Date: 20210217

File: 566-02-8640

Citation: 2021 FPSLREB 15

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

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

BETWEEN

MARIE MACHE-RAMEAU

Grievor

and

DEPUTY HEAD
(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as
Mache-Rameau v. Deputy Head (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Yavar Hameed, counsel

For the Employer: Simon Deneau, counsel

Decided on the basis of written submissions, filed June 23 and July 7 and 19, 2017.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] Marie Mache-Rameau ("the grievor") has held a federal public service position since 1990. In January 2014, her position, classified at the PE-03 group and level, was eliminated as part of a workforce adjustment. She was working at the Canadian International Development Agency, which is now part of the Department of Foreign Affairs, Trade and Development ("the employer").

[2] On February 22, 2013, the grievor filed the following grievance, challenging the employer's January 30, 2013, decision to declare her a surplus employee because her human resources programs advisor position was affected by a workforce adjustment:

> [Translation]
>
> …
>
> *Please accept this letter as an official grievance challenging CIDA's January [30], 2013, decision to name Ms. Mache-Rameau as surplus to her position, mentioned in the heading above. This grievance is filed under section 15 of the* National Joint Council By-Laws *("the* By-Laws*") and the* Work Force Adjustment Directive *("the* Directive*"). Please confirm that you are the representative who is authorized to deal with this grievance at the first level or if we need to present this grievance to someone else.*
>
> *Because of CIDA's noted January [30], 2013, decision, it is interpreting and applying the* Directive *erroneously and in a way that adversely affects Ms. Mache-Rameau.*
>
> *Ms. Mache-Rameau argues that CIDA's January [30], 2013, decision has affected her rights as a public service employee and that it has caused,* inter alia*, economic losses. Ms. Mache-Rameau requests that she receive full compensation for all the losses associated with CIDA's January [30], 2013, decision and that that decision be annulled.*
>
> …

[3] On April 8, 2013, the employer decided the grievance, as follows:

> [Translation]
>
> …
>
> *I carefully read the facts supporting your grievance and have reached the following conclusion:*
>
> *On April 24, 2012, the Canadian Human Rights Commission (CHRC) informed you and CIDA that it would not launch*

> *proceedings before the Federal Court about the implementation of the Memorandum of Understanding.*
>
> *On November 2, 2012, the Federal Court ruled that the applicant (Ms. Mache-Rameau) had not demonstrated the prima facie evidence required of her in this matter.*
>
> *Finally, on February 27, 2013, the Public Service Staffing Tribunal dismissed your complaint about your layoff on the grounds that it was untimely.*
>
> *For these reasons, there is reason to believe that the decisions that CIDA made in your file are fair and reasonable.*
>
> *Consequently, your grievance is dismissed.*
>
> …

[4] The referral to adjudication was initially done on May 7, 2013, relying on s. 209(1)(a) (the interpretation or application of a provision of a collective agreement or an arbitral award) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2). By a letter of May 9, 2013, the Public Service Labour Relations Board Director, Registry Operations and Policy, advised the grievor, "[translation] Without the bargaining agent's express approval, the grievance cannot be referred to adjudication under s. 209(1)(a) of the *Public Service Labour Relations Act* …", and, "[translation] … therefore, [I] regret that I am unable to consider your request." On May 31, 2013, the grievance was again referred to adjudication, relying this time on s. 209(1)(b) (disciplinary action resulting in termination, demotion, suspension, or financial penalty). The grievor now alleges that the employer's action was in fact disguised discipline.

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

[6] On June 19, 2017, an *Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to*

provide for certain other measures (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

II. Summary of the evidence

[7] The parties filed a joint statement of facts and documentary evidence on consent, the essence of which is summarized in the following paragraphs.

A. The first complaint to the Canadian Human Rights Commission

[8] On August 1, 2003, the grievor filed a first complaint against the employer with the Canadian Human Rights Commission ("the first discrimination complaint"). The complaint alleged that the employer had engaged in discriminatory conduct toward her based on race and that it had prevented her advancement and promotion to a higher level.

[9] Around December 23, 2005, the Canadian Human Rights Commission asked that a human rights tribunal be constituted to hear the first discrimination complaint under s. 44(3)(a) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). The complaint was then sent to the Canadian Human Rights Tribunal.

