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Citation: 2004 PSSRB 18

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PATRICK RYAN

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Before: Ian R. Mackenzie, Board Member

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Halifax, Nova Scotia,
November 18, 19 and 20, 2003.

[1] Patrick Ryan filed a grievance alleging that a confrontation with Robert Evans at a meeting on January 11, 2002, was a breach of the anti-discrimination article of the collective agreement between the Public Service Alliance of Canada (Operational Services) and the Treasury Board of Canada. In particular, he alleged that the actions of Mr. Evans at the meeting constituted interference with union activity and were also in breach of the Departmental policy on harassment.

[2] At the commencement of the hearing, Mr. Newman objected to my jurisdiction to hear this grievance. Mr. Newman submitted that this matter was not a proper grievance under section 91 of the *Public Service Staff Relations Act (PSSRA)* and that Mr. Ryan should have proceeded by way of a complaint under section 23 of the *PSSRA*. Section 91 of the *PSSRA* allows for the adjudication of grievances where there is no other administrative procedure under any Act of Parliament. Section 23 of the *PSSRA* is an administrative procedure for dealing with discrimination on the basis of union activity. The substance of Mr. Ryan's complaint was, Mr. Newman submitted, intimidation for exercising rights under the *PSSRA* - the very matter contemplated as a complaint under the *PSSRA*. Mr. Newman also submitted that the grievor knew that a complaint under section 23 was appropriate as he referred to section 23 in correspondence to the employer prior to filing a grievance.

[3] Mr. Newman referred me *to Canada (Attorney General)* v. *Boutilier*, [1999] 1 F.C. 459 (affirmed [2000] 3 F.C. 27 (C.A.); leave to appeal denied - [2000] S.C.C.A. No. 12) and *Chopra* v. *Canada (Treasury Board)*, [1995] 3 F.C. 445. He submitted that the test articulated in these decisions was whether the substance of a grievance could have been dealt with by another process. The purpose of the legislative provision is to prevent duplication of procedures. Mr. Newman pointed out that section 91 does not say "another Act of Parliament"; therefore, the other procedure referred to in section 91 can be contained in the *PSSRA*. Mr. Newman asked that I dismiss the reference to adjudication on the basis that it was not founded upon a viable grievance.

[4] Mr. Done submitted that I did have jurisdiction to hear the grievance. He submitted that section 92 of the *PSSRA* allows for the Board to take jurisdiction, as the grievance relates to a clause in the collective agreement. The employer accepted the grievance and responded to it at all levels without raising concerns about whether it was a proper grievance.

[5] Mr. Done submitted that what Parliament intended in section 91 was to avoid duplication of efforts and giving grievors "two kicks at the cat". This is not the case here. Based on Board jurisprudence, the bargaining agent determined that a complaint under section 23 of the *PSSRA* was not appropriate in these circumstances. Board decisions have found that the rights under section 8 of the *PSSRA* do not apply where the meeting does not relate to either bargaining or discipline: *The Professional Institute of the Public Service of Canada and Treasury Board and Stuart Watson and Wayne Humber* (2000 PSSRB 5); *MacKay and Faulds* (Board File No. 161-2-324 (1985) (QL)) and *Henderson and Murray* (Board File Nos. 161-2-310 and 313 (1984) (QL)). Mr. Done referred to *Boutilier (supra)*, which states that the other procedure must provide "some personal benefit" to the individual. Mr. Done submitted that in a complaint under section 23 of the *PSSRA* the Board was restricted to declaratory relief only, which does not resolve the labour relations problem and is of no personal benefit to Mr. Ryan. The remedies sought by Mr. Ryan in his grievance cannot be obtained through a complaint. It could not be the intent of the legislation to require complaints under section 23 in such circumstances, as this would mean that there is no remedy for intimidation or discrimination at a meeting that is neither about bargaining nor disciplinary in nature.

