Federal Court  Cour fédérale

Date: 20091216

Docket: T-1733-08

Citation: 2009 FC 1273

Ottawa, Ontario, December 16, 2009

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

CHARLOTTE RHÉAUME

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Charlotte Rhéaume (the applicant) seeks judicial review of a decision of Renaud Paquet, an adjudicator appointed by the Public Service Labour Relations Board, dated October 6, 2008, wherein the adjudicator dismissed the grievance filed by the applicant on January 21, 2002, since he was without jurisdiction under section 92 of the former *Public Service Staff Relations Act*, R.S.C. (1985), c. P-35.

[2] If the Court finds that the adjudicator did not have jurisdiction to hear the applicant's grievance under section 92 of the former *Public Service Staff Relations Act*, the applicant, in the alternative, seeks judicial review of the final decision of her employer, the Canada Customs and Revenue Agency, on her grievance, dated February 2, 2004, and, consequently, an extension of time.

Relevant facts

[3] The applicant works for the Canada Customs and Revenue Agency (the Agency). She was based in Montréal and performed tasks in connection with the administration and interpretation of the Goods and Services Tax (GST) and some aspects relating to excise taxes. For this, she held a position classified as PM-2. As the result of an administrative reorganization, the applicant's tasks were assigned to other administrative units and centres.

[4] In late October 2001, the Agency assigned the applicant new tasks as an office review officer, also a PM-2 position but involving work that was very different from what the applicant was doing before. Considering the applicant's little experience in these new tasks, the Agency temporarily assigned her PM-1 level tasks under what the Agency described as a [TRANSLATION] "planned training plan" so that the applicant would be [TRANSLATION] "qualified to perform PM-2 functions within a reasonable lapse of time" (Exhibit D-4 of the applicant's affidavit, Applicant's Record, at page 63).

[5] The applicant felt aggrieved by these assignments and, with the support of her union, the Public Service Alliance of Canada, filed a grievance on January 21, 2002. This grievance bore number 2002-1208-33498 at first, but was subsequently dealt with under number 2002-1208-34825 (the grievance). The grievance was several pages long, but the most relevant elements are the following (Exhibit D-1 of the applicant's affidavit, Applicant's Record, at pages 52 and 53):

> [TRANSLATION]
>
> I believe that the employer:
> - has transferred me prematurely;
> - has violated the *Employment Equity Act*;
> - is limiting my opportunities for advancement by ignoring my qualifications, experience and interests;
> - is not providing me with access to relevant and necessary training;
> - is assigning me non-professional tasks at the lower level of PM-01 and is violating my dignity;
> - is tarnishing my professional image;
> - is limiting access to assignments in the scientific field, for which I have a master's degree and experience;
> - is contravening section 11 of the Canadian Charter and the *Employment Equity Act* and its related regulations;
> - has violated the *Public Service Employment Act* and *Regulations*; and
> - has failed to comply with the *Canada Customs and Revenue Agency Act*.
>
> Corrective measures requested
>
> That the employer assign me work appropriate for my group and level and not at the lower PM-01 level;
>
> Considering that the employer has temporarily assigned me to a position in Income Tax, that the employer immediately give me adequate technical training so that I can be comfortable in this new sector, perform my work professionally and understand the context of my work and its implications until I obtain a specialized position meeting my qualifications and interests;

> That the employer respect the Charter, the *Public Service Employment Act* and *Regulations* , the *Canada Customs and Revenue Agency Act* and the Equity Act by retroactively applying to November 1, 1999, the Work Force Adjustment Policy/Directive and correct my present level;
>
> That the employer allow me priority access to positions employment in the scientific field, on an indeterminate basis or for assignments;
>
> Should the employer fail to apply the Work Force Adjustment Policy/Directive, that the employer repatriate my GST tasks to Montréal;
>
> That the employer reinstate me, in priority to all other persons, in a position in the public service at my position level.