[10] On November 29, 2006, after a mediation session facilitated by the Canadian Human Rights Tribunal, the parties reached a settlement agreement on the first discrimination complaint ("the settlement agreement"), which the Canadian Human Rights Commission approved.

[11] In 2007, the grievor began 18 months of training at the Public Service Commission, as stipulated in the settlement agreement. On her return to the employer in February 2009, she asked to be appointed to a position classified at the PE-04 group and level, in accordance with her interpretation of the agreement.

[12] Through the Canadian Human Rights Commission, the parties again tried to settle their dispute about the interpretation of the settlement agreement via mediation. The parties were involved in a mediation process between July 2009 and January 2012.

However, on or around March 7, 2012, the employer informed the grievor and the Canadian Human Rights Commission that it no longer wished to participate in the mediation.

[13] Unable to resolve the dispute, and after receiving information from the Canadian Human Rights Commission, the grievor made a motion with the Federal Court for an order to make the settlement agreement approved by the Canadian Human Rights Commission a Federal Court order. She obtained the order on May 29, 2012.

[14] The grievor applied for a show-cause order against the employer on the grounds that it was in contempt of court by not honouring the settlement agreement. On November 2, 2012, the Federal Court dismissed the application (*Rameau v. Canada (Attorney General)*, 2012 FC 1286).

[15] In light of the ongoing dispute between the parties, on January 16, 2013, the grievor wrote to the Canadian Human Rights Tribunal, asking it to intervene.

[16] In a decision rendered on August 26, 2014 (*Mache-Rameau v. Canadian International Development Agency*, 2014 CHRT 26), the Canadian Human Rights Tribunal found that it did not have jurisdiction to deal with the settlement-agreement dispute. It found that the agreement's provisions did not allow it to remain seized of the first discrimination complaint and that the agreement's effect was to close its file. It found that the parties had designated the Federal Court as the appropriate body to settle any other dispute that could arise from the agreement.

[17] The grievor challenged the Canadian Human Rights Tribunal's decision by way of judicial review. On October 19, 2015, the Federal Court confirmed the Canadian Human Rights Tribunal's decision that it did not have jurisdiction to decide the issue of interpreting the settlement agreement (*Rameau v. Canada (Attorney General)*, 2015 FC 1180).

B. The second complaint to the Canadian Human Rights Commission

[18] After the employer withdrew from the mediation about interpreting the settlement agreement, but before the Federal Court made the agreement one of its orders, the grievor made a second complaint with the Canadian Human Rights Commission on May 28, 2012 ("the second discrimination complaint"). In it, she

alleged that among other things, the employer had violated the settlement agreement by refusing to acknowledge its obligation to promote her to a position classified at the PE-04 group and level on her return to it. She argued that she was the victim of discriminatory treatment with respect to employment on the basis of her race and ethnic origin.

[19] The grievor also alleged that the employer had discriminated by retaliating against her, that contrary to the stipulations of the settlement agreement, it had evaded its obligations, and that it had taken other adverse measures against her.

[20] By means of a decision dated July 16, 2014, the Canadian Human Rights Commission found that the Canadian Human Rights Tribunal's review of the second discrimination complaint was not justified. The grievor applied for judicial review of that decision. On January 13, 2017, the Federal Court dismissed her application (*Mache-Rameau v. Canada (Attorney General)*, 2017 FC 43).

C. Layoff

[21] Following a selection for retention or layoff process, the grievor received a letter dated October 1, 2012, advising her that her position was declared surplus as of October 9, 2012, due to a lack of work. The letter also informed her of her options under the *Work Force Adjustment Directive*.

[22] On January 24, 2013, the grievor made a complaint with the Public Service Staffing Tribunal about her layoff ("the staffing complaint").

[23] On January 30, 2013, the employer informed the grievor that since she had not chosen any option within the 120-day opting period, she was deemed to have chosen a 12-month surplus employee priority period to find another reasonable position in the core public administration.

