Date: 20160624

Files: 566-02-10986 to 10993

Citation: 2016 PSLREB 55

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

SHELLEY WEPRUK

Grievor

and

TREASURY BOARD
(Department of Health)

and

DEPUTY HEAD
(Department of Health)

Employer

Indexed as
Wepruk v. Treasury Board and Deputy Head (Department of Health)

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Charles Gordon and Patricia A. Deol, counsel

For the Employer: Richard E. Fader, counsel

Decided on the basis of written submissions, filed January 19, February 26, and March 11, 2016.

I. Individual grievances referred to adjudication

[1] Shelley Wepruk ("the grievor") was employed as a border integrity specialist in the inspectorate program of the Department of Health ("the employer"), located in Burnaby, British Columbia. The applicable collective agreement is for the Applied Science and Patent Examination Group bargaining unit, concluded between the Treasury Board and the grievor's bargaining agent, the Professional Institute of the Public Service of Canada ("the union"), and expired on September 30, 2014. The grievor filed eight grievances, which will be summarized in the next section of this decision.

[2] At the parties' request, I agreed to issue an interim decision in an attempt to address the jurisdictional issues raised by the employer to several of the grievances.

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the background facts

[4] In the fall of 2013, the employer noticed a pattern of absences by the grievor on Thursdays. It also found a document from Simon Fraser University (SFU) in Burnaby that indicated that a certain course was offered there on Thursdays. This raised the employer's suspicion that the grievor was fraudulently using different types of leave with pay to cover absences while attending university classes during work hours. The employer subsequently learned that another employee, Albert Tsou, had seen the grievor on the SFU campus.

[5] The grievor learned that Mr. Tsou's sighting had been reported to management. She called him on his personal cell phone to tell him he was causing her stress. After that discussion, she met with him in a boardroom and advised him that she considered his actions to be bullying. He reported this incident to the employer, and in February 2014, the grievor was called into a meeting to discuss her interaction with Mr. Tsou and her Thursday absences. During that meeting, the employer threatened to contact SFU to access her student records but did not and later confirmed to the grievor that it would not. She filed a grievance contesting the employer's access to her university records (PSLREB File No. 566-02-10986), characterizing the threat as harassment, intimidation, and a breach of policies and guidelines, including the Treasury Board of Canada's *Policy on Harassment Prevention and Resolution*.

[6] In December 2013, the grievor's uncle died, and she was denied bereavement leave on the ground that uncles are not a category of family members for whom such leave applies. The grievor grieved the denial (PSLREB File No. 566-02-10987).

[7] In June 2014, the grievor was met with to discuss two days of sick leave she had requested in April 2014. She had not provided a medical certificate for those two days, despite an earlier written direction in the fall of 2013 that she certify all future sick leave requests. She was given a letter of reprimand for insubordination (for not following a clear directive), and her leave was converted to leave without pay, so she then grieved both the letter of reprimand (PSLREB File No. 566-02-10988) and the harassment she claimed was present (PSLREB File No. 566-02-10989).

[8] On June 16, 2014, teachers in British Columbia participated in a well-publicized strike/study day, and the grievor requested leave for family related responsibilities for that day. The employer refused, as the day had been promoted ahead of time, and she could have made alternate arrangements. She grieved that refusal, alleging that it was part of a pattern of harassment (PSLREB File No. 566-02-10992).

[9] The grievor filed a grievance contesting a letter of reprimand given to her on June 26, 2014, for her behaviour towards Mr. Tsou during another interaction at work, and contesting that she was forced to undergo mandatory conflict resolution training as part of the imposed discipline (PSLREB File No. 566-02-10991).

[10] On July 3, 2014, the grievor was suspended indefinitely without pay pending an investigation into a threat she allegedly made against management in an email she sent to the union. It appears that the union contacted the Royal Canadian Mounted Police (RCMP), which then contacted the employer. A grievance was filed contesting the suspension (PSLREB File No. 566-02-10990).

[11] Following the employer's investigation, the grievor's employment was terminated on October 9, 2014, backdated to the date of the indefinite suspension, for the email she had written to her union in which she allegedly threatened violence against a member of management. She filed a grievance contesting her discharge (PSLREB File No. 566-02-10993).

[12] Of the eight grievances filed by the grievor, the employer takes no issue with the adjudicability of the grievances in files 566-02-10987 (about bereavement leave), 566-02-10992 (about family related leave), and 566-02-10993 (about the termination of employment).

[13] I will now deal with the issues concerning the remaining grievances.

III. Summary of the arguments and analysis

A. Grievance 566-02-10986

[14] This grievance was filed on February 21, 2014, further to a fact-finding meeting held on February 12, 2014, during which the employer advised the grievor it would contact SFU without her consent to obtain her personal and student records. She alleged intimidation and harassment by the employer.

[15] The meeting was called to investigate two allegations: first, that the grievor had behaved inappropriately toward a fellow employee (Mr. Tsou), and second, to re-examine her absences from work on four Thursdays between September and November 2013 and therefore her eligibility for leave on those days. The employer alleges that it learned that the grievor had been seen on the SFU campus during working hours, despite the fact that she was absent on a combination of certified sick leave, uncertified sick leave, family related responsibilities leave, and medical appointments leave during that period.

1. Argument

[16] In a relatively detailed letter of over three pages the union sent to the employer eight days after the fact-finding meeting and one day before it filed the grievance, it objects to the meeting on a number of grounds, one of which is the breach of privacy allegation of threatening to contact SFU. While the letter makes several allegations of improper behaviour by the employer and alleges that it was biased in its conduct of the meeting, the word "harassment" is never mentioned, and no mention is made of either article 1 or 25 of the collective agreement.

