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Files: 566-34-46731 and 46732

Citation: 2024 FPSLREB 164

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

BRADLEY DUPUIS

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Dupuis v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Sandra Gaballa, representative

For the Employer: Nicholas Gualtieri, director, Labour Relations Division

Decided on the basis of written submissions, filed April 4, 2023, and May 1, 15, and 21, 2024.

REASONS FOR DECISION

I. Introduction

[1] This decision addresses only the preliminary jurisdictional objections that arose from two grievances that Bradley Dupuis ("the grievor") filed against the Canada Revenue Agency ("the employer" or CRA). The grievances arose from the implementation of the *Policy on COVID-19 Vaccination for the Canada Revenue Agency* ("the Policy").

[2] The Policy came into effect on November 8, 2021, and was applicable to all employees of the employer. It stipulated that the employees were required to be fully vaccinated unless they were granted an exemption based on a prohibited ground of discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). Employees were required to disclose their vaccination status by providing an attestation of it by November 26, 2021. On December 23, 2021, the grievor grieved the requirement to provide it based on it being personal medical information ("the attestation grievance").

[3] The Policy further stipulated that employees who were unwilling to disclose their vaccination status by the attestation deadline would be placed on administrative leave without pay until they complied with the Policy or were approved for an exemption or accommodation. The grievor requested an accommodation for religious reasons. After it was denied, he filed a second grievance on January 26, 2022, grieving that decision ("the accommodation grievance").

[4] The grievances were referred to adjudication on February 16, 2023. The attestation and the accommodation grievances were referred to adjudication under s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") and resulted in the creation of the Federal Public Sector Labour Relations and Employment Board ("the Board") files numbered 566-34-46731 and 566-34-46732. Both alleged a violation of clause 6.01, which is the managerial responsibilities clause in the collective agreement between the Canada Revenue Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Services Group, which expired on October 31, 2021 ("the collective agreement"). Clause 6.01 was renewed without modification in the collective agreement that expires on October 31, 2025.

[5] The accommodation grievance was also referred to adjudication under s. 209(1)(b) and resulted in the creation of Board file no.566-34-46733.

[6] On April 4, 2023, the employer raised a number of jurisdictional objections. It argued that the Board does not have jurisdiction to hear the attestation grievance due to the following:

- clause 6.01 was intended only to highlight management's residual rights and did not meet the requirement of s. 209(1)(a) of the *Act* that the application of a collective agreement provision must be "in respect of the employee";
- clause 6.01 was not raised at any point during the grievance presentation process; and
- it is untimely.

[7] The employer also argued that the accommodation grievance referred under s. 209(1)(b) should be dismissed as no disciplinary action was taken.

[8] The grievor responded by withdrawing his referral under s. 209(1)(b), and as such, Board file no. 566-34-46733 was closed.

[9] On May 15, 2024, the employer withdrew its objection to the attestation grievance's timeliness. It also informed the Board that it objects to the reference to clause 6.01 in the accommodation grievance for the same reasons as stated in its objections to the attestation grievance.

[10] For the reasons provided in this decision, I find that the Board does not have the jurisdiction to hear the attestation grievance; however, the accommodation grievance should proceed to adjudication.

II. Summary of the relevant facts

A. The attestation grievance

[11] The attestation grievance stated this: "I grieve the employers [*sic*] requirement to disclose personal medical information as a [*sic*] part of the vaccine mandate".

[12] The grievance was denied at all the levels of the grievance presentation process. All the replies stated that they were made after considering the grievance presentations, documentation when provided, and the bargaining agent's submissions. The grievor does not dispute that clause 6.01 was not referenced specifically during the grievance presentation process.

[13] In its third-level reply, the employer provided as follows:

> …
>
> *I understand that you consider that the* Policy *infringes, without reasonable justification, on the rights guaranteed to all Canadian citizens under Canadian Human Rights legislation. In particular, the right to the security of a person, which in your view means that no one can be forced to accept medical treatment against his or her will, and the right to equality, which implies that no one can be subjected to discriminatory treatment in the context of a government policy because of his or her personal characteristics based on one of the grounds provided for in the* Canadian Charter of Rights and Freedoms *(*Charter*), or the* Canadian Human Rights Act *(*CHRA*). As the* Policy *is a reasonable measure to ensure the health and safety of employees, it does not violate the Charter or the CHRC* [*sic*]*.*
>
> *Furthermore, the CRA may, pursuant to its authority under the* Canada Revenue Agency Act*, determine the terms and conditions of employment applicable to employees through its policies to the extent that they do not conflict with the provisions of a collective agreement or an Act of Parliament. I find that the* employer *has acted within its authority in developing and implementing the* Policy*.*
>
> …

[14] In its final-level reply, the employer included statements to the same effect as those in the second paragraph just quoted.