[24] On February 12, 2013, the employer asked the Public Service Staffing Tribunal to dismiss the staffing complaint on the grounds that it had been made after the time limit. On February 27, 2013, the Public Service Staffing Tribunal dismissed the complaint on the grounds that it was untimely (*Mache-Rameau v. President of the Canadian International Development Agency*, Public Service Staffing Tribunal file 2013-0019 (20130227)). On April 15, 2014, the Federal Court upheld that decision on judicial review (*Rameau v. Canadian International Development Agency*, 2014 FC 361).

D. A request that the senior associate deputy minister of External Affairs intervene

[25] On February 5, 2016, the grievor sent a letter directly to the senior associate deputy minister of External Affairs, alleging that the employer had violated the settlement agreement and that it had refused any mediation to reach a new agreement. She alleged that her layoff was unjustified and that the employer was responsible for reinstating her position, given the following three requirements, among others: (1) the settlement agreement, which was made an order of the Federal Court; (2) the *Canadian Human Rights Act*; and (3) the spirit and values of s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982* (UK), 1982, c 11, which must guide each decision of the attorney general of Canada in a discrimination matter.

[26] On February 26, 2016, the senior associate deputy minister of External Affairs dismissed the grievor's request. The refusal was challenged by way of judicial review before the Federal Court. That Court struck down the judicial review application (*Rameau v. Attorney General of Canada*, Federal Court file no. T-504-16 (20160502)).

III. Summary of the arguments

A. For the employer

[27] The employer objected to my jurisdiction to hear the grievance for three reasons.

1. The disguised disciplinary measure

[28] The employer argued that since the issue of the disguised disciplinary measure was not raised during the grievance procedure, the principles raised in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), apply. Consequently, I would not have jurisdiction to hear the grievor's grievance. The grievance in no way mentions a termination, demotion, suspension, or financial penalty resulting from a wrongful act by the employer. The grievance mentions only a violation of the *Work Force Adjustment Directive*. The grievor did not attempt to have a disciplinary action removed from her file and did not identify an act that could have provoked a disciplinary action. The mere mention of economic losses in the grievance's wording cannot equate to a financial penalty (*Rogers v. Canada (Revenue Agency)*, 2010 FCA 116).

[29] According to *Burchill*, only a grievance that was presented and dealt with at the final level of the grievance procedure may be referred to adjudication under s. 209(1) of the *Public Service Labour Relations Act*. A grievance cannot be altered once it has been referred to adjudication and cannot raise new issues that were not raised during the grievance procedure. The dispute in *Burchill* is similar to this grievance. The approach in *Burchill* has been followed consistently by the courts and by decision makers dealing with grievances in the federal public sector. In support of its position, the employer referred to the following decisions: *Garcia Marin v. Canada (Treasury Board)*, 2007 FC 1250; *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5; *Robertson v. Deputy Head (Department of National Defence)*, 2014 PSLRB 63; and *Boudreau v. Canada (Attorney General)*, 2011 FC 868.

[30] The employer argued that as in *Lee*, the grievor's application for a referral to adjudication is simply her ploy so that I will take jurisdiction to hear the grievance. Only after the Public Service Labour Relations Board Director, Registry Operations and Policy, refused to pursue the grievor's referral to adjudication based on s. 209(1)(a) of the *Public Service Labour Relations Act* did she first allege a disguised disciplinary action in her May 31, 2013, referral to adjudication, by relying on s. 209(1)(b). Similarly, in her notice to the Canadian Human Rights Commission under s. 210(1) of the *Public Service Labour Relations Act* dated April 4, 2017, she made no mention of a disguised disciplinary action. In fact, instead, she mentioned the interpretation of the settlement agreement, which shows that her true intent was to refer to adjudication the issue of interpreting the agreement and the *Work Force Adjustment Directive*.

2. Interpreting the *Work Force Adjustment Directive*

[31] The employer argued that interpreting the *Work Force Adjustment Directive* and the settlement agreement do not fall within my jurisdiction established by s. 209(1) of the *Public Service Labour Relations Act* (*Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74, upheld in *Amos v. Canada (Attorney General)*, 2011 FCA 38). In this case, the Public Service Labour Relations Board Director, Registry Operations and Policy, advised the grievor, "[translation] Without the bargaining agent's express approval, the grievance cannot be referred to adjudication under s. 209(1)(a) of the *Public Service Labour Relations Act* [the interpretation or application of a provision of a collective agreement or an arbitral award] …", and, "[translation] … therefore, [I] regret that I am unable to consider your request." In fact,

because the grievor was not represented by a bargaining agent, the referral of her grievance did not meet the requirement of s. 209(2) of the *Public Service Labour Relations Act,* namely, her bargaining agent had to agree to represent her in the adjudication procedure.