[6] Mr. Done submitted that the decisions relied on by Mr. Newman were human rights cases and did not apply to this case.

[7] Mr. Done also submitted that because section 23 of the *PSSRA* has no time limits, one way or the other Mr. Ryan would be before the Board and that it could very well be the same person who would hear it as a complaint. It would simply be the same Board member wearing a different hat.

[8] Mr. Done submitted that I should reserve my decision on the issue of jurisdiction and proceed to hear the evidence on the merits of the case. He submitted that this would be most efficient as everyone was present and ready to proceed.

[9] In reply, Mr. Newman submitted that the parties cannot consent to jurisdiction, as the adjudicator either has jurisdiction or does not. Issues of jurisdiction can be raised at any time in the course of a grievance, including at adjudication. The fact that the grievance was based on a provision of the collective agreement is not relevant. The fact is that, save for criminal conviction for which a pardon has been received, there is

an administrative procedure for everything else contained in the anti-discrimination article (Article 19) of the collective agreement.

[10] Mr. Newman noted that although it might be desirable to proceed to hear the grievance for labour relations purposes, this is not the role of an adjudicator. An adjudicator has a very specific statutory role and is not a "labour relations doctor". Mr. Newman submitted that a section 23 complaint at this stage might not go to a hearing, as the bargaining agent would not be coming to the Board with "clean hands".

[11] Mr. Newman submitted that the standard of proof in a complaint under section 23 was higher than in a grievance. He also submitted that there was a difference in judicial review, with a complaint going to the Federal Court of Appeal for review and a grievance going to the Federal Court Trial Division.

[12] Mr. Newman also submitted that just because you do not get a remedy, it does not mean that the complaint process is the wrong route. Mr. Newman submitted that no useful purpose would be served to hear any evidence on this case.

[13] At the hearing, I asked the parties for their submissions on *Shaw* (Board File Nos. 166-2-27880 to 27882 (1998) (QL)). Mr. Newman noted that the decision pre-dated *Boutilier (supra),* but that the reasoning in the decision had not been altered by the more recent decisions of the Federal Court of Appeal. He submitted that the adjudicator had reached the right conclusion. Mr. Done submitted that in *Shaw*, the grievor had not made a specific reference to the particular part of the no-discrimination clause. Mr. Ryan had clearly specified the part of the clause he was relying on. He also submitted that the decision was not binding on me.

[14] I reserved my decision on the jurisdictional issue and proceeded to hear evidence on the merits of the grievance. At the hearing, I did indicate that consent or acquiescence by the employer could not give me jurisdiction. I also indicated that I could not change hats and proceed by way of a section 23 complaint at this hearing, as I had been specifically appointed as an adjudicator under the *PSSRA*.

[15] An order excluding witnesses was granted. Three witnesses testified on behalf of the grievor, the grievor testified, and two witnesses testified for the employer. Both parties made opening statements.

Evidence

[16] Patrick Ryan works at CFB Halifax in the main supply building in the warehouse. At the time of the events at issue, he was the first Vice-President of the Union of National Defence Employees Local, and Acting Chief Shop Steward. Robert Evans is the Supply Operations Officer at CFB Halifax. Approximately 190 people report to Mr. Evans, including Mr. Ryan.

[17] Mr. Ryan testified that he had a previous encounter with Mr. Evans, relating to his return to work after a seven-month assignment. Mr. Ryan remembered Mr. Evans pounding the table at this meeting. Mr. Evans recalled this meeting as being very confrontational and testified that he "lost it" and pounded the table. Mr. Evans also recalled an encounter on the shop floor with Mr. Ryan, where Mr. Ryan raised issues about the temperature on the shop floor. Mr. Evans testified that he felt Mr. Ryan had "ambushed" him.