[6] This grievance unsuccessfully went through the various levels of the grievance process to be finally dismissed at the final level on February 2, 2004, in a decision of the Assistant Commissioner of the Agency's Human Resources Branch, for the following reasons (Applicant's Record, at pages 66 and 67):

> [TRANSLATION]
>
> . . .
>
> Concerning the retroactive application of the Work Force Adjustment Appendix (WAA) to November 1, 1999, I must advise you that I consider your grievance to be out of time. In fact, under your collective agreement, your grievance cannot concern situations that happened more than 25 days before you filed the grievance. For this reason, your grievance is dismissed on this point.
>
> I have nevertheless studied your file. I consider that management did not have to apply the Work Force Adjustment Appendix in 1999 because at that time you still had to perform tasks that were related to your duties. I also consider that management acted correctly in October 2001 by notifying you that your workload had

> become clearly insufficient to warrant preserving your position and by offering you two permanent transfers, which you refused. Finally, I am of the opinion that management properly complied with the Work Force Adjustment Appendix by determining that you were surplus in 2002 and by offering you a guarantee of a reasonable job offer. If your grievance had been filed within the time limits, it would also have been dismissed for the reasons mentioned above.
>
> As far as your request for training and your dissatisfaction with your tasks are concerned, your union representative acknowledged that this grievance had become moot because, since your grievance in January 2002, you were given a training plan and you are now performing PM-2 tasks. I am therefore informing you that your grievance is dismissed.

[7] The union refused to refer the grievance to adjudication before the Public Service Labour Relations Board. The applicant did not file a complaint against or seek a remedy from her union for refusing to refer the grievance to adjudication.

[8] Despite the union's refusal, the applicant decided to refer the grievance to adjudication herself, without her union's support or consent . She referred three grievances to adjudication:

a. The first reference to adjudication, dated March 16, 2004, was made under subparagraph 92(1)(*b*)(ii) of the former *Public Service Staff Relations Act*. It should be noted that the numbering of the English and French versions of paragraph 92(1)(*b*) of this Act does not match, since the English version is divided into subparagraphs (i) and (ii), which are not in the French version; however, the legal scope of both versions is identical. The applicant made the following handwritten note on the referral form: [TRANSLATION] "constructive

dismissal, demotion and workforce adjustment" (Exhibit D-7 of the applicant's affidavit, Applicant's Record, at pages 92 and 93).

b. The second reference to adjudication, also dated March 16, 2004, was made under paragraph 92(1)(*c*) of the former *Public Service Staff Relations Act*. The applicant made the following handwritten note on the referral form: [TRANSLATION] "and workforce adjustment" (Exhibit D-7 of the applicant's affidavit, Applicant's Record, pages 95 and 96).

c. The third reference to adjudication, dated March 23, 2004, was made under section 99 of the former *Public Service Staff Relations Act* (Exhibit D-7 of the applicant's affidavit, Applicant's Record, at pages 98 and 99).

[9] On October 25, 2004, the Agency made a preliminary objection to the references to adjudication and to the adjudicator's jurisdiction. The applicant requested and obtained two postponements of the hearing before the adjudicator at which the preliminary objection was to be disposed of. A hearing was finally held on this issue, and the adjudicator's decision dated October 6, 2008, allowed the Agency's objections and dismissed the grievance for lack of jurisdiction.

Relevant legislation

[10] The new *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, came into force on April 1, 2005. The new Act replaced the former *Public Service Staff Relations Act*, R.S.C. 1985,

c. P-35, subject to the transitional provisions in the *Public Service Modernization Act*, S.C. 2003,

c. 22. Among other things, these transitional provisions provided the following:

57. (1) The following rules apply to requests for arbitration made before the day on which section 136 of the new Act comes into force and for which no arbitral award had been made before that day:	57. (1) Les règles ci-après s'appliquent aux demandes d'arbitrage présentées avant la date d'entrée en vigueur de l'article 136 de la nouvelle loi et qui n'ont fait l'objet d'aucune décision arbitrale :
(*a*) if no arbitration board had been established or arbitrator appointed before that day, the request is to be dealt with as though it had been made under section 136 of the new Act;	*a*) si aucun conseil d'arbitrage n'a été créé ni aucun arbitre nommé avant cette date, il est décidé de la demande comme si elle avait été présentée en vertu de cet article;
(*b*) if an arbitrator had been appointed before that day, the arbitrator is deemed to be an arbitration board consisting of a single member established under section 139 of the new Act and the arbitration is to continue in accordance with Division 9 of Part 1 of the new Act; and	*b*) si un arbitre a été nommé avant cette date, celui-ci est réputé être un conseil d'arbitrage à membre unique créé aux termes de l'article 139 de la nouvelle loi et il est décidé de la demande conformément à la section 9 de la partie 1 de cette loi;
(*c*) if an arbitration board had been established before that day, the arbitration board is deemed to be an arbitration board consisting of three members established under section 140 of the new Act and the arbitration is to continue in accordance with Division 9 of Part 1 of the new Act.	*c*) si un conseil d'arbitrage a été créé avant cette date, celui-ci est réputé être un conseil d'arbitrage de trois membres créé aux termes de l'article 140 de la nouvelle loi et il est décidé de la demande conformément à la section 9 de la partie 1 de cette loi.
(2) For greater certainty, an arbitral award may be made under subsection (1) only in respect of a term or condition of employment that could have been embodied in an arbitral award made under the former Act as it read immediately before the day on which section 140 of the new Act comes into force.	(2) Il est entendu que la décision arbitrale rendue au titre du paragraphe (1) ne peut porter que sur une condition d'emploi susceptible d'être incluse dans une décision arbitrale rendue au titre de l'ancienne loi, dans sa version antérieure à la date d'entrée en vigueur de l'article 140 de la nouvelle loi.
. . .	[...]
	61. (1) Sous réserve du paragraphe (5), il

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.	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.

[11] The relevant provisions of the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, as amended, are the following:

91. (1) Where any employee feels aggrieved	91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de 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*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(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	(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) a provision of a collective agreement or an arbitral award, or	(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;
(*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),	*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.
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.

(2) An employee is not entitled to present any 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, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

. . .

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

(2) Le fonctionnaire n'est pas admis à présenter un grief portant sur une mesure prise en vertu d'une directive, d'une instruction ou d'un règlement conforme à l'article 113. Par ailleurs, il ne peut déposer de grief touchant à l'interprétation ou à l'application à son égard d'une 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.

[...]

92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à 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*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a financial penalty,

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

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.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(*a*), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

(2) Pour pouvoir renvoyer à l'arbitrage un grief du type visé à l'alinéa (1)*a*), le fonctionnaire doit obtenir, dans les formes réglementaires, l'approbation de son agent négociateur et son acceptation de le représenter dans la procédure d'arbitrage.

(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the *Public Service Employment Act*.

(3) Le paragraphe (1) n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief portant sur le licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*.

(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(*b*) any portion of the public service of Canada specified in Part II of Schedule I.

(4) Le gouverneur en conseil peut, par décret, désigner, pour l'application de l'alinéa (1)*b*), tout secteur de l'administration publique fédérale spécifié à la partie II de l'annexe I.

99. (1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement

99. (1) L'employeur et l'agent négociateur qui ont signé une convention collective ou sont liés par une décision arbitrale peuvent, dans les cas où l'un ou l'autre cherche à faire exécuter une obligation qui, selon lui, découlerait de cette convention ou décision, renvoyer l'affaire à la Commission, dans les

of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.	formes réglementaires, sauf s'il s'agit d'une obligation dont l'exécution peut faire l'objet d'un grief de la part d'un fonctionnaire de l'unité de négociation visée par la convention ou la décision.
(1.1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies, the bargaining agent may, in the prescribed manner and with the agreement of the employer, refer the matter to the Board.	(1.1) L'agent négociateur peut, avec le consentement de l'employeur, renvoyer l'affaire à la Commission s'il s'agit d'une obligation dont l'exécution peut faire l'objet d'un grief de la part du fonctionnaire de l'unité de négociation visée par la convention ou la décision.
(2) Where a matter is referred to the Board pursuant to subsection (1) or (1.1), the Board shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.	(2) Après avoir entendu l'affaire qui lui est renvoyée au titre du présent article, la Commission se prononce sur l'existence de l'obligation alléguée et, selon le cas, détermine s'il y a eu ou non manquement.
(3) The Board shall hear and determine any matter referred to it pursuant to subsection (1) or (1.1) as though the matter were a grievance, and subsection 96(2) and sections 97 and 98 apply in respect of the hearing and determination of that matter.	(3) La Commission entend et juge l'affaire qui lui est renvoyée au titre du présent article comme s'il s'agissait d'un grief, et le paragraphe 96(2) ainsi que les articles 97 et 98 s'appliquent à l'audition et à la décision.

