Date: 20210614

File: 566-02-38849

Citation: 2021 FPSLREB 67

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

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

BETWEEN

RAYMOND PAYNE

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Payne v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Dan Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Ron Pink, counsel

For the Employer: Kieran Dyer, counsel

Decided on the basis of written submissions, filed January 22, and February 12 and 19, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The Treasury Board ("the employer") has filed objections to the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision also refers to any of its predecessors) to hear a grievance referred to adjudication by Raymond Payne ("the grievor").

[2] The grievor is an employee of the Department of National Defence who works as a crane/forklift operator at FMF Cape Scott in Nova Scotia, known as the Halifax Dockyards. His position is classified at the MDO-5 group and level in the Ship Repair (East) bargaining unit represented by the Federal Government Dockyard Trades and Labour Council East ("the bargaining agent").

[3] In a grievance filed on January 18, 2018, the grievor alleged that his employer violated clause 20.01 (Safety and Health) of the collective agreement for the Ship Repair (East) bargaining unit that expired on December 31, 2018 ("the collective agreement"). The clause reads as follows:

> ***20.01*** *The Employer shall make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Council and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury. The Council agrees to encourage its members to observe all safety rules and to use all appropriate protective equipment and safeguards.*

[4] The grievor requested the following corrective action: (1) the reimbursement of sick leave and vacation leave credits to their levels of March 30, 2017, "[p]rior to the start of this violence in the workplace complaint", and (2) compensation for longer-term, ongoing mental anguish "… caused due to management's unwillingness to respond to my complaint in a more timely fashion."

[5] Unsuccessful in the internal grievance procedure, the grievor referred the matter to adjudication, with the support of his bargaining agent, on July 16, 2018, under s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[6] Following the Board's appointment of a mediator and then the grievor's withdrawal from mediation, the employer filed an objection to jurisdiction on December 23, 2019. It requested that the Board dismiss the grievance without an oral hearing. The employer advanced its objection on the basis that the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*") and the *Canada Occupational Health and Safety Regulations* (SOR/86-304; "the *OHS Regulations*") provide redress. It submitted as follows:

> …
>
> … *Subsection* 208(2) *of the* Federal Public Sector Labour Relations Act *states that*
>
> > ***208 (2)*** *An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act*.*
>
> *Parliament has created a separate procedure giving a different administrative body exclusive jurisdiction to deal with issues of occupational health and safety, outlined in Part II of the* Canada Labour Code*, and section 20.9 of its subordinate* Canada Occupational Health and Safety Regulations *(SOR/86-304).*
>
> …

[7] The Board scheduled a hearing for February 21, 2020. As a result of a pre-hearing conference call on January 20, 2020, the Board cancelled the hearing to initiate a written submission process with respect to the employer's jurisdictional objection, as outlined in a direction to the parties on January 24, 2020. The Board suspended that process on January 28, 2020, after the parties notified it that they were engaged in settlement discussions.

[8] On November 19, 2020, the Board received notification that the parties had reached an impasse in their discussions. The employer requested that the Board proceed with the written submission process discussed at the pre-hearing conference. The grievor requested that the Board schedule a hearing.

[9] On my appointment in December 2020 as the panel of the Board in this matter, I reviewed the history of the file and the parties' November 29, 2020, positions. I directed the Registry of the Board to notify the parties that a written submission process would proceed as outlined on January 24, 2020. The Registry informed the parties as follows:

…

> *The panel of the Board now seized of this file has reviewed the situation and determined that the Board will proceed with the written submission process on the employer's objection to jurisdiction discussed at the pre-hearing conference of January 20, 2020, and as detailed in the Board's email to the parties dated January 24, 2020.*
>
> *Consequently, the written submission process will proceed as follows:*
>
> *The parties shall have until* ***January 15, 2021*** *to provide to the Board any agreed statement of facts or book of documents that they may wish to jointly submit.*
>
> *The employer shall have until* ***January 22, 2021*** *to complete its submissions.*
>
> *The grievor's representative shall have until* ***February 12, 2021*** *to complete its submissions including any reply to the employer's submissions.*
>
> *The employer shall have until* ***February 19, 2021*** *to reply.*
>
> *The parties are reminded of the further instructions in the Board's email of January 24, 2020, as follows ….*
>
> …
>
> [Emphasis in the original]

[10] In its written argument of January 22, 2021, the employer withdrew its objection to the Board's jurisdiction based on the *Code* and the *OHS Regulations*. It reformulated its objection, arguing as follows (1) that the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5; "*GECA*"), provides an alternative mechanism for redress in this situation, and (2) that the grievor relies on a consultative article of the collective agreement, which does not grant him any substantive rights:

…

> *1. The Federal Public Sector Labour Relations and Employment Board ("Board") is without jurisdiction to hear this grievance. Mr Raymond Payne is seeking a remedy from the Board even though he has already obtained redress for the situation complained of under the* Government Employees Compensation Act*. Further, there is no article in the collective agreement on which Mr Payne can ground his grievance. The grievance cannot be referred to adjudication. Accordingly, the Board should dismiss the grievance without a hearing.*
>
> …

[11] For the following reasons, I have allowed the employer's second objection to the Board's jurisdiction and dismiss the grievance for that reason.

II. History

[12] The employer summarized the history of the case as follows which was not disputed by the bargaining agent:

> …
>
> *3. Mr Payne asked management to investigate his coworkers' behavior under the* Canada Occupational Health and Safety Regulations *in March 2017. Management advised him to file a harassment complaint. Mr Payne declined. Therefore, management initiated a violence in the workplace investigation.*
>
> *4. Mr Payne then filed the present grievance in January 2018. He alleged that management violated Article 20.01 (Safety & Health) of the Ship Repair - East Collective Agreement* [expiry date: December 31, 2018]. *He requested reimbursement of sick leave and vacation leave credits. He also requested "settlement for additional longer term (ongoing mental anguis[h])" due to management not responding to his complaint in a more timely fashion.*
>
> *5. The employer denied the grievance at the first level in February 2018. It found his claim that management was not protecting his health and safety was unfounded, given that he did not agree to participate in the harassment process that management suggested. With regard to his first corrective action, management advised Mr Payne that the Nova Scotia Workers' Compensation Board ("WCB") provides the proper mechanism for workplace injury claims. With regard to his second corrective action, management noted that Mr Payne was unable to describe the corrective action he was seeking, and only indicated that "a professional adjudicator will understand."*
>
> *6. The Commanding Officer ("CO") partially upheld the grievance at the second level in May 2018. The CO committed to investigating his complaint in an expedient and transparent manner. He informed Mr Payne that a third-party was being sought to investigate his complaint under the* Canada Occupational Health and Safety Regulations. *With regard to his first corrective action, the CO reminded Mr Payne that the Novia Scotia WCB is available to review and investigate workplace injuries. With regard to his second corrective action, the CO affirmed the employer's commitment to provide him a healthy work environment with advancement opportunities, which Mr Payne expressed concern about during the grievance hearing. He also encouraged Mr Payne to file a harassment complaint if he felt he was being harassed.*
>
> *7. Mr Payne objected to the appointment of a third-party law firm as Competent Person. He contacted the Labour Program at ESDC*

> *regarding the status of his violence in the workplace investigation. The Labour Program advised management to seek a new Competent Person given Mr Payne's objection. Mr Payne later agreed to appoint someone else as Competent Person.*
>
> *8. Mr Payne's last day at work was November 14, 2019. He has been on leave ever since. The employer granted Mr Payne 130 days of Injury on Duty Leave covering the period of November 18, 2019 to May 25, 2020.*
>
> *9. An Injury Report was submitted to the Nova Scotia WCB in relation to the injury. The injury in that report is the same injury complained of in this grievance. On March 26, 2020, the Nova Scotia WCB approved his claim for medical aid costs and time lost retroactively to November 14, 2019. The Nova Scotia WCB later increased Mr Payne's benefits to the Long-Term Rate. Mr Payne continues to receive WCB benefits.*
>
> *10. Mr Payne received the report from the Competent Person on September 9, 2020.*
>
> …
>
> [*Sic* throughout]

III. Written arguments

[13] The following summaries abbreviate the parties' written submissions while reflecting the original wording of their arguments in considerable part. For certain sections, direct quotations are provided.

A. For the employer

[14] The employer's reformulated grounds for objecting to the Board's jurisdiction are that the *GECA* provides an alternate mechanism for redress in the situation experienced by the grievor and that clause 20.01 of the collective agreement, on which the grievor relied, does not grant him a substantive right that may be adjudicated.