3. The human rights issue

[32] The employer argued that were I to determine that I have no jurisdiction to hear the allegation of a disguised disciplinary action, then neither would I have jurisdiction to hear the grievance on the sole ground that it raises a human rights issue. The grievor's grievance does not fall under the scope of jurisdiction established by s. 209(1) of the *Public Service Labour Relations Act*. Consequently, I could not be seized with the human rights issue that she raised. In *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, an adjudicator determined that a grievance was not adjudicable for the sole reason that it alleged a violation of the *Canadian Human Rights Act*. Instead, the powers that allow for interpreting and applying the *Canadian Human Rights Act* in grievance adjudication are conferred only once it is determined that a grievance falls within the scope of jurisdiction conferred by the *Public Service Labour Relations Act* under s. 209(1). Therefore, s. 209(1) is a preliminary provision for exercising the powers set out in s. 226(1).

[33] In addition, the grievor did not raise a human rights issue as part of the grievance procedure. For the same reasons raised with respect to a disguised disciplinary measure, the employer argued that I have no jurisdiction to hear the human-rights issue, according to the principles established in *Burchill*.

B. For the grievor

[34] The grievor argued that the employer's objection should be dismissed and that my jurisdiction to hear and determine her grievance must be exercised.

1. The disguised disciplinary measure

[35] According to the grievor, the employer's allegation that she changed the substance of her grievance is erroneous. The employer had clear and specific knowledge of its substance, the grounds of the dispute, and the financial losses, at all levels of the grievance procedure. The substance of the grievance was never hidden,

not before, during, or after it was filed. The employer was aware of its substance because the grievor sent it a notice relevant to that issue. The grievance is essentially based on allegations that she was a victim of racial discrimination in the context of her work. The settlement agreement at the heart of this dispute is based on those allegations.

[36] According to s. 209(1)(b) of the *Public Service Labour Relations Act*, which the grievor relied on when she referred her grievance to adjudication, the grievance must involve "… a disciplinary action resulting in termination, demotion, suspension or financial penalty …". She argued that it is important to consider what constitutes a disguised disciplinary action and the factual context of her grievance. According to paragraph 16 of *Rogers*, a disguised disciplinary action does not require an employer action being described as disciplinary in the grievance wording. The financial impact of a decision can be a form of discipline, even if the decision is labelled administrative or not disciplinary. It is enough that the employer's act caused an economic loss that affected the grievor. However, it is important to note that the loss should be foreseeable and not incidental to the harm alleged in the grievance. The grievor's losses were directly tied to the fact that the employer's interpretation of the settlement agreement disregarded the possibility of promoting her to a position classified at the PE-04 group and level.

[37] The employer's interpretation of the settlement agreement and the fact that it could exert control in the workplace based on that interpretation is an example of a disguised disciplinary action. Moreover, the grievor argued that its violation of the agreement and the fact that it subtly forced her to retire could be akin to a disguised termination. In that context, her layoff flowed from its interpretation of the agreement.

[38] The grievor argued that the documentary file and the joint statement of facts clearly established the substance of the grievance. According to her, the parties' relevant correspondence shows that the discrimination allegations are intimately linked to the grievance and cannot be separated from it without ignoring the basis of this dispute. Several times, she objected to the employer's attitude with respect to the settlement agreement. Before the grievance was filed, the employer was aware of three facts, which were that the parties disagreed with respect to the interpretation of the agreement, that the agreement came about after a complaint to the Canadian Human Rights Commission, and that the basis of the complaint was a racial discrimination

allegation. Despite its awareness of the facts, the employer refused to resolve the issue. Even worse, just two months after announcing to the grievor that it refused to participate in the mediation, it informed her that her position was subjected to the workforce adjustment.