[18] In December of 2001, problems in the Customer Service Support Office (CSSO) on the second floor of Building D206 had come to a head. Mr. Ryan testified that these labour-management problems were discussed with the Base Commander (Commander A.J. Kerr) in December of 2001, at a meeting with Commander Kerr, Ken DeWolfe, the union local president, and Mr. Ryan. He testified that the union asked Commander Kerr if he was willing to work with it to resolve the issues in the workplace. Mr. Ryan testified that he was designated by the union local as the union official who would be handling this matter. Mr. Ryan sent an e-mail to Commander Kerr on December 13, 2001, requesting that the time limits for grievances relating to work problems in Building D-206 be extended (Exhibit G-2). In that e-mail, Mr. Ryan stated that the union would be involved in all meetings held with members. Commander Kerr replied:

> *As we work together to resolve the issues that you and Ken* [DeWolfe] *brought to my attention concerning the work environment in D-206, I will extend the time limit for employees to initiate a grievance while we attempt to informally resolve the issue.*
>
> ...

[19] Commander Kerr forwarded this e-mail to Mr. Evans. Mr. Evans did not recall reading this e-mail at the time.

[20] Mr. Evans testified that he had become concerned about morale in the workplace and had suggested to Commander Kerr that they consider using the Good Working Relations Support team to assist in resolving the issues in the workplace. Patricia Moriarty, the Good Working Relations Support Team leader, testified that Mr. Evans approached her early in December 2001 to discuss morale in the workplace and the role that the Good Working Relations Support Team might play. The Good Working Relations Support Team's primary role was to provide "informal harassment advice and counsel" to anyone involved in a harassment complaint. Also included in its role was facilitating the resolution of interpersonal conflicts in the workplace (Exhibit G-6).

[21] Mr. Ryan testified that a number of employees in the affected work unit had asked him to attend all meetings relating to the issues in the workplace and to be their representative at all meetings. Deborah Irvine, a CSSO employee, testified that she asked Mr. Ryan to attend all meetings relating to the workplace issues sometime early in December. Mr. Ryan testified that he did not take any steps to advise Mr. Evans because he had already obtained the concurrence of the Base Commander and this e-mail had been copied to Mr. Evans (Exhibit G-2). Mr. Evans testified that he told Mr. DeWolfe that he could attend meetings if he wished. Mr. Evans testified that it was not his role to invite union officials, but that if employees wanted a union representative to attend, he had no problem with that. Ms. Irvine and Daphne Daye and Wesley Embanks, all CSSO employees, testified that Mr. Evans had told them at a previous meeting that the union was going to be present at all meetings.

[22] All employees were advised of the first meeting with the Good Working Relations Support Team through an e-mail from Chief Petty Officer H.J. Puddifant, sent on January 10, 2002 (Exhibit E-1). Ms. Moriarty testified that the purpose of the meeting was to give an overview of the Good Working Relations process, including raising awareness of harassment investigations and respect in the workplace. Ms. Daye testified that she forwarded a copy of the e-mail to Mr. Ryan soon after receiving it (Exhibit E-1). Mr. Evans testified that he expected Chief Petty Officer Puddifant to organize the meeting, including inviting union representatives.

[23] Mr. Ryan asked his supervisor, Charlie Payne, for permission to attend the meeting and Mr. Payne agreed. Mr. Embanks was a union steward for CSSO. He testified that he needed union representation at that meeting and was not attending the meeting in his capacity as a union representative.

[24] Mr. Ryan testified that when he arrived at the conference room, Chief Petty Officer Puddifant and a manager, Gloria Fry, were at the back of the room and he greeted them. Mr. Evans walked into the room, looked at Mr. Ryan and walked to the back of the room to help in the setting up of the projector. Mr. Evans testified that Ms. Moriarty pointed to Mr. Ryan and asked who he was. Mr. Evans testified that he wondered why Mr. Ryan was there. Mr. Ryan was not employed at CSSO and Mr. Evans had not been told that a union representative would be attending.