[15] In his referral to adjudication, the grievor referenced clause 6.01 as the only ground for his grievance under s. 209(1)(a). He did not dispute that the Policy is not contained in the collective agreement; nor is there anything in it related to providing medical or personal information.

B. The accommodation grievance

[16] The accommodation grievance stated this: "I grieve the employers [*sic*] decision to deny my religious accommodation for the Covid 19 [*sic*] vaccination policy".

[17] The employer denied the grievance at all the levels of the internal grievance process. Similarly to the attestation grievance, no specific mention was made of clause 6.01 during the grievance presentation process.

[18] In its first-level reply, the employer provided as follows:

…

> *In addition, the CRA has an obligation to ensure the health and safety of its employees. In the context of a global pandemic, it is reasonable for the CRA to take all reasonable precautions under the circumstances to protect the health and safety of employees.…*
>
> *This being said, you consider that the* Policy *infringes, without reasonable justification, on the rights guaranteed to all Canadian citizens under the* Canadian Charter of Rights and Freedoms *(*Charter*). In particular, you referenced human rights, which in your view means that no one can be forced to accept medical treatment against their will, and that no one can be subjected to discriminatory treatment in the context of a government policy because of their personally held religious beliefs. As the Policy is a reasonable measure to ensure the health and safety of employees, it does not violate the* Charter *or the* Canadian Human Rights Act *(*CHRA*).*
>
> *The CRA may, pursuant to its authority under the* Canada Revenue Agency Act*, determine the terms and conditions of employment applicable to employees through its policies to the extent that they do not conflict with the provisions of a collective agreement or an Act of Parliament. I find that the* employer *has acted within its authority in developing and implementing the* Policy*.*

…

[19] The third-level reply echoed the same message. The final-level reply was silent on these points.

[20] Unlike the attestation grievance, the referral-to-adjudication form stated that the accommodation grievance also concerned the interpretation or application of the no-discrimination (Human Rights) clause in the collective agreement, in addition to clause 6.01.

III. Summary of the submissions

A. For the employer

[21] The employer objected to the grievor's reliance on clause 6.01 for two reasons. Each is explained in turn in the following paragraphs.

1. The claim that clause 6.01 does not meet the requirement of s. 209(1)(a) of the *Act*

[22] The employer submitted that clause 6.01, a management rights clause, was intended only to highlight management's residual rights. It argued that a referral based

on clause 6.01 does not meet the requirement of s. 209(1)(a) of the *Act* that a grievance be related to "… the interpretation or application in respect of the employee of a provision of a collective agreement …".

[23] The employer argued that clause 6.01 could not form a standalone basis for a referral to adjudication. General clauses in collective agreements that are meant to be introductions, such as definitions and objective clauses, do not grant substantive rights. According to it, the same reasoning should apply to the managerial responsibilities clause, which grants only the employer substantive rights.

[24] It argued that the Board has jurisdiction over an individual grievance filed under s. 209(1)(a) only if it involves the interpretation or application of a collective agreement. That could include grievances that challenge a policy or practice not incorporated into the collective agreement, when a specific breach of a collective agreement clause granting substantive rights is alleged. However, with respect to the managerial responsibilities clause, it did not grant a substantive right to challenge the employer's actions that were neither incorporated into nor in violation of a specific collective agreement clause.

[25] Further, unlike some other collective agreements, the collective agreement in this case did not include an obligation to exercise management rights **reasonably**. As such, the Board has no jurisdiction to assess the Policy's reasonableness. Had the parties intended to limit the employers' management rights in the collective agreement, they would have said so explicitly.

[26] The employer added that it was within its general rights to manage its workplace by adopting and implementing policies unilaterally, limited only by the collective agreement (see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 84 at para. 54).

[27] It stated that its management authority derives from its broad statutory authority under the *Canada Revenue Agency Act* (S.C. 1999, c. 17), including s. 30(1)(d), which states that "[t]he Agency has authority over all matters relating to human resources management, including the determination of the terms and conditions of employment of persons employed by the Agency …".

[28] The employer argued that s. 209 of the *Act* does not establish freestanding jurisdiction to adjudicate the application of employer policies (see *Boudreau v. Treasury Board (Department of National Defence)*, 2010 PSLRB 100 at paras. 23 to 34 (upheld in 2011 FC 868)). It argued that unlike private-sector jurisprudence, in which arbitrators have assessed the reasonableness of unilaterally adopted employer policies, it exercised its statutory, not contractual, managerial authority. It stated that since the grievances do not disclose a violation of a substantive collective agreement clause, the Board does not have jurisdiction to review or opine on the Policy's reasonableness in the broad sense that private-sector labour arbitrators have done.

