Federal Court  Cour fédérale

Date: 20150115

Docket: T-1742-13

Citation: 2015 FC 50

Ottawa, Ontario, January 15, 2015

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

ZABIA CHAMBERLAIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review filed under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The applicant, Ms. Chamberlain, is challenging a decision rendered on September 23, 2013 (*Chamberlain v Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, [2013] CPSLRB No 83), by Mr. George Filliter (the adjudicator or Mr. Filliter), a grievance adjudicator of the Public Service Labour Relations Board (the Board). In his decision, Mr. Filliter concluded he did not have jurisdiction to hear the applicant's grievance. Specifically, he concluded he had no jurisdiction to deal with the

applicant's alleged violations of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. For the following reasons, the application is dismissed.

I. **Background**

[2] Ms. Chamberlain is a long-serving public servant, employed in the Strategic Policy and Research Branch (SPR) of the Department of Human Resources and Skills Development Canada (HRSDC). Her substantive position is classified at the group and level ES-07.

[3] For the purpose of this application, it is not necessary to outline in detail what led to the filing of Ms. Chamberlain's grievance, but it is useful to provide some context.

[4] In 2006, Ms. Chamberlain accepted a temporary acting assignment in an EX-01 position in the Skills and Employment Branch (SEB) of the HRSDC. She claims that the workload related to that position was excessive, and the Director General (DG) to whom she reported was difficult and aggressive. Further, she claims she was subjected to harassment by the DG. In April 2008, Ms. Chamberlain raised her concerns with the Senior Assistant Deputy Minister (ADM) of the SEB. Shortly thereafter, Ms. Chamberlain left on sick leave and she has never returned to work since then. The ADM conducted an investigation into Ms. Chamberlain's allegations and concluded, among other things, that the DG had not conducted himself appropriately. Ms. Chamberlain was not satisfied with several aspects of the investigation's conclusions. In the meantime and as planned, Ms. Chamberlain's acting assignment ended in October 2008. Although she was on sick leave, discussions were held concerning her return to work in an EX-07 position in the SPR. However, these discussions did not lead to an agreement. On

December 3, 2008, Ms. Chamberlain filed a grievance in which she complained about several matters. Those matters were well summarized by Justice Gleason in *Chamberlain v Canada (Attorney General)*, 2012 FC 1027 at para 4, [2012] FCJ No 1140 [*Chamberlain FC*]:

> 4 On December 3, 2008, Ms. Chamberlain filed a grievance in which she complained about several matters, including the treatment she had received from her supervisor, the investigation conducted by the ADM, the contents of the investigation report, her inability to compete for the posted EX-01 positions and loss of the EX-01 salary, HRSDC's alleged disregard of its obligation to ensure her health and safety in accordance with Part II of the *Canada Labour Code*, RSC, 1985, c L-2) [the Code], the alleged failure of HRSDC to accommodate her and the discrimination she claims to have faced as a woman, a member of a visible minority group and a person with a disability. […]

[5] Ms. Chamberlain's grievance was denied by the Acting ADM at the final level of the internal grievance process. On March 11, 2009, Ms. Chamberlain referred her grievance to adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA].

[6] In addition to her grievance, and stemming from the same factual matrix, Ms. Chamberlain filed four complaints with the Board under section 133 of the *Canada Labour Code*, RSC 1985, c L-2 [CLC]. In her complaints, Ms. Chamberlain, alleged that the employer failed to provide her with a safe work environment and took reprisal actions against her because she had exercised her rights under Part II of the CLC.

[7] Board members can act and sit in two capacities, namely as members of the Board and as grievance adjudicators. Grievances filed and referred to adjudication under the PSLRA are dealt with by Board members acting in their capacity as grievance adjudicators, while complaints filed

under section 133 of the CLC are dealt with by members of the Board acting on behalf of the Board itself.

