Date: 20010202

File: 166-2-29657

Citation: 2001 PSSRB 9

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

Chris Kehoe

Grievor

and

Treasury Board
(Human Resources Development Canada)

Employer

Before: Yvon Tarte, Chairperson

For the Grievor: Edit Bramwell, Public Service Alliance of Canada

For the Employer: Richard Fader, Counsel

(Decided without an oral hearing)

[1] This decision deals with the issue whether the Board should exercise its powers pursuant to section 84 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* (Regulations) to dismiss, for want of jurisdiction, a grievance filed by Ms. Chris Kehoe.

Facts

[2] At some time between December 18, 1998 and February 2, 1999, Ms. Kehoe filed a grievance in relation to an employer's failure to accommodate her medical condition in accordance with her general physician's recommendation. Ms. Kehoe alleged that that failure constituted harassment and constructive dismissal.

[3] On April 2, 2000, the employer denied Ms. Kehoe's grievance at the final level of the grievance process. Ms. Kehoe referred her grievance to adjudication on April 14, 2000, relying on clauses M-22 (sick leave with pay) and M-27 (pay administration) of her collective agreement.

[4] On September 14, 2000, the employer raised an objection to the jurisdiction of an adjudicator to hear Ms. Kehoe's grievance pursuant to the *Public Service Staff Relations Act* (PSSRA) and applied for a decision dismissing the grievance pursuant to section 8 of the Regulations.

[5] On September 27, 2000, the Board was informed that the parties agreed to have the employer's objection dealt with on the basis of written arguments. On October 3, 2000, the Board requested the parties to submit written arguments on the employer's objection.

Position of the Parties

[6] The employer filed its written submissions on October 19, 2000. They read as follows:

. . .

PART I

Statement of Facts

> *1. Pursuant to an agreement between the parties, and the direction of the Public Service Staff Relations Board (the "Board"), the preliminary question of the jurisdiction of the Board to entertain the grievance of* Chris Kehoe *(166-2-29657) is herein dealt with in writing.*

2. The grievance that gives rise to this reference to adjudication was signed by the grievor on October 20, 1998. The grievance reads as follows:

> *I grieve the employer's failure to accommodate me with employment as outlined in my physician's report of December 18, 1997. I allege that this constitutes harassment and a constructive dismissal from my employment*
>
> Corrective Action Requested
>
> *I be provided with reinstatement without loss of pay from May 16, 1997 and that I be provided with employment consistent with the doctor's report. I also wish to be made whole and receive full compensation for all losses and injuries sustained [emphasis added].*

3. Despite the fact that the original grievance makes no reference to a violation of the collective agreement, the grievor's bargaining agent representative, Anne Clark-McMunagle added this element in her letter of April 13, 2000, to the Board. The letter goes on to specifically mention that the grievance, at least in part, is an allegation that the employer failed to "accommodate" the grievor's disability:

> *The grievor is a member of the CR group, employed by the Human Resources Development of Canada. This grievance concerns Article M-22 (Sick Leave With Pay), Article M-27 (Pay Administration) and also failure to accommodate [emphasis added].*

PART II

Point at Issue

4. Does the Board have jurisdiction to hear this reference to adjudication where the grievance in part, if not in whole, represents an allegation that the employer failed to accommodate the grievors [*sic*] *disability? Or, alternatively, is this a matter that is beyond the jurisdiction of the Board as it is covered by the administrative procedure for redress under the* Canadian Human Rights Act *(the "*CHRA*")?*

PART III

Submissions

5. Subsection 91(1) of the Public Service Staff Relations *Act (the "*PSSRA*") sets out a specific bar to the right of an*

employee to present a grievance. A grievance cannot relate to a matter in respect of which an administrative procedure for redress is provided in or under an Act of Parliament:

> *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 [emphasis added].*
>
> **Public Service Staff Relations Act**, *R.S.C. 1985, c. P-35, as amended, section 91*

6. In other words, where an administrative procedure is provided in an Act of Parliament, such as the CHRA, *under which the employee's grievance, in whole or in part, may be redressed, the aggrieved employee is barred from pursuing the grievance and adjudication procedures set out in sections 91 and 92 of the* PSSRA. *Instead, the employee must submit his or her complaint to the authority that has, under the appropriate statute, the power to deal with it.*

> **In re Public Service Staff Relations Act and in re Philip L. Cooper**, *[1974] 2 F.C. 407 at 412 (C.A.)*