[15] The employer cited s. 208(2) of the *Act*, which reads as follows:

> ***208 (2)*** *An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.

[16] If a grievance may not be presented because of s. 208(2) of the *Act*, the employer argued that it cannot be referred to adjudication. If an employee refers such a grievance to adjudication, the Board may not entertain it; see *Canada (Attorney General) v. Boutilier*, [2000] 3 FC 27 (C.A.) at para. 17.

[17] *Boutilier* holds that the factual situation complained of must be essentially the same in the other redress process It also holds that s. 91(1) (the equivalent of s. 208(2) in precursor legislation) "… does not require that the same redress be available under … some other … Act", or that the redress be as good as, or better, than what is sought in the grievance: at paragraph 4, citing *Byers Transport Ltd. v. Kosanovich*, 1995 CanLII 3515 (FCA)("*Byers Transport*") at para. 378.

[18] Arguing further based on *Boutilier* and on *Chow v. Canada (Attorney General)*, 2009 FCA 206 at para. 6, the employer stated as follows:

> *Even a lesser available remedy will oust the Board's jurisdiction. All that is required is that the other procedure for redress be available to the employee, and that it is capable of producing some real redress which could be of personal benefit to him. Any lack of success before the other administrative process is irrelevant.*

[19] The *GECA* provides a procedure for redress as that term is used in s. 208(2) of the *Act*.

[20] The Board does not have jurisdiction over work-related illnesses and injuries. The applicable provincial workers' compensation board (WCB) determines compensation; see *Miller v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 164 at paras. 82 to 90; and *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35 at para. 58.

[21] In the grievor's case, he has already received compensation for his injury from the Nova Scotia WCB.

[22] The *GECA* provides a "… fault-free, comprehensive and exclusive compensation plan for federal government employees injured in the course of employment." Parliament intended that specialized provincial boards adjudicate claims by federal government employees resulting from injuries at work, in lieu of employees pursuing a cause of action against their employer; see *Prentice v. Canada*, 2005 FCA 395 at paras. 35 and 70 to 72; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at paras. 26, 29, 30, 33 to 35, and 39; and *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25 at paras. 28 and 63.

[23] In addition to s. 208(2) of the *Act*, s. 12 of the *GECA* also ousts the Board's jurisdiction by prohibiting any claim, including a grievance, against the employer for a

workplace accident. The employer further maintained the following: "Neither the GECA nor the FPSLRA requires that the employee actually apply for compensation under the GECA for his grievance to be barred; all that is required is that the GECA be available."

[24] The grievor alleged suffering as a result of workplace violence and the employer's failure to respond in a timely fashion. The subject matter of his grievance falls squarely under the *GECA*. Pursuant to that legislation, the Nova Scotia WCB approved his compensation claim.

[25] An employee cannot "double dip", by seeking redress from the Board and from the WCB for the same incident, or "forum-shop" to obtain a preferred remedy. The fact that the Nova Scotia WCB cannot order the employer to restore the grievor's sick leave credits is of no consequence; see *Boutilier*, at para. 23, and at para. 4, citing *Byers Transport*, at para. 378.

[26] The Supreme Court of Canada has held that employer immunity flowing from workers' compensation schemes is fundamental. If there were no bar to action against employers, the integrity of the system would be compromised. As summarized by the employer, the Supreme Court found that "[i]t would be unfair to allow actions to proceed against employers where there is a chance of the employee obtaining greater compensation, and yet still force employers to contribute to a no-fault insurance scheme"; see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890 at para. 26.

[27] The employer referred to s. 9 of the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50; "*CLPA*"), which reads as follows:

> ***9*** *No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.*

[28] Compensation under the *GECA* is paid out of the Consolidated Revenue Fund. As such, the *CLPA* also bars the grievor from pursuing his grievance against the employer.

[29] In summary, the Board lacks jurisdiction to entertain the grievance, which falls within the scope of the *GECA* by virtue of s. 12 of the *GECA*, s. 9 of the *CLPA*, and s. 208(2) of the *Act*.

[30] Beyond the statutory bars to the Board's jurisdiction, there is no source for the remedy sought by the grievor in the collective agreement. He relied on clause 20.01, but that provision does not grant recourse to employees.

[31] The Board's jurisprudence is clear that this is "… intended to be a consultative provision and not a vehicle for an employee to gain access to the grievance process" (quoting *Spacek v. Canada Revenue Agency*, 2006 PSLRB 104 at para. 40). Clause 20.01 requires the employer to consult with the bargaining agent about health and safety issues. It does not create an obligation to employees. The collective agreement is clear that "the parties undertake to consult", the parties being the employer and the bargaining agent, not the employee. The grievance does not meet the requirement in s. 209(1)(a) that the application of the provision be in respect of the employee.

[32] As noted, *Spacek*, at para. 40, held that a provision that is virtually identical to clause 20.01 is "… intended to be a consultative provision and not a vehicle for an employee to gain access to the grievance process." Clause 20.01 requires consulting with the bargaining agent about health and safety issues; it does not create an obligation to employees; see *Ristivojevic v. Canada Revenue Agency*, 2020 FPSLREB 79 at para. 242; and *Parsons v. Treasury Board (National Defence)*, 2004 PSSRB 160 at para. 38.

[33] The parties who "undertake to consult" under clause 20.01 are the employer and the bargaining agent, not the employee. Therefore, the grievance does not meet the requirement in s. 209(1)(a) of the *Act* that the application of a provision of the collective agreement must be "in respect of the employee".

[34] The employer requested that the Board dismiss the grievance without a hearing, for lack of jurisdiction.

[35] The employer submitted the following, in the alternative:

…

> *… if the Board takes jurisdiction, the employer will proceed to request an order for an Independent Medical Exam. The parties*

> *have agreed that if the Board takes jurisdiction over the grievance they will put the matter in abeyance until the Board issues a decision on the request for an Independent Medical Exam.*
>
> …

B. For the grievor

[36] The grievor responded that there is no available alternative administrative mechanism as contemplated by s. 208(2) of the *Act* and that the language of the grievance does not render it a matter that cannot be adjudicated.

[37] The grievor summarized the basis for his contention that the employer's objection to jurisdiction based on s. 208(2) of the *Act* is unfounded as follows:

> …
>
> *2. Subsection 208(2) will only prevent an employee from pursuing a grievance if the alternative administrative procedure is capable of dealing* ***meaningfully*** *and* ***effectively*** *with* ***the substance of the employee's grievance*** *and is capable of producing some* ***real redress*** *which could be of personal benefit to the same complainant.*
>
> *3. The Union submits there is no alternative mechanism to deal meaningfully and effectively with the substance of the Grievance and produce real redress that is of personal benefit to the Grievor. Workers' Compensation benefits do not meet that threshold as they (1) do not deal with the subject-matter [sic] of the Grievance, and (2) do not offer real redress. A determination as to whether there has been a compensable workplace injury is not the same as a determination whether the Employer has violated the express and implied terms of the Collective Agreement.*
>
> …
>
> [Emphasis in original]

[38] The right to file a grievance is qualified by s. 208(2) of the *Act*. It prevents employees from filing grievances related to matters for which there is a legislated alternative administrative procedure for redress.

[39] The employer argued that the *GECA* is an alternative administrative procedure that meets the limitation set out in s. 208(2) of the *Act*.

[40] The *GECA* provides employees access to provincial workers' compensation regimes. That arrangement represents a historic compromise by which federal

government employees relinquished their cause of action against employers for workplace injuries in favour of a no-fault insurance regime administered by the provinces. In Nova Scotia, the regime is set out in the *Workers' Compensation Act*, SNS 1994-95, c 10 ("*WCA*"). The compromise is described in s. 28(1) of the *WCA* as follows:

> ***28 (1)*** *The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against*
>
> *(a) the worker's employer or that employer's servants or agents; and*
>
> *(b) any other employer subject to this Part, or any of that employer's servants or agents,*
>
> *as a result of any personal injury by accident*
>
> *(c) in respect of which compensation is payable pursuant to this Part; or*
>
> *(d) arising out of and in the course of the worker's employment in an industry to which this Part applies.*

[41] A similar description of the compromise can be found in s. 12 of the *GECA* as follows:

> ***12*** *Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.*

[42] Under the *WCA*, injured employees are entitled to claim temporary or permanent replacement benefits when their incomes are interrupted because of a workplace injury. Injured employees may also claim compensation for expenses incurred treating or recovering from the injury and expenses that facilitate a return to work or a search for alternative employment. Claims are made to, and adjudicated by, the WCB. An application for benefits is determined in the first instance by a WCB caseworker, with a right of appeal to a WCB hearing officer and then to the Workers' Compensation Appeals Tribunal.

