Federal Court  Cour fédérale

Date: 20120831

Docket: T-56-11

Citation: 2012 FC 1027

Ottawa, Ontario, August 31, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

ZABIA CHAMBERLAIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Zabia Chamberlain, is a long-serving member of the federal public service, employed in the Department of Human Resources and Skills Development [HRSDC]. In 2006, she was offered and accepted a temporary promotion to an acting assignment in an excluded EX-01 position. She claims that the workload in that position was excessive and that she was subjected to ongoing harassment by the supervisor to whom she reported in the acting assignment. Matters came to a head in April 2008, when the supervisor swore and shouted at Ms. Chamberlain. She alleges

that he was also physically intimidating and on other occasions had made comments to her that she found to be sexually suggestive and inappropriate.

[2] In April 2008, Ms. Chamberlain made a complaint to the Assistant Deputy Minster [ADM] to whom her supervisor reported. Ms. Chamberlain fell ill shortly thereafter and has not worked since. The ADM investigated Ms. Chamberlain's complaint and concluded that Ms. Chamberlain's supervisor had violated the Treasury Board Harassment Policy. Ms. Chamberlain, however, was not satisfied with the investigation report and has been engaged in a lengthy debate about it with HRSDC. Indeed, the correspondence between Ms. Chamberlain, her co-workers and HRSDC spawned the record before the Court in this application, which consists of 14 bound volumes of documentation.

[3] Ms. Chamberlain's acting assignment in the EX-01 position ended on its originally scheduled end-date of October 6, 2008, although she was absent due to illness at the time. HRSDC has offered to return Ms. Chamberlain to her substantive position of ES-07 in another branch of HRSDC, but Ms. Chamberlain claims that due to her medical condition she cannot work in the locations that have been made available. She also argues that she ought to continue to be paid at the EX-01 level and alleges that she was effectively blocked from competing for promised vacancies at the EX-01 level because her former supervisor, about whom she complained, ran the competitions for these positions.

[4] On December 3, 2008, Ms. Chamberlain filed a grievance in which she complained about several matters, including the treatment she had received from her supervisor, the investigation

conducted by the ADM, the contents of the investigation report, her inability to compete for the posted EX-01 positions and loss of the EX-01 salary, HRSDC's alleged disregard of its obligation to ensure her health and safety in accordance with Part II of the *Canada Labour Code*, RSC, 1985, c L-2) [the Code], the alleged failure of HRSDC to accommodate her and the discrimination she claims to have faced as a woman, a member of a visible minority group and a person with a disability. Ms. Chamberlain referred her grievance to adjudication under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA or the Act]. Ms. Chamberlain also filed four complaints with the Public Service Labour Relations Board [PSLRB or the Board], alleging that the employer violated its obligations to provide her with a safe work environment under the Code and engaged in reprisals contrary to the Code.

[5] In a decision dated December 13, 2010, Adjudicator Filliter of the PSLRB dismissed Ms. Chamberlain's grievance on a preliminary basis, holding that it did not raise any adjudicable issue. In the same decision, Vice-Chairperson Filliter also ruled on the four Code-based complaints and held that only portions of them were adjudicable. In this application, Ms. Chamberlain seeks judicial review of the Adjudicator's decision dismissing her grievance.

[6] Jurisdiction over judicial review of decisions of the PSLRB is divided between this Court and the Federal Court of Appeal. When Board members sit as grievance adjudicators, their decisions are reviewable by this Court. All other of their decisions are reviewable by the Federal Court of Appeal (see *Beirnes v Canada (Treasury Board - Employment and Immigration Canada)* (1993), 67 FTR 226, 4 WDCP (2d) 555 (TD)). I therefore can only consider the portions of Mr. Filliter's decision which disposed of Ms. Chamberlain's grievance. The portion of his

decision ruling on the Code complaints is reviewable by Federal Court of Appeal, and, indeed, that Court has already received and decided such a review.

[7] In this regard, on February 8, 2012, the Federal Court of Appeal dismissed Ms. Chamberlain's application for judicial review in respect of the portion of Vice Chairperson Filliter's decision that dealt with the Code (*Chamberlain v Canada (Attorney General)*, 2012 FCA 44 [*Chamberlain*]). Ms. Chamberlain sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, which refused leave on August 9, 2012.

[8] Ms. Chamberlain's present application for judicial review contains several arguments, some of which have been disposed of by the Federal Court of Appeal in *Chamberlain*. In particular, Ms. Chamberlain alleges that the Adjudicator violated the requirements of procedural fairness and was biased, arguments which also pertain to her Code-based claims and which were considered and dismissed by the Federal Court of Appeal in *Chamberlain*. As is discussed below, the principles of issue estoppel, or the rule that an issue that has already been determined between parties cannot be re-litigated, and *stare decisis*, or the rule that lower courts are bound by the rulings made by higher courts, require that I follow the decision of the Federal Court of Appeal on these points and results in the dismissal of Ms. Chamberlain's arguments related to an alleged breach of procedural fairness and bias.

[9] In addition to these points, Ms. Chamberlain alleges that the Adjudicator made a number of other reviewable errors in dismissing her grievance. Although she articulates them in various ways, these errors can be summarised as basically falling into three categories. She first alleges that the

Adjudicator erred in finding that the grievance is not related to a disciplinary action resulting in demotion or financial penalty within the meaning of paragraph 209(1)(b) of the PSLRA. Second, she attacks the Adjudicator's dismissal of her grievance, arguing that she asserted human rights violations which the Adjudicator should have found to be adjudicable. Finally, she makes a number of allegations that are in essence a repetition of her claims concerning the errors she believes the Adjudicator made in ruling on her complaints under the Code, or, indeed, that relate to the merits of the Code-based claims that the PSLRB is still adjudicating.

[10] The final category of error is not appropriately raised in this application for judicial review as it is outside this Court's jurisdiction. Moreover, it was already ruled upon in part by the Federal Court of Appeal and in other part is the subject of an ongoing proceeding before the PSLRB. Thus, only the first and second of the substantive areas in which Ms. Chamberlain alleges the Adjudicator erred are properly raised here.

[11] As is discussed below, the reasonableness standard of review applies to the Adjudicator's determination that Ms. Chamberlain's grievance is not related to a disciplinary action resulting in demotion or financial penalty under paragraph 209(1)(b) of the PSLRA. For the reasons set out below, I have concluded that the Adjudicator's decision on this issue is reasonable and, accordingly, that this ground for review fails.

[12] As concerns the second ground raised by Ms. Chamberlain - related to her human rights claims - Ms. Chamberlain's grievance raises a claim that the employer failed to accommodate her in breach of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA] and also raises a claim that

she has been discriminated against in violation of the CHRA. Although these claims are not clearly stated, Ms. Chamberlain does allege in her grievance that she was a victim of discrimination and that the employer failed to facilitate her return to work. She also mentions the CHRA. The Adjudicator did not consider the adjudicability of the alleged violations of the CHRA in his decision and thus, as is more fully discussed below, committed a reviewable error. It may well be that Ms. Chamberlain's human rights claims are inadjudicable, but this matter was not addressed by the Adjudicator and should have been. I have accordingly determined that the Adjudicator's order dismissing Ms. Chamberlain's grievance must be set aside and the matter be remitted back to him (if he is available or to another PSLRB adjudicator if he is not) to determine whether or not Ms. Chamberlain's claim of an alleged breach of the CHRA is adjudicable under the PSLRA. As the standard of review of an Adjudicator's determination of arbitrability is reasonableness, it is for the Adjudicator – and not this Court – to make this determination.

