File: 166-2-27755

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

Roseline Audate

Grievor

and

Treasury Board (Veterans Affairs)

Employer

Before: Yvon Tarte, Chairperson

For the Grievor: Pierrette Gosselin, Counsel

For the Employer: André Garneau, Counsel, Q.C.,

Heard in Montréal,
on November 24 and 25, 1998.

Decision on a question of jurisdiction

Grievance

Roseline Audate, who works as a nurse at the Veterans' hospital in Ste-Anne de Bellevue, was suspended on September 17, 1996 for a period of 10 days following two incidents that occurred in the previous month.

The employer alleged that Ms. Audate was negligent in the performance of her duties on two occasions. According to the employer's evidence, on August 12, 1996, the grievor improperly disposed of bio-medical waste thereby endangering the health of a fellow worker and on August 19, 1996, she failed to complete the incident/accident report required by hospital policy following a fall by a patient during her shift.

During her testimony, Ms. Audate claimed that the disciplinary measure imposed on her constituted a discriminatory practice based on her race, colour and ethnic origin.

As a result of this statement, and given the recent decision of McGillis J. in *Canada v. Boutilier*, [1999] 1 F.C. 459 (Trial Division), I asked the representatives of the parties to submit written submissions to me on the question of the jurisdiction of an adjudicator to hear the referral of a disciplinary measure when, as is the case herein, the grievor claims that the measure imposed constitutes a discriminatory practice in contravention of the provisions of the *Canadian Human Rights Act* (CHRA), R.S.C. (1985), c. H-6.

The complete text of these submissions is reproduced below.

Letter from the employer

On December 18, 1998, the employer sent the following letter to the Board:

> [Translation]
> […]
>
> *Ms. Audate's statement of grievance in file 166-2-27755 objects to a disciplinary measure of a 10-day suspension that she received on September 17, 1996 because she "considers*

this measure unfair, discriminatory and unfounded". The statement does not specify in what way this disciplinary measure is discriminatory.

During the hearing, counsel for Ms. Audate, Ms. Gosselin explained that the disciplinary measure was a discriminatory practice against Ms. Audate based on her race, colour and ethnic origin. Ms. Gosselin added that this discriminatory practice violated the no-discrimination clause in the collective agreement between the Professional Institute of the Public Service of Canada and the Treasury Board and was based on prohibited grounds of discrimination under the Canadian Human Rights Act.

In light of this clarification of Ms. Audate's statement of grievance, the adjudicator, Mr. Tarte, referred to the recent decision by McGillis J. in Canada (Attorney General) v. Boutilier, unreported, November 13, 1998, Federal Court file T-1450-97 and asked the parties to send him submissions on the question of his jurisdiction to decide the referral to adjudication of the grievance as clarified.

In file 166-2-28733, which was also the subject of the recent mediation session, Ms. Audate's statement of grievance specified that the disciplinary measure of a five-day suspension that she received "contravened clause 44.01 of the collective agreement because it constituted discrimination against me". It is assumed that the discrimination of which Ms. Audate is complaining is the same as that which Ms. Gosselin mentioned at the hearing of file 166-2-27755.

It would therefore appear that the question raised in these two files is whether an adjudicator has jurisdiction under the provisions of sections 91 and 92 of the Public Service Staff Relations Act to decide a referral to adjudication of a grievance that claims that the imposition of a disciplinary measure on a grievor constituted a prohibited discriminatory practice under the Canadian Human Rights Act?

I must point out that given the Federal Court decisions in Chopra v. Treasury Board (Canada), [1995] 3 F.C. 445, Mohammed v. Treasury Board (Canada), unreported, June 16, 1998, Federal Court file T-1328-97 and Canada (Attorney General) v. Boutilier, supra, it seems clear to me that the answer to the above question is that an adjudicator would be without jurisdiction to decide the referral to adjudication.

In Boutilier, McGillis J., after analysing the legislation and the Chopra and Mohammed cases, reached the following conclusion:

> *Given my analysis of the legislative scheme, I have determined that the procedure outlined in the Canadian Human Rights Act was intended by Parliament to provide the sole redress for a complaint of a discriminatory practice in the context of the interpretation of a provision in a collective agreement, unless the Commission determines, in the exercise of its discretion, that the grievance process ought to be exhausted.*
>
> *In my view, this conclusion applies equally to a complaint involving a disciplinary measure, that is, an occurrence or matter affecting the terms and conditions of employment of a grievor as provided for in paragraph 91(1)(b) of the Public Service Staff Relations Act, as to a complaint involving the interpretation of a provision of a collective agreement as provided for in paragraph 91(1)(a)(ii), as was the case in Boutilier.*
>
> *Prior to the employer making any submissions to the Board on the jurisdiction of the adjudicator to decide the referral to adjudication of Ms. Audate's grievance in file 166-2-27755, I would ask that you check with the adjudicator and the representatives for Ms. Audate to confirm that the question to be addressed is that described above. I would also ask that you verify whether the same question must be addressed in file 166-2-28733.*
>
> *I will be in a better position, once these questions have been confirmed, to indicate to you when the employer would be able to make submissions to the Board, if applicable.*
>
> […]

Reply of the grievor to the employer's letter

On January 8, 1999, the grievor sent the following reply to the employer's letter to the Board:

> [Translation]
>
> […]
>
> ***THE FACTS***
>
> – *On November 24, 1998, the Chairperson of the PSSRB, Yvon Tarte, heard the evidence presented by the parties in a grievance of a 10-day suspension imposed on a nurse at the Hôpital Ste-Anne de Bellevue on October 16, 1996. A second grievance objecting to a five-day suspension imposed on the same complainant had been referred to*

the PSSRB the week before the hearings. The Chairperson upheld the objection of Mr. Garneau, representative for the Treasury Board, who objected to that grievance being heard at the same time as the first one since it had been referred too late. Both grievances deal with alleged professional and/or administrative shortcomings and in both instances we have claimed that there was discrimination.

- *By the end of the day, the employer had completed the presentation of his evidence and we were examining our third witness, Roseline Audate, when the Chairperson suspended the hearings on his own volition because of the decision rendered by McGillis J. on November 13, 1998 in Boutilier; that decision which brings into question the jurisdiction of the PSSRB in matters of discrimination. The complainant, a Haitian by origin, stated that the measure in question could constitute a form of discrimination based on her ethnic origin.*

- *On December 7, 1998, the Professional Institute, the bargaining agent representing Mr. Boutilier, filed an appeal , to the Federal Court of the decision of McGillis J.*

In light of this recent decision, the Chairperson gave the representatives of the parties until January 7, 1999 to present their arguments on the jurisdiction of the Board in the instant case.