[17] In the first paragraph of the grievance, the grievor indicates that she is grieving the "… inappropriate and improper statement that the employer would be contacting SFU …" without her consent. The second paragraph indicates that that behaviour is harassing, intimidating, and a breach of policies and guidelines. The third paragraph refers to the grievor's privacy rights having been breached.

[18] The employer responded to the letter on March 27, 2014, stating that, among other things, SFU would not be contacted without the grievor's consent. At the end of the letter, the employer does use the word harassment when it states that the grievor had withdrawn her statement, made at the fact-finding meeting, that she had filed a formal harassment complaint in January 2014. The employer advised the union that such allegations were serious and that it considered the grievor's comments malicious, vexatious, and a serious breach of judgement.

[19] The union responded to this letter on May 16, 2014, covering several subjects. The only reference to harassment is found in the section entitled, "Ms. Wepruk's meeting with Mr. Mori on January 9, 2014". The union denies that the grievor had alleged that she had filed a formal harassment complaint or that she had done anything to withdraw statements she made in January 2014.

[20] In its grievance response dated February 25, 2015, the employer indicates that as it had decided not to contact SFU, the grievance was therefore moot.

[21] The grievance was referred to adjudication on April 2, 2015, and in the space on the referral form reserved for indicating the provision of the collective agreement or

arbitral award that is the subject of the grievance, the union indicated only, "Collective Agreement and the Policy on Harassment Prevention and Resolution".

[22] On June 3, 2015, the employer filed an objection to the Board's jurisdiction to hear this grievance, alleging that although it was referred to adjudication as relating to the interpretation of a collective agreement, it cites no collective agreement provision. In her letter dated February 20, 2014, setting out her objections to the employer's threat to contact SFU, the grievor does not cite any collective agreement provision, only privacy laws.

[23] In a letter dated June 25, 2015, sent in response to the employer's objection, the union alleges that clauses 1.01 and 1.02 of the collective agreement formed the basis of the grievance.

[24] The grievor also argues that this grievance is related to others she filed to which the employer did not object. She alleges that those grievances are part of the context of this one. She refers to the harassment grievance (file 566-02-10989) and states that this grievance is part of the pattern grieved in that grievance.

[25] In its written submissions dated January 19, 2016, the employer points out that the grievance makes no allegation of disguised discipline and no reference to the collective agreement. The employer cites *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, for the proposition that absent raising an issue specifically provided for in s. 209 of the *PSLRA*, there is no jurisdiction to adjudicate. As the grievance made no mention of disciplinary or collective agreement interpretation issues, the Board has no jurisdiction, and any attempt to include such allegations at this stage is a violation of the principles set out in the following decisions: *Burchill v. Canada (Attorney General)*, [1980] F.C.J. No. 97 (QL); *Boudreau v. Canada (Attorney General)*, 2011 FC 868; and *Mutart v. Canada (Attorney General)*, 2014 FC 540. The employer also points out that while sexual harassment is prohibited by article 43 of the collective agreement, personal harassment is not included in it. The employer points out that the grievor could have sought judicial review of this decision but did not and that this should prevent her from calling contradictory evidence under the guise of context in her grievance against her termination.

[26] The grievor's written submissions of February 26, 2016, state that the employer mischaracterized this grievance and that it is in fact a harassment grievance. She states that *Burchill* has no application, as the employer was always clear on the nature of the grievance; the grievance form makes this clear, as does the correspondence the parties exchanged (the union does refer to correspondence issued after the grievance was filed but refers to it as having been exchanged before the grievance was filed).

[27] Thus, as the grievance alleges harassment, and as harassment is addressed in article 25 of the collective agreement, it is also adjudicable as an interpretation grievance. While the grievor acknowledges that article 25 is not expressly stated in the grievance, there was no need to, as its nature and object were clear to the employer (see *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64).

[28] In its reply submission, the employer states that the grievor is raising article 25 for the first time, that the grievance does not refer to it, and that it was not argued during the grievance process (see *Burchill*). The grievance alleges no violation of the collective agreement or discipline and so does not fall under s. 209 of the *PSLRA*.

2. <u>Analysis</u>

[29] I would first point out that the issue of this grievance being related to, and its context with, other adjudicable grievances does not respond to the employer's position that it is not adjudicable. The context argument will be addressed later in this decision.

[30] Other issues raised include breach of privacy, allegations that the employer's behaviour at the fact-finding meeting was harassment and so contrary to Treasury Board policy, and intimidation.

[31] In its letter dated June 25, 2015, the union submits that the grievance is based on article 1 of the collective agreement, which reads as follows:

> ***Article 1***
>
> ***Purpose of Agreement***
>
> ***1.01*** *The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Institute, to set forth*

> *certain terms and conditions of employment relating to remuneration, hours of work, employee benefits and general working conditions affecting employees covered by this Agreement.*
>
> ***1.02*** *The parties to this Agreement share a desire to improve the quality of the Public Service of Canada, to maintain professional standards and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish within the framework provided by law, an effective working relationship at all levels of the public service in which members of the bargaining unit are employed.*

[32] The jurisprudence of the former Board and the Federal Court has consistently held that article 1 and clauses comparable to it do not grant substantive rights to employees. In *Forster v. Canada Revenue Agency*, 2006 PSLRB 72 at paragraph 25, the adjudicator noted that the parties had agreed that the similar provision in the applicable collective agreement in that case did not create substantive rights and concluded that the grievor in that case could not rely on that provision to assert a right to refuse unsafe work.

