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Citation: 2002 PSSRB 101

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

SOCIAL SCIENCE EMPLOYEES ASSOCIATION

and

CANADIAN UNION OF PROFESSIONAL AND TECHNICAL EMPLOYEES

Complainants

and

FRANK CLAYDON, SECRETARY OF THE TREASURY BOARD AND COMPTROLLER GENERAL OF CANADA; TOM SMITH, HUMAN RESOURCES EXECUTIVE, TREASURY BOARD AND SECRETARIAT, ATTENTION: LUCIENNE ROBILLARD, PRESIDENT

Respondents

RE: Complaints under section 23 of the Public Service Staff Relations Act

Before: Evelyne Henry, Deputy Chairperson

For the Complainants: Peter Engelman, Counsel for Social Science Employees Association (SSEA) (AESS)

Michel Roy, Counsel for Canadian Union of Professional and Technical Employees (CUPTE) (SCEPT)

For the Respondents: Renée Roy, Counsel

Heard at Ottawa, Ontario,
May 6 to 8, 2002.

[1] The present case consists of two complaints under section 23 of the *Public Service Staff Relations* Act (PSSRA) submitted by two separate bargaining agents arising out of the same circumstances and involving the same employer and the same respondents.

[2] The first complaint was submitted by the Social Science Employees Association (SSEA) and named as respondents: Frank Claydon, Secretary of the Treasury Board and Comptroller General of Canada; Tom Smith, Human Resources Executive, Treasury Board of Canada; and the Treasury Board of Canada, Secretariat, attention Ms. Lucienne Robillard, President (Board file 161-2-1208).

[3] The complaint reads in part as follows:

> *2.* ***The complainant complains that the employer Treasury Board and Mr. Frank Claydon and Mr. Tom Smith, on behalf of Treasury Board (TB)*** …
>
> *(i)* *discriminated against individual members of the complainant in regard to their employment because they are members of the complainant;*
>
> (ii) *discriminated against the complainant and its individual members in relation to the terms and conditions of their employment because the complainant and its members were and are exercising rights under the* Act*;*
>
> (iii) *imposed and/or proposed the imposition of conditions in the contracts of employment of members of the complainant which seek to restrain the complainant and individual members of the complainant from exercising their rights under the* Act;
>
> (iv) *sought by intimidation, threats, the imposition of pecuniary penalties and by other means to compel individual members of the complainant from exercising rights under the* Act*; and*
>
> *All of the above are in violation of sections 8 and 9 of the* Act*.* …
>
> *3.* ***The following is a concise statement of each act or omission complained of:***
>
> *(i)* *The complainant is a bargaining agent under the* Act *representing approximately 7200 employees in the federal public service,*

including economists, sociologists and social science support workers who are employees of the Treasury Board. The respondent, Frank Claydon, is the Secretary of the Treasury Board & Comptroller General of Canada. The respondent Tom Smith is a Human Resources Executive in Pay Administration of the Treasury Board.

(ii) *The complainant's members are represented employees of the Treasury Board. The previous collective agreement between the complainant and Treasury Board expired on June 21, 2000. The current collective agreement was signed on June 27, 2001 and applied retroactively to June 22, 2000.*

(iii) *The complainant since late August, 2001 has received several complaints from its members that the method of determination by the respondent of their retroactive salary entitlement resulting from promotions, transfers, deployment, or acting situations is unclear, arbitrary or undefined.*

(iv) *Prior to this time, the complainant had not received any complaints regarding retroactive salary entitlements arising from a discriminatory application of the* Lajoie *decision.*

(v) *The complainant through a series of discussions initiated in early September, 2001, and ongoing to date, has attempted to clarify with the respondent its policy governing retroactive salary entitlement of its employees.*

(vi) *In mid-October, 2001, senior staff of the complainant became aware of an information bulletin on the issue and immediately requested an urgent meeting with Treasury Board officials.*

(vii) *The complainant was not given a written nor oral explanation of the discriminatory policy until a meeting on Monday, October 22, 2001, when a Treasury Board official explained that the discriminatory policy originated in the diverging views of two senior officials respectively responsible for represented and excluded/unrepresented employees.*

(viii) *In the course of these discussions, a Treasury Board negotiator concurred that the issue of* Lajoie *had not been raised at the bargaining table.*

(ix) *On November 8, 2000, the respondent published an Information Bulletin entitled "Economic Increase for Excluded and Unrepresented PE, OM, CA and MM Groups" [Schedule "B"] (the "November Bulletin"). The Bulletin states in part:*

> *…with respect to the retroactive application of revised rates of pay, for all excluded and unrepresented employees (including Executives), who were promoted, transferred, or deployed, or who commenced acting pay during the retroactive period, be paid in accordance with the provisions of the Lajoie decision (Federal Court of Appeal decision 149 N.R. 223), except where such treatment provides a lesser benefit than that accruing to the employee following a recalculation of the promotion, transfer, deployment, or acting rate of pay.*

(x) *Accordingly, through the November Bulletin, the Treasury Board allowed its unrepresented or excluded employees to benefit from either the* Lajoie *method of calculation of retroactive salary entitlement or recalculation depending on which method would provide the employee with greater benefit.*

(xi) *On January 31, 2001, the respondent published a further Information Bulletin (the "January Bulletin"), explaining its policy regarding retroactive salary entitlement of its members resulting from promotions, transfers or deployment [Schedule "A"].*

(xii) *The Information Bulletin addresses the issue of which of the* Lajoie *method or recalculation applies to the determination of retroactive pay entitlement for represented employees of the respondent. The Bulletin clearly states:*

> ***The Lajoie Decision only is applied when the higher position is represented, and the Lajoie Decision or better is applied when the higher level position is excluded or unrepresented. [bold and underlined text in original]***

(xiii) *The reference to "higher" position in the Bulletin is with respect to the new position into which the employee is promoted, transferred or deployed.*

(xiv) *In the course of the October 22, 2001 meeting, a Treasury Board official confirmed that it had been past practice to give employees, both represented and unrepresented, the benefit of the more favourable of the* Lajoie *and recalculation methods.*

(xv) *The complainant asserts that the differential treatment between represented and unrepresented employees of the respondent is clear, explicit and intentional. The effect of this differential treatment is that the respondent's represented employees will only be entitled to retroactive salary entitlement determined by the Lajoie standard, even in the event that a recalculation would allow them a higher retroactive salary entitlement. The respondent's failure to allow its represented employees the option of benefiting from either Lajoie or recalculation unequivocally discriminates against its represented employees.*

(xvi) *The complainant states that the above constitutes,* inter alia, *discrimination against the complainant; discrimination against members of the complainant because of their membership in the complainant; threats and intimidation against the complainant and members of the complainant for exercising their rights under the* Act.

4. ***The following steps have been taken by or on behalf of the complainant for the adjustment of the matters giving rise to the complaint:***

(i) *The complainant has attempted to clarify the Treasury Board's policy through ongoing discussions and has met with a representative of the Treasury Board to discuss the Treasury Board's policy with a view to creating a non-disciplinary policy regarding determination of retroactive salary entitlement.*

(ii) *During the discussion on October 22, 2001, a Treasury Board official acknowledged that Treasury Board treated represented and excluded/unrepresented employees*

differentially, but Treasury Board has not corrected its discriminatory policy.

5. ***The complainant requests that the Board issue the following order:*** …

(i) *an order directing the respondents to observe the prohibitions contained in sections 8 and 9 of the* Act*;*

(ii) *an order directing the respondents to cease and desist from further violations of sections 8 and 9 of the* Act*;*

(iii) *an order that the respondents not impose any conditions, or remove any and all conditions currently imposed, upon the complainant or upon the employment of members of the complainant, which violate the* Act*;*

(iv) *an order that the respondent allow the complainant's members to have the same rights and privileges as unrepresented employees of the respondent specifically under the respondent's policy governing retroactive salary entitlement resulting from promotions, transfers, deployment, or acting situations effected on or after June 21, 2000 [as described in the Treasury Board's Information Bulletin dated January 31, 2001 and attached hereto as Schedule "A"];*

(v) *an order that the complainant's members have the benefit of the more financially beneficial method of determining retroactive salary entitlement resulting from promotions, transfers, deployment, or acting situations as between the method of calculation outlined in the* Lajoie *decision [see: Schedule "A"] or recalculation of retroactive salary entitlement;*

(vi) *and a further order that the respondents exercise any discretion associated with the above in a non-discriminatory fashion; and*

(vii) *such further and other relief as may be appropriate in the circumstances.*

[4] The second complaint was filed by the Canadian Union of Professional and Technical Employees (CUPTE), against the same respondents but in the French language. It reads:

[Translation]

2. The complainant claims that:

i. Several full members of the complainant have been the victims of discrimination because of their jobs and membership in the union.

ii. The complainant and several of its members have been the victims of discrimination in regard to the application of the conditions of employment for the simple reason that they were exercising their rights under the Act.

iii. The employer intervenes in the labour contracts of many of its members and seeks to restrict them in terms of exercising their rights.

iv. The employer imposes restrictions of a financial nature on several of the complainant's members.

3. Give a brief description of each contested action or omission:

i. *The complainant is a bargaining agent under the Act and represents approximately one thousand (1,000) Public Service employees, including translators, terminologists and interpreters, all Treasury Board employees. The defendant Frank Claydon is the Secretary of the Treasury Board and Comptroller General of Canada. The defendant Tom Smith is a human resources executive in pay administration for the Treasury Board Secretariat.*

ii. *The complainant's members are duly represented Treasury Board employees. The previous collective agreement terminated on April 18, 2000. The collective agreement that is currently in force was signed on June 28, 2001, and is retroactive to April 19, 2000.*

iii. *Since September 2001, the complainant has received several reports from its members indicating that the defendant's determination of their retroactive pay resulting from promotions or acting situations lacked precision and was based on arbitrary reasons.*

iv. *Previously, the complainant had not received any complaints from its members in regard to retroactivity based on the discriminatory application of the Lajoie decision.*

v. *Towards mid-October 2001, the complainant learned about an information notice on this matter and brought it up with a representative of the Treasury Board Secretariat, who was already aware of the situation.*

vi. *During this conversation, the Treasury Board Secretariat representative admitted that the Lajoie decision had not been addressed during discussions at the bargaining table.*

vii. *On November 8, 2000, the defendant published an Information Notice entitled Economic Increase for Excluded and Unrepresented PI, OM, CA and MM Groups (Annex "B").*

viii. *This Notice states the following:*

"The Treasury Board also authorises that, with respect to the retroactive application of revised rates of pay, all excluded and unrepresented employees (including Executives), who were promoted, transferred, or deployed, or who commenced acting pay during the retroactive period, be paid in accordance with the provisions of the Lajoie decision (Federal Court of Appeal decision 149 N.R.223), except where such treatment provides a lesser benefit than that accruing to the employee following a recalculation of the promotion, transfer, deployment, or acting rate of pay. Examples of how to apply Lajoie or better treatment have been provided in Annex "E"."

ix. *Therefore, it is clear from the November Notice that the Treasury Board authorized its employees in the excluded and unrepresented groups to be paid according to the method developed in Lajoie or to do a recalculation to ensure that these employees could take advantage of the more favourable arrangement.*

x. *On January 31, 2001, the defendant published a new Information Notice explaining its policy on this matter. (Annex "A")*

xi. *This information notice stated as follows:*

"The Lajoie Decision only is applied when the higher position is represented, and the Lajoie Decision or better is applied when the higher level position is excluded or unrepresented." (Emphasis as indicated by the Treasury Board)

xii. *The "higher position" refers to the position to which the employee was promoted or deployed.*

xiii. *The complainant submits that the different treatment provided by the defendant to represented and excluded or unrepresented employees is explicit and deliberate. The effect of this difference in treatment is to lock represented employees into the standards established by Lajoie even if a recalculation would lead to higher compensation under a retroactive situation. It is submitted that this difference in treatment equates to discrimination in regard to the complainant and its full members because of their union membership. This amounts to an intimidation tactic towards the complainant and its members.*

4. The following measures were taken by the complainant to correct the situation:

The complainant contacted a representative of the Treasury Board Secretariat in an attempt to clarify the situation and a meeting between all stakeholders was planned for October 31, 2001. This meeting was postponed since the defendant had no conclusion to present in this matter at that date.

5. ***The complainant is asking the Board to order the defendant to:***

i. *respect the prohibitions set out in sections 8 and 9 of the Act;*

ii. *stop violating these provisions;*

iii. *remove all of the conditions that, in violation of the Act, restrict the complainant or its members' terms of employment;*

iv. *to treat the complainant's full members in the same manner as the defendant's unrepresented employees specifically in regard to the policy on retroactivity in connection with promotions, deployments and transfers as well as acting situations, as of April 19, 2000, in order to correct the directive of January 31, 2001. (Annex "A")*

v. *authorize the complainant's full members to benefit from the more financially advantageous method, whether it is the one established in Lajoie or the one that involves a recalculation of retroactivity in connection with promotions, transfers, deployments and acting situations;*

vi. *exercise their discretion in this matter in a non-discriminatory manner; and*

> *vii. any other redress deemed appropriate under the circumstances.*

[5] The respondents' reply was: "that at no time did we contravene section 23 of the *Public Service Staff Relations Act".*

[6] The complainants called three witnesses on their behalf. The first was William Krause, President of the SSEA since 1991.

[7] The SSEA represents approximately 7,800 employees comprised mainly of economists (ES) and employees in the social science support group (SI).

[8] Mr. Krause was active in the negotiation process for the Economists', Sociologists' and Statisticians' Association (ESSA), the former name for the SSEA, through the 80's and 90's. He was the chief negotiator for the SSEA in the last two rounds of negotiations.

[9] In 1998, the parties negotiated two collective agreements; one for the SI group signed on March 6, 1998 and one for the ES group signed on April 8, 1998. Both collective agreements were to expire on June 21, 1999. (Exhibit S-8). This round of negotiation represented the first round of bargaining since the wage freeze imposed by the federal government on the federal Public Service, which lasted from 1992 to 1998. It is referred to as "round 1".

[10] In 1999, the parties combined the two ES and SI collective agreements to harmonize provisions from both, except for pay rates. It was signed on March 8, 2000 effective from June 22, 1999 to June 21, 2000 (Exhibit S-9). It was known as "round 2". Mr. Krause was the chief negotiator for the SSEA in "round 2".

[11] In 2000, negotiations started for "round 3". The combined ES-SI group collective agreement was signed on June 27, 2001 and was effective June 22, 2000 to June 21, 2003 (Exhibit S-10).

[12] All three rounds of negotiations involved the application of retroactive pay. All involved the renewal of subparagraph 27.03(b)(iii) of the collective agreement which reads:

> *27.03*
>
> […]
>
> *(b) Where the rates of pay set forth in Appendix "A" have an effective date prior to the date of signing of the collective agreement the following shall apply:*
>
> […]
>
> *(iii) rates of pay shall be paid in an amount equal to what would have been paid had the collective agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay;*

During those rounds Mr. Krause is adamant that there were no discussions at the bargaining table of the retroactive calculation of wages.

[13] The discussions relating to paragraph 7 of the Pay Notes during "round 3" were restricted to the issue of consolidating two former provisions into one and adjusting the percentage increase to 2.5%. There were no discussions pertaining to the decision of the Federal Court of Appeal in *Lajoie and Treasury Board* (1992), 149 N.R. 223, nor to the recalculation of retroactive wages.

[14] After the signing of the last collective agreement, the SSEA began to receive complaints from its members about their back pay. These complaints were more numerous than in previous rounds of negotiation.

[15] The SSEA assumed the back pay was always calculated, as in the past, consistent with subparagraph 27.03(b)(iii) which involved going back in time and applying the new rates of pay when effective for the recalculation of pay rates upon promotion or reclassification or when acting in a higher position, known as the "standard recalculation method".

[16] The SSEA had issued a press release (Exhibit S-4) on May 22, 2001 informing its members of the negotiated increases. It also sent its members a pay path document (Exhibit S-5) explaining the negotiated increases.