7. This precise issue was addressed by Simpson J., in Chopra, supra, *as follows:*

> *Subsection 91(1) was introduced into the* PSSRA *as section 90 in 1966 [S.C. 1966-67, c. 72]. It was not disputed that its purpose at that time was the prevention of duplicate proceedings under the* PSSRA *and the* Public Service Employment Act *[now R.S.C. 1985, c. P-33]. However,*

> *subsection 91(1) did not state that it applied only to the* PSSRA *and the* Public Service Employment Act. *This meant that, if legislation, such as the* Canadian Human Rights Act *[R.S.C., 1985, c. H-6], was later enacted, it could be encompassed by subsection 91(1) if it provided other administrative procedures for redress [emphasis added].*
>
> **Chopra v. Canada (Treasury Board)**, *[1995] 3 F.C. 445 at 452 (T.D.)*
>
> *See especially:*
>
> **Interpretation Act**, *R.S.C. 1985, I-21, as amended, section 10*

8. Simpson J. then considered the effect of subsection 91(1) of the PSSRA *and the meaning of the word "redress". She concluded as follows:*

> *…as long as the* CHRA *has jurisdiction to deal meaningfully and effectively with the substance of the employee's grievance, then it can provide redress… [emphasis added].*
>
> **Chopra**, supra *at 455*

9. In her reasons for decision in Canada (Attorney General) v. Boutilier, *McGillis J. concurred with the reasoning of Simpson J., and clarified that the existence of such a procedure for redress is all that is required to bar a grievance under subsection 91(1) of the* PSSRA*:*

> *A review of the analysis in* Byres [*sic*] Transport Ltd. *v.* Kosanovich, *supra, confirms that the question to be addressed is the existence of a "procedure for redress", and not the nature or the extent of the remedies available under any such procedure.*
>
> **Canada (Attorney General) v. Boutilier**, *[1999] 1 F.C. 459 (T.D.), per. McGillis J.; affirmed [2000] 3 F.C. 27 (C.A.); leave to appeal to the Supreme Court of Canada denied, [2000] S.C.C. No. 12*, infra

10. This line of reasoning is consistent with the jurisprudence of the Federal Court of Appeal. The Byers Transport *case addressed paragraph 242(3.1)(b) of the* Canada Labour Code*:*

> *It will be recalled that this paragraph prohibits an adjudicator from considering a complaint of unjust dismissal where*
>
> *242.(3.1)…*
>
> *(a) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.*
>
> **Byers** , supra *at* 373

11. An application of the Byers *decision does not require the administrative procedure be "similar in process" or "clearly duplicative", rather, Strayer J.A. interpreted 242(3.1)(b) of the* Canada Labour Code *as follows:*

> *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 an 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 <u>must be capable of producing some real redress which could be of personal benefit to the same complainant</u> [emphasis in original].*
>
> **Byers**, supra, *at 378*

12. This was confirmed in the recent decision of the Federal Court of Appeal in Canada (Attorney General) v. Boutilier *(1999), 181 D.L.R. (4th) 590. Of critical importance to the facts of this case is the following statement by the Court of Appeal, the effect of which is to make inconsequential the bargaining agent's attempt to distance the grievance from what is primarily a human rights complaint:*

> *¶ 23 In summary, the principle set out in Byers Transport governs these cases. It is consistent with the wording and purpose of the statute, with Cooper, and with virtually all of the jurisprudence*

of this Court. The dispute resolution system in federal labour matters is, therefore, not as simple as one would like it to be. If another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance". Possible delay in securing redress administratively itself is not significant, unless perhaps it is so pronounced that it can be said that no real remedy is available to the grievor at all. Differences in the administrative remedy, even if it is a "lesser remedy", do not change it into a non-remedy [footnote omitted].

¶ 24 This principle does not prevent unions from bargaining for rights beyond the Human Rights Code area, for a grievor can go to arbitration as long as no remedy is available at the Human Rights Commission to vindicate these new rights. This result gives primacy in dispute resolution to the human rights administration, as well as other expert administrative schemes, where expertise and consistency is plainly favoured by Parliament, rather than decisions of ad hoc adjudicators. PSSRA is different than most labour codes where arbitration is made the exclusive remedy. It is up to the Human Rights Commission to send matters to arbitration pursuant to section 41 if, in its discretion, it feels it appropriate. Any other interpretation would render the words in subsection 91(1) meaningless or twisted beyond recognition [emphasis added - footnotes omitted].

