Federal Court		Cour fédérale

Date: 20100526

Docket: T-1593-09

Citation: 2010 FC 556

Ottawa, Ontario, May 26, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

WANDA MACFARLANE

Applicant

and

DAY & ROSS INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this case, the Applicant is seeking the judicial review of a decision dated September 2, 2009, of an adjudicator appointed pursuant to subsection 242(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, whereby which he ruled that he did not have jurisdiction to hear the complaint submitted by Wanda MacFarlane (the "Applicant") in which she alleged that she had been unjustly dismissed from her position with Ross & Day Inc. (the "Respondent"), on the ground that a

procedure for redress related to her complaint was provided for in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[2] For the reasons set out below, this judicial review application shall be allowed in part only. The adjudicator did not breach any principles of natural justice or procedural fairness in conducting the proceedings and rendering his decision, and he correctly ruled that paragraph 242(3.1)(b) of the *Canada Labour Code* precluded him from hearing and deciding the unjust dismissal complaint. However, the adjudicator was in error when he declined jurisdiction in a manner that would exclude the complaint being referred back to him by the Canadian Human Rights Commission in the exercise of its authority pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.

Background

[3] The Respondent was first employed with the Applicant in February of 2001. She was dismissed on July 4, 2008 for the following reasons set out in the written notice of dismissal which was sent to her by the Respondent (Exhibit 2 of the affidavit of Wanda MacFarlane at page 36 of the Application record):

> This letter will serve as confirmation of the Company's decision to terminate your employment, effective immediately.
>
> The reasons for our decision include the following: your grossly negligent conduct which resulted in you deleting 149 records, and your subsequent attempt at covering this up; your recent absence without authorization; your unwillingness to continue working in your current role.

[4] The Applicant challenged this dismissal on August 29, 2008, by filing the following written complaint pursuant to section 240 of the *Canada Labour Code* (Exhibit 1 of the affidavit of Eric Rowley, at page 18 of Respondent's record):

> I believe I have been unjustly dismissed by Day and Ross Ltd, July 24 (sic), 2008.
> Please investigate this matter.

[5] An adjudicator was subsequently appointed pursuant to subsection 242(1) of the *Canada Labour Code* to hear and decide this complaint, and on April 21, 2009, he served notice that a hearing would be held on August 25 and 26, 2009 (paragraph 9 of the affidavit of Wanda MacFarlane).

[6] After this notice of hearing on her *Canada Labour Code* complaint was sent out, the Applicant submitted another complaint to the Canadian Human Rights Commission dated May 28, 2009. In a detailed three-page narrative in her complaint addressed to the Commission, the Applicant made, in particular, the following submissions (Exhibit 5 of the affidavit of Eric Rowley at pages 35 and 37 of the Respondent's record):

> I have reasonable grounds to believe that I have been discriminated against. I declare the following to be true to the best of my knowledge.
>
> My name is Wanda Irene MacFarlane and my complaint is against Day & Ross Inc. I am 62 years old and I have been diagnosed with clinical depression, fibromyalgia, and migraine. I believe that I have been discriminated against on the bases both of my age and my disability.
>
> […]

> On July 4 2008 I was terminated, retroactively, by hand delivered letter, having been disabled since May 23rd 2008. I believe that increasing my exposure to applications known to increase my disability until I was no longer able to function, denying me disability insurance, and terminating my employment while I am disabled citing errors made as a result of this known disability constitute discrimination on the basis of disability.

[7] The Canadian Human Rights Commission notified the Respondent of this complaint on July 24, 2009. In its letter, the Commission indicated the following (Exhibit 5 of the affidavit of Eric Rowley at page 32 of the Respondent's record):

> Please note that an initial review of the complaint has not identified any issues related to section 41(1) of the *Canadian Human Rights Act*. Under section 41(1), the Commission can refuse to deal with complaints in certain circumstances. In particular, the Commission can refuse to deal with a complaint where another redress procedure is available to the complainant, the complaint is beyond the Commission's jurisdiction, the allegations in the complaint occurred more than one year before the complaint was filed, or the complaint is frivolous, trivial, vexatious or made in bad faith. If you believe that this complaint raises issues under section 41(1), you should notify the Commission within thirty days of receipt of this letter so as not to delay the processing of the complaint.

[8] It is useful to note that this complaint is still pending before the Canadian Human Rights Commission, and that as of the date of the hearing of this judicial review application, no decision pursuant to section 44 of the *Canadian Human Rights Act* has yet been rendered by the Commission.

[9] On August 14, 2009, the attorney representing the Respondent wrote to the adjudicator to inform him that, in the light of this new complaint submitted under the *Canadian Human Rights*

Act, the Respondent was now challenging the adjudicator's jurisdiction to hear the *Canada Labour Code* complaint on the basis of paragraph 242(3.1)(b) of that Code.

[10] The Applicant disputed this jurisdictional challenge on the basis that there was no allegation of discrimination in her *Canada Labour Code* complaint and that this complaint "**can** be decided without determining whether discrimination took place" (Exhibit 6 of the affidavit of Wanda MacFarlane at page 50 of the Application record). The Applicant also submitted to the adjudicator the following particulars with respect to her *Canada Labour Code* complaint (Exhibit 7 of the affidavit of Wanda MacFarlane at page 54 of the Application record):

> With regard to the particulars of my unjust dismissal claim, they are as follows:
>
> My letter of dismissal stated four separate and distinct reasons for terminating my employment. […]
>
> It is my position that each an every one of these allegations is unfounded. Further, it is my position that, even if any and all of these allegations were judged on a balance of probabilities to be true, my dismissal would still be found to be unjust because Day & Ross failed to apply progressive discipline.

[11] The adjudicator responded on August 18, 2009 to the various exchanges of the parties concerning his jurisdiction and the continuation of the proceedings before him by rejecting the Respondents' request for an adjournment and thus maintaining the original schedule for the hearing of the complaint (Exhibit 10 of the affidavit of Wanda MacFarlane at page 63 of the Application record):

> Upon reflection, I am of the view that the hearing will continue as scheduled next week and if the employer wishes to pursue their objection to my jurisdiction they can call the necessary evidence to

> support their contention that there is a connection between the matter before me and the complaint filed before the HRC.