[39] In her February 22, 2013, grievance, and in her oral submissions at the March 22, 2013, hearing that was part of the grievance procedure, the grievor pointed out that basically, her grievance was about the fact that the employer had imposed disguised disciplinary measures on her, which were a termination, a demotion, or reprisals against her. Clearly, the employer understood that the grievance focused mainly on the settlement agreement issue and that the correct interpretation of the agreement should have been made well before the *Work Force Adjustment Directive* was implemented. Thus, for the grievor, the need to interpret that directive became null and void because the settlement agreement granted her a promotion to a position classified at the PE-04 group and level, out of reach of the layoff aimed at the position classified at the PE-03 group and level.

[40] Despite all the actions that the grievor made, the employer disregarded its legal obligations and refused to deal with the difference in the interpretation of the settlement agreement. It benefitted from the situation by trying to demote her to a lower-status position.

[41] The decisions that the employer cited differ from the grievor's file in the sense that they refer to matters in which the contents of the grievances changed radically after they were referred to adjudication, although the grievors had clearly not raised the arguments with their employers. The grievor's file meets the required and requested criteria for referring her grievance to adjudication, as stipulated in *Shneidman v. Canada (Attorney General)*, 2007 FCA 192 at paras. 26 and 27, meaning that the nature of the grievance is sufficiently detailed. The Federal Court of Appeal stated that it is up to a grievor to clearly state the grounds of a grievance. There is no doubt that the grievor raised the grounds during the grievance procedure and that the employer cannot reasonably allege a lack of understanding of the grievance's nature.

[42] Although the applicable section of the *Public Service Labour Relations Act* cited in the grievance referral form changed as of the May 31, 2013, referral to adjudication,

my jurisdiction would not be based on the form and the referral of the grievance to adjudication but instead on its substance and the circumstances of its referral.

2. An interpretation of the *Work Force Adjustment Directive*

[43] The grievor argued that she does not seek an interpretation of the *Work Force Adjustment Directive*. The grievance seeks an interpretation of the settlement agreement. Consequently, the *Work Force Adjustment Directive* should not have been applied to her position. When seeking an interpretation of this agreement, the grievor is not bound by the constraints imposed by s. 209(1)(a) of the *Public Service Labour Relations Act*.

[44] The grievance, which focuses on and includes the grievor's layoff, is a way for her to highlight another form of prejudice in addition to the discriminatory treatment that she continues to face. The employer's discriminatory treatment has had several consequences on her professional life; among others, financial losses and the barriers that are continuously and in many ways placed in her career progression path. It was entirely foreseeable that her position would be affected by the *Work Force Adjustment Directive* and that the employer did everything in its power to compel her to take forced retirement. In this case, the employer was wrong; it continually and skillfully avoided dialogue and displayed consistent disregard toward her. In that context, the disregard specifically attacks her skills and gives the employer the power to permanently keep her in a subordinate position, thus contravening the settlement agreement.

[45] The employer did not cite any grounds to justify its claim that I do not have jurisdiction to interpret the settlement agreement.

3. The human rights issue

[46] The grievor argued that it is well established that assessing the substance of a grievance can reveal that it is based simultaneously on allegations of discrimination and disguised disciplinary action. My responsibility is to assess each file, case by case, in view of the facts of the case and the relevant case law. In that context, and given the facts and background of the grievance, and because it arose from a pattern of discriminatory treatment with resulting economic losses for the grievor, it may be dealt with at adjudication pursuant to ss. 209(1) and 226(1)(g) of the *Public Service*

Labour Relations Act. She argued that her grievance meets the requirements of s. 209(1)(b) of the *Public Service Labour Relations Act*.

[47] It is well established in the case law that I would have jurisdiction to hear a grievance based on a human rights issue (*Chamberlain v. Canada (Attorney General)*, 2012 FC 1027; *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68; *Lovell v. Canada Revenue Agency*, 2010 PSLRB 91; *Canada (House of Commons) v. Vaid*, 2005 SCC 30; and *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42).