[29] In support, the employer relied on *Peck v. Parks Canada*, 2009 FC 686, in which the Federal Court distinguished between statutory management rights and those retained by private-sector employers in collective agreements and stated at paragraph 39 as follows:

> *[39] These cases, however, can be easily distinguished. First of all, they all relate to private sector arbitral jurisprudence. In none of these cases was there an employer exercising statutory authority to establish terms and conditions of employment. Contrary to the situation of a private employer bound by a collective agreement, Parks Canada may in its management function do that which it is not specifically or by inference prohibited by statute. As already mentioned, there is no limitation on Parks Canada's authority over classification.…*

[30] The employer also relied on *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 at paras. 93 to 100; *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55 at paras. 32 to 35, citing *Canada (Attorney General) v. Lâm*, 2008 FC 874 at para. 28; *Swan v. Canada Revenue Agency*, 2009 PSLRB 73 at para. 55; and *Mackwood v. National Research Council of Canada*, 2011 PSLRB 24 at paras. 10 to 12.

2. The claim that the reference to clause 6.01 changed the essential nature of the grievances

[31] As a second ground for its objection, the employer argued that the principles outlined in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), prevented the grievor from changing the nature of the attestation grievance at the adjudication stage. Specifically, it argued that since the grievance presentations did not contain any reference to clause 6.01, it could not be relied upon at adjudication.

[32] The employer argued that the crux of the attestation grievance was against the employer's requirement to disclose personal medical information as part of the Policy.

[33] The employer submitted that at no time during the grievance process were arguments presented about an alleged breach of clause 6.01. That clause appeared only in the referral-to-adjudication form, presumably in an attempt to meet the requirement of s. 209(1)(a) of the *Act*.

[34] The employer argued that it was clear from the grievance responses that the employer responded to a grievance that challenged the Policy for alleged personal information that was requested and collected about the vaccination status of CRA employees. It submitted that clearly, clause 6.01 is not part of the attestation grievance and was not addressed in the grievance process or the related responses.

[35] The employer submitted that by alleging a breach of clause 6.01 at the referral-to-adjudication stage, the grievor caught it "off guard" in the sense that a new basis for the attestation grievance was raised other than what was grieved during the entire grievance process and all the responses.

[36] The employer maintained that the attestation grievance ought to be dismissed on the basis that it falls outside the Board's jurisdiction.

[37] The employer asked that the accommodation grievance be dismissed on the same basis, however, it added that it did not object to the referral of the accommodation grievance based on the "no discrimination" clause, as it was specifically contained in the collective agreement. I took from that statement that the employer was asking the Board to declare that the grievor could not rely upon clause 6.01 if the grievance were to proceed.

B. For the grievor

[38] The grievor disagreed with both of the employer's preliminary objections. I will review their arguments in turn as I have done in the last section.

1. Response to the claim that clause 6.01 does not meet the requirement of s. 209(1)(a) of the *Act*

[39] The grievor submitted that the employer did not demonstrate that the grievances do not involve the application of a collective agreement provision with

respect to the grievor. He stated that the employer's claim that the Board lacks jurisdiction to assess its actions for reasonableness is not supported by the law.

[40] The grievor argued that the fact that federal public sector employers draw their management rights from statutes does not mean they cannot be subject to Board scrutiny in a manner comparable to private-sector arbitrations. He argued that the Federal Court's decision in *Peck*, cited by the employer, is not an applicable precedent with respect to the Board's jurisdiction under the *Act* or the question of the interplay between a collective agreement and management rights stemming from statute. Rather, it involved a classification grievance that was judicially reviewed and that did not pertain to a collective agreement.

[41] The grievor relied on *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 ("*Association of Justice Counsel 2017*"), in which the Supreme Court specifically addressed the issue of management rights, as follows:

> …
>
> *[18] In unionized workplaces, labour arbitrators recognize management's residual right to unilaterally impose workplace policies and rules that do not conflict with the terms of the collective agreement (D. J. M. Brown and D. M. Beatty, with the assistance of C. E. Deacon,* Canadian Labour Arbitration *(4th ed. (loose-leaf)), vol. 1, at topic 4:1520). Often, this residual power is recognized expressly in a "management rights" clause. Clause 5.01 of the collective agreement is one such clause, as it reserves for the employer the right to exercise all management powers that have not been "specifically abridged, delegated or modified" by the collective agreement.*
>
> *[19] For federal government employers, many of these residual management rights are set out in legislation.…*
>
> …

