Date: 20080812

Docket: T-2029-06

Citation: 2008 FC 942

Ottawa, Ontario, August 12, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANNA CHOW

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Ms. Anna Chow (the "Applicant") seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, F-7, of the decision of Adjudicator Dan Butler (the "Adjudicator") made on October 13, 2006. In that decision, the Adjudicator dismissed the grievances submitted by the Applicant pursuant to the *Public Service Staff Relations Act*, R.S.C. 1985, c. P- 35 (the "former Act") as repealed by the *Public Service Modernization Act*, S.C. 2003, c.22 section 285. The Adjudicator found that the grievances related to human rights issues and that an alternate administrative process for redress was available to the Applicant,

pursuant to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "CHRA"); accordingly in these circumstances he lacked jurisdiction to adjudicate the grievances at issue.

II. Background

[2] The factual background is taken from the exhibits attached to the affidavits of Sandy Donaldson and Drew Heavens, filed on behalf of the Applicant and the Respondent, respectively.

[3] The Applicant began employment with Statistics Canada (the "Employer") in February 1997, initially in a term position. In February 1998, she won a competition for a permanent position. In October 1999, she took sick leave to care for her mother. In May 2000, one month after the death of her mother, the Applicant applied for disability benefits. Letters were provided to the Employer by the Applicant's attending psychologist in March, August and October 2000 concerning her inability to return to work at those times. Medical reports were also provided in January and July 2001 by her attending physician.

[4] By June 2001, the Employer required the Applicant to undergo a health assessment to be conducted by Health Canada. Although the Applicant attended an appointment on July 6, 2001, she did not sign the document that would authorize the release of information to the Employer. That history was set out in a letter dated July 11, 2001 from Dr. J. Lloyd-Jones, Medical Officer with Occupational Health and Safety Agency ("OHSA") to Ms. Johanne Grégoire, Human Resources Operations Division with the Employer.

[5] By letter dated July 12, 2001, the Employer provided the Applicant with an explanation for the Health Canada Assessment, as follows:

> As part of this effort Johanne Grégoire had arranged an appointment with Health Canada. You attended the appointment but failed to sign the release forms. As a result the assessment was not completed. In many of our conversations and in discussion with Mel Jones it was made clear that completing the assessment was a condition for your returning to work at Statistics Canada in any capacity. You had requested an assignment be found outside of O.I.D., preferably outside of Statistics Canada because of stress related reasons. [Emphasis added].
>
> The purpose of the Health Canada Assessment is to determine whether or not you are ready to return to work and to specify what restrictions if any must be respected should you return to work. Our first and foremost concern is your wellness. We view the assessment as the first step in helping you access the resources that will enable you to begin on your career path again. Please be assured that the information obtained by Health Canada is kept strictly confidential. Statistics Canada while being the sponsoring department for the assessment is only entitled to know whether or not you are able to return to work and if there are restrictions that must be respected. Any additional information obtained during the assessment is for your benefit alone. [Emphasis added].

[6] By a further letter dated July 31, 2001, the Employer restated its reasons for requesting the Health Canada Assessment, as follows:

> Again, the purpose of the Health Canada Assessment is to determine whether or not you are ready to return to work and to specify what restrictions if any must be respected should you return to work. Our first and foremost concern is your wellness. We view the assessment as the first step in helping you access the resources that will enable you to begin on your career path again. Please be assured that the information obtained by Health Canada is kept strictly confidential. Statistics Canada while being the sponsoring department for the assessment is only entitled to know whether or not you are able to return to work and if there are

> restrictions that must be respected. Any additional information obtained during the assessment is for your benefit alone.

[7] The Applicant's family physician prepared a brief report dated August 5, 2001, addressed "To whom it may concern", advising that the Applicant has been fit for work since November 2000 and continued to be fit from that time up to the present.

[8] By letter dated October 22, 2001, the Employer again advised the Applicant that an assessment from OHSA was required in order to resolve her employment situation. A further appointment had been arranged in that regard for November 5, 2001. It appears from a letter dated November 1, 2001 from the Employer that the Applicant sought legal advice and the appointment was rescheduled for November 19, 2001.