[43] The *GECA* and the *WCA* together create a scheme that provides injured employees of the Treasury Board in Nova Scotia workers' compensation benefits in lieu of a cause of action against their employer. The *WCA* expressly restricts the

compensation that may be awarded to compensation for loss of earnings and other costs associated with workplace injuries.

[44] As outlined by the grievor, the workers' compensation regime does not address other entitlements conferred expressly, or by implication, by a collective agreement, whether substantive or procedural. WCB agents are not empowered to address collective agreement provisions dealing with subjects such as overtime, premiums, scheduling, leave, job postings, discrimination, or discipline. They also may not enforce statutory rights such as minimum employment standards under Part III of the *Code* or prohibitions under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[45] Article 19 of the collective agreement sets out the applicable grievance procedure. The grievor submitted that clause 19.02 covers an exceedingly broad spectrum of issues, including any issue that deals with "… a provision of a statute or regulation, or of a direction or other instrument made or issued by the Employer that deals with terms and conditions of employment …", any issue that relates to "a provision of the collective agreement", and any issues that arise "… as a result of any occurrence or matter affecting his or her terms and conditions of employment." Clause 19.02 reads as follows:

> ***19.02*** *Subject to and as provided in section 208 of the* Public Service Labour Relations Act*, an employee may present an individual grievance to the Employer if he or she feels aggrieved:*
>
> *a. by the interpretation or application, in respect of the employee, of:*
>
> *i. a provision of a statute or regulation, or of a direction or other instrument made or issued by the Employer, that deals with terms and conditions of employment;*
>
> *or*
>
> *ii. a provision of the collective agreement or an arbitral award;*
>
> *or*
>
> *b. as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[46] Clause 19.10 of the collective agreement reads as follows:

> ***19.10*** *Subject to and as provided for in the* Public Service Labour Relations Act*, a grievor who feels treated unjustly or aggrieved by an action or lack of action by the Employer in matters other than*

> *those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 19.08, except that:*
>
> *a. where there is another administrative procedure provided by or under any act of Parliament* **to deal with the grievor's specific complaint** *such procedure must be followed, and*
>
> *b. where the grievance relates to the interpretation or application of this collective agreement or an Arbitral Award, an employee is not entitled to present the grievance unless he has the approval of and is represented by the Council.*
>
> [Emphasis added]

[47] Clause 19.10 mirrors s. 208(2) of the *Act* but expressly provides that the alternative administrative procedure must be able "… to deal with the grievor's specific complaint …". The grievor maintained that if the administrative procedure is unable to deal with the subject matter of the grievance, neither the exception stated by s. 208(2) nor the exception stated under the collective agreement can be met.

[48] The grievor contended that the case law sets out clear criteria when the Board does not have jurisdiction to hear a grievance given the operation of s. 208(2) of the *Act*. The Board lacks jurisdiction if an alternative administrative procedure can deal meaningfully and effectively with the substance of the employee's grievance and is capable of providing some real redress that could be of personal benefit to the employee.

[49] In *Byers Transport*, an adjudicator under Part III of the *Code* found that an employee was unjustly dismissed. The Federal Court of Appeal set aside the decision, finding that the matter should have been the subject of an unfair-labour-practice complaint under Part I of the *Code* rather than adjudicated under Part III. The remedies available under Part I and III were almost identical, but Part III contained language similar to s. 208(2) of the *Act*, while Part I did not.

[50] The grievor noted that paragraph 39 of the majority reasons in *Byers Transport* is frequently cited as providing the appropriate framework for determining whether s. 208(2) of the *Act* excludes a matter from the grievance procedure and adjudication, 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 the adjudicator under paragraph 242(3.1)(b). That paragraph does not require that* the same redress *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* another *procedure for redress. The point is even clearer in the French version which simply requires that there be* "un autre recours". ***I do not believe that for there to be a "procedure for redress … elsewhere" there must be a procedure which will yield exactly the same remedies, although no doubt that procedure must be capable of producing some real redress which could be of personal benefit to the same complainant.***
>
> [Emphasis in the original]

[51] The essential finding in paragraph 39 is that the redress available under the alternative administrative procedure does not have to be exactly the same as under the grievance procedure, but the factual situation must be "essentially the same".

[52] In *Johal v. Canada Revenue Agency*, 2009 FCA 276, the Federal Court of Appeal found that s. 208(2) of the *Act* did not apply if the alternative administrative procedure could not provide redress. The grievor cited paragraphs 35 to 37, as follows:

> *[35] Accordingly, the appellants are not barred by the text of subsection 208(2) from presenting their grievance under subsection 208(1). As Justice Strayer stated in* Byers *(at para. 39), for a remedy provided under another statute to exclude a person from presenting a grievance under subsection 208(1) "the procedure must be capable of producing some real redress which could be* ***of personal benefit to the complainant****" (emphasis added).*
>
> *[36] This interpretation of the text of subsection 208(2) is supported by its purpose, which is to ensure that employees resort to the recourse specifically provided to them for dealing with their employment grievance, and not to the general and residual recourse under subsection 208(1):* Boutilier *at paras. 3-4. This purpose would not be served by interpreting subsection 208(2) as providing that the existence of a specific recourse, to which an employee has no access, precludes that employee from presenting a grievance under subsection 208(1).*
>
> *[37] The scheme of the* PSLRA *favours the internal, expeditious, and informal administrative resolution of workplace grievances. It would be inconsistent with this statutory objective to interpret subsection 208(2) as providing that an application for judicial review is the only recourse open to the appellants for dealing with their allegation that Ms Mao should not have been appointed to the*

> *MG-05 position by virtue of a preferred status to which she was not entitled.*

[53] As indicated in *Johal*, the grievor maintained that the purpose of the *Act* is to facilitate the expeditious adjudication of workplace disputes. To that end, s. 208(2) should not be applied in a way that would create an insurmountable barrier to an employee realizing his or her substantive employment rights.

[54] *Chickoski v. Canada (Attorney General)*, 2017 FC 772, considered the decision of an associate deputy minister that s. 208(2) of the *Act* and s. 20.9 of the *OHS Regulations* operate to exclude a matter containing an allegation of workplace violence from the grievance procedure. In its reasons, the Federal Court did not see fit to determine whether the *OHS Regulations* provided real redress of personal benefit to the employee, stating as follows at paragraph 89: "While I have serious doubts that the remedies available under the OHS Regs are capable of producing some real redress which could be of personal benefit to Mr. Chickoski, it is not necessary that I make such determination."

[55] The grievor maintained that *Chickoski* makes it clear that not every issue raised by an employee that involves, or might involve, workplace violence is excluded from the Board's jurisdiction by s. 208(2) of the *Act*. The grievor also submitted that the Federal Court expressed serious doubts as to whether the violence-in-the-workplace provisions in the *OHS Regulations* offer "real redress" to individual grievors.

[56] *Chickoski* summarized the relevant case law, as follows:

> …
>
> *[81] … The factors identified in* Byers Transport, Boutilier, and Johal *combine to yield the following principles that assist in determining whether an alternate administrative procedure falls within subsection 208(2) of the* PSLRA*:*
>
> *- the procedure for redress elsewhere does not have to yield exactly the same remedies;*
>
> *- the remedies do not have to be as good or better than the ones being ousted;*
>
> *- differences in the administrative remedy, even if it is a lesser remedy, do not change it into a non-remedy;*
>
> *- it has to:*
>
> *(1) deal meaningfully and effectively with*

> *(2) the substance of the employee's grievance;*
>
> *- the administrative procedure must:*
>
> *(1) be capable of producing some real redress which*
>
> *(2) could be of personal benefit to the same complainant.*
>
> *…*

[57] In *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 70, a decision of the Board examining whether s. 208(2) of the *Act* prevented it from hearing grievances related to complaints of exposure to second-hand smoke, the employer argued that several statutes provided for alternative administrative procedures, including the *GECA*, the *Non-smokers' Health Act* (R.S.C., 1985, c. 15 (4th Supp.)), and the *Code*.

[58] (Note by panel: *Galarneau* was the second of three related Board decisions. In *Galarneau et al. v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 1, the employer unsuccessfully objected to the Board's jurisdiction on timeliness grounds. In 2009 PSLRB 70, the Board ruled against the employer's two objections that other administrative redress procedures were available to resolve the dispute and that the collective agreement clause did not create substantive individual rights that could be grieved. In *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 12, the employer prevailed on the merits finding that the employer took reasonable measures to protect the occupational safety and health of employees.)