[12] It is to be noted that the Agency is not mentioned in Part I of Schedule I to the former *Public Service Staff Relations Act* but in Part II of Schedule I as a portion of the public service of Canada that is a separate employer. The Agency was included in Part II by operation of section 177 of the *Canada Customs and Revenue Agency Act*, S.C. 1999, c. 17, s. 177. No order

designating the Agency was filed in Court by the applicant, and the respondent confirmed that no such order had been issued.

Adjudicator's decision

[13] After having established the relevant facts, the adjudicator noted that the "evidence showed that the grievor never stopped receiving her PM-02 salary, even though she performed PM-01 tasks for a few months in 2002". The adjudicator then described the Agency's preliminary objections and the applicant's replies.

[14] The adjudicator found that the applicant could not refer her grievance to adjudication under subsection 99(1) of the former *Public Service Staff Relations Act*, since, according to the very wording of the Act, this recourse was intended for the employer and the bargaining agent.

[15] The adjudicator also concluded that the applicant could not refer her grievance to adjudication under paragraph 92(1)(*b*) of the former Act because this recourse was only available to public servants who work for a portion of the public service of Canada included in Part I of Schedule I to the former Act, which excludes the Agency.

[16] The adjudicator also concluded that the applicant could not refer the grievance to adjudication under paragraph 92(1)(*a*) of the former Act because the bargaining agent refused to approve the reference and this approval was required under section 92.

[17] Finally, the adjudicator concluded that the grievance could not be referred to adjudication under paragraph 92(1)(*c*) of the former Act because this paragraph concerns disciplinary action resulting in termination of employment, suspension or a financial penalty, which did not apply to the applicant. The adjudicator noted that the applicant mentioned constructive dismissal in her reference to adjudication, but the adjudicator dismissed this argument because ". . . from reading the grievance, [he saw] no indication that it deal[t] with constructive dismissal", adding the following:

> [24] By claiming that her grievance deals with disciplinary action, the grievor is altering the essence of the grievance since disciplinary action is not part of the grievance as originally filed. As established in *Burchill*, [*Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109], an adjudicator has jurisdiction to deal only with the original grievance and not with a different grievance or one the essence of which is no longer the same. The grievor's original grievance focuses primarily on the *Work Force Adjustment* policy and is in no way a disciplinary grievance. Therefore, I allow the employer's objection to that effect. (adjudicator's decision, p. 10, reproduced in the Applicant's Record, at page 33).

Parties' positions

[18] The applicant, who is acting on her own behalf, raised a large number of questions in her written and oral submissions. The questions relate to a basic position, namely the applicant's argument that she was constructively dismissed from her previous position at the Agency, where her tasks involved the interpretation and application of the GST and some aspects relating to excise taxes. Because of this constructive dismissal, the applicant submits that the adjudicator erred with respect to the nature of grievance and therefore erred when he decided that he was without jurisdiction.

[19] The applicant submits that the Agency's changing her tasks was not a workforce adjustment within the meaning of administrative policies, but rather an artificial adjustment made by the employer that led to her constructive dismissal from her former position. In support of her allegations, the applicant cites the definition of the term "work force adjustment" in Appendix E of the collective agreement applicable at that time and which was entered into between the Agency and the Public Service Alliance of Canada (Applicant's Record, at page 77):

> **Work force adjustment—**is a situation that occurs when a deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to participate or an alternative delivery initiative.

[20] According to the applicant, her former GST-related tasks still exist, but were moved from Montréal to Ottawa, or to other departments, agencies and administrative centres. There was therefore no real workforce adjustment within the meaning of Appendix E. In addition, Appendix E requires that a "deputy head" decides to abolish a position. However, according to the applicant, in her case, Regional Headquarters had abolished her position. In the applicant's view, this is a constructive dismissal, especially since, after her former position was abolished, the Agency assigned her tasks which were at a lower level than those of a PM-2 position.

[21] The applicant submits that the adjudicator failed to deal with the constructive dismissal and that, accordingly, his decision dismissing her reference to adjudication for lack of jurisdiction must be set aside.

[22] The respondent submits that several exhibits filed by the applicant before the Federal Court in support of her claim of an alleged constructive dismissal were not submitted to the adjudicator and consequently these exhibits should be struck from the record. The Court will deal with this issue further on.