[9] In the meantime, by letter dated November 9, 2001, the Applicant's family physician again reported that the Applicant had been fit for work since November 2000. Dr. Geller stated the Applicant's leave of absence from January to May 2001 was for reasons other than those requiring the Applicant's extended leave of absence from October 1999 to October 2000. According to Dr. Geller, the Applicant was on leave in 2001 for dental treatment outside Canada.

[10] Dr. Geller effectively repeated this position in a further letter to the Employer, dated November 26, 2001.

[11] By letter dated November 21, 2001, Dr. L. Taras of OHSA wrote to Ms. Lorraine Lys, Chief, Staff Relations with the Employer. Dr. Taras advised that the Applicant had attended on November 19, but the assessment had not been completed.

[12] By letter dated December 3, 2001, Ms. Lys replied to Dr. Taras. In her letter, Ms. Lys provided details of the Employer's concerns about the Applicant's difficulties on the job. Ms. Lys stated that an earlier application for disability benefits had been denied and that the Applicant did not follow the appeal process in that regard. She asked for an opinion as to the Applicant's fitness to return to work and if future long periods of leave could be anticipated.

[13] By letter dated April 29, 2002, Mr. Richard Barnabé, Assistant Chief Statistician with the Employer, wrote to the Applicant about the outstanding request that she undergo a fitness to work evaluation by Health Canada. In this letter, Mr. Barnabé stated that "[f]ailure to comply with this request and to undergo the medical evaluation will result in management taking action to terminate your employment with Statistics Canada".

[14] The Applicant replied by letter dated May 7, 2002. She objected to what she described as "coercive" actions by the Employer with respect to the fitness to work evaluation. She indicated that she had consented to have the evaluation carried out by OHSA but that she could not say that her consent was voluntarily given. She had signed the consent form but then amended it to show that her consent was given "involuntarily". This form was submitted to OHSA but, by

letter dated May 9, 2002, Dr. Taras advised Ms. Lys that the evaluation could not proceed in the absence of voluntary consent by the Applicant.

[15] By letter dated May 22, 2002, the Applicant was informed that her employment was terminated as of May 24, 2002, due to her lack of co-operation in the efforts made to address the lengthy absences from work, including participation in a Health Canada assessment. The Applicant was advised of her right to grieve the decision to terminate her employment.

[16] According to the Adjudicator's decision, the Applicant had filed a number of grievances relative to her employment prior to her termination in May 2002. On April 11, 2002, she received a final level reply from the Employer to 84 grievances that she had filed. On May 3, 2002, the Applicant referred 84 grievances to adjudication under the former Act. Ultimately, only four of these grievances were consolidated by the Public Service Staff Relations Board (the "former Board") under file number 166-02-313131.

[17] On August 23, 2002, the former Board advised that a hearing in this file was scheduled for October 15, 2002. By letter dated August 30, 2002, the Applicant requested that the hearing be held in abeyance pending a hearing before the Canadian Human Rights Commission ("CHRC") relative to a complaint that she had filed pursuant to the CHRA. The Employer did not oppose that request and the former Board granted the postponement.

[18] On August 6, 2002, the Applicant referred further grievances. These grievances were not processed since incomplete information had been submitted.

[19] On December 19, 2002, the Applicant referred 33 grievances to adjudication. The Employer had given its final level reply to these grievances, as well as 13 others, on August 1, 2002.

[20] On July 25, 2003, the former Board replied to an inquiry from the Applicant concerning the status of the grievances that had been referred to adjudication in December 2002. The former Board advised that files had been opened for 16 of the grievances that had been referred for adjudication on December 19, 2002. The former Board returned 17 grievances since they appeared to be outside the jurisdiction of an adjudicator pursuant to subparagraphs 92(10)(b)(i) and (ii) of the former Act. The former Board consolidated the remaining grievances as three files as follows:

i) File No. 166-02-32584, termination of employment, being grievances 94, 95, 96, 97, 98, 120, 121 122, 123, 124, 125, 126 and 127;

ii) File No. 166-02-32585, suspension, being grievance 103; and

iii) File No. 166-02-32586, financial penalty, being grievances 106 and 107.