[12] Following a request from the Respondent for a reconsideration of his decision to proceed with the hearing, the adjudicator responded as follows by email dated August 19, 2009, 8:34 am (Exhibit 20 of the affidavit of Eric Rowley, at page 269 of the Respondent's record):

> I have received and read your response document, but in order to ensure fairness in this proceeding it is my view that the hearing must proceed. I note that you refer to certain documents in the company's Book of Documents. As you are aware, at this time I have received the Book of Documents, but I am not aware of whether or not the complainant has received it, and what her position is with respect to it being before me as evidence. In my view, the only way in which the preliminary matter can [b]e addressed, let alone the merits of the matter, is to continue with the hearing and that is what I have decided. The essence of your objection has an evidentiary basis, and at this time I have no evidence before me.
>
> Both parties are to attend at the hearing as per the Notice of Hearing sent by myself earlier this year and be prepared to raise any preliminary objections. At that time I will address any preliminary matters and decide whether or not to proceed on the merits. I would expect that both parties would be prepared to proceed on the merits if needed.

[13] Faced with this scheduling and process decision, the Respondent then requested that the proceedings be bifurcated. The adjudicator responded as follows that same day by email dated August 19, 2009 1:05 pm (Exhibit 22 of the affidavit of Eric Rowley, at page 275 of the Respondent's record):

> I will hear submissions on your request to bifurcate the hearing, but unless convinced to do so, I would expect the hearing to proceed on the merits.

[14] A hearing was thus held before the adjudicator on August 25, 2009, during which evidence was submitted and representations were made concerning the jurisdictional issue. After hearing the parties on the jurisdictional issue, the adjudicator decided to reserve his decision. He decided to adjourn the hearing on the merits of the complaint until he had ruled on the jurisdictional issue (paragraph 39 of the affidavit of Wanda MacFarlane and paragraph 59 of the affidavit of Eric Rowley).

The adjudicator's decision

[15] The adjudicator ruled that he did not have jurisdiction to hear the complaint under the *Canada Labour Code* in view of paragraph 242(3.1)(b) thereof, as interpreted by the Federal Court of Appeal in *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354, 126 D.L.R.. (4th) 679, [1995] F.C.J. No. 1066 (QL), leave to appeal to the S.C.C. dismissed, [1995] S.C.C.A. No. 444 (QL) (hereinafter referred to as "*Byers Transport*").

[16] The adjudicator noted that he needed to address two questions to determine the jurisdictional issue under paragraph 242(3.1)(b) of the *Canada Labour Code*: a) is the factual situation in the *Canadian Human Rights Act* complaint essentially the same as in the *Canada Labour Code* complaint? and b) does the *Canadian Human Rights Act* process provide for some real redress which would be of personal benefit to the Applicant?

[17] He answered these questions as follows at paragraphs 19 to 21 of his decision:

> 19. In the matter before me, despite the contention of the complainant, I have no hesitation concluding that the complaint before me is essentially the same as the complaint she filed with the CHRC. In my view, although the complaint she filed with the CHRC is more detailed, one need look no farther than her own words found in the second last paragraph. These words are set forth above in paragraph 8. She clearly and without equivocation claims that her termination amounted to discrimination on the basis of disability. Therefore, I have no alternative but to conclude that complaint (sic) before the CHRC is essentially the same as that before me. This is especially so when one considers the fact the complainant submits that the "errors" that lead to her dismissal were as a result of her disability.
>
> 20. With respect to the remedial power under the *CHRA*, I agree with [t]he analysis of adjudicator Cooper in *Duncan,* [[2000] C.L.A.D. No. 588]. In that case, at paragraph 17, the learned adjudicator identifies some of the broad remedies available under the *CHRA*. Although they are not necessarily the same as those available under the *Code*, one would be hard pressed to categorize them as other than "real redress which could be of personal benefit to the same complainant."
>
> 21. For all of the reasons above I have no hesitation in concluding that I am statute barred from hearing this matter.

[18] This could have put an end to the matter. However the adjudicator then went one step further at paragraphs 22, 23 and 24 of his decision, and ruled that he had no jurisdiction to hear complaints for unjust dismissal raising human rights violations:

> 22. In coming to this conclusion I note that the Code has not been amended, as other pieces of legislation across the country have, to reflect the decision of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board and O.P.S.E.U., Local 324* [2003] 2 S.C.R.157, 2003 SCC 42. This decision concluded amongst other things, that an arbitrator appointed under a collective agreement, had the authority to interpret the pertinent Human Rights legislation. This was because, according to the court, the pertinent Human Rights legislation is incorporated into each collective agreement. *Parry Sound*, *supra* has been applied by

> arbitrators and adjudicators across the country, and has seen the amendment of various pieces of legislation to reflect the state of the law as formulated by the Supreme Court of Canada.
>
> 23. That said, as an adjudicator appointed under the provisions of the *Canada Labour Code*, I am a creature of statute and therefore cannot go on a "frolic of my own". I must apply the statute as drafted.
>
> […]
>
> 24. It is my conclusion that as I am without jurisdiction to hear this matter the complaint, it would be futile to hear evidence on the merits of the complaint.

Position of the Applicant

[19] The Applicant, who is self-represented, has identified ten issues in her application for judicial review. The Applicant added issues and expanded upon some issues in her memorandum of fact and law and in her oral submissions at the hearing of this application. Many of these issues are overlapping. I will summarize the Applicant's position as follows.

[20] First, the Applicant submits that the adjudicator violated the principles of natural justice and procedural fairness since the Applicant was not able to adequately hear the proceedings and the adjudicator did little to remedy that problem. Indeed, the Applicant submits that the hearing room, situated in a local civic centre, was noisy. She thus found herself unable to fully follow the proceedings. Although she did ask the adjudicator to take appropriate measures, she claims he failed to do so.

[21] Second, the Applicant claims that she was never given an opportunity to make her submissions on the bifurcation of the proceedings sought by the Respondent. This again raises issues pertaining to natural justice and procedural fairness.

[22] Third, the Applicant submits that the reasons of the adjudicator for declining jurisdiction are deficient since the adjudicator's analysis does not reveal his reasoning process, nor does it demonstrate that the relevant law and policy were properly applied, nor does it specifically respond to the arguments of the Applicant. Although this submission is, to a certain extent, related to the Applicant's arguments challenging the merits of the decision, it does raise some natural justice and procedural fairness considerations.

[23] Finally, the Applicant submits that the adjudicator was wrong in declining jurisdiction. He is said to have failed to properly identify the essential nature of her *Canada Labour Code* complaint, which makes no reference to human rights issues, and failed to carry out a proper analysis thus leading him to conclude that both complaints were essentially the same and consequently erroneously refusing to exercise his jurisdiction.

Position of the Respondent

[24] The Respondent asserts that no breach to procedural fairness or to the principles of natural justice occurred in this case. In response to the Applicant's allegation that she was unable to follow the hearing, it is claimed that she made only one comment on this matter at the beginning of the hearing, and that the adjudicator remedied the situation appropriately. The Applicant did not raise the issue after the adjudicator had corrected the situation, and her failure to object after assistance

had already been provided is fatal to her argument. Moreover, the Applicant actively participated in the hearing; it can thus be inferred that she could and did hear the proceedings.