[42] The grievor argued that management's residual right to unilaterally impose workplace rules is not unlimited. Those rights must be exercised reasonably and consistently with the collective agreement. In support of this, he referred to *Association of Justice Counsel v. Treasury Board*, 2018 FPSLREB 38, in which the Board reached a similar conclusion, as follows:

> …
>
> ***194** Management rights in the federal public service are enshrined in ss. 7 and 11.1 of the* FAA *and 6 and 7 of the* Act *and give the*

> *employer broad authority to organize the public service, allocate resources, and assign duties. Clause 5.01 of the collective agreement is an acknowledgment that the employer retains all the rights, powers, and authority granted to it to the extent that they are not specifically modified by the collective agreement.*
>
> ***195*** *However, the employer's unilateral exercise of its management rights is not unfettered. Although the employer argued in this case that the* KVP Co. *decision was not relevant, I do not agree. As recently noted by the Supreme Court of Canada in* Association of Justice Counsel v. Canada (Attorney General)*,2017 SCC 55 at para. 20, which involved the same parties and the same collective agreement provision as these policy grievances,* KVP Co. *has long been interpreted as requiring employers to exercise their management rights reasonably and consistently with collective agreements.*
>
> …

[43] The grievor submitted that clearly, the employer was required to exercise its rights in a reasonable manner according to the applicable case law, especially given the similarity between clause 6.01 in this case and clause 5.01, as mentioned in the cases just cited.

[44] Further, the grievor submitted that the Federal Court's decision in *Boudreau* does not support the employer's proposition that the Board lacks jurisdiction over the interpretation of employer policies. Rather, the basis for that decision was that the grievance could not be allowed, as its nature had changed. The grievor submitted that assessing the reasonableness of the employer's actions falls squarely within the Board's jurisdiction.

[45] The grievor argued that the employer's argument that clause 6.01 did not confer substantive rights was also without support. He stated that the Board's decisions in *Wepruk*, *Swan*, and *Mackwood* are all distinguishable on the facts, as they pertain to clauses setting out the purpose and intent of the applicable collective agreements. Further, the employer did not demonstrate that clause 6.01 was general or purely consultative within the meaning of the Board's decision in *Payne*.

[46] The grievor also relied on Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at topic 4:1520; *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd.*, [1965] O.L.A.A. No. 2 (QL) ("*KVP*"); and *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 24.

2. Response to the claim that the reference to clause 6.01 changed the essential nature of the grievances

[47] The grievor submitted that the employer did not demonstrate that the nature of the grievances had changed or that it was unaware of the nature of the grievances.

[48] He argued that at no time did the employer raise concerns that they did not know what the real disputes were. According to him, the employer's replies demonstrated that the question of the reasonableness of management's actions was raised during the grievance process and that they were able to respond accordingly. He argued that the Federal Court of Appeal's decision in *Burchill* does not preclude dealing with something that was clearly within the scope of the grievance.

[49] The grievor relied on *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, in which Adjudicator Olsen dismissed a preliminary objection based on the *Burchill* principle, writing as follows:

> …
>
> *113 I conclude on the evidence that the original complaint and its subsequent iteration as a grievance raised the issue of camouflaged discipline and that the reference to adjudication was not an attempt to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance relating to discipline. The employer has in no way been caught off guard by any of the allegations or arguments raised by the grievor. Indeed, all of the issues and allegations had already been raised by her long ago, and the parties had debated the entire situation during both the investigation and grievance process. In my view, the grievance in context alleges camouflaged disciplinary action, and the referral to adjudication under paragraph 209(1)*(b) *does not offend the* Burchill *principle.*
>
> …

[50] The grievor submitted that the nature of the grievances was not changed, and that the employer was not in any way "caught off guard" by the arguments on the reasonableness of its actions. He stated that clearly, the employer was aware of those allegations before the referrals were made under s. 209(1)(a) of the *Act*.

[51] The grievor stated that *Payne* is clearly distinguishable on the facts of that case as it pertained to a health-and-safety provision of a collective agreement that the Board found was purely consultative.

[52] Finally, the grievor argued that the essence of the attestation grievance was the claim that the employer's application of the Policy to him was unreasonable. He argued that despite the absence of a specific mention of clause 6.01, it was clear that the employer also understood that to be the case. He relied on the grievance responses, in which the employer defended its application of the Policy to the grievor as "reasonable".

IV. Analysis and reasons

[53] Two main jurisdictional objections must be determined. I will review each of these objections separately.

A. Can the grievor refer an individual grievance to adjudication based solely on clause 6.01?

[54] This first issue concerns whether clause 6.01, a management rights clause, can be used as a standalone basis for referring an individual grievance to adjudication.