[23] The respondent submits that the applicable standard of review in this case is that of reasonableness considering that the adjudicator's decision is based on a question of mixed law and fact, namely, the interpretation of section 92 of the former *Public Service Staff Relations Act* and the assessment of the facts relevant to the grievance filed by the applicant.

[24] On the substantive issue, the respondent submits that the adjudicator was without jurisdiction, basically for the same reasons as those given by the adjudicator in his decision.

Motion to strike

[25] In a notice of motion filed before the Court on January 20, 2009, the respondent requested that several paragraphs of the applicant's affidavit in support of her application for judicial review be struck, principally because they contained legal arguments, which was contrary to Rule 81 of the *Federal Courts Rules*. The respondent also applied to have certain exhibits struck from the record as a result of this and also asked to have the exhibits which had not been filed in evidence before the adjudicator struck.

[26] The respondent's motion was dismissed with costs by Prothonotary Mireille Tabib for the reasons stated in her decision dated March 2, 2009. The respondent did not appeal the decision.

[27] At the hearing before me, the respondent repeated the same arguments submitted to the Prothonotary in support of the motion to strike the affidavit and various exhibits. This is an indirect appeal of the Prothonotary's decision. Since the respondent did not appeal the Prothonotary's decision in a timely manner, there is no need to deal with this application any further.

[28] I note, however, that the applicant's application for judicial review obviously concerns the adjudicator's decision but also includes an alternative application for the judicial review of the Agency's final decision on the applicant's grievance should the adjudicator be without jurisdiction to dispose of it. I will deal with this alternative application later, but, for the purpose of the motion to strike, I note that the applicant could in fact submit the exhibits in question in support of her alternative application.

[29] Nevertheless, as far as the judicial review of the adjudicator's decision is concerned, this Court usually examines a case as it was before the administrative tribunal in question: see, among others, *Ontario Association of Architects v. Association of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C.331, at paragraph 30. This way of proceeding is not, however, without exceptions, according to the principle that justice is not a slave to procedure. Accordingly, there are many circumstances in which this approach must not be used. In this case, the file as it was before the adjudicator will be considered for the judicial review of the impugned decision. I note, however, that the decision regarding the judicial review of the

adjudicator's decision would be the same, whether or not all the exhibits filed by the applicant are considered.

Applicable standard of review

[30] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 62, the Supreme Court of Canada ruled that the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[31] The issue before the adjudicator in the present case was whether the applicant's grievance could be referred to adjudication under section 92 or 99 of the former *Public Service Staff Relations Act*, specifically regarding the applicant's allegations that this grievance concerned a constructive dismissal. To answer this question, the adjudicator had to interpret sections 92 and 99 of the Act in question, reproduced above, analyze and interpret the language of the grievance and determine on the basis of the facts before him whether the grievance established a constructive dismissal.

[32] There is some disagreement in case law about the standard of review which applies in similar circumstances. In fact, the issue before the adjudicator was one of jurisdiction, but it is

also an issue which is at the core of the adjudicator's expertise in labour relations matters in the federal public service.

[33] Accordingly, in *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, at paragraphs 15 to 21, a panel of the Federal Court of Appeal ruled that the standard of correctness applied to an adjudicator's decision about her jurisdiction under subsection 92(1) of the former *Public Service Staff Relations Act*. However, in *Archambault v. Customs and Revenue Agency*, 2006 FCA 63, another panel of the Federal Court of Appeal upheld the decision of Justice Tremblay-Lamer, 2005 FC 183, at paragraphs 13 to 15, in which the standard of review of patent unreasonableness was applied to an adjudicator's decision on an alleged constructive dismissal, in which the adjudicator concluded that he did not have jurisdiction for a grievance under paragraph 92(1)(*c*) of the former Act. In contrast, the standard of correctness was applied in *Canada (Attorney General) v. Frazee*, 2007 FC 1176, at paragraphs 14 to 16, and in *Olson v. Canada (Attorney General)*, 2008 FC 209, at paragraph 16, to adjudication decisions on section 92 of the former Act. However, in *Canada (Attorney General) v. Basra*, 2008 FC 606, at paragraphs 12 to 13, a mixed standard was established, namely that of correctness for the legal test to be used and that of reasonableness for the application of the legal test to the facts, for an adjudicator's decision rendered under section 209 of the new *Public Service Labour Relations Act*, the current equivalent of section 92 of the former Act.