[13] At the hearing of this matter, two evidentiary issues were raised. Ms. Chamberlain sought to file additional evidence, which I ruled was inadmissible. I set out my reasons for so doing below. Counsel for the respondent also made a motion to strike portions of the record before the Court, and I took this issue under reserve. For the reasons that follow, I am granting the respondent's motion to strike in part.

Issues

[14] As is apparent from the foregoing, the issues that arise in this case are the following:

1. What record is appropriately before the Court in these matters;

2. What is the impact of the decision of the Federal Court of Appeal in *Chamberlain* on the bias and breach of procedural fairness claims made in this case;
3. What standard of review is applicable to the portions of the Adjudicator's decision that are properly before this Court in this application;
4. Is the Adjudicator's decision, determining that Ms. Chamberlain's grievance does not allege a disciplinary action resulting in demotion or financial penalty, reasonable;
5. Should the Adjudicator have considered the human rights claims Ms. Chamberlain alleges were made in her grievance; and
6. What remedy is appropriate?

What material is appropriately before the court in these matters?

[15] At the hearing of this application, Ms. Chamberlain sought to file five additional affidavits: three from herself, dated September 6, 2011, October 7, 2011 and January 10, 2012; another signed by Julie Dupuis, dated January 6, 2012; and, finally, an affidavit from her mother, Salima Dean, dated January 6, 2012. By order dated February 14, 2012, Prothonotary Aronovitch ruled that none of these affidavits was admissible. Madam Aronovitch's order was not appealed and therefore represents a final and binding determination on the admissibility of these five affidavits. For this reason, I ruled on May 16, 2012, during the second day of hearing in this matter, that none of the five affidavits could be filed and that they would not be considered by me in deciding this application.

[16] As noted, during the hearing, counsel for the respondent sought an order striking portions of the record that had been filed by Ms. Chamberlain. More specifically, counsel sought to strike all the affidavits or affirmative declarations contained at Tab 5 of the applicant's record, with the exception of the affidavits of M. Rondeau, dated January 14, 2011 and of T. Dugas, dated January 27, 2011.[1] She also sought to strike Tabs A and B of Tab 6 of the applicant's record (a series of questions posed to and answers given by Ms. Chamberlain's treating physician and psychologist) and all materials that post-dated the Adjudicator's decision.[2] The latter included numerous documents obtained by Ms. Chamberlain from HRSDC through requests she made under the *Privacy Act*, RSC , 1985, c P-21, and exhibits that have been filed before the PSLRB in the context of the ongoing hearings into the portions Ms. Chamberlain's Code-based complaints that Vice-Chairperson Filliter determined were adjudicable.

[17] The general rule, which has been qualified as "trite law", is that an applicant on judicial review can only rely on evidence that was before the decision-maker (see e.g. *Ochapowace Indian Band v Canada (Attorney General)*, 2007 FC 920 at para 9, 316 FTR 19 [*Ochapowace Indian Band*]; *Slaeman v Canada (Attorney General)*, 2012 FC 641 at para 15). There are limited exceptions to this rule, namely when the evidence relates to a challenge to procedural fairness, the tribunal's jurisdiction or is general background information of assistance to the court (*Ochapowace Indian Band* at para 9).

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[1] The material counsel wished struck under this tab is comprised of the affirmative declaration of R. Borysewize, dated October 28, 2010; of D. Bryson, dated November 3, 2010; of D. Jelly, dated November 3, 2010; of C. Corneau, dated November 19, 2010; of M. Chaussé, dated October 2010; of F. Dean, dated October 26, 2010 and of D. Londynski, dated November 8, 2010, as well as the affidavits of D. Bryson, dated April 29, 2011; C. Corneau, dated April 21, 2011 and of M. Chaussé, dated April 2011.

[2] The material counsel sought to be struck because it post-dates the decision is comprised of the documents at Tabs 8, 9. 10, D and E1 and 11, A, B, C, D, E, and F of the applicant's record.

[18] The impugned documents at Tabs 5 and 6 of the Record are arguably related to Ms. Chamberlain's procedural fairness claims as they contain evidence that the Adjudicator did not admit (which she asserts amounted to a breach of procedural fairness). Accordingly, I have determined that these documents will not be struck from the record. Even though the decision of the Federal Court of Appeal in *Chamberlain* results in the dismissal of these claims, the record was constituted before that decision was made and the procedural fairness and bias issues placed before me for determination. Accordingly, evidence related to them is properly part of the record (even though the claims themselves must be dismissed for the reasons set out below).

[19] The rest of the impugned documents, however, post-date the Adjudicator's decision and thus were not before him and do not fall within one of the exceptions noted above. Given the date they were created, they cannot shed light on the hearing before the Adjudicator and do not concern his jurisdiction. The documents contained at Tabs 8, 9, 10, D and E1, and 11A, B, C, D, E and F of the applicant's record are therefore not admissible in this application and will be struck from the record. I accordingly have not considered them in making this decision.

What is the impact of the Decision of the Federal Court of Appeal in *Chamberlain* on the bias and breach of procedural fairness claims made in this case?

[20] Turning to the procedural fairness and bias claims made by Ms. Chamberlain, as noted, the Federal Court of Appeal considered and dismissed essentially the same claims in *Chamberlain*. Indeed, Ms. Chamberlain's written submissions to the two Courts on these points are very similar. In both proceedings, she alleged that she was not provided with the opportunity to present her case in full, that her evidence and cited jurisprudence were not sufficiently considered and that the Adjudicator did not issue summons to witnesses whom Ms. Chamberlain wished to call. The Court

of Appeal found that, while Ms. Chamberlain may have disagreed with the outcome of the decision as well as the reasons, her right to procedural fairness had been respected, and there was no reasonable apprehension of bias.

[21] The respondent argues that Ms. Chamberlain is barred from bringing these issues before this Court due to the application of the doctrine of abuse of process, as outlined by the Supreme Court of Canada in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 [*City of Toronto*]. I disagree. The doctrine of abuse of process is normally not applied when issue estoppel pertains. For the reasons set out below, I find that issue estoppel does pertain in this case. In addition, the doctrine of *stare decisis* prevents Ms. Chamberlain from re-litigating the bias and procedural fairness issues. Thus, while I agree with counsel for the respondent that these issues cannot be re-litigated, I differ as to the reason why this is so.

[22] The principle of issue estoppel, a branch of the broader doctrine of *res judicata*, exists to prevent collateral attacks of decisions. In order for issue estoppel to apply, three elements are required: first, the same parties (or their privies) must be involved in the two cases; second, a final decision must have been made in the earlier case; and third, the same question must have been decided in the earlier case (*Danyluk v Ainsworth Technologies*, 2001 SCC 44 at para 25, [2001] 2 SCR 460 [*Danyluk*]). Where these three elements are present, the issue cannot be re-litigated.

[23] There are important policy reasons behind the doctrine of issue estoppel. As the Supreme Court of Canada stated in *BC Workers' Compensation Board v Figliola*, 2011 SCC 52 at para 34, [2011] 3 SCR 422 [*BC Workers*], the proper way to challenge a legal determination is through an

appeal or review and not a collateral attack or a proceeding commenced in another forum. The Court summarized the applicable principles in the following way:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on.
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature.
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.
>
> - Avoiding unnecessary re-litigation avoids an unnecessary expenditure of resources.
>
> [*BC Workers* at para 34, citations omitted.]