[25] Mr. Evans approached Mr. Ryan and interrupted a conversation that Mr. Ryan was having with Mr. Embanks. Mr. Evans asked, in a normal tone, why Mr. Ryan was there. Mr. Ryan testified that he responded that he was there representing members as a union official. Ms. Moriarty testified that Mr. Ryan said that he had a right to be there. Mr. Ryan testified that, at this point, Mr. Evans raised his voice and belligerently stated that Mr. Ryan did not work there, but worked downstairs and that what happened "upstairs" was none of his concern. Mr. Ryan stated that Mr. Evans then asked him to leave. Mr. Ryan told him that he was not going to leave, as he was at the meeting as a union officer representing members. Mr. Evans testified that he did not ask Mr. Ryan to leave. Mr. Evans described Mr. Ryan as being "charged". Mr. Evans stated that he was not upset, but was simply trying to resolve a problem. Mr. Evans then asked Mr. Ryan to step out in the hallway to talk. Mr. Ryan followed Mr. Evans out into the hallway.

[26] After Messrs. Ryan and Evans left the room, the door was closed behind them. Mr. Evans testified that his back was to the door, but that to his knowledge the door was not closed. Ms. Irvine testified that she heard raised voices in the hallway. Mr. Evans asked Mr. Ryan again why he was there. Mr. Ryan responded as before. Mr. Evans then asked whether someone in the room had requested that Mr. Ryan attend the meeting. Mr. Ryan responded in the affirmative and told Mr. Evans that he should know this because of the e-mail sent to Commander Kerr (Exhibit G-2). Mr. Ryan also told Mr. Evans that they would not be doing a Good Working Relations Support Team exercise if it had not been for the union talking to Commander Kerr.

Mr. Evans then said: "So, you said someone in there invited you. Come with me." Mr. Evans testified that he told Mr. Ryan that he would like to verify that it was true that someone had invited him.

[27] Mr. Ryan testified that upon returning to the conference room, Mr. Evans said, in an angry and loud voice, that he wanted to say something. He then said: "I want a show of hands. Who invited Mr. Ryan to this meeting?" Mr. Evans then looked at each person individually and may have pointed his finger at each person, asking each person if he or she had invited Mr. Ryan. Mr. Evans testified that he did not point his finger at anyone. Ms. Moriarty testified that she did not recollect any pointing. She also testified that Mr. Evans appeared frustrated, but not angry. Mr. Ryan testified that Mr. Evans then turned to him and said: "There you go, nobody wants you here. You lied to me. I want you to leave." Mr. Evans testified that he did not accuse Mr. Ryan of lying. At this point, Ms. Moriarty said that the team had no problem with Mr. Ryan attending. Mr. Evans said that this was fine and told Mr. Ryan that they could discuss this matter later. He also testified that if Mr. Ryan had told him that Mr. DeWolfe had asked him to attend, there would not have been a problem.

[28] Mr. Ryan testified that he felt that Mr. Evans belittled his position as Vice-President of the Local and he felt totally demeaned and embarrassed. Ms. Moriarty testified that people felt uncomfortable, and she could feel the tension in the room. She did not recall any shouting by Mr. Evans, but it was clear that he was frustrated. She stated that the incident did not help to create a positive working relationship. Ms. Irvine testified that she was afraid. Ms. Daye testified that the incident was embarrassing and not professional.

[29] Mr. Ryan filed a grievance on the following Tuesday, January 15, 2002, setting out the events at the meeting. Mr. Ryan requested the following as corrective action:

1. *Apology in writing;*
2. *Apology in front of all staff;*
3. *Assurances that there will be no interference in union business;*
4. *Mr. Evans should be put on a SHAPE [anti-harassment] course;*
5. *Hearing at all levels; and*

6. To be made whole.

[30] Commander Kerr stated in the grievance response, dated February 6, 2002, that after discussing the matter with witnesses at the meeting, he concluded that "tension was clearly present" in the exchange between Messrs. Evans and Ryan. However, he concluded that Mr. Ryan had not been treated in a manner that was belittling or harassing.