[34] In these circumstances, it seems to me to be appropriate to proceed to an analysis of the factors making it possible to identify the proper standard of review for the purposes of this case.

[35] According to paragraph 64 of *Dunsmuir*, this analysis must be contextual and ". . . is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal". It is, however, not always necessary to consider all of the factors, as some of them may be determinative of the applicable standard of review in a specific case.

[36] In this case, the adjudicator's decision is not protected by a privative clause. In fact, section 101 of the former *Public Service Staff Relations Act*, R.S.C. (1985), c. P-35, which included a full privative clause for adjudicators' decisions made under this Act, was repealed by the *Public Service Reform Act*, S.C. 1992, c. 54, s. 73. A privative clause similar to the one in section 101 of the former Act is now provided in section 233 of the new *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 233. Nevertheless, for the period concerned in this case, no privative clause was in force. However, in *Barry v. Canada (Treasury Board)*, 221 N.R. 237, [1997] F.C.J. No. 1404 (QL) (FCA), the Federal Court of Appeal noted that the fact that the privative clause in section 101 of the former Act was repealed did not in any way change the applicable standard of review:

> 2 A preliminary issue raised on this appeal concerns the standard of curial deference owed the adjudicator's decision. The Motions Judge was of the view that because the privative clause contained in the Act was repealed as of June 1, 1993, the proper standard embraces the question of whether the adjudicator's decision is "supportable by the evidence": see *Public Service Reform Act*, S.C. 1992, c.54, s.73; and *Canada (Attorney General) v. Wiseman*

(1995), 95 F.T.R. 200; *Canada (Procureur général) v. Séguin* (1995), 101 F.T.R. 64.

3 In our respectful view, the standard of review adopted by the Motions Judge is contrary to the teachings of the Supreme Court. 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 ("PSAC No. 2) 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. In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 337-38, Sopinka J. writing for the Court, held that even where there is no privative clause the standard of review for arbitral awards which involve the interpretation of collective agreements is circumscribed by the concept of patently unreasonable:

> In a number of past decisions, this Court has indicated that judicial deference should be accorded to the decisions of arbitrators interpreting a collective agreement even in the absence of a privative clause. For example, in *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, Estey J. commented, at p. 275, with the rest of the Court concurring on this point, that:
>
> > the law of review has evolved, even in the absence of a privative clause, to a point of recognition of the purpose of contractually-rooted statutory arbitration; namely, the speedy, inexpensive and certain settlement of differences without interruption of the work of the parties. The scope of review only mirrors this purpose if it concerns itself only with matters of law which assume jurisdictional proportions.
>
> . . .
>
> A similarly deferential approach based on the purpose of arbitration was taken in *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214. In that case, a majority of this Court applied the patently unreasonable test to the decision of an arbitrator appointed pursuant to a collective agreement, even though this was consensual rather than statutory arbitration and there was no privative clause *per se*. Noting that neither of the parties to the agreement had any choice but to have a grievance arbitrated, Pigeon J. stressed, at p. 214 that:

> [o]n the other hand, the arbitration is not meant to be an additional step before the matter goes before the courts, the decision is meant to be final. It is therefore imperative that decisions on the construction of a collective agreement not be approached by asking how the Court would decide the point but by asking whether it is a "patently unreasonable" interpretation of the agreement.
>
> 4 In conclusion, the standard of review of an adjudicator's decision, rendered under the Act, with respect to the interpretation of the provisions of a collective agreement is whether the decision is patently unreasonable. This was true prior to June 1, 1993 and the same holds true after that date.

[37] The nature of the scheme established by the former *Public Service Staff Relations Act* also calls for the application of the standard of reasonableness. Both the Supreme Court and the Federal Court of Appeal have often recognized the relative expertise of adjudicators in the interpretation of collective agreements and have applied a deferential standard of review to such decisions: *Canadian Union of Public Employees, Local 963 v N. B. Liquor Corporation*, [1979] 2 S.C.R. 227, at pages 235 and 236; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pages 962 and 963; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at paragraph 58; *Plourde v. Walmart Company of Canada Inc*., 2009 SCC 54, at paragraph 34; *Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)*, 2005 FCA 366, at paragraph 18; and *Barry v. Canada (Treasury Board)*, 221 N.R. 237, [1997] F.C.J. No. 1404 (QL) (FCA).