[55] Clause 6.01 provides that "**[e]xcept to the extent provided herein**, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the public service" [emphasis added].

[56] The *Act* provides broad rights to employees to file individual grievances (s. 208). However, the same broad rights do not extend to adjudication. Indeed, only a subset of them may be referred to the Board. In this instance, for the grievances to be referred to adjudication, they must relate to "… the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award …" (see s. 209(1)(a)). If they do not, then I do not have jurisdiction to hear them.

[57] The employer claims that clause 6.01 does not meet the requirements of s. 209(1)(a). I will review that objection to each grievance separately, as the underlying facts differ for each one.

1. The attestation grievance

[58] The attestation grievance challenges the employer's Policy requirement to provide vaccination attestations, which the grievor considers is private medical information. The sole clause relied upon in the grievance referral is clause 6.01 - the managerial responsibilities clause. No other clause is referred to or alleged to apply.

[59] The grievor argues that the employer has a duty to act reasonably in the exercise of its management rights under clause 6.01. Moreover, he argues that I have jurisdiction to review the reasonableness of the employer's actions, even if the collective agreement is silent on those issues.

[60] To support his position, the grievor relied on the Supreme Court of Canada's decision in *Association of Justice Counsel 2017*. In that case, the employer had sought to impose a mandatory standby policy, which was a topic not covered by the collective agreement. Similarly to this case, the Association of Justice Counsel argued that the residual management rights mentioned in its collective agreement were not absolute and that they had to be exercised in a reasonable manner. The management rights clause in that case provided as follows:

> …
>
> *[9] …*
>
> *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.*
>
> …

[61] However, as the Supreme Court pointed out, those management rights were not unfettered. Under clause 5.02 of that collective agreement, the employer was required to "act reasonably, fairly and in good faith" when administering that agreement.

[62] In rendering its decision, the Supreme Court considered the interplay between the management rights clause and clause 5.02 of the collective agreement in that case. It made the following comments, which are of relevance to this case:

> …
>
> ***IV. Analysis***
>
> A. Does the Directive Breach Clause 5.02 of the Collective Agreement?
>
> ***(1) Residual Management Rights***
>
> *[17] The standard of review for judicial review of grievance arbitrators' decisions is reasonableness (*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at paras. 32-33). At issue is the interpretation of a management rights clause in a collective agreement, clearly a matter on which labour arbitrators are owed*

> *deference (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 7).*
>
> *[18] In unionized workplaces, labour arbitrators recognize management's residual right to unilaterally impose workplace policies and rules that do not conflict with the terms of the collective agreement (D. J. M. Brown and D. M. Beatty, with the assistance of C. E. Deacon,* Canadian Labour Arbitration *(4th ed. (loose-leaf)), vol. 1, at topic 4:1520). Often, this residual power is recognized expressly in a "management rights" clause. Clause 5.01 of the collective agreement is one such clause, as it reserves for the employer the right to exercise all management powers that have not been "specifically abridged, delegated or modified" by the collective agreement.*
>
> *[19] For federal government employers, many of these residual management rights are set out in legislation. Under ss. 7 and 11.1 of the* Financial Administration Act*, R.S.C. 1985, c. F-11, the Treasury Board is authorized to exercise a number of different powers with respect to its human resources management responsibilities. These rights include providing for the allocation and effective use of human resources (s. 11.1(1)(a)); determining and regulating the pay of employees, the hours of work and leave and any related matters (s. 11.1(1)(c)); and providing for any other matters necessary for effective human resources management (s. 11.1(1)(j)).*
>
> *[20] That said, management's residual right to unilaterally impose workplace rules is not unlimited. Management rights must be exercised reasonably and consistently with the collective agreement (Brown and Beatty, at topic 4:1520;* Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. *(1965), 16 L.A.C. 73 (Ont.); Irving, at para. 24).*
>
> *[21] Clause 5.02 of the collective agreement also constrains management's ability to exercise these rights, as it provides that in administrating the collective agreement, the employer must "act reasonably, fairly and in good faith". Any unilaterally imposed workplace policy must comply with these limitations.*
>
> *[22] The question raised before the adjudicator was whether the standby directive represented a reasonable and fair exercise of management rights. The employer's good faith is not in issue.*
>
> …

[63] It is important to underscore that that analysis responded to the question of whether the impugned policy breached clause 5.02 of the collective agreement, which, as just noted, imposed an obligation on the employer to act reasonably. No such clause exists in this case.

[64] To support its analysis, the Supreme Court referenced two decisions: *KVP* and *Irving Pulp & Paper, Ltd.* I believe that a closer review of both decisions is helpful.