[31] In the final level response, the Director General of Employee Relations, R.J. Sullivan stated:

> *... While the observations of witnesses at the meeting do not lead conclusively to a finding that you were harassed as alleged, I do concur with the Base Commander where he stated in his reply at the second level that Mr. Evans could have handled the situation in a different way. Similarly however, there was a concomitant obligation on your part to provide more clarity as to your purpose and role at the meeting.*

[32] Mr. Evans testified that the courtesy of advance notice of attendance at meetings had always been a given in labour-management relations before. He testified that he had an agreement with Mr. DeWolfe that the union could be part of the exercise. He was expecting Mr. DeWolfe to be there and not Mr. Ryan. He testified that he was frustrated that he, Chief Petty Officer Puddifant, or Ms. Moriarty had not been notified that Mr. Ryan would be attending. He testified that he wished he had done things differently, and that this "was not my finest hour". He recognized that he had put Mr. Ryan on the spot and made him feel bad, and made his staff feel uncomfortable. He testified that he probably should have explained why he was asking the questions. Mr. Evans also testified that he had planned on discussing this matter with Mr. DeWolfe, but decided not to because Mr. Ryan had filed his grievance.

Arguments

For the Grievor

[33] Mr. Done submitted that there was little doubt that what happened in the conference room on January 11, 2002, should not have happened. The question is whether that inappropriate behaviour constituted a breach of Article 19 of the collective agreement. Mr. Ryan's response to the behaviour of Mr. Evans was not unreasonable. Mr. Evans' behaviour could perhaps be explained up until the point

when Mr. Ryan identified himself and his role at the meeting. For some reason, Mr. Evans had a problem with Mr. Ryan being there.

[34] Mr. Done stated that Mr. Evans knew that Mr. Ryan was invited to participate in the meeting from the e-mail sent by Commander Kerr the previous month (Exhibit G-2). After Mr. Ryan told him why he was at the meeting, Mr. Evans was not prepared to drop the issue and invited Mr. Ryan to discuss it in the hall. On returning to the room, Mr. Evans proceeded to ask everyone who had invited him. Mr. Done asked: why would it matter? Also, how important was it to know the answer? Mr. Evans did not go to the union local president the next day to discuss this matter; therefore, it could not have been all that important to Mr. Evans. Mr. Done submitted that the appropriate question for Mr. Evans to ask would have been whether Mr. Ryan had permission from his supervisor to attend. Mr. Ryan had obtained this permission.

[35] Mr. Done submitted that Mr. Evans' expression of regret at this hearing comes close to an apology, but it is nearly two years after the events in question. The Department's "Harassment Prevention and Resolution" policy (Exhibit G-5) defines harassment as:

> *...any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace and which the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, or any act of intimidation or threat. It includes harassment within the meaning of the* Canadian Human Rights Act (CHRA).

[36] Mr. Done submitted that the actions of Mr. Evans met this definition. Mr. Evans' behaviour was more than inappropriate and crossed the line into a breach of the collective agreement. Mr. Done submitted that a meaningful, substantive remedy to this breach of the collective agreement was required.

For the Employer

[37] Mr. Newman submitted that Mr. Evans' expression of regret at this hearing should go a long way toward resolving this situation. This is not a systemic issue. It was always the position of management that Mr. Evans could have handled the situation better. It is unfortunate that this matter escalated to this point, as it should have been resolved at an earlier stage.

[38] Mr. Newman stated that, although he was not suggesting any blame, it took two people to have a confrontation. It was unfortunate that the situation started to escalate. Both parties had an opportunity to do something about the escalating situation but did not. The reaction of Mr. Evans was not appropriate. One thing led to another, and everything happened in a very short period of time. In a sense, Mr. Newman argued, Mr. Evans was sandbagged at the meeting. It was quite clear that Mr. Ryan felt he had a right to be at the meeting but there was no specific invitation. Mr. Ryan did not understand Mr. Evans' concerns and "everybody got rigid".