[17] In late summer 2001, the SSEA members started receiving their retroactive pay and started to complain. Mr. Krause called the Treasury Board negotiator, Daniel Langevin and a series of meetings began. Mr. Krause heard of the *Lajoie* decision for the first time in or around September 2001. The January 31, 2001

Information Bulletin (Exhibit S-2) came to the attention of Mr. Krause, who realized that the employer was using two methods of calculating retroactive pay: the *Lajoie* method and the standard recalculation method. Mr. Krause also learned that the employer was applying the *Lajoie* or better method to unrepresented and excluded employees.

[18] The *Lajoie* application meant that there was no reconstruction of an employee's history of promotion, reclassification or acting appointments. For the vast majority of employees this resulted in lesser amounts of retroactive pay and lesser amounts of current and ongoing salary and/or a lower increment position on the pay scale.

[19] Mr. Langevin confirmed on October 22, 2001 to Mr. Krause that there had been no discussions of the retroactive pay calculation method or the *Lajoie* decision during the negotiations of the collective agreement.

[20] Mr. Krause was concerned that the employer was using the *Lajoie* or better method for unrepresented employees. The choice of method of calculation of back pay was on the basis of affiliation creating an incentive for employees to be non-unionized.

[21] Mr. Krause was also concerned that the employer would have an incentive to increase the retroactive period to gain a fiscal advantage by bargaining in bad faith.

[22] Mr. Krause stated that at the October 22, 2001 meeting Mr. Langevin had admitted that the January Bulletin (Exhibit S-2) "does discriminate against the SSEA members but I am not going to say on what basis". Mr. Krause advised Mr. Langevin of the SSEA's intention to file the complaint. Mr. Langevin also stated he would have to raise the issue of the application of the principles enunciated in the *Lajoie* decision at the bargaining table of other groups he was involved with.

[23] At the October 22, 2001 meeting, Mr. Krause learned from Treasury Board Policy Analyst, Ms. Marchand-Bigras that the January Bulletin (Exhibit S-2) emanated from those officials at Treasury Board who were responsible for unrepresented and excluded employees independently from those responsible for represented employees. Ms. Marchand-Bigras stated she had concerns that Exhibit S-2 might discriminate between represented and unrepresented employees.

[24] After the complaint was filed, Mr. Krause had lunch with the Assistant Secretary, Human Resources Management Division who stated "it's a terrible thing we had done to the PE's" and wished him luck with his complaint.

[25] On March 6, 2002 the employer issued a new circular, Exhibit S-6, pertaining to the economic increases for PE and OM groups. This circular discontinued the *Lajoie* or better method of recalculation of retroactive pay and directed that retroactive recalculations be performed according to the principles enunciated in the *Lajoie* decision only.

[26] Mr. Krause is of the opinion that the *Lajoie* method had not been applied to his members after round 2 of negotiations. The SSEA did not receive complaints from its members after that round of negotiations with regard to retroactive pay application.

[27] Mr. Krause understood from his discussions with Treasury Board that departments were not following Treasury Board's instructions; thus the SSEA members received the most beneficial method of calculation for their retroactive wages.

[28] The January Bulletin (Exhibit S-2) and the November Bulletin (Exhibit S-3) were never sent to Mr. Krause although in the past copies of information circulars not addressed to the SSEA were also forwarded to him.

[29] Mr. Krause introduced as Exhibits S-7 to S-10 excerpts from the collective agreements for: Economics Sociology and Statistics, Code 208/90 (Exhibit S-7); Economics, Sociology and Statistics, Code 208/98 (Exhibit S-8); Economics and Social Science Services, Code 208/00, 412/00 (Exhibit S-9) and Economics and Social Science Services, Codes 208, 412 (Exhibit S-10).

[30] In cross-examination Mr. Krause admitted that the SSEA had an open relationship with the Treasury Board negotiator, Daniel Langevin. Mr. Krause does not believe Mr. Langevin would deliberately deceive the SSEA.

[31] Mr. Krause reiterated that he would be surprised to hear that the *Lajoie* method of calculation was applied to the second round of negotiation that resulted in the collective agreement (Exhibit S-9).

[32] Ms. Helene Paris is a Research Officer at the SSEA since February 19, 2001. She was a Research Officer at the Professional Institute of the Public Service of Canada

(PIPSC) for eleven years prior to her appointment at the SSEA. Her functions involve compensation analysis and advice at the bargaining table.

[33] Ms. Paris participated in the restructuring of the pay scales for the ES and SI groups in the round 3 negotiations. She, Claude Danik, Danielle Chainé, Daniel Langevin and Lise Lamothe were involved in the process. During those meetings there were no discussions about retroactive pay and its calculation.

[34] After the tentative agreement was reached, the SSEA issued a press release (Exhibit S-4). Ratification kits were prepared with the pay paths (Exhibit S-5) that she prepared with Mr. Danik. These pay paths do not deal with the issue of wage progression in cases of promotions, transfers or acting appointments. An example of the pay paths was discussed with Ms. Chainé of the Treasury Board who confirmed that they had the same understanding. There were no discussions about retroactive pay and its calculation.

[35] During a September 4, 2001 meeting with the employer, the SSEA representatives were advised that the employer was experiencing problems with its payroll software in that it was not taking into account individual members' anniversary dates in calculating back pay. Ms. Paris received a message from Ms. Lamothe, (Exhibit S-12) on September 17, 2001 explaining that the employer was applying the *Lajoie* decision to the SSEA members.

[36] Ms. Paris researched the issue and found the January Bulletin, exhibit S-2, on a sub-site of the Treasury Board website. It explained why the *Lajoie* decision was being invoked to recalculate back pay. She also found the November 2000 Bulletin (Exhibit S-3). Ms. Paris had not known of the existence of these bulletins and felt they discriminated against the SSEA members.

[37] Ms. Paris had many discussions with the SSEA officials and with the employer representatives. Ms. Paris attended the October 22, 2001 meeting along with Mr. Krause and Mr. Danik with the employer representatives Mr. Langevin, Ms. Chainé, Ms. Marchand-Bigras and Ms. Lamothe. She learned that the January Bulletin (Exhibit 2) was a policy decision made unilaterally by the section of Treasury Board responsible for unrepresented and excluded employees.

[38] Ms. Paris prepared a document (Exhibit S-13) to illustrate the two retroactive pay calculation methods, in red applying the *Lajoie* method, in blue applying the recalculation method for an ES-4. It shows a difference of one increment, the *Lajoie* method being one lower.

[39] In cross-examination Ms. Paris indicated that she and Danielle Chainé were involved in merging the SI and ES scales of remuneration. She recalled discussing the lateral movement of employees on the new scales when their increment would disappear.

[40] Ms. Paris discussed the pay path (Exhibit S-5) with Ms. Chainé before it was issued. Ms. Paris did not interpret the *Lajoie* decision in the same way as the employer did.

[41] Mr. Luc Pomerleau has been employed in the federal Public Service since 1980 as a translation specialist. He was elected Vice-President of the CUPTE in 1990 and became President shortly thereafter. The function became a full-time responsibility in January 1993.

[42] As President, Mr. Pomerleau is responsible for the representation of and collective bargaining for the translation (TR) group. Mr. Pomerleau sits as the representative of the CUPTE on several consultative committees such as the National Joint Council (NJC) as well as the Public Service Commission (PSC) consultative council.

[43] Mr. Pomerleau was the chief negotiator for the TR group when collective bargaining resumed in 1997. Mr. Pomerleau has participated in seven rounds of negotiations. The TR group uses an interest-based bargaining method of negotiations with the employer. Members of the negotiating team are elected. Counsel Michel Roy is also part of the team.

[44] There are approximately 1,100 members of the CUPTE.

[45] Mr. Pomerleau introduced the TR collective agreement (Exhibit C-1) which expires April 18, 2003. He also introduced as Exhibit C-2 a copy of the CUPTE complaint in the French language. Exhibit C-3 is the January 31, 2001 bulletin in French. Exhibit C-4 is the November 8, 2000 bulletin in French.

[46] Mr. Pomerleau stated that in the last round of negotiations subparagraph 15.03(b)(iii) of the collective agreement dealing with retroactive pay was renewed without any discussions on the method of calculation of back pay. There was no mention of the *Lajoie* decision at the bargaining table. Subparagraph 15.03(b)(iii) reads:

> *15.03*
>
> […]
>
> *(b) Where the rates of pay set forth in Appendix "A" of the Agreement have an effective date prior to the date of signing of the Agreement, the following shall apply:*
>
> […]
>
> *(iii) retroactive pay shall be paid in a single amount equal to the difference between what an employee received and what he would have received on the effective date of the revision in rates of pay;*

[47] Mr. Pomerleau introduced as Exhibit C-5 the TR ratification document he had issued to the CUPTE members. This document describes, among others, the changes made to the TR-2, TR-3 and TR-4 pay scales and the creation of a new TR-5 pay scale. A copy was sent to Daniel Langevin and one to the Translation Bureau.

[48] Mr. Pomerleau learned of the existence of the *Lajoie* decision following the signing of the collective agreement. At a meeting with the compensation specialists of the Translation Bureau, in attendance there were Public Works (PWGSC) people to review the application of the changes to the collective agreement. The tentative agreement was reached June 1st, 2001. There was a meeting on June 29 to finalize the instructions to the compensation people. This is when Mr. Pomerleau was told by Mr. William Yates of PWGSC that the *Lajoie* decision prevented doing a recalculation of pay of those promoted or acting during the retroactive period. Mr. Pomerleau could not make any sense of this statement and made some enquiries of Daniel Langevin.

[49] Mr. Langevin admitted to Mr. Pomerleau that the *Lajoie* decision was never discussed at the bargaining table. Mr. Langevin confirmed this fact in an e-mail dated July 16, 2001 (Exhibit C-6). In the e-mail, Mr. Langevin refers to Louise Richer, pay analyst and Donald Barabé, a senior manager from the Translation Bureau.

[50] Mr. Pomerleau spoke to Mr. Danik of the SSEA, during the summer, who told him the SSEA's difficulty with back pay was a computer problem and that the *Lajoie* decision did not apply to them. A few weeks later, Mr. Pomerleau learned from Mr. Krause that the SSEA was now experiencing difficulties with the application of the *Lajoie* decision and of the existence of information bulletins.

[51] In 1998 in the negotiations for the collective agreement an increment was added to the TR-2, TR-3 and TR-4 levels. This was a half increment. There were no problems with the *Lajoie* decision then.

[52] The CUPTE had received a handful of complaints regarding the calculation of retroactive pay. After enquiries to its members it received some 25 grievances which are being held in abeyance pending the outcome of this complaint.

[53] When Mr. Pomerleau learned of the existence of Exhibit C-3, the January 31, 2001 bulletin, he communicated again with Daniel Langevin. A meeting with Treasury Board negotiators, which had been scheduled for October 31st, was cancelled. The CUPTE decided then to file a complaint under section 23 of the PSSRA since the application of the *Lajoie* decision to unionized employees discriminated against its members.

[54] Mr. Langevin has been a negotiator with Treasury Board since March or April 1996. He started the first round of negotiations with the SSEA in 1997. They concluded the SI agreement in November 1997, then the ES agreement prior to the expiry of the ES agreement in 1998. Mr. Langevin was involved in all three rounds of negotiations with the SSEA.

[55] Mr. Langevin indicated that retroactive pay is normally governed by pay notes or in the pay administration provisions of the collective agreement which are negotiated.

[56] Mr. Langevin attended a strategy meeting of Treasury Board negotiators in 1997. It was decided that if no provisions were put forward regarding back pay, the employer would not put anything forward which would mean it was going to implement the *Lajoie* decision. The employer preferred to apply the *Lajoie* decision which meant history was not rewritten for employees who had moved within the bargaining unit or from another bargaining unit during the retroactive period. This meant that he would take the actual salary the employees earned at the applicable date and go straight

down to the next salary again at next salary revision. This is how he understood the *Lajoie* decision and how it is applied by the employer.

[57] Mr. Langevin does not recall discussing the *Lajoie* decision or back pay in the first round of negotiations with the SSEA. It would have been irrelevant for the ES collective agreement. In the next two rounds Mr. Langevin did not bring it up, nor did he discuss the *Lajoie* decision at the bargaining table.

[58] Mr. Langevin described the negotiations with the SSEA as a semi interest-based approach. There was a pay sub group which met off the table to consolidate the SI and ES pay scales. When it was consolidated not everyone benefited in the same way. This was primarily a union concern. There were several meetings.

[59] Mr. Langevin assumed the bargaining agents were aware of the *Lajoie* decision since it was a decision of the Federal Court of Appeal and he did not raise it because the employer was prepared to live with it which it considered to be the status quo.

[60] Mr. Langevin learned after the fact that the *Lajoie* decision was not applied after the first round but he was told it would be applied in further rounds and that it was applied in rounds 2 and 3.

[61] Mr. Langevin attended the meeting with the SSEA on October 22nd or 23rd at which the employer confirmed that it applied the principles enunciated in the *Lajoie* decision or better to excluded and non-represented employees.

[62] Mr. Langevin started to raise the issue of the *Lajoie* decision in his other negotiations with other bargaining agents following the meeting with the SSEA to avoid a repetition of that problem.

[63] Mr. Langevin confirmed that he did not raise the *Lajoie* decision in the last two rounds of negotiations with the CUPTE.

[64] He learned that the CUPTE had a problem with the *Lajoie* decision at about the same time he heard from the SSEA.

[65] In cross-examination Mr. Langevin confirmed that subparagraph 27.03(b)(iii) of the ES agreement had not changed.

[66] Mr. Langevin indicated that he was told that, although Treasury Board expected departments to implement the straight down calculation approach, many were not applying it and that Treasury Board made a decision not to redo the implementation.

[67] Mr. Langevin does not recall seeing Exhibit S-3 but believes he received a copy of Exhibit S-2 at or about the time it was issued. Mr. Langevin is not aware of any documents dealing with the implementation of retroactive pay for represented staff prior to November 8, 2000.

[68] Mr. Langevin agreed that an excluded ES-6 and an ES-6 represented by the SSEA at the same increment could have their pay recalculated differently and end up having a different base salary with possible differences in pension benefits and of thousands of dollars in retroactive pay.

[69] Mr. Langevin did not know why Treasury Board decided to treat excluded or unrepresented employees better than represented employees.

[70] Mr. Langevin confirmed that subparagraph 15.03(b)(iii) in the TR agreement was the same during the last three rounds of negotiations.

[71] Mme Suzanne Marchand-Bigras is a Policy Analyst in the Pay Administration Section of Treasury Board since June 1998. She provides advice to compensation managers and chiefs of staff relations in departments. Upon signing of collective agreements, her section is responsible for advising departments of changes in the pay or articles and the implications there would be.

[72] Ms. Marchand-Bigras indicated that the *Lajoie* decision was decided in 1992; it provides the principle of revising salary straight down; any salary revision would be within the same column. Ms. Marchand-Bigras produced Exhibit E-1 using the AS-6 and PE-5 1999 salary scales to illustrate the application of the *Lajoie* approach. In that example the *Lajoie* approach is more advantageous than the standard reclassification approach.

[73] Ms. Marchand-Bigras stated that the *Lajoie* approach was not applied after the first round of bargaining in 1998/1999. The *Lajoie* approach was applied after the second round as can be seen in a July 27, 1999 memorandum to Compensation Managers and Chiefs of Staff Relations (Exhibit E-2).

[74] Ms. Marchand-Bigras explained how Pierrette Lemay and she agreed to issue a note to employees to explain how the informatics portion was processed and how it was implemented in the EC and CS collective agreements. This is included in Exhibit S-12 on page 5.

[75] Ms. Marchand-Bigras admitted that it bothered her that some employees were treated differently because they were bound by the *Lajoie* decision. It did not seem fair to her, as a compensation person, that two sets of rules had to be implemented. Also it was an additional workload for the compensation community.

[76] Ms. Marchand-Bigras believes the *Lajoie* approach was applied after round 2 but its effect would not be felt as much as in round 3 because it consisted mostly of straight economic increases with everybody getting relatively the same increase.