¶ 25 An Adjudicator must, therefore, grapple with these jurisdictional matters before or during hearings but, hopefully, most of them can be resolved at the commencement of the grievance proceedings.

3. Some Policy Concerns

¶ 26 Some concerns were raised by counsel for the appellants and the intervener about the uncertainty that will result from this interpretation of subsection 91(1); it is possible, it is said, that, during a hearing before an adjudicator on the meaning of a collective agreement, a human rights issue might arise, causing a loss of jurisdiction. This is true, but that is the unavoidable effect of the language in the section. One can only hope that, in future, the parties will do their best to

> *determine in advance whether human rights issues are involved and, if they are, act accordingly [emphasis added].*
>
> **Canada (Attorney General) v. Boutilier** *(1999), 181 D.L.R. (4th) 590; leave to appeal to the Supreme Court of Canada denied, [2000] S.C.C. No. 12.*

13. Thus, in the case at bar, the issue to be determined is whether or not the CHRA*, manifests the existence of an administrative procedure under which the grievor might receive some real redress which could be of personal benefit to her in respect of her grievance.*

14. The basis of the current grievance is clearly a matter dealt with under the CHRA*, as the allegation is that the employer failed to accommodate the grievor's disability.*

15. Sections 3 and 7 of the CHRA *provide as follows:*

> *3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, disability and conviction for which a pardon has been granted [emphasis added].*
>
> *****
>
> *7. It is a discriminatory practice, directly or indirectly,*
>
> *(a) to refuse to employ or continue to employ or indirectly, or*
>
> *(b) in the course of employment, to differentiate adversely in relation to an employee*
>
> *on a prohibited ground of discrimination.*
>
> **Canadian Human Rights Act**, *R.S.C. 1985, c. H-6, as amended, subsection 3(1) and section 7*

16. Thus, the substance of the grievance, failure to accommodate a disability, is within the ambit of the CHRA*.*

17. Section 53 of the CHRA *sets out the available remedies:*

> *53. (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the*

> *inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:*
>
> *(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including*
>
> *(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or*
>
> *(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,*
>
> *in consultation with the Commission on the general purposes of those measures;*
>
> *(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;*
>
> *(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and*
>
> *(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.*
>
> **CHRA**, supra, *section 53*

18. Clearly this is a meaningful and effective redress mechanism available to the grievor for the alleged failure to accommodate her disability. The existence of an administrative procedure that culminates in this remedial power is sufficient to trigger the prohibition set out in section 91 of the PSSRA.

19. Subsection 91(1) of the PSSRA *does not require that the "administrative procedure for redress" be equivalent or*

identical. It is not a question of comparing the procedural aspects of two administrative procedures but, rather, of determining whether the CHRA *offers an administrative procedure to deal meaningfully and effectively with the grievor's complaint. The commission and its investigator are independent third party reviewers who provide an administrative procedure for redress that includes the potential for a quasi-judicial review by the Tribunal. That, in itself, clearly meets the section 91 limitation.*

Chopra, supra *at 455-6;*

Byers, supra*, at 378; and*

MacNeil v. Attorney General of Canada, *[1994] 2 F.C. 261 (C.A.)*

CHRA, supra*, section 50*

20. As stated by Simpson J. in Chopra, supra*:*

> *…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 *[emphasis added].*
>
> **Chopra**, supra*, at 460*

21. What is available to the grievor under the CHRA *is clearly an "administrative procedure for redress" as the term is used in section 91 of the* PSSRA.

Canada (Attorney General) v. Boutilier, supra

22. Accordingly, the grievor has, in the procedures under the CHRA*, access to an administrative procedure which can provide her meaningful redress. As a result, this grievance should be dismissed without a full hearing on the merits.*

PART IV

Order Sought

> *23. The Employer requests that this reference to adjudication be dismissed as it is a matter that is clearly beyond the jurisdiction of the Board to consider.*
>
> *. . .*

[7] Ms. Kehoe responded to the employer's arguments on November 15, 2000. Her written submissions read as follows:

> *. . .*
>
> ***PART I***
>
> ***Statement of Facts***
>
> *1. The Grievor does not contend the facts which are set out in Part I of the Employer's written arguments on preliminary objection to jurisdiction.*
>
> ***PART II***
>
> ***Point at Issue***
>
> *2. The Grievor wishes to indicate that the Public Service Staff Relations Board (PSSRB) has previously taken jurisdiction over matters concerning accommodation and disability. Further, the Grievor feels that the matters at issue in the merits of her grievance go directly to the heart of her relationship with her Employer, and therefore should be under the jurisdiction of the Board.*
>
> ***PART III***
>
> ***Submissions***
>
> *3. The Grievor has been a federal public servant for more than 24 years. At the time relevant to the grievance she was working at Human Resources Development Canada as a CR-04 at the Richmond Hill HRDC office. As a result of the working conditions to which she was subjected, she suffered considerable financial hardship, depression, including anxiety and panic attacks, and deterioration of her physical health.*
>
> *4. The Grievor left work on sick leave in May of 1997. The illness which compelled her to take sick leave was a result of the ongoing stress which she had experienced while in the workplace. This was caused by her supervisor and other colleagues in her work unit.*
>
> *5. Eventually the Grievor received disability insurance, which continued until April 30, 1998. At that point the*

> *Grievor was provided by her attending physician with a certification of medical fitness for work.*
>
> *6. Ms. Kehoe's physician indicated that the earliest she would be able to return to work would be in December of 1997, with certain conditions. Paramount among these was that she not return to the same HRDC work site which she had left to go on sick leave and then disability.*
>
> *7. No work at the CR-04 level was found in the entire greater Toronto area for the Grievor. In December of 1998 she was examined by a Health and Welfare Canada doctor, who again recommended that she be placed at a work site other than the Richmond Hill HRDC location.*
>
> *8. In December, 1998, a temporary job with Income Support Programs in Scarborough was offered to the Grievor. While she was paid at the CR-04 level, the tasks which she performed were far below that level, consisting mostly of filing.*
>
> *9. The Grievor remained at the Scarborough position until she was unable to continue due to painful, recurring back problems.*
>
> ***PART IV***
>
> ***Order Sought***
>
> *10. The Grievor requests that the Employer's jurisdictional objection be denied in order that she may be allowed to present the merits of her case to the Public Service Staff Relations Board.*
>
> . . .

[8] The employer replied to Ms. Kehoe's arguments on November 21, 2000. Its reply reads as follows:

> . . .
>
> *REPLY*
>
> 1. *The following in is* [*sic*] *reply to the Grievor's Written Arguments in the preliminary objection to jurisdiction in* Chris Kehoe v. Treasury Board of Canada (Human Resources Development Canada)*, Board file number: 166-2-29657.*
>
> 2. *The grievor's position that "the Public Service Staff Relations Board (PSSRB) has previously taken jurisdiction over matters concerning accommodation and disability"*

is, respectfully submitted, irrelevant. Any prior position taken by this Board has been surpassed by the recent decision of the Federal Court of Appeal in Canada v. (Attorney General) v. Boutilier.

> **Canada (Attorney General) v. Boutilier**, *[1999] 1 F.C. 459 (T.D.), per. McGillis J.; affirmed [2000] 3 F.C. 27 (C.A.); leave to appeal to the Supreme Court of Canada denied, [2000] S.C.C. No. 12*

3. *The position of the Federal Court of Appeal is clear and is captured by the following portions of the decision:*

> *¶ 23 In summary, the principle set out in Byers Transport governs these cases. It is consistent with the wording and purpose of the statute, with Cooper, and with virtually all of the jurisprudence of this Court. The dispute resolution system in federal labour matters is, therefore, not as simple as one would like it to be. If another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance". Possible delay in securing redress administratively itself is not significant, unless perhaps it is so pronounced that it can be said that no real remedy is available to the grievor at all. Differences in the administrative remedy, even if it is a "lesser remedy", do not change it into a non-remedy [footnote omitted].*
>
> *¶ 24 This principle does not prevent unions from bargaining for rights beyond the Human Rights Code area, for a grievor can go to arbitration as long as no remedy is available at the Human Rights Commission to vindicate these new rights. This result gives primacy in dispute resolution to the human rights administration, as well as other expert administrative schemes, where expertise and consistency is plainly favoured by Parliament, rather than decisions of ad hoc adjudicators. PSSRA is different than most labour codes where arbitration is made the exclusive remedy. It is up to the Human Rights Commission to send matters to arbitration pursuant to section 41 if, in its discretion, it feels it appropriate. Any other interpretation would render the words in subsection 91(1) meaningless or twisted beyond recognition [footnotes omitted].*