[25] The Respondent adds that the adjudicator properly decided to bifurcate the proceedings as he had the authority to determine the procedure to be followed under paragraph 242(2)(b) of the *Canada Labour Code*. Further, the Applicant offered no evidence showing that she objected to the sought bifurcation at the time of the hearing. At no time during the hearing or prior to the issuance of the decision did the Applicant raise any issue regarding the fairness of the hearing, the process, or the adjudicator's actions. Moreover, the reasons given by the adjudicator to bifurcate the proceedings were reasonable in the circumstances.

[26] The Respondent adds that the adjudicator reasonably determined that the complaint filed under the *Canadian Human Rights Act* was essentially the same as the complaint before him. Consequently, paragraph 242(3.1)(b) of the *Canada Labour Code* clearly applies in this case, and the adjudicator was thus without jurisdiction to consider the complaint under the *Canada Labour Code*.

The legislation

[27] The relevant provisions of the *Canada Labour Code* are subsection 240(1) and sections 242 and 243 which read as follows:

240. (1) Subject to subsections (2) and242(3.1), any person	**240.** (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut

déposer une plainte écrite auprès d'un inspecteur si :

(*a*) who has completed twelve consecutive months of continuous employment by an employer, and

a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même

(*b*) who is not a member of a group of employees subject to a collective agreement,
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

242. (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.

(2) An adjudicator to whom a complaint has been referred under subsection (1)

(2) Pour l'examen du cas dont il est saisi, l'arbitre :

(*a*) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

a) dispose du délai fixé par règlement du gouverneur en conseil;

(*b*) shall determine the procedure to be followed but shall give full opportunity to the parties to the complaint to

b) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui

present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(*c*) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(*b*) a procedure for redress has been provided elsewhere in or under this or any other Act of

présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

c) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16*a*), *b*) et *c*).

(3) Sous réserve du paragraphe (3.1), l'arbitre:

a) décide si le congédiement était injuste;

b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :

a) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;

b) la présente loi ou une autre loi fédérale prévoit un autre recours.

Parliament.

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :

(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;

(*b*) reinstate the person in his employ; and

b) de réintégrer le plaignant dans son emploi;

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

243. (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

[28] Subsection 3(1), section 7, subsections 40(1), 41(1), 44(1)(2)(3) and 53(2) and (3) of the *Canadian Human Rights Act* read as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.	**40.** (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.
41. (1) Subject to section 40,	**41.** (1) Sous réserve de

the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

l’article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu’elle estime celle-ci irrecevable pour un des motifs suivants :

(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

a) la victime présumée de l’acte discriminatoire devrait épuiser d’abord les recours internes ou les procédures d’appel ou de règlement des griefs qui lui sont normalement ouverts;

(*b*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

(*c*) the complaint is beyond the jurisdiction of the Commission;

c) la plainte n’est pas de sa compétence;

(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

e) la plainte a été déposée après l’expiration d’un délai d’un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the

44. (1) L’enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l’enquête.

investigation.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(*a*) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(*b*) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act, it shall refer the complainant to the appropriate authority.

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and
(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :
(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,
(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);

(*b*) shall dismiss the complaint to which the report relates if it is satisfied
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

b) rejette la plainte, si elle est convaincue :
(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

53. (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
(ii) making an application for approval and implementing a plan under section 17;

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :
(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),
(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

(*b*) that the person make

b) d'accorder à la victime, dès

available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

d) d'indemniser la victime de la totalité, oude la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

wilfully or recklessly.

The issues

[29] Though stated differently by the parties, the fundamental issues raised by these proceedings are as follows:

a. What is the standard of review applicable in this case?

b. Were the principles of natural justice or procedural fairness violated by the adjudicator?

c. Did the adjudicator err in declining jurisdiction?

The standard of review

[30] *Dunsmuir v. New Brunswic*k, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmui*r) at para. 62 established a two-step process for determining the standard of review: "[f]irst, 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] As a general rule, issues involving principles of natural justice or turning on procedural fairness are to be reviewed on the basis of a correctness standard: *Canada (Citizenship and*

Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43. As noted by the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No.2056 (QL) at para. 53:

> CUPE [*C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29] directs a court, when reviewing a decision challenged on the grounds of procedural fairness, to isolate any act or omission relevant to procedural fairness (at para. 100). This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.

[32] Consequently, the issues of natural justice and procedural fairness raised by the Applicant shall be reviewed on a standard of correctness.

[33] A stringent standard of review has also been applied to decisions of adjudicators made pursuant to subsection 242(3.1) of the *Canada Labour Code*. In *Canada Post Corp. v. Pollard*, [1994] 1 F.C. 652 (C.A); [1993] F.C.J. No. 1038 (QL), the Appeal Division of the Federal Court of Canada made a lengthy analysis of the standard of review applicable to decisions of adjudicators under that provision, and it ruled that such decisions were jurisdictional in nature and thus subject to a standard of correctness in judicial review proceedings. This was again reiterated by Strayer J.A. in the 1995 decision of *Byers Transport*, at page 371, with respect to both paragraphs 242(3.1)(a) and (b) of the *Canada Labour Code*:

> In reviewing the adjudicator's conclusion that he was not precluded from jurisdiction over the claim by virtue of paragraph 242(3.1)(a), the learned trial judge applied the standard of patent unreasonability. He found no such unreasonability to exist in the adjudicator's conclusion. The appellant argues that the adjudicator's finding was

> one of jurisdiction for which the standard of review should have been correctness. I agree. In its decision in *Pollard* this Court had occasion to consider the standard of review in respect of the application of subsection 242(3.1). It held that a determination as to whether an adjudicator is precluded by this subsection from considering the unjust dismissal complaint of a person is a finding as to the existence of jurisdiction and the standard for judicial review of such a determination is that of correctness. This is so notwithstanding the provisions of the privative clause which states as follows: [follows section 243 of the *Canada Labour Code* reproduced above]

[34] However, *Dunsmuir*, at para. 54, holds that deference will usually be called for where a tribunal is interpreting its own statute or statutes closely connected to its function. Nevertheless, a tribunal must be correct where it is interpreting its constitutive legislation to determine true questions of jurisdiction, such as jurisdictional lines between two or more competing specialized tribunals: *Dunsmuir*, at paras. 59 and 61. In this case, the issue is, therefore, whether *Dunsmuir* has modified the standard of review applicable to the interpretation and application of paragraph 242(3.1)(b) of the *Canada Labour Code*. I rule that it has not.