[65] In *KVP*, the grievor was terminated for violating a unilaterally imposed company policy on garnishment orders. The collective agreement in question did not have a management rights clause. However, it contained a clause that provided a timeline for the presentation of grievances "… arising from a claim by an employee that his discharge or suspension by the Company was unjust or contrary to the terms of the Agreement." The arbitration board concluded that that clause (referred to as "art. 8.08") made it abundantly clear that it was vested with the jurisdiction to "review the action of the company in discharging the grievor or determine whether or not the discharge was unjust or contrary to the terms of the collective agreement or unfair under all the circumstances" (at para 13).

[66] This point was reiterated once more at paragraph 41, when the arbitration board stated this:

> ***41*** *For the reasons outlined above under the heading "Effect of Lack of Management's Rights Clause" I am of the view that the provisions of art. 8.08 of the collective agreement clearly clothe this board with jurisdiction to determine whether or not the discharge of the grievor on June 24, 1964, was unjust or contrary to the terms of the collective agreement or unfair under all the circumstances.*

[67] The arbitration board further stated that that case was distinguishable from other previous decisions, which it cited, in which arbitrators had declined jurisdiction based on the respective collective agreements being silent on the subject matter of the grievances and therefore providing no jurisdiction for arbitral intervention (see paragraphs 14 and 15).

[68] I have chosen to highlight these facts to underscore that the arbitration board in *KVP* first satisfied itself that it had jurisdiction to intervene based on the collective agreement's wording. Only after it did so did it proceed to review the case law to help it determine whether the unilaterally imposed company rule was unjust or contrary to the collective agreement's terms. It is in that context that the arbitration board stated that unilaterally imposed rules must be consistent with the collective agreement and be reasonably applied.

[69] Comparing that decision to this case, the collective agreement does not provide me with jurisdiction to review the employer's actions to determine whether they were "unjust". In fact, there is no language in the collective agreement that would "clothe this board with jurisdiction", as held in *KVP*, to review the reasonableness of the employer's actions.

[70] Turning now to *Irving Pulp and Paper, Ltd.*, which concerned the unilateral introduction of a company policy that imposed random alcohol testing on employees working in safety-sensitive positions. The grievor in that case challenged his employer's right to do it on the basis that it violated his privacy rights. The Supreme Court made the following remarks, which are of relevance to this case:

> …
>
> *[22] When employers in a unionized workplace unilaterally enact workplace rules and policies, they are not permitted to "promulgate unreasonable rules and then punish employees who infringe them" (*Re United Steelworkers, Local 4487 & John Inglis Co. Ltd. *(1957), 7 L.A.C. 240 (Laskin), at p. 247; see also* Re United Brewery Workers, Local 232, & Carling Breweries Ltd. *(1959), 10 L.A.C. 25 (Cross)).*
>
> *[23] This constraint arises because an employer may only discharge or discipline an employee for "just cause" or "reasonable cause" — a central protection for employees.* ***As a result, rules enacted by an employer as a vehicle for discipline must meet the requirement of reasonable cause*** *(*Re Public Utilities Commission of the Borough of Scarborough and International Brotherhood of Electrical Workers, Local 636 *(1974), 1974 CanLII 2379 (ON LA), 5 L.A.C. (2d) 285 (Rayner), at pp. 288-89; see also* United Electrical, Radio, and Machine Workers of America, Local 524, in re Canadian General Electric Co. Ltd. (Peterborough) *(1951), 2 L.A.C. 688 (Laskin), at p. 690;* Re Hamilton Street Railway Co. and Amalgamated Transit Union, Division 107 *(1977), 1977 CanLII 2953 (ON LA), 16 L.A.C. (2d) 402 (Burkett), at paras. 9-10; Ronald M. Snyder,* Collective Agreement Arbitration in Canada *(4th ed. 2009), at paras. 10.1 and 10.96).*
>
> *[24] The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. (1965), … 16 L.A.C. 73 (Robinson). The heart of the "KVP test", which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable (Donald J. M. Brown and David M. Beatty, Canadian Labour Arbitration (4th ed. (loose-leaf)), vol. 1, at topic 4:1520).*