ARGUMENTS

Difference between Boutilier and Ms. Audate's grievance

It is important to distinguish between a grievance relating to the interpretation of the collective agreement and a grievance objecting to disciplinary action. In Boutilier, the grievance deals strictly with the interpretation of a clause of the collective agreement. Mr. Boutilier objected to his employer denying him marriage leave for his union with his spouse. It is specifically the definition of spouse that is at issue because the case involves a homosexual couple. Ms. Audate's grievance is objecting to disciplinary action. It is not the same thing at all from the standpoint of the PSSRB's jurisdiction. It is important not to attribute an interpretation to the decision that the wording itself does not give it. It does not apply to a grievance in a disciplinary context:

> *"Given my analysis of the legislative scheme, I have determined that the procedure outlined in the Canadian Human Rights Act was intended by Parliament to provide the sole redress for a complaint of a discriminatory practice in the context of the*

interpretation of a provision in a collective agreement, ... ".

Nor is this a complaint of discrimination since the discrimination element in this case is only one of several other elements that we are raising in our defence. We can therefore, in all logic, argue that the adjudicator could allow the grievance even if he does not accept this line of defence by relying simply on the principles of justice for the imposition of disciplinary measures in the context of employer-employee relations, such as the progressiveness of the penalty, the employer's shortcomings, discrimination in the penalty, etc.

It is not possible to decide this question before hearing all of the evidence and we are of the opinion that the PSSRB has full jurisdiction to hear the case and to decide the matter in its entirety. That is not the case with the CHRC, whose jurisdiction is limited to deciding whether or not there was discrimination.

The conclusions reached by McGillis J. in Boutilier should not be applied to the case at bar because that would imply that the PSSRB no longer has jurisdiction to hear a grievance of disciplinary action if the intent is to argue that the measure constitutes, at least in part, a form of discrimination prohibited by the CHRA, the Charter of Rights and the collective agreements, all of which contain a no-discrimination clause. That is certainly not the result that the decision was seeking.

Restrictions on an employee's rights set out in s. 91(1) do not apply to grievances objecting to disciplinary action

Section 91(1) of the PSSRA, which defines the rights of the employee with respect to grievances, does not refer to grievances of a disciplinary nature and I believe that Mr. Garneau is mistaken in his letter to the Board of December 18, 1998 when he expresses the opinion that the finding of McGillis J. in Boutilier applies equally to a complaint involving a disciplinary measure as to a question of the interpretation of the collective agreement. In support of his reasoning, he argues that a disciplinary measure constitutes an occurrence or matter affecting the terms and conditions of employment, thereby reiterating the wording of 91(1)(b).

The Dictionnaire des relations de travail by Gérard Dion, published by the Presses de l'Université de Laval, defines the term "conditions de travail" [terms and conditions of employment] as follows: [Translation] "Requirements imposed on an employee by the employer at the time of hiring. These conditions are henceforth part of the terms and

conditions of employment. Hiring conditions, assignment conditions". Based on this definition, disciplinary action cannot be considered an occurrence or matter that affects the terms and conditions of employment. For this reason alone, we believe that the conclusions in Boutilier do not apply to the grievances presented by Ms. Audate because they are of a disciplinary nature.

The right to impose disciplinary action on an employee is part of the prerogatives granted to the employer in the exercise of his right to manage. The employee has the right to object to such action by filing a grievance if he considers it to be unfair or unfounded. If the measure involves a financial penalty, the grievance may be referred to adjudication under s. 92(1)(b) of the PSSRA, which does not specify any restrictions, not even the requirement of obtaining the approval of the bargaining agent concerned.

Jurisdiction of adjudicators over grievances involving discrimination

Discrimination of all its forms is prohibited under the Quebec and Canadian Charters. Most collective agreements in the country reiterate in their own words the key elements of these prohibitions in order to actively contribute to the elimination of discrimination by providing an easy procedure for redress for employees: the grievance. Most bargaining agents have shown fierce vigilance in defending the rights of their members in the area of discrimination.

Weber, rendered in 1995 by the Supreme Court, granted arbitrators the power and jurisdiction to decide all questions relating to human rights entrenched in the Charters. That decision clearly establishes their jurisdiction and specifies that it is necessary to show judicial deference for the arbitration process. To the extent that the restrictions contained in s. 91(1) of the PSSRA do not cover grievances of a disciplinary nature - and that is our position - we do not see why the Board should not continue to hear the grievances presented by Ms. Audate. It would not be contrary to the findings in Boutilier because McGillis J. clearly states in her decision that the context is that of the interpretation of a provision of a collective agreement.

In the event that our arguments are not accepted by this Board, and without recognizing the validity of the decision of the Federal Court in Boutilier which we do not support in any way since the Professional Institute has appealed it, we have taken the precaution of contacting the CHRC to ask it to exercise its discretion and to empower the PSSRB, under the circumstances, to complete the hearing of this grievance as quickly as possible.

> *I have appended the letter to our arguments. We have taken this initiative, suggested by McGillis J. in her decision when she states: "unless the Commission determines, in the exercice* [sic] *of its discretion, that the grievance process ought to be exhausted..." for the sole purpose of preventing Ms. Audate from having to suffer further delays and the costs of a legal battle over the jurisdiction of the courts. A means must be found to proceed with these cases, until such time as the decision has been reviewed, so that we can manage the situation in a practical way, in the interests of the complainant and of all parties.*
>
> […]

Employer's argument

The employer's written argument is dated February 10, 1999 and reads as follows:

> [Translation]
>
> […]
>
> ***THE FACTS***
>
> 1. *Ms. Audate's statement of grievance objects to the disciplinary measure of a 10-day suspension that she received on September 17, 1996 because she "considers this measure unfair, discriminatory and unfounded". This statement does not specify in what way the disciplinary measure is discriminatory.*
>
> 2. *During the hearing, counsel for Ms. Audate, Ms. Gosselin clarified that the disciplinary measure was a discriminatory practice against Ms. Audate based on her race, colour and ethnic origin. Ms. Gosselin added that this discriminatory practice violated the no-discrimination clause in the collective agreement between the Professional Institute of the Public Service of Canada and the Treasury Board (article 44) and was based on prohibited grounds of discrimination under the Canadian Human Rights Act.*
>
> 3. *In light of this clarification of Ms. Audate's statement of grievance, the adjudicator, Mr. Tarte, referred to the recent decision by McGillis J. in Canada (Attorney General) v. Boutilier, [1998] F.C.J. no. 1635 (Tab 4) and asked the parties to send him submissions on the question of his jurisdiction to hear the referral to adjudication of the grievance as clarified.*