[59] *Galarneau* (2009 PSLRB 70) summarized the law on the applicability of s. 208(2) at paragraph 42 as follows:

> *[42] To determine whether another administrative procedure is provided, the adjudicator must identify the purpose of the dispute and determine whether it may reasonably and effectively be dealt with under the administrative procedure.* ***The adjudicator must consider the essence of the grievors' allegations to determine the purpose of the grievance. The limitation on filing a grievance will apply if the administrative procedure can deal with the main issues raised by the grievance and not with secondary or accessory issues. If an administrative procedure exists, the recourse and remedies available under the grievance process and under the administrative procedure do not have to be identical, but the administrative procedure must provide the grievor with a real and beneficial remedy.***
>
> [Emphasis added]

[60] According to the grievor, the adjudicator in *Galarneau* (2009 PSLRB 70) found that the complaint mechanism in the *Code* did not provide "real and beneficial redress" to the grievors because a fundamental aspect of their grievance was the damage suffered as a result of the employer's violations of their collective agreement entitlements. The grievor cited paragraphs 58 to 60 as follows:

> *[58] However, I must also determine whether that procedure offers real and beneficial redress to the grievors. In my opinion, the procedure could ultimately lead to an order forcing the employer to eliminate second-hand smoke in the grievors' workplaces, but it could not lead to awarding damages. In their grievances, the grievors seek two remedies: an order to eliminate the second-hand smoke and the awarding of damages.*
>
> *[59]* ***I do not believe that the grievors' claims for damages can be considered accessory or secondary elements of the grievances. The grievors seek two remedies: one having a prospective perspective, which is the elimination of the second-hand smoke for the future, and the other involving compensation for harm allegedly already suffered. I do not see on what basis less importance or value can be attributed to the claim for damages or on what basis it could be deemed a secondary element.***
>
> *[60]* ***To conclude in this case that the complaint mechanism constitutes an administrative procedure for redress within the meaning of subsection 208(2) of the*** Act ***would amount to depriving the grievors of the right to claim damages if it is established that the employer violated the collective agreement. I believe that such an interpretation of subsection 208(2) of the*** Act ***would unduly limit the right of the grievors to have their allegations heard. For that reason, I conclude that the complaint mechanism provided in the*** Code***, although useful for determining whether the employer violated its duty to ensure the protection of its employees' health and safety under section 124 of the*** Code***, does not provide a redress measure as complete and beneficial as the grievances because it does not cover a key component of the redress sought by the grievors. In that regard, l believe that the complaint mechanism does not offer redress that is sufficiently comprehensive to be deemed real and beneficial for the grievors.*** *Therefore, I conclude that, in this case, the grievors could rightly file their individual grievances under subsection 208(1) of the* Act.
>
> [Emphasis added]

[61] As consistently found in the case law, the Board lacks jurisdiction to hear a grievance if an alternative administrative procedure exists to address its subject matter. The available remedy under that administrative procedure need not be exactly

the same. Only if the procedure is capable of dealing meaningfully and effectively with the substance of the employee's grievance and of producing some real redress that could be of personal benefit to the grievor will s. 208(2) of the *Act* apply. If the redress does not cover a key component of the corrective action sought by the grievor, it is not "real redress".

[62] The grievor addressed s. 9 of the *CLPA* as follows:

> …
>
> *37. … The purpose of the CLPA was considered by the New Brunswick Court of Appeal in* Smith v. Royal Canadian Mounted Police*, 2007 NBCA 58. There, the court upheld a motions judge decision not to dismiss a civil claim brought by two RCMP officers alleging various torts related to an alleged campaign of workplace harassment. At paragraph 12, the court's reasons include:*
>
> > *The appellants argue that the Smith's action is barred pursuant to s. 9 of the* Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (*CLPA*) and s. 12 of the* Government Employee Compensation Act*, R.S.C. 1985, c. G-5 (GECA). Section 9 of the* CLPA *provides that no proceedings lie against the Crown in respect of a claim if compensation has been paid or is payable out of the Consolidated Revenue Fund in respect of the damage or loss tied to the claim.* ***The obvious object of s. 9 is to prevent "double recovery" for the same claim****:* Sarvanis v. Canada*, [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27, 2002 SCC 28 (S.C.C.). Invoking that provision, the Attorney General goes on to argue that compensation is available in relation to the Smiths' claim pursuant to s. 12 of the* GECA *and, therefore, the Smiths' action is statute-barred. That provision may be paraphrased as follows: "where an accident happens to an employee in the course of his employment under such circumstances as to entitle the employee to compensation under this Act (*GECA*) the employee has no claim against her Majesty."* ***If one reads the* GECA *in its entirety, it becomes apparent that that Act was intended to ensure that workers' compensation benefits available under provincial schemes to provincial workers are available to federal workers who suffer work-related injuries. In return, the federal scheme requires that the provincial governments be reimbursed for the cost of administering claims made by federal workers****:* W. (D.) v. New Brunswick (Workplace Health, Safety & Compensation Commission) *(2005), 288 N.B.R. (2d) 26, [2005] N.B.J. No. 282, 2005 NBCA 70 (N.B. C.A.);* Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal) *(2004), 224 N.S.R. (2d) 276, [2004] N.S.J. No. 242, 2004 NSCA 83 (N.S. C.A.);* Rees v. Royal Canadian Mounted Police *(2005), 246 Nfld. & P.E.I.R. 79, [2005] N.J. No. 103, 2005 NLCA 15 (N.L. C.A.).*

> *38. The court found the GECA and CLPA could not statute-bar a civil claim because no workplace injury had been suffered (para 13); the source of the employees' claim against the RCMP was in tort, therefore there was no risk of double-recovery.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[63] The workers' compensation regime set out in the *GECA* and the *WCA* is not an alternative administrative procedure within the meaning of s. 208(2) of the *Act* in the circumstances of the grievor's case. The regime neither deals meaningfully and effectively with the substance of his grievance nor provides real redress of personal benefit to him with respect to anything outside his workplace injury. Moreover, there is no risk of double recovery as contemplated by the *CLPA*.

[64] The grievor seeks the two following remedies: (1) the reimbursement of sick leave and vacation leave credits to the credit levels of March 30, 2017, before the violence-in-the-workplace complaint was made, and (2) compensation for additional longer-term and ongoing mental anguish caused by the employer's failure to respond to that complaint in a timelier fashion.

[65] The workers' compensation regime is incapable of dealing meaningfully and effectively with entitlements conferred exclusively by the collective agreement. Whether the grievor was denied sick leave, vacation leave, and his entitlement to a workplace free from harassment is a question that falls entirely outside the WCB's jurisdiction. There is no mechanism in the workers' compensation regime to enforce a collective agreement. The WCB cannot restore the grievor's sick leave and vacation leave credits or find that the employer failed in its duty to provide a harassment-free workplace. Therefore, it does not provide "real redress". The regime was established only to compensate for losses directly resulting from a workplace injury, regardless of other contractual or statutory entitlements.

[66] If the Board upholds the employer's objection, its ruling would create "an escape hatch" permitting the employer to avoid any and all of its collective agreement obligations when an employee suffers a workplace injury compensable by the WCB. In the grievor's case, the employer would be "off the hook" for his lost sick leave and vacation leave entitlements. Those benefits accrued before the compensable workplace

injury occurred or materialized. To deny the grievor access to those entitlements would be to reach into the past and dissolve accrued entitlements. More importantly, a Board ruling to accept the employer's objection would also mean that the employer could not be held to account for any future failure to provide a safe, harassment-free workplace so long as a grievor has suffered a compensable injury. In the grievor's words:

> …
>
> *… It cannot be the intent of subsection 208(2) and the GECA to disentitle the Grievor from accessing Collective Agreement entitlements simply because he suffered a compensable injury, and, conversely, allow him to bring the Grievance if the injury is not so serious* [as] *to warrant WCB benefits.*
>
> …

[67] The grievor summarized his argument as follows:

> …
>
> *45. Section 9 of the CLPA is of no application because there is no risk that the Grievor will double-recover. For the most part, the source of the remedy requested in the Grievance is not the same as the source of the entitlement to Workers' Compensation benefits. Workers' Compensation benefits compensate the Grievor only for his loss of earnings and other costs directly resulting from the workplace injury. Sick leave and vacation leave are Collective Agreement entitlements that accrued and vested before the workplace injury. They are wholly unrelated to the injury and were not at all contingent on the injury occurring. Similarly, a finding that the Employer failed to provide a harassment-free workplace is outside the bounds of what could hope to be achieved through WCB. The Workers' Compensation regime is fault-free. Concerning the claim for general damages ("ongoing mental anguis* [*sic*]*"), if the matter proceeds to adjudication it will be up to the adjudicator to decide* [the] *appropriate remedy, including whether any potential remedy has been mitigated or is unavailable.*
>
> *46. … the Workers' Compensation regime does not constitute an alternative administrative procedure such that subsection 208(2) applies. It does not deal meaningfully and effectively with the substance of the Grievance: Collective Agreement entitlements that accrued before the compensable workplace injury. The Workers' Compensation regime does not provide real redress for the entitlements claimed in the Grievance.*
>
> …

[68] Turning to the employer's objection that clause 20.01 of the collective agreement does not grant the grievor a substantive right that may be adjudicated, the grievor maintained that under the case law, grievances should be construed liberally and with the goal of resolving workplace disputes expeditiously, with as little technicality as possible. According to the grievor, the relevant principles were helpfully canvassed by the Board in *Hurley v. Treasury Board (Department of National Defence)*, 2018 FPSLREB 35, ("*Hurley*") as follows:

> …
>
> *193* Blouin Drywall *stands for the principle that* ***cases should not be won or lost on a technicality of form but on their merits to ensure that disputes are fully, fairly, and promptly resolved. Grievances should be construed liberally so that the real complaint is dealt with.***
>
> *194 The* Blouin Drywall *principle was cited with approval and adopted by the Supreme Court of Canada in* Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.) ("*Parry Sound*"). **The Court stated that procedural requirements, such as one to provide details of a grievance in writing, should not be stringently enforced unless there is some prejudice to the employer. Unless some exists, it is more important to resolve the factual dispute that pave rise to the grievance.***
>
> *195* ***A fundamental principle of labour law is resolving workplace disputes expeditiously and with as little technicality as possible. In addition to cost considerations, that is the entire rationale for statutorily required arbitration.*** *Without it, employers and unions might as well run to court for every dispute.*
>
> *196 The case of* Dominion Citrus Ltd. v. Teamsters, Local 419*, [2001] O.L.A.A. No. 419 (QL), again confirms the principle that adjudicators ought to deal with the real dispute unless there is evidence of actual prejudice stemming from genuine surprise, which on its own is not enough.*
>
> *197 The decision in* Electrohome Ltd. v. International Brotherhood of Electrical Workers, Local 2345 *(1984), 16 L.A.C. (3rd) 78, does a good job of capturing the issue. There are two basic guidelines: (1) grievances should be liberally construed so that the real dispute can be resolved, but that must be balanced with (2) ensuring that there is no prejudice. A party may be prejudiced if it loses the ability to deal with the issue during the grievance process.*
>
> *198 In* McMullen v. Canada Revenue Agency*, 2013 PSLRB 64 at para. 102, the former Public Service Labour Relations Board adopted the same principles. It articulated that* Burchill *is consistent with labour relations principles. Grievances and the grievance process exist to allow parties to express their dispute and expose each other to their arguments, to eliminate surprise. The*

> Burchill *principle prevents a party from being deprived of the right to deal with an issue during the grievance process.*
>
> …
>
> [Emphasis added]

[69] The grievor noted that grievances are often written by individuals without legal training or experience. The principles articulated in *Hurley* are even more important when applied to the *Act* because it allows individual employees to file their own grievances. The language that employees use to describe their grievances should be construed liberally so as to ascertain the true nature of the dispute. That language should be cause to dismiss a grievance only if the defect in the grievance language prejudices a party.

[70] The grievor urged the Board to dismiss the employer's preliminary objections, concluding as follows:

> …
>
> *49. The Grievance should not be dismissed on the basis that Article 20.01 does not provide a right in respect of the Grievor. The Grievance should not be construed so narrowly. The requested remedy invokes Collective Agreement entitlements beyond those provided for in Article 20.01: sick leave and vacation leave and the right to a workplace free from violence. Any reasonable person reading the Grievance's requested remedy would understand there were other relevant articles, express or implied, that might have been violated: Article 12 for sick leave, Article 10 for vacation leave, and the* Code *entitlement to a safe and violence-free workplace. The entitlements to sick leave and vacation leave and a violence-free workplace are derived from the express or implied terms of the Collective Agreement. A claim for sick leave requires a breach of Article 12; a claim for vacation leave requires a breach of Article 10. The Grievance should not be dismissed on this ground because to do so would be an unduly narrow reading of the Grievance inconsistent with the arbitral consensus.*
>
> …
>
> *50. … The Workers' Compensation regime set out in the GECA and* Workers' Compensation Act *is not capable of dealing meaningfully and effectively with the substance of the Grievance. The alleged Collective Agreement breaches do not engage the Workers' Compensation regime. The entitlements claimed accrued and vested before the compensable injury and cannot be realized through the WCB. The WCB has no jurisdiction to adjudicate Collective Agreement violations. Moreover, the WCB cannot produce real redress because the redress available does not cover a key component of the redress sought by the Grievor: lost sick*

> *leave and vacation leave and a failure to provide a harassment-free workplace. The only compensation available through the WCB is compensation for the lost earnings and other losses resulting from the workplace injury. There is no risk of double-recovery as contemplated by the CLPA. The language of the grievance does not render it inarbitrable. The subject-matter [sic] of the Grievance is sufficiently clear that the Employer has suffered no prejudice by surprise.*
>
> …

C. The employer's rebuttal

[71] The employer reiterated four reasons that the Board does not have jurisdiction:

(1) s. 208(2) of the *Act* does not allow the grievance to be presented or adjudicated;
(2) s. 12 of the *GECA* bars any claim against the Crown when an employee has received compensation;
(3) s. 9 of the *CLPA* precludes any proceeding against the Crown if compensation is otherwise payable to an employee; and
(4) the grievor relied on clause 20.01 of the collective agreement, which does not accord him access to the grievance procedure.

[72] If the Board finds that any of those prohibitions apply, it must dismiss the grievance for lack of jurisdiction.

[73] The grievor contended in error that clause 19.10 permits the reference of a broader range of grievances to the Board than does s. 208(2) of the *Act*. The clause begins with the words, "Subject to and … provided for in the [*Act*] …", which clearly establish the intent that it be interpreted in the same way as s. 208(2). Even if the scope of clause 19.10 could be interpreted more broadly, s. 208(2) serves as a backstop preventing the referral of the grievance to adjudication. The parties can neither contract out of the *Act* nor give the Board jurisdiction where it has none; see *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17 at para. 340.

[74] In relying on *Byers Transport*, the grievor conceded both that the Board lacks jurisdiction if an alternate administration procedure deals with the same factual situation and that the procedure need not provide the same remedy. As he stated, all that is required is that the procedure "… must be capable of producing some real redress which could be of personal benefit to the complainant." The compensation provided by the Nova Scotia WCB was of personal benefit to the grievor.

[75] *Galarneau* (2009 PSLRB 70), argued by the grievor, is inconsistent with the Federal Court of Appeal's decisions in both *Johal* and *Byers Transport*. *Galarneau* was decided before *Johal* and did not refer to *Byers Transport*. The employer could not seek judicial review of *Galarneau* because it was a preliminary ruling and because the employer ultimately succeeded on the merits.

[76] The Board is bound by the Federal Court of Appeal's interpretation of s. 208(2) of the *Act*. The *GECA* deals with the same fact situation and is capable of providing real redress of personal benefit. The Supreme Court of Canada's ruling in *Sarvanis v. Canada*, 2002 SCC 28, confirms that the question to be posed is whether the factual basis for the grievor's WCB compensation is the same as the factual basis of his grievance — if so, the grievance cannot continue; see also *Begg v. Canada (Minister of Agriculture)*, 2005 FCA 362.

[77] It is not in dispute that the grievor received WCB benefits as a result of the factual situation (his workplace injury of stress) that led to his grievance. That fact becomes even clearer given his submission that his requested corrective action in his original grievance includes "general damages" for "… mental anguish suffered as a result of the incident."

[78] Even if s. 208(2) of the *Act* and the *GECA* do not bar the grievance, s. 9 of the *CLPA* does. *Sarvanis* supports giving s. 9 broad interpretation so that the Crown is not liable under any ancillary heads of damages for an event that has already been compensated. All damages arising out of the incident experienced by the grievor are subsumed under s. 9 of the *CLPA*. The fact that the grievor seeks the reimbursement of sick leave and vacation leave under additional heads of damages does not give the Board jurisdiction. He already received compensation from the Nova Scotia WCB.

