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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Immigration and Refugee Board)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board (Immigration and Refugee Board)

In the matter of a group grievance referred to adjudication

Before: Michael McNamara, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: David Yazbeck, counsel

For the Employer: Joshua Alcock, counsel

Heard at Ottawa, Ontario,
May 25, 2016.

I. Group grievance referred to adjudication

[1] On February 28, 2007, the Public Service Alliance of Canada (PSAC) filed this group grievance on behalf of Norman Murray, Grace Chujor, Ted Guinto, Veena Jariwala, Marlene MacKay, Nadia Rudner, Herbert Smith, Bibi Wali, and other case officers in the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB), Toronto Region.

[2] The background to this matter began in 1991 when the IRB hired the grievors as case officers at the PM-01 group and level. The grievors submit that in the years since, they and other visible minority employees have remained clustered at the PM-01 level and have been unable to progress in their careers in the public service. They also state that the employer's policies and practices have maintained the under-classification of their positions. The grievors attribute this to what they allege is a longstanding situation of systemic racial discrimination at the IRB.

[3] The grievance alleges that the IRB's past and present actions, policies, and practices discriminate adversely, deny employment opportunities and benefits, and create and promote employment barriers against visible minority case officers. The grievance requests that these alleged discriminatory actions, policies, and practices be eliminated; that the IRB implement positive actions to correct conditions and to remove barriers to employment opportunities; and that all employees who were adversely affected be compensated and made whole.

[4] When this grievance was presented, the grievors were covered by the agreement between the PSAC and the Treasury Board for the Program and Administrative Services Group that expired on June 20, 2007 ("the collective agreement").

[5] On June 19, 2008, the grievance was referred to adjudication, and notice was given to the Canadian Human Rights Commission, which did not participate in the hearing.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations 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) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[7] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the *Public Service Labour Relations Act* to the *Federal Public Sector Labour Relations Act (¨the new Act¨)* and changing the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board ("the Board"). Any references to the governing legislation in this decision will refer to the new Act.

[8] Systemic discrimination is a complex type of discrimination; it is difficult to see, difficult to understand, and difficult to prove. It results from the often unintended consequences of established employment systems and practices. Because it is not necessarily motivated by conscious acts, it can be hard to detect. One must consider the actual results of an employment system to discern whether its procedures might be resulting in discrimination, intended or not.

[9] In my view, a full review of the evidence is required to assess whether this grievance has merit. The employer has raised a number of objections to hearing this matter and argues that it should be dismissed without a hearing. I am not persuaded for the reasons set out below.

II. Reasons

A. Is the grievance overbroad, and does it lack sufficient detail?

[10] The employer submits that the grievance is overbroad and that it lacks enough detail for the employer to be able to properly respond. The grievance alleges that a longstanding problem of systemic racial discrimination has been creating barriers and has been negatively affecting the employment rights and opportunities of visible minority employees at the IRB. Whether that is true will not be known until the evidence is heard. However, the grievance is quite clear as to the allegation, and there

is no doubt that the employer fully understands the claim.

[11] There is no better evidence of that than the employer's first and second responses to the grievance. Both are lengthy documents that specifically address the issue of systemic discrimination in a detailed and comprehensive manner. They reference and analyze several prior reports, which investigated allegations of systemic discrimination at the IRB.

[12] Even if I were to find that the grievance lacked sufficient particulars (which I do not) that would not be fatal as it could be cured through the exchanges that take place during the grievance procedure or by providing a statement of particulars. This point was made in *Devonian Electrical Services Ltd. v. International Brotherhood of Electrical Workers, Local 424*, [1971] A.G.A.A. No. 1 (QL) at para. 15, where the arbitration board said that a responding party to a grievance should expect to receive answers to the questions of "when", "where", "how" and "who" from the party making the initial allegation. However, it was noted that these questions are usually answered as the grievance is processed through the steps before the arbitration hearing.

[13] In this case, the employer did not object that the grievance was overbroad and did not express a need for particulars during the grievance procedure. Indeed, it did not request particulars until 2012, long after the grievance was filed and the grievance procedure had completed. When one was asked for, a statement of particulars was provided.