[77] Ms. Marchand-Bigras indicated that there are differences in terms and conditions of employment for excluded employees. She used the example of the ES-8 merit pay. In cross-examination she admitted there are fewer than five represented employees at the ES-8 level. In some collective agreements the negotiated steps of the senior levels are higher than what is in the regulations to which performance pay applies.

[78] In cross-examination Ms. Marchand-Bigras agreed that the example in Exhibit E-1 is one in a scale that had not expired, exactly as in the *Lajoie* decision. She also admitted that what was applied to excluded or unrepresented employees was the *Lajoie* decision or better.

[79] Ms. Marchand-Bigras agreed that the *Lajoie* decision has a negative impact when there is restructuring in a bargaining unit's pay scale.

Arguments for the SSEA

[80] As there was insufficient time for all parties to submit their arguments in the time allotted for the hearing the parties were requested to submit written arguments.

[81] The SSEA's submission contained a review of the evidence from its point of view followed by the following:

***Issues in Dispute**:*

A. IS THE EMPLOYER'S POLICY AS SET OUT IN EXHIBITS S-2 AND S-3 DISCRIMINATORY?

B. IF THE POLICY IS DISCRIMINATORY, HAS THE EMPLOYER PROVIDED A REASONABLE EXPLANATION FOR IT?

C. IS THE COMPLAINANT REQUIRED TO PROVE ANTI-UNION ANIMUS AND IF SO, WHAT IS THE NATURE OF THAT REQUIREMENT?

D. IF THE COMPLAINANT MUST PROVE ANTI-UNION ANIMUS, HAS THE TEST BEEN MET?

***Argument**:*

A. THE EMPLOYER'S POLICY AS SET OUT IN EXHIBITS S-2 AND S-3 DISCRIMINATES AGAINST SSEA AND ITS MEMBERS ON THE BASIS OF UNION STATUS/MEMBERSHIP

Discrimination – Required Elements

100. To establish discrimination on the basis of union status/membership, there are three elements a complainant must prove: differential treatment that is adverse in nature and based at least in part on union status/membership: Famous Players Inc., *[1997] OLRB Rep. January/February 50 [TAB 8].*

101. Discrimination on the basis of union status has been defined as an employer's action or attitude that has a negative effect insofar as the freedom to exercise the right to join a union: Retail Clerks' International Union and Bank of Canadian National, *35 di 39; [1980] 1 Can. L.R.B.R. 470 [TAB 15].*

102. In a more general sense, discrimination has been defined as:

> *(…) A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favoured.*
>
> *Black's Law Dictionary, Fifth Edition, West Publishing Co. 1979.*

103. Le Petit Robert defines « discrimination » and « discriminatoire » as follows:

> ***Discrimination*** *: Le fait de séparer un groupe social des autres en le traitant plus mal.*
>
> ***Discriminatoire*** *: Qui tend à distinguer un groupe humain des autres, à son détriment.*

104. *It has long been held that complaints, whether in labour law or human rights law, must only prove that the ground of discrimination (here – union status/membership) was a factor, not the primary factor, for the adverse differential treatment:*

> Upper Lakes Shipping Ltd. v. Sheehan, *[1979] 1 S.C.R. 902. [TAB 17]*
>
> Holden v. Canadian National Railway, *[1990] F.C.J. No. 419, 112 N.R. 395. (Fed. C.A.) [TAB 9]*

105. *Thus, the issue in these proceedings is whether the employer has discriminated against its represented employees by treating them differently, adversely, and in part on the basis of union status/membership by taking a benefit away from them. While it is clear that represented and unrepresented/excluded employees have some different benefits, terms and conditions of employment, until the implementation of this last collective agreement, these two groups of employees were treated identically for many purposes, including the calculation of the retroactive pay entitlement i.e.* Lajoie *or better. Now, the Employer has unilaterally taken that option away from its represented employees and is offering it only to its excluded and unrepresented employees.*

106. *The Employer asserts that it can do whatever it wants to its unrepresented/excluded employees and thus its policy, although clearly discriminatory, is justifiable. With the greatest of respect, this argument does not accord/correspond to the facts of this case and is circular in nature.*

107. *This is not a case about changing the terms and conditions and/or benefits afforded to unrepresented/excluded employees. It is about unilaterally changing the terms, conditions and/or benefits of represented employees. After all, the Employer did not change its method of*

calculating retroactive pay for unrepresented/excluded employees; it remains as 'Lajoie *or better', whereas the Employer's method of calculation of retroactive pay for SSEA members is now worse, i.e. only* Lajoie.

108. *The Employer's argument in this forum is equivalent to the following employer's argument in a human rights forum. The employer can treat its white male employees any way it wants. The employer then maintains the status quo for white male employees with respect to their salaries but reduces the salaries of its female and visible minoirity employees by 25%. The proposition that the employer can treat its white male (unrepresented/excluded) employees any way it wants, while it may be true, is irrelevant to the issue of whether the employer's actions are discriminatory towards its female and visible minority (represented) employees.*

109. *The Complainant is not alleging, as the Employer suggests, that all differences in the terms, conditions and/or benefits that exist between unrepresented/excluded employees and those that are represented will lead to a finding of discrimination on the basis of union status. If this were the union's position, it would have complained on numerous occasions to the Board on many issues. The Employer's assertion is a complete distortion of the Complainant's position and of the particular facts of this case.*

110. *As set out in the evidence portion of these submissions, the issue of the calculation of retroactive pay was specifically negotiated by the parties some time before the mid to late 1980's and has remained unchanged ever since. It has not been the subject of negotiations since then and has always been applied in the same fashion, to both represented and unrepresented/excluded employees since to SSEA's knowledge (according to the Employer, the change occurred in 2000 but this was not known to SSEA or its members). The Employer then unilaterally and without any discussion with SSEA, changed its method of calculating retroactive pay and recalculating promotions, acting positions, etc. after SSEA ratified the last collective agreement.*

111. *Thus, although unions and employers can agree on differences in terms, conditions and benefits*

for their represented employees as opposed to unrepresented/excluded employees, that is not what happened here. It goes without saying that in a unionized context, the employer cannot unilaterally change the terms and conditions of employment of its represented employees.

112. *The argument that the Employer's actions here are discriminatory based on union status/membership are stronger than those in* Famous Players Inc., supra *[TAB 8] where the Ontario Labour Relations Board found the employer liable for discrimination for removing a benefit (free movie passes) from its recently unionized employees on the basis of a past practice/estoppel. In that case, the parties had not negotiated the issue so the discrimination argument was based in part on the past practice.*

113. *In the case at bar, the Complainant not only has a longstanding past practice/estoppel argument with respect to the Employer's application of the standard recalculation method, but also has a provision in its collective agreement which was negotiated many years ago and was never re-negotiated. It was simply unilaterally altered by the Employer's recent actions.*

114. *If the facts of this case did not involve the unilateral change of a negotiated term in a collective agreement which had been applied in a particular fashion for many years, but rather a new, non-negotiated provision, the Complainant would not be here. For example, if the Employer in its efforts to overcome problems attracting managers into the Public Service ranks offered Caribbean cruises to its unrepresented staff in addition to normal vacation entitlements, the resulting differential treatment could not be the subject of a discrimination complaint. The parties would have negotiated vacation leave entitlements but the issue of a Caribbean cruise is new and there is no past practice in that regard. In addition, the status quo would be the entitlement to vacation leave and there would not an issue of a benefit being taken away from the represented employees.*

115. *The Employer violated sections 8 and 9 of the Act when it applied a discriminatory and adverse treatment to members of SSEA with respect to the determination of their retroactive pay entitlement. On its face, the January Bulletin*

discriminates between unrepresented/excluded employees and represented employees on the basis of union membership. As indicated above, discrimination is defined as differential treatment of one group of individuals over another, to its detriment. On its face, the Employer's policy clearly meets this definition.

116. *In cases of discrimination in the context of human rights legislation, it is the discriminatory effect which is prohibited rather than the discriminatory intent. This approach was adopted by the Canada Labour Relations Board in* Retail Clerks' International Union, supra *[TAB 15]:*

> *Our experience in labour relations clearly indicates that an action or attitude itself has its own positive or negative effect insofar as the freedom to exercise the right to join a union is concerned. If an employer's action or attitude per se clearly has the effect of interfering with or destroying the rights of an employee recognized by the Code, the case of the union and the employee is heard and this is all that the Board requires in order to reach a conclusion, unless the preponderance of the evidence presented by the defence provides new or contradictory facts.*

117. *The Complainant agrees that the Employer can provide different terms and conditions to its employees, however, the Complainant states that the Employer is precluded from discriminating against its represented employees and the Complainant on the basis of union membership. In this case, the Employer unilaterally imposed a lesser benefit to its represented employees than what those employees had been receiving up to that point while it preserved the greater benefit for its unrepresented and excluded employees.*

B. THE EMPLOYER HAS NOT PROVIDED A REASONABLE EXPLANATION FOR ITS DISCRIMINATORY POLICY

118. *The evidence of Mr. Krause relating to his discussions with Mr. Langevin during the October 22, 2001 meeting is uncontradicted therefore there is no need to compare their testimonies.*

119. *Alternatively, if there are any contradictions between the evidence of Mr. Krause and that of Mr. Langevin, SSEA submits that the evidence of Mr. Krause ought to be preferred over that of Mr. Langevin as on points of importance to this case, Mr. Langevin's recollection appears to be poor and incomplete at best. In light of the admitted frank and open rapport between these two individuals, SSEA submits that the evidence of Mr. Krause is to be preferred over that of Mr. Langevin as it is reasonable to conclude that Mr. Langevin felt comfortable enough with Mr. Krause to make the admissions he made during the October 22, 2001 meeting. Mr. Krause's evidence of that meeting was not challenged by the Employer and accordingly, it stands as the only evidence on that point. Mr. Langevin admitted during this meeting that the policy was discriminatory against SSEA members but he would not say on what basis.*

120. *Neither of the Employer's officials and named respondents to this complaint, Frank Clayton and Tom Smith, were called as witnesses. Moreover, the evidence clearly establishes that the discriminatory policy at issue in these proceedings was issued by senior officials at Treasury Board yet no such officials were called as witnesses to explain/justify this policy and the reason for which the Employer's interpretation of the* Lajoie *decision [TAB 5] was applied to represented employees only.*

121. *Mr. Langevin did not provide any explanation for this policy. Ms. Marchand-Bigras testified that she was told that the Employer had to apply '*Lajoie*' as it was an application of the law and that the Employer was bound to it. The difficulties with that statement are as follows:*

    (a) If the Employer was bound to apply Lajoie, *it was so bound from the moment the decision was handed down, namely in 1992 yet the Employer's own evidence confirmed that the Employer did not apply* Lajoie *for Round 1 of bargaining;*

    (b) If the Employer was bound to apply Lajoie, *it should be so bound to apply it to all of its employees as the ruling in the* Lajoie *does not in any way restrict its application to represented employees only.*

(c) *If the Employer is bound to apply decisions from the Federal Court, it is also bound to apply regulations promulgated pursuant to the Act such as the Terms and Conditions of Employment Policy [Exhibit S-14] and the* Public Service Employment Regulations, 2000 *(section 2) as well as more recent decisions of the Board such as the decision in* Buchmann v. CCRA, *(2002), 2002 PSSRB 14 (hereinafter "*Buchmann*") [TAB 4].*

122. *Given the lack of any explanation/justification by senior official and the clear contradiction in the explanation provided by Ms. Marchand-Bigras, the Employer has not provided a reasonable explanation for the reason why it treats SSEA and its members differently/adversely from its unrepresented/excluded employees.*

C. ANTI-UNION ANIMUS NOT REQUIRED

123. *The Complainants submit that a violation of sections 8 and 9 of the Act does not require evidence of anti-union animus on the part of the Employer.*

124. *Sections 8 and 9 of the Act state as follows:*

> *8.(2) Subject to subsection (3), no person shall*
>
> *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act (…)*
>
> *(b) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*
>
> *(i) to become, refrain from becoming or cease to be, or except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or*

> *(ii) to refrain from exercising any other right under this Act.*
>
> *(…)*
>
> *9.(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.*

125. Paragraph 8(2) (a) prohibits an employer from discriminating against any person ***because the person is a member of an employee organization****. The January Bulletin [Exhibit S-2], on its face, clearly states that the only reason for which employees are being treated differently is the fact that they are represented by a bargaining agent:*

> *In accordance with the* Lajoie *Decision, rates of pay resulting from promotions, transfers, deployments, or acting situations are not recalculated during the retroactive period of a pay rate scale revision. The new rate of pay to be implemented is the one immediately below the former rate of pay being revised. This applies to all retroactive revisions to rates of pay paid to represented employees.*
>
> *In a Treasury Board bulletin dated November 8, 2000, entitled Economic Increase for Excluded and Unrepresented PE, OM, CA and MM Groups, you were advised that when implementing retroactive rate of pay revisions applicable to excluded or unrepresented employees the* Lajoie *Decision is applied and a recalculation is done. The excluded or unrepresented employees then benefit from the better of the two resulting revised rates of pay.*
>
> *(…) The* Lajoie *Decision only is to be applied when the higher position is represented, and the* Lajoie *Decision or better is applied when the higher level position is excluded or unrepresented.*

126. *Both witnesses for the Employer, Mr. Langevin and Ms. Marchand-Bigras conceded that the "*Lajoie *or better" option which is afforded to unrepresented/excluded employees only is the most beneficial option as it gives those employees the benefit of either method of recalculation of retroactive pay. As was confirmed in the example prepared by Ms. Paris [S-13], the application of the* Lajoie *Decision in the context of this case has a significant adverse economic impact and can represent a difference in annual wage rates of upwards of $2,400.00, not to mention the long term impact on wage-driven benefits such as pensions. Accordingly, the Employer, in implementing the policy set out in the January Bulletin, has applied a differential and adverse treatment to its represented employees on the basis of their union affiliation.*

127. *Not only is the "*Lajoie *only" option less beneficial to represented employees, it is not the method of recalculation that the parties had negotiated at the bargaining table when the parties agreed to the language in Article 27.03(b)(iii). Mr. Krause's evidence was clear on this point. SSEA understood at all times that the recalculation method that would be used to calculate its members' retroactive wages would be the 'standard recalculation' method. Any other method used by the Employer constitutes a lesser benefit and consequently, has an adverse effect on represented employees.*

128. *In the decision* Public Service Alliance of Canada and National Capital Commission, *(1994) 26 PSSRB Decision 6 [TAB 14], the union filed an unfair labour practice complaint against the employer for issuing an information bulletin in the context of an upcoming certification vote. The contested provisions of the bulletin stated as follows:*

> *In the event that employees choose to be represented by PSAC, a period of collective bargaining would follow. Under the Public Sector Compensation Act, all matters related to compensation, administration of compensation, wages and benefits are frozen and non-negotiable until the end of the application of the Act in 1997-98. A new collective agreement entered into by the parties would contain the provisions*

> *frozen by legislation and the non-monetary items negotiated by both parties.*
>
> *In the event that employees choose not to be represented by PSAC, the same legislated freeze applies. The terms and conditions of employees hired before May 1, 1994 would remain, as they are now, those of their former collective agreements. Employees hired on or after May 1, 1994 would remain subject to the Compendium of Terms and Conditions of Employees.*
>
> *If employees were to choose an alternate form of representation at a later date, negotiations could once again only address non-monetary items if they occurred under the freeze.*

129. The Board held that these paragraphs, to the extent that they attempted to convey to employees that there was no advantage in voting in favour of certification (at pages 6-7):

> *The remaining three paragraphs are quite a different matter. In our opinion, they attempt to convey to employees that there is little point in voting in favour of certification of the Alliance because the legislation had frozen all compensation, wages and benefits for federal public servants until 1997-98 and that the same situation would prevail without Alliance representation. In the last paragraph of the bulletin, it is suggested that employees are free to choose "an alternate form of representation at a later date". Although this paragraph lends itself to several interpretations, there is a clear message that any representation during the freeze period would not bring any great advantage. No mention is made of the benefits of voting affirmatively, such as having the right of a certified bargaining agent to negotiate with the employer a collective agreement incorporating the frozen terms and conditions of employment as well as any new non-monetary issues to which the parties agree; as well, there is the right of the bargaining agent and any affected employees to refer grievances respecting the proper interpretation of provisions of the collective agreement to*