> *¶ 25 An Adjudicator must, therefore, grapple with these jurisdictional matters before or during hearings but, hopefully, most of them can be resolved at the commencement of the grievance proceedings.*
>
> *3. Some Policy Concerns*
>
> *¶ 26 Some concerns were raised by counsel for the appellants and the intervener about the uncertainty that will result from this interpretation of subsection 91(1); it is possible, it is said, that, during a hearing before an adjudicator on the meaning of a collective agreement, a human rights issue might arise, causing a loss of jurisdiction. This is true, but that is the unavoidable effect of the language in the section. One can only hope that, in future, the parties will do their best to determine in advance whether human rights issues are involved and, if they are, act accordingly.*
>
> **Canada (Attorney General) v. Boutilier**, supra *at paras 23-26*

4. *Both in her original grievance and in her Written Reply, the grievor is alleging, in whole or in part, a failure by the employer to accommodate her physical disability.*

5. *As indicated in the employer's Written Argument, this is a matter covered by the* Canadian Human Rights Act *and the procedures for redress provided thereunder.*

6. *As a result, it is respectfully submitted that this matter falls squarely within the* Boutilier *principle and this Board should refuse to exercise jurisdiction over it.*

. . .

Reasons for Decision

[9] In the case at hand, the issue before the Board is whether it should exercise its authority to dismiss, for want of jurisdiction, the grievance filed by Ms. Kehoe. The employer requested the Board to exercise the powers set out in section 8 of the Regulations. Paragraphs 8(1) and (2) read as follows:

> ***8.*** *(1) Subject to subsection (2), but notwithstanding any other provision of these Regulations, the Board may dismiss an application on the ground that the Board lacks jurisdiction.*

> *(2) The Board, in considering whether an application or complaint should be dismissed pursuant to subsection (1), shall*
>
> *(a) request that the parties submit written arguments within the time and in the manner specified by the Board; or*
>
> *(b) hold a preliminary hearing.*

[10] The process set out in section 8 of the Regulations cannot be followed to dismiss a grievance, as it applies to all cases before the Board, other than grievances. However, section 84 of the Regulations contains, in relation to grievances, a process similar to that set out in section 8. Indeed, paragraphs 84 (1) and (2) read as follows:

> ***84.*** *(1) Subject to subsection (2), but notwithstanding any other provision of these Regulations, the Board may dismiss a grievance on the ground that it is not a grievance that may be referred to adjudication pursuant to section 92 of the Act.*
>
> *(2) The Board, in considering whether a grievance should be dismissed pursuant to subsection (1), shall*
>
> *(a) request that the parties submit written arguments within the time and in the manner specified by the Board; or*
>
> *(b) hold a hearing.*

[11] The fact that the employer based its application on section 8 of the Regulations, rather than on section 84, is of little consequence in this case. Although sections 8 and 84 apply to different types of cases, they are to the same effect; they both entitle the Board to dismiss a case for want of jurisdiction. Furthermore, as I have already expressed, those processes are similar. I note that Ms. Kehoe did not object to the employer's application being based on section 8. To the contrary, the parties requested the Board to deal with the issue of jurisdiction on the basis of written submissions. The Board will therefore deal with the employer's application as if it were based on section 84 of the Regulations.

[12] I will first examine whether having recourse to the process set out in section 84 of the Regulations is appropriate in the circumstances of the instant case.

[13] In *Gascon*, 2000 PSSRB 68 (166-2-28934), the Board was seized with an application to dismiss a grievance for want of jurisdiction. In dealing with that application, the Board found at §14 that having recourse to the process set out in

section 84 of the Regulations is appropriate where there is a serious concern that the grievance is not one that may be referred to adjudication. The Board further found at §15, that, on the face of the record before it, there was an arguable case that the grievance was one that may be referred to adjudication. The Board therefore denied the application.

[14] In order to determine whether a grievance may be referred to adjudication, one has to consider the provisions of sections 91 and 92 of the PSSRA. Subsection 91(1) provides for the issues which an employee can grieve and subsection 92(1), which types of grievances an employee can refer to adjudication. These subsections read 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.*
>
> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*

> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)*(f) *or* (g) *of the* Financial Administration Act, *or*
>
> (c) *in the case of an employee not described in paragraph* (b)*, disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> [Emphasis added]

[15] On its face, Ms. Kehoe's grievance appears to be directed at an employer's failure to accommodate her medical condition and at some harassment therefrom. Ms. Kehoe drafted her grievance as follows:

> . . .
>
> *I grieve the employer's failure to accommodate me with employment as outlined in my physician's report of December 18, 1997. I allege that this constitutes harassment and constructive dismissal from my employment.*
>
> . . .