[79] The grievor's argument that his vacation and sick leave entitlements are unrelated to his injury is without merit. Throughout the grievance procedure, he requested reimbursement for time lost as a result of stress; that is to say, as a result of his injury.

[80] The grievor relied on *The Attorney General of Canada v. Smith,* 2007 NBCA 58, but that decision supports the employer's position. *Smith*, at paras. 12 and 13, found that the *CLPA* did not bar a civil claim in that case because the plaintiffs, unlike the

grievor, did not suffer a workplace injury. Because the grievor did suffer a workplace injury, the *CLPA* bars his grievance.

[81] The grievor did not dispute that clause 20.01 of the collective agreement is only a consultative provision that does not provide him access to the grievance procedure. Instead, he claimed that his grievance concerns leave provisions of the collective agreement but did not explain on what basis those provisions were breached. He raised the leave provisions for the first time in his written submission, two-and-one-half years after the reference to adjudication.

[82] The essence of the grievance remains that the employer allegedly failed to provide a safe workplace, which, according to the grievor, caused his injury. He contends that the Nova Scotia WCB cannot find that the employer failed to provide a safe workplace, effectively acknowledging that the heart of the grievance is workplace safety.

[83] The employer noted that the grievor urged a broad interpretation of his grievance because the *Act* allows individual grievors to frame and file their own grievances. The grievor's position ignores the fact that his bargaining agent authorized the presentation of the grievance. In s. 14 of the form referring the grievance to the Board for adjudication, the bargaining agent relied only on clause 20.01 of the collective agreement.

[84] The employer concluded by contending that the grievor's arguments are "… an obvious attempt to change the essence of the grievance to bring it within the Board's jurisdiction." It requests that the Board dismiss the grievance for lack of jurisdiction.

IV. Analysis and reasons

[85] The employer offered multiple arguments to support its contention that the Board lacks jurisdiction to receive and hear the grievance. Were the Board to accept any one of the arguments, it must decline jurisdiction and dismiss the grievance.

[86] I have chosen to consider as the first-order question the employer's objection to jurisdiction, as stated initially, that clause 20.01 of the collective agreement, on which the grievor relies, does not grant him a substantive right that may be adjudicated. Ensuring that a reference of an individual grievance to adjudication is properly founded in a provision or provisions of a collective agreement is a primary

determination. Once the basis in the collective agreement for a grievance is confirmed, attention can turn to other questions of jurisdiction, in this case involving the interaction of statutory authorities.

[87] In rebuttal, the employer restated the objection and separated it into two parts: (1) that the grievor relies on clause 20.01 of the collective agreement, which does not accord him access to the grievance procedure, and (2) that s. 208(2) of the *Act* does not allow the grievance to be presented or adjudicated.

[88] I prefer the employer's initial formulation both for its simplicity and for its focus on the issue at the centre of the Board's case law.

[89] The analysis of the foundation of the grievance in the collective agreement begins with its express wording. The record indicates that the grievor filed his grievance at the first level of the grievance procedure on January 18, 2018, phrasing it as follows: "I feel my employer has violated artical [*sic*] 20.01 Safety and Health."

[90] The grievor specified corrective action as follows:

> *1- reimbursement of sickleave and vacation leave credits back to prior levels of* ***March 30th****, 17. Prior to the start of this violence in the workplace complaint.*
>
> *2- Settlement for additional longer term (ongoing mental anguis), that has been caused due to managements unwillingness to respond to my complaint in a more timely fashion.*
>
> [*Sic* throughout]

[91] In the Form 20 "Notice of Reference to Adjudication of an Individual Grievance", the grievor identified "Art. 20.01 Safety & Health" as the provision of the collective agreement that was the subject of his grievance. The First Vice-President of the bargaining agent signed the Form 20, indicating the bargaining agent's support for the reference to adjudication.

[92] The wording of the original grievance and the specification in Form 20 of the "[p]rovisions of the collective agreement … that is the subject of the individual grievance" frames the Board's inquiry. In this case, both the original grievance and Form 20 clearly identified clause 20.01 of the collective agreement as the provision of which the interpretation or application was challenged. Whether the reference to sick leave and vacation leave credits or to compensation for mental anguish in the

statement of requested corrective action expanded the subject matter of the grievance is an important second-order question that must also be addressed.

[93] Clause 20.01 of the collective agreement reads as follows:

> ***20.01*** *The Employer shall make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Council and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury. The Council agrees to encourage its members to observe all safety rules and to use all appropriate protective equipment and safeguards.*

[94] The employer referred to three Board decisions that have examined the nature of collective agreement provisions such as clause 20.01: *Spacek*, *Ristivojevic*, and *Parsons*.

[95] In *Spacek*, at para. 13, the Board reviewed this provision, which is almost identical to the first two sentences of clause 20.02:

> …
>
> **24.01** The Employer shall continue to make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Institute and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury or occupational disease.

[96] In its analysis, *Spacek* in turn cited four earlier decisions: *Breault v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-24186 (19940428), [1994] C.P.S.S.R.B. No. 61 (QL); *Kolski v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-02-25899, 25900, and 26020 (19941206), [1994] C.P.S.S.R.B. No. 149 (QL); *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 148-02-11 (19730709), [1973] C.P.S.S.R.B. No. 9 (QL); and *Albus v. Treasury Board (Solicitor General)*, PSSRB File Nos. 166-02-16887 and 16888 (19871125), [1987] C.P.S.S.R.B. No. 343 (QL).

[97] *Spacek* drew the following conclusions from the earlier case law and an assessment of clause 24.01:

…

> *[36] The case law is clear, and, apparently, consistent since about 1973, according to the authorities filed. Clause 24.01 of the collective agreement is a consultative clause giving rights to the bargaining agent. Ms. Spacek has provided no contrary authority under the former* Act *that bears on this issue.…*
>
> …
>
> *[40] In my view, the language of clause 24.01 of the collective agreement is very clear. It is intended to be a consultative provision and not a vehicle for an employee to gain access to the grievance process. It is not necessary for me to pronounce further on the scope of clause 24.01. I am dismissing this grievance because it does not fall within an adjudicator's jurisdiction under paragraph 92(1)(*a*) of the former* Act*.*
>
> …

[98] The collective agreement provision examined in *Ristivojevic* is identical to clause 20.01, save for the name of the bargaining agent. In its decision issued in 2020, 14 years after *Spacek*, the Board reconfirmed the ruling in *Spacek*, stating as follows:

> …
>
> *[242] I agree with the employer's submissions and the reasoning in* Spacek *that article 22 is consultative and that it requires the employer to consult with the bargaining agent about health and safety issues. As set out in* Spacek*, the employer's obligation is to the bargaining agent and not to an individual grievor.*
>
> …

[99] The collective agreement provision reviewed in *Parsons* was also virtually identical to the first two sentences of clause 20.01. The Board summarized its ruling as follows:

> …
>
> *[38] A tenet in interpreting collective agreement language is that the agreement has to be read as a whole. In* Canadian Labour Arbitration (Third Edition)*, authors Brown and Beatty write, at paragraph 4:2150:*
>
> > The context in which words are located is critical to their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole.
>
> *In looking at clause 22.01 as a whole, I have no difficulty in determining that it is an obligation owed to the bargaining agent,*

> *not the employee. Therefore, an alleged violation of the clause would be one about which the bargaining agent would complain.*
>
> …

[100] It is uncontroversial that I am not bound by previous decisions of the Board. However, it is equally uncontroversial that there must be a compelling reason or reasons to depart from the case law, particularly when the case law has been consistent in great part.

[101] What did the grievor counterargue to establish that he enjoys a substantive right under clause 20.01 that may be adjudicated?

[102] I find it notable that the grievor did not attempt to distinguish the Board decisions cited by the employer or, in fact, comment on them in any way. Instead, he depended largely on one Board decision from 2018 — *Hurley* — and urged that I rely on the case law referenced in argument by the grievor in that decision to justify accepting jurisdiction.

[103] It must be said initially that *Hurley* does not address whether a collective agreement provision such as clause 20.01 concerning health and safety provides a legitimate basis for an individual grievance. *Hurley* is about something quite different.

[104] In *Hurley*, the Board considered a grievance filed by a retiring university teacher, who argued that he was entitled under a memorandum of agreement and under past practice to certain benefits (double increments, course relief, and sabbaticals). In its analysis, the Board reviewed the evidence to determine whether two of the issues — course relief and sabbaticals — were raised at a meeting with management that led to the filing of the grievance or were discussed during the subsequent grievance procedure. The Board described its task as follows at paragraph 40: "The following are at issue. Were sabbaticals and course relief raised at the April 2015 meeting? Were they raised on the face of the grievance? Were they raised and discussed during the grievance process?"