[38] In this case, the adjudicator interpreted and applied his enabling statute rather than a collective agreement. On the basis of *Dunsmuir*, at paragraph 68, ". . . adjudicators acting under the *PSLRA* [the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25] can be presumed

to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". There is no reason not to apply the same presumption to adjudicators appointed under the former *Public Service Staff Relations Act*. In fact, as was also emphasized by the Supreme Court of Canada in *Dunsmuir* at paragraph 54: "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".

[39] The purpose of the former *Public Service Staff Relations Act* concerning grievances and adjudication also favours deference. In fact, the purpose is clearly to establish expeditious and inexpensive procedures for the settlement of grievances in all sectors of the federal public service.

[40] Finally, the nature of the issues in question also calls for the standard of reasonableness. In fact, the issues in question are not of central importance to the legal system and are within an adjudicator's expertise, since they concern the organization of labour relations (see *Dunsmuir*, at paragraphs 55 and 70).

[41] Nevertheless, the interpretation of section 92 of the former Act does somewhat relate to an adjudicator's jurisdiction. The Supreme Court of Canada teaches that true issues of

jurisdiction are subject to the standard of correctness: *Dunsmuir*, at paragraph 59.

Justice Rothstein recently had an opportunity to clarify what is meant by a true issue of jurisdiction in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, at paragraphs 33 and 34, which concerned the judicial review of a decision of the Ontario Financial Services Tribunal and its jurisdiction to award costs:

> [33] Administrative tribunals are creatures of statute and questions that arise over a tribunal's authority that engage the interpretation of a tribunal's constating statute might in one sense be characterized as jurisdictional. However, the admonition of para. 59 of *Dunsmuir* is that courts should be cautious in doing so for fear of returning "to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years".
>
> [34] The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority.

[42] Considering the nature of the labour relations scheme established by the statute in question and the legal issues raised, I consider that the adjudicator's decision should be reviewed on the standard of reasonableness. In any event, as I will point out later, the adjudicator's decision is not only reasonable but also correct from all points of view. Accordingly, although, in my view, the standard of review of reasonableness applies in this case, I would reach the same conclusions by applying the correctness standard.

Was the adjudicator's decision reasonable?

[43] There is no doubt that the bargaining agent refused to approve the referral of the applicant's grievance to adjudication. In this case, the adjudicator's decision that the essential conditions for the referral of the grievance to adjudication under paragraph 92(1)(*a*) of the former *Public Service Staff Relations Act* had not been satisfied is above reproach considering the mandatory provisions of subsection 92(2) of this Act. In fact, the applicant did not file a reference to adjudication under this provision.

[44] There is also no doubt that the Agency is listed in Part II of Schedule I to the former Act as a portion of the public service of Canada that is a separate employer. In addition, the applicant was not able to offer any orders concerning the Agency that might have been issued under subsection 92(4) of the former *Public Service Staff Relations Act*, and the respondent confirmed that no such order had been issued. Consequently, the adjudicator's decision that the applicant was not contemplated by paragraph 92(1)(*b*) of the former Act and could therefore not refer her grievance to adjudication under this paragraph is not only reasonable but also correct. The provision concerns employees in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection 92(4) of this Act.

[45] As far as paragraph 92(1)(*c*) of the former Act is concerned, the applicant could refer her grievance to adjudication pursuant to this paragraph only if her grievance concerned "disciplinary action resulting in termination of employment, suspension or a financial penalty". The issue therefore is whether the applicant's grievance in fact concerned such disciplinary

action. On reading the grievance, the adjudicator noted that it did not concern such an action and that the applicant could therefore not refer her grievance to adjudication by operation of this provision. This part of the adjudicator's decision seems to me to be not only reasonable but also correct. In fact, even a generous reading of the grievance does not reveal any allusions to disciplinary action resulting in termination of employment, suspension or a financial penalty.

[46] However, the applicant submits that one must go beyond the words used in her grievance to understand that it actually does refer to a constructive dismissal. A close reading of this grievance does not support such an interpretation. The grievance concerns administrative reorganization, lack of training, the contested assignment of duties, requests for priority for other positions, and so on. The corrective measures requested are of the same type. This is not a grievance about constructive dismissal, and the adjudicator's decision in this respect is not only reasonable but also correct.

