CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

GUYLAINE BÉLANGER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CORRECTIONAL SERVICE OF CANADA, UNION OF CANADIAN CORRECTIONAL OFFICERS

Respondents

RULING

MEMBER: Athanasios D. Hadjis

2009 CHRT 36
2009/11/12

[1] The Complainant, Guylaine Bélanger, is a correctional officer employed with the Correctional Service of Canada (CSC), one of the respondents in this case. The other respondent is the bargaining agent for correctional officers, the Union of Canadian Correctional Officers - CSN (the Union). In her complaints against them, Ms. Bélanger alleges that the CSC and the Union entered into a collective agreement in 2006 containing a clause that discriminates against female correctional officers like her.

[2] The Canadian Human Rights Commission (CHRC) has referred her complaints against both respondents to the Canadian Human Rights Tribunal (CHRT) for further inquiry. The Union has filed a preliminary motion requesting that the CHRT decline to deal with the case for lack of jurisdiction over the subject matter (*rationae materiae*). The Union claims that labour arbitrators have the exclusive jurisdiction to dispose of the matters raised in Ms. Bélanger's complaints.

Facts giving rise to the complaints

[3] Ms. Bélanger began her career with the CSC in 1989, occupying office clerk positions (which are classified in the federal public service as "CR" positions). She states in her complaints that in 1999, in an effort to increase the representation of women within the male-dominated correctional officer occupational group ("CX"), the CSC modified its hiring criteria. These changes enabled Ms. Bélanger to apply and be appointed to a CX position in December 1999.

[4] She and other women who became correctional officers in this manner were initially able to include their years of service in their previous positions when calculating and selecting vacation leave, determined on the basis of seniority. She alleges that this policy was not well received by the incumbent, mostly male correctional officers, who felt that the newly hired female correctional officers had the advantage, through their prior careers as clerks, not to have worked in dangerous environments and be subject to irregular work schedules, as was the case for correctional officers. Consequently, a level of frustration towards these newly arrived female officers developed amongst the male correctional officers.

[5] Ms. Bélanger states in her complaints that in 2006, the Union signed a new collective agreement with the Treasury Board of Canada, as well as a secondary agreement with the CSC directly, referred to as the "Global Agreement". The Global Agreement contained a clause stipulating that vacation dates would now be chosen by any system agreed to at the "local level", or if agreement could not be reached, by a default process based on the number of years of service from the time the employee became a correctional officer, rather than merely an employee of the CSC.

[6] Ms. Bélanger filed her human rights complaints several months after the Global Agreement was finalized. She alleges in the complaints that she has little faith in the "local level" system for awarding vacation leave, adding that at her workplace, only 17% of correctional officers are women, and that of the 6% of correctional officers who held CR positions before transferring in to CX positions, almost all are women (90%). Thus, the vast majority of the employees participating in a local vote regarding vacation dates would be men, who would vote "against" the mostly female correctional officers who came from the CR group. She also highlights the fact that if no agreement is reached, the default process is designed not to take into account the portion of her seniority at CSC acquired within the female-dominated CR group.

The Union's motion

[7] The Union points out that ss. 208 and 209 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, (*PSLRA*) provide that an employee of the public service is entitled to present a grievance and have it adjudicated upon, if the employee feels aggrieved by the interpretation or application of a provision of a collective agreement. Furthermore, according to s. 236(1) of the *PSLRA*, the right of an employee to seek redress by way of grievance is "in lieu of any right of action" that the employee may have in relation to any act or omission giving rise to the dispute.

[8] The Union argues that the facts giving rise to the present dispute relate to annual vacation leave, a matter that is provided for in the collective agreement with the Treasury

Board (art. 29) and addressed more explicitly in the Global Agreement signed between the Union and CSC. Thus, the Union contends that the *PSLRA* has essentially ousted the Tribunal of any jurisdiction in this matter, and conferred it exclusively to the grievance adjudication process.

Analysis

[9] As the Supreme Court, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Attorney General)*, 2004 SCC 39 at para. 14 ("*Morin*") noted, there is no legal presumption of the grievance adjudication process's exclusivity, *in abstracto*. The question in each case is whether the relevant legislation applied to the dispute at issue, taken in its factual context, establishes that this process has exclusive jurisdiction over the dispute.

