termination of employment at the Canada Revenue Agency, he or she has jurisdiction to decide whether the collective agreement had been breached or the grievors had been subject to discrimination prohibited by the *CHRA*.

[37] In *Swan and McDowell*, the adjudicator declined jurisdiction over the grievances on the basis that the essential character of the grievances involved staffing and the employer's staffing program and because article 1, the collective agreement provision cited by the grievors did not create any substantive rights and finally, that the grievor had not properly raised the issue of article 1 in her grievance. The present case is clearly distinguishable from *Swan and McDowell* in that here, the grievor properly raised the issue of the application of a collective agreement provision which does give substantive rights and her grievance's essential character concerns human rights.

[38] In *Spencer*, the grievance related in large part to the employer's policy of giving indeterminate employment status to term employees after three years of continuous employment. The employer argued that the adjudicator had no jurisdiction to interpret that policy since it was not part of the collective agreement. However, that policy did

not include recourse for challenging its application or interpretation. The adjudicator held that a gap in another administrative mechanism for redress cannot provide the basis for expanding the jurisdiction of an adjudicator as set out in section 209 of the *Act*. I agree with that conclusion. However, the issue in the present case is not to give recourse to the grievor to fill the gap left by the *PSEA* and the *PSER*. Rather, it is to give her recourse to examine her allegations of discrimination and of a violation of the collective agreement.

[39] In *Hureau*, the grievor alleged that the employer did not respect the personal references clause of the collective agreement in the course of a selection process. The employer objected to the jurisdiction of the adjudicator on the basis that the grievance related to staffing. The adjudicator determined that he had jurisdiction to hear the grievance to the extent that it related to a violation of the collective agreement. However, he concluded that any remedies concerning staffing would be outside his jurisdiction. In the present case, I have jurisdiction to hear the grievance but will leave the issue of remedy open for the time being pending the submissions of the parties when the hearing resumes.

[40] In *Brown* (PSLRB), the grievor alleged that he was discriminated against by the fact that the employer did not appoint him to a position for which he had qualified. The adjudicator declined jurisdiction on the basis that the grievance was about staffing decisions for which a recourse procedure was available to the grievor. That is not the case for this grievance. The Federal Court confirmed the adjudicator's decision in *Brown* (PSLRB).

[41] The facts of this case are comparable to the facts in *Veillette*. In that case, the grievor filed three grievances alleging that the employer violated the no-discrimination clause of the collective agreement by not offering him acting appointments and by excluding him from a competitive process on the basis of family status and union involvement. The employer objected to the adjudicator's jurisdiction on the basis that the grievances were about staffing and that other recourses were available. The adjudicator dismissed the employer's objection for the two grievances for which no recourse procedure was available to the grievor. He also stated that the no-discrimination clause of the collective agreement conferred substantive rights on employees.

[42] In conclusion, I dismiss the objection raised by the employer, and I determine that I have jurisdiction to hear this grievance. It is clear in my mind that this grievance relates to the no-discrimination clause of the collective agreement. According to the facts submitted to me, the employer was to offer the grievor a short-term acting appointment but decided not to on the sole basis of her common-law spouse's professional activities. That could be a violation of the collective agreement, and I have jurisdiction to consider that alleged violation, considering that I am not barred by subsection 208(2) of the *Act,* since there is no other administrative procedure for redress available to the grievor under any Act of Parliament, other than the *CHRA*.

[43] In no way should my decision be perceived as indicating that the employer violated the collective agreement by discriminating against the grievor. That remains to be proven at an oral hearing on the merits of the grievance.

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

(The Order appears on the next page)

V. Order

[45] The employer's objection is dismissed.

[46] The PSLRB will contact the parties to schedule a hearing on the merits of the grievance.

July 23, 2013.

Renaud Paquet,
adjudicator