[24] All the elements necessary for the doctrine of issue estoppel are present in this case. First, the parties before me are identical to those before the Court of Appeal in *Chamberlain*. Second, with the Supreme Court of Canada having refused Ms. Chamberlain's application for leave to appeal the decision of the Federal Court of Appeal, there is no doubt that the Federal Court of Appeal's decision is final. Third, as indicated, Ms. Chamberlain's application before the Court of Appeal raised identical issues to those here and thus the questions before the Court of Appeal were the same as those here. Therefore, the doctrine of issue estoppel must result in the dismissal of Ms. Chamberlain's procedural fairness and bias arguments.

[25] There is an additional reason why these arguments must be rejected, namely, the principle of *stare decisis* or rule that requires adherence by a court below to the law as determined by superior courts that hear appeals from the court below. Justice Rothstein (then of the Federal Court of Appeal), explained in *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 at para 54, [2003] FCJ No 151: "The principle of *stare decisis* is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher coordinate court. They cannot refuse to follow it" [citations omitted]. The Federal Court of Appeal hears appeals from this Court and decided precisely the same issue as is now before me regarding the alleged bias of the Adjudicator and the claim that he violated the principles of procedural fairness. Accordingly, the decision in *Chamberlain* is binding on me, and for this reason as well Ms. Chamberlain's bias and procedural fairness claims must be dismissed.

What standard of review is applicable to the portions of the Adjudicator's Decision that are before this Court in this application?

[26] The next issue that arises is the standard of review to be applied to the questions properly before this Court. It will be recalled that they involve the following two inquiries: first, whether the Adjudicator erred in determining that the grievance did not relate to a disciplinary action resulting in demotion or financial penalty within the meaning of paragraph 209(1)(b) of the PSLRA and, second, whether he erred in failing to consider Ms. Chamberlain's human rights claims.

[27] To begin with the simpler question regarding the standard of review applicable to Ms. Chamberlain's human rights claims, the Federal Court of Appeal recently dealt with a similar question in *Turner v Canada (Attorney General)*, 2012 FCA 159, [2012] FCJ No 666 [*Turner*]. In

Turner, the Court reviewed a decision of the Canadian Human Rights Tribunal where the applicant alleged the Tribunal had failed to consider a basis of discrimination raised in his complaint. The Court determined that no deference was owed to the Tribunal's decision in this regard, it being for the reviewing Court to decide whether an inferior tribunal has failed to address an issue before it (at para 43). Thus, as concerns Ms. Chamberlain's claim that the Adjudicator erred in dismissing her human rights claims, no deference is to be afforded to the Adjudicator's decision, and it is for the Court to determine whether he failed to address an issue that was raised in her grievance.

[28] With respect to the standard applicable to the review of the Adjudicator's determination that the grievance did not relate to a disciplinary action resulting in demotion or financial penalty, within the meaning of paragraph 209(1)(b) of the PSLRA, there is conflicting authority on this point.

[29] Ms. Chamberlain appears to argue for the correctness standard as she claims that the Adjudicator's determination is erroneous. Counsel for the respondent, on the other hand, argues that the applicable standard of review is reasonableness, asserting that the case law has determined that this standard is applicable to review of the PSLRB's interpretation of paragraph 209(1)(b) of the Act (citing in this regard *Canada (Attorney General) v Amos*, 2011 FCA 38, 330 DLR (4th) 603 [*Amos*] and *Lindsay v Canada (Attorney General)*, 2010 FC 389, 369 FTR 64 [*Lindsay*]). Counsel argues in the alternative that application of the four factors from the "pragmatic and functional analysis", which were re-affirmed in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 64, [2008] 1 SCR 190 [*Dunsmuir*], also results in the application of the reasonableness standard, given the presence of a strong privative clause in the PSLRA, the purpose of the PSLRB, which is tasked with providing expeditious settlement of workplace disputes, the nature of the question before the Adjudicator and,

more generally, the expertise of PSLRB adjudicators in interpreting the scope of their jurisdiction under paragraph 209(1)(b) of the Act.

[30] To put the issue in context, it is useful to review the relevant statutory provisions. Sections 208 and 209 of the PSLRA define which matters may be the subject of a grievance and which matters may be referred to adjudication by federal public servants. Generally speaking, these sections provide employees in the federal public service with broad rights to grieve virtually any workplace-related issue but circumscribe the scope of matters which may be referred to adjudication before the PSLRB. These sections provide in relevant part:

Right of employee **208.** (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**Droit du fonctionnaire** **208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) 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 regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	b) par suite de tout fait portant atteinte à ses conditions d'emploi.
	Réserve (2) Le fonctionnaire ne peut présenter de grief individuel si

Limitation
(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

[…]

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

[…]

Reference to adjudication
209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

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

un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne.

[…]

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

[…]

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

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

b) soit une mesure disciplinaire entraînant le licenciement, la

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

(c) in the case of an employee in the core public administration,

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

[…]

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

rétrogradation, la suspension ou une sanction pécuniaire;

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

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

[…]

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

Somewhat similar provisions were contained in the predecessor legislation, the *Public Service Staff Relations Act*, RSC 1985, c P-35:

Right of employee
91. (1) Where any employee feels aggrieved
(a) by the interpretation or application, in respect of the employee, of
(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing

Droit du fonctionnaire
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,

with terms and conditions of employment, or
(ii) a provision of a collective agreement or an arbitral award, or
(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),
in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

Limitation
(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

lorsqu'il s'estime lésé :
a) par l'interprétation ou l'application à son égard :
(i) soit d'une disposition législative, d'un règlement -- administratif ou autre --, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,
(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;
b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas a)(i) ou (ii) et portant atteinte à ses conditions d'emploi.

Restrictions
(2) Le fonctionnaire n'est pas admis à présenter de 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

including the final level in the grievance process, with respect to
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,
(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),
(i) disciplinary action resulting in suspension or a financial penalty, or
(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or
(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

Approval of bargaining agent
(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

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

Approbation de l'agent négociateur
(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.

[...]

> 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.
>
> […]

[31] These sections have been the subject of considerable litigation, on a variety of issues, including the scope of review to be applied by this Court to decisions of the PSLRB (or its predecessor, the Public Service Staff Relations Board [PSSRB]). Much of the older case law (decided before the decision of the Supreme Court of Canada in *Dunsmuir*) held that the applicable standard of review to be applied to decisions of the PSSRB regarding its jurisdiction was correctness (see e.g. *Marin v Canada (Treasury Board)*, 2007 FC 1250, 320 FTR 119; *Chadwick v Canada (Attorney General)*, 2004 FC 503, [2004] FCJ No 605; *Canada (Attorney General) v Marinos*, [2000] 4 FC 98, 186 DLR (4th) 517). These cases reasoned that the statute circumscribes the Board's jurisdiction in setting out what matters are adjudicable and, accordingly, that what is now section 209 of the PSLRA is a jurisdictional provision, necessitating review on the correctness standard.