[48] The grievor argued that in the alternative, the Federal Court has already recognized that a grievance based solely on a discrimination allegation can be dealt with at adjudication (*Chamberlain v. Canada (Attorney General)*, 2012 FC 1027). The Federal Court cited with approval the Supreme Court of Canada's ruling in *Parry Sound*, which recognized an adjudicator's jurisdiction to hear a grievance based solely on a discrimination issue in the context of the Ontario *Labour Relations Act, 1995* (S.O. 1995, c. 1, Sched. A). According to the Court, the arbitrator's jurisdiction in *Parry Sound* arose from a section of that Act very similar to s. 226(1)(g) of the *Public Service Labour Relations Act*. The grievor cited *Gibson*, *Lovell*, and s. 208(2) of the *Public Service Labour Relations Act* in support of her position.

[49] When interpreting s. 209(1)(b) of the *Public Service Labour Relations Act*, the nature of a disguised disciplinary action could rely on a discrimination allegation. Human-rights case law recognizes the subtle and circumstantial part of discrimination that is normally publicly hidden or denied by the employer. In that respect, the grievor referred me to *Stringer v. Canada (Attorney General)*, 2013 FC 735 at para. 45, and *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT). Thus, a discrimination allegation that is integral to the grievance cannot be set aside without an in-depth review of the grievance's context and of the circumstances that gave rise to it, which requires addressing its substance. The nature of the grievance's central issue is situated in the context of a racial discrimination allegation that is intimately tied to the workplace and that the employer has never acknowledged.

4. Remedy

[50] The grievor seeks reinstatement to her public service position, namely, a position classified at the PE-04 group and level, without having to interpret the *Work*

Force Adjustment Directive. She argued that the employer's decision caused her economic losses. She asks to be made whole for all losses associated with the employer's decision to lay her off.

C. The employer's reply

1. The disguised disciplinary measure

[51] The employer argued that the grievor's claims that it was not necessary for her to raise an action described as disciplinary in her grievance wording and that merely mentioning an economic loss equates to a disguised-discipline allegation have no basis in law. In *Canada (Attorney General) v. Frazee*, 2007 FC 1176, the Federal Court ruled that not every employer action that adversely affects an employee amounts to discipline. According to *Frazee*, the employer's intention is one of the primary factors when determining whether an employee was disciplined. In addition, the employer emphasized that the concept of a disguised disciplinary action implies that an employer engaged in a camouflage, lure, ruse, wilful deficiency, or culpable act within the meaning of the decisions in *Financial Transactions and Reports Analysis Centre of Canada v. Boutziouvis*, 2011 FC 1300, and *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7.

[52] The case law shows that an allegation of a disguised disciplinary action is very specific. In her grievance's wording and during the grievance procedure, the grievor never alleged that the employer had a disciplinary or disguised discipline intention by laying her off after the workforce adjustment or that it was a camouflage. Nor did she ever identify an act on her part for which the employer would have later taken disguised disciplinary action. Instead, throughout her submissions, she alleged that the interpretation of the settlement agreement is at the heart of the dispute, which in no way involves an allegation of a disguised disciplinary action.

[53] According to the employer, the grievor did not explain how the decisions it cited differ from the matter in dispute. It argued that there are very similar circumstances between the decisions and this case because they all involve allegations of disguised disciplinary actions that were not raised during the grievance procedure.

2. The human rights issue

[54] In *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027, cited by the grievor, an adjudicator had to determine whether Ms. Chamberlain's allegations of a human rights violation were adjudicable. The Federal Court's decision did not deal with that issue, contrary to the grievor's argument. The decision stipulates that the powers allowing the adjudicator to interpret and apply the *Canadian Human Rights Act* were conferred on the adjudicator only if he determined that the grievance fell with the area of his jurisdiction, in accordance with s. 209(1) of the *Public Service Labour Relations Act*. The adjudicator's subsequent decision (*Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115), which found a lack of jurisdiction, was also upheld on judicial review before the Federal Court. It determined that the adjudicator's decision even withstood the correctness standard (*Chamberlain v. Canada (Attorney General)*, 2015 FC 50). The Federal Court ruled that s. 209 did not apply to individual grievances presented by grievors not covered by a collective agreement and that contain independent allegations of a *Canadian Human Rights Act* violation. The Federal Court also ruled that s. 209 is the only provision of the *Public Service Labour Relations Act* that attributes jurisdiction to an adjudicator. Section 226 does not create another category of grievances that can be referred to adjudication. According to the Federal Court, the adjudicator did not err when he concluded that he did not have jurisdiction over the grievor's human rights allegations because he did not have jurisdiction over her grievance in the first place.