[35] In this type of case, the adjudicator must decide a true question of jurisdiction; he must delineate his jurisdiction from that of the Canadian Human Rights Commission. In making this determination, the adjudicator must not only interpret the relevant provisions of the *Canada Labour Code*, but also the provisions of the *Canadian Human Rights Act*. The legislative scheme set out in the *Canadian Human Rights Act* is beyond the scope of the adjudicator's usual expertise. In these circumstances, it is my view that, either under the case law prior to *Dunsmuir* and *Dunsmuir* itself, the standard of review applicable to determinations by adjudicators under paragraph 242(3.1)(b) of the *Canada Labour Code* is that of correctness.

[36] My view is reinforced by *Johal v. Canada (Revenue Agency)*, 2009 FCA 276, 312 D.L.R. (4th) 663, [2009] F.C.J. 1198 (QL), a case decided after *Dunsmuir* by the Federal Court of Appeal ("*Johal*"). In that case, the issue was similar to the one herein. The question to be decided in that case was whether the appellants were barred from presenting individual grievances under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, as their employer's staffing program addressed the subject matter of the grievance. While the federal Court of Appeal found that arbitration was available to the appellants, it applied a standard of correctness in interpreting the various statutory provisions at issue. Evans J.A. noted the following in *Johal* at paras. 28 to 30:

> 28 There is no case precisely on point. However, in similar contexts this Court has held that determining whether employees come within statutory exclusion clauses analogous to subsection 208(2) is a jurisdictional question, and therefore reviewable on a standard of correctness: see, for example, *Canada Post Corp. v. Pollard*, [1994] 1 F.C. 652 (F.C.A.) ("*Pollard*") and *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354 at 371 and 373 ("*Byers*") (*Canada Labour Code*), and *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 ("*Boutilier*") (*Public Service Staff Relations Act*, the predecessor of the *PSLRA*).
>
> 29 After those cases were decided, *Dunsmuir* (at para 54) expanded the scope of judicial deference to specialized tribunals' interpretation of their "home" legislation, and legislation closely related to it, emphasizing (at para. 59) that only the interpretation of those statutory provisions which raise "true" questions of jurisdiction or *vires* is reviewable on a standard of correctness. Further, writing for the Court in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, Justice Rothstein inferred from *Dunsmuir* that reviewing courts must exercise caution in characterizing an issue as jurisdictional, and (at para. 34)
>
> > ... will only exceptionally apply a correctness of [*sic*] standard when interpretation of [the tribunal's home statute] raises a broad question of the tribunal's authority.

> 30 In my opinion, correctness is the applicable standard of review in the present case because subsection 208(2) of the *PSLRA* and section 54 of the *CRAA* demarcate the jurisdiction of competing administrative processes, namely, that created under subsection 208(1) and that provided by the CRA's Staffing Program. According to *Dunsmuir* (at para. 61), correctness is normally the standard of review for such questions. I see no reason not to apply that principle here, even though final level decisions are subject to the "final and binding" provision in section 214 of the *PSLRA*.

[37] However, the adjudicator's decision in this case was predicated upon his finding of fact concerning the nature of the complaint before him. Determinations of fact are usually to be reviewed on a standard of reasonableness: *Dunsmuir,* at para. 53. Where, as in this case, the legal and jurisdictional analysis can be separated from the underlying findings of fact, this Court should show deference to the adjudicator on those findings of fact: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591, 2007 SCC 14 at para. 19; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 26.

[38] Consequently, though correctness is the appropriate standard of review concerning the adjudicator's interpretation and application of paragraph 242(3.1)(b) of the *Canada Labour Code*, the factual determination which must be made by the adjudicator prior to interpreting and applying that provision - and in this case, he was to determine if the complaint before him was essentially the same as the one submitted pursuant to the *Canadian Human Rights Act* - is subject to review under a standard of reasonableness.

Were the principles of natural justice or procedural fairness violated by the adjudicator?

[39] The Applicant claims that she had difficulties hearing the proceedings before the adjudicator, and consequently asks that the adjudicator's decision be set aside and a new hearing be held based on this breach of her fundamental right to a fair hearing.

[40] In my view, the Applicant's position on this issue cannot be accepted.

[41] The Applicant submits in her affidavit at paragraphs 29, 31 to 33 that she had difficulties following the oral argument of opposing counsel because of background noise. Though the window from which the noise was emanating was closed, the Applicant claims that she still had difficulties hearing the proceedings and asked the opposing counsel to speak louder. She claims that the adjudicator failed to correct the situation.

[42] The Respondent responds that, in fact, the Applicant had no difficulties hearing the proceedings and that she actively participated and intervened at all stages of the proceedings. The Respondent has also offered an affidavit in evidence in support of this. In his affidavit, at paragraphs 30 to 33, Eric Rowley declares that the hearing was held in a room facing a skating rink located in the civic centre where the proceedings were being conducted. At the beginning of the hearing, the Applicant indicated she had difficulty hearing counsel for the Respondent because of noise from the rink. Consequently, the small window was thus closed and the adjudicator requested counsel to speak in a louder voice, which he did. After this initial complaint, the Applicant never raised again

any new complaint concerning the conduct of the meeting or claimed she had have difficulties hearing the proceedings; indeed, she is said to have taken an active part in the hearing.

[43] I need not decide between the different versions of events offered by the Applicant and the Respondent, since it is undisputed that the Applicant only complained once at the beginning of the hearing about her inability to follow the argument of opposing counsel, and that corrective measures were taken in response. If these measures were insufficient to allow the Applicant to adequately hear opposing counsel, it was incumbent on her to inform the adjudicator so as to allow him an opportunity to adequately address the concern. Having failed to do so, she cannot now raise the issue *ex post facto* in judicial review proceedings.

[44] The key fact here is that the Applicant did not follow up on her complaint by informing the adjudicator that the corrective measures taken were insufficient or by requesting that the hearing be moved to another more adequate location. Rather, the Respondent remained silent on the issue throughout the remainder of the hearing, and in fact actively participated in the hearing. She only raised this issue anew in these judicial review proceedings, long after the hearing had ended and after she had received the decision of the adjudicator.

[45] I find an analogy here with cases where failure to provide translation services at a hearing were raised in judicial review proceedings. If a litigant participates in a hearing without complaining that he or she cannot understand the language of the proceedings, that litigant cannot subsequently claim in judicial review proceedings a breach of procedural fairness resulting from a failure to

provide translation services which were never requested: *Garcia v. Canada (Attorney General)*, 2001 FCA 200, [2001] F.C.J. No. 1001 (QL) at para. 11; *Kirchmeir v. Edmonton (City) Police Service*, 2000 ABCA 324, [2000] A.J. No. 1563 (QL)at para. 29.