[105] Under the long-standing principle established in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), a grievor may not alter the basis of his or her grievance at adjudication.

[106] In *Hurley*, the Board found that the question of the grievor's entitlement to course relief and sabbaticals was not raised at the meeting or at any time during the grievance procedure. It ruled as follows:

> …
>
> *42 For the reasons that follow, I have concluded that I do not have jurisdiction to consider the course relief and sabbaticals issues. I am not persuaded that they were raised at the April 2015 meeting, were contemplated in the grievance, or were raised and discussed at all levels of the grievance process. Thus, I am precluded from hearing them, in accordance with the* Burchill *principle.*
>
> …

[107] To the extent that the employer did not present its objection to jurisdiction in the case before me as a *Burchill* matter, the primary analysis in *Hurley* offers little to guide my decision. More importantly, as mentioned, *Hurley* does not address whether the type of collective agreement provision at issue in this case allows an individual employee, as opposed to a bargaining agent, access to adjudication if a violation of the collective agreement is alleged.

[108] The grievor, for his part, also did not invoke *Burchill* as such, but in effect, he mounted a counterargument as if the *Burchill* principle were at issue by maintaining that the way in which he framed his grievance throughout raised adjudicable collective agreement entitlements. Specifically, he identified the reimbursement of sick leave and vacation leave credits and compensation for the violation of his right to a violence-free workplace as corrective action. By doing so, the grievor maintained that he expressly or by inference alleged violations of other collective agreement provisions, clearly making his case eligible for individual-grievance adjudication.

[109] The thrust of the decisions cited in argument in *Hurley*, at paras. 193 to 198, is that grievances should be construed liberally and with the goal of resolving workplace disputes expeditiously, with as little technicality as possible, "… so that the real complaint is dealt with." Procedural requirements should not be stringently enforced "… unless there is some prejudice to the employer"; see *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42; *Dominion Citrus Ltd. v. Teamsters, Local 419*, [2001] O.L.A.A. No. 419 (QL); and *Electrohome Ltd. v. I.B.E.W., Local 2345* (1984), 16 L.A.C. (3d) 78.

[110] The grievor also cited the Board's decision in *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, for its finding that the grievor's complaint clearly set out its disciplinary context, thus refuting the employer's *Burchill* objection that the grievance did not on its face identify discipline as the subject matter.

[111] The grievor's argument places before me a key issue. By mentioning the reimbursement of sick leave and vacation leave credits as well as compensation for mental anguish in his request for corrective action, did the grievor import alleged violations of other collective agreement provisions into the grievance?

[112] If I were to answer that question in the affirmative, it would follow that the grievor had a right under the *Act* to seek adjudication of the alleged violations. That finding is imperative for his case because he does not at any point appear to contest the preponderate depiction in the case law of a clause such as 20.01 of the collective agreement as a consultative provision that does not itself provide access to the grievance procedure or to adjudication to individual employees.

[113] I note here that, while the grievor's written submission cited comments in *Galarneau* about alternative administrative procedures, he did not point out that the adjudicator at paras. 66 and 67 accepted that the first sentence of provisions such as clause 20.01 creates a substantive duty to individual employees. However, I believe that finding, out of step with other Board decisions, should be discounted given that it was not subject to judicial review because the employer ultimately succeeded on the merits in 2010 PSLRB 12. I note as well that *Ristivojevic*, a much more recent Board decision (2020) on the issue, reinforced *Spacek* and other earlier decisions in finding that provisions such as clause 20.01 create an obligation to the bargaining agent, not to individual employees. *Ristivojevic* was not subject to a judicial review application.

[114] The employer's rebuttal of the grievor's position contended that the grievor's arguments were "… an obvious attempt to change the essence of the grievance to bring it within the Board's jurisdiction."

[115] As always, it is important to touch base with the defining provisions of the governing statute and of the collective agreement.

[116] In the context of this case, the *Act* defines the entitlement of an individual employee to present a grievance as follows:

> ***208 (1)*** *Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> > ***(a)*** *by the interpretation or application, in respect of the employee, of*
> >
> > …
> >
> > ***(ii)*** *a provision of a collective agreement or an arbitral award ….*

[117] The right to refer a grievance to adjudication is set out in s. 209 of the *Act* as follows:

> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> > ***(a)*** *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award ….*

[118] With respect to the operation of ss. 208(1)(a)(ii) and 209(1)(a) of the *Act*, a grievor must have obtained the support of, and be represented by, the bargaining agent pursuant to s. 209(2) of the *Act*.

[119] The grievance procedure under the grievor's collective agreement necessarily reflects the requirements set out in the *Act*.

[120] Clause 19.02 of the collective agreement reads in part as follows:

> ***19.02*** *Subject to and as provided in section 208 of the* Public Service Labour Relations Act, *an employee may present an individual grievance to the Employer if he or she feels aggrieved:*
>
> *a. by the interpretation or application, in respect of the employee, of:*
>
> …
>
> *ii. a provision of the collective agreement or an arbitral award ….*

[121] Clause 19.27 of the collective agreement reads in part as follows:

> ***19.27*** *Where a grievance has been presented up to and including the final level in the grievance procedure with respect to:*

> *a. the interpretation or application of a provision of this collective agreement or related Arbitral Award,*
>
> …
>
> *and the grievance has not been dealt with to the grievor's satisfaction, it may be referred to adjudication in accordance with the provisions of the* Public Service Labour Relations Act *and* Regulations.

[122] The employer contended that s. 209(1)(a) of the *Act* specifically stipulates that for purposes of adjudication, the issue of collective agreement interpretation must be "in respect of the employee". The same stipulation is imported into the collective agreement by virtue of the reference in clause 19.27, which reads, "in accordance with the provisions of the Public Service Labour Relations Act and Regulations." Because the undertakings outlined in clause 20.01 of the collective agreement involve the employer and the bargaining agent, a grievance alleging a violation of clause 20.01 is not "in respect of [an] employee". As a result, it cannot be referred to the Board for adjudication.

[123] The same argument applies with respect to the filing of a grievance in the first place. Clause 19.02 of the collective agreement also includes the qualifying words "in respect of the employee", as well as the preface, "Subject to and as provided in section 208 of the Public Service Labour Relations Act …", which is where the words "in respect of the employee" originate.

[124] Based on the Board's case law already reviewed, I would have to concur with the employer's argument. Were I to rely solely on the identification of clause 20.01 of the collective agreement in the grievance filing and in the Form 20 referral to adjudication, the analysis would end, because clause 20.01 does not provide the basis for a grievance "in respect of the employee" in this case. The employer's objection to jurisdiction would be sustained.

[125] I note in passing that I give little weight to the argument offered briefly that the grievor's inexperience in drafting grievances should be considered. He secured the support and representation of his bargaining agent, as required, for both the presentation of his grievance to the employer and its reference to the Board. The bargaining agent's authorized representative signed both the grievance form and the Form 20 reference to adjudication in which the **only** collective agreement provision cited as the subject matter was clause 20.01. If the bargaining agent intended to

support a grievance and a reference to adjudication that alleged violations of other collective agreement provisions, it was in a position to advise that the grievor include those provisions as the stated subject matter. The presumption must be that a bargaining agent has the experience and expertise to understand the requirements of the *Act* and to ensure that both a grievance form and a Form 20 reference to adjudication appropriately identify specific collective agreement violations that may be referred to the Board under the *Act*.

[126] That said, I must return to assess whether mentioning the reimbursement of sick leave and vacation leave credits as well as compensation for mental anguish in the request for corrective action is sufficient to import alleged violations of other collective agreement provisions into the grievance.