[14] *K-Bro Linen Systems Inc. v. Teamsters Local Union 847*, 2015 CanLII 67644 (ON LA), noted that given the informality of the grievance procedure and recognizing that a grievance cannot be placed on the same level as formal pleadings written by lawyers, allegations expressed in a grievance should be broadly interpreted.

[15] I find that the grievance is not overbroad; nor does it lack sufficient detail.

B. Is the essential character of the grievance classification and staffing?

[16] The employer submits that I lack jurisdiction because the essential character of this grievance is classification and staffing, matters that fall under the exclusive jurisdiction of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA).*

[17] In my view, this case is not a classification or a staffing grievance but is about alleged systemic discrimination that is said to manifest primarily in the policies and practices which determine how positions are classified or staffed. It is based on article 19 of the collective agreement and ss. 7 and 10 of the *CHRA*.

[18] Article 19 of the collective agreement states that there shall be no discrimination in the workplace by reason of race. Section 7 of the *CHRA* states that it is a discriminatory practice to differentiate adversely in relation to an employee because of race. Section 10 of the *CHRA* states that it is a discriminatory practice to pursue a policy or practice that deprives a class of individuals of employment opportunities because of race.

[19] The fact that the alleged discrimination is said to manifest in certain classification or staffing decisions does not make this a classification or staffing grievance. The pith and substance of the grievance is alleged systemic racial discrimination.

[20] Subsection 215(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) states that a bargaining agent may present a group grievance on behalf of employees who feel aggrieved by the interpretation or application of a provision of a collective agreement. That is the situation in this case. This grievance involves interpreting and applying article 19 of the collective agreement. Accordingly, it meets the requirements of s. 215(1), and I have jurisdiction to hear it.

[21] In *Haynes v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 85, the employer denied the grievor an acting position because it thought that there might be a conflict of interest due to the work of her spouse. The grievor complained that the employer had discriminated against her on the basis of family status and that by doing so, had breached the no-discrimination clause of the collective agreement. The employer argued that the *PSEA* is a complete code for dealing with staffing matters and therefore the adjudicator lacked jurisdiction to hear the grievance. Such a grievance could only be heard by the then Public Service Staffing Tribunal (PSST).

[22] The adjudicator concluded that the PSST's jurisdiction to deal with staffing disputes under the *PSEA* did not preclude the former Public Service Labour Relations Board (PSLRB) from hearing a grievance about a staffing appointment that alleged a breach of the relevant collective agreement's no-discrimination clause.

[23] I agree with the analysis outlined in *Haynes* at paragraphs 27 and 28:

> *[27] … 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 … is clearly that of human rights.*
>
> *[28] … 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.*

[24] The *Haynes* decision speaks precisely to the issues in the case before me. Just as the individual grievance in *Haynes* met the requirements of s. 209(1), the group grievance before me meets the requirements of s. 215 by calling for an interpretation and application of a collective agreement provision (article 19, the no-discrimination clause). There is no bar to the Board adjudicating human rights disputes that also involve staffing or other human resources related matters.

[25] I also note that the IRB's chairperson, who was the respondent in Mr. Murray's 2009 staffing decision (see *Murray v. Chairperson of the Immigration and Refugee Board of Canada*, 2009 PSST 33), argued the opposite of what the Treasury Board argues here. In that case, the respondent said that a complaint of systemic discrimination, by its nature, could not be the subject of a complaint of abuse of authority under s. 77 of the *PSEA*. Such a complaint must be personal to the complainant. It was noted that the PSST had already held as much in *Visca v. Deputy Minister of Justice*, 2006 PSST 16 at para. 24. See *Murray*, at para. 64.

[26] In *Murray*, the PSST agreed with that analysis and applied *Visca* to Mr. Murray's complaint, finding that Mr. Murray's claim was about not being appointed to the position in question and therefore was based on a clear personal interest. Thus, it was a legitimate staffing complaint and was adjudicated as such, notwithstanding the systemic discrimination arguments that were put forward to support the case. Whether or not I agree with that line of reasoning, I cannot ignore the fact that the employer argues precisely the opposite of what was argued in *Murray*.