[46] The Applicant also claims that she was never given an opportunity to make her submissions on the issue of bifurcation of the proceedings. Again, I cannot accept her argument.

[47] In his email dated August 19, 2009 8:34 am (Exhibit 20 to the affidavit of Eric Rowley page 269 of Respondent's record), the adjudicator clearly indicated to both parties that "the only way in which the preliminary matter can [b]e addressed, let alone the merits of the matter, is to continue with the hearing and that is what I have decided", and then added that at "that time I will address any preliminary matters and decide whether or not to proceed on the merits" [emphasis added]. This was a clear and unmistakable notice to the parties that the request for bifurcation would be addressed together with the preliminary issue of jurisdiction.

[48] That same day, by email dated August 19, 2009 1:05 pm (Exhibit 22 to the affidavit of Eric Rowley page 275 of Respondent's record), the adjudicator added that he "will hear submissions on your request to bifurcate the hearing, but unless convinced to do so, I would expect the hearing to proceed on the merits." Again, he thereby clearly notified both parties that the submissions on bifurcation would be heard with those on jurisdiction.

[49] The Applicant was clearly provided with an opportunity to respond to, and submit arguments on, the jurisdictional issues raised by the Respondent and the request for bifurcation that ensued: affidavit of Wanda MacFarlane at paragraphs 35 to 39; affidavit of Eric Rowley at paragraphs 51 to 61. Moreover, the Applicant has failed to identify in her written and oral submissions a single argument that she has not been able to plead with respect to the request for bifurcation; she merely proffered generalities concerning the process.

[50] In the end, after hearing from both parties, the adjudicator decided that it would be preferable for him to first decide the jurisdictional issue prior to proceeding on the merits. Though there is no transcript of the hearing, the affidavit of Eric Rowley at paragraph 63, which is not challenged on this point, reports the adjudicator's position at the hearing as follows:

> I have to bifurcate. … I will render a decision on the preliminary objection. If I have jurisdiction, then I will be in contact with the parties for additional dates. If I don't have jurisdiction, we would be avoid calling evidence, etc. [Then, turning to the Complainant:] This also protects you. If I find I don't have jurisdiction, you still have the CHRA Complaint, and it allows you to present that and doesn't give the Company a chance to "discover" your case. … It is in the best interests of both parties to do so and I will not be proceeding …".

[51] Pursuant to paragraph 242(2)(b) of the *Canada Labour Code* reproduced above, the adjudicator had the authority to determine the procedure to be followed in this case, including the authority to order a bifurcation of the proceedings. Though the Respondent would have preferred to have their jurisdictional objection decided on a written record rather than at a hearing, the adjudicator decided otherwise. The hearing which was held was to deal first with the jurisdictional issues raised by the Respondent and the resulting potential bifurcation of the proceedings. The

Applicant was notified in writing prior to the hearing that these issues would be dealt with at the hearing. The Applicant was also provided with an opportunity to offer evidence and to make representations on the preliminary issues, and she availed herself of this opportunity. Consequently, the Applicant's contention that her right to a fair hearing was denied cannot be accepted.

[52] The Applicant also argues that insufficient reasons were provided by the adjudicator in his decision.

[53] The adequacy of reasons is to be assessed in the light of the role of reasoned decisions: they incite the decision maker to focus on the relevant factors and evidence, they ensure that the representations of the parties have been considered, they allow effective appeals or judicial review proceedings, and provide a standard by which future activities can be regulated: *Via Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25 (C.A.), 193 D.L.R. (4th) 357, [2000] F.C.J. No. 1685 (QL) at paras. 17 to 22. As noted in *Via Rail, supra*, at para. 21, "[w]hat constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case."

[54] In this case, the adjudicator identified the issue to be decided, namely whether the complaint submitted under the *Canadian Human Rights Act* deprived him of the jurisdiction to hear the complaint pursuant to paragraph 242(3.1)(b) of the *Canada Labour Code*. The adjudicator also determined that the intent of paragraph 242(3.1)(b) of the *Canada Labour Code* is to avoid the multiplicity of proceedings arising from the same set of facts; consequently, he identified the principal issue of fact raised by the proceedings, namely whether both complaints were essentially

similar. The adjudicator took into consideration the submission of the Applicant that each complaint related to different matters, but he ruled otherwise. The adjudicator cogently explained in his decision why he so ruled. The adjudicator then examined the case law and, on the basis of his analysis, ruled that he did not have jurisdiction to hear the matter.

[55] After carefully reviewing the adjudicator's decision, I conclude that the reasons found therein make explicit the relevant factors and evidence, are responsive to the representations of both parties, constitute a sufficient basis for effective judicial review proceedings, and set a standard upon which future decisions may be decided in similar circumstances. Consequently, I conclude that these reasons are adequate within the meaning of *Via Rail, supra*.

[56] For all of the above reasons, I cannot accept the Applicant's arguments as to the natural justice and procedural fairness issues that she has raised. In my view, the Applicant's right to a fair hearing and process was not violated.

Did the adjudicator err in declining jurisdiction?

[57] The first issue to be decided under this heading is whether the adjudicator erred in concluding that the Applicant's complaint under the *Canada Labour Code* was essentially the same as her complaint under the *Canadian Human Rights Act.* As noted above, this is a conclusion which is to be reviewed on a standard of reasonableness.

[58] The adjudicator's determination was unambiguous: both complaints were essentially the same. He came to this conclusion in the light of the wording of the complaint submitted pursuant to the *Canadian Human Rights Act*, which reads as follows:

> On July 4 2008 I was terminated, retroactively, by hand delivered letter, having been disabled since May 23rd 2008. I believe that increasing my exposure to applications known to increase my disability until I was no longer able to function, denying me disability insurance, and terminating my employment while I am disabled citing errors made as a result of this known disability constitute discrimination on the basis of disability.

[59] The Applicant submits that her complaint under the *Canada Labour Code* is different in nature, but she provides few grounds in support of her position except to argue that it is the Respondent's burden to show just cause for dismissal, and that the Respondent proceeded to summary dismissal without just cause and without prior warning.

[60] While it is true that the burden of proof may fall on different parties depending on whether the complaint is processed under the *Canada Labour Code* or the *Canadian Human Rights Act*, and that the certain principles of labour law may be more difficult to plead in the context of proceedings under the *Canadian Human Rights Act* (an issue on which I take no position), these considerations have little to do with the relevant issue: are both complaints essentially the same?