[8] Because of the similarities between Ms. Chamberlain's grievance and complaints, the Board combined the grievances and complaints for purposes of a hearing. It assigned Mr. Filliter to act as both an adjudicator with regard to Ms. Chamberlain's grievance and a Board member acting on behalf of the Board with regard to her CLC complaints.

[9] The employer raised a preliminary objection to the referral of Ms. Chamberlain's grievance to adjudication. In order to understand this objection, it is useful to outline some specificity of the public service grievance process.

[10] The right of any public service employee to file a grievance is set out in section 208 of the PSLRA. Ms. Chamberlain was not an employee covered by a collective agreement and her right to file an individual grievance stemmed from paragraph 208(1)(*b*) of the PSLRA. This paragraph provides that an employee is entitled to present an individual grievance if he or she feels aggrieved "as a result of any occurrence or matter affecting his or her terms and conditions of employment". This provision is broad and allows the filing of a grievance regarding several matters affecting an employee's conditions of employment. However, not every type of grievance can be referred to adjudication. Section 209 of the PSLRA restricts the grievances which can be referred to adjudication to those expressly listed.

[11] Ms. Chamberlain referred her grievance to adjudication under paragraph 209(1)(*b*) of the PSLRA, which relates to grievances challenging disciplinary actions resulting in termination, demotion, suspension or financial penalty. The employer raised a preliminary objection to the adjudicator's jurisdiction on the ground that Ms. Chamberlain's grievance was not challenging a disciplinary action.

[12] In a decision dated December 13, 2010 (*Chamberlain v Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 130, [2010] CPSLRB No 127), Mr. Filliter dismissed Ms. Chamberlain's grievance for lack of jurisdiction. He concluded that Ms. Chamberlain's grievance did not allege a disciplinary action or a financial penalty as required under paragraph 209(1)(*b*) of the PSLRA, and therefore, it could not be referred to adjudication under section 209. In the alternative, Mr. Filliter stated that even if the grievance had alleged a disciplinary action, there was no *prima facie* evidence of a disciplinary action before him that would give him jurisdiction to hear the grievance.

[13] The employer had also raised a preliminary objection with regard to Mr. Filliter's jurisdiction over Ms. Chamberlain's CLC complaints.

[14] In the same decision, Mr. Filliter, this time in his capacity as a Board member, allowed the employer's objection in part. He concluded he had jurisdiction over the complaints but only insofar as they related to allegations of actions of reprisal taken by the employer on or after January 23, 2009, as a result of Ms. Chamberlain's exercise of her rights under the CLC.

Accordingly, he directed the Board to schedule a continuation of the hearing to deal with the CLC complaints in their limited scope.

[15] Ms. Chamberlain sought judicial review of both findings. Jurisdiction over applications for judicial review of decisions of the Board is divided between this Court and the Federal Court of Appeal (FCA). Decisions rendered by Board members acting as grievance adjudicators are reviewable by this Court whereas decisions rendered by Board members acting on behalf of the Board are reviewable by the FCA. Ms. Chamberlain filed an application for judicial review challenging the decision dismissing her grievance with this Court, and she filed another application for judicial review challenging the decision narrowing the scope of her CLC complaints with the FCA.

[16] On February 8, 2012, the FCA (*Chamberlain v Canada (Attorney General)*, 2012 FCA 44, [2012] FCJ No 192 [*Chamberlain FCA*] dismissed Ms. Chamberlain's application for judicial review of the portion of Mr. Filliter's decision that concerned the CLC complaints. The FCA concluded that Mr. Filliter did not err in allowing in part the employer's objection regarding these complaints. A section of the judgment is also relevant to the proceedings challenging the grievance because in both applications, Ms. Chamberlain was alleging breaches of procedural fairness by Mr. Filliter. The FCA rejected Ms. Chamberlain's allegations, and it concluded Ms. Chamberlain was not denied a fair opportunity to present her case and her arguments. The Court also rejected Ms. Chamberlain's allegation that Mr. Filliter had not been impartial.