[39] Mr. Newman noted that the e-mail exchange between Mr. Ryan and Commander Kerr (Exhibit G-2) occurred sometime before the meeting. The subject of the e-mail exchange was grievance time limits and we do not know how thoroughly Mr. Evans reviewed it. Mr. Evans was the one who brought up the idea of the Good Working Relations Support Team and had expressed concerns about relations in the workplace. He was not anti-union in any way.

[40] Mr. Newman submitted that the meeting did go on and that Mr. Ryan was permitted to stay. Mr. Evans testified that he had intended to follow up with the Local president, but Mr. Ryan had already submitted a grievance and the process had become formalized.

[41] Mr. Newman submitted that Article 19 of the collective agreement was not meant to be used for trivial complaints. Complaints of harassment or discrimination are serious allegations meant to address egregious behaviour and should not be lightly invoked. There was no evidence of anti-union feelings on the part of Mr. Evans. In fact, there was evidence that he welcomed union participation. Although the events at the meeting were unfortunate, they do not amount to a breach of the collective agreement, and Mr. Ryan has not met his burden of proof.

[42] Mr. Newman referred me to the Treasury Board policy on "Harassment in the workplace" (Exhibit G-4), *Floyd Joss and Treasury Board (Agriculture and Agri-Food Canada),* (2001 PSSRB 27) and *Henri Bédirian and Treasury Board (Justice Canada),* (2002 PSSRB 89).

[43] With regard to the grievor's requested remedies, Mr. Newman submitted that no adjudicator has ever forced someone to give an apology. As far as taking a course on harassment, Mr. Newman submitted that everyone should be taking such courses, not just managers.

Reply Argument for the Grievor

[44] Mr. Done submitted that the Department's own "Harassment Prevention and Resolution" policy (Exhibit G-5) provides that a single act can constitute harassment. A course of conduct is not required. Mr. Done submitted that an adjudicator does not have to look at other cases, as the definition of harassment in the Department's own policy should be what is considered.

Reasons for Decision

Jurisdiction

[45] Section 91 of the *PSSRA* establishes the right of an employee to file a grievance and, consequently, the jurisdiction of an adjudicator to hear that grievance:

> ***91.*** *(1) Where any employee feels aggrieved*
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> *(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.
>
> ***91.*** *(1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :*

> a) *par l'interprétation ou l'application à son égard :*
>
> *(i) soit d'une disposition législative, d'un règlement -- administratif ou autre --, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,*
>
> *(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;*
>
> b) *par suite de tout fait autre que ceux mentionnés aux sous-alinéas* a)*(i) ou (ii) et portant atteinte à ses conditions d'emploi.*

[46] The relevant phrase is, in English: "in respect of which no administrative procedure for redress is provided in or under an Act of Parliament". In French, the relevant phrase is: « si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale. » The issue in this case is whether this language means that a grievance alleging discrimination on the basis of union membership or activity cannot be adjudicated.

[47] The Federal Court has never dealt with the application of section 91 of the *PSSRA* to complaints and grievances under the *PSSRA*. The Court decisions on jurisdiction cited by counsel for the employer have all related to human rights issues, where the other administrative procedure falls under a different statute.

[48] The legislative history of section 91 is instructive. The provision was initially introduced to prevent duplication of proceedings under the *Public Service Employment Act* and the *PSSRA*: *Chopra (supra)*. In *Cooper* v. *Canada* (1974), 2 F.C. 407, the Federal Court of Appeal stated:

> *Where a procedure is so provided under which an employee's grievance may be redressed, the aggrieved employee cannot resort to the grievance procedure under ... the* Public Service Staff Relations Act *but must submit his complaint* ***to the authority which has, under the appropriate statute, the power to deal with it.*** *An employee who is dissatisfied with the decision of that authority may not file a grievance ... in respect of that decision. (Emphasis added)*