THE QUESTION

4. *Does the adjudicator have jurisdiction under the provisions of sections 91 and 92 of the Public Service Staff Relations Act to hear the referral to adjudication of a grievance by Ms. Audate that claims that the disciplinary measure imposed on her was a prohibited discriminatory practice under the Canadian Human Rights Act?*

ARGUMENT

The Public Service Staff Relations Act (PSSRA)

5. *Sections 91 and 92 of the PSSRA. confer jurisdiction.*

6. *Where an employee feels aggrieved as a result of an occurrence or matter affecting the terms and conditions of his employment, paragraph 91(1)(b) allows the employee to present a grievance at each of the levels of the grievance process, provided that "no administrative procedure for redress is provided in or under an Act of Parliament".*

7. *If the grievance relates to disciplinary action resulting in suspension, paragraph 92(1)(b) allows the employee to refer the grievance to adjudication "where an employee has presented a grievance up to and including the final level in the grievance process [. . .] and the grievance has not been dealt with to the satisfaction of the employee".*

8. *Consequently, there are two prior conditions to the referral of a grievance to adjudication. There must be no other administrative procedure for redress provided in or under an Act of Parliament, and the employee has to have presented his grievance up to and including the final level in the grievance process. An adjudicator may not hear a referral to adjudication unless these two conditions have been met.*

The Canadian Human Rights Act (CHRA)

9. *Since Ms. Audate is complaining that the disciplinary action against her was a prohibited discriminatory practice under the CHRA, it is necessary to determine whether that Act provides her with an administrative procedure for redress within the meaning of paragraph 91(1)(b) of the PSSRA..*

10. *In Cooper v. Canada (Canadian Human Rights Commission) [1996] 3 S.C.R. 854, the Supreme Court of Canada considered the jurisdiction of the Commission to decide questions of general law. La Forest J. commented as follows on the scheme of the CHRA:*

The Act sets out a complete mechanism for dealing with human rights complaints. Central to this mechanism is the Commission. Its powers and duties are set forth in ss. 26 and 27, and Part III of the Act. Briefly put, the Commission is empowered to administer the Act, which includes among other things fostering compliance with the Act through public activities, research programs, and the review of legislation. It is also the statutory body entrusted with accepting, managing and processing complaints of discriminatory practices. It is this latter duty which is provided for in Part III of the Act.

A complaint of a discriminatory practice may, under s. 40 , be initiated by an individual, a group, or the Commission itself. On receiving a complaint the Commission appoints an investigator to investigate and prepare a report on its findings for the Commission (ss. 43 and 44(1)). On receiving the investigator's report, the Commission may, after inviting comments on the report by the parties involved, take steps to appoint a tribunal to inquire into the complaint if having regard to all the circumstances of the complaint it believes an inquiry is warranted (ss. 44(3)(a)). Alternatively the Commission can dismiss the complaint, appoint a conciliator, or refer the complainant to the appropriate authority (ss. 44(3)(b), 47(1) and 44(2) respectively).

If the Commission decides that a tribunal should be appointed, then, pursuant to the Commission's request, the President of the Human Rights Tribunal Panel appoints a tribunal (s. 49). This tribunal then proceeds to inquire into the complaint and to offer each party the opportunity to appear in person or through counsel before the tribunal (s. 50). At the conclusion of its inquiry the tribunal either dismisses the complaint pursuant to s. 53(1) or, if it finds the complaint to be substantiated, it may invoke one of the various remedies found in s. 53 of the Act. These remedies include an order that a person cease a discriminatory practice; that a right, opportunity or privilege denied the victim be made available to him or her; and that the person engaged in the discriminatory practice compensate the victim of the practice for lost wages and expenses resulting from the practice and, where it is warranted, pay a fine to the victim. Finally, if the tribunal was composed of less than three members, it is open to

> *a party to appeal the tribunal's decision to a three-member Review Tribunal on any question of law or fact or mixed law and fact (ss. 55 and 56).*

11. *With respect to Ms. Audate's grievance, section 3 of the CHRA defines the prohibited grounds of discrimination which are based on race, national or ethnic origin and colour; section 7 prohibits such grounds of discrimination in the course of employment; section 40 provides for a complaint to be filed; and section 53 defines the powers of redress available if the complaint is substantiated. It seems clear that Ms. Audate's grievance could have been the subject of a complaint to the Canadian Human Rights Commission and that that Commission was in a position to grant her the redress she was seeking in her grievance should the complaint be substantiated.*

Federal Court case law

12. *Chopra v. Canada (Treasury Board) [1995] 3 F.C. 445 (Tab 2) involves an application for judicial review of the decision of a adjudicator who ruled that, under subsection 91(1) of the PSSRA, he did not have jurisdiction to decide the grievance presented by the applicant since it alleged contravention of the no-discrimination provision (clause 44) in the Master Agreement between Treasury Board and the Professional Institute of the Public Service of Canada. The applicant, who was complaining of racial discrimination, had filed a grievance with respect to an acting appointment when the grievor was declared ineligible for a competition. The adjudicator found that the applicant could seek redress under the Canadian Human Rights Act. Simpson J. reached the following conclusion:*

> *The Adjudicator was correct when he concluded that he was without jurisdiction to hear the applicant's grievance by reason of subsection 91(1). I am satisfied that the CHRA provides "redress" on the facts of this case because the CHRC has jurisdiction over the substance of the grievance and because the CHRC can offer a broader range of remedies than an adjudicator under the Master Agreement. The differences in the procedures under the CHRA and the Master Agreement in terms of parties, public interest input and control of the process do not, in my view, detract from the fact that the applicant will receive redress under the CHRA.*