[17] On August 31, 2012, Justice Gleason, in *Chamberlain FC*, allowed in part Ms. Chamberlain's application for judicial review against Mr. Filliter's decision to dismiss her grievance for lack of jurisdiction. Justice Gleason found that the FCA, in *Chamberlain FCA*, had already disposed of Ms. Chamberlain's allegation of breach of procedural fairness. She also found reasonable the adjudicator's finding that the grievance was not covered by paragraph 209(1)(*b*) of the PSLRA because it did not relate to a disciplinary action. However, she found that Ms. Chamberlain's grievance also raised human rights issues, namely that the employer had failed to accommodate her, and that she had been subjected to discrimination under the CHRA, which were not dealt with by the adjudicator. She concluded that the adjudicator should have addressed the issue of whether Ms. Chamberlain's allegations that her rights under the CHRA had been violated were adjudicable under the PSLRA. As a result, she set aside Mr. Filliter's order dismissing the grievance and remitted the matter back to him. More specifically, she directed the adjudicator to determine whether Ms. Chamberlain's alleged breaches of the CHRA were adjudicable under the PSLRA.

II. **The decision under review**

[18] The adjudicator canvassed the issue as requiring him to determine whether paragraph 226(1)(*b*) of the PSLRA (now repealed, replaced by paragraph 20(*b*) of the *Public Service Labour Relations and Employment Board Act*, SC 2013, c 40, s 365 [PSLREBA]) granted him jurisdiction to entertain Ms. Chamberlain's allegations of CHRA violations. Section 226 of the PSLRA lists the powers granted to an adjudicator in relation to matters referred to adjudication, while paragraph 226(1)(*g*) (now paragraph 226(2)(*a*)) specifically provides that an adjudicator has the power to interpret and apply the CHRA.

[19] The adjudicator determined that subsection 226(1) of the PSRLA was not a provision that attributes jurisdiction to an adjudicator with respect to grievances that raise stand-alone CHRA violations. He ruled that paragraph 226(1)(*b*) would only apply once a grievance has first been properly referred to adjudication under subsection 209(1) of the PSLRA and where interpreting and applying the CHRA was required for the resolution of the issue raised in the grievance. Accordingly, since Ms. Chamberlain's grievance was not adjudicable under subsection 209(1) of the PSLRA, he concluded he did not have jurisdiction over the alleged CHRA violations included in her grievance.

III. **Issues and analysis**

[20] Ms. Chamberlain raises several arguments against the adjudicator's decision.

A. *The scope of the matter remitted back to the adjudicator*

[21] Ms. Chamberlain submits that Justice Gleason set aside the adjudicator's decision to dismiss her grievance and remitted back to him the entirety of her grievance for re-assessment. In her view, the impact of Justice Gleason's judgment was to reopen all the issues raised in her grievance. With respect, Ms. Chamberlain misread, or misunderstood, the scope of Justice Gleason's judgment.

[22] Justice Gleason found reasonable the adjudicator's determination that Ms. Chamberlain's grievance did not relate to a disciplinary action, and therefore, it was not adjudicable under

paragraph 209(1)(*b*) of the PSLRA. Accordingly, she indicated this ground of review raised by Ms. Chamberlain failed, and only granted the application for judicial review in part.

[23] The fact that Justice Gleason set aside the adjudicator's order does not imply she was remitting back the totality of Ms. Chamberlain's grievance. On the contrary, it is clear from both the reasons and the conclusions of her judgment that Justice Gleason was only reopening Ms. Chamberlain's grievance to allow the adjudicator to determine whether he had jurisdiction over the human rights allegations contained in the grievance, despite the fact that the grievance was not adjudicable under paragraph 209(1)(*b*) of the PSLRA. The second paragraph of the judgment's conclusions states the application for judicial review was allowed in part. Paragraph 5 of the conclusions makes it clear as to the limited scope of the direction given to the adjudicator:

> 5. Her grievance is remitted back to Adjudicator Filliter, if he is available to hear it, or to another PSLRB adjudicator if he is not, for determination as to whether a PSLRB adjudicator possesses jurisdiction to adjudicate upon Ms. Chamberlain's human rights claims, and if such jurisdiction is determined to exist, to hear and decide those claims on their merits; […]