> *[25] The* KVP *test has also been applied by the courts. Tarnopolsky J.A. launched the judicial endorsement of* KVP *in* Metropolitan Toronto (Municipality) v. C.U.P.E. *(1990) … 74 O.R. (2d) 239 (C.A.), leave to appeal refused, [1990] 2 S.C.R. ix, concluding that the "weight of authority and common sense" supported the principle that "all company rules with disciplinary consequences must be reasonable" (pp. 257-58 (emphasis in original)). In other words:*
>
> > ***The Employer cannot, by exercising its management functions, issue unreasonable rules and then discipline employees for failure to follow them.*** *Such discipline would simply be without reasonable cause. To permit such action would be to invite subversion of the reasonable cause clause. [p. 257]*
>
> *[26]* ***Subsequent appellate decisions have accepted that rules unilaterally made in the exercise of management discretion under a collective agreement must not only be consistent with the agreement, but must also be reasonable if the breach of the rule results in disciplinary action*** *(*Charlottetown (City) v. Charlottetown Police Association *(1997) … 151 Nfld. & P.E.I.R. 69 (P.E.I.S.C. (App. Div.)), at para. 17; see also* N.A.P.E. v. Western Avalon Roman Catholic School Board*, 2000 NFCA 39, 190 D.L.R. (4th) 146, at para. 34;* St. James-Assiniboia Teachers' Assn. No. 2 v. St. James-Assiniboia School Division No. 2*, 2002 MBCA 158, 222 D.L.R. (4th) 636, at paras. 19-28).*
>
> …
>
> [Emphasis added]

[71] *Irving Pulp and Paper, Ltd.* serves to confirm that rules enacted by an employer as a vehicle for discipline must meet the requirement of reasonable cause. This is not the case in this instance as the grievor did not allege any disciplinary action.

[72] As for *KVP* and *Association of Justice Counsel 2017*, neither of those decisions stands for the proposition that a management rights clause on its own provides jurisdiction to an adjudicator to review the reasonableness of employers' unilaterally imposed policies. Rather, in both cases, jurisdiction was found in those collective agreements beyond the management rights clause (or despite its absence in *KVP*), which enabled arbitral intervention.

[73] The substance of the attestation grievance, as the grievor defined it, is that the employer's application of the Policy to him (i.e., the requirement to provide a vaccination attestation) was unreasonable. Having to provide that or any medical information is not set out in the collective agreement. This matter involves only the exercise of the employer's management rights.

[74] As previously noted, with respect to this grievance, there is no language in the collective agreement that would "clothe this board with jurisdiction", to review the reasonableness of the employer's actions.

[75] As a result, neither the collective agreement's wording nor the jurisprudence support the grievor's argument that I possess jurisdiction to review the employer's action for reasonableness.

[76] Further, I believe that the grievor's position is not supported within the applicable legislative framework.

[77] The Board is a quasi-judicial statutory tribunal established by the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365). Section 19 of that Act provides that "[t]he Board is to exercise the powers and perform the duties and functions that are conferred or imposed on it by this Act or any other Act of Parliament." Therefore, my jurisdiction starts and ends within those boundaries.

[78] Section 12 of the *Act* confers authority on the Board to administer that Act. Section 13 states that the Board is to provide adjudication services for the referral of grievances to adjudication under Part 2 of the *Act*, which includes individual grievances.

[79] As previously noted, despite the broad right to file individual grievances, only those specifically listed in s. 209 of the *Act* may be referred to adjudication. To agree with the grievor's position would render s. 209(1)(a) of the *Act* meaningless, as it would provide the Board with the authority to review **all** the employer's decisions for reasonableness, regardless of whether or not the subject matter fell within the scope of the collective agreement, which, clearly, Parliament did not intend.

[80] For all those reasons, this portion of the employer's objection is upheld as I find that I am without jurisdiction to review the exercise of the employer's management rights under clause 6.01.

[81] As the grievor has not alleged any other violation of the collective agreement, the attestation grievance is dismissed.

2. The accommodation grievance

[82] The grievance referral for the accommodation grievance was based on the no discrimination (Human Rights) clause (clause 19.01) of the collective agreement in addition to clause 6.01.

[83] The employer does not contest that the accommodation grievance was properly referred to adjudication under clause 19.01. However, it does challenge its referral to adjudication under clause 6.01, simply stating that it is for the same reasons as stated in its objection to the attestation grievance. However, the employer does not address the significant difference between the two grievances; specifically, the attestation grievance is based on clause 6.01 alone, whereas the accommodation grievance also relies on clause 19.01.

[84] It is worth restating the wording of clause 6.01. It provides, "Except to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the public service."

[85] By referring to the no discrimination clause (clause 19.01), the grievor identified the clause that limits the management rights clause, i.e., the "[e]xcept to the extent provided", in the collective agreement. The grievance therefore meets the requirement of s. 209(1)(a) of the *Act* that the matter relates to "… the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award …".

[86] For those reasons, I find that this portion of the employer's preliminary objection about the accommodation grievance is unfounded.

B. Did the reference to clause 6.01 in the grievance referrals change their nature?

[87] The second objection raised by the employer concerns whether the reference to clause 6.01 in the grievance referrals changed the nature of the grievances such that it cannot be relied upon at the adjudication stage of the grievance process.