C. <u>Can and should issue estoppel be applied against Mr. Murray?</u>

[27] The employer argues that Mr. Murray (but not the other grievors) should be precluded from pursuing this grievance on the basis of issue estoppel, due to his prior PSST decision. The employer correctly lays out the three conditions necessary to apply the doctrine of issue estoppel, which are that the issue must be the same as one decided in a prior judicial decision, that the prior decision must have been final, and that the parties to both proceedings are the same.

[28] Clearly, this issue is not the same as the one that was before the PSST.

[29] The issue in *Murray* was whether the employer had abused its authority by choosing to use a non-advertised selection process for a particular appointment process and whether that decision adversely impacted Mr. Murray in his efforts to obtain an appointment. The fact that systemic racial discrimination was alleged and argued in that case does not mean that the issue was the same as the one raised in this case.

[30] This grievance takes a broad approach to what is alleged to be a longstanding systemic problem. Indeed, that was the employer's first objection — that the grievance was overly broad and that it should be dismissed for that reason. Yet, the employer also argues that the issue in this case is the same as the narrow issue that was before the PSST in *Murray*.

[31] Nor are the parties the same. The respondent in *Murray* was the IRB's chairperson, as mandated by ss. 15 and 77(1)(a) of the *PSEA*. The respondent in this case is the employer, the Treasury Board.

[32] Issue estoppel does not apply. The parties are not the same. The issue is not the same. Nor is the purpose of the proceeding, the process or the stakes.

[33] Even if the three conditions were met, the second aspect of issue estoppel would still have to be considered. Would it be fair to apply issue estoppel against Mr. Murray? Would it create an injustice? If so, should the Board exercise its discretion and not apply it? See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, and *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52.

[34] The Supreme Court looked at this in the context of administrative tribunal decisions in *Penner* 2013 SCC 19 at para 31:

> *Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in Danyluk. … The discretion … must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence … legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in Danyluk, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."*

[35] In my view, it would be pointless and unfair to exclude Mr. Murray from the process when the matter would proceed in any event with the other grievors. His exclusion would have no impact on the use of judicial resources. I fail to see the point, or the fairness, of arguing that issue estoppel should be applied against one grievor in a group grievance and believe that excluding Mr. Murray would result in a real injustice.

[36] Accordingly, even if the conditions of issue estoppel were met in this case (which they were not), I would exercise my discretion to allow Mr. Murray to proceed with the grievance.

D. <u>Are the other grievors abusing the process?</u>

[37] The employer is not arguing that issue estoppel could be applied against the other grievors. However, it alleges that it would be an abuse of process for the other grievors to proceed.

[38] The decision in Mr. Murray's staffing complaint relates only to Mr. Murray's personal circumstances and allegations of discrimination about one particular staffing matter. Given that, it is hard to fathom how it could be an abuse of process for the other individual grievors to seek to exercise their recourse against alleged systemic discrimination under the collective agreement and the *CHRA*.

[39] Effectively, the suggestion is that the other seven grievors (and the other visible minority case officers on whose behalf they grieved), who allege that they have been personally and negatively affected by systemic discrimination, should be content to accept Mr. Murray's staffing decision as a complete answer to their own allegations. If they do not, they are wasting judicial resources and abusing the process.

[40] That is a rather startling proposition. The grievors are simply trying to assert their right to have their discrimination allegations heard and determined on the merits. The employer is well within its rights to argue that in its view, the grievors have not been discriminated against. However, arguing an abuse of process on these facts is another matter altogether.

E. Do I have jurisdiction in respect of events prior to April 1, 2005?

[41] The employer argues that I lack jurisdiction over any grievance concerning human rights if the events that gave rise to the grievance occurred before April 1, 2005. On that date, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act* (S.C. 2003, c. 22; *PSMA*), was proclaimed into force. Jurisdiction was conferred on the PSLRB to interpret and apply the *CHRA* in the context of grievances referred to adjudication pursuant to the *Public Service Labour Relations Act*. Prior to this, the Canadian Human Rights Tribunal had exclusive jurisdiction to interpret and apply the *CHRA*.