[21] On August 6, 2003, the Employer advised the former Board that it was challenging the jurisdiction of an adjudicator to hear Files No. 166-02-32584 to 32586 on the basis that these matters were not referred to the former Board within the time limit under the *P.S.S.R.B. Regulations and Rules of Procedure*, 1993, SOR/93-348 (the “former Regulations”). On August

11, 2003, the Applicant requested that these Files be held in abeyance until the CHRC had disposed of her complaint.

[22] By letter dated December 4, 2003, the CHRC advised that it would investigate the Applicant's complaint under the CHRA.

[23] The investigator appointed to investigate the Applicant's complaint pursuant to the CHRA completed his Report on March 18, 2004, and recommended that the Applicant's complaint be dismissed as follows:

> It is recommended, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint because:
> - the investigation found no evidence that the respondent treated the complaint in an adverse differential manner because of her perceived disability;
> - the evidence shows that the respondent attempted to assist the complainant in her effort to obtain long-term disability benefits and,
> - the evidence shows that the respondent terminated the complainant's employment because she refused to undergo a fitness to work assessment by Health Canada.

[24] In the meantime, by written submissions dated March 31, 2004, the Employer objected to the jurisdiction of an adjudicator to hear all of the references to adjudication on three grounds. First, the Employer argued that all the grievances were inextricably linked to the allegations of discrimination set out in the Applicant's human rights complaint. In these circumstances, they fell outside the jurisdiction of an adjudicator under section 92 of the former Act unless the CHRC decided that the Applicant ought to exhaust the grievance process, pursuant to the CHRA.

[25] Second, the Employer argued that with respect to the alleged suspension and financial penalties raised in Files No. 166-02-31313, 32585 and 32586, that no discipline took place and there was no evidence that any of the grievances alleged a breach of the collective agreement. As a result, the grievances do not meet the requirements of section 92 of the former Act.

[26] Finally, with respect to Files No. 166-02-32584 to 32586, the Employer argued that the Applicant had filed her grievances beyond the time prescribed by the former Regulations.

[27] By letter dated October 6, 2004, the CHRC dismissed the Applicant's complaint for the following reasons:

> Before rendering their decision, the members of the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(b) of the *Canadian Rights Act*, to dismiss the complaint because:
>
> · *the investigation found no evidence that the respondent treated the complainant in an adverse differential manner because of her perceived disability;*
> · *the evidence shows that the respondent attempted to assist the complainant in her effort to obtain long-term disability benefits; and*
> · *the evidence shows that the respondent terminated the complainant's employment because she refused to undergo a fitness to work assessment by Health Canada*.

[28] The Applicant sought judicial review of the decision of the CHRC in case number T-1993-04. By Order dated January 5, 2006, the Applicant's application for judicial review was struck without leave to amend pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules"),

on the grounds that the Applicant had failed to respect certain time-lines that had been established by the Court. Her application for judicial review was not adjudicated upon its merits.

[29] The matter came on for hearing before the Adjudicator on February 20 and 21 and April 10, 2006. Written submissions dated June 28, July 5, 11 and 26, and August 25, 2006, were also presented. In his decision dated October 13, 2006, the Adjudicator reviewed the arguments that were made by the Applicant and the Employer.

[30] First, the Adjudicator addressed the Applicant's arguments as to the timeliness and admissibility of the Employer's jurisdictional arguments. He concluded that neither objection was established. The Applicant was the one who sought an adjournment of the adjudication process in order to obtain a decision relative to the complaint that she had filed with CHRC. The Employer was not untimely in raising the jurisdictional objection. The Applicant was not prejudiced by the timing of the Employer's objections or by the substance of that objection.

[31] The Adjudicator rejected the Applicant's arguments that the Employer was foreclosed from raising the jurisdictional objection because it had not done so at the beginning of the hearing. The Adjudicator found that the objection had been raised before the former Board and in a timely manner.