[24] The impact of Justice Gleason's judgment is unequivoqual. The adjudicator's decision regarding his lack of jurisdiction to deal with Ms. Chamberlain's grievance under paragraph 209(1)(*b*) of the PSLRA (allegations of a disciplinary action) was maintained, and it constitutes a final determination. The grievance was sent back to the adjudicator with a limited and specific question to be answered. Justice Gleason found that Ms. Chamberlain's grievance raised, among other allegations, CHRA violations, and that the adjudicator had failed to turn his mind to whether those specific allegations were adjudicable under the PSLRA. Therefore, when the

matter was sent back to him, the only issue before the adjudicator related to the adjudicability of the human rights issues contained in the grievance. Ms. Chamberlain was not allowed to reopen the debate that had already been heard and determined by the adjudicator, nor was she allowed to raise new allegations. The adjudicator clearly understood the limited scope of the issue he had to decide. He set it out as follows, at para 65 of his decision:

> 65 There is only one issue I need to consider: Do I have jurisdiction to consider the grievance solely on the basis of the fact that the grievor raised allegations of a violation of the *CHRA*?

[25] This statement is a correct interpretation of the specific issue which was sent back to him for determination by Justice Gleason.

B. *The respondent's objection concerning portions of Ms. Chamberlain's record and evidence*

[26] The respondent argues that several portions of Ms. Chamberlain's application record should be struck on the basis that they are either not relevant to the issue or they were not part of the record before the adjudicator.

[27] It is well established that as a general rule, the proper record on judicial review is limited to the evidentiary record that was before the administrative tribunal. There are a few exceptions to that principle, one of which is when new evidence is adduced before the Court to support allegations of breaches of procedural fairness on the part of the administrative tribunal (*Chamberlain FC* at para 17). The state of the law in that regard is well summarized by Justice Stratas in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing*

Agency (Access Copyright), 2012 FCA 22 at paras 18-29, 428 NR 297, where he explained the rule and its exceptions:

> 18 Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.
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> 19 Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.
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> 20 There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> > (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide

> evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: *e.g*, *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra*.

[28] As a result, I will disregard any evidence that was not before Mr. Filliter relating to his jurisdiction over Ms. Chamberlain's alleged CHRA violations with the exception of Ms. Chamberlain's statements contained in her affidavits of October 30, 2013 and December 10, 2013, which concern her allegations of breach of procedural fairness.

C. *Procedural fairness*

[29] Ms. Chamberlain alleges the adjudicator breached his duty to act fairly and failed to be impartial. With respect, these arguments must fail. Issues of procedural fairness are reviewable under the correctness standard of review (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502).

[30] First, several of Ms. Chamberlain's reproaches against Mr. Filliter are connected to the fact that the adjudicator did not allow her to revisit the totality of her grievance and to adduce evidence. As indicated previously, the adjudicator correctly understood the limited and specific question he was directed to address. Thus, he did not err in preventing Ms. Chamberlain from adducing evidence and raising arguments that did not concern the adjudicability of her alleged human rights violations.

[31] Second, the adjudicator decided that the issue of the adjudicability of the alleged CHRA violations contained in Ms. Chamberlain's grievance would be dealt with by way of written submissions. The respondent argues that both parties agreed to proceed in writing. For her part, Ms. Chamberlain submits that she did not agree to proceed by way of written submissions and that everything went too fast when that decision was made on September 10, 2012. In my view, the question of whether the decision to proceed by way of written submissions was made by consent or was imposed by the adjudicator is not determinative. Section 227 of the PSLRA (now repealed, replaced by section 22 of the PSLREBA) gives the adjudicator the discretion to decide if a matter referred to adjudication will be dealt with at an oral hearing or by way of written submissions:

Determination without oral hearing 227. An adjudicator may decide any matter referred to adjudication without holding an oral hearing.	**Décision sans audience** 227. L'arbitre de grief peut trancher toute affaire dont il est saisi sans tenir d'audience.