[32] More recent cases from this Court, however, apply the reasonableness standard (see e.g. *Lindsay* at paras 36-38 and *Kagimbi v Canada (Attorney General)*, 2011 FC 527 at para 15), drawing inspiration from *Dunsmuir* and subsequent cases on the standard of review from the Supreme Court of Canada, which militate in favour of a more deferential standard of review. In

addition, several recent cases from the Federal Court of Appeal, concerning other sorts of determinations made by the PSLRB under other sections of the PSLRA, have also held that a reasonableness standard of review is applicable (see e.g. *Amos* at para 33, cited above at para 29; *Public Service Alliance of Canada v Canadian Federal Pilots Association*, 2009 FCA 223 at para 50, [2010] 3 FCR 219 [*Federal Pilots Association*]; and *Attorney General of Canada v Public Service Alliance of Canada*, 2011 FCA 257 at paras 27-35, 343 DLR (4th) 156 [*AG v PSAC*]).

[33] The matter of the standard of review applicable to the determination at issue in this case has not been definitively settled by the Federal Court of Appeal. Contrary to what that counsel for the respondent asserts, the *Amos* decision did not deal with the standard of review to be applied to the Board's determination of arbitrability under paragraph 209(1)(b) of the PSLRA. Rather, the *Amos* case concerned the jurisdiction of the PSLRB to enforce settlements and the standard of review applicable to the Board's determination that it possessed jurisdiction to do so.

[34] In the relatively recent decision in *Rhéaume v Canada (Attorney General)*, 2010 FCA 355, 415 NR 47, the Court of Appeal noted the division in the case law on the standard of review applicable in cases like the present and declined to pronounce on what standard is applicable to determinations of the Board under paragraph 92(1)(b) of the PSSRA (the precursor to paragraph 209(1)(b) of the PSLRA) because the Board decision at issue in that case was both reasonable and correct. Justice Trudel, writing for the Court, noted that the Court of Appeal would "consider [the] issue [of the applicable standard of review] another time" (at para 9).

[35] In light of this division in the case law, it is necessary to analyse the PSLRA and the nature of the issue before the Adjudicator to determine the appropriate standard of review. The requisite analysis is a contextual one and involves consideration of a number of factors, including: (1) the presence or absence of a privative clause and the wording of any such clause; (2) the purpose of the PSLRB; (3) the nature of the question at issue, and; (4) the expertise of the PSLRB (paraphrasing *Dunsmuir* at para 64).

[36] As counsel for the respondent correctly notes, the PSLRA (unlike the PSSRA) contains a strong privative clause. In this regard, section 233 of the PSLRA provides as follows:

Decisions not to be reviewed by court **233.** (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.	**Caractère définitif des décisions** **233.** (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.
No review by *certiorari*, etc. (2) No order may 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 of the adjudicator's proceedings under this Part.	**Interdiction de recours extraordinaires** (2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie.

[37] The Federal Court of Appeal has held that this strongly-worded privative clause is an important factor leading to the conclusion that the reasonableness standard of review is applicable to other sorts of decisions made by the PSLRB. For example, in *Federal Pilots Association* (cited

above at para 32), the Court was required to determine what standard of review is applicable to the PSLRB's determination of the scope of a bargaining unit. Justice Evans, writing for the majority of the Court, noted that section 233 is a "strong preclusive clause" and considered this factor an important one in determining that the standard of review applicable in that case was reasonableness (at paras 18 and 55). Likewise, in *AG v PSAC* (at para 35, cited above at para 32), the Court of Appeal relied in on the privative clause contained in section 51 of the PSLRA in determining that the reasonableness standard of review is applicable to a decision of the PSLRB setting essential service levels that must be maintained in the event of a strike or lockout. In *Amos* (cited above at para 29), the content of the privative clause was an important factor in the determination that the reasonableness standard of review is applicable to the Board's decision that it possessed jurisdiction to enforce grievance settlements (see para 29).

[38] Section 233 of the PSLRA is similar to the privative clause found in Part I of the Code, which sets out the provisions relating to labour relations in the federal private sector and establishes and provides authority to the Canada Industrial Relations Board [CIRB]. The case law firmly establishes that the reasonableness standard of review applies to decisions of the CIRB, in part due to the strongly-worded privative clause found in section 22 of the Code (see e.g. *Syndicat des débardeurs du Port de Québec (CUPE, Local 2614) v Société des Arrimeurs de Québec Inc*, 2011 FCA 17, 419 NR 225 at para 37; *JD Irving Ltd v General Longshore Workers, Checkers and Shipliners of the Port of Saint John*, 2003 FCA 266 at paras 10-11, [2003] 4 FC 1080). Thus, the first factor from the pragmatic and functional analysis points strongly towards selection of the reasonableness standard of review.

[39] In so far as concerns the second factor in the standard of review analysis, the purpose of the PSLRB – like any labour tribunal – is to provide expeditious and final settlement of workplace disputes. Such purpose has often been held to warrant application of the reasonableness standard of review (see e.g. *Federal Pilots Association* at para 55, cited above at para 32; *Amos* at para 30, cited above at para 29).

[40] The third factor, which involves consideration of the type of issue determined by the Adjudicator, also militates strongly in favour of selection of the reasonableness standard of review. In the impugned decision, the Adjudicator was required to determine whether Ms. Chamberlain's grievance related to "disciplinary action" by her employer that resulted in demotion or financial penalty. Determination of this issue requires consideration of both fact and law, which is the hallmark of the type of decision that normally attracts the reasonableness standard of review.

[41] Finally, consideration of what types of actions constitute discipline lies at the very heart of a labour tribunal's expertise. Myriads of these sorts of cases have arisen before the PSLRB and their resolution requires sensitivity to workplace realities that is at the very core of the Board's expertise and is often outside the expertise of a reviewing court. Thus, the fourth factor likewise points to selection of the reasonableness standard of review.

[42] The fact that section 209 is drafted in terms that set out the scope of what issues may be referred to adjudication (and therefore the scope of an adjudicator's jurisdiction) does not detract from the conclusion that the applicable standard of review of a determination of arbitrability is reasonableness. In *Dunsmuir* (cited above at para 29), where the Supreme Court of Canada set out

its current approach to standard of review issues, Justices LeBel and Bastarache, writing for the majority, indicated that "[d]eference 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" (at para 54). While they noted that "true questions of jurisdiction or *vires*" will be subject to review on a correctness standard, they hastened to point out that such situations will arise infrequently and "reiterate[d] the caution of Dickson J. in *CUPE* [*Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227] that reviewing judges must not brand as jurisdictional issues that are doubtfully so" (at para 59).

[43] In subsequent decisions, the Supreme Court has re-confirmed that there will be few circumstances where the interpretation of a tribunal of its constituent statute will give rise to a "true" jurisdictional question reviewable on a correctness standard. In a trilogy of post-*Dunsmuir* decisions dealing with the jurisdiction of administrative tribunals to award costs, the Supreme Court applied the reasonableness standard to the tribunals' determination of the scope of their jurisdiction, indicating that, as a general rule, a tribunal's interpretation of its authority under its constituent statute should be afforded deference and, accordingly, ought to be reviewed on the reasonableness standard. In *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678, Justice Rothstein, writing for the majority, stated that "courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (at para 34). To similar effect, in S*mith v Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 SCR 160, Justice Fish, writing for the majority, summarily dismissed an argument that the issue of the tribunal's ability to award costs posed a jurisdictional question, holding at para 36 that:

> The jurisdictional ground is without merit. [The tribunal has …] 'the authority to make the inquiry' whether 'costs' under [the statute] refer solely to costs incurred in proceedings before them. A determination that plainly falls within their 'statutory grant of power'.

This passage seems to indicate that where the statute affords the tribunal authority to address the issue, the question is not a jurisdictional one. Finally, in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471, the Court held that the reasonableness standard of review will apply to a tribunal's interpretation of the scope of its authority under its constituent statute if the issue is "within its expertise" and "does not raise issues of general legal importance" (per Justices LeBel and Cromwell, writing for the Court, at para 24).