[42] This grievance alleges that there has been a pattern of long-term, continuing, and systemic discrimination. It may well be necessary to hear evidence of events from before April 1, 2005, to obtain a complete picture of what is being alleged.

[43] I do not read s.64 of the *PSMA* as an absolute bar to my jurisdiction to interpret and apply the *CHRA* in respect of events which took place before April 1, 2005. Section 64 was a transitional provision designed to ensure that giving the PSLRB jurisdiction to interpret and apply the CHRA did not open the floodgates to human rights based grievances based on prior events.

[44] Two of these situations arose when grievances were presented just after the new law came into effect. Both *Lafrance v. Treasury Board (Statistics Canada) 2006 PSLRB 56* and *MacNeil v. Treasury Board (Department of National Defence*) 2009 PSLRB 84 dealt with individual accommodation grievances where events had begun prior to the

new legislation. In both cases the Board found that these were continuing grievances, and therefore timely, that it had jurisdiction in respect of them, and that it could hear evidence of events prior to April 1, 2005 to provide context. However, the Board held that it lacked jurisdiction to determine whether the events alleged in the grievances that took place before April 1, 2005 were discriminatory.

[45] The grievance before me was filed on February 28, 2007 – two years after the PSLRB had acquired jurisdiction to interpret and apply the *CHRA*. It is not an individual human rights case where the specific events on which it is based can be identified with precision. It is a broad based claim of systemic discrimination brought by the bargaining agent on behalf of seven grievors and unnamed others, as well. It will be argued, at least in part, on the basis of trends and patterns found in statistical information. This kind of evidence reveals that there has been discrimination, or that there has not been discrimination, only after significant passage of time.

[46] It may be that the *PSMA* transitional language was applied appropriately for the circumstances of the *Lafrance* and *MacNeil* grievances. However I do not believe that in crafting transitional language to prevent an opening of the flood gates of human rights grievances in 2005, it was Parliament's intention to restrict allegations of systemic discrimination or prevent them from being fully aired. Allegations like this seek to demonstrate patterns or trends, over time. This is the nature of systemic discrimination and there is nothing in the provision to suggest that the Board would lack jurisdiction to fully hear these cases, where the trends extend to the post *PSMA* realities of labour relations.

[47] I note as well that the jurisprudential trend, for good policy reasons, has been steadily moving towards enhancing, not restricting, the ability and the obligation of arbitrators and adjudicators to apply substantive rights and obligations under human rights and other employment legislation. These statutory rights and obligations are to be considered incorporated into collective agreements so that they may be dealt with via arbitration and adjudication. See *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42.

[48] I note, as well, that my jurisdiction to hear and to fully determine this matter does not rest on my ability to interpret and apply the *CHRA*.

[49] The same conclusion was reached in *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 33 (allowed in part by the Federal Court on other grounds in 2013 FC 735). The Court noted the adjudicator's finding on this point but made no comment on it, as neither party raised any issue with this aspect of the decision. Therefore, it stands as good law.

[50] At paragraphs 71 and 73, the adjudicator noted as follows:

> *[71] … The employer also argued that adjudicators of the Board did not have jurisdiction over human rights issues before the coming into force of the* Act *on April 1, 2005. Therefore, according to the employer, I should not consider the instances for which the grievor claimed that he was not accommodated that occurred before April 1, 2005.*
>
> …
>
> *[73] The employer is correct in arguing that adjudicators did not have jurisdiction over human rights issues before the coming into force of the* Act*. However, that does not prevent an adjudicator from determining if clause 19.01 of the collective agreement, which existed in the previous collective agreement with essentially the same wording, was violated. In other words, independent of the coming into force of the* Act*, the no-discrimination clause of the collective agreement applied to the grievor and to the employer….*

[51] Certainly, as in *Stringer*, I have jurisdiction over human rights issues that might have arisen before April 1, 2005, pursuant to article 19, the no-discrimination clause of the collective agreement.

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

(*The Order appears on the next page*)

III. Order

[53] The employer's motion to have this matter dismissed is denied. The grievance will be scheduled for a hearing as soon as possible.

July 10, 2017.

Michael McNamara,
a panel of the Federal Public Sector
Labour Relations and Employment Board