[33] In *Canada (Attorney General) v. Lâm*, 2008 FC 874 ("*Lâm*"), the Federal Court, by whose decisions I am bound, clearly stated as follows at paragraph 28: "Article 1 of the collective agreement is a general clause, an introduction or a preface that does not grant any substantive right to employees." In *Lâm v. Treasury Board (Department of Health)*, 2007 PSLRB 69, the adjudicator had accepted the grievor's argument to the effect that the Treasury Board's harassment policy fell within the objectives of article 1 of the collective agreement at issue, a conclusion that the Federal Court unequivocally rejected.

[34] In matters dealing with comparable clauses, *Lâm* was applied by the adjudicators in *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73; and *Mackwood v. National Research Council of Canada*, 2011 PSLRB 24.

[35] Even had the grievance specified article 1, which it did not, it could not have granted substantive rights to the grievor. Accordingly, I reject that element of her argument.

[36] With respect to the privacy issue, the grievor cited no article of the collective agreement that could be applied to what she characterized as the employer's threat, and neither did she allege discipline during the grievance process. In addition, I agree with the employer that this issue is moot as it did not act on its "threat" to contact SFU. The employer abandoned its proposed action.

[37] Lastly, I turn to the union's allegation that this grievance is adjudicable under article 25 of the collective agreement, given its harassment focus. Although the grievance clearly refers to harassment, it does not mention article 25. The article reads as follows:

> ***Article 25***
>
> ***Safety and Health***
>
> ***25.01*** *The Employer shall continue to make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Institute and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury or occupational illness.*

[38] While the union concedes that this is the first time that article 25 was raised directly, it alleges that the tenor of the communications it had with the employer made it clear that harassment was an issue in this grievance. While it is true, as the employer points out, that the grievance does not refer directly to article 25, I accept the union's contention that referring to a particular collective agreement provision in a grievance is not always necessary, as long as, from the grievance's wording, the employer can be reasonably expected to understand that a particular collective agreement provision is in play. For example, a grievance alleging that the employer inappropriately distributed overtime need not mention the collective agreement provision concerning the allocation of overtime, as the employer can reasonably be expected to understand from the grievance wording which provision of the collective agreement is in play.

[39] While I agree with the union's allegation that the employer could have deduced that harassment was an issue between the grievor and Mr. Shelley, I have concluded that the employer could not reasonably have understood that article 25 of the

collective agreement, which on its face concerns occupational safety and health, was in play. Its wording does not capture the issue of personal harassment such that the employer should have known that it was in play even though the union had never referred to it directly. Therefore, the union's admitted reference to article 25 for the first time during the exchange of submissions on jurisdiction constitutes a violation of the rule in *Burchill.*

[40] I conclude that this grievance is not adjudicable on the basis of either article 1 or 25 of the collective agreement. As I alluded to earlier in this decision, that leaves the question of the employer's objection to the grievor being permitted to lead what it referred to as "contradictory evidence under the guise of context", which I will deal with later in this decision, as the issue is applicable to several of the grievances.

B. Grievance 566-02-10988

[41] The issue in this grievance concerns a letter of reprimand issued for the grievor's failure to substantiate two sick leave days with a medical certificate, further to earlier instructions.

[42] The grievance was filed on June 25, 2014, following a meeting held on June 20, 2014. Further to the meeting, the employer decided to record the grievor's leave days of April 8 and 9, 2014, as unauthorized leave and to issue her a letter of reprimand.

[43] The employer's letter of reprimand, dated the same day as the meeting, states that the grievor had been advised in October 2013 that she required a medical certificate to support all leave requests (no end date to this order was noted) and that she was unable at the meeting to provide a satisfactory response to why she did not follow this directive for her leave requests in April 2014. The employer considered it insubordination.

[44] The disciplinary report at Tab 8 of the employer's book of exhibits indicates that the grievor stated that she had not seen a doctor about her absences and that she understood that the need for a medical certificate was extinguished automatically with the end of the fiscal year, as that date coincided with the end of her acting supervisor's

assignment. The report states that the grievor had received an email on March 20, 2014 (i.e., before her leave days), advising her of the extension of the supervisor's acting appointment to June 30, 2014. The grievor did provide a medical certificate dated May 7, 2014, stating that she was absent on April 8 and 9, 2014, due to illness. She advised the employer that she had obtained that certificate when seeing her doctor for another reason.

[45] The report concludes by stating that she had received a clear direction that was legal and that was never modified or rescinded. The grievor had demonstrated that she understood the direction by providing medical notes on other occasions and had never challenged it or indicated that she could not follow it. She apologized for causing a problem, but the employer did not believe that she was in fact contrite. It noted that it was another incident that was part of an increasing number of inappropriate behaviours. Its finding was that her behaviour displayed willful misconduct and, specifically, insubordination. Its response to the grievance, issued on February 25, 2015, found that there was insubordination, as the directive for her to provide medical certificates for all absences had been given in writing.

1. <u>Argument</u>

[46] On June 3, 2015, the employer objected to the Board's jurisdiction to hear and decide this grievance, as it concerns a written reprimand. In support, it cited *Lamarre v. Treasury Board (Fisheries and Oceans)*, PSSRB File No. 166-02-26902 (19960311), [1996] C.P.S.S.R.B. No. 20 (QL); and *Focker v. Canada Revenue Agency*, 2008 PSLRB 7.

[47] The grievor's letter of June 25, 2015, states that the grievance did not, as the employer alleges, concern a written reprimand. Instead, she states that it concerns the employer's decision to record her leave as unauthorized and therefore concerns the imposition of a financial penalty.