[55] The employer argued that in *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, the adjudicator found that *Lovell* and *Gibson* do not support the argument that a discrimination allegation that is independent of a collective agreement is adjudicable under s. 209(1) of the *Public Service Labour Relations Act.* In *Chamberlain v. Canada (Attorney General)*, 2015 FC 50, the Federal Court also concurred with the adjudicator's reasons for setting aside the case law that the grievor had cited. The employer argued that it is now well established that I have no jurisdiction to hear an independent human-rights allegation by the grievor, who is not covered by a collective agreement.

[56] The employer argued that *Parry Sound* is part of a legislative context different from this case. Contrary to the grievor's claims, the Ontario *Labour Relations Act, 1995*

and the *Public Service Labour Relations Act* are not similar. The Ontario legislation does not contain a section that similarly limits an arbitrator's area of jurisdiction as does s. 209(1) of the *Public Service Labour Relations Act*. Then, *Parry Sound* determined that the rights and obligations provided by the Ontario *Human Rights Code* (RSO 1990, c. H.19) are incorporated into each collective agreement over which an arbitrator has jurisdiction under the Ontario *Labour Relations Act, 1995*. Yet, in this case, the grievor is not unionized and cannot rely on the ground of jurisdiction to interpret a collective agreement provided by s. 209(1)(a) of the *Public Service Labour Relations Act*. Moreover, in *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, the adjudicator dismissed comparisons with the Ontario legislation and separated the *Public Service Labour Relations Act* from the legislative context in *Parry Sound* and *Vaid*. The adjudicator noted that each case must be decided on its particular facts and in light of its statutory scheme. I would derive my jurisdiction solely from the *Public Service Labour Relations Act* and would have no inherent jurisdiction. With respect to individual grievances, the *Public Service Labour Relations Act* would limit my jurisdiction to matters covered by s. 209(1) of the *Public Service Labour Relations Act* (see *Wray v. Treasury Board (Department of Transport)*, 2012 PSLRB 64).

IV. Analysis

[57] The employer argued that I have no jurisdiction to hear this grievance, for three reasons. Its first argument relies on *Burchill* and on the fact that the grievance referred to adjudication did not raise any allegations of a disguised disciplinary action. It also argued that such an allegation was raised only after the grievance was referred to adjudication a second time, after the letter from the Public Service Labour Relations Board Director, Registry Operations and Policy. According to the employer, the grievance that the grievor tried to argue before me now is not the same one that the parties discussed during the grievance procedure. I can only agree with the employer on those points.

[58] The first issues I must deal with are whether the grievor's grievance alleges a disguised disciplinary action, and if it does not, whether the parties discussed a disguised disciplinary action as part of the grievance procedure. In other words, did the grievor try to raise an allegation for the first time at adjudication that the parties did not already discuss?

[59] Although the parties agree that their dispute before me arose from their divergent interpretations of the settlement agreement, the grievance that the grievor presented to the employer does not clearly challenge the interpretation or the application of the agreement to her. As mentioned earlier in this decision, instead, the grievor's grievance reads as follows:

> [Translation]
>
> …
>
> *Please accept this letter as an official grievance challenging CIDA's January [30], 2013, decision to name Ms. Mache-Rameau as surplus to her position, mentioned in the heading above. This grievance is filed under section 15 of the* National Joint Council By-Laws *("the* By-Laws*") and the* Work Force Adjustment Directive *("the* Directive*"). Please confirm that you are the representative authorized to deal with this grievance at the first level or if this grievance must be filed with someone else.*
>
> *Because of CIDA's noted January [30], 2013, decision, it is interpreting and applying the* Directive *erroneously and in a way that adversely affects Ms. Mache-Rameau.*
>
> *Ms. Mache-Rameau argues that CIDA's January [30], 2013, decision has affected her rights as a public service employee and that it has caused,* inter alia*, economic losses. Ms. Mache-Rameau requests that she receive full compensation for all the losses associated with CIDA's January [30], 2013, decision and that that decision be annulled.*
>
> …

[60] It does not fall to me to decide an allegation of a failure to execute an agreement in settlement of a dispute that was before another body, especially when that other body and its review proceedings refused to do it.