[61] In the light of the clear statements found in the complaint submitted pursuant to the *Canadian Human Rights Act*, and the absence of any satisfactory argument from the Applicant as to how her *Canada Labour Code* complaint differs, and taking into account *Byers Transport* and

Boutilier (discussed in more detail below), I have no hesitation in concluding that the adjudicator reasonably decided that both complaints were essentially similar.

[62] Consequently, I must now examine the legal consequences of the adjudicator's decision on this issue. This attracts a correctness standard of review.

[63] As noted by the adjudicator in his decision, in view of paragraph 242(3.1)(b) of the *Canada Labour Code* and *Byers Transport*, and *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27, 181 D.L.R. (4th) 590, [1999] F.C.J. No. 1867 (QL), leave to appeal to S.C.C. dismissed, [2000] S.C.C.A. No. 12 (QL) (*Boutilier*), adjudicators appointed pursuant to subsection 242(1) of the *Canada Labour Code* have usually declined to hear a complaint under that *Code* where the dismissal is also subject to a complaint under the *Canadian Human Rights Act*: see in particular *Mundo Peetabeck Education Authority and Wade*, [1997] C.L.A.D. No. 290 (QL); *Royal Bank of Canada and Verzosa*, [1998] C.L.A.D. No. 49 (QL); *Peters and Canadian Imperial Bank of Commerce*, [1998] C.L.A.D. No. 670 (QL); *Hiebert v. Milne's Moving and Storage Ltd.*, [1999] C.L.A.D. No 507 (QL); *Duncan v. Nenqayani Treatment Centre Society*, [2000] C.L.A.D. No. 588 (QL); *Tse v. Federal Express Canada Ltd.*, [2004] C.L.A.D. No. 559; *Schuyler v. Oneida Nation of the Thames Board Council*, [2005] C.L.A.D. No. 270 (QL).

[64] Within this corpus of decisions by adjudicators, two distinct lines of cases are found. A number of adjudicators, such as in *Mundo Peetabeck Education Authority and Wade*, *supra*, at

paras. 19 and 20, have declined to decide a *Canada Labour Code* complaint where a similar complaint under the *Canadian Human Rights Act* is pending, though they assert residual jurisdiction to decide the complaint should the matter be referred for adjudication under the *Code* by the Canadian Human Rights Commission pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*. However, other adjudicators, such as in *Tse v. Federal Express Canada Ltd.*, *supra*, at paras. 41 and 44, have decided that they had absolutely no jurisdiction over dismissal complaints involving allegations of human rights violations under the *Canadian Human Rights Act*. In the present case, the adjudicator followed the latter line and declined jurisdiction in such a manner as to preclude the Canadian Human Rights Commission from referring the matter back to him under paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.

[65] For the reasons set out below, I conclude that the adjudicator was correct in staying the hearing of the complaint on the merits, but that he was wrong to decline jurisdiction in such a manner as to preclude the Canadian Human Rights Commission from referring the matter back to him under paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.

[66] I will begin my analysis with *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.C. 449, [1994] F.C.J. No. 640 (QL). In that case, both a complaint of unfair dismissal under the *Canada Labour Code* and a complaint alleging discrimination pursuant to the *Canadian Human Rights Act* had been filed by the complainant. The adjudicator under the *Code* had nevertheless assumed jurisdiction over the complaint, and this was challenged by way of a judicial review

application on the ground that paragraph 242(3.1)(b) of the *Code* precluded the adjudicator from proceeding. Rothstein J. ruled that the adjudicator did have jurisdiction as follows (at para. 23 of the decision):

> […] With respect to remedy, a brief review of section 53 of the *Canadian Human Rights Act* and subsection 242(4) of the *Canada Labour Code* indicates that the statutory provisions, although not identical in wording, appear in substance to be similar. However, again, a body of jurisprudence has developed in respect of each type of remedy and it is not clear, at this stage, that the procedures under the *Canadian Human Rights Act* and the *Canada Labour Code* would yield the exact same remedy. For these reasons, and because I do not have sufficient information before me as to the similarities and differences between the respondents' unjust dismissal complaints and human rights complaints, I find that the Adjudicator did not err in concluding that paragraph 242(3.1)(b) of the *Canada Labour Code* was not a bar to his jurisdiction in this case.

[67] This reasoning was however shortly thereafter questioned by the Court of Appeal in *Byers Transport*. In that case, the complainant had filed both a complaint for unjust dismissal under section 240 of the *Canada Labour Code* and a complaint under section 97 of that *Code* claiming that her employer had committed an unfair labour practice in laying her off or dismissing her for her union activities. Strayer J.A. ruled that the section 97 complaint precluded the adjudicator from hearing the section 240 complaint in the light of the provisions of paragraph 242(3.1)(b) of the *Code*. The reasoning of Strayer J.A. is set out in pages 377 to 380 of *Byers Transport* (paras. 20 to 22):

> I have also considered carefully the decision of the Trial Division in *Sagkeeng Alcohol Rehab Centre Inc*. In that case it was argued that because one of the grounds alleged for the complaint of unjust dismissal was discrimination as prohibited by the *Canadian Human Rights Act*, there was another form of redress under that Act of Parliament which precluded the adjudicator from dealing with the

complaint by virtue of paragraph 242(3.1)(b). The Trial judge emphasized that he did not have evidence before him as to the nature of these allegations but he rejected the argument based on paragraph 242(3.1)(b) in part on the basis of his interpretation of the meaning of that paragraph. He held [at page 463] that the other "procedure for redress" referred to therein "cannot be based on a different cause of action or provide a lesser remedy" than the procedure under Part III of the *Canada Labour Code*.

[…]

While not questioning the result in that case, given the evidence before the trial judge, I have some reservations as to his analysis of the meaning of "a procedure for redress" of a "complaint" as referred to in the statute. I believe that the complaint (i.e. the factual situation complained of) must be essentially the same in the other "procedure for redress". But I doubt that the remedies have to be as good or better under the other provision in order to oust the jurisdiction of the adjudicator under paragraph 242(3.1)(b). That paragraph does not require that the same redress be available under another provision of the *Labour Code* or some other federal Act. What it requires is that in respect of the same complaint there be another procedure for redress. The point is even clearer in the French version which simply requires that there be "*un autre recours*". I do not believe that for there to be a "procedure for review . . . elsewhere" there must be a procedure which will yield exactly the same remedies, although no doubt that procedure must be capable of producing some real redress which could be of personal benefit to the same complainant.