[44] In the recent decision of *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, 2011 SCC 61, [2011] 3 SCR 654, Justice Rothstein, writing for the majority, reconfirmed that there will be few situations where a tribunal's interpretation of its scope of authority under its constituent statute will be reviewable on a correctness standard. He stated as follows at paragraph 34:

> The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely

> connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[45] My conclusion that the reasonableness standard is applicable to the Adjudicator's interpretation of paragraph 209(1)(b) of the PSLRA is reinforced by conclusions of the Ontario and Alberta Courts of Appeal in deciding similar issues. In *Ontario Public Service Employees Union v Seneca College of Applied Arts & Technology*, [2006] OJ No 1756, 80 OR (3d) 1, the Ontario Court of Appeal, in a pre-*Dunsmuir* decision, determined that the patent unreasonableness standard of review was applicable to the determination of the board of arbitration on the scope of its jurisdiction to award punitive damages under the terms of the collective agreement in issue. To similar effect, in *Alberta v Alberta Union of Provincial Employees*, 2008 ABCA 258, the Alberta Court of Appeal applied the reasonableness standard to an arbitrator's determination of arbitrability.

[46] In light of the foregoing, the reasonableness standard is applicable to the review of the Adjudicator's determination that Ms. Chamberlain's grievance did not relate to a disciplinary action resulting in financial penalty or demotion. This standard is a deferential one and requires that a reviewing court consider both the tribunal's reasons and the outcome. Generally speaking, a court cannot intervene unless it is satisfied that the reasons of the tribunal are not justified, transparent or intelligible and that the result does not fall "within [the] range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). It matters not whether the reviewing court agrees with the tribunal's conclusion, would have reached a different result or might have reasoned differently. So long as the reasons are comprehensible and the result is one that

is rational and supportable in light of the facts and the applicable law, a court should not overturn an inferior tribunal's decision under the reasonableness standard of review.

[47] In the present case, therefore, the issue is not whether the Adjudicator erred in dismissing Ms. Chamberlain's grievance under paragraph 209(1)(b) of the PSLRA but, rather, whether his decision and reasoning are defensible in light of the applicable facts and law and whether his reasons are comprehensible (or transparent and intelligible). Insofar as concerns his failure to deal with the human rights claim that Ms. Chamberlain alleges she made in the grievance, however, no deference is warranted.

Is the Adjudicator's decision determining that the Ms. Chamberlain's grievance does not allege a disciplinary action resulting in demotion or financial penalty reasonable?

[48] A review of whether the Adjudicator's decision under paragraph 209(1)(b) of the PSLRA is reasonable must start with the grievance itself. Ms. Chamberlain represented herself in the grievance process, before the PSLRB and before this Court. Her grievance listed eight points in which she asserts that the employer has violated her rights. Although the grievance is quite lengthy, the essence of the claims made in it may be paraphrased as follows:

1. the employer breached its obligations regarding workplace health and safety in imposing an overly heavy workload and undue pressure on Ms. Chamberlain and through her supervisor's "aggressive, harassing, abusive and physically-violating behaviours" towards Ms. Chamberlain (Grievance Statement, Respondent's Record, Vol 2, p 110);

2. the employer disregarded its obligations to treat the issue of Ms. Chamberlain's workplace health and safety concerns in accordance with the procedures that Ms. Chamberlain asserts were required under the Code and the *Canada Occupational Health and Safety Regulations*, SOR/86-304;
3. the employer disregarded its obligations to treat Ms. Chamberlain with "proactive positive inclusion measures as a woman, a working parent, … a [v]isible [m]inority and as a person with a disabling health condition", in violation of the *Employment Equity Act*, SC 1995, c 44 and applicable Treasury Board policies (Grievance Statement, Respondent's Record, Vol 2, p 110). Later portions of the grievance can be read as alleging that these actions also violated the CHRA;
4. the employer failed to correct errors that Ms. Chamberlain claims were contained in the investigation report that the Assistant Deputy Minister completed, following the complaints made by Ms. Chamberlain;
5. the employer failed to accommodate Ms. Chamberlain and discriminated against her as a result of her "work-imposed health limitations," resulting in the loss of the EX-01 salary that Ms. Chamberlain had been paid during her acting assignment (Grievance Statement, Respondent's Record, Vol 2, p 110);
6. the employer disregarded its obligations under the Treasury Board *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service*;

7. the employer "[d]isregarded the damage to [Ms. Chamberlain's] established career path" that was caused by her supervisor having led her to believe that the acting EX-01 assignment would lead to a permanent EX position, by "exploiting" her in that position and by subjecting her to "questionable management behaviours," all of which resulted in Ms. Chamberlain being denied normal career development opportunities, loss of the acting EX-01 salary and being "excluded" from the job competitions for posted permanent EX vacancies at HRSDC, because the competitions for the vacancies were run by the supervisor who had harassed her (Grievance Statement, Respondent's Record, Vol 2, pp 110-111); and
8. the employer failed to follow proper administrative procedures in respect of expenditures and decisions, the use of Ms. Chamberlain's e-mail during the period of her sick leave, statements made in the investigation report and, generally, through its disregard for her "health recovery" (Grievance Statement, Respondent's Record ,Vol 2, p 111).

[49] Many of the foregoing points concern the Code. Under the PSLRA, claims of a violation of the Code are to be made via way of complaint and not by way of grievance (PSLRA at s 240; Code at ss 133, 147) and thus, as noted above, cannot be raised in this application for judicial review. Others of the foregoing points in the grievance claim violation of policies or administrative procedures. Such claims are not adjudicable under the PSLRA. Thus, only the claims related to an alleged breach of subsection 209(1) of the PSRLA and of the CHRA might be adjudicable.

[50] In dealing with the issue of adjudicability of the grievance under paragraph 209(1)(b) of the PSLRA, the Adjudicator considered first whether the grievance, on its face, disclosed any claim that the employer had disciplined Ms. Chamberlain and concluded that it did not. He then went on to consider the issue of disguised discipline, or a claim that otherwise apparently non-disciplinary behaviour by an employer might be disciplinary if motivated by an intention to correct employee misconduct or otherwise punish an employee, and invited Ms. Chamberlain to place before him any evidence which might establish that she had been disciplined. In response, Ms. Chamberlain filed much of the voluminous record that is before this Court on this application.

[51] The Adjudicator reviewed the evidence, correctly noting that Ms. Chamberlain bore the onus of demonstrating that she had suffered discipline, and found that she had failed to establish that any act of the employer could be considered disciplinary. More particularly, the Adjudicator concluded that the employer's decision to not extend Ms. Chamberlain's acting EX-01 assignment was not disciplinary nor was the decision to post and fill the EX-01 vacancies. Neither of these acts was taken as a result of any misconduct by Ms. Chamberlain; nor were they designed to punish or correct her. The Adjudicator similarly held that the ADM's investigation report was not a disciplinary action, that requiring Ms. Chamberlain to utilize her sick leave was not disciplinary, and that refusing to allow an employee to participate in second language training, absent other evidence of a disciplinary intent, is not disciplinary action. The Adjudicator thus concluded that there was no evidence that the employer intended to discipline Ms. Chamberlain and therefore that there was no *prima facie* evidence of discipline sufficient to afford him jurisdiction over Ms. Chamberlain's grievance under paragraph 209(1)(b) of the PSLRA.