[61] However, the grievance specifically challenged the interpretation of the *Work Force Adjustment Directive* and its application to the grievor. When the grievance was referred to adjudication, s. 209(2) of the *Public Service Labour Relations Act* provided the following, and this requirement has not been amended since:

> ***209 (2)*** *Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

[62] The grievor was not represented before me by her bargaining agent. In fact, she is not represented by any bargaining agent, because the position she held when her

grievance was filed was not part of a bargaining unit. In these circumstances, she has no standing to act before me with respect to the employer's interpretation of the *Work Force Adjustment Directive* and application to her. However, she did not ask me to rule on the interpretation of that directive or its application to her.

[63] Instead, the grievor claimed before me that her grievance challenges a disguised disciplinary measure. However, in its April 8, 2013, decision as part of the applicable grievance procedure, the employer indicated that it considered the grievance a continuation of the first discrimination complaint and the staffing complaint. Thus, the employer's decision refers only to human rights issues, the interpretation of the settlement agreement, and the staffing complaint. Its decision does not mention any allegation of disciplinary action, which suggests that the parties discussed no such allegation as part of the grievance procedure. The decision in question reads as follows:

> [Translation]
>
> …
>
> *I carefully read the facts supporting your grievance and have reached the following conclusion:*
>
> *On April 24, 2012, the Canadian Human Rights Commission (CHRC) informed you and CIDA that it would not launch proceedings before the Federal Court about the implementation of the Memorandum of Understanding.*
>
> *On November 2, 2012, the Federal Court ruled that the applicant (Ms. Mache-Rameau) had not demonstrated the prima facie evidence required of her in this matter.*
>
> *Finally, on February 27, 2013, the Public Service Staffing Tribunal dismissed your complaint about your layoff on the grounds that it was untimely.*
>
> *For these reasons, there is reason to believe that the decisions that CIDA made in your file are fair and reasonable.*
>
> *Consequently, your grievance is dismissed.*
>
> …

[64] I note with interest that the joint statement of facts that the parties filed before me does not mention that they discussed an allegation of a disguised disciplinary action as part of the applicable grievance procedure. I also note that the grievor first tried to refer her grievance to adjudication by making no mention of a disguised disciplinary action. I also note that in support of the subsequent referral of her grievance to adjudication on May 31, 2013, which was then based on an allegation of a

disguised disciplinary action, she argued that she had clearly alleged as part of the applicable grievance procedure that the employer had disregarded the settlement agreement when it applied the *Work Force Adjustment Directive* and that that omission "[translation] is at the heart of the February 22, 2013, grievance".

[65] Therefore, based on these facts, I find that the grievor did not raise any allegation of a disguised disciplinary action as part of the grievance procedure and that she raised that allegation for the first time after having referred her grievance to adjudication. Given the Federal Court of Appeal's decision in *Burchill*, she could not refer that allegation to adjudication under s. 209(1)(b) of the *Public Service Labour Relations Act*. Thus, I cannot determine whether it is well founded.

[66] The employer also argued that I have no jurisdiction to hear this grievance on the sole ground that it would raise a human rights issue. On that point as well, I must find in the employer's favour. *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, and *Chamberlain v. Canada (Attorney General)*, 2015 FC 50, clearly established that the *Public Service Labour Relations Act* does not allow for adjudicating a grievance based solely on a human-rights violation. Given my finding that the grievor could not refer an allegation of disguised disciplinary action to adjudication, the only issue that remains before me deals with an allegation of a human rights violation. Therefore, I can also not determine whether it is well founded.

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

(The Order appears on the next page)

V. Order

[68] The employer's objection to the Board's jurisdiction to hear the grievance is allowed.

[69] The grievance is denied.

February 17, 2021.

FPSLREB Translation

Steven B. Katkin
a panel of the Federal Public Sector Labour Relations and Employment Board