[32] This issue before the adjudicator was an appropriate one for written submissions. The issue raised a pure question of law that did not require the filing of any evidence. Therefore, it

was appropriate for the adjudicator to decide the parties would proceed in writing. It also appears from the file that Ms. Chamberlain had a full and ample opportunity to present all of her arguments. Therefore, she was not prejudiced by the fact that the matter proceeded by way of written submissions.

[33] Furthermore, there is nothing in the record to support a finding that Mr. Filliter did not conduct the matter in a fair and impartial manner.

D. *Substantive errors*

[34] Ms. Chamberlain submits the adjudicator erred in concluding that he did not have jurisdiction to deal with her human rights allegations. With respect, I am of the view that the adjudicator did not err in his interpretation of sections 208, 209 and 226 of the PSLRA and that the Court's intervention is not warranted.

[35] As stated previously, the adjudicator's determination that Ms. Chamberlain's grievance was not adjudicable under paragraph 209(1)(*b*) of the PSLRA became final when Justice Gleason found that decision to be reasonable. Moreover, Ms. Chamberlain's grievance could not have been referred to adjudication under any other paragraph of subsection 209(1) of the PSLRA. Therefore, the issue concerning the adjudicability of alleged human rights violations required the adjudicator to determine whether paragraph 226(1)(*g*) (now paragraph 226(2)(*a*)) of the PSLRA, which gives an adjudicator power to interpret and apply the CHRA, attributes jurisdiction over a grievance raising stand-alone CHRA violations.

[36] In my view, the adjudicator's decision should be reviewed under the reasonableness standard of review. The adjudicator was interpreting his enabling statute over which he has considerable expertise and that militates in favour of the reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 54-57, [2008] 1 SCR 190; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 28, [2011] 1 SCR 160; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16, [2011] 3 SCR 471; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, 34, [2011] 3 SCR 654; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 49-50, [2013] 2 SCR 559).

[37] At the same time, the adjudicator was dealing with a pure question of law which required him to interpret provisions of the PSLRA that were determinative of his jurisdiction to deal with Ms. Chamberlain's grievance. These provisions, to some extent, delineated his jurisdiction over that of the Canadian Human Rights Commission (CHRC). This could militate in favour of the correctness standard of review (*Alberta Teachers' Association* at para 30).

[38] In any event, the selection of the reasonableness standard of review is not determinative because I am of the view that the adjudicator's decision stands on either standard of review. I consider that the adjudicator's interpretation of sections 208, 209 and 226 of the PSLRA contains no error.

[39] The legislative scheme adopted by Parliament in relation to the grievance processes applicable to public service employees is very specific, and it is different from those generally

seen in the private sector. Parliament chose to provide a "right to grieve" on several matters related to employment conditions to all public servants, including those not represented by a bargaining agent and not covered by a collective agreement. It is useful to cite section 208 of the PSLRA:

Right of employee
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

(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 a 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.

Limitation
(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*.

Limitation
(3) Despite subsection (2), an

Droit du fonctionnaire
208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Réserve
(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

Réserve
(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter

employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Limitation
(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Limitation
(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

Limitation
(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with

de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Réserve
(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Réserve
(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

Réserve
(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Canada.

Order to be conclusive proof
(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Force probante absolue du décret
(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada

[40] However, Parliament also chose to limit the types of grievances that employees could refer to adjudication. Section 209 of the PSLRA circumscribes and limits the types of grievances that can be referred to adjudication:

Reference to adjudication
209. (1) An employee 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;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(*c*) in the case of an employee

Renvoi d'un grief à l'arbitrage
209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique

in the core public administration,

(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or

(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

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

Designation
(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(*d*).

centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Application de l'alinéa (1)*a*)
(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)*a*), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

Désignation
(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)*d*), tout organisme distinct.