13. *In Mohammed v. Canada (Treasury Board) [1998] F.C.A. no 845 (Tab 3) an application for judicial review again raised the question of whether an adjudicator appointed*

under the PSSRA erred in refusing to exercise jurisdiction to hear the applicant's grievance. The applicant, a Muslim woman who was also a member of a visible minority, had presented a grievance in which she argued that electronic mail messages send about her violated the no-discrimination clause in the collective agreement between the Public Service Alliance of Canada and the Treasury Board. In his decision, Cullen J., after referring to the decision of the Court of Appeal in Byers Transport v. Kosanovich [1995] 3 F.C. 354 (Tab 1), reached the following conclusion:

> *From the words of Mr. Justice Linden it appears that the administrative procedure for redress referred to in subsection 91(1) does not have to be identical to the grievance procedure mandated by the PSSRA. In addition, the remedies given in the two procedures do not have to be identical; rather the party should be able to obtain "real redress" which could be of benefit to the complainant. All that is required under subsection 91(1) is the existence of another procedure for redress, where the redress that is available under that procedure is of some personal benefit to the complainant.*

14. *In Boutilier, the adjudicator found that the provisions in the collective agreement between the Professional Institute of the Public Service of Canada and the Treasury Board relating to marriage leave (clause 20) discriminated against same sex couples in violation of the provisions of the CHRA prohibiting discrimination on the basis of sexual orientation. The jurisdiction of the adjudicator to hear a referral to adjudication dealing with such allegations of discrimination was not raised at the hearing. However, it was the only issue raised in the application for judicial review. McGillis J., after analysing the scheme of the CHRA and the decisions in Chopra and Mohammed, commented as follows:*

> *Given my analysis of the legislative scheme, I have determined that the procedure outlined in the Canadian Human Rights Act was intended by Parliament to provide the sole redress for a complaint of a discriminatory practice in the context of the interpretation of a provision in a collective agreement, unless the Commission determines, in the exercise of its discretion, that the grievance process ought to be exhausted.*

15. *There is no reason why this conclusion would not apply equally to a grievance relating to disciplinary action, specifically, an occurrence or matter affecting the terms and conditions of employment of an aggrieved employee*

mentioned in paragraph 91(1)(b) of the PSSRA - as is the case with Ms. Audate - and to a grievance relating to the interpretation of a provision of a collective agreement mentioned in paragraph 91(1)(a) - as was the case in Boutilier.

16. *Since the decision in Boutilier, the issue of the jurisdiction of an adjudicator to hear a grievance containing allegations that could perhaps be the subject of a complaint to the Canadian Human Rights Commission, was again the subject of an application for judicial review to the Federal Court in O'Hagan v. Canada (Correctional Service) [1999] F.C.J. No. 32 (Tab 5). The adjudicator had concluded that he was without jurisdiction to consider the grievance presented by the applicants, nurses with Correctional Service, who alleged a violation of the no sexual harassment provision in the Master Agreement between the Treasury Board and the Professional Institute of the Public Service Of Canada (clause 43). The adjudicator had ruled that the applicants could seek redress under the Canadian Human Rights Act. In O'Hagan, after considering Chopra, Mohammed ad Boutilier, Wetson J. stated the following:*

> *In the matter before me, the question once again is, did the adjudicator, Mr. Burke, err in law in concluding that the CHRA provides an "administrative procedure for redress" within the meaning of subsection 91(1) of the PSSRA? Counsel who appeared before me in this matter are all very experienced in these matters and have participated in one way or another in most of these decisions before the Court. The Court was advised that both Mohammed, supra, and Boutilier, supra, have been appealed to the Federal Court of Appeal. It was indicated that counsel will attempt to try and have these cases heard together. If this case is appealed, it may also be useful to have this matter heard with the other two cases. Essentially the issue in this case is also whether the substance of these grievances is exclusively within the jurisdiction of the Canadian Human Rights Commission pursuant to the CHRA since section 14 of the CHRA recognizes that sexual harassment is a prohibited ground of discrimination and the Tribunal is afforded broad remedial powers pursuant to subsection 53(2) of the CHRA.*
>
> *Obviously, the Court must consider the matter before it, but I am also mindful of the fact that three important decisions of this Court have all addressed the question of whether the CHRA*

provides an "administrative procedure for redress" within the meaning of the PSSRA. In a nutshell, all three cases have agreed that it does. No doubt that, as the jurisprudence evolves, a judge of this Court may differ with another judge on the interpretation and approach with respect to the statutes at issue. This is evident in the Boutilier decision, supra, where the Court disagreed to some extent with the approach to the legislation taken by the Court in Chopra, supra. On the other hand, in Boutilier the Court agreed with the approach taken by the Court in Mohammed.

Obviously, counsel for the applicants and the intervenor pointed out what they contended were errors in all three decisions of the Trial Division. By way of example, it was strenuously argued that both Mohammed and Chopra were cases dealing with stand alone discrimination and dissimilar to the case herein which deals with the application and interpretation of Article 43 within the collective agreement. This argument leads the intervenor to suggest that since Article 43 is in the collective agreement, the procedure for redress must provide for a meaningful involvement of one of the parties to the contract, that is the union. This reflects the labour relations reality that administrative procedures for redress must include a signatory to the contract, that is, the bargaining agent.

This approach is consistent with the intervenor's submissions regarding section 99 of the PSSRA wherein he submits that Parliament did not intend that human rights matters would be dealt with differently under subsection 91(1) of the PSSRA and section 99 of the PSSRA. It is clear from all three decisions of this Court that the Federal Court, Trial Division, has considered the legislation at issue in para materia. All three cases have considered the two acts of parliament together as forming a system and as interpreting and affecting each other. While there may be differences of opinion as between the decisions, the result of all three decisions is identical.

…

As such, and on balance, I cannot find any principle, approach or precept that would cause me to find differently than the previous judges of this Court. It is my opinion that, where possible,

> *like cases should be treated alike. This obviously should be a fundamental goal of the law.*
>
> ***CONCLUSION***
>
> *17. It appears clear from the Federal Court decisions in Chopra, Mohammed, Boutilier and O'Hagan that the adjudicator is without jurisdiction under the provisions of sections 91 and 92 of the Public Service Staff Relations Act to hear the referral to adjudication of Ms. Audate's grievance, which claims that the disciplinary measure imposed on her was a prohibited discriminatory practice under the Canadian Human Rights Act.*
>
> [...]