[49] The Federal Court of Appeal, in *Boutilier (supra)* concluded:

> *This Court and the Trial Division of this Court has consistently taken the view that Parliament, by the language used in the section, intended to remove from the normal grievance procedures under the* PSSRA *certain specialized*

> *areas which it was thought should be dealt with under the administrative process set out in the legislation governing those particular areas.*

[50] The Federal Court of Appeal in the same decision, also quoted, with approval, the following from the judgment of the Trial Division in *Boutilier (supra)*:

> *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. (Emphasis added)*

[51] Counsel for the employer emphasized that section 91 of the *PSSRA* referred to "an Act of Parliament", and not "another" Act of Parliament. The Federal Court of Appeal has concluded the opposite, with its explicit reference to "another" Act of Parliament, in *Boutilier (supra)*, quoted above. It is worth noting that other legislative provisions are much more explicit when limiting jurisdiction. For example, the *Canada Labour Code* uses the phrase "a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament" (s. 242(3.1)(b)).

[52] In *Shaw (supra)*, the adjudicator concluded that he did not have jurisdiction over a grievance alleging discrimination on the basis of union activity. He relied on the Federal Court Trial Division decision in *Chopra (supra)* to support the notion that when there is an administrative procedure available in an Act of Parliament, the bargaining agent and the employee cannot invoke the grievance procedure and

concluded: "It is only when there is no (other) administrative procedure for redress in an Act that an employee becomes entitled to present his grievance". All of the cases relied on by the adjudicator in reaching his conclusion involved administrative procedures outside of the *PSSRA* (either the *Public Service Employment Act* or the *Canadian Human Rights Act*). Also, the adjudicator did not have the benefit of the reasons in the Federal Court of Appeal in *Mohammed et al (supra).*

[53] The Federal Court of Appeal in *Boutilier (supra)*, focused on Parliament's intent in referring to "other administrative procedures" as follows:

> *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 by ad hoc adjudicators.*

[54] This emphasis on expertise and consistency leads to an examination of the differences between a reference to adjudication and a complaint, and in particular, to the differences between the decision makers in each process. Under the *PSSRA*, a Board member can sit either as an adjudicator (for grievances) or as a Board (for complaints). Section 93 of the *PSSRA* stipulates that the Board shall assign Board members to hear adjudication grievances. An adjudicator has the same powers as a Board member hearing a complaint, and a decision of an adjudicator can be enforced in the same way as an order under section 23 of the *PSSRA.*

[55] There is no significant difference in employee rights under the statute and under the anti-discrimination provision in the collective agreement. The Federal Court of Appeal has held that since the anti-discrimination provision in the collective agreement and the statutory prohibition both deal with employee rights, the parties must have intended to afford employees the same protection already granted under the *PSSRA (Quan* v. *Canada (Treasury Board)*, [1990] 2 F.C. 191*; sub. nom. Treasury Board* v. *Bodkin).* The Court quoted, with approval, the following from the adjudicator's decision in *Bodkin*:

> *As is clear from Article M-16, discrimination, interference, restriction, coercion, harassment, intimidation or any disciplinary action are prohibited with respect to an employee by reason of "activity in the union". The words "activity in the union" are not defined in the collective agreement. In searching for the parties' intention with respect to those words, I have been mindful of the labour relations context in which this contract was signed as well as*

> *the legislative context. My assumption is that the parties, as a minimum, intended to afford employees the same protection already granted to them under section 6 of the* Public Service Staff Relations Act...
>
> *A strict and narrow interpretation of the words "activity in the union" that would restrict the protection to the internal administrative affairs of the union disregards the context in which collective agreements are signed and in the end can only serve to deprive the relevant Article M-16 of its intended effect.*

[56] The main difference between a reference to adjudication and a complaint is that a decision by an adjudicator is subject to judicial review by the Federal Court Trial Division, while a decision in a complaint is subject to judicial review by the Federal Court of Appeal. In my view, this distinction is not relevant to the issue of jurisdiction.