> *adjudication by an independent third party. (…) Whether this constitutes sufficient reason to convince the employees in the bargaining unit to vote in favour of representation by a bargaining agent is a matter for them to decide.*
>
> *The complaint is allowed.*

130. *The* PSAC and NCC *case above did not make any reference to anti-union animus and the Board found that the employer had violated section 8(2)(a) of the Act, based on the wording of the bulletin. SSEA submits that in the case at bar, unlike the excerpt of the bulletin above, the January Bulletin [Exhibit S-2] and the November Bulletin [Exhibit S-3] are unequivocal and clearly seek to discourage represented employees from being members and/or exercising their rights under the Act. SSEA submits that this discriminatory policy constitutes a violation of section 8(2)(a) of the Act in that by imposing it, the Employer seeks to persuade employees to cease to be or to continue to be members of an employee organization and/or from exercising their rights under the Act.*

131. *In* Retail Clerks' International Union and Bank of Canadian National, *35 di 39; [1980] 1 Can. L.R.B.R. 470 [TAB 15], the Canada Labour Relations Board found that the employer discriminated contrary to the Code when it decided to assume all its tellers' cash deficits in all its branches except for those which were unionized or for which certifications were pending.*

132. *In the* Retail Clerks' International Union *case, the Board had to determine whether anti-union animus was an essential element of the alleged infractions. The Board adopted an approach analogous to that found in human rights discrimination cases (at pages 9-10):*

> *Moreover, in Canada, the decisions of human rights commissions with regard to discrimination confirm this trend. It is the discriminatory effect which is prohibited rather than the discriminatory intent, as was held in* The Board of Yorkton Regional High School and the Saskatchewan Human Rights Commission, *dated July 6, 1970 (Bence C.J., Q.B.). (…)*

> *This approach appears logical to us; otherwise, the Board would find itself involved in an extremely difficult – indeed, almost impossible – exercise, because in trying to discover the underlying motivation, it would have to become involved in interminable proceedings relating to intent, which lead nowhere. Our experience in labour relations clearly indicates that an action or attitude itself has its own positive or negative effect insofar as the freedom to exercise the right to join a union is concerned. If an employer's action or attitude per se clearly has the effect of interfering with or destroying the rights of an employee recognized by the Code, the case of the union and the employee is heard and this is all the Board requires in order to reach a conclusion unless the preponderance of the evidence presented by the defence provides new or contradictory facts.*

133. *This case was heard in 1979 and the Board applied the amendments to the Code which included a reverse onus provision (as it still reads today). Thus, even when the statute shifts the onus to the employer to 'disprove' the allegations made against it, the Board considers the discriminatory effect rather than the discriminatory intent in determining whether the employer has violated the Code.*

134. *In finding that the employer had discriminated against its represented employees, the Board stated at pages 11-12:*

> *What we must first determine then, is whether this action taken by the employer can be interpreted as an action by which it sought to "discriminate against any person in regard to employment, pay or any other term or condition of employment…" because "this employee" is or proposes to become…a member…of a trade union or participates in the promotion, formation or administration of a trade union" (section 184(3)(a)).*
>
> *(…)*
>
> *It is clear, therefore, that the application of a general policy to all B.C.N. branches, with*

> *the exception of employees of branches which were certified or involved in certification procedures, constitutes, on the face of it, discrimination because this action is in fact tantamount to making a distinction between the tellers who were unionized or involved in certification procedures and the tellers of the other non-unionized branches, to the detriment, of course, of the unionized tellers, because they were members of the union or were involved in procedures relating to applications for certification.*
>
> *In this regard then, section 184(3)(a) was violated.*

135. *The Board then went on to determine whether the effects of the employer's decision on the union members were 'inherently destructive of important employee rights' and held that the unionized employees' stated dissatisfaction with the employer's policy and the fact that the employer was aware of such dissatisfaction resulted in an inherently destructive action on the part of the employer. SSEA submits that the grievances filed by SSEA members on the issue of the Employer's application of the* Lajoie *decision is evidence of their dissatisfaction and objection to the Employer's policy.*

136. *SSEA further submits that evidence of anti-union animus is not required under the Act as the Act does not provide for a reverse onus provision as in other labour statutes, requiring the employer to prove that it did not act contrary to the Act. Subsection 96(5) of the* Labour Relations Act, 1995 *[TAB 11] and subsection 98(4) of the* Canada Labour Code *[TAB 6] reverse the onus of proof on the employer who is alleged to have committed an unfair labour practice complaint.*

137. *SSEA argues that without a reverse onus provision in the Act, a complainant should not be required to prove anti-union animus as such evidence lies almost exclusively within the employer's knowledge. The reasons for which an employer discriminates against its represented employees are almost always only within the employer's knowledge and the complainant will almost never be able to adduce direct evidence as to the nature of its motivation. Accordingly, in the absence of such a reverse*

onus provision in the Act, SSEA should not be required to prove anti-union animus in order to make its case.

138. *In the alternative, SSEA submits that the absence of such a reverse onus provision in the Act creates a lower threshold for proving anti-union animus. Accordingly, SSEA submits that it ought to be considered to have discharged its onus on the balance of probabilities when it proves that the Employer's actions are discriminatory, have an adverse effect on its members and for which the Employer has no reasonable explanation.*

C. ANTI-UNION ANIMUS – NECESSARY ELEMENT

139. *In the further alternative, should evidence of anti-union animus be required, which is expressly denied, then SSEA submits that such a motivation should be inferred here from the failure of the Employer to provide a reasonable explanation for its actions and the complete lack of evidence put forth by the Employer or its senior officials.*

140. *Neither in its written response to the complaint nor in its evidence before the Board, has the Employer come forth with any justification for its discriminatory policy other than to say that it is permitted to treat its represented and unrepresented/excluded differently. In the absence of any reasonable explanation for this differential treatment on the part of the Employer, SSEA submits that anti-union animus must be inferred as it is incumbent upon the Employer to come forth with a credible explanation that is free of anti-union motive and which explains the reason for the discriminatory/differential treatment.*

141. *In* Re Famous Players Inc., *[1997] OLRB Rep. January/February 50 [TAB 8], the Ontario Labour Relations Board held that the employer's denial of certain benefits to its recently unionized employees constituted discrimination under section 72 of the* Labour Relations Act, 1995 *which states:*

> *72. No employer, employer's organization or person acting on behalf of an employer or an employer's organization,*

> *(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;*
>
> *(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or*
>
> *(c) shall seek by threat of dismissal or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.*

142. *In* Famous Players Inc., supra, *the employer stopped providing free movie passes and free movie pre-screening access to its recently unionized/certified employees immediately following the execution of the first collective agreement between these parties. The employer's only explanation for this conduct (as set out in paragraph (i) of the parties' agreed facts at page 51) was that it was not required by the collective agreement to provide such benefits. The parties agreed that the issue of movie passes has never been discussed in negotiations. The Board found that the employer's conduct constituted a violation of section 72. The Board held that in the absence of evidence which explained the employer's motive, it had to conclude that the differential treatment was contrary to the Act (*Famous Players Inc., supra *at paragraph 27, page 60).*

143. *In so finding, the Board relied upon the approach taken by the Board in a previous case* Pop Shoppe (Toronto) Limited, *[1976] OLRB Rep. June 299 [TAB 13], where the Board stated:*

> *4. (…) Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct (See* Barrie Examiner *[1975] OLRB Rep. Oct. 745 and* The Corporation of the City of London *[1976] OLRB Rep. Jan. 990).*
>
> *5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, pervious anti-union conduct and any other "peculiarities". (See* National Automatic Vending Co. Ltd. *case 63 CLLC 16, 278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. (…)*

144. *In the case at bar, the Employer has not provided any reasonable explanation for its discriminatory policy. The Employer has not presented any*

'viable non-union' reasons for applying this policy. In these circumstances, SSEA submits that the Board ought to infer anti-union animus on the part of the Employer as least in part motivating it to discriminate against represented employees.

145. *In light of the Employer's failure to put forth any explanation or justification for this policy, SSEA states that an adverse inference must be drawn against the Employer as to its motive in introducing this policy.*

146. *The Canada Labour Relations Board, as it then was, has long held that anti-union motives need only be a proximate cause for an employer's action to be found to be a violation of paragraph 94(3)(a)(i) of the* Canada Labour Code:

> Air Atlantic Limited *(1986), 68 di 30. [TAB 2]*
>
> American Airlines Incorporated *(1981), 43 di 114. [TAB 3]*
>
> VOCM Radio Newfoundland Limited *(1995), 98 di 18. [TAB 18]*

147. *In* Emery Worldwide *(1990), 79 di 150 (Can. L.R.B.) upheld (October 16, 1990 Doc. No. A-52-90 (Fed. C.A.) [TAB 7], the Board that the employer did commit an unfair labour practice when it acted out of anti-union animus, even if it was an incidental reason.*

148. *In this case, that the fact that there are 'scores' of grievances that are currently being held in abeyance constitutes evidence of SSEA members' dissatisfaction with and objection to the Employer's policy in this case. In addition, the Employer's admission that the 'Lajoie or better' method of calculation constitutes a better benefit demonstrates that the Employer was aware (or ought to have been aware) that the application of a lesser benefit to represented employees would have a detrimental impact on them.*

149. *It is also significant that subsequent to the filing of the within complaint, for reasons undisclosed and unexplained, the Employer changed its position with respect to the application of the 'Lajoie or better' to some of its unrepresented and excluded employees as was confirmed by*

Exhibit S-6. The timing of this change in policy, coupled with Ms. Paris' uncontradicted evidence as to the comments made to her by Ms. Chaîné (see Ms. Paris' evidence paragraph 51 above i.e. "because of your complaint, the PE's will only be getting Lajoie*"), are at the very least indicative of the Employer's anti-union motive. As Ms. Chaîné was present at the hearing and was not called by the Employer to testify, we can infer that Ms. Paris' evidence was reliable in that regard and ought to be given significant weight.*

150. *SSEA submits that the Employer's subsequent change in policy which had the effect of taking the greater benefit away from more employees (rather than to revert to the status quo which afforded all employees the greater benefit) demonstrates the Employer's attempt to discredit SSEA and present it as the reason for which the Employer had to treat all employees the same/equally by giving them the lesser benefit.*

151. *It is also important to consider that the Employer in this case did not come forward to advise the union that it intended to apply the* Lajoie *decision after Round 2 when it knew that it had been an issue with PSAC in the previous round and that SSEA would have no knowledge of that since its collective agreement from Round 1 had been implemented prior to December 1998 when the collective agreement between PSAC and Treasury Board was signed. The Employer's conduct in this regard is indicative of its contempt and/or disregard for SSEA and its members, which is consistent with an anti-union motivation.*

152. *While the actions of the Employer in Round 2 may well constitute bad faith bargaining, the filing of such a complaint at this time would be ineffective as the parties have since concluded another collective agreement. SSEA submits that the implicit admission of the Employer regarding its failure to raise the issue of the* Lajoie *decision (and of its intention to apply it after Round 2) at the bargaining table is indicative of anti-union animus on the part of the Employer.*

153. *SSEA submits that an inference of anti-union animus may be drawn from the lack of full and frank discussion on the issue of* Lajoie *and from the fact that the Employer actually instructed its negotiators not to raise it at the table. This lack*

of disclosure continued right up until the hearing; starting with the Employer's actions at the bargaining table, its application of the January Bulletin and November Bulletin, its failure to provide a full defence to this complaint, its refusal to attend mediation, its delay in the hearing dates for this complaint, its change of position regarding the relevance of bargaining history between these parties, its misinterpretation of the Lajoie *decision, its corresponding refusal to apply* Buchmann*, its comments regarding the need to 'educate' the unions, etc. SSEA submits anti-union motivation may be inferred from all of the above.*

154. *The Employer instructed its negotiators in 1996-97 (before Round 1) not to inform the bargaining agents of its inappropriate interpretation of the* Lajoie *decision. The Employer then proceeded not to apply its own erroneous interpretation (after Round 1). For the following/ensuing round of negotiation (Round 2), the Employer once again instructed its negotiators to remain silent on the issue of its interpretation of* Lajoie *and its planned implementation to all represented employees.*

155. *Notwithstanding the Employer's apparent 'application' of its interpretation of* Lajoie *after Round 2, given the limited duration of that collective agreement [Exhibit S-9], the lack of restructuring involved in that collective agreement and the economic increases which were applied across the board in that collective agreement, it was not possible for SSEA and its members to ascertain that there had been a change in the Employer's position with respect to retroactive salary calculations.*

156. *This change in the Employer's position only became apparent to SSEA after the third round of bargaining as the resulting collective agreement was for a three year duration, involved a massive restructuring of pay rates and had an extended retroactive period.*

157. *Other examples of cases where the employer was found to have discriminated against the union and its members include* Air Alliance Inc. *(1991) 86 di 13, 92 CLLC 16,013 (Brault) CLRB [TAB 1], where the Board also found that the employer's exclusion of former striking employees from a profit sharing plan violated the Code because it*

penalized them for participating in a lawful strike. On the question of anti-union animus, the Board held in that case that a policy or action that penalizes persons because they have participated in a strike was a violation of the Code (at page 9):

> *There remains the question of anti-union animus […]. Whether motivated by anti-union animus or not, a policy or action of the employer that penalizes persons because they have participated in a strike clearly contravenes this provision. In this case, the employer does not deny that it imposed an economic sanction; indeed, it asserts the right to do so in its reply to the complaint:*
>
> > *"21. Without prejudice to the foregoing, it is more than reasonable for the respondent to include such an exclusion, ie. excluding striking employees from enjoying the company's profits, since these employees, through their action, have caused the company to incur substantial expenses, a premise that is fundamental to the very nature of such a plan…"*

158. *In* The Cambridge Reporter, *[1993] OLRB Rep. October 1035 (Goodfellow) OLRB [TAB 16], the Board held that, upon reviewing the evidence as a whole, the employer's denial of bonus payments to striking employees constituted an unfair labour practice and discriminated against striking employees.*

Estoppel

159. *The Complainant further submits that the Employer is estopped from unilaterally imposing the* Lajoie *method of calculation for retroactive pay entitlement as a result of its past practice following collective bargaining between these parties and its failure to raise the issue at the bargaining table.*

160. *The relevant provisions of the collective agreements negotiated between SSEA and Treasury Board between 1992 and 2001 relating to Pay Administration and to Appointments Above the Minimum During the Retroactive Period ("Pay Notes") have remained substantively*

unchanged save and except for minor amendments in format.