[48] The employer's written submissions dated January 19, 2016, cite the following cases for the proposition that written reprimands are not adjudicable under s. 209 of the *PSLRA*: *Canada (Attorney General) v. Lachapelle*, [1979] 1 F.C. 377; *Rajakaruna v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-23135 (19930414), [1993] C.P.S.S.R.B. No. 59 (QL); *Reasner v. Treasury Board (Transport Canada)*, PSSRB

File No. 166-02-26260 (19950607), [1995] C.P.S.S.R.B. No. 51 (QL); *Bratrud v. Office of the Superintendent of Financial Institutions*, 2006 PSLRB 63; *Parkolub v. Canada Revenue Agency*, 2007 PSLRB 64; *Focker*; *Canada (Attorney General) v. Robitaille*, 2011 FC 1218 (aff'd 2012 FCA 270); and *Bétournay v. Canada Revenue Agency*, 2012 PSLRB 128.

[49] The grievor's submissions of February 26, 2016, characterize the employer's actions as discipline resulting in a financial penalty, as she was not paid for the two sick days. She alleges that that was done in bad faith and that it was part of her being harassed. She alleges that the adjudicator must take into account the entire context of the grievance (see *McMullen*; and *Teti v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 112, upheld in 2014 FC 994) and points to the fact that her medical certificate was rejected before the penalty was imposed as proof of the employer's bad faith. The union alleges that as the employer's purpose was to correct insubordination, its actions were disciplinary in nature.

[50] The employer's reply states that the grievor has ignored the long line of cases that have decided that written reprimands are not adjudicable. The issue is whether this is a case of disciplinary action resulting in a financial penalty. The case law has always drawn a distinction between a financial loss and a financial penalty, and in this case, the written reprimand was the penalty and the denial of sick leave was the administrative application of the collective agreement and the principle of "no work, no pay". The grievor could have challenged the denial of sick leave under the collective agreement but did not. The allegation of bad faith cannot be used to cloak an otherwise non-adjudicable grievance with jurisdiction, as adjudicators have no free-standing authority to adjudicate all grievances, and jurisdiction must first be found in s. 209 of the *PSLRA* (see *Chamberlain*). She could have addressed the issue of bad faith before the Federal Court but did not.

2. Analysis

[51] The employer's argument that written reprimands are excluded from the list of adjudicable disciplinary measures is unassailable. Also unassailable is its contention that a financial loss in the form of denied sick leave is not automatically characterized as a financial penalty. However, she also alleged that the denial of her leave was in fact

a disguised disciplinary (financial) penalty, as it was tainted with bad faith. On that issue, she is entitled to the right to make her case before me. Accordingly, this grievance is adjudicable. However, the onus will be on the grievor to prove that the employer characterizing her sick leave as unauthorized was motivated by disciplinary intent such that it can be characterized as a financial penalty.

[52] Lastly, the union raised the issue of context once again, but my decision on its adjudicability makes it unnecessary for me to deal with that argument.

C. Grievance 566-02-10989

[53] This grievance was filed on the same day as the one challenging the denial of sick leave. It is worded in very general terms and simply alleges that the grievor has been the subject of ongoing harassment and bullying by her employer, in violation of article 25 (Safety and Health) of the collective agreement, legislation, and Treasury Board guidelines, among other things.

[54] In its response to the grievance, the employer indicates that the grievor had alleged that there were factions in the workplace in the form of an “in group” and an “out group”. She had alleged that she felt that she was part of the out group and that she had experienced retribution for filing grievances. The response states that she failed to support her allegations, which did not come within the Treasury Board definition of harassment.

1. Argument

[55] The employer raised a preliminary objection to the Board’s jurisdiction over this grievance. In its written submissions of January 19, 2016, it states that the reference to article 25 was an attempt to make this grievance adjudicable, as it concerns personal harassment, a subject not covered by the collective agreement. The employer argues that the grievor is trying to turn article 25 (which provides that the employer should make all reasonable provisions for the occupational safety and health of employees) into a personal harassment clause, when no such clause exists. The employer alleges that the wording of the grievance reveals that its pith and substance is personal harassment. Any attempt to amend the grievance at this stage would be a violation of

Burchill. To the extent that the grievance does relate to a health and safety issue, the employer alleges that there exists another procedure for redress (Part II of the *Canada Labour Code* (R.S.C. 1985, c. L-2; *CLC*)) that provides a complete code for all health and safety matters.

[56] The grievor's written submissions of February 26, 2016, state that the grievance is adjudicable, as it involves the interpretation or application of a collective agreement provision and clearly refers to article 25. She argues further that article 25 encompasses workplace violence, which includes harassment. See *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273, which confirmed that workplace violence under the *Canada Occupational Health and Safety Regulations*, SOR/86-304, made under the *CLC* (*COHSR*), includes harassment. The grievor points out that the employer's submission accepts this (at page 6), as the employer cites that decision, but for a different purpose (pointing out that the *CLC* provides a complete other system for redress).

[57] The grievor argues that federal employers have a responsibility under the *COHSR* to ensure occupational health and safety and that article 25 incorporates this into the collective agreement and provides substantive rights; see *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 70. The grievance is clear that its pith and substance concerns the employer's harassing conduct as a violation of both the *CLC* and the collective agreement. The Federal Court of Appeal ruling makes it clear that the collective agreement prevents the employer from engaging in harassment that could be detrimental to the health of employees. This position is supported by the employer's harassment policy, as it refers to workplace violence and the *CLC* expressly (sections 3.2 and 3.5) and informs about the reasonable provisions that the employer must make under article 25 (see *Galarneau*).

[58] On the *Burchill* issue, the union argues that the nature of the grievance has been clear all along. As for other processes for redress, the union argues that no issue arises under s. 208(2) of the *PSLRA,* since the Board is properly seized under s. 209(1)(a). Furthermore, the *CLC* does not provide a redress measure, as it does not cover damages; see *Galarneau*. In addition, the union refers to the Board's decision in *Perron v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 109, to the effect that

judicial review is not another administrative procedure within the meaning of s. 208 and per *Teti*.