[52] As is outlined below, the Adjudicator's conclusions are reasonable in light of the record before him and the applicable law.

[53] In her application before this Court, Ms. Chamberlain essentially makes three arguments regarding the erroneous nature of the Adjudicator's determination under paragraph 209(1)(b) of the PSLRA. As is detailed below, none of them provides any basis for interfering with the Adjudicator's decision.

[54] She first argues that the Adjudicator's conclusion that the employer's actions in her case were non-disciplinary is incorrect, because she did suffer a financial loss in no longer receiving the EX-01 salary, in being required to utilise her sick leave credits and in incurring legal expenses to pursue her grievance, which all were caused by the situation she found herself in and HRSDC's failure to correct it. She secondly argues that the threats made by her supervisor were the equivalent of verbal reprimands and, therefore, disciplinary. She finally argues that the Adjudicator failed to follow and apply the applicable case law. Each of these arguments is discussed below.

[55] Dealing with the first, it will be recalled that paragraph 209(1)(b) of the PSLRA requires that an adjudicable grievance relate to a disciplinary action that results in termination, demotion, suspension or financial penalty. On the facts of Ms. Chamberlain's situation, only demotion or financial penalty could pertain. For her situation to come within the scope of paragraph 209(1)(b) of the PSLRA, however, it is not enough for Ms. Chamberlain to have been placed in a lower-rated position or to have suffered a financial loss. Rather, as correctly noted by the Adjudicator, the reason behind any demotion or loss must be also disciplinary.

[56] Determination of whether an act is disciplinary is a fact-driven inquiry and may involve consideration of matters such as the nature of the employee's conduct that gave rise to the action in question, the nature of the action taken by the employer, the employer's stated intent and the impact of the action on the employee. Where the employee's behaviour is culpable or where the employer's intent is to correct or punish misconduct, an action generally will be viewed as disciplinary. Conversely, where there is no culpable conduct and the intent to punish or correct is absent, the situation will generally be viewed as non-disciplinary (*Lindsay* at para 48 (cited above at para 29); *Canada (Attorney General) v Frazee*, 2007 FC 1176 at paras 23-25, [2007] FCJ No 1548 [*Frazee*]; *Basra v Canada (Deputy Head - Correctional Service)*, 2008 FC 606 at para 19, [2008] FCJ No 777).

[57] Some situations are obviously disciplinary; these would include, for example, situations where the employer overtly imposes a sanction (like a suspension or termination) in response to an employee's misconduct. Others are more nuanced and require assessment of the foregoing factors to determine whether the employer's intent actually was to discipline the employee even though it may assert it had no such motive. Justice Barnes explained the requisite inquiry in the following terms in *Frazee* at paragraphs 21-25:

> [T]he issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline […] an employee's feelings about being unfairly treated do not convert administrative action into discipline […]
>
> The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline […]
>
> It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary

> controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. Thus in *Gaw v. Treasury Board (National Parole Service)* (1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary […]
>
> The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary […] However, that threshold will not be reached where the employer's action is seen to be a reasonable response (but not necessarily the best response) to honestly held operational considerations.
>
> Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's view of it could be seen to involve culpable or corrigible behaviour by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee […]
> [citations omitted]

[58] With these principles in mind, it is clear that the Adjudicator's determination that the grievance did not allege any disciplinary action on its face is reasonable. None of the eight points raised by Ms. Chamberlain in her grievance alleges that she was subject to a disciplinary action or an act of HRSDC taken to punish her or correct her behaviour. As noted, it is not enough that she suffered a financial loss in order for her claim to fall within the scope of paragraph 209(1)(b) of the PSLRA; rather, such loss must also be tied to a disciplinary action on the part of the employer to render her claim adjudicable. There is no such action alleged in the grievance.

[59] Likewise, the Adjudicator's determination that the circumstances giving rise to the grievance did not disclose a situation of disguised discipline is also reasonable. Ms. Chamberlain did not engage in any misconduct and none was alleged against her. Nor was there any evidence of intent on the part of HRSDC to punish or correct Ms. Chamberlain. Indeed, the ADM's investigation concluded that Ms. Chamberlain's supervisor had engaged in inappropriate behaviour, thus vindicating Ms. Chamberlain's position. In the face of this fact, it is not surprising to find the absence of any intent to punish or correct Ms. Chamberlain. Furthermore, there was no evidence of any act taken by HRSDC akin to a disciplinary sanction. Ms. Chamberlain was not demoted for reasons related to poor performance, but, rather, her acting assignment came to its planned conclusion, and no new EX-1 position was offered to her. Having her former supervisor run the competitions for the vacancies is not akin to an act of discipline, and Ms. Chamberlain cited no authority to suggest otherwise.

[60] As noted, Ms. Chamberlain's third argument is that the Adjudicator failed to follow applicable authority, citing in this regard the PSLRB decisions in *Frazee* (cited above at para 56); *Kelly v Canada (Treasury Board - Department of Transport)*, 2010 PSLRB 80 [*Kelly*]; *Robitaille v Canada (Deputy Head - Department of Transport)*, 2010 PSLRB 70 (which was later reversed on appeal in 2011 FC 1218) [*Robitaille*]; *LaBranche v Canada (Treasury Board - Department of Foreign Affairs & International Trade)*, 2010 PSLRB 65 [*LaBranche*]; *Leclair v Canada (Treasury Board – Correctional Service)*, 2010 PSLRB 49 [*Leclair*]; *Hanna v Deputy Head (Department of Indian Affairs and Northern Development)*, 2009 PSLRB 94 [*Hanna*]; *Gill v Canada (Treasury Board - Department of Human Resources and Skills Development)*, 2009 PSLRB 19 [*Gill*]; *Lloyd v Canada (Revenue Agency)*, 2009 PSLRB 15 [*Lloyd*]; *Giroux v Canada (Treasury Board - Border*

Services Agency), 2009 PSLRB 45 [*Giroux II*]; *Gaskin v Canada Revenue Agency*, 2008 PSLRB 96 [*Gaskin*]; *Stevenson v Canada Revenue Agency*, 2009 PSLRB 89; *Giroux v Canada (Treasury Board – Border Services Agency)*, 2008 PSLRB 102 [*Giroux I*] *Vallée v Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52 [*Vallée*]; *Boivin v Canada Customs and Revenue Agency*, 2003 PSSRB 94 [*Boivin*]; *Thibault v Canada (Treasury Board – Correctional Service)*, 1996 PSSRB 166-2-26613 [*Thibault*]; and *Robertson v Treasury Board (Department of National Defence)*, 1971 PSSRB 166-2-454 [*Robertson*]. She also asserts that the Adjudicator erred in stating that the decision in *Wong v Canada Revenue Agency*, 2006 PSLRB 133, [2006] CPSLRB No 133 supports the proposition that refusing second language training, in the circumstance of that case, was not disciplinary.

[61] Ms. Chamberlain is mistaken on these points. The Adjudicator correctly treated the jurisprudence and did not ignore or fail to follow applicable authorities. *Wong* was also accurately reflected.