[32] The Adjudicator accepted the submissions of the Employer that the Applicant's grievances were beyond the jurisdiction of an adjudicator because those grievances were

essentially human rights issues that had been the subject of a process before the CHRC and that that tribunal had not required, pursuant to its statutory authority in that regard, that the Applicant exhaust the grievance process. The Adjudicator, in paragraphs 91 to 93 of his reasons, addressed this mandate as follows:

> ¶91 Paragraphs 41(1)(*a*) and 44(2)(*a*) of the *CHRA* describe circumstances under which the CHRC may decide not to deal with a complaint because there are "… grievance or review procedures otherwise reasonably available …" These paragraphs read as follows:
>
> > 41. *(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that*
> >
> > (a) *the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;*
> >
> > . . .
> >
> > 44. *(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied*
> >
> > *(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available …*
> >
> > *it shall refer the complainant to the appropriate authority.*
>
> Where an employee of the Public Service alleges discrimination, she or he may file a grievance with her or his employer, which constitutes the "appropriate authority" mentioned in subsection 44(2) of the *CHRA*.
>
> ¶92 In the cases before me it is uncontested that the CHRC did not refer the grievor to the grievance process pursuant to either paragraphs 41(*a*) or 44(2)(*a*) of the *CHRA*.

> ¶93 The grievor notes that, although the CHRC dismissed her complaint on the basis of paragraph 44(3)(*b*) of the *CHRA*, it did not mention on which ground her complaint was dismissed. The significance of this distinction to the grievor's argument is not entirely clear. I do note, however, that there is, at minimum, no indiction in the CHRC's decision that it found that the complaint was beyond its jurisdiction.

III. Submissions

A. *The Applicant's Submissions*

[33] The Applicant submits that the Adjudicator committed a reviewable error by ignoring the pith and substance of her grievances, specifically the reason given by the Employer for her termination. She submits that as an indeterminate employee she could only be discharged pursuant to the authority of paragraph 11(2)(f) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (now repealed). She argues that the decision of the Adjudicator does not mention the Employer's termination letter which indicates that she was being discharged for having refused to see a doctor chosen by the Employer. She alleges that the Adjudicator's failure to mention the reasons for her termination is an error of law arising from a failure to consider relevant evidence.

[34] The Applicant relies on the decision in *Canada (Attorney General) v. Grover*, [2007] F.C.J. No. 58 where the employer required the employee to see a doctor not of his choosing. The employee considered most of the employer's conduct as motivated by discrimination. Upon engaging the grievance process, the adjudicator found that the pith and substance of the case dealt with a labour and employment issue and was amenable to the grievance procedure under the former Act.

[35] The Applicant also argues that she followed the directions given by the Federal Court of Appeal in *Boutilier v. Canada (Treasury Board)*, [2000] 3 F.C. 27 when she decided to proceed with a complaint before the CHRC. The Federal Court of Appeal decided that employees with human rights disputes should pursue complaints before the CHRC. Here, the Applicant followed that process but the CHRC did not exercise its discretion to refer her complaint for adjudication under the former Act.

[36] The Applicant says that the CHRC dismissed her complaint because it was a labour and employment issue. She argues that the Adjudicator, in dismissing the view of the CHRC in this regard as "irrelevant", committed a reviewable error. In *Boutilier*, the Federal Court of Appeal determined that only the CHRC has discretion to refer a matter back to the former Board pursuant to paragraph 41(1)(a). The Applicant says it is contrary to the statutory scheme of the CHRA to disregard the opinion of the CHRC in dismissing her complaint. She says that the CHRC was making similar findings under section 44 that it could have made pursuant to section 41.

[37] Alternatively, the Applicant argues that the Adjudicator's decision fails to withstand review upon the standard of reasonableness *simpliciter* and should be quashed.

[38] The Respondent submits that the Adjudicator's decision should be reviewed upon the standard of reasonableness *simpliciter* , relying upon the decision of the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

[39] The Respondent argues that having regard to the statutory framework of the former Act an adjudicator does not have jurisdiction over a grievance where the subject matter is a human rights issue. The process under the CHRA has been recognized to be an administrative procedure for which redress is provided in or under an Act of Parliament for the purpose of subsection 91(1) of the former Act. In that regard, the Respondent relies upon the decisions in *Chopra v. Canada (Treasury Board)*, [1995] 3 F.C. 445 and *Boutilier*.