[59] Finally, the union contests the employer's statement at page 9 of its submissions of January 19, 2016, which is that the investigation reports and briefing notes form part of its decision together with the final-level grievance reply and therefore can be entered into evidence. The union responds that internal employer memoranda as well as the discipline report were not provided to the grievor or to it at the final level of the grievance process and accordingly do not form part of the final level decisions.

[60] The employer's reply states that while the grievor relies on harassment protection as provided for in the collective agreement, the agreement deals only with sexual harassment, and that personal harassment is dealt with only in the employer's policy. As noted by the former Board and the Federal Court in *Boudreau*, that policy is not incorporated into the collective agreement and therefore is not adjudicable. Reading personal harassment into article 25 would amend the collective agreement and therefore would violate s. 229 of the *PSLRA*. The grievor is trying to do indirectly what she cannot do directly. Citing a decision of the Occupational Health and Safety Tribunal of Canada in *Via Rail Canada v. Mulhern*, 2014 OHSTC 3, the employer argues that harassment and violence are not synonymous and that while a harassment allegation might support a violence finding, it does not make that allegation independently adjudicable based on the collective agreement's health and safety provision.

[61] The employer states that this is the first time that the grievor suggested that the nature of the grievance is harassment in an attempt to make it adjudicable and that she should have used the other administrative procedure for redress. Even if the redress available is not equivalent to that which she could obtain from an adjudicator, the Federal Court of Appeal, in *Canada (Attorney General) v. Boutilier*, 1999 CanLII 9397 (FCA), notes that it need not be equivalent as long as it deals with the substance of the grievance. The employer alleges that Part XX of the *COHSR* deals meaningfully with violence, and as the grievor's reformulated grievance supposedly has that issue at its centre, the *CLC* procedure should have been used. *Teti* and *Perron*

are inapplicable because they involve allegations of harassment based on prohibited grounds of discrimination, and therefore, there was no issue of jurisdiction in either of those cases.

2. Analysis

[62] Despite the employer's contention that this is the first time the grievor has raised the issue of harassment and article 25, I find that that article is expressly mentioned in the grievance, both in its statement portion and in the section setting out the redress requested, as well as in the document (Form 20) referring the grievance to adjudication. Therefore, I dismiss the employer's argument based on *Burchill.*

[63] The employer also alleges that the grievor included article 25 only to make the grievance adjudicable. Even if so, this fact alone does not render it non-adjudicable. Section 209 of the *PSLRA* states that a grievor may refer to adjudication a grievance that is "related to" the interpretation or application of a provision of a collective agreement, regardless of the employer's evaluation of the merits of the allegation made in the grievance.

[64] On the issue of how to interpret article 25, both parties provided extensive written submissions to either prove or refute the allegation that this article applies to cases of personal harassment. The employer argues that article 25 is not a personal harassment clause and that turning it into one would constitute an amendment to the collective agreement and therefore a violation of s. 229 of the *PSLRA.* The union contends that article 25 has incorporated into the collective agreement federal regulations designed to ensure occupational health and safety and that harassment is included in that ambit.

[65] As the employer raised the preliminary objection about jurisdiction, it bears the onus of convincing me that even were I to take the allegations as true, no possible violation of article 25 could be sustained. Having not yet heard any evidence on this issue, and given the paucity of evidence on the file, I am unable to come to the conclusion that the grievor could make no arguable case. I am also unable to state that personal harassment issues can never be the subject of grievances under the health and safety article in the collective agreement. Indeed, the employer submitted a

decision of the Occupational Health and Safety Tribunal of Canada that states that a harassment allegation might support a violence finding. As the former Board held in *Hager v. Statistics Survey Operations*, 2009 PSLRB 80, the test for adjudicability must be applied in a fashion that errs on the side of allowing grievances to be heard on their merits.

[66] Finally, I must address the employer's alternative submission that the procedure to address workplace violence provided for in the *CLC* is a complete procedure for redress within the meaning of s. 208(2) of the *PSLRA* and that it should have been used in the circumstances of this case. It rejects the union's contention that that the fact that that procedure might not provide for awarding damages means that it does not constitute another procedure for redress.

[67] If I were to accept the employer's argument, it seems to me that article 25 of the collective agreement would be rendered a nullity and would provide individual grievors with no substantive rights and no ability to grieve health and safety matters, which I would approach with caution.

[68] In any event, the employer has clearly argued that "… to the extent that this grievance is not in pith and substance an allegation of personal harassment and is one concerning occupational health and safety … there is no jurisdiction as a result of section 208 … as there is another procedure for redress under Part II of the [*CLC*]". As I understand the grievor's allegations thus far, she alleges that she was the subject of harassment, and on this issue, my conclusions stated earlier apply.

[69] Finally, as with my earlier conclusion, I also find for this grievance that I am unable to come to a definite conclusion on the issue of the other procedure for redress given the paucity of facts about this grievance. It refers to no particular incident or facts and refers only obliquely to "ongoing harassment", without any further details. I will retain jurisdiction over this grievance for the purposes of the hearing and will render a final decision on the matter once I have heard the evidence.

D. Grievance 566-02-10990

[70] On July 3, 2014, the grievor was indefinitely suspended without pay pending the investigation of a threat she allegedly made against management in an email she sent to the union. According to the letter of suspension, on July 2, 2014, the RCMP contacted the employer and advised it that in correspondence to the union, the grievor had made a threat of violence against her supervisor; namely, that one day soon she would snap and bring one of her guns to work and "shoot the bastard". The employer considered that her presence in the workplace constituted a serious and immediate threat and placed her on administrative suspension pending investigation.