[57] In this case, there is no appreciable difference between a reference to adjudication and a complaint. The same expertise is applied in both, as the same individuals, with the same powers, hear complaints and grievances. Since the Federal Court of Appeal has held in *Quan (supra)* that the same principles apply for complaints as for grievances relating to union activity, there is no concern about consistency. The decision in *Quan* also explicitly accepted the fact that allegations of anti-union discrimination can be heard as either complaints or grievances.

[58] In conclusion, a purposive analysis of section 91 in the general context of the legal framework set out in the *PSSRA* leads me to conclude that an adjudicator does have jurisdiction over a grievance alleging discrimination on the basis of union membership or union activity.

Discrimination on the Basis of Union Activity

[59] Mr. Ryan has alleged a breach of the anti-discrimination provision of his collective agreement:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

[60] The grievor bears the burden of proof in establishing that the events of the morning of January 11, 2002, constitute discrimination, interference, restriction, coercion, harassment or intimidation by reason of his activity in his union.

[61] There is little doubt about the confrontation between Messrs. Evans and Ryan at the Good Working Relations presentation in the conference room. Although there may be some differences in the telling, there is remarkable consistency from all witnesses given the passage of time. It is clear that the confrontation both inside the conference room and in the hallway made many of the meeting participants uncomfortable. Ms. Moriarty, as an outsider, observed tension in the room. At the hearing, Mr. Evans acknowledged that this "was not his finest hour". However, not all uncomfortable human interaction can be considered "harassment" or "intimidation". In *Joss (supra),* the adjudicator noted, at paragraphs 90 and 96:

> *... harassment should not be founded upon non-consequential incidents, non-culpable errors of judgment or foolish behaviour. Neither, in my view, should it be employed as a weapon in the workplace, especially where such use is furthering personal vendettas. The proper function of the law of harassment and harassment policies in the work place is not to cause problems or exacerbate interpersonal disputes, but to protect those in need of protection.*
>
> ....
>
> *Hard feelings, feelings of resentment, and out right feuds between employees crossing all ranks are not unique in employment relationships. Such situations do not always amount to harassment and more often than not, are two-way streets. These problems are not necessarily effectively remedied by disciplinary action, and certainly not by indiscriminate use of harassment policies or harassment complaints as this unfortunate tale reveals.*

[62] The actions of Mr. Evans at the meeting showed a lapse in judgement that senior management recognized in the grievance response, and that Mr. Evans acknowledged at the hearing. I find that this lapse of judgement, although unfortunate, is not a breach of the collective agreement.

[63] Mr. Ryan was not prevented from participating in the meeting, and Mr. Evans' comments did not restrict or interfere with Mr. Ryan's role as a union representative. There was no evidence that Mr. Ryan was demeaned in the eyes of union members in

attendance at the meeting. Although union members may have felt uncomfortable, Mr. Ryan did not lose any status as a result of the confrontation.

[64] The grievance process is not always the best avenue to resolve tension in labour-management relations. Mr. Ryan was quick to file a grievance, without allowing for any time for discussion between the union local and management. Mr. Evans was contrite at the hearing, recognizing that he over-reacted. However, this recognition does not appear to have been conveyed during the grievance process. It is indeed unfortunate that both sides did not make sincere efforts to resolve their conflict prior to adjudication. The DND "Maritime Forces Atlantic Guide to Good Working Relations" (Exhibit G-6) puts it succinctly:

> *... Good working relations will triumph once we acknowledge the fact that unresolved disputes do not go away by themselves. Because delaying the inevitable will only escalate stress levels, we must collectively 'manage the process' better and make early resolution a high priority.*

[65] In conclusion, the grievance is denied.

Ian R. Mackenzie,
Board Member

OTTAWA, March 16, 2004.