Collective Agreement May 1991 to May 3, 1992 [Exhibit S-7]	Collective Agreement May 3, 1992 to June 21, 1999 [Exhibit S-8]	Collective Agreement June 22, 1999 to June 21, 2000 [Exhibit S-9]	Collective Agreement June 22, 2000 to June 21, 2003 [Exhibit S-10]
Article 17.03 (b) Where the rates of pay set forth in Appendix A have an effective date prior to the date of signing of the collective agreement, the following shall apply: (…) (iii) rates of pay shall be pain in an amount equal to what would have been paid had the collective agreement been signed or an arbitration award rendered therefore on the effective date of the revision in rates of pay; (…)	Article 27.03 (b) where the rates of pay set forth in Appendix A of this Agreement have an effective date prior to the date of this Agreement, the following shall apply: (…) (iii) rates of pay shall be paid in an amount equal to what would have been paid had this Agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay; (…)	Article 27.03 (b) Where the rates of pay set forth in Appendix A have an effective date prior to the date of signing of the collective agreement, the following shall apply: (…) (iii) rates of pay shall be paid in an amount equal to what would have been paid had the collective agreement been signed or an arbitral award rendered therefore on the effective date of the revision in the rates of pay; (…)	Article 27.03 (b) Where the rates of pay set forth in Appendix A have an effective date prior to the date of signing of the collective agreement, the following shall apply: (…) (iii) rate of pay shall be paid in an amount equal to what would have been paid had the collective agreement been signed or an arbitral award rendered therefore on the effective date of the revision in the rates of pay; (…)
11. An employee who, during the retroactive period, was appointed to a position in the ES levels 2 to 7 scale of rates above the minimum on the ($) scale of rates shall, effective the date of the employee's appointment be paid in the (A) scale of rates at the rate shown immediately below the employee's former rate of pay.	12. An employee who, during the retroactive period, was appointed to a position in the ES levels 2 to 7 scale of rates above the minimum on the ($) scale of rates shall, effective the date of the employee's appointment, be paid in the (A) scale of rates at the rate shown immediately below the employee's former rate of pay.	8. An employee who, during the retroactive period, was appointed to a position in the ES levels 2 to 7 or SI levels 1 to 8 scale of rates above the minimum on the ($) scale of rates shall, effective the date of the employee's appointment, be paid in the (A) scale of rates at the rate shown immediately below the employee's former rate of pay.	7. An employee who, during the retroactive period, was appointed to a position in the ES levels 2 to 7 or SI level 1 to 8 scale of rate above the minimum on the ($) scale of rates shall, effective the date of the employee's appointment be paid in the (A) scale of rates at the rate shown immediately below the employee's former rate of pay. An employee who, during the retroactive period, was appointed to a position in the ES level 1 scale of rates above the minimum on the ($) scale

			of rates shall, effective the date of his appointment be paid in the (A) scale of rates at a rate of pay which is two point five percent (2.5%) higher than the employee's former rate of pay rounded to the next multiple of $10).

161. *The evidence of Mr. Krause and Mr. Langevin confirm that neither of the parties raised the issue of retroactive calculation or "Lajoie" at the bargaining table.*

162. *The evidence of Mr. Langevin was that (in 1996/1997) Treasury Board negotiators were instructed specifically not to raise the issue at the bargaining table as it considered the Lajoie decision to be binding on the parties and changing the language in the collective agreement would have meant that a different method of implementing backpay would be used. At no time did the Employer advise the bargaining agents of its interpretation of the Lajoie decision and/or of its intention to apply it to all represented employees.*

*163. Both Mr. Langevin and Mr. Krause confirmed that the issue of the method of recalculation of retroactive wages was not discussed at the bargaining table in Round 3. The Complainants submit that the Employer is estopped from changing the method of recalculation to the "*Lajoie*" method. The Employer represented to SSEA through its silence that the 'standard recalculation method' would apply to this collective agreement. SSEA had no indication that the standard recalculation method would not apply because:*

(a) The Employer applied the 'standard recalculation method' after Round 1;

*(b) Even if the Employer applied the '*Lajoie*' method after Round 2, SSEA was not aware of it due to the particular circumstances of that collective agreement (no restructuring, economic increases across the board and short retroactive period); and-*

(c) *The employer did not raise the issue of "*Lajoie*" at the bargaining table during Round 3 even though it clearly intended to apply it.*

164. *SSEA clearly relied on the Employer's representation to its detriment. Mr. Krause testified that had the issue of 'Lajoie' been raised at the bargaining table, he would have secured the most beneficial method of recalculation for his members. The Complainant further submits that the Employer is precluded from changing the method of calculation of retroactive wage entitlement based on its past practice.*

165. *Mr. Langevin recognized the Employer's obligation to raise the issue upon becoming aware that SSEA had no knowledge of 'Lajoie'. Mr. Langevin testified that he felt obligated to raise the issue with the bargaining agent with whom he was engaged in ongoing negotiations in order to avoid a situation where another bargaining agent would file a complaint under section 23 of the Act. It is interesting to note that this bargaining agent was PIPSC, the same bargaining agent of whom Mr. Lajoie was a member. It strains credibility to say that Mr. Langevin felt obligated to raise the* Lajoie *issue with PIPSC but felt no such obligation to SSEA, a stranger to the proceedings involving Mr. Lajoie.*

Proper Forum – Adjucation (Grievance) vs. Section 23 Complaint

166. *The Employer has indicated throughout these proceedings that it views this matter as more appropriately adjudicated pursuant to section 99 adjudication of the Act. Moreover, the Employer relies on this premise to argue that estoppel may not be advanced in the context of these proceedings.*

167. *It is well established in arbitral jurisprudence that labour tribunals have exclusive jurisdictions over matters constituting unfair labour practices. The issue in these proceedings are broad in that they involve discrimination and differential treatment between unrepresented/excluded and represented employees.*

168. *While there may be some overlap between issues relating to discrimination and some interpretation of the collective agreement, the*

Complainant submits that the concurrent jurisdictions between the Board and adjudication are not unusual and does not oust the Board's jurisdiction to deal with matters that constitute violations of the Act.

169. *The Complainant submits that this Board is the most expeditious forum to address all issues in dispute and that accordingly, affords the parties the most practical and efficient method of adjudication. If this matter were to be separated into severable grievances for each individual who disputes his or her retroactive wage entitlement, it would unnecessarily and unduly protract this issue. All of these grievances arise out of the same circumstances, namely what is the appropriate method of recalculation of retroactive wages to be used (and what the parties negotiated at the bargaining table).*

170. *In addition, SSEA submits that while a section 99 referral would address part of SSEA's concerns i.e. the significant negative consequences to scores of its individual members, it does not address the damage to SSEA's reputation and the corresponding incentive for its members to seek to leave SSEA either through obtaining excluded positions, seeking other union affiliations or a possible decertfication. In addition, there is an issue as to whether SSEA could seek damages for individual grievors in the context of a policy grievance filed under section 99 of the Act.*

171. *With respect to the allegations of discrimination, the Complainant submits that it may not be possible to raise this in the context of an adjudication proceeding as an adjudicator only has jurisdiction to compare treatment of bargaining unit employees. Arbitrators have held that non-discrimination provisions in a collective agreement are restricted to matters relating to differential treatment among members of bargaining unit only and that such provisions are not intended to prohibit an employer from providing different terms of employment to unit and non-unit employees:*

> Re Husky Oil Operations Ltd. and C.E.P., Loc. 1997, *(1999) 84 L.A.C. (4th) 162 (McPhillips). [TAB 10]*
>
> Re Ontario Hydro and CUPE, Loc. 1000, *(1994) 40 L.A.C. (4th) 135 (Swan). [TAB 12]*

The Buchmann Decision and Other Applicable Statutes

172. *The Complainants that there are additional grounds for which the Employer's application of the* Lajoie *decision to SSEA members is discriminatory, namely that it has erroneously interpreted the* Lajoie *decision. The Employer's application of the* Lajoie *method of calculation is erroneous in light of the recent decision in* Buchmann and Canada Customs and Revenue Agency, *(2002) PSSRB 14 (Smith) [TAB 4].*

173. *Ms. Marchand-Bigras confirmed that the example that she prepared [Exhibit E-1] does not apply SSEA employment classifications or wage rates. The example prepared by Ms. Paris [Exhibit S-13] does apply SSEA employment classifications and wage rates giving a more accurate depiction of the effect of the Employer's interpretation of* Lajoie *on SSEA members. In addition, Exhibit E-1 depicts a situation where an employee was promoted from an unexpired wage rate to a new classification and wage rate which, as will be demonstrated below, is a case that is more closely analogous to the fact situation in the* Lajoie *decision. The example prepared by Ms. Paris, Exhibit S-13, depicts an employee being promoted* ***in the same classification*** *during the retroactive period, moving from an expired wage rate to an expired wage rate. The Complainants submit that in such case, the Employer's interpretation of the* Lajoie *decision does not apply and in fact, in such a case, the employee's wage rate in the promoted position must be recalculated using the revised rates of pay. The Public Service Staff Relations Board confirmed this principle in its recent decision in* Buchmann.

174. Buchmann *distinguishes* Lajoie *and is similar to our case. In the* Buchmann *case, the Board states that retroactive wages are to be calculated using the revised retroactive wages. In this case, the employee had been promoted from a PM-02 position to an AU-01 position during the retroactivity period of the collective agreement covering the PM positions. The Board considered the* Lajoie *decision and distinguished it on its facts in that the PM classification had not expired in the* Lajoie *case and the retroactivity related only to the AU level (ie. the position to which the employee had been promoted). The Board held*

that the Lajoie *decision was not applicable. The Board concluded at page 24, par. 55:*

> *Accordingly, the starting point for the grievor's salary review was his present salary level at the time his new appointment was offered and accepted. On September 9, 1999, the grievor was a PM-02 at the third salary level. The retroactive effect of the new collective agreement increased his pay from $41,940 to $42,788 in that position. He was offered a promotion to the AU position. Therefore the calculation of his salary level in that new position must be based upon his PM salary of $42,788 as a result of the retroactive adjustment pursuant to the new collective agreement. It is from that salary that his salary for the promotion to the AU position is to be calculated.* ***In other words, where an employee is promoted during the retroactive period of a collective agreement covering the position the employee is moving from, the employee's salary in the new position must be recalculated based upon the retroactive salary.*** *[emphasis added]*

175. *SSEA submits that the facts of this case are more consistent with the facts which SSEA members are facing as a result of the implementation of their last collective agreement. As a result, SSEA submits that the Board's interpretation in the* Buchmann *case support its position that the Employer's interpretation and application of* Lajoie *is erroneous.*

176. *Exhibit S-14 entitled Terms and Conditions of Employment Policy defines 'rate of pay on promotion' as follows:*

> *24.(1) The appointment of an employee described in Section 23 constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed exceeds the maximum rate of pay applicable to the employee's substantive level immediately before that appointment by:*
>
> *(a) an amount equal to at least the lowest pay increment*

> *for the position to which he or she is appointed, where that position has more than one rate of pay; or (…)*

177. *The Employer (Ms. Marchand-Bigras) indicated that the Employer had to comply with the above-noted provisions of the Terms and Conditions of Employment Policy only upon the date the employee was appointed to the promoted position. Once that promotion was effected, the rates of pay earned by that employee may not be revised retroactively as a result of the application of the* Lajoie *decision. In other words, should an employee be promoted during the retroactive period, he or she would have a lower salary than would the employee who was similarly promoted after the retroactive period. This could potentially result in a situation where the Employer unilaterally converts a 'promotion' into a 'demotion' using retroactive wage calculations which SSEA submits is untenable.*

178. *The collective agreement (Article 27) also provides the way in which retroactive pay is to be calculated. The Employer cannot unilaterally change the application of this provision.*

Conclusion:

179. *SSEA submits that the Employer discriminated against SSEA and its members when it applied a policy to represented employees that had an adverse effect on them with respect to the calculation of their retroactive wage entitlement. For all the foregoing reasons, SSEA submits that the Employer has violated sections 8 and 9 of the Act and respectfully requests that the Board issue the following order:*

    (i) an order directing the Respondents to observe the prohibitions contained in sections 8 and 9 of the Act*;*

    (ii) an order directing the Respondents to cease and desist from further violations of sections 8 and 9 of the Act*;*

    (iii) an order that the Respondents not impose any conditions, or remove any and all conditions currently imposed, upon the Complainant or upon the employment of

members of the Complainant, which violate the Act*;*

(iv) an order that the Respondent allow the Complainant's members to have the same rights and privileges as unrepresented employees of the Respondent specifically under the Respondent's policy governing retroactive salary entitlement resulting from promotions, transfers, deployment, or acting situations effected on or after June 21, 2000 [as described in the Treasury Board's Information Bulletin dated January 31, 2001 [Exhibit S-2];

(v) an order that the Respondent put the Complainant's members back into the position they would have been in but for the Employer's discrimination;

(vi) an order that the Complainant's members have the benefit of the more financially beneficial method of determining retroactive salary entitlement resulting from promotions, transfers, deployment, or acting situations as between the method of calculation outlined in the Lajoie *decision or recalculation of retroactive salary entitlement;*

(vii) and a further order that the Respondents exercise any discretion associated with the above in a non-discriminatory fashion; and

(viii) such further and other relief as may be appropriate in the circumstances.

180. SSEA also submits that the Board should expressly reserve jurisdiction to address the implementation issues which may arise from the said orders.

[82] The CUPTE submitted its arguments in the French language. The CUPTE reviewed its evidence and made the following arguments:

[Translation]

Part II – Arguments

It is clear from the above-mentioned Notices (C-3 and C-4) that the Treasury Board authorized the compensation of its excluded and unrepresented employees based on its interpretation of the method developed in Lajoie or having a recalculation done in order to enable its employees to benefit from the best settlement.

We refer the Board to a recent decision in the matter of Buchmann *v.* Canada Customs and Revenue Agency *(2002, PSSRB 14), in which important distinctions were made with regard to the principles set out in Lajoie. But the point we believe lies at the centre of this dispute is the different treatment given to the two groups and its detrimental effect on represented groups, such as the TRs. The effect of this difference in treatment is to lock represented employees into the standards set by the Lajoie decision even if a recalculation would lead to a higher compensation under retroactivity.*

The complainant submits that the difference in treatment between represented employees and those who are excluded or unrepresented by the defendant is explicit and deliberate.

In its previously mentioned Notices, the employer clearly indicated its intention to give its excluded and unrepresented groups the best advantage, thereby guaranteeing dissatisfaction among the ranks in its TR Group, which led to complaints that were different from those normally received during periods of retroactivity. Many of these complaints, 25 in all, were lodged as grievances under section 91 of the PSSRA.

Discrimination is defined as follows in Gage: "the act of making or recognizing differences and distinctions; the act or practice of making or showing a difference based on prejudice". The same dictionary characterizes as discriminatory anything that is "marked by or showing partiality or prejudice".

An important question is whether the existence of an anti-union bias is an essential ingredient in the alleged infractions. We leave it to our SSEA colleagues to take this issue further. Nonetheless, we believe that it would be useful to point out that the analysis of an employer's intention in connection with an allegation of discriminatory practices such as the one in question has to be looked at in terms of degrees or levels. There are levels of intent, and what has been presented as evidence is the fact that the Treasury

Board, through its Notices of November 8, 2000, and January 31, 2001, stated a clear and deliberate intention that favoured its excluded and unrepresented employees over the represented groups, such as the TRs. It is clear, according to the dictionary's definition, that the TR Group, among others, was treated "differently" from the excluded and unrepresented groups in terms of the application of retroactive pay. We submit that there is no need to go any further in the levels of management's intent since the Act does not seem to require any evidence of intent at a deeper level for this type of infraction. Section 8(2)(a) *of the* Public Service Staff Relations Act *states:*

> *(2) Subject to subsection (3), no person shall*
>
> *(*a*) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act.*

Section 9(1) goes on to state:

> *Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.*

What is stated is the prohibition against making unfair distinctions with regard to a union or based on an individual's being a member of a union.

In terms of free association with a union, the incentive not to belong could not be more clearly stated.

In terms of the CUPTE members, one cannot deny the demoralizing effect of such practices on any employee governed by federal laws. This constitutes an invitation to alienation from the union and manipulation of the system since, under certain circumstances, it may be more beneficial, for instance, to postpone the date of an appointment to the post-retroactive period.

In Alliance of Canadian Cinema, Television and Radio Artists *v.* Canadian Broadcasting Corporation, *Decision no. 839 of December 20, 1990, the Canada Industrial Relations Board examined the issue of the need to have malicious intent in connection with a prohibition under s. 94(1) of the* Canada Labour Code.

> *"It is not necessary for a complainant to succeed under section 94(1)(a) to establish an anti-union animus or an intention to discriminate on the part of the employer. Indeed, that provision calls for an objective test first concerned with the effect of the employer's actions on the legitimate rights of employees or their unions. On the other hand, it does not impose the burden of proof on the employer." p. 127*

We agree that this statement was not based on an interpretation of subsection 94(3) of the Code but we do raise the question of whether the evidence of anti-union sentiment is necessary in the context of applications under sections 8 and 9 of the Public Service Staff Relations Act.