[10] At issue in *Morin* was whether the terms of a collective agreement violated the equality provisions of Quebec's *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). The Court remarked that this issue, on its face, was "precisely the type of question, read in light of the legislation and in its factual matrix", that the Human Rights Tribunal of Quebec (Quebec Tribunal) is mandated to answer. However, in order to properly assess whether the labour arbitration process has nonetheless acquired exclusive jurisdiction over such matters, the Court proposed a two-step analysis:

(1) Look at the relevant legislation and what it says about the arbitrator's jurisdiction;
(2) Examine the nature of the dispute and see whether the legislation suggests it falls exclusively to the arbitrator.

[11] In the first step of the analysis, the Court in *Morin* observed that the Quebec *Labour Code*, R.S.Q., c. C-12, required that every disagreement respecting the interpretation or application of a collective agreement (i.e., grievance) be submitted to arbitration. Thus, the arbitrator had jurisdiction over matters arising out of the collective agreement's operation, such as the one brought up in that case. The Court also noted in this step of the analysis that although the Quebec Tribunal and the Human Rights Commission of Quebec (Quebec Commission) had a broad and generous jurisdiction over human rights matters in Quebec, it was not exclusive. For instance, the Quebec Commission had the authority under s. 77 of the *Quebec Charter* to refuse to act or stop acting on behalf of a complainant where he or she has pursued a remedy before another instance based on the same facts as the complaint. Thus, the jurisdiction of the Quebec Commission and Tribunal was concurrent with other adjudicative bodies.

[12] Turning to the present case, the *PSLRA* similarly provides that an employee is entitled to present a grievance (and ultimately have that grievance adjudicated upon) if he or she is aggrieved by the interpretation or application of a provision in the collective agreement (ss. 208 and 209). This right to seek redress exists in lieu of any right of action that the employee may have (s. 236(1)). Furthermore, comparable to the situation in Quebec, the CHRC and CHRT do not have exclusive jurisdiction to deal with matters arising from the *Canadian Human Rights Act* ("*CHRA*"). For instance, pursuant to s. 41, the CHRC may refuse to deal with a complaint where it appears to the CHRC that the complainant ought to exhaust his or her available grievance or review procedures or where the complaint is one that could more appropriately be dealt with according to a

procedure provided for under an Act other than the *CHRA*. The CHRT'S and CHRC's non-exclusivity vis à vis matters relating to the *CHRA* is in fact evident in the *PSLRA* itself (s. 226(*g*) and (*h*)), which explicitly grants grievance adjudicators the power to interpret and apply the *CHRA*, and to give relief pursuant to its remedial provisions. Thus, just as the Court held in *Morin*, it follows that the CHRC's and the CHRT's jurisdiction may be concurrent with that of other adjudicative bodies, including grievance adjudicators.

[13] The Supreme Court made a similar observation, albeit in a different legislative context, in *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 91. The Court found, in the first step of its analysis, that a parliamentary employee's claim of workplace discrimination and harassment could potentially fall under both the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (*PESRA*) and the *CHRA*, and therefore be dealt with through *PESRA*'s grievance adjudication process.

[14] Dealing with the second step of the analysis, the Supreme Court in *Morin* (at para. 20) noted that a particular claim's characterization (be it as a tort claim, a human rights claim or a claim under the labour contract) is not determinative of whether the claim falls within the ambit of the arbitrator's exclusive jurisdiction. The question is whether the dispute, viewed in its essential character and not formalistically, is one over which the legislature intended the arbitrator to have exclusive jurisdiction.

[15] The Court held that the main fact that animated the dispute between the parties in *Morin* was that the collective agreement contained a term that treated the complainants and other members of their group (i.e. teachers with less seniority who were typically younger in age) less favourably than more senior teachers. The Court therefore defined the issue in dispute as being whether it was discriminatory to negotiate and agree to a term that adversely affected only younger and less experienced teachers (*Morin* at para. 23). The Court added that the essence of the dispute was the process of negotiation and the inclusion of this term in the collective agreement, concluding (at para. 24) that when viewed in this factual matrix, this was not a dispute over which the labour arbitrator had exclusive jurisdiction. The Court therefore determined that the Quebec Human Rights Tribunal had jurisdiction over the dispute and rejected the claim that the labour arbitrator's jurisdiction was exclusive.