[62] The *Boivin*, *Gaskin*, *Leclair* and *Vallée* cases concerned complaints under the Code and, accordingly, are irrelevant to a claim under paragraph 209(1)(b) of the PSLRA. The cases of *Giroux I*, *LaBranche*, *Giroux II*, *Lloyd* and *Kelly* also do not relate to paragraph 209(1)(b) of the PSLRA and are clearly distinguishable from Ms. Chamberlin's situation because they concerned claims of a violation of an anti-discrimination provision contained in the applicable collective agreement. In Ms. Chamberlain's case, on the other hand, no such issue arose because she did not have the support of her bargaining agent in filing the grievance or in referring the grievance to adjudication.

Therefore, she could not argue that any anti-discrimination provision in the collective agreement was violated in light of the requirements of subsections 208(4) and 209(2) of the PSLRA.

[63] *Robitaille* and *Thibault* are also distinguishable from Ms. Chamberlain situation. In both, there was misconduct by the employee that concerned the employer. In *Robitaille*, the employee was found to have engaged in poor management practices and abused his authority as a manager. Accordingly, he was demoted and suspended without pay for a period of time. The employer paid the employee for the missed time prior to the hearing and attempted to argue that the suspension was no longer an issue and that the demotion was non-disciplinary. These arguments were rejected by the PSLRB adjudicator, who focused on the employer's intention in imposing the measures and determined that they were imposed in an effort to correct the misconduct. While this decision was set aside on review, the adjudicator's finding regarding intention was not disturbed, but the Court did hold that a written reprimand did not constitute disciplinary action within the meaning of subsection 209(1) of the PSLRA. This determination supports the respondent's position. The *Thibault* decision is likewise distinguishable from Ms. Chamberlain's situation. There the employer's intention was found to be disciplinary because it decided not to renew the grievor's acting assignment when it received reports of his drinking on the job. Evidence of any such intent is entirely absent in Ms. Chamberlain's situation.

[64] The cases of *Hanna* and *Gill*, cited by Ms. Chamberlain, both support the respondent's position. In *Hanna*, the adjudicator found that she did not have jurisdiction under paragraph 209(1)(b) of the PSLRA because the employer's refusal to indemnify the legal fees of the grievor, who had hired counsel while subject to a harassment investigation that resulted in no action, was not

disciplinary. In *Gill*, the employer imposed an administrative suspension pending the disposition of criminal charges for kidnapping and assault and actually terminated the employee's employment when it revoked his security clearance as he no longer met the requirements for his job. Because these decisions were found to be motivated by the desire to protect the public and not by a desire to punish the grievor, the adjudicator in Mr. Gill's case dismissed his grievance. Ms. Chamberlain's case contains far less evidence of any employer conduct that could be found to be disciplinary.

[65] The *Stevenson*, *Frazee*, and *Robertson* cases cited by the Adjudicator also support the reasonableness of his conclusion. In *Stevenson*, the grievor was demoted due to his lack of productivity. The adjudicator in that case found the demotion to not be disciplinary because it was based on the employer's legitimate operational requirements as opposed to a desire to punish or correct the grievor. The case represented a stronger claim to discipline than Ms. Chamberlain's case does as Mr. Stevenson at least had failed to perform adequately. No such suggestion is made in Ms. Chamberlain's case.

[66] In *Frazee*, this Court set aside an adjudicator's decision and indicated that an administrative suspension of a veterinarian employed by the Canadian Food Inspection Agency, about whom a client had complained, was not a disciplinary action in the absence of the requisite disciplinary intent. Once again, the claim for discipline in that case was much stronger than in Ms. Chamberlain's as the employer there, unlike here, took an overt action to suspend the grievor, and there was dissatisfaction (albeit of a client of the department) with the grievor's performance. These factors are entirely absent in Ms Chamberlain's case.

[67] In *Robertson*, the adjudicator declined jurisdiction because he found that the employer's dismissal of the grievor for incompetence was not disciplinary. Again, this case is of no assistance to Ms. Chamberlain.

[68] Thus, contrary to what Ms. Chamberlain asserts, the Adjudicator did not fail to follow applicable authority. Rather, his decision is consistent with previous cases. In the absence of any evidence of negative conduct by Ms. Chamberlain or any evidence of a desire by HRSDC to correct or punish her, the Adjudicator's decision that Ms. Chamberlain's grievance did not relate to a disciplinary action that resulted in demotion or financial penalty was reasonable.

Should the Adjudicator have considered the human rights related claims Ms. Chamberlain alleges were made in her grievance?

[69] Turning, finally, to the Adjudicator's failure to consider Ms. Chamberlain's human rights claims, as already discussed, her grievance alleged a failure to address her need for accommodation in facilitating a return to work and also alleged that she had been a victim of discrimination, based on disability, sex and being a member of a visible minority. She also claimed non-pecuniary compensation under subsections 53(2) and 53(3) of the CHRA, which provide for compensation for pain and suffering and for wilful and reckless breaches of that Act's provisions.

[70] At the hearing in this matter, counsel for the respondent acknowledged that Ms. Chamberlain's grievance raised violations of the CHRA but submitted that these allegations cannot be subject to judicial review because they were not addressed in the decision. This argument misses

the point – it is precisely *because* they were not addressed by the Adjudicator that I find he has committed an error.

[71] While overt discrimination on the basis of sex and race or ethnicity are evident bases for human rights claims, the failure to accommodate can also amount to discrimination on the basis of disability, as has been recognized in numerous cases (see e.g. *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; [2007] 1 SCR 161; *Desormeaux v Ottawa (City)*, 2005 FCA 311, [2005] FCJ No 1647).

[72] Most grievances that are advanced to adjudication under the PSLRA regarding discrimination involve an alleged breach of a non-discrimination provision contained in a collective agreement. In such cases, it is clear that a PSLRB adjudicator possesses jurisdiction to hear the grievances if the bargaining agent supports the grievance (PSLRA, paragraph 209(1)(a) and subsection 209(2)). However, no such claim could have been advanced by Ms. Chamberlain because she did not obtain the support of her bargaining agent for her grievance. That said, it is arguable that the PSLRA may also provide for a right to adjudicate a claim based on an alleged violation of the CHRA that arises independently from a breach of a provision in the collective agreement. As counsel for the respondent conceded during the argument of this application, the case law has not definitively foreclosed such a possibility.

[73] In this regard, subsection 208(2) of the PSLRA specifically contemplates grievances being filed that allege violations of the CHRA. Subsection 209(1) of the Act purports to limit the types of human rights claims that may be referred to adjudication as being those:

> (a) which relate to the interpretation or application of a collective agreement provision (for which the bargaining agent must provide its support in accordance with subsection 209(2) of the PSLRA);
>
> (b) which relate to disciplinary action resulting in termination, demotions, suspension or financial penalty; or
>
> (c) in the case of an employee in a federal department, demotion or termination for unsatisfactory performance or for any other reason that does not relate to a breach of discipline or misconduct.

[74] However, section 210 of the PSLRA contemplates that grievances alleging violations of the CHRA may be referred to adjudication (and that notice of such claims should be provided to the Canadian Human Rights Commission by the party advancing the claim). Paragraph 226(1)(g) of the PSLRA moreover provides PSLRB adjudicators with the power to "interpret and apply the [CHRA] and any other Act of Parliament relating to employment matters", other than provisions of the CHRA related to pay equity, "whether or not there is a conflict between the Act being interpreted and applied in the collective agreement, if any", and paragraph 226(1)(h) enables PSLRB adjudicators to grant relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the CHRA.

[75] It is at least arguable that the foregoing provisions might have rendered Ms. Chamberlain's human rights claims adjudicable by the PSLRB. There is authority to suggest that the limitation of jurisdiction contained in subsection 209(1) of the PSLRA does not remove jurisdiction to consider a

grievance alleging a human rights violation even if the grievor's claims do not fall within one of the enumerated grounds listed in subsection 209(1) of the PSLRA.