1. The attestation grievance

[88] Since I have found that I am without jurisdiction to hear the attestation grievance, it is not necessary to address the employer's other jurisdictional objection related to it.

2. The accommodation grievance

[89] The employer relies on *Burchill* and argues that the grievor cannot seek to rely on clause 6.01 at adjudication as it was not raised during the grievance process. In essence, it argues that the grievor has changed the nature of the grievance such that it became a new grievance that was presented to the Board for determination.

[90] The grievor acknowledges that he did not specifically refer to clause 6.01 during the grievance presentation process. However, he argues that the true nature of the grievance has not changed, since the reasonableness of the employer's actions has always been at issue.

[91] I have reviewed the case law that the parties presented, and I find useful the statement made in the Federal Court's *Boudreau* decision, at paras. 19 and 20. Those paragraphs provide as follows:

> *[19] In the Court's opinion, the rules of procedural fairness dictate that employer [sic] should not be required to defend in arbitration against a substantially different characterization of the issues than it encountered during the grievance procedure. This is not merely a technicality, but is fundamental to the proper functioning of the dispute resolution system for labour disputes in the federal public administration. See* Burchill, *above, at para 5,* Canada (Treasury Board) v Rinaldi, *[1997] FCJ No 225 at para 28 (FCTD) and* Shofield v Canada (Attorney General), *[2004] FCJ No 784, 2004 FC 622, cited in approval and discussed by the Federal Court of Appeal in* Shneidman v Canada (Customs and Revenue Agency), *2007 FCA 192 at paras 26-28.*
>
> *[20] The Court has already noted that there is a sharp divide between matters that can be referred to adjudication and those that cannot under the scheme of the Act (sections 208 and 209). Therefore, court decisions having to do with grievances made in accordance with other federal and provincial labour relations statutes must be approached with great caution, considering that the scope of matters that can go to adjudication may be broader in those instances. That said, it is not challenged that the Harassment policies are not part of the collective agreement. In this context, given the different treatment awarded to adjudicable and non-adjudicable matters under section 209 of the Act, an essential element of this system is that employees are not permitted to alter the nature of their grievances during the grievance process or upon referral to adjudication. Otherwise, employees who had grieved a matter not adjudicable under section 209 of the Act would alter their grievances so that an adjudicator could acquire jurisdiction.*

[92] As stated by the Federal Court in *Boudreau*, a grievor cannot alter their grievance upon its referral to adjudication. However, they can and should clarify what their grievance statements mean during the internal grievance presentation process. This is what that process is intended for. It ensures that the employer understands what is being challenged and that it has the opportunity to respond.

[93] In this case, the wording of the grievance provides this: "I grieve the employers [*sic*] decision to deny my religious accommodation for the Covid 19 [*sic*] vaccination policy".

[94] I note that the grievance's wording does not specifically mention clause 19.01 - the no-discrimination clause. Nor is any mention made of it in the grievance replies. Yet, the employer does not contest the appropriateness of the grievance's referral to adjudication under that clause.

[95] The grievor argues that the employer was aware that he was challenging the reasonableness of the employer's actions, just as it was aware that he was challenging the no discrimination clause in the collective agreement. He relies on the wording of the employer's grievance replies in support of that.

[96] The first- and third-level replies to the grievance indicate that the employer understood the grievor's position to be that "… the *Policy* infringes, without reasonable justification, on the rights guaranteed to all Canadian citizens under the *Canadian Charter of Rights and Freedoms* (*Charter*) …". The replies added that the Policy was a reasonable measure and that the employer had the authority to determine the terms and conditions of employment through policies "… to the extent that they do not conflict with the provisions of a collective agreement …". I find from these statements that the employer understood that the reasonableness of its Policy was at issue and relied on its management rights as a justification for its actions.

[97] As a result, I find that the issue of the employer's use of its management rights were clearly at play and that therefore, the reference to clause 6.01 in the referral to adjudication did not change the essence of the grievance.

[98] Moreover, in section 241(1) of the *Act*, the legislator specifically provided that a defect in form or technical irregularity does not invalidate a grievance.

[99] For those reasons, I am denying the employer's preliminary objection that is based on the grievor having changed the essence of the grievance.

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

(The Order appears on the next page)

V. Order

[101] The employer's jurisdictional objections against the attestation grievance (Board file no. 566-34-46731) are upheld in part.

[102] The attestation grievance (Board file no. 566-34-46731) is dismissed.

[103] The employer's jurisdictional objections against the accommodation grievance (Board file no. 566-34-46732) are denied.

[104] The accommodation grievance (Board file no. 566-34-46732) is to be sent to the Board's Registry for scheduling in due course.

November 26, 2024.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board