In other words, beyond intent, would the discriminatory effect of the employer's action not constitute a violation of sections 8 and 9 of the Act? Beyond intent, is it not the inherent effect of the employer's decision that should be examined?

This issue was already addressed by the CIRB in Retail Clerks' International Union *v.* Bank Canadian National *35 do 39; (1980) 1 Can LRBR 470, CIRB Decision no. 189.*

> *It is in this sense that the search for the employer's motivation in cases of unfair labour practices takes on a completely different connotation. The search for anti-union animus on the part of an employer approximates, as nearly as possible, by analogy, and all things being equal, the search for criminal intent in proceedings within criminal jurisdiction. This is not the objective of a labour tribunal. All that the labour tribunal must seek to determine is whether, in a specific case, the freedom of an employee to join the union of his choice has been respected, whether the freedom of a union or an employee to exercise the rights provided for in the Code has been preserved—in other words, whether there has been a departure from the natural purpose of the objectives and intention set forth in the Code owing to the employer's course of action. It is the course of action and its consequences, far more than the motivation behind it, which should be examined." p. 10*

The negative effect of the measures adopted by the employer in this matter was mentioned above and amply demonstrated. This is not the type of behaviour that only touches the CUPTE in an apparent or incidental manner. The lesser benefit of the application of retroactive pay in regard to the union members can be measured in real numbers and

economic value, and has detrimental consequences for union activities.

The employer has not provided any sufficient justification in response to the union's interventions following the signing of the last collective agreement and during the deposition of its evidence before the Board. No reason based on administrative or financial considerations or the interests of collective bargaining were presented to justify or simply explain the different treatment accorded by the Treasury Board to excluded and unrepresented employees and those who are represented.

Part III – Conclusion

In summary, we present the following arguments:

2. *The employer's practice of giving the better advantage to its excluded and unrepresented groups with regard to retroactive pay is discriminatory and violates the prohibitions set out in sections 8 and 9 of the* Public Service Staff Relations Act.

3. *The rights associated with section 6 of this Act have precedence. Exceptional circumstances and very serious reasons would be needed to circumvent the prohibitions in the Act.*

4. *No justification was provided by the employer in support of its discriminatory practice to explain the notices of November 8, 2000, and January 31, 2001.*

5. *We submit that sections 8 and 9 of the Act do not require that the existence of anti-union feelings by the employer have to be proven. An objective criterion, which would be the detrimental effect of the employer's practices on the CUPTE members and their union, suffices to establish that the practices in question contravene the Act.*

6. *We also point out that there does not appear to be any inconsistency between the CUPTE's complaint and that of the SSEA (161-2-1208 and 1211).*

   Since these complaints were heard jointly, the CUPTE fully endorses all of the points raised by its SSEA colleagues in support of this matter and bases itself entirely on their arguments.

6. *For these reasons, we submit that the defendant, by applying discriminatory treatment to the*

> *detriment of its represented employees, is in violation of sections 8 and 9 of the Act and that the corrective measures set out in paragraph 5 of our complaint to the Board are appropriate.*

[83] The respondents replied to both submissions with the following:

> ***RESPONDENT'S WRITTEN SUBMISSIONS***
>
> ***EMPLOYER'S POSITION***
>
> 1. *Represented employees will obtain the terms and conditions of employment that are negotiated on their behalf by their bargaining agent at the negotiation table. This is the very "raison d'être" of collective bargaining.*
>
> 2. *To claim that it is discriminatory on the basis of union membership for excluded/unrepresented employees and represented employees to receive different or unequal terms and conditions of employment would be tantamount to stating that the collective agreement provides the minimum benefits that will inure to represented employees. Should excluded and unrepresented employees receive more vacation leave, performance pay, or any other more favourable term or condition of employment, represented employees would be successful in their claim of discrimination on the basis of union membership. This would act to paralyse the Employer in the exercise of its authority to set terms and conditions of employment for excluded and unrepresented employees.*
>
> ***STATEMENT OF FACTS***
>
> 3. *The Employer summarizes the salient facts as follows:*
>
> 4. *The Federal Court of Appeal rendered its decision in* Lajoie *in 1992.*
>
> 5. *From 1992 to 1997, there was a legislated freeze that prevented collective bargaining.*
>
> 6. *Since that freeze was lifted, the respective Complainants have successfully concluded three rounds of collective bargaining with the Employer.*
>
> 7. *Prior to the first round of negotiations, the negotiation team for the Employer made the decision that it did not need to raise the issue of calculation of retroactive remuneration or the* Lajoie *decision during negotiations since they felt that they could live with*

the Federal Court of Appeal's interpretation of the relevant provision of the collective agreement.

8. *The* Lajoie *decision was not discussed during the first round.*

9. *Suzanne Marchand-Bigras testified that during the implementation of the first collective agreements signed following the legislated freeze, no one at the Employer's Pay Administration section recalled the impact of the* Lajoie *decision until some of the collective agreements had already been implemented. The Employer sought to rectify this situation and determined it would apply the* Lajoie *method following round two since that is the interpretation that was given by the Federal Court of Appeal to the language in the collective agreement.*

10. *The* Lajoie *decision was not discussed during the second or third rounds of collective bargaining.*

11. *The* Lajoie *decision was put into effect in the course of implementation of the second and third collective agreements for all represented employees.*

12. *The Employer's application of the* Lajoie *decision was, and remains, that for employees covered by collective agreements with the same language as in* Lajoie, *the Employer is not to reconstruct the employee's history when calculating retroactive remuneration. The employee remains at the same step of the salary range where he/she was appointed and the Employer must move "straight down" in order to determine the employee's revised salary.*

13. *The Employer understood any reference made by SSEA or CUPTE bargaining team members to "straight down" to imply a reference to the application of the* Lajoie *decision.*

14. *In essence, what took place was confusion surrounding the application of the* Lajoie *decision. The evidence brought to light the fact that the Employer, through Daniel Langevin, and the Complainants had different understandings of how the retroactive remuneration would be calculated.*

POINTS OF ARGUMENT

I. Treasury Board Secretariat and Frank Claydon are not proper respondents in this matter.

II. The onus is on the complainants to show a violation of sections 8 or 9 of the **Public Service Staff Relations Act.**

III. The Employer does not discriminate against represented employees when it sets a term or condition of employment for excluded and unrepresented employees that is different and superior to that which has been negotiated with bargaining agents on behalf of their members.

IV. Differential treatment is not sufficient to constitute discrimination contrary to sections 8 and 9 of the **Public Service Staff Relations Act.** ***The Complainants must show anti-union animus.***

V. In cases where differential treatment or dismissal has been found to constitute discrimination, the action in question had taken place immediately following and as a direct result of union activity.

VI. The interpretation of a collective agreement provision is not a proper subject in a section 23 complaint.

ARGUMENT

I. Treasury Board Secretariat and Frank Claydon are not proper respondents in this matter.

15. It has been well established in Public Service Staff Relations Board ("PSSRB") jurisprudence dealing with allegations of violations of section 8 and 9 of the Public Service Staff Relations Act *("PSSRA") that the Treasury Board (or Treasury Board Secretariat) is not a "person" and consequently cannot be a named Respondent.*

> Economists' Sociologists' and Statisticians' Assn and Canada (Treasury Board), *[1978] C.P.S.S.R.B. No. 6, online: QL (CSBB), at Tab 1 of the Respondents' Book of Authorities.*
>
> Federal Government Dockyard Trades and Labour Council East and Treasury Board et al., *[1990] C.P.S.S.R.B. No. 200, online: QL (CSBB), at Tab 2 of the Respondents' Book of Authorities.*

16. *No nexus has been established between the complaint at hand and any action on the part of Frank Claydon. The fact that he was nominal head of the Treasury Board Secretariat at the time of the filing of the complaint is not sufficient to arrive at a finding that he has engaged in an unfair labour practice.*

***II. The onus is on the complainants to show a violation of sections 8 or 9 of the* Public Service Staff Relations Act.**

17. *The onus is on the Complainants in a section 23 complaint to demonstrate that sections 8 or 9 have been violated.*

> Prue and Bhabha, *[1989] C.P.S.S.R.B. No. 210, online: QL (CSBB), at Tab 3 of the Respondents' Book of Authorities.*
>
> Public Service Alliance of Canada and Little, *[1996] C.P.S.S.R.B. No. 76, online: QL (CSBB), at Tab 4 of the Respondents' Book of Authorities.*

18. *The Employer submits that the Complainants have not brought any evidence that there has been a violation of section 9. In no way have they shown that any person would have discriminated against the employee organization. Their Complaints only involve the employee organizations incidentally through the impact on their members.*

III. The Employer does not discriminate against represented employees when it sets a term or condition of employment for excluded and unrepresented employees that is different and superior to that which has been negotiated with bargaining agents on behalf of their members.

19. *The Employer submits that it is not discriminatory for the Employer to set a term or condition of employment for its excluded and unrepresented employees that is different and superior to that which has been negotiated with bargaining agents on behalf of their members.*

20. *The Employer has the legislated right to set the terms and conditions for its excluded and unrepresented employees pursuant to sections 7 and 11 of the* Financial Administration Act*:*

> *7 (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to*

> *(e) personnel management in the public service of Canada, including the determination of the terms and conditions of employment of persons employed therein;*
>
> *11 (2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> *(i) provide for such other matters, including terms and conditions of employment not otherwise specifically provided for in this subsection, as the Treasury Board considers necessary for effective personnel management in the public service.*
>
> *Financial Administration Act, R.C.S. 1970, c. F-10.*

21. *By way of contrast, represented employees will obtain the terms and conditions of employment that are negotiated on their behalf by their bargaining agent at the negotiation table. This is the very "raison d'être" of collective bargaining.*

22. *To claim that it is discriminatory on the basis of union membership for these two groups to receive different or unequal terms and conditions of employment would be tantamount to stating that the collective agreement provides the minimum benefits that will inure to represented employees. Should excluded and unrepresented employees receive more vacation leave, performance pay, or any other more favourable term or condition of employment, represented employees would be successful in their claim of discrimination on the basis of union membership. This would paralyse the Employer in the exercise of its rights as the Employer to set terms and conditions of employment for excluded and unrepresented employees.*

23. *A particularly clear and reasoned enunciation of this principle can be found in* Ontario Hydro *in 1994. In that case, the union was claiming that bargaining unit members were required to make an election about a voluntary separation program at a time when much less information was available to them than was available to non-represented employees.*

Re Ontario Hydro and Canadian Union of Public Employees, Local 1000 *(1994), 40 L.A.C. (4th) 135, at Tab 5 of the Respondents' Book of Authorities.*

24. *In finding that this did not constitute discrimination, the Board commented at page 9 with respect to the fact that there are so few cases on this subject:*

> *"It is surprising that there are so few cases on this subject, but perhaps it simply indicates that it has been generally accepted that no-discrimination clauses of the present type, whether such clauses are interpreted narrowly or broadly, were never intended to prohibit preferential treatment of members of one bargaining unit over those of another, or of excluded employees over members of a bargaining unit or units. The very essence of collective bargaining is that such differences will be the subject of negotiation separately in respect of each bargaining unit, and of corporate policy in respect of non-represented employees. It is endemic in such a legal structure that very different outcomes will arise for differently represented groups; in the case of Ontario Hydro, that result is already clearly indicated by the differences between the society collective agreement and the union collective agreement, and by the quite different terms and conditions of employment applicable to non-represented employees.*
>
> *Clauses prohibiting discrimination on the basis of union membership have never been interpreted, nor has it even been proposed, to prohibit an employer from providing terms and conditions of employment for non-represented employees that are very different from those of bargaining unit members, even if they are in fact quite superior. It simply would never have been in the contemplation of reasonable persons in the position of the present parties, in negotiating such a clause, to prohibit such differences; if it had been, there would be a string of grievances on a wide variety of topics. It is obvious that, if it were never contemplated that such a provision could prohibit providing superior terms and conditions of employment to non-bargaining unit members than to bargaining unit members, it could not have been contemplated that it would prohibit providing the same benefit to bargaining unit and non-bargaining unit members because it could be more valuable to non-bargaining unit members, for whatever reason. It is perhaps instructive that*

> *the editors, Brown and Beatty, Canadian Labour Arbitration, 3rd ed., looseleaf, in para. 8:1000, in attempting to characterize the Browning Harvey and Major Foods cases, provide them as authority for the proposition that "a claim that bargaining unit employees should be eligible for the same fringe benefits as non-unionized employees" … "is a matter for collective bargaining and not for arbitration". (Emphasis added)*

25. *In* Re Major Foods Ltd. And R.W.D.S.U., Loc. *1065, adjudicator Stanley also came to the conclusion that it could not be an offence for an employer to establish different terms and conditions of employment for its organized and unorganized employees:*

> *There is a provision in the* Industrial Relations Act *which is for all intents and purposes identical to the collective agreement provision (s. 3(2)). It prohibits an employer from discriminating against any person in regards to any term or condition of employment on the basis of union membership. If counsel for the union were correct in his argument the same reasoning would apply to the interpretation of s. 3(2) and it would be an offence for an employer to establish different terms and conditions of employment for its organized and unorganized employees. Clearly that is not the intent of the statutory provision and it is not the way it has been interpreted by labour boards and by the courts: see Adams, Canadian Labour Law (1985), pp.489-495. Labour boards have held that for there to be an offence against the statutory prohibition there must be demonstrated an intent to discriminate. Evidence of no legitimate business purpose has been accepted in these cases to support a conclusion of intent to discriminate. The employer in the case before us is, in effect, arguing that they have a legitimate business reason to not extend the benefits in question to unit employees. They have a binding contract with those employees that set the terms and conditions of [page 137] employment for a certain period of time. I am satisfied that, notwithstanding the remarks of the local manager, the employer's decision to give the benefit only to its non-union work-force had nothing to do with an anti-union animus. (Emphasis added)*

Re Major Foods Ltd. And Retail, Wholesale & Department Store Union, Local 1065 *(1989), 7 L.A.C. (4th) 129, online: QL (LAC), at Tab 6 of the Respondents' Book of Authorities.*

26. *The reasoning in* Ontario Hydro *was followed in the British Columbia case of* Re Husky Oil Operations Ltd and C.E.P., Loc. 1997 *(1999), 84 L.A.C. (4th) 162. In* Re Husky Oil, *the union contended that unionized employees should also receive a corporate performance bonus which had been granted to non-unionized employees but which was not expressly provided for in the collective agreement. Arbitrator McPhillips set out very clearly as follows:*

> *"It seems to me to be axiomatic that a collective agreement will contain different benefits than those given to non-bargaining unit employees. Otherwise, there would be little purpose in having a collective agreement other than to set minimum standards. There is certainly nothing in the jurisprudence which indicates that employees covered by a collective agreement can also demand any other benefits that they may wish to have. If this Union were successful in the grievance before this Board, they could, on the same logic, demand for example, the ten personal days off each year which are presently given to non-union personnel."*
>
> Re Husky Oil Operations Ltd and C.E.P., Loc. 1997 *(1999), 84 L.A.C. (4th) 162, at Tab 7 of the Respondents' Book of Authorities.*

27. *This simple proposition has been fully well established in the jurisprudence of arbitration boards across this country and the Employer respectfully submits that this is the only reasonable conclusion that can be drawn by the Public Service Staff Relations Board.*

28. *A finding to the contrary would lead us to the incongruous result that bargaining agents could file a section 23 complaint every time that excluded and unrepresented employees obtain any term or condition that is superior to those obtained during negotiations.*

29. *This type of incongruous and unacceptable result was noted in* Ontario Hydro, Re Major Foods *and* Re Husky Oil *in further support of the conclusion that clauses prohibiting discrimination on the basis of union membership should not be interpreted in the fashion being proposed by the Complainants.*

30. *Most recently on November 5, 2001, Arbitrator Saltman followed this line of cases in the Ontario case of* Nova Chemicals (Canada) Ltd. v. Communications, Energy and Paperworkers Union, Local 914 (Voluntary Severance Grievance)*, and arrived at the same conclusion. In that case, unionized employees had been offered a different and less beneficial voluntary severance program than that which was offered to non-unionized employees.*

    Nova Chemicals (Canada) Ltd. v. Communications, Energy and Paperworkers Union, Local 914 (Voluntary Severance Grievance), [2001] O.L.A.A. No. 777, online: QL (OLAA), at Tab 8 of the Respondents' Book of Authorities.