[71] The grievance was filed on July 10, 2014. In its response on February 25, 2015, the employer stated that the suspension was appropriate, that it takes violence seriously, and that it has a responsibility to exercise its discretion to determine threats.

1. Argument

[72] The employer filed a preliminary objection to the adjudicability of this grievance, alleging that the suspension was administrative in nature and not disciplinary, as alleged in the referral to adjudication. The grievor responded on June 25, 2015, alleging that she was without compensation until her termination on October 9, 2014 (a financial penalty), and that her termination was backdated to the first day of the suspension.

[73] In its written submissions of January 19, 2016, the employer cites *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28 at paragraphs 152 to 155, for the proposition that it can backdate terminations, and *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62 at paragraph 154, for the proposition that doing so renders the grievance against the indefinite suspension moot. The employer acknowledges that if its objection to jurisdiction is rejected, the grievance must be heard on the facts, and that in that case, it will submit that the suspension was administrative in nature, citing *Canada (Attorney General) v. Frazee*, 2007 FC 1176; and *Clark v. New Brunswick (Department of Natural Resources and Energy)*, [1995] N.B.L.A.A. No. 15 (QL).

[74] The grievor's submissions of February 26, 2016, characterize the suspension as a financial penalty given that it was without pay. She also refers to the letter of suspension as evidence of disciplinary intent as it refers to misconduct.

[75] The employer's reply states that the grievor failed to address its authority to backdate the termination and cites *Basra* and *Brazeau* in this regard.

2. Analysis

[76] The grievor did not address the employer's submission that it has the authority under the *Financial Administration Act* (R.S.C., 1985, c. F-11) and previous Board decisions to retroactively date a termination to the first day of a preceding suspension without pay. Whether the indefinite suspension is characterized as administrative or disciplinary, the fact is that the termination was backdated to the first day of the suspension. The grievor did not allege or demonstrate that this grievance, challenging her indefinite suspension, raises issues that cannot be addressed by a hearing on the merits of the termination grievance or that such issues were brought to the employer's attention during the grievance process. Therefore, I find that in accordance with a long line of cases decided by the Board and its predecessors on this very issue, this grievance is moot.

E. Grievance 566-02-10991

[77] On June 26, 2014, the grievor was given a letter of reprimand, which stated that she had behaved inappropriately towards Mr. Tsou, in particular when she approached him a second time on November 22, 2013, and accused him of bullying her. It also imposed mandatory training on dealing with conflict constructively. The grievance was filed July 25, 2014, and contests the discipline imposed, alleging that it was the result of a biased investigation and harassment by management. The grievance mentions no collective agreement article and was referred to adjudication as a disciplinary grievance in accordance with s. 209(1)(b) of the *PSLRA*. The employer responded to the grievance on February 25, 2015, stating that the discipline and training were appropriate.

1. Argument

[78] The employer objected to the Board's jurisdiction to hear and decide this grievance in a letter dated June 3, 2015, as it concerns a written reprimand. It cited *Lamarre* and *Focker*.

[79] The grievor responded on June 25, 2015, alleging that this grievance was part of an ongoing pattern of harassment that is the subject of the grievance in file 566-02-10989 and that therefore, it should be heard.

[80] In its written submissions of January 19, 2016, the employer cites Tab 14 of its book of exhibits, which is a summary of the privacy grievance (file 566-02-10986). In the background information found in that summary, the employer details the facts of the grievor's allegedly inappropriate interaction with Mr. Tsou. It indicates that Mr. Tsou, who was a full-time student at SFU and a part-time employee of the employer, had mentioned to a co-worker that he had seen the grievor on the SFU campus. That co-worker then so informed the grievor's supervisor. Then, through a co-worker, the grievor obtained Mr. Tsou's cell phone number and advised him that she needed to speak to him about a serious matter, which was that his report was causing her stress. He apologized for any stress caused and indicated that he had thought he had seen her on campus. On November 22, 2013, she approached him in person, asked to meet him in a boardroom, presented him with a copy of the employer's "Values and Ethics Code", and showed him documents about bullying. He advised management of the meeting, said he felt intimidated, and reported that she had asked him for a written apology.

[81] The employer's written submissions cite the following cases for the proposition that written reprimands are not adjudicable under s. 209 of the *PSLRA*: *Lachapelle*, *Rajakaruna*, *Reasner*, *Bratrud*, *Parkolub*, *Focker*, *Robitaille*, and *Bétournay*.

[82] The grievor's submissions state that the investigation was plagued with bias and a lack of procedural fairness and that that demonstrates a pattern of harassment. She alleges that the grievance is not limited to challenging the letter of reprimand and that the decision maker must look at the context (see *McMullen*), as doing so will lead to a conclusion that this grievance is really about harassment and therefore concerns

article 25 (Safety and Health), thus conferring jurisdiction on the decision maker under s. 209(1)(a) of the *PSLRA*.

[83] The grievor argues that the *Burchill* principle does not apply, as the employer cannot argue that it was unaware of the true nature of her objective; the grievance refers to harassment directly in both its statement and in the requested corrective action. In addition, she claims that this grievance is adjudicable as it concerns a financial penalty, since it requests that she be credited any leave she was required to take to cover her absence of June 16, 2014 (presumably during the British Columbia teachers' strike/study day) and since the letter of reprimand was meant to correct her behaviour towards another employee.

[84] In its response, the employer states that the grievor's allegations of bad faith and procedural fairness do not render an otherwise non-adjudicable grievance adjudicable, as they do not convert a written reprimand into a financial penalty. Instead, the allegations should have been the subject of a judicial review. The collective agreement does not provide protection for personal harassment, only sexual harassment.