Employer's response to the grievor's reply

On March 5, 1999, the employer filed the following submissions in response to the grievor's reply, dated January 8, 1999:

> [Translation]
>
> [...]
>
> ***Difference between Boutilier and Ms. Audate's grievance***
>
> *1. The complainant states under this heading that the conclusions of McGillis J. in Boutilier should not be applied to the instant case because that would imply that an adjudicator would not have jurisdiction to hear a grievance relating to disciplinary action where an argument of prohibited discrimination under the CHRA was only one of several elements of the defence to said disciplinary action.*
>
> *2. The fact that the discrimination element is only one of several others would not confer jurisdiction on the adjudicator to examine that element. All of the federal court case law is to the effect that only the CHRC has jurisdiction to consider a question of discrimination where it can grant redress to the complainant. In the instant case, the CHRC could certainly grant to Ms. Audate the redress of rescinding the disciplinary action if the discrimination was substantiated. Further, sections 41, 42 and 44 of the CHRA anticipate situations of overlapping jurisdiction by stipulating that:*
>
> > *41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in*

> *respect of that complaint it appears to the Commission that*
>
> *(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available; [. . .]*
>
> *42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision*
>
> *(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.*
>
> *44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.*
>
> *(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied*
> *(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, [. . .]*
>
> *it shall refer the complainant to the appropriate authority.*

3. *In Boutilier, McGillis J. makes the following observations concerning the possibility of overlap:*

> *[para32] Paragraphs 41(1)(a) and 44(2)(a) of the Canadian Human Rights Act constitute important discretionary powers in the arsenal of the Commission, as it performs its role in the handling of a complaint, and permit it, in an appropriate case, to require the complainant to exhaust grievance procedures. Paragraphs 41(1)(a) and 44(2)(a) also indicate that Parliament expressly considered that situations would arise in which a conflict or an overlap would occur between legislatively mandated grievance procedures, such as that provided for in the Public Service Staff Relations Act, and the legislative powers and procedures in the Canadian Human Rights Act for dealing with complaints of discriminatory practices. In the event of such a conflict or overlap,*

> *Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(a) and 44(2)(a), to determine whether the matter should proceed as a grievance under other legislation such as the Public Service Staff Relations Act, or as a complaint under the Canadian Human Rights Act. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.*
>
> *[para33] Parliament also chose, by virtue of subsection 91(1) of the Public Service Staff Relations Act, to deprive an aggrieved employee of the qualified right to present a grievance in circumstances where another statutory administrative procedure for redress exists. Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the Canadian Human Rights Act apply and govern the procedure to be followed. In such circumstances, the aggrieved employee must therefore file a complaint with the Commission. The matter may only proceed as a grievance under the provisions of the Public Service Staff Relations Act in the event that the Commission determines, in the exercise of its discretion under paragraphs 41(1)(a) or 44(2)(a) of the Canadian Human Rights Act, that the grievance procedure ought to be exhausted.*
>
> *[para34] In circumstances where the Commission is considering exercising its discretion under paragraph 41(1)(a) not to deal with the complaint, it must also consider, by virtue of subsection 42(2), whether the failure to exhaust the grievance procedure was attributable to the complainant. In circumstances where the failure to exhaust the grievance procedure is caused by virtue of the operation of the statutory limitation in subsection 91(1) of the Public Service Staff Relations Act, which prevents the presentation of the grievance, the Commission will have no difficulty in determining that question.*

Restrictions on an employee's rights set out in s. 91(1) do not apply to grievances objecting to disciplinary action

4. *Under this heading, the complainant argues that a disciplinary measure is not an occurrence or matter*

affecting terms and conditions of employment as set out in section 91.

5. *If disciplinary action was not an occurrence or matter affecting the terms and conditions of employment, then a grievance involving disciplinary action could not be referred to adjudication because, under section 92, only a grievance that has been sent to the final level of the grievance process can be referred to adjudication. Under section 91, only an occurrence or matter affecting the terms and conditions of employment can be the subject of a grievance presented to the levels of the grievance process.*

6. *That is certainly not the result that Ms. Audate is seeking, and it was certainly not the intention of Parliament for disciplinary action to be excluded from referral to adjudication. What is set forth in sections 91 and 92 is that any disciplinary action may be the subject of a grievance presented to the levels of the grievance process, but that only a grievance dealing with disciplinary action resulting in termination of employment, suspension or a financial penalty may be referred to adjudication under section 92.*

7. *In considering a similar question, Cullen J. made the following comments in Mohammed:*

> *[para 21] Similarly, subsections 91(1) and 92(1) provide that not all matters are grievable and not all grievable matters can be referred to adjudication. Specifically, only matters relating to the interpretation or application of a provision of the collective agreement or of an arbitral award may be adjudicated. By enacting these two provisions, Parliament has limited the jurisdiction of the adjudicators appointed under the PSSRA rather than granting them exclusive jurisdiction to hear any and all grievances.*

Jurisdiction of adjudicators over grievances involving discrimination

8. *Under this heading, the complainant states that the Supreme Court in Weber "granted arbitrators the power and jurisdiction to decide all questions relating to human rights entrenched in the Charters". What the Supreme Court decided in that case is expressed more precisely by McLaughlin J. in the following paragraph of [1995] 2 S.C.R. 929:*

> *Summary of the Law*
>
> *[para 671] I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.*
>
> 9. *What McLaughlin J. accepts in this case is that the arbitrator has jurisdiction "provided that the legislation empowers the arbitrator to hear the dispute". That is precisely the issue that interests us in the instant case: does the adjudicator have jurisdiction under sections 91 and 92 of the PSSRA, the provisions that confer jurisdiction, to hear a dispute alleging prohibited discrimination under the CHRA? All of the Federal Court case law is to the effect that section 91 prohibits an adjudicator from hearing such a dispute because Parliament provided another administrative procedure for redress under the CHRA.*
>
> […]

Response of the grievor to the employer's argument

On March 26, 1999, the grievor responded as follows to the employer's argument:

> [Translation]
>
> […]
>
> *After reading the employer's argument with respect to the jurisdiction of the adjudicator to hear the above-mentioned referral to adjudication, here are our final comments.*
>
> ***DISTINCTION BETWEEN FEDERAL COURT CASE LAW AND THE GRIEVANCE OF ROSELINE AUDATE***

The case law cited by my colleague, who refers in particular to the Federal Court decisions in Chopra, Mohammed, Boutilier and O'Hagan, deals exclusively with grievances involving the interpretation of collective agreements.