[…]

This analysis supports the view that where Parliament has established specialist tribunals, whether under the *Canada Labour Code* or elsewhere, to deal with certain aspects of employer-employee relationships, it should not be taken to have conferred concurrent jurisdiction on *ad hoc* adjudicators to deal with the same matter. In my view the procedure in Part III for the filing of complaints by non-unionized employees for unjust dismissal, for hearing by an adjudicator, should be seen as a residual procedure intended to provide some redress where such redress was not otherwise available. It seems to me that that is the clear meaning of paragraph 242(3.1)(b).

> Nor need this approach create serious problems for a dismissed employee who is perhaps not sure which procedure for redress to invoke. As far as I can ascertain, one can file complaints under both Part I and Part III of the Code without incurring any expense. The critical deadline in each case is 90 days after the complainant is aware of the cause for complaint. The Part III remedy being residual, it would be prudent for the complainant to prosecute first the Part I complaint. Only if she is unable to establish an unfair labour practice as the cause for her dismissal should she then pursue further the Part III complaint. It will be noted that in the present case the respondent did in fact file complaints under both Parts, but she failed to pursue the Part I complaint to its conclusion by seeking a hearing before the Board. It was she who terminated her Part I redress procedure.

[68] That analysis was repeated a few years later in *Boutilier*, *supra*. The issue in that case was whether an adjudicator appointed under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 was without jurisdiction to decide a dispute related to human rights that arose under a collective agreement in the light of a provision of that Act which limited grievances to matters "in respect of which no administrative procedure for redress is provided for in or under an Act of Parliament […]." Linden J.A. ruled that the adjudicator did not have jurisdiction on the basis of the reasoning set out in *Byers Transport*, citing with approval the comments of the Trial Division judge in that case, Madame Justice Gillis, reported at [1999] 1 F.C. 459, [1998] F.C.J. No. 1635, and which are particularly apposite in the instant case (at para. 33 and 32 of the Trial Division decision reproduced at para. 17 and 18 of the appeal decision in *Boutilier*) [emphasis added]:

> Parliament also 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.
>
> […]
>
> Paragraphs 41(1)(a) and 44(2)(a) of the *Canadian Human Rights Act* constitute important discretionary powers in the arsenal of the Commission, as it performs its role in the handling of a complaint, and permit it, in an appropriate case, to require the complainant to exhaust grievance procedures. Paragraphs 41(1)(a) and 44(2)(a) also indicate that Parliament expressly considered that situations would arise in which a conflict or an overlap would occur between legislatively mandated grievance procedures, such as that provided for in the *Public Service Staff Relations Act*, and the legislative powers and procedures in the *Canadian Human Rights Act* for dealing with complaints of discriminatory practices. In the event of such a conflict or overlap, Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(a) and 44(2)(a), to determine whether the matter should proceed as a grievance under other legislation such as the *Public Service Staff Relations Act*, or as a complaint under the *Canadian Human Rights Act*. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.

[69] Linden J. A. himself specifically recalled in *Boutilier*, at para. 24, that it was for the Canadian Human Rights Commission to decide whether or not to send a matter to arbitration if, in its statutory discretion, it deems this appropriate:

> This principle does not prevent unions from bargaining for rights beyond the Human Rights Code area, for a grievor can go to arbitration as long as no remedy is available at the Human Rights Commission to vindicate these new rights. This result gives primacy in dispute resolution to the human rights administration, as well as other expert administrative schemes, where expertise and consistency

> is plainly favoured by Parliament, rather than decisions of ad hoc adjudicators. PSSRA is different than most labour codes where arbitration is made the exclusive remedy. It is up to the Human Rights Commission to send matters to arbitration pursuant to section 41 if, in its discretion, it feels it appropriate. Any other interpretation would render the words in subsection 91(1) meaningless or twisted beyond recognition. [Emphasis added]

[70] In my view, the reasoning of Gillis J. and of Evans J.A. in *Boutilier* is compelling, and it should be extended to the interpretation of the interplay between paragraph 242(3.1)(b) of the *Canada Labour Code* and paragraphs 41(1)(b) and 44(2)(b) of the *Canadian Human Rights Act*.

[71] Indeed, in adopting paragraph 242(3.1)(b) of the *Canada Labour Code,* Parliament intended to avoid a multiplicity of proceedings in the context of an unfair dismissal. The use of the imperative "shall" in paragraph 242(3.1)(b) is a clear indication that an adjudicator appointed under subsection 241(1) of the *Canada Labour Code* must refuse to hear the complaint where another procedure for redress has been provided for elsewhere in that *Code* or in another act of Parliament.

[72] Moreover, in the light of *Byers Transport* and *Boutilier*, it is beyond dispute that the complaint mechanism provided for in the *Canadian Human Rights Act* is another procedure for redress within the meaning of paragraph 242(3.1)(b) of the *Canada Labour Code*.

[73] Consequently, an adjudicator appointed under subsection 242(1) of the *Canada Labour Code* must decline to hear a complaint filed under subsection 240(1) of that *Code* if another substantially similar complaint has been filed under the *Canadian Human Rights Act* or, in the event

that no complaint has been submitted under that Act, if the *Canada Labour Code* complaint raises human rights issues which could reasonably constitute a basis for a substantially similar complaint under the *Canadian Human Rights Act*.

[74] However, unlike what was stated by the adjudicator in this case, an adjudicator appointed under subsection 242(1) of the *Canada Labour Code* is not wholly without jurisdiction. His jurisdiction is simply ancillary to that of the Canadian Human Rights Commission and of the Canadian Human Rights Tribunal. Consequently, the Canadian Human Rights Commission could, in the exercise of its statutory discretion under either paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*, refer the complaint to the adjudicator if it is satisfied that it could be more appropriately dealt with in the context of a hearing held pursuant to section 242 of the *Canada Labour Code*. I add that in such an event, the adjudicator appointed under the *Canada Labour Code* would have the authority to hear and decide the human rights allegations to the extent that they relate to the unjust dismissal which he is appointed to adjudicate. This flows logically from the reasoning in *Boutilier*.

[75] The adjudicator's interpretation of his jurisdiction in this case was too restrictive. I am of the view that the adjudicator erred when he decided that the reasoning of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board and O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42 ("*Parry* Sound") did not extend to an adjudicator appointed under subsection 242(1) of the *Canada Labour Code*. I see no reason why such an adjudicator would be precluded from considering human rights issues which arise in the context of an unjust dismissal

complaint in the event the Canadian Human Rights Commission refers the complaint back to the adjudicator under its authority pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.