[85] The employer submits that the Federal Court in *Boudreau* rejected the union's *McMullen* argument on looking at the entire context of a grievance, stating that it was not just a technicality, but fundamental to the proper functioning of the dispute resolution system in the federal public service.

[86] The employer points out that the adjudicator in *McMullen* did not consider the *Boudreau* decision, but that the same adjudicator in a later decision (*Calabretta v. Treasury Board (Department of Public Safety and Emergency Preparedness)*, 2015 PSLREB 85) did rely on *Boudreau* without referring to his earlier decision in *McMullen*.

[87] According to the employer, adjudication was the first time that the grievor pointed to the occupational safety and health provisions of the collective agreement in an effort to locate jurisdiction and that as she did not raise it during the grievance process, the employer was unaware that it was an issue. Article 25 does not make personal harassment adjudicable.

[88] The employer submits that it is not suggesting that the grievor cannot rely on the events in the grievance for context. Rather, it is arguing that she is prohibited from calling evidence to relitigate the issues. In this sense, the employer states that the grievor can enter into evidence the final-level decision and supporting documents.

2. Analysis

[89] It is clear that on its face, this grievance contests a letter of reprimand, which is, *prima facie*, beyond the Board's jurisdiction. The grievor argues that it should nonetheless be heard, as it is evidence of the allegation of an ongoing pattern of harassment. However, even though the facts on which this grievance is based may be related to and in context with other adjudicable grievances, this does not respond to the employer's submission that this particular grievance is not adjudicable. As with the other grievances, I will deal with the context issue in the next section of this decision.

[90] In her February 2016 submissions, the grievor also attempts to allege that it is adjudicable as a grievance concerning the interpretation or application of a clause of the collective agreement, yet the grievance makes no such reference to a violation of the collective agreement, and the referral to adjudication clearly states that it was referred as a disciplinary grievance. The grievor alleges that she was subject to disciplinary action equivalent to a financial penalty. For corrective action, the grievor requests that she be credited any leave she was required to take to cover her absence of June 16, 2014. Accordingly, this grievance is adjudicable. The onus will be on the grievor to prove that the employer's denial of her leave request was motivated by disciplinary intent such that it can be characterized as a financial penalty.

IV. The context issue

[91] As I have already alluded to, the grievor claimed the right to present evidence, including evidence related to several of her grievances that I have deemed beyond my jurisdiction to decide. The grievor wishes to raise these events as context for the grievances over which I do have jurisdiction. As I have held earlier in this decision, while the grievances may not be adjudicable, that finding does not, in and of itself, address the grievor's ability to call any evidence about those events. What is at issue is

the employer's contention that she cannot call evidence that is contradictory to or inconsistent with its findings at the final level of the grievance process.

A. Argument

[92] The employer states that the grievor is unable to present evidence to contest the final-level responses of non-adjudicable grievances and points out that she never sought judicial review of them, which it alleges is the proper forum for challenging such matters.

[93] In its written submissions of January 19, 2016, the employer objects to the grievor calling any evidence inconsistent with findings made in a final-level reply (i.e., to the effect that no harassment was present or that she was insubordinate or exhibited improper behaviour). She should not be allowed to challenge the findings *de novo*, as under s. 214 of the *PSLRA*, they are considered final and binding. The employer acknowledges that no cases are directly on point and that therefore the Board must be guided by the wording of the legislation and clause 35.16 of the collective agreement, which repeats the sense of s. 214 and reads as follows:

> ***35.16*** *Where a grievance has been presented up to and including the final step in the grievance process, and the grievance is not one that may be referred to adjudication, the decision on the grievance taken at the final step in the grievance process is final and binding and no further action may be taken under the* Public Service Labour Relations Act.

[94] Finally, the employer argues that based on case law, the investigation reports and briefing notes also form part of the decision and so will be admissible but not contestable.

[95] The grievor responds that even if certain grievances are not adjudicable, they can nonetheless form part of the evidence presented with respect to the termination grievance. She argues that evidence of harassment is probative and relevant and to prevent her from leading this evidence would amount to a breach of procedural fairness and a denial of natural justice. Her case rests on an allegation that she was harassed, to the employer's knowledge, by her supervisor over a lengthy period, that her employer did nothing to address it under its policies, and that this fact sheds light

on the appropriateness of the termination. In short, it provides background with which to assess her conduct. She asks how else one could assess whether the employer's decision to dismiss her was excessive in all the circumstances of the case.

[96] The grievor points to several cases in which these issues were considered as background. Section 226 of the *PSLRA* (now s. 20(e) of the *PSLREBA*) provides an adjudicator with broad statutory authority to admit evidence, and s. 228 provides that an adjudicator must allow both parties to a grievance to be heard, either orally or in writing. The grievor argues that excluding relevant evidence would prevent a party from fully presenting its case and amount to a denial of natural justice, unless there are compelling grounds for the exclusion, and that no exclusionary rule applies in this case. Among the decisions cited by the grievor in support of this argument were the following: *R. v. Wray*, [1971] S.C.R. 272; *R v. Zeolkowski*, [1989] 1 S.C.R. 1378; *Anderson v. Maple Ridge District* (1993) 10 C.P.C. (3d) 258 (B.C.C.A.), cited in *Chubb Security Canada Inc. v. United Brotherhood of Carpenters and Joiners of America, Local 1928*, [2001] B.C.C.A.A.A. No. 7; *Université du Québec à Trois-Rivières v. Laroque*, [1993] 1 S.C.R. 471 and *Greater Toronto Airports Authority v. Public Service Alliance of Canada (Buehler Grievance)* (2007), 158 L.A.C. (4th) 97.