[40] The Respondent further submits that the Adjudicator's view about the weight of the CHRC's conclusions as to the reason for the Applicant's termination must be viewed in context. According to the Respondent, the Adjudicator was simply saying that the opinion of the CHRC on the merits of the case would not be determinative for the purpose of establishing jurisdiction for adjudication purposes. At paragraphs 99 and 100 of his reasons, the Adjudicator said the following:

> ¶99 Elsewhere, there are cross-currents in what the grievor argues. In addition to questioning whether the CHRC's investigator "… exceeded his jurisdiction …", the grievor also reacted to the investigator's conclusion by stating: "With respect, this conclusion does not depend on the CHRC's jurisdiction but rather from [*sic*] the arbitration tribunal's …" If the grievor is saying here that the task of determining whether a disciplinary termination of employment has occurred falls within the expertise of an adjudicator operating under the former *Act*, rather than that of the CHRC, then I would strongly endorse the statement. Any CHRC conclusion as to the reasons for a termination of employment, beyond determining whether there has been a violation of the *CHRA*, cannot be taken as conclusive or even probative for adjudication purposes. The expertise for this finding likes with an adjudicator. This finding would be based on sworn evidence and the evidence presented at the adjudication hearing – which could differ from the information gathered by the CHRC's

> investigator – and the other party would have had an opportunity to challenge it.
>
> ¶100 Given these observations, I give not weight to the CHRC's conclusion on the reasons for the grievor's termination of employment. I also find that the CHRC's decision not to refer the grievor to the grievance process does not dispose of the jurisdictional issue before me. None of this means, however, that the CHRC's investigation and decision are irrelevant.

[41] Finally, the Respondent argues that the Adjudicator committed no error in assessing the pith and substance of the Applicant's grievances. Although none of the grievances expressly mentioned human rights issues, the Adjudicator carefully analyzed the grievances, comparing them with the wording of her complaints to the CHRC. He correctly identified the basic substance of the grievances and reasonably concluded that the substance of the grievances was the same as the substance of the complaints to the CHRC.

[42] The Respondent notes that the decision in *Grover* is not helpful to the Applicant. In each case, the issue of jurisdiction is to be decided on the basis of the evidence. In this case, the task for the Adjudicator was to identify the pith and substance of the grievances. Here, the Adjudicator correctly, or at least reasonably, determined that the pith and substance of the grievances was the same as that of the complaint to the CHRC.

IV. Discussion and Disposition

[43] The first matter to be addressed is the applicable standard of review. The Applicant argues that the Adjudicator's decision should be reviewed on the standard of correctness on the

ground that the Adjudicator committed errors of law. The Respondent submits that the applicable standard of review is reasonableness *simpliciter*, if not reasonableness.

[44] In its recent decision in *Dunsmuir v. New Brunswick*, 2008 SC 9, the Supreme Court of Canada said that there are but two standards of review, that is the standards of correctness and reasonableness. At paragraph 47, Justice Bastarache and Justice Lebel said the following:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[45] At paragraph 50, Justices Bastarache and Lebel said that the "standard of correctness must be maintained in respect of jurisdictional and some other questions of law." At paragraph 54, they commented on the need for deference when the decision of a specialized tribunal is at issue, as follows:

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto*

> *(City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. …

[46] In the present case, the decision at issue was made by an experienced tribunal in the context of labour law. Before the decision in *Dunsmuir*, the standard of patent unreasonableness was applied to decisions of adjudicators with respect to their decisions about jurisdiction. In that regard, I refer to the decision by the Federal Court of Appeal in *Barry v. Canada (Treasury Board)* (1997), 221 N.R. 237 (F.C.A.) where the Court said the following at page 239:

> It is true that prior to the repeal of the privative clause, that Court had held in *Canada (Attorney General) v. PSAC*, [1993] 1 S.C.R. 941… that the appropriate standard of review for decisions of an adjudicator acting under the Act was whether the decision was "patently unreasonable." In our view, nothing has changed by virtue of the repeal of the privative clause.