[16] I do not perceive any significant distinction between *Morin*'s factual matrix and that of Ms. Bélanger's case. She has essentially advanced the same basic question, the only real difference being the ground of discrimination upon which her claim is made. She asserts that the Union and CSC negotiated and agreed to a term (the method for the determination of annual vacation leave) that adversely affects her and other members of her group (i.e. female correctional officers, and more particularly those who earned their seniority in female dominated jobs outside the CX classification). Just as the Court noted in the context of the facts in *Morin* (at para. 24), the parties in the present case should not have any difficulty agreeing on how the Global Agreement's annual vacation leave provision, if valid, would be interpreted and applied - the "local" correctional officers must reach an agreement on how vacation leave is distributed failing which, the matter is settled based on seniority earned within the CX group. The only real question at issue is

whether the process that led to the clause's adoption and its subsequent inclusion in the Global Agreement violated the *CHRA*.

[17] The Union points out that in the introductory paragraph of Ms. Bélanger's response to the motion, she states that she was adversely differentiated in the course of her employment due to the "implementation" ("*mise en application*") of the vacation leave clause in the Global Agreement. The Union urges me to consider this statement as an admission on her part that what is at issue in this case is, in fact, the application of a provision of the collective agreement, and that the factual matrix is therefore not analogous to the one described in *Morin*. I disagree. The Union is taking Ms. Bélanger's submissions in this respect out of context. It is evident on a plain reading of her response to the motion (particularly paragraphs 1 and 2), that her statements therein are consistent with the allegations in her complaints, i.e., that what is at issue is the adoption and inclusion of the clause rather than how it is to be interpreted or applied.

[18] I therefore find, pursuant to the second step of the analysis, that the nature of this dispute and the applicable legislation do not suggest that the matter falls within the exclusive jurisdiction of the labour adjudicator.

[19] I note, furthermore, that in reaching its conclusion that the Quebec Tribunal possessed the jurisdiction to deal with the matter, the Court in *Morin* took into consideration the fact that the unions in that case were, on the face of it, opposed in interest to the complainants, being affiliated with one of the negotiating groups that made the allegedly discriminatory agreement. The Court observed that if the unions in that case chose not to file a grievance before the arbitrator, the teachers would have been left with no legal recourse (other than possibly filing a claim against their unions for breaching their duty of fair representation). On this point, the Court cited the Ontario Court of Appeal, in *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)*, 2001 CanLII 21234, which indicated that by assigning exclusive jurisdiction to labour arbitrators in such circumstances, the rights of individual unionized employees could be rendered "chimerical".

[20] The same observation may be applicable to Ms. Bélanger's situation. At the core of her claim is the assertion, or at least the implication, that the Union discriminated against her and other female correctional officers by negotiating and including the clause in the Global Agreement, in order to favour the interests of the Union membership's male majority. This assertion alone would likely place her at cross-purposes with the Union. Therefore, requiring that she gain the Union's approval before presenting her grievance and that she be represented by the Union in the arbitration proceedings would give rise to the same concerns discussed in *Morin*.

[21] For all the above reasons, I find that the CHRT has jurisdiction to inquire into Ms. Bélanger's complaints. The Union's motion is therefore dismissed.

Athanasios D. Hadjis

OTTAWA, Ontario

November 12, 2009

PARTIES OF RECORD

TRIBUNAL FILES:	T1419/4509 and T1420/4609
STYLE OF CAUSE:	Guylaine Bélanger v. Correctional Service of Canada and the Union of Canadian Correctional Officers
RULING OF THE TRIBUNAL DATED:	November 12, 2009
APPEARANCES:	
Pierre Chapleau	For the Complainant
Sheila Osborne-Brown	For the Canadian Human Rights Commission
No one appearing	For the Respondent, Correctional Service of Canada
Gérard Notebaert	For the Respondent, Union of Canadian Correctional Officers