[97] The grievor argues that a high level of procedural fairness is required when harassment and termination are at issue, citing the following cases, among others, in support: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Potvin v. Canada (Attorney General)*, 2005 FC 391; *Pelletier v. Canada (Attorney General)*, 2005 FC 1545 and *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105. She further argued that not allowing evidence about a key element of the case breaches natural justice, procedural fairness, and *audi alteram partem* (to hear the other side). If the employer was not able to find cases on point on this issue, it is because its interpretation is erroneous.

[98] The grievor argues that s. 214 of the *PSLRA* is no more than a privative clause (see *Dubé v. Canada (Attorney General)*, 2006 FC 796). The legislation must be interpreted and applied in a way that is consistent with natural justice and procedural fairness, and the preamble to the *PSLRA* gives voice to a commitment to the fair, credible, and efficient resolution of matters.

[99] Finally, the grievor cites *Teti* and *Fontaine-Ellis v. Treasury Board (Health Canada)*, PSSRB File No. 166-02-27804 (19980114), [1998] C.P.S.S.R.B. No. 3 (QL), in which the former Board and its predecessor considered evidence relating to non-adjudicable matters (a letter of reprimand and harassment).

[100] The employer's reply first focuses on what documents should be included in the decision. It points out that although the grievor objected to its position, she made no comment on the five Federal Court cases on which the employer relies. On the issue of the grievor's argument that excluding her evidence would exclude relevant evidence, the employer argues that it is a red herring, since the legislation was meant to operate in this manner, much as timeliness provisions operate, namely, to exclude otherwise relevant evidence for a legislative purpose of finality.

[101] At issue is not a common law evidentiary rule, but a statutory provision on finality. For the employer, regardless of relevance, procedural fairness, or natural justice, the issue is of legislative intent. What is required, and what the grievor wishes to avoid, is an application of a clear and ordinary meaning to s. 214 of the *PSLRA*. If a decision is final and binding for all purposes, then it cannot be challenged *de novo* under s. 209. The argument that s. 214 is merely a privative clause is without foundation; while it operates as a weak privative clause, this does not take away from the fact that its primary purpose is as a finality clause. Furthermore, clause 35.16 of the collective agreement repeats s. 214, and it would defy logic to say that the intent of the clause was to operate as a privative clause. The intent is clearly finality.

B. <u>Analysis</u>

[102] As confirmed by s. 20(e) of the *PSLREBA*, adjudicators have broad discretionary powers with respect to admitting evidence. On the other hand, I must also consider, when determining admissibility, the employer's finality argument. Lastly, with respect to this particular case, I must also bear in mind the fact that the employer had the burden of substantiating its objection to jurisdiction.

[103] I agree with the employer that the grievor cannot do indirectly what she cannot do directly. That is, she cannot challenge the employer's findings and convert non-adjudicable grievances into ones upon which I may rule. That being said, I am not

aware of any jurisprudence, and the employer acknowledged that it was unable to find any, which would prevent the grievor from presenting evidence about her employment history, whether or not that history involves issues that were the subjects of prior grievances. Indeed, as stated at paragraph 88 of this decision, the employer acknowledged that the grievor could rely on the events in the grievance for context.

[104] While many Federal Court decisions have referred to s. 214 of the *PSLRA*, all of them referenced it with respect to the standard of review. The employer acknowledges that the Federal Court has found that section to be a weak privative clause, but it insists that that section also operates to prevent the grievor from adducing evidence related to those inarbitrable grievances.

[105] I find that at this point in the proceedings, given the few facts I possess, it is too early for me to decide what type of evidence the grievor may or may not call to prove the grievances over which I have reserved jurisdiction. Therefore, at this early stage of the proceedings, I will allow the grievor the right to call evidence as she intends, with two clear provisos. First, she is not to do so to have me adjudicate grievances that in accordance with s. 214 are the subject of final and binding decisions and over which I have declined jurisdiction. Second, her right to call evidence is not, as it is not for any grievor, unlimited, and I reserve the right as decision maker to refuse to hear such evidence should it become clear during the hearing that I ought to. In other words, I reserve the right to make decisions on the scope of the evidence as it unfolds.

[106] Finally, I come to the issue of documents and which of them form part of the file. The employer claims the right to enter into evidence investigation reports and briefing notes, as they form part of the final-level decision. The grievor takes issue with the scope of the documentation that forms part of the file.

[107] Just as I have found earlier in this decision that the context issue is separate and apart from the adjudicability issue, so is the issue of what documentation the employer (or the grievor for that matter) can enter into evidence separate and apart from the issue of what constitutes a final-level decision. Even if the phrase “final-level decision” refers only to the final-level reply itself (and I make no finding on this point), the employer is not prevented, merely by virtue of that fact, from entering into evidence any documentation in its possession that it feels is required to prove its case

or reply to that of the grievor, subject to the ordinary rules of evidence. Therefore, as with the context issue, I reserve my right as the decision maker to rule on this issue as the hearing and the evidence unfold.

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

(The Order appears on the next page)

V. Order

[109] For PSLREB File Nos. 566-02-10987, 566-02-10992, and 566-02-10993, the grievances are adjudicable.

[110] For PSLREB File No. 566-02-10986, the grievance is not adjudicable. I order this file closed.

[111] For PSLREB File No. 566-02-10988, the grievance is adjudicable.

[112] For PSLREB File No. 566-02-10989, I will retain jurisdiction over the grievance for the purposes of the hearing.

[113] For PSLREB File No. 566-02-10990, the grievance is moot. I order this file closed.

[114] For PSLREB File No. 566-02-10991, the grievance is adjudicable.

June 24, 2016.

Steven B. Katkin,
a panel of the Public Service Labour Relations and Employment Board