Ms. Audate's grievance relates to a disciplinary matter. The facts concerning the grievance and on the basis of which the employer imposed a 10-day suspension must be considered in light of two key questions relevant to discipline in labour law: Was there cause for disciplinary action? Was the measure imposed appropriate given all of the circumstances? The element of racial discrimination is only one of several others that is raised.

It is clear that the PSSRB has exclusive jurisdiction to decide grievances of a disciplinary nature and to analyse the facts based on principles recognized in case law. It is our view that the CHRC ***does not constitute an administrative procedure for redress*** *for reasons other than discrimination based on one of the prohibited grounds under the Act. Its jurisdiction is limited to determining whether or not there was discrimination. It would be ridiculous to argue that it is the only body empowered to hear a grievance like that of Ms. Audate, which is of a mixed nature. In our opinion, the PSSRB has full jurisdiction to be seized with this grievance since the discrimination element is subsidiary and does not constitute the primary reason for the grievance.*

In any event, it certainly cannot decline jurisdiction before hearing all of the evidence. It could at most reserve judgment on the question of discrimination and refer the matter to the CHRC if it concluded that the suspension was imposed on Ms. Audate solely because she is black.

But the grievance could also be allowed even if the evidence of racial discrimination was not conclusive, if it were shown that the measure was not imposed in accordance with recognized rules and principles of labour law. No conclusion worthy of that name can be reached without hearing all of the evidence.

CONCLUSION

This is why we are asking the Board to set a date as soon as possible to resume the hearings of Ms. Audate's present grievance, along with the grievance of a five-day suspension, bearing file no. 166-2-28733.

[…]

[The section in bold appears in the original]

Reasons in support of the decision on the question of jurisdiction

The jurisdiction of an adjudicator appointed under the Public Service Staff relations Act (PSSRA), R.S.C. (1985), c. P-35, is derived from section 92 of said Act. Among other elements, section 92 confers on a duly appointed adjudicator the jurisdiction to hear grievances relating to disciplinary action resulting in suspension, provided that such grievances have been heard at the final level of the grievance process.

The right of an employee to present a grievance is defined in section 91 of the PSSRA. Subsection 91(1) reads as follows:

> ***91.*** *(1) Where any employee feels aggrieved:*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing 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 the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*

In light of the provisions of subsection 91(1), I must first determine whether another administrative procedure of redress is available to Ms. Audate under an Act of Parliament. More specifically, does the procedure for redress provided in the CHRA constitute an administrative procedure as defined in section 91 of the PSSRA?

In his argument, the employer's representative concludes that, given the decisions of the Federal Court in *Chopra v. Canada*, [1995] 3 F.C. 445 (Trial Division), *Mohammed v. Canada* (Court file T-1328-97), *Boutilier (supra)* and *O'Hagan v. Canada*

(Court file T-2510-95), the adjudicator is without jurisdiction, under the provisions of the PSSRA, "to hear the referral to adjudication of a grievance by Ms. Audate which claims that the disciplinary measure imposed on her was a prohibited discriminatory practice under the *Canadian Human Rights Act*".

In *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354 (C.A.), the Federal Court of Appeal had to decide whether an adjudicator appointed under the *Canada Labour Code* (CLC) was without jurisdiction to hear a grievance alleging unfair dismissal of an employee who had also filed a complaint of unfair labour practices against her employer; the complaint alleged that the employer had dismissed her because she was suspected of participating in union activities. Subsection 242(3.1) of the CLC stipulates that "No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where [. . .] (b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament". Rendering the decision for the majority of the Court, Strayer J. concluded as follows at page 378 of the decision:

> *[…] I believe that the complaint (i.e. the factual situation complained of) must be essentially the same in the other "procedure for redress". But I doubt that the remedies have to be as good or better under the other provision in order to oust the jurisdiction of the adjudicator under paragraph 242(3.1)(b). That paragraph does not require that <u>the same redress</u> be available under another provision of the Canada Labour Code or some other federal Act. What it requires is that in respect of the same complaint there be <u>another</u> procedure for redress. The point is even clearer in the French version which simply requires that there be "un autre recours". I do not believe that for there to be a "procedure for redress . . . elsewhere" there must be a procedure which will yield exactly the same remedies, although no doubt that procedure must be capable of producing some real redress which could be of personal benefit to the same complainant.*
>
> […]
>
> [The underlined passages appear in the original]

Thus Strayer J. concluded that, in order to oust the jurisdiction of an adjudicator, there need only be another procedure for redress to deal with a complaint that is essentially the same as that before him, regardless of whether the powers for redress of that other procedure are the same or not. An application to appeal this decision was dismissed by the Supreme Court of Canada (Court file 24944, March 21, 1996).

In *Chopra v. Canada* (*supra*), Simpson J. was seized with an application for judicial review of the decision of an adjudicator appointed under the PSSRA to the effect that he was without jurisdiction to hear a grievance based solely on the no-discrimination clause in a collective agreement: the grievor claimed that the employer had acted in a discriminatory manner toward him because of his race. The grievor had also filed two complaints of discrimination against the employer with the Canadian Human Rights Commission (CHRC). Simpson J. concluded that the adjudicator had not erred with respect to his jurisdiction and concluded her decision as follows at page 460:

> *The Adjudicator was correct when he concluded that he was without jurisdiction to hear the applicant's grievance by reason of subsection 91(1) [of the PSSRA]. I am satisfied that the CHRA provides "redress" on the facts of this case because the CHRC has jurisdiction over the substance of the grievance and because the CHRC can offer a broader range of remedies than an adjudicator under the Master Agreement. The differences in the procedures under the CHRA and the Master Agreement in terms of parties, public interest input and control of the process do not, in my view, detract from the fact that the applicant will receive redress under the CHRA.*

In the reasons for decision, Simpson J. also commented as follows at pages 455, 456 and 457:

> […] *Clearly, the CHRC cannot enforce a provision of a collective agreement. However, in my view, this conclusion is not dispositive of the issue of the CHRC's ability to provide redress In my view, as long as the CHRC has jurisdiction to deal meaningfully and effectively with the substance of the employee's grievance, then it can provide redress.*
>
> […]
>
> […] *the complaint and the grievance are substantially the same. Both raise issues of discrimination.* […]
>
> […]
>
> *Counsel for the Alliance and for the applicant conceded that, pursuant to subsection 53(2) of the CHRA, the CHRC has broader remedial powers than those available to an adjudicator.* [. . .] *Given the broad powers under subsection 53(2) of the CHRA and the clear possibility of damages under subsection 53(3), I have concluded that a victim of*

> *discrimination and harassment can obtain a remedy from the CHRC.*

Simpson J. concluded that, when the CHRC has jurisdiction to deal with the merits of a grievance meaningfully and effectively, an adjudicator appointed under the PSSRA is ousted of jurisdiction to hear the grievance.