[47] In my opinion, having regard to the decision in *Dunsmuir* and the earlier jurisprudence relative to judicial review of an adjudicator's decision, the appropriate standard of review here is reasonableness. The Adjudicator was not dealing with a question of law in making a decision on his jurisdiction to adjudicate the Applicant's grievances.

[48] As mentioned earlier, the Applicant filed her initial grievance in 2002. The Adjudicator issued his decision on October 13, 2006. Pursuant to section 285 of the *Public Service Modernization Act*, the former Act was repealed. The transitional provisions of the *Public*

Service Modernization Act provide that grievances that were not formally disposed of prior to the coming into force of certain provisions of the new statute shall be subject to the former Act. In this connection, I refer to the *Public Service Modernization Act*, Part V, section 61, which reads as follows:

61. (1) Subject to subsection (5), every grievance presented in accordance with the former Act that was not finally dealt with before the day on which section 208 of the new Act comes into force is to be dealt with on and after that day in accordance with the provisions of the former Act, as they read immediately before that day.	61. (1) Sous réserve du paragraphe (5), il est statué conformément à l'ancienne loi, dans sa version antérieure à la date d'entrée en vigueur de l'article 208 de la nouvelle loi, sur les griefs présentés sous le régime de l'ancienne loi s'ils n'ont pas encore fait l'objet d'une décision définitive à cette date.
(2) For the purposes of subsection (1), an adjudicator under the former Act may continue to hear, consider or decide any grievance referred to him or her before the day on which section 209 of the new Act comes into force, except that if the adjudicator was a member of the former Board, he or she may do so only if requested to do so by the Chairperson.	(2) Pour l'application du paragraphe (1), l'arbitre de grief choisi sous le régime de l'ancienne loi et saisi d'un grief avant l'entrée en vigueur de l'article 209 de la nouvelle loi, peut continuer l'instruction de celui-ci. Si l'arbitre est un membre de l'ancienne Commission, il ne peut continuer l'instruction du grief que si le président le lui demandé.
(3) The Chairperson has supervision over and direction of the work of any member of the former Board who continues to hear, consider or decide a grievance under subsection	(3) Le membre de l'ancienne Commission qui continue l'instruction d'un grief au titre du paragraphe (2) agit sous l'autorité du président.

(2).

(4) If an adjudicator under the former Act refuses to continue to hear, consider or decide a grievance referred to in subsection (2), the Chairperson may, on any terms and conditions that the Chairperson may specify for the protection and preservation of the rights and interests of the parties, refer the grievance to a member of the new Board.	(4) En cas de refus d'un arbitre de grief de continuer l'instruction d'un grief au titre du paragraphe (2), le président peut renvoyer le grief à un membre de la nouvelle Commission selon les modalités et aux conditions qu'il fixe dans l'intérêt des parties.
(5) If a grievance referred to in subsection (1) is referred to adjudication after the day on which section 209 of the new Act comes into force, the provisions of the new Act apply with respect to the appointment of the adjudicator.	(5) Si le grief visé au paragraphe (1) est renvoyé à l'arbitrage après la date d'entrée en vigueur de l'article 209 de la nouvelle loi, l'arbitre de grief qui en est saisi est choisi conformément à la nouvelle loi.
(6) For the purposes of subsections (2) and (5), the adjudicator may exercise any of the powers an adjudicator under the former Act could have exercised under that Act.	(6) Pour l'application des paragraphes (2) et (5), l'arbitre de grief jouit des pouvoirs dont disposait un arbitre de grief sous le régime de l'ancienne loi.

[49] The Adjudicator's principal task was to address the jurisdictional objection raised by the Respondent. Section 91 and 92 of the former Act are relevant in that regard, in particular the following provisions:

91. (1) Where any employee feels aggrieved	91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award, or

(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

…

R.S., c. P-35, s. 90.

Adjudication of Grievances

Reference to Adjudication

Reference of grievance to

réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :

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

(i) soit d'une disposition législative, d'un règlement -- administratif ou autre --, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,

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

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas a)(i) ou (ii) et portant atteinte à ses conditions d'emploi.