[127] In point 4 of its summary of the history of the case, the employer conceded as follows that the grievor mentioned sick leave, vacation leave, and "ongoing mental anguis[h]" due to his alleged experience of workplace violence in his grievance by way of his statement of requested corrective action:

> *4. Mr Payne then filed the present grievance in January 2018. He alleged that management violated Article 20.01 (Safety & Health) of the Ship Repair - East Collective Agreement* [expiry date: December 31, 2018]*. He requested reimbursement of sick leave and vacation leave credits. He also requested "settlement for additional longer term (ongoing mental anguis[h])" due to management not responding to his complaint in a more timely fashion.*

[128] In points 5 and 6 of the summary, the employer also referred to the corrective action sought by the grievor:

> *5. … With regard to his first corrective action, management advised Mr Payne that the Nova Scotia Workers' Compensation Board ("WCB") provides the proper mechanism for workplace injury claims. With regard to his second corrective action, management noted that Mr Payne was unable to describe the corrective action he was seeking, and only indicated that "a professional adjudicator will understand."*
>
> *6. … With regard to his first corrective action, the CO reminded Mr Payne that the Novia Scotia WCB is available to review and investigate workplace injuries. With regard to his second corrective action, the CO affirmed the employer's commitment to provide him a healthy work environment with advancement opportunities, which Mr Payne expressed concern about during the grievance*

> *hearing. He also encouraged Mr Payne to file a harassment complaint if he felt he was being harassed.*

[129] There is no question that the employer has known the grievor's interest in securing the reimbursement of sick leave and vacation leave credits and a settlement for mental anguish since the initial filing of the grievance. I do not believe that the grievor's continued reference to those issues in his arguments at adjudication could come as a surprise or place the employer in a position of prejudice.

[130] Does it then follow that in the absence of obvious prejudice to the employer, I should give the grievance the expansive reading that the grievor urged, based on the broader case law that he cited, and accept that adjudicable violations of collective agreement provisions other than clause 20.01 are properly before me?

[131] Borrowing a key term from the seminal decision *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, what is the "essential character" of the subject matter of the grievance? There seems to be no doubt that the grievor's experience of workplace violence, subsequently recognized as an injury by the Nova Scotia workers' compensation authority, is the essential subject matter of his grievance. It seems probable that he identified clause 20.01 of the collective agreement in his grievance and in Form 20 on his belief that the employer, in the circumstances of his case, failed to take "… all reasonable provisions for [his] occupational safety and health …", as required by the clause.

[132] The grievor's argument requires that I take the further step of finding that sick leave and vacation leave are also essential subject matters of the grievance. (I address compensation for mental anguish separately.)

[133] Clearly, the grievor did not specify on the grievance form or in Form 20 what aspects of the sick leave and vacation leave articles of the collective agreement were breached or how that agreement entitled him as a result to receive a reimbursement of credits. So that collective agreement breaches related to sick leave and vacation leave can be found to comprise essential parts of the grievance's subject matter, it is not unreasonable to expect some identification of the nature of the disputed interpretation or application beyond the simple mention of leave reimbursement as part of corrective action. There is none. The grievor's written submission tries to explain away the lack of specification in the grievance form and in Form 20 by arguing that "[a]ny reasonable

person reading the grievance's requested remedy would understand there were other relevant articles, express [*sic*] or implied, that might have been violated: Article 12 for sick leave. Article 10 for vacation leave …".

[134] Certainly, a reasonable person would be able to identify articles 10 and 12 as, respectively, the sources for entitlements to vacation leave and sick leave in the grievor's collective agreement. However, in my opinion, the same reasonable person would not know with confidence anything more about the nature of the alleged violations of the two articles. He or she could speculate, but speculation is not a sound basis for understanding or characterizing the parameters of a dispute.

[135] As to corrective action in the form of compensation for mental anguish, once more, there is no indication in the grievance or in the Form 20 of the basis in the collective agreement for the grievor's claim. I note the following reference in point 5 of the employer's history of the case with respect to compensation for mental anguish: "With regard to his second corrective action, management noted that Mr Payne was unable to describe the corrective action he was seeking, and only indicated that 'a professional adjudicator will understand.'"

[136] It is not an adjudicator's role, any more than it is for a reasonable person, to speculate how a grievor might argue the basis in the collective agreement that founds a compensation claim. It is for a grievor to make that basis apparent. If I accepted jurisdiction in this case, the absence of any clarification in the grievance or in Form 20 would leave me unable to know with any confidence the nature of the alleged separate breach of the collective agreement that justifies an award of damages. As to our reasonable person, I believe that he or she would readily understand a compensation claim as an aspect of remedy to be considered only if a breach of some other entitlement or right were first established.

[137] In the grievor's submission, he cites the *Code* as the source of his "… entitlement to a safe and violence-free workplace", something that a reasonable person would also know. The grievor's submission on that point squarely undermines his position. The grievance and adjudication processes under the *Act* cannot entertain an allegation that a provision of the *Code* has been violated. The Board has jurisdiction over certain disputes involving the *Code*, but this is not the case in this instance.

[138] In his submission, the grievor also asked that I accept jurisdiction on the basis that the workers' compensation regime "… does not cover a key component of the redress sought by the grievor: lost sick leave and vacation leave and a failure to provide a harassment-free workplace." He also asserted that the "… entitlements claimed accrued and vested before the compensable injury …".

[139] On the latter point, the employer rejected the argument, maintaining that any time lost was the result of his injury. I have found that the essential subject matter of the grievance was his experience of workplace violence, subsequently recognized as an injury by the Nova Scotia workers' compensation authority. If, as maintained by the grievor, the disputed entitlements to sick leave and vacation leave accrued and vested before the injury, it is not then clear how breaches of those entitlements were related to the essential subject matter of the grievance. Once more, I think that a reasonable person would more plausibly view the sick leave and vacation leave elements as aspects of remedy rather than separate subjects for adjudication.

[140] The grievor's argument that workers' compensation does not address the corrective action sought in his grievance broaches the issue of whether the *GECA* provides an alternative mechanism for redress in this situation. I do not believe that I need to venture into an examination of the *GECA* or rule on the alleged limits of workers' compensation remedies to determine whether clause 20.01 of the collective agreement grants the grievor a substantive right that may be adjudicated.

[141] In the end, I find it problematic in the circumstances of this case to endorse the proposition that by simply mentioning sick leave, vacation leave, and compensation for mental anguish in his brief statement of corrective action, the grievor necessarily placed other collective agreement entitlements before the Board that may be adjudicated. In the abstract, I accept that details in a request for remedy could make it clear that a dispute involves the interpretation or application of other collective agreement provisions in addition to the provision or provisions explicitly identified as the subject matter of matters on a grievance form or a Form 20 reference to adjudication. I believe that such a determination depends on how specific the statement of corrective action is, as well as on context.

[142] If **any** mention in a grievance of an element of remedy that can be reasonably associated with a collective agreement provision is sufficient to secure access to

adjudication, I am concerned about risking an approach to s. 209 of the *Act* and its filing requirements that would be too liberal. There is no dispute that the Board should always be primarily concerned with ensuring "… that the real complaint is dealt with …", as urged by the case law from other jurisdictions cited by the grievor. Nevertheless, the Board's jurisdiction is explicitly established by statute. The identification of the "real complaint" must be sufficiently clear to allow the Board to rule on its jurisdiction confidently and without speculation.

[143] In the circumstances of this case, the grievor explicitly identified one and only one collective agreement provision — clause 20.01 — as the subject matter of his grievance both on the grievance form and in the Form 20. The bargaining agent signified its support for the grievance while clearly knowing that clause 20.01 was the only specified subject matter. I cannot go further to add other collective agreement provisions. The "real complaint" arose from the grievor's experience of workplace violence and the resulting workplace injury. He identified clause 20.01 as the subject matter on his apparent belief that it addressed that "real complaint".

[144] As discussed, there is no statutory basis for accepting that the reference in the statement of corrective action to compensation for mental anguish — described by the grievor as a matter involving the *Code* — established a second foundation in the collective agreement for an adjudicable individual grievance. As to the references to sick leave and vacation leave in the statement of corrective action, I find that the absence of something more, even if relatively minimal, to identify the nature of the alleged collective agreement violations and their relation to the grievor's experience of workplace violence prevents me from accepting that sick leave and vacation leave provisions were also valid subject matters of the grievance itself.

[145] Therefore, I accept the employer's objection to jurisdiction that clause 20.01 of the collective agreement, on which the grievor relies, does not grant him a substantive right that may be adjudicated.

[146] For that reason, I dismiss the grievance as a matter outside the Board's jurisdiction under s. 209(1)(a) of the *Act*.

[147] My ruling means that I need not address the other jurisdictional arguments advanced by the employer or the counterarguments offered by the grievor. Comments

that I might make would constitute obiter and, in my view, would not be appropriate in this case.

[148] Nonetheless, I have elected to report in this decision the important debate in the parties' submissions with respect to the *GECA* and the *CLPA*, on which I have not ruled. I have done so out of respect for the care and effort that the parties took to place their views before me. In my view, the arguments offered by the parties may well merit consideration in an appropriate forum and in the appropriate circumstances.

[149] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[150] The grievance is dismissed.

June 14, 2021.

Dan Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board