[76] Under paragraph 242(3)(a) of the *Canada Labour Code*, an adjudicator must "consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon". Surely a dismissal made in violation of an employee's human rights is "unjust" within the meaning of that provision of the *Code*, and I fail to understand why an adjudicator could not so find. Obviously, the decision of the adjudicator in such a case is made under the relevant provisions of the *Canada Labour Code*, and the remedial measures which the adjudicator can order are those set out in that *Code* and not those provided for in other legislation such as the *Canadian Human Rights Act.* However, the concept of "unjust dismissal" is not such as to foreclose any consideration of motives for dismissal based on violations of human rights where an adjudicator is properly referred a matter pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.

[77] As held in *McLeod v. Egan*, [1975] 1 S.C.R. 517, management's rights must be exercised in accordance with the employee's statutory rights. This principle applies where the concerned employee is subject to a collective labour agreement and with even greater logic where no collective labour agreement exists. Those statutory rights include those set out in section 7 of the *Canadian Human Rights Act* which provides that it is a discriminatory practice to refuse to continue to employ an individual on a prohibited ground of discrimination.

[78] Where there is a breach of a human rights statute within a labour relations context, *Parry Sound* stands for the proposition that an arbitrator has jurisdiction to adjudicate the grievance raising the violation of such rights even if these rights run counter to the terms of a collective agreement governing the employee-employer relationship. In *Parry Sound*, a probationary employee had filed a grievance with respect to her discharge on the basis of an alleged violation of her human rights under the Ontario *Human Rights Code* even though the applicable collective agreement recognized management's unfettered right to discharge probationary employees. Iacobucci J. held, on the basis of *McLeod v. Egan, supra*, that the statutory human rights at issue had been implicitly incorporated into the collective agreement so as to confer jurisdiction on the arbitrator to decide the grievance (*Parry Sound* at paras. 28 and 32):

> As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.
>
> […]
>
> Under *McLeod*, a collective agreement cannot extend to an employer the right to violate the statutory rights of its employees. On the contrary, the broad power of the appellant to manage operations and direct employees is subject not only to the express provisions of the agreement, but also to the statutory rights of its employees. Just as the collective agreement in *McLeod* could not extend to the employer the right to require overtime in excess of 48 hours, the collective agreement in the current appeal cannot extend to the appellant the right to discharge an employee for discriminatory reasons. Under a collective agreement, as under laws of general application, the right

> to direct the work force does not include the right to discharge a probationary employee for discriminatory reasons. The obligation of an employer to manage the enterprise and direct the work force is subject not only to express provisions of the collective agreement, but also to the statutory rights of its employees, including the right to equal treatment in employment without discrimination.

[79] These principles apply with even more force in situations, such as in the instant case, where there is no collective agreement preventing the application of the statutorily guaranteed right not to be dismissed on prohibited grounds of discrimination.

[80] These principles being clearly set out, Iacobucci J. in *Parry Sound* then addressed the issue whether the grievance arbitrator had jurisdiction to hear the grievance. Indeed, it was submitted in that case that although the arbitrator had the power to interpret and apply human rights and other employment-related statutes under the statutory scheme relating to grievance dispute resolution in Ontario, that power could only be exercised if it had already been determined that the arbitrator had, at the outset, jurisdiction over the subject matter of the grievance. Iacobucci J. accepted that argument, but held that it was not determinative in that case (*Parry Sound* at paras. 48-49) [emphasis added]:

> But even if it is true that a dispute must be arbitrable before an arbitrator obtains the power to interpret and apply the Human Rights Code, it does not thereby follow that an alleged contravention of an express provision of a collective agreement is a condition precedent of an arbitrator's authority to enforce the substantive rights and obligations of employment-related statutes. Under *McLeod*, the broad right of an employer to manage operations and direct the work force is subject not only to the express provisions of the collective agreement but also to the statutory rights of its employees. This means that the right of a probationary employee to equal treatment

> without discrimination is implicit in each collective agreement. This, in turn, means that the dismissal of an employee for discriminatory reasons is, in fact, an arbitrable difference, and that the arbitrator has the power to interpret and apply the substantive rights and obligations of the Human Rights Code for the purpose of resolving that difference.
>
> Consequently, it cannot be inferred from the scheme of the LRA that it was the legislature's intention to displace or otherwise restrict the legal principles enunciated in McLeod. The appellant's submissions in respect of the structure of s. 48 are consistent with the conclusion that the substantive rights and obligations of the *Human Rights Code* are implicit in each collective agreement over which an arbitrator has jurisdiction. If an arbitrator is to enforce an employer's obligation to exercise its management rights in accordance with the statutory provisions that are implicit in each collective agreement, the arbitrator must have the power to interpret and apply human rights and other employment-related statutes. Section 48(12)(j) confirms that an arbitrator does, in fact, have this right.

[81] This principle extends to adjudication of disputes under section 242 of the *Canada Labour Code*. Indeed, though the adjudicator under that *Code* is reviewing an employer's decision to terminate the employment relationship under the employee's individual contract of employment rather than under a collective agreement, the same authority to enforce an employer's obligation to exercise its management rights in accordance with the statutory provisions is implicitly included in that individual contract of employment. If we simply replace the phrase "collective agreement" by "individual contract of employment" in the above comments made in *Parry Sound*, we clearly have the principles applicable in this case.

[82] In my view, the absence of a statutory provision in the *Canada Labour Code* explicitly conferring on an adjudicator the power to interpret and apply human rights statutes or any other

statute does not negate the adjudicator's authority to do so. This power is rather implicitly provided for in paragraph 242(3)(a) of the Canada Labour Code: it gives the adjudicator the authority to consider whether the dismissal was "unjust", and empowers the adjudicator to render a binding decision on this matter.

[83] I find support for this view in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14. In that case, the issue was whether the Ontario Social Benefits Tribunal was bound to follow provincial human rights legislation. Bastarache J. answered in the affirmative; he observed at para. 26 that "it was undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law."

Conclusion

[84] In conclusion, I rule that the adjudicator did not violate any principles of natural justice or procedural fairness in conducting the proceedings and rendering his decision. I also rule that the adjudicator correctly decided not to hear the complaint before him on the merits. Consequently, the decision of the adjudicator in this case is largely upheld, save to the extent that the adjudicator declined jurisdiction in a manner which would preclude the complaint being referred back to him by the Canadian Human Rights Commission in the exercise of its authority pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.

[85] On costs, I note that the Respondent has been largely successful in this judicial review. However, an important aspect of the adjudicator's decision has nevertheless been found in error. In

this respect, the results of these proceedings may be said to be mixed. Consequently I will exercise my discretion under the *Federal Courts Rules* and make no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed in part only. The Court sets aside that part of the adjudicator's decision declining jurisdiction in a manner which would preclude the complaint being referred back to him by the Canadian Human Rights Commission in the exercise of its authority pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*. The remainder of the adjudicator's decision is upheld.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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