31. *The Employer respectfully submits that the Respondents should not be held to have discriminated against represented employees on the sole basis that the Employer set a term or condition of employment for excluded and represented employees that differed and was superior to that which was negotiated for represented employees.*

32. *As a point of note, the Complainants cannot claim that the Employer "unilaterally" altered the term or condition of employment as it relates to the implementation of retroactive remuneration. In fact, the Employer did nothing more than put into application a decision of the Federal Court of Appeal. It cannot be faulted for that.*

33. *The retroactive application of pay provisions was a matter for collective bargaining for represented employees. The bargaining agent cannot here claim that their failure to bring the matter to the table, or any potential confusion during negotiations, whatever it may be, is a result of discrimination on the part of the Employer.*

34. *Furthermore, it was not the responsibility of the Employer to bring this issue to the negotiation table. As brought out in the testimony of Daniel Langevin and the Complainants' witnesses, the bargaining agent is responsible for its own research and prepare itself for a round of negotiations.*

IV. *Differential treatment is not sufficient to constitute discrimination contrary to sections 8 and 9 of the* Public Service Staff Relations Act. *The Complainants must show anti-union animus.*

35. *There is a heavy burden of proof on a complainant under section 23 of the* PSSRA. *In order to show that a person acting on behalf of the Employer has discriminated against her contrary to paragraph 8(2)*(a)*, the complainant must show:*

    (i) that she was discriminated against in regard of employment or any term or condition of employment,

    (ii) because she was a member of an employee organization or was exercising any right under the Act, and

    (iii) that she was subjected to such discrimination by the person named in the complaint as the respondent.

    Gennings and Milani, *[1971] C.P.S.S.R.B. No. 9, online: QL (CSBB), at Tab 9 of the Respondents' Book of Authorities.*

    Ager and Arcand, *[1978] C.P.S.S.R.B. No. 11, online: QL (CSBB), at Tab 10 of the Respondents' Book of Authorities.*

36. *A complaint of a violation contrary to paragraph 8(2)*(a) *cannot succeed unless the complainant shows that there is discrimination on the part of the respondent* ***and*** *that this discrimination flows directly "because" the complainant is a member of an employee organization.*

37. *The Complainants have not brought any evidence of anti-union animus. The only evidence that came to light was that the Employer, through Daniel Langevin, and the Complainants had different understandings of how the retroactive remuneration would be calculated. The fact that there was a great deal of confusion surrounding the calculation of retroactive remuneration does not amount to "unfair treatment" on the part of the Employer, let alone "unlawful conduct".*

38. *Daniel Langevin testified that he was acting in good faith when he approached negotiations as he did. He testified that it was his understanding that the Federal Court of Appeal decision in* Lajoie *had interpreted the meaning of the wording of the collective agreement and that the Employer was bound to follow that interpretation. In his view, he did not need to raise the issue of* Lajoie *at the negotiation table since he did not wish to change the wording of the collective*

agreement. There is no reason to question his credibility in this respect. Neither of the Complainants attempted to allege that he was being deceitful or that he was attempting to hide anything from them.

39. *The Complainant SSEA claims that "an inference of anti-union animus can be drawn from the lack of full and frank discussion on the issue of* Lajoie *and from the fact that the Employer actually instructed its negotiators not to raise it at the table". The Employer respectfully submits that this flies in the face of the clear testimony of the presidents of both SSEA and CUPTE that they fully trusted Daniel Langevin and that they felt that he was bargaining in good faith and that they still felt this way at the time of their testimony during the hearing.*

40. *In fact, both the President for SSEA and the President for CUPTE testified that they have an open relationship with Daniel Langevin, that they trust him, that they do not believe he was trying to trick them and that they hope to continue their relationship as it was previously. This is clearly not evidence of discriminatory behaviour on the part of the Employer in its dealings with the bargaining agents.*

41. *The fact that the Employer, through the Executive and Excluded Groups section of the Human Resources Management Division, determined that the excluded and unrepresented employees would receive "*Lajoie *or better" does not taint the Employer's actions with anti-union animus. The testimony of both Daniel Langevin and Suzanne Marchand-Bigras emphasized that decisions with respect to excluded and unrepresented employees are entirely distinct from negotiated agreements between parties.*

42. *Furthermore, the Complainants should not be successful with their claim that the Employer might find this an incentive to bargain more slowly in order to make the retroactive period as long as possible. The Complainants cannot so speculate that the Employer may engage in bad faith bargaining. Rather, they can make a complaint of bad faith bargaining should the possibility ever arise. In any case, it is unfounded speculation and an oversimplification of the matter to claim that bargaining more slowly would save the Employer money.*

V. In cases where differential treatment or dismissal has been found to constitute discrimination, the action in question had taken place immediately following and as a direct result of union activity.

43. The Employer respectfully submits that differential treatment alone is not sufficient to constitute discrimination on the basis of union membership. A finding of discrimination is usually found where there is unusual or atypical conduct that immediately follows trade union activity:

> *In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See* National Automatic Vending Co. Ltd. *Case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. […] (Emphasis added)*
>
> Pop Shoppe (Toronto) Limited, *[1976] OLRB Rep. June 299, at Tab 13 of the Complainant SSEA's Book of Authorities.*

44. The Complainants have not brought forth any evidence whatsoever of recent union activity that might have preceded the negotiations that took place in rounds two or three that might have triggered anti-union activity.

45. *In all cases dealing with an unfair labour practice/discrimination on the basis of union membership relied upon by SSEA, the Employer's actions had come on the heels of new union activity:*

In Air Alliance *(Tab 1 of SSEA's Book of Authorities), the company distributed the details of its profit sharing plan policy that excluded strikers immediately following the union having sought a strike mandate. The CLRB consequently held that the company was trying to influence a strike vote.*

In CAW, *the complainant was dismissed immediately after having been a key player in organizing an important union meeting and her dismissal coincided with the employer engaging in anti-union propaganda (albeit mild).*

In Brotherhood, *there had been recent evidence of anti-union animus, the incidents relied upon were not sufficient to dismiss an employee and the employee was dismissed during a time of "fragile and highly sensitive periods of union organization".*

In Emery Worldwide, *there were telltale signs: the timing of the layoffs with union activities, the employer did not respect seniority, the complainant suddenly had a poor evaluation, and the employer used every excuse possible.*

In Famous Players, *the employer had stopped offering free movie passes to employees covered by the collective agreement immediately following the signing of the very first collective agreement and the OLRB held that this was indicative of the intention to penalize the newly unionized group. By contrast, they had not denied the passes to all other unionized staff.*

In Pop Shoppe, *there had been a recent finding of anti-union action, the employer had changed its approach to absenteeism right after certification and dismissed the complainants on that basis. Furthermore, its approach to discipline had not at all been consistent.*

In Retail Clerks, *it was only when employees at a number of branches took steps to join the union that the employer started its policy of assuming all its tellers' cash deficits except for those that are unionized or for which certification was pending.*

> *This caused a number of resignations from the union.*
>
> *In* Cambridge Reporter, *employees who had been on strike for its duration did not receive a recognition bonus whereas employees who had held a sit-in against the union did not have their bonus reduced.*
>
> *In* VOCM Radio, *the employer provided no evidence of financial difficulty to justify layoffs, there was no evidence of a plan to downsize, the employer had just given profit sharing, the individuals were not selected prior to the union drive and the individuals selected were union supporters.*

46. *Furthermore, it is insufficient for the Complainants to allege that this would constitute an incentive for employees not to be unionized. If one were to follow the Complainants' logic, any term or condition of employment that was more advantageous for excluded and unrepresented employees would constitute an incentive for employees not to be unionized.*

47. *In any respect, while an employee can choose to be a member of a bargaining unit or not, he or she would nevertheless be required to pay union dues and would still be subject to the same collective agreement.*

VI. The interpretation of a collective agreement provision is not a proper subject in a section 23 complaint.

48. *The Employer also submits that the PSSRB does not have the jurisdiction pursuant to a complaint filed under section 23 to make an order with respect to the interpretation of a provision of the collective agreement. The PSSRB's jurisdiction is limited to the following:*

> *23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 8, 9 or 10;*
>
> *(b) to give effect to any provision of an arbitral award;*

> *(c) to give effect to a decision of an adjudicator with respect to a grievance; or*
>
> *(d) to comply with any regulation respecting grievances made by the Board pursuant to section 100.*

*49. It should be emphasized that it is really quite irrelevant for the purposes of this complaint pursuant to section 23 whether the "*Lajoie*" or the "*Lajoie *or better" method of calculating retroactive increases is the "correct interpretation of the collective agreement".*

50. It is respectfully submitted that the Board should only address the interpretation of the collective agreement if it is necessary to determine whether or not there has been discrimination on the basis of union membership or if it would be necessary in the making of an order. The Employer respectfully submits that such is not the case in this instance.

ORDER SOUGHT

The Respondents respectfully request that these complaints be dismissed.

[84] The CUPTE concurred with the SSEA's reply to the respondent's submission which follows:

REPLY SUBMISSIONS OF THE COMPLAINANT

SOCIAL SCIENCE EMPLOYEES' ASSOCIATION

1. The Employer's response to this complaint is premised on a mischaracterization of the fact situation of this case. In taking this approach, the Employer is consistently avoiding the response that is warranted in the circumstances, namely that of providing an explanation for the discriminatory policy that it has imposed on its represented employees.

2. This complaint is not about represented and unrepresented employees having different terms and conditions of employment with the same employer. It is about the Employer unilaterally imposing a different application of a pre-existing term of employment that is discriminatory to its unionized employees while preserving the more beneficial application of that same term of employment to its non-unionized employees. The Employer is mischaracterizing the facts in this case so as to fall

under the cases it relies upon to justify its discriminatory actions in this case.

3. *In paragraphs 7 to 9 of its Statement of Facts, the Employer concedes that the* Lajoie *decision had not been discussed during the first round of bargaining. The Employer further concedes that it had instructed its negotiation team not to raise the issue of calculation of retroactive remuneration or the* Lajoie *decision at the bargaining table when it had not yet applied/implemented its interpretation of the* Lajoie *decision to members of the Complainant and when its own Pay Administration section did not 'recall the impact of the* Lajoie *decision'. The fact that the Employer 'sought to rectify this situation' by postponing its application to the second round of collective bargaining is an admission on the part of the Employer that it had not adopted a uniform/consistent approach to calculations of retroactive pay for its employees. Moreover, the fact that the Employer decided to extend the use of the 'Lajoie *or better' option to the other bargaining agents after it had agreed to this option on a without prejudice basis for PSAC employees is an implicit acknowledgment by the Employer that it would be 'unfair' to impose the* Lajoie *decision when the parties to the collective agreement are not aware of its application.*

4. *In this regard, it is worth noting that SSEA was not aware of the Employer's application of the* Lajoie *decision after the second round of bargaining since that collective agreement gave straight economic increases to all groups of employees resulting in the same unremarkable proportionate relativity between groups.*

5. *With respect to paragraph 12 of the Employer's submissions, the Employer's application of the* Lajoie *decision does not take into consideration the fact that the salary range from which the employee was promoted was an expired rate at the time the employee was so promoted. The* Lajoie *decision involved an employee being promoted from a salary range that is still in effect (unexpired) to an expired rate in the promoted position. The complaints in this case involve movement from an expired rate of pay to an expired rate of pay.*

6. *With respect to paragraph 13 of the Employer's submissions, there is no evidence to support the Employer's contention that it "understood any reference made by SSEA or CUPTE bargaining team*

member to 'straight down' to imply a reference to the application of the Lajoie *decision". All witnesses confirmed that the* Lajoie *decision had not been discussed at the bargaining table and so there could not have been any 'implication' of such a reference. Ms. Paris' evidence was clear that the reference to 'straight down' in the pay paths [Exhibit S-5] did not relate to the* Lajoie *decision but rather related to the vertical reading of the document down the columns which represented the wage rate progression for employees including annual economic increases and anniversary date increases.*

7. *The Employer states in paragraph 14 that what took place was "confusion surrounding the application of the* Lajoie *decision". The Complainant argues then that it was incumbent on the party seeking to change the status quo to clearly communicate to the other party that it intends to change its interpretation of an existing provision of the collective agreement and such communication should be done prior to or during collective bargaining negotiations.*

8. *The Employer contends on the one hand that it had clear directives as to the application and implementation of the* Lajoie *decision yet it also contends that there were different 'understandings' of how the retroactive remuneration would be calculated. There would not be any different understandings had the Employer clearly and expressly communicated its intention to change the method of calculation of retroactive pay to all affected parties, including pay administration staff, departments and bargaining agents.*

9. *With respect to the proper respondent to this complaint, the Employer is raising this objection for the first time. SSEA submits that the Employer cannot raise this objection in final argument, after the evidence has been heard. SSEA submits that the Employer, by taking a fresh step and proceeding with the hearing, has waived its right to object to any procedural irregularities there may have been in this proceeding.*

10. *In the alternative, if Treasury Board cannot be a named Respondent in this matter by virtue of the fact that it is not a "person" for the purposes of sections 8 and 9 of the Act, then SSEA submits that the individually named Respondents are proper Respondents as they must be considered to constitute "persons" for the purposes of the Act. The Employer cannot have it both ways – exclude the Treasury*

Board as a named Respondent because it is not a "person" and exclude the individually named Respondents because they are the 'nominal' heads of Treasury Board. The Employer is responsible for the actions of its directing minds and it would be ludicrous to suggest that the Complainant must find the actual person who made the initial policy decision that resulted in the filing of the within complaint (the Employer could hide behind an interminable amount of bureaucrats to avoid liability or being named as a party to an unfair labour practice complaint). The Employer had every opportunity to call the senior official who was responsible for the policy to explain the reason for which this discriminatory policy was issued and yet, it chose not to call any such witness.