[47] The applicant tried to amend the grievance when she referred it to adjudication to turn it into a grievance on dismissal by writing the words [TRANSLATION] "constructive dismissal, demotion and workforce adjustment" on the referral document. Can the grievance therefore be referred to adjudication under paragraph 92(1)(*c*) of the former Act? The adjudicator decided that it could not on the basis of *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109. This aspect of the adjudicator's decision is also reasonable and correct. In fact, the Federal Court of Appeal dealt with a similar issue in *Burchill*, above, by refusing to allow such a change. The

Federal Court recently confirmed this approach in *Shneidman*, above, at paragraph 26. There is therefore no need to dwell on this issue.

[48] Finally, as far as the referral of the grievance under section 99 of the former *Public Service Staff Relations Act* is concerned, here, too, the adjudicator's decision is not only reasonable but also correct because only the employer and the bargaining agent are concerned by this section. In fact, the applicant is no longer contesting that aspect of the adjudicator's decision according to which her grievance could not be referred to adjudication under section 99 (see paragraph 61 of the applicant's memorandum of fact and law, Applicant's Record, at page 157).

[49] In conclusion, the adjudicator's decision is reasonable and correct in all aspects.

Alternative application

[50] The applicant, in the alternative, seeks judicial review of her employer's final decision on her grievance, dated February 2, 2004, and consequently an extension of time for that purpose.

[51] I understand that the applicant is seeking permission from this Court to extend the 30-day time limit under subsection 18.1(2) of the *Federal Courts Act* to allow her to file an application for judicial review of the Agency's final decision on her grievance of more than five years ago and dated February 2, 2004. By doing so, the applicant could apply for judicial review of her employer's decision before this Court if she is unable to refer her grievance to adjudication.

[52] This application for permission should have been made in a separate motion rather than by way of an alternative finding in a judicial review proceeding. However, even if I were to consider the alternative finding on its merits I must dismiss the application.

[53] The decision whether to grant an extension of the time provided for in section 18.1 of the *Federal Courts Act* is discretionary. The principles to guide the Court in exercising its discretionary power were recently reiterated by the Federal Court of Appeal in *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249, at paragraph 8:

> The decision whether to grant an extension of time is a discretionary one. This court has set out the principles that should guide the exercise of that discretion in *Canada (Attorney General) v. Hennelly* (1999), 167 F.T.R. 158:
>
> > The proper test is whether the applicant has demonstrated:
> >
> > a. a continuing intention to pursue his or her application;
> > b. the application has some merit;
> > c. that no prejudice to the respondent arises from the delay; and that a reasonable explanation for the delay exists.

[54] The applicant does not meet any of these criteria.

[55] The decisions rendered under the grievance procedure established under section 91 of the former *Public Service Staff Relations Act* can be subject to judicial review if the grievances underlying these decisions are not likely to be referred to adjudication under section 92 of this

Act (see, among others, *Vaughan v. Canada*, [2005] 1 S.C.R. 146, at paragraphs 2 and 32, *Hagel v. Canada (Attorney General)*, 2009 FC 329, and *Julien v. Canada (Attorney General)*, 2008 FC 115).

[56] As I have already stated, the applicant's grievance does not concern a disciplinary measure but rather an administrative reorganization. Concerning the application of the appendix to the collective agreement dealing with workforce adjustment, her employer argued that the grievance was out of time (see the final decision dated February 2, 2004, Applicant's Record, at pages 66 and 67). With regard to this aspect of the grievance and the other aspects regarding the applicant's dissatisfaction with the changes to her tasks and with the new position assigned to her, her bargaining agent refused to support the referral of the grievance to adjudication.

[57] This is therefore not a situation in which the applicant's grievance cannot be referred to adjudication because of statutory provisions. Instead, the grievance was not referred to adjudication because of the bargaining agent's refusal to agree to this.

[58] In addition, this grievance is out of time in several respects. Finally, the employer resolved some aspects of the grievance several years ago already by assigning PM-2 tasks to the applicant.

[59] Allowing a judicial review in such circumstances seems unusual, especially considering that over five years have passed since the employer's final decision.

Conclusion

[60] The application for judicial review is therefore dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is dismissed, with costs to the respondent.

"Robert M. Mainville"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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