[41] Section 209 does not encompass individual grievances filed by employees who are not covered by a collective agreement and which raise stand-alone CHRA violation issues. In my view, section 209 is the only provision of the PSLRA that attributes jurisdiction to a grievance adjudicator. Section 226 does not create another category of grievances that can be referred to adjudication. Subsection 226(1) (now subsection 226(2) of the PSLRA and sections 20-23 of the PSLREBA) provides the power vested in the adjudicator regarding any matter referred to an adjudicator. The powers enumerated in subsection 226(1), among which is the power to interpret and apply the CHRA, come into play once a grievance has properly been referred to adjudication. In other words, once the adjudicator is validly seized of a grievance that has been referred to adjudication, he or she can interpret and apply the CHRA if the issues raised in the grievance involve provisions of the CHRA. Therefore, in my view, the adjudicator did not err when he concluded that he did not have jurisdiction over Ms. Chamberlain's human rights allegations, because he did not have jurisdiction over her grievance in the first place.

[42] I can only add that I agree with the distinctions that the adjudicator made with the case law referenced in *Chamberlain FC*. Moreover, in my view, the following excerpts from the adjudicator's decision offer an excellent summary of the correct interpretation of sections 209 and 226 of the PSLRA:

> 87 In other words, the condition precedent for an adjudicator to consider a remedy under subsection 226(1) of the *PSLRA* requires him or her to first conclude the matter was referred to adjudication under subsection 209(1) of the *PSLRA*.
>
> 88 In this case, the grievor referred the grievance to adjudication under paragraph 209(1)(*b*) of the *PSLRA*, which, under the circumstances of this case, was the only applicable provision of that subsection. In my preliminary decision, I determined the grievor had not established a *prima facie* case that disciplinary action had been taken by the employer against her, a

> finding determined to be reasonable by the Federal Court in *Chamberlain FC*.
>
> 89 In paragraph 76 of *Chamberlain FC*, the Federal Court refers to *Parry Sound*. This is a case in the private sector in which the Supreme Court of Canada concluded an arbitrator was correct to assume jurisdiction to consider a grievance alleging termination of a probationary employee on the basis of claims of human rights violations. The private-sector scheme was not at all the same as the adjudication scheme contemplated by the *PSLRA*. The latter clearly defines and limits the matters that can be referred to adjudication.
>
> […]
>
> 93 I am of the view subsection 226(1) of the *PSLRA* must be interpreted contextually, having regard to the particular facts of each case. An interpretation of subsection 226(1) of the *PSLRA* that would grant adjudicators the power to interpret and apply provisions of the *CHRA*, even if there is no grievance referable pursuant to subsection 209(1) of the *PSLRA*, would have the effect of barring federal employees from resorting to recourses under the *CHRA* (with the exception of pay equity issues).
>
> 94 More directly, such an interpretation would have the effect of "reading in" a basis for a referral to adjudication that is not present in subsection 209(1) of the *PSLRA*.
>
> 95 In my view, both results could not have been intended by Parliament without clear language.

[43] The only route open to Ms. Chamberlain in relation to her stand-alone alleged CHRA violations was to file a complaint before the CHRC.

[44] The type of situation in which Ms. Chamberlain found herself has since been revisited by Parliament when it adopted the *Economic Action Plan Act, No 2*, SC 2013, c 40 [Bill C-4] which received Royal Assent on December 12, 2013. Bill C-4 amended subsection 209(1) of the PSLRA by adding paragraph c.*1(c)(i)* which provides that an individual grievance related to a

discriminatory practice set out in the CHRA will be referable to adjudication. Therefore, individual grievances raising human rights issues will be referable to adjudication, and the CHRC will no longer have jurisdiction over employment-related discrimination complaints. Unfortunately, these changes cannot affect Ms. Chamberlain's situation because the new provisions are not yet in force and cannot broaden the adjudicator's jurisdiction over her human rights allegations.

[45] For all these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in the amount of $250 in favour of the respondent.

"Marie-Josée Bédard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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