In *Mohammed v. Canada* (*supra*), Cullen J. heard an application for judicial review of the decision of an adjudicator appointed under the PSSRA to the effect that the latter was without jurisdiction to decide the grievance of a grievor that was based solely on the no-discrimination clause in her collective agreement and alleged that the employer had discriminated against her on the basis of her race and her religion. Cullen J. pointed out that the standard for judicial review in the case at bar was that of the correctness of the adjudicator's decision with respect to his jurisdiction.

Cullen J. concluded that subsections 91(1) and 92(1) of the PSSRA did not confer exclusive jurisdiction on the adjudicator to hear all grievances. He ruled as follows at paragraph 27 of his decision:

> *From the words of Mr. Justice Linden* [rather it was Strayer, J. in Byers, *supra*] *it appears that the administrative procedure for redress referred to in subsection 91(1) does not have to be identical to the grievance procedure mandated by the PSSRA. In addition, the remedies given in the two procedures do not have to be identical; rather the party should be able to obtain "real redress" which could be of benefit to the complainant. All that is required under subsection 91(1) is the existence of another procedure for redress, where the redress that is available under that procedure is of some personal benefit to the complainant.*

Further, Cullen J. considered the decisions of the adjudicators appointed under the PSSRA in *Yarrow* (Board file 166-2-25034) and *Sarson* (Board file 166-2-25312) and concluded as follows at paragraphs 29 and 30 of his decision:

> *It should be noted that the decisions cited by the applicant (Yarrow v. Treasury Board, [1996] C.P.S.S.R.B. No. 10 and Sarson v. Treasury Board, [1996] C.P.S.S.R.B. No. 18) are distinguishable from the case at bar. In both of those cases, the employees were seeking to challenge various provisions of the collective agreement which related to same-sex benefits. As support for their arguments, the employees relied, in part, on the no discrimination clauses contained in the collective agreement. The subject of both of those claims was not discrimination, per se, but whether the employees*

> *were entitled to the benefits requested. The discrimination claim was incidental to the claim for benefits and the cause of action was not clause M-16.01 in relation to stand alone discrimination as in the case at bar and as was the case in Chopra. Similarly, the adjudicators found that there were [sic] no administrative procedure for redress provided in or under the CHRA since neither the CHRC nor the Human Rights Tribunal has the jurisdiction to interpret and apply the provisions of the Master Agreement.*
>
> *In the case at bar, the applicant is only requesting relief on the basis of the no discrimination clause; not using the clause as an aid to interpreting other provisions of the Master Agreement. What is to be determined is whether the facts, as alleged, demonstrate a case of discrimination on a prohibited ground.*

Cullen J. dismissed the application for judicial review and his decision was appealed. His reasoning is based on the premise that the grievor's grievance essentially constituted a complaint of discrimination based on race and religion.

In *Canada v. Boutilier (supra),* McGillis J. heard an application for judicial review of the decision of an adjudicator appointed under the PSSRA in which he did not deal with the question of his jurisdiction to hear the grievor's grievance; the grievance objected to the employer's decision not to grant him marriage leave on the occasion of the celebration of his union with his same-sex partner. While the grievance was based on the clause of the collective agreement dealing with marriage leave, McGillis J. concluded as follows at pages 467, 480 and 481:

> *The written argument submitted on behalf of Mr. Boutilier focussed virtually exclusively on the question of whether the denial of the marriage leave constituted discrimination based on sexual orientation. In the conclusion of the written submissions, Mr. Boutilier's representative summarized her position by indicating that the definition of "marriage" proposed by the employer had "the effect of denying the provision of an employment benefit to homosexual employees contrary to the [Canadian Human Rights Act].*" […]
>
> […]
>
> *In the present case, the question raised by Mr. Boutilier in his grievance is a complex, controversial and fundamental human rights issue concerning the availability of an employment benefit, namely marriage leave, to a homosexual couple. The entire substance of his grievance is an allegation of discrimination based on the denial of an employment benefit to him for reasons directly related to his sexual orientation. In other words, the allegation of*

> *discrimination underlies and forms the central, and indeed the only, issue in the grievance. To phrase the grievance in the terms of sections 2 [as am. by S.C. 1998, c. 9, s. 9] and 7 of the Canadian Human Rights Act, Mr. Boutilier alleges that the employer differentiated adversely in relation to him in the course of employment, on a prohibited ground of discrimination, namely his sexual orientation, by denying him marriage leave. In my opinion, his case falls squarely and directly within the terms of the statutory mandate accorded to the Commission and the Human Rights Tribunal under the Canadian Human Rights Act.*

McGillis J. compared the provisions of the CHRA and the PSSRA and found, at pages 475, 476, 480 and 481, that an adjudicator appointed under the latter legislation was without jurisdiction to decide a complaint of discriminatory practice based on one of the prohibited grounds of discrimination listed in the CHRA:

> *Paragraphs 41(1)(a) and 44(2)(a) of the Canadian Human Rights Act constitute important discretionary powers in the arsenal of the Commission, as it performs its role in the handling of a complaint, and permit it, in an appropriate case, to require the complainant to exhaust grievance procedures. Paragraphs 41(1)(a) and 44(2)(a) also indicate that Parliament expressly considered that situations would arise in which a conflict or an overlap would occur between legislatively mandated grievance procedures, such as that provided for in the Public Service Staff Relations Act, and the legislative powers and procedures in the Canadian Human Rights Act for dealing with complaints of discriminatory practices. In the event of such a conflict or overlap, Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(a) and 44(2)(a), to determine whether the matter should proceed as a grievance under other legislation such as the Public Service Staff Relations Act, or as a complaint under the Canadian Human Rights Act. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.*
>
> *Parliament also chose, by virtue of subsection 91(1) of the Public Service Staff Relations Act, to deprive an aggrieved employee of the qualified right to present a grievance in circumstances where another statutory administrative procedure for redress exists. Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the Canadian Human Rights Act apply and govern the procedure to be followed. In such circumstances, the aggrieved employee must therefore file a complaint with the Commission. The matter may only proceed as a grievance under the provisions of the Public Service Staff Relations Act in the event that the Commission determines, in the exercise of its discretion under paragraphs*