…

S.R., ch. P-35, art. 90.

Arbitrage des griefs

Renvoi à l'arbitrage

Renvoi d'un grief à l'arbitrage

92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à

adjudication
92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.
…

l'arbitrage tout grief portant sur :

a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;

b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la Loi sur la gestion des finances publiques;

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

…

[50] At paragraph 103 of his decision, the Adjudicator stated the issue in the following terms:

> ¶ 103 All of this reinforces the need for an adjudicator to examine grievances independently and carefully for an indication that human rights issues are the subject matter – the central question in the logic of *Boutilier* for determining whether there exists another " … administrative procedure for redress …" within the meaning of subsection 91(1) of the former *Act*. The Board articulated in *Kehoe v. Treasury Board* (*Human Resources Development Canada*), 2001 PSSRB 9 at ¶ 20, the important refinement that the subsection 91(1) bar applies where the human rights issues form the " … very pith and substance …" of the grievance rather than being " … merely accessory …" thereto. The question here, then, is the following: does an examination of the grievances and of the records before me show that the matters pursued by the grievor focus on issues or actions that at their essence – in their "pith and substance" – involve human rights issues? Or, to use the words of *Cherrier*, at ¶ 47, does a "… human rights element [lie] at the heart of the grievance …"?

[51] In *Boutilier*, at paragraph 17, the Federal Court of Appeal dismissed the applicants' appeals and adopted the following from the trial judgment:

> … where the operation of a limitation contained in either subsection 91(1) or (2) deprives an employee of his qualified right to present the grievance, the employee cannot subsequently purport to refer the grievance to adjudication under subsection 92(1). In the event that an employee purports to refer such a grievance to adjudication, the adjudicator has not jurisdiction to entertain it.
>
> Parliament chose, by virtue of subsection 91(1) of the Public Service Staff Relations Act, to deprive an aggrieved employee of the qualified right to present a grievance in circumstances where another statutory administrative procedure for redress exists. Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the Canadian Human Rights Act apply and govern the procedure to be followed. In such circumstances, the aggrieved employee must therefore file a complaint with the Commission. The matter may only proceed as a grievance under the provisions of the Public Service Staff Relations Act in the event that the Commission

> determines, in the exercise of its discretion under paragraphs 41(1)(a) or 44(2)(a) of the Canadian Human Rights Act, that the grievance procedure ought to be exhausted.

[52] The Court noted, at paragraph 23 that:

> [i]f another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance."

[53] The Adjudicator addressed his mind to the issue of jurisdiction that had been legitimately raised by the Employer. He determined that the pith and substance of the Applicant's complaint was a human rights issue wherein she had elected to present to the CHRC.

[54] The Adjudicator based his decision on the jurisdictional issue on the ground that the facts giving rise to the Applicant's grievance were the same ones relied upon by her in filing her complaint before the CHRC. That body investigated the complaint and determined that there was insufficient evidence to support a recommendation that the complaint proceed to a full inquiry before the Canadian Human Rights Tribunal.

[55] Having regard to the evidence submitted to the Adjudicator, including the Applicant's complaint to the CHRC dated May 8, 2003 and her letter dated August 30, 2002 to the former Board, requesting that her grievance be held in abeyance pending completion of the proceedings before the CHRC, the Adjudicator's decision that he lacked jurisdiction was a reasonable one.

[56] It was open to the CHRC, in making its decision upon the Applicant's complaint, to direct that a complainant pursue a "grievance or review procedure otherwise reasonably available", pursuant to paragraph 44(2)(a) of the CHRA. That discretionary power was not exercised by the CHRC. The decision of the Commission in that regard is not the subject of the within proceeding. The adequacy of the alternate redress process, that is the recourse to the complaint process under the CHRA, is not the determinative question; it is the availability of this alternate process that is to be considered.

[57] In the result I am satisfied that the Adjudicator's decision meets the standard of reasonableness and there is no basis for judicial intervention. The application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that: The application for judicial review is dismissed with costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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