[76] In this regard, in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] 2 SCR 157 [*Parry Sound*], the Supreme Court of Canada was called upon to determine whether a provision in the Ontario *Labour Relations Act*, 1995, SO 1995, c 1, Sch A [OLRA], similar to paragraph 226(1)(g) of the PSLRA, afforded a grievance arbitrator jurisdiction to adjudicate upon human rights claims that arose independently from the provisions of the collective agreement. The Court determined that it did. In *Parry Sound*, the employer terminated the employment of a probationary employee who had gone on maternity leave, and she grieved, alleging that the dismissal was motivated by improper discrimination in violation of Ontario human rights legislation. The collective agreement that governed her employment did not contain an anti-discrimination provision and moreover provided that a managerial decision to release a probationary employee was not arbitrable. Despite this, the Supreme Court concluded that the arbitrator was correct in assuming jurisdiction over the employee's grievance because he was empowered to do so, at least in part, by reason of a provision in the OLRA similar to paragraph 226(1)(g) of the PSLRA. In other words, jurisdiction flowed not from the usual jurisdiction-granting provisions in the statute (that hinge on a violation of the collective agreement) but, rather, at least in part, from a remedial provision akin to paragraph 226(1)(g) of the PSLRA. Justice Iacobucci, writing for the majority, noted that there are important policy considerations that militate in favour of granting labour arbitrators jurisdiction over unionized employees' human rights claims. These include improving access to justice and ensuring the expeditious resolution of all workplace disputes (see paras 50 to 54). Arguably, similar reasoning could be applied to the PSLRA.

[77] A somewhat similar issue arose in *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 [*Vaid*], where the Supreme Court was called upon to rule on the jurisdiction of the PSLRB to adjudicate the human rights claims of a terminated parliamentary employee, under another statute, the *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp), s 2 [PESRA]. In many respects, PESRA is similar to the PSLRA, and, in particular, contains provisions similar to sections 208 to 210 of the PSLRA. Thus, both statutes provide a limitation on the types of matters which may be referred to adjudication, which are narrower than the types of issues that may be grieved. In *Vaid*, the Court found that Mr. Vaid's complaint that he was laid off due to ethnicity, in violation of the CHRA, was adjudicable by the PSLRB.

[78] These decisions are very much in keeping with the direction in which modern labour law has progressed, which has been to extend the jurisdiction of labour tribunals to hear all workplace disputes. Thus, claims that arise directly or inferentially from an alleged breach of a collective agreement must be determined by a labour tribunal and not by the courts (see e.g. *Weber v Ontario Hydro*, [1995] 2 SCR 929, 125 DLR (4th) 583, and the multitude of other cases that have applied *Weber*).

[79] As counsel for the respondent conceded, the case law has not yet definitively determined whether the PSLRB possesses jurisdiction to adjudicate human rights claims in cases like that of Ms. Chamberlain. Certain decisions of the PSLRB suggest such jurisdiction does exist. For example, in *Gibson v Canada (Treasury Board – Department of Health)*, 2008 PSLRB 68, Adjudicator Filliter took jurisdiction in a situation where the grievor claimed that the employer's decision to not extend his term contract was made for discriminatory reasons in violation of the

CHRA. Adjudicator Filliter noted in this regard that the provisions of subsection of 226(1)(g) of the PSLRA were "important in [his] deliberations" (at para 10). In result, though, he dismissed the grievance on the merits.

[80] To similar effect, in *Lovell v Canada (Revenue Agency)*, 2010 PSLRB 91, Adjudicator Mackenzie concluded that he possessed jurisdiction over a grievance that alleged the employee had been terminated in violation of an anti-discrimination clause in the collective agreement and also in violation of the CHRA. In finding that he had jurisdiction over the claims, Adjudicator Mackenzie held that the provisions in subsection 208(2) and paragraphs 226(1)(g) and (h) of the PSLRA afford PSLRB adjudicators jurisdiction over claims of breach of the CHRA that arise independently from the collective agreement. He noted that it was "clear from the statutory provisions that it was not intended that employment matters in the federal public service be needlessly bifurcated" (at para 22).

[81] There is, however, at least one conflicting decision from the PSLRB. In *Wong v Canadian Security Intelligence Service*, 2010 PSLRB 18, Adjudicator Butler found he did not possess jurisdiction over claims of a violation of the CHRA. In so ruling, however, he did not consider the impact of the decisions of the Supreme Court of Canada in *Parry Sound* and *Vaid* (cited above at paras 76 and 77).

[82] In light of the foregoing, it is arguable that Ms. Chamberlain's claims of violation of her human rights were adjudicable. The adjudicator, however, failed to address this issue in the decision under review, possibly because Ms. Chamberlain raised a myriad of other issues and did not

articulate this issue clearly. Be that as it may, a tribunal's failure to address an issue raised by a grievance or a complaint does give rise to reviewable error because in such circumstance the tribunal fails to exercise its jurisdiction and has not decided the matters before it. In this regard, as noted, in *Turner* (cited above at para 27), in circumstances much like the present, the Federal Court of Appeal remitted a matter to the Human Rights Tribunal when it erred in failing to address an issue that was raised in a complaint. Similarly, in *Peters v Canada (Attorney General)*, 2009 FC 400, [2009] FCJ No 528, Justice Russell of this Court quashed a decision of the Pension Appeals Board because he found the Board to have committed an error of law in not considering issues raised by the applicant. Similar conclusions were reached in *Miguel v Canada (Minister of Citizenship and Immigration)*, 2004 FC 94 and *Van de Wetering v Canada (Attorney General)*, 2003 FCT 588, 233 FTR 229.

[83] Thus, the Adjudicator made a reviewable error in failing to determine whether Ms. Chamberlain's human rights claims were adjudicable. This not to say that the human rights claims of Ms. Chamberlain *are* in fact adjudicable. That is a determination that must be reached by the Adjudicator. However, in failing to even *consider* this issue, the Adjudicator erred.

What remedy is appropriate?

[84] As discussed above, it is the role of the Adjudicator, not this Court, to determine whether the human rights claims raised by Ms. Chamberlain's claim are adjudicable because the PSLRB is to be afforded deference in its determinations on arbitrability. As such, this matter will be remitted back to Mr. Filliter (if he is available, or to another adjudicator if he is not) for the consideration of

whether a PSLRB adjudicator possesses jurisdiction to adjudicate upon Ms. Chamberlain's human rights claims, and if so, to hear and decide those claims on their merits.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The documents contained at Tabs 8, 9, 10 D and E1, and 11A, B, C, D, E and F of the applicant's record are struck from the record;
2. This application for judicial review is granted in part;
3. Ms. Chamberlain's grievance is determined to raise claims that her employer breached the CHRA in failing to accommodate her claimed disability and in discriminating against her based on her sex, disability and ethnic origin;
4. The Adjudicator's order dismissing Ms. Chamberlain's grievance is set aside;
5. Her grievance is remitted back to Adjudicator Filliter, if he is available to hear it, or to another PSLRB adjudicator if he is not, for determination as to whether a PSLRB adjudicator possesses jurisdiction to adjudicate upon Ms. Chamberlain's human rights claims, and if such jurisdiction is determined to exist, to hear and decide those claims on their merits; and
6. Success on this application being divided, there is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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