> *41(1)(a) or 44(2)(a) of the Canadian Human Rights Act, that the grievance procedure ought to be exhausted.*
>
> […]
>
> *My review of the relevant legislative provisions and the jurisprudence has therefore led me to conclude that the Canadian Human Rights Act provides an "administrative procedure for redress", within the meaning of subsection 91(1) of the Public Service Staff Relations Act, for a grievance based on a discriminatory practice arising from an employer's interpretation of a provision in a collective agreement.*
>
> […]
>
> *[…] Mr. Boutilier was therefore not entitled, by virtue of subsection 91(1) of the Public Service Staff Relations Act, to present his grievance at any of the levels of the grievance process. Consequently, Mr. Boutilier had no right to refer his grievance to adjudication under subsection 92(1) of the Public Service Staff Relations Act, and the Adjudicator had no jurisdiction to entertain the adjudication.*

In her reasons, McGillis J. concluded that the substance of the grievor's grievance was a complaint of discriminatory practice by the employer against the grievor based on sexual orientation. McGillis J. allowed the application for judicial review. Her decision was appealed.

In *O'Hagan v. Canada* (*supra*), Wetson J. was required to decide whether an adjudicator appointed under the PSSRA had jurisdiction to decide grievances in which the grievors claimed to have been victims of sexual harassment. Wetson J. ruled that the adjudicator was without jurisdiction in these circumstances. His decision was appealed. His reasons reflect the same approach as that adopted in the cases cited earlier, that is, whether the substance of the grievance was a complaint of discriminatory practice based on one of the prohibited grounds of discrimination under the CHRA. Wetson J. concluded as follows at paragraph 21 of his decision:

> *There is little doubt that in the case at bar the subject matter of the grievance is sexual harassment as contained in Article 43 [of the collective agreement]. In Boutilier, there is little doubt that the entire substance of the grievance dealt with discrimination based on the denial of an employment benefit directly related to Mr. Boutilier's sexual orientation. It was held that the allegation of discrimination "underlies and forms the central and indeed the only issue in the grievance." In the case before me it is clear that the subject matter is sexual harassment which likewise forms the central and,*

> *indeed, the only issue in the grievance. Section 14 of the CHRA recognizes sexual harassment to be a prohibited ground of discrimination. As indicated previously, the Tribunal [Canadian Human Rights] is also afforded broad remedial powers pursuant to subsection 53(2) of the CHRA.*

While the above-cited cases are not all to the same effect, particularly with respect to the nature of the powers of redress available under another procedure for redress, it does not change the fact that, in each one, all of the courts agree on one point: an adjudicator is without jurisdiction to hear a grievance when the substance of the grievance can be dealt with under another procedure for redress.

Let us add to this discussion the decision of the Federal Court, Trial Division in *Canada Post Corporation v. Barrette* (Court files T-1373-97 and T-1375-97). In that case, Evans J. appears to indicate that an employee who is not satisfied with the result of the adjudication of his grievance against disciplinary action may, subsequently, file a complaint with the CHRC.

I must therefore decide whether, in the case before me, Ms. Audate's grievance can be dealt with under another procedure for redress.

It would be useful to review at this time the nature of the redress available under the CHRA. Provisions 7, 40(1), 43(1), 44, 48.1 and 53 of the CHRA are particularly relevant in the instant case:

> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> *(a) to refuse to employ or continue to employ any individual, or*
>
> *(b) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> ***40.*** *(1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.*
>
> ***43.*** *(1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.*

44. *(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.*

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

> *(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).*

48.1 *(1) There is hereby established a tribunal to be known as the Canadian Human Rights Tribunal consisting, subject to subsection (6), of a maximum of fifteen members, including a Chairperson and a Vice-chairperson, as may be appointed by the Governor in Council.*

(2) Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights.

(3) The Chairperson and Vice-chairperson must be members in good standing of the bar of a province or the Chambre des notaires du Québec for at least ten years and at least two of the other members of the Tribunal must be members in good standing of the bar of a province or the Chambre des notaires du Québec.

(4) Appointments to be made having regard to the need for regional representation in the membership of the Tribunal.

(5) If a member is absent or incapacitated, the Governor in Council may, despite subsection (1), appoint a temporary substitute member to act during the absence or incapacity.

(6) The Governor in Council may appoint temporary members to the Tribunal for a term of not more than three years whenever, in the opinion of the Governor in Council, the workload of the Tribunal so requires.

53. *(1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.*

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

> *(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including*

> *(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or*
>
> *(ii) making an application for approval and implementing a plan under section 17;*
>
> *(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;*
>
> *(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;*
>
> *(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and*
>
> *(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*
>
> *(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*
>
> *(4) Subject to the rules under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.*

Regardless of Ms. Gosselin's claims in her written arguments, the testimony of Ms. Audate was clear. According to the grievor, the disciplinary measure was imposed on her because she was black and of Haitian origin.

In *Rhéaume* (Board files 166-2-21976 to 21979), I tried to show that the jurisdiction of the Public Service Staff Relations Board and that of the CHRC were completely different, so that it could be concluded that the procedures for redress under each of their enabling acts are cumulative and distinct. This opinion, which was upheld by the Quebec Court of Appeal in *Québec Poultry Ltée v. Quebec Human Rights*

Commission, [1979] C.A. 148, was nevertheless rejected by Simpson J. in *Chopra* (*supra*). Given that, according to Ms. Audate, the 10-day disciplinary measure imposed on her was, in itself, a prohibited discriminatory practice under the collective agreement and under the CHRA, given the administrative procedure for redress found in the CHRA to compensate for discriminatory practices in the workplace, and given the previously cited case law of the Federal Court, I must conclude that I am without the necessary jurisdiction to decide the case since there is another administrative procedure for redress under another Act of Parliament. Not only does the CHRA contain another administrative procedure for redress for discriminatory practices in the workplace, but it appears, from reading it, to provide much more substantial remedies than those that could be granted as relief by an adjudicator appointed under the PSSRA.

Since the resolution of Ms. Audate's grievance depends on a ruling of discriminatory practice by the employer, based on one or more of the prohibited grounds of discrimination under in the CHRA, I conclude that I am without the necessary jurisdiction to decide this case.

Yvon Tarte
Chairperson

OTTAWA, May 20, 1999.

Certified true translation

Serge Lareau