[16] The *Canadian Human Rights Act* (CHRA) addresses the issues of an employer discriminating against an employee on the basis of disability or harassing an employee on that basis. Indeed, sections 3 and 7 and subsection 14(1) of the CHRA read as follows:

> ***3.*** *(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.*
>
> ***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.*

> ***14.*** *(1) It is a discriminatory practice,*
>
> *. . .*
>
> *(c) in matters related to employment,*
>
> *to harass an individual on a prohibited ground of discrimination.*

[17] The CHRA also provides for a right to complain about discrimination or harassment on the basis of disability. Sections 4 and 39 and subsection 40(1) of the CHRA provide for the following:

> ***4.*** *A discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.*
>
> ***39.*** *…a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 14.1.*
>
> ***40.*** *(1) …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.*
>
> *. . .*

[18] The issues raised by Ms. Kehoe in her grievance can clearly be pursued through the complaint process set out in the CHRA. The Federal Court of Appeal decided in *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.), that the CHRA complaint process is an "…administrative procedure for redress…." for the purposes of subsection 91(1) of the PSSRA. In arriving at its decision, the Court endorsed the following reasons which Madame Justice McGillis had given in *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.), at pages 471 and 472:

> *. . .*
>
> *A review of the statutory scheme reveals that an employee possesses only a qualified right to present a grievance at each of the levels specified in the statutory process in the Public Service Staff Relations Act. In particular, an employee's right to present a grievance is qualified or limited in two respects: by the requirement in subsection 91(1) that no administrative procedure for redress exists in another Act*

> *of Parliament; and, by the requirement in subsection 91(2) for the approval of and representation by the bargaining agent. Furthermore, under section 92, an employee may only refer a grievance to adjudication following the completion of the grievance process, up to and including the final level. In the event that an employee is not entitled to present the grievance at each of the levels in the process, by reason of the operation of a statutory limitation in either subsection 91(1) or (2), the grievance may not be referred to adjudication under section 92. In other words, where the operation of a limitation contained in either subsection 91(1) or (2) deprives an employee of his qualified right to present the grievance, the employee cannot subsequently purport to refer the grievance to adjudication under subsection 92(1). In the event that an employee purports to refer such a grievance to adjudication, the adjudicator has no jurisdiction to entertain it.*
>
> . . .
>
> [Footnote omitted]

The Court also quoted the following extract of Madame Justice McGillis' reasons in *Boutilier* (T.D.), *supra*, at pages 475 and 476:

> . . .
>
> *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.*
>
> . . .

[19] Finally, in *Boutilier* (C.A.), *supra*, the Federal Court of Appeal also endorsed the following reasons which Madame Justice McGillis had given in *Boutilier* (T.D.), *supra*, at page 476:

. . .

> *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.*
>
> . . .
>
> [Emphasis added]

[20] The only logical conclusion to which one may come when examining Ms. Kehoe's grievance is that its essence relates to fundamental human rights issues, i.e. discrimination and harassment on the basis of disability. These issues are not merely accessory to the grievance, but rather form its very pith and substance. When one tries to determine the scope of the grievance while making abstraction of those issues, all that remains is an unparticularized allegation of constructive dismissal.

[21] I note that, in the written arguments she filed in this case, Ms. Kehoe did not deny that her grievance was directed at human rights issues. In fact, the only argument she made was that, in the past, adjudicators appointed pursuant to the PSSRA have taken jurisdiction over matters relating to disability and accommodation. However, she failed to recognize that the decision of the Federal Court of Appeal in *Boutilier* (C.A.), *supra*, has changed the legal landscape in that regard.

[22] In the circumstances of the case at hand, as Ms. Kehoe's grievance raises issues which can be pursued through the complaint process set out in the CHRA, and in light

of the decision which the Federal Court of Appeal rendered in *Boutilier* (C.A.), *supra*, I find that, on the face of the record before the Board, Ms. Kehoe's grievance is not one which may be presented pursuant to subsection 91(1) of the Act and, as such, cannot be referred to adjudication pursuant to subsection 92(1). I further find it appropriate to have recourse, in this case, to the process set out in section 84 of the Regulations.

[23] For the reasons above, I find that Ms. Kehoe's grievance is not one that may be referred to adjudication pursuant to section 92 of the PSSRA.

[24] The employer's application is therefore allowed. Ms. Kehoe's grievance is hereby dismissed for want of jurisdiction.

Yvon Tarte,
Chairperson

Ottawa, February 2, 2001.