11. *With respect to the violation of section 9 of the Act, the discriminatory treatment of SSEA members arose from the implementation of the last collective agreement that was negotiated between SSEA and Treasury Board. The detrimental impact on SSEA members as a result of the application of the Employer's discriminatory policy necessarily affects SSEA in the same negative manner. SSEA members would not be so affected but for their membership in SSEA. If the Employer is correct in its view that SSEA, as part of its representative functions, has an obligation to find obscure memos on the Treasury Board's website, then the detrimental impact on SSEA could include a perception that it is incompetent or even, in collusion with the Employer in matters relating to recalculation of retroactive pay. This would most certainly result in a loss of membership or at the very least, in a loss of confidence of members in SSEA.*

12. *In addition, SSEA submits that the Employer's subsequent removal of the '*Lajoie *or better' option from the PE group after SSEA filed this complaint also had a detrimental impact on its reputation in that SSEA is seen as the cause of the Employer's change in policy which had the effect of taking a benefit away from these employees to reduce all employees to the lowest common denominator.*

13. *The Complainant does not dispute the Employer's right to set the terms and conditions for its excluded and unrepresented employees and has so agreed in paragraphs 109, 111 and 117 of its submissions. The Complainant is not taking issue with the terms and conditions of employment* ***that have been the subject of negotiations****. Rather, the Complainant is taking issue with the Employer's unilateral change of these*

existing negotiated provisions which results in a lesser benefit to its members. The evidence was clear that these parties did not negotiate Lajoie *in any of their collective bargaining sessions and SSEA objects precisely on the basis that the Employer is not complying with the pay administration provisions which have been negotiated by these parties.*

14. *While the Complainant may have the onus to show that there has been a violation of sections 8 and 9 of the Act, SSEA submits that an inference may be drawn by the Board upon considering all of the circumstances of the case. As set out in paragraphs 118 to 122 and 139 to 158 of the Complainant's submissions, anti-union animus may be inferred from the failure of the Employer to provide a reasonable explanation for its actions. This is confirmed at paragraph 25 of the Employer's submissions where it cites Arbitrator Stanley in* Re Major Foods Ltd. and R.W.D.S.U. Loc. 1065 *and fails to emphasize the sentence underlined below*:

> *There is a provision in the Industrial Relations Act which is for all intents and purposes identical to the collective agreement provision (s. 3(2)). It prohibits an employer from discriminating against any person in regards to any terms or condition of employment on the basis of union membership. If counsel for the union were correct in his argument the same reasoning would apply to the interpretation of s. 3(2) and it would be an offence for an employer to establish different terms and conditions of employment for its organized and unorganized employees. Clearly that is not the intent of the statutory provision and it is not the way it has been interpreted by labour boards and by the courts: see Adams, Canadian Labour Law (1985), pp. 489-495. Labour boards have held that for there to be an offence against the statutory prohibition there must be demonstrated an intent to discriminate. Evidence of no legitimate business purpose has been accepted in these cases to support a conclusion of intent to discriminate.*

15. *All of the cases cited by the Employer in Parts III and IV of its submissions, deal with new terms and conditions of employment where the employer introduces new terms or conditions of employment to its unrepresented employees. In addition, the cases cited by the Employer are in the context of a referral*

of a grievance where the union is alleging a violation of the non-discrimination clauses of the relevant collective agreement. The cases relied upon by the Complainant involve unfair labour practice complaints concerning a similar fact situation as that of the case at bar, namely where the employer interferes with the status quo and/or takes away pre-existing benefits from its represented employees but leaves them for its unrepresented employees (see Re Famous Players Inc. *[1997] OLRB Rep. January/February 50 [Tab 8]*, Retail Clerks' International Union and Bank of Canadian National, *35 di 39; [1980] 1 Can. L.R.B.R. 470 [Tab 15]).*

16. *In* Re Ontario Hydro and Canadian Union of Public Employees, Local 1000 *(1994), 40 L.A.C. (4th) 135 at Tab 5 of the Respondent's Book of Authorities, the arbitration board was seized with a grievance where the union was alleging that the employer had violated the 'non-discrimination clause' in the collective agreement and that it had 'unfairly treated' its union members. This case is not relevant/applicable for the purposes of considering discrimination in the context of an unfair labour practice complaint. The case stands for the proposition that a non-discrimination clause in a collective agreement is not intended to prohibit an employer from providing different terms of employment to unit and non-unit employees.*

17. *There was a similar situation in* Re Major Foods Ltd. and R.W.D.S.U., Local 1065 *(1989) 7 L.A.C. (4th) 129 where the union alleged that the exclusion of union employees from a new dental plan violated the non-discrimination provision of the collective agreement. This case also stands for the proposition that the non-discrimination provision is intended to ensure that all employees covered by the collective agreement are treated equally with regard to benefits under the collective agreement. Such discrimination clauses are generally applied to prevent differences of treatment among member of the bargaining unit and not to address any differences between bargaining unit and non-bargaining unit employees.*

18. *SSEA submits that this line of cases, including* Re Husky Oil Operations Ltd. and C.E.P., Loc. 1997 *(1999), 84 L.A.C. (4th) 162 (Tab 7 of Respondent's Book of Authorities), further confirms the fact that the proper forum for the case at bar is pursuant to a section 23 complaint given the need to consider the terms and conditions of employment outside the bargaining unit and the need to consider not only the*

impact on the bargaining unit employees but also on the bargaining agent.

19. *In* Re Husky Oil Operations Ltd., supra, *the union alleged that the payment of a corporate performance bonus to non-unionized employees violated the non-discrimination provision of the collective agreement which stated that "the Company will not use its function of management for the purpose of any discrimination against any employee". The evidence in this case demonstrated that the union had expressly refused to negotiate the bonus programs with the employer when they were initially introduced. After a very acrimonious round of bargaining (the parties did not negotiate bonus programs), the employer increased the corporate performance bonus and did not give it to bargaining unit employees. The Board concluded that the matter of the payment of a corporate performance bonus was a matter that should be expressly negotiated between the parties and dismissed the grievance. The Board distinguished the facts before it from those in* Re Inglis Ltd., *17 L.A.C. (2d) 380 (Beck):*

> *¶ 21. Our situation is not the same as that in* Re Inglis, supra, *which was referred to by the Union. In that case, non-union employees were paid for not coming to work during a snowstorm but bargaining unit employees were not. In that case, the Union succeeded in its grievance on the basis that there was no explanation given by the Company as to why the distinction existed. In his remarks however, Arbitrator Beck also addressed the type of situation which we have here and indicated the Union would be unsuccessful in that circumstance. He observed at pp. 382-83:*
>
> > *The contention of the company that the union is not entitled to demand the same treatment as non-union employees on every matter that may affect them as employees is unquestionably correct, i.e., the union could hardly complain, and allege discrimination, if, after having bargained for a pension plan or a vacation plan that was embodied in a collective agreement, the company then entered into a different and more generous pension and vacation plan with its non-union employees. The union's remedy is to be found at the bargaining table when the collective agreement is*

> *renegotiated. However, that is not the case here. What we have here is a single act based exclusively on one proposition – that union members will be paid only if they showed up for work and that non-union members would be paid whether they showed up for work or not. The line of demarcation between those who would be paid and those who would not be paid is based solely on the fact of union membership. I hold that this is a company decision that calls for a credible explanation. In the absence of such explanation it is reasonable to infer that the company was animated by a desire to distinguish between employees solely on the basis of union membership and as such is held to have violated art. 6:01 of the collective agreement. [Emphasis added]*

20. *The Complainant is not attempting to secure a new superior 'benefit' than what it obtained by way of collective bargaining – rather, it is attempting to preserve an existing benefit that has been expressly negotiated.*

21. *The Employer's contention that it was bound to apply the* Lajoie *decision does not explain the reason why the Employer chose not to apply the same principles to its unrepresented and excluded employees. The* Lajoie *decision does not make any distinction between represented and unrepresented employees. The* Lajoie *decision was fact specific – it dealt with a particular set of factual circumstances involving a specific bargaining unit, a specific bargaining agent as well as a specific collective agreement. The Employer was not 'forced' to change its method of calculation of retroactive pay after the* Lajoie *decision was issued. In fact, the evidence was clear that the Employer actually chose NOT to apply the* Lajoie *decision to the first round of collective bargaining with the Complainant after the legislative freeze. If the Employer purports to be bound by precedent-setting jurisprudence then it is also bound to review and revise its policies which are based on such jurisprudence when and as more relevant and probative jurisprudence develops and evolves.*

22. *While it is most often the case that there is a context of anti-union activity in findings of discrimination, the basis for the finding has been the employer's withdrawal of a pre-existing benefit and/or status quo:* Famous Players Inc. *[1997] OLRB Rep.*

January/February 50 [Tab 8], Retail Clerks' International Union and Bank of Canadian National, *35 di 39; [1980] 1 Can. L.R.B.R. 470 [Tab 15]. The Employer appears to be suggesting in paragraphs 43 to 45, that the union has to prove 2 unfair labour practice complaints in order to be successful in one of them. In other words, the Employer is suggesting that a pre-condition of anti-union activity is required for an unfair labour practice complaint to be successful (and that an employer can freely discriminate against its represented employees in periods between strikes and/or certification proceedings). It is not surprising that most of the reported cases involve other types of union activity such as strikes and/or certification proceedings since those are the circumstances in which unions and their members are at their most vulnerable. Sections 8 and 9 of the Act do not require an additional finding of anti-union activity – the Act precludes discrimination against represented employees* ***at all times****.*

23. *With respect to paragraph 39 of the Employer's submissions, it is worth noting that the evidence of Mr. Krause and Mr. Pomerleau concerning their trust in Mr. Langevin was given prior to the testimony given by Mr. Langevin wherein he admitted that he actually knew of the Employer's application and intended application of the* Lajoie *decision and that he had been instructed not to raise it at the bargaining table. In any event, Mr. Langevin is not named as a Respondent to this complaint as he was not responsible for issuing the discriminatory policy.*

24. *With respect to paragraph 47 of the Employer's submissions, disaffected members could always move to decertify SSEA or to apply for excluded positions.*

25. *With respect to paragraphs 48 to 50 of the Employer's submissions, SSEA submits that the Employer has made the (correct) interpretation of the collective agreement relevant in these proceedings by implementing a discriminatory policy that is directly affected by/related to the application of an existing provision in the collective agreement. The Employer called evidence relating to the bargaining history precisely because this evidence is relevant to these proceedings.*

26. *At paragraphs 12 and 49 of the Employer's submissions, the Employer maintains that its interpretation of the* Lajoie *decision was and continues to be the correct one but that in any event, it is quite irrelevant for the purposes of this complaint*

> *whether its interpretation is the correct one. With the greatest of respect, the correct interpretation* ***is*** *relevant because it bears directly on the Employer's motivation in applying this discriminatory policy exclusively to represented employees. The Employer is continuing to apply its interpretation of the* Lajoie *decision despite the very different factual circumstances of that case to the situation facing SSEA members and despite the fact that this Board has issued a more recent decision in* Buchmann *which is directly on point and which mirrors the factual circumstances of this case. SSEA submits that this is an indicia of the Employer's bad faith vis-à-vis SSEA and its members and ultimately, of its disrespect for this Board.*
>
> *27. For all the foregoing reasons and those set out in its submissions dated May 17th, 2002, the Complainant submits that the Employer has violated sections 8 and 9 of the Act and that its complaint ought to be upheld.*

Reasons for Decision

[85] The sections of the PSSRA pertinent to this complaint are:

> ***23.*** *(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 8, 9 or 10;*
>
> *. . .*
>
> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *(2) Subject to subsection (3), no person shall*
>
> *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> *(b) impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a*

> *person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or*
>
> *(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*
>
> *(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or*
>
> *(ii) to refrain from exercising any other right under this Act*
>
> . . .
>
> ***9.*** *(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization*
>
> . . .
>
> [Emphasis added]

[86] The issue I have to determine is whether Frank Claydon, Tom Smith and the Treasury Board Secretariat are in violation of the PSSRA when the employer applied its policy as set out in Exhibits S-2 (C-4) and S-3 (C-5) to employees represented by the SSEA and the CUPTE.

[87] Exhibit S-2 reads:

> *DATE: January 31, 2001*
>
> *TO: Compensation Managers*
> *Chiefs of Staff Relations*
>
> *SUBJECT: Lajoie Decision*
>
> *The purpose of this bulletin is to provide clarification regarding the application of the Lajoie Decision (Federal Court of Appeal Decision 149 N.R. 223) when implementing retroactive salary revisions.*
>
> *In accordance with the Lajoie Decision, rates of pay resulting from promotions, transfers, deployments, or acting situations are not recalculated during the retroactive period of a pay*

rate scale revision. The new rate of pay to be implemented is the one immediately below the former rate of pay being revised. This applies to all retroactive revisions to rates of pay paid to represented employees.

In a Treasury Board bulletin dated November 8, 2000, entitled Economic Increase for Excluded and Unrepresented PE, OM, CA and MM Groups, you were advised that when implementing retroactive rate of pay revisions applicable to excluded or unrepresented employees the Lajoie Decision is applied and a recalculation is done. The excluded or unrepresented employees then benefit from the better of the two resulting revised rates of pay.

When trying to determine which of the above is applicable when a represented employee is promoted, deployed, transferred, or acting in an excluded or unrepresented position, or when an excluded or unrepresented employee is promoted, deployed, transferred, or acting in a represented position, the terms and conditions of the higher level position apply. The Lajoie Decision only is applied when the higher position is represented, and the Lajoie Decision or better is applied when the higher level position is excluded or unrepresented.

Please note that wording in certain collective agreements, such as that found in the current Electronics Group (EL) agreement (i.e., "Acting pay will be recalculated as the result of any pay increment or any change to the range of rates in the employee's substantive position or any change to the range of rates in the higher position") does not negate the Lajoie Decision which is still applied to the retroactive portion of the pay rate revisions. Recalculations are performed only when pay rate changes are effective on a date which is after the collective agreement signing date.

Various examples illustrating the above are attached for your reference.

Departmental Compensation managers should direct any questions that they may have regarding this bulletin to their corporate Compensation officials who, if need be, can contact the Pay Administration Section for represented employees, or the Executive and Excluded Groups for excluded or unrepresented employees.

Tom Smith

Director, Pay Administration
Labour Relations Division
Human Resources Branch

[88] Exhibit S-2 on its face discriminates between represented and unrepresented employees.

[89] The evidence has revealed that in the case of a restructuring of pay scales the application of the *Lajoie* decision as understood by the employer has a negative impact upon employees. Therefore the application of the *Lajoie* decision only to represented employees and the *Lajoie* decision or better to unrepresented and excluded employees is discriminatory.

[90] While it is possible for the employer to negotiate collective agreements with terms and conditions that are different from those it has set for excluded and unrepresented employees, those terms must be negotiated for the represented employees and there must be a legitimate business reason to grant the terms to the excluded and unrepresented employees.

[91] The evidence here reveals that the application of the *Lajoie* decision to employees in bargaining units represented by the SSEA and the CUPTE was not discussed during the negotiation of their respective collective agreements. It cannot be said that the application of the *Lajoie* decision was a negotiated term or condition of employment. No valid reason was provided to explain why the *Lajoie* decision would apply to unrepresented employees only if it provided a greater benefit than the recalculation method while it would apply to represented employees no matter what the outcome was for them.

[92] The evidence of the respondents was that the *Lajoie* decision was a decision of the Federal Court of Appeal and that bargaining agents had the responsibility of knowing of its existence and its application to them even if they were not a party to it. A conscious decision was made by the employer not to raise the *Lajoie* decision during negotiations. The application of the principles enunciated in the *Lajoie* decision was to be discussed only if the issue was raised by the bargaining agents. This falls short of establishing that the application of the *Lajoie* decision to employees in bargaining units represented by the SSEA and the CUPTE was a negotiated term or condition of employment. Even if it could be implied that it was, there were no explanations provided to justify that the *Lajoie* decision would not apply to excluded ESs and TRs and unrepresented employees unless it provided a greater benefit than the recalculation method which the SSEA and the CUPTE believed they had renewed in their collective agreements.

[93] As the respondents and the employer have provided no legitimate business reason, or justification, for the distinction in the treatment of represented and unrepresented employees, the discrimination is therefore contrary to the PSSRA since it discriminates against employees in bargaining units represented by the SSEA and the CUPTE "because the person … was or is exercising any right under this Act", that is, the right to participate in collective bargaining.

[94] Discrimination contrary to sections 8 and 9 of the PSSRA requires intent or anti-union animus. In the present case, intent can be inferred by the employer's failure to provide an explanation of compelling business reasons, or legitimate business purposes for its actions. The employer has provided no valid reason to explain the differential treatment. I can only infer that the detrimental effect of the discrimination on the employees in the bargaining units represented by the CUPTE and the SSEA was intended, as well as the repercussions on their bargaining agents.

[95] The evidence is quite clear that Tom Smith, on behalf of the employer, has signed and issued Exhibit S-2; therefore, the complaint against him is founded.

[96] The complaint against Frank Claydon and the Treasury Board Secretariat is more problematic as the Treasury Board Secretariat is not a person and no evidence was presented to show that Frank Claydon was aware or ought to have been aware of the employer's discriminatory policy.

[97] Both complainants were represented by experienced counsel well aware of Access to Information procedures and the means available to them such as *subpoena duces tecum* to establish that Frank Claydon was aware or should have been aware of the policy. They chose not to lead evidence with regard to Frank Claydon; therefore, the complaint against him must fail.

[98] Having found that the complaint against Tom Smith, Director of Pay Administration in the Labour Relations Division of the Human Resources Branch of the Treasury Board is founded and that he was acting on behalf of the employer, I must now turn to the remedy sought by the complainants.

[99] The evidence has revealed that the effect of the discriminatory policy has been financially detrimental to employees in bargaining units represented by the SSEA and the CUPTE. The policy may also have undermined the credibility of their bargaining

agents. A cease and desist order is therefore appropriate as well as an order requiring the employer to apply to the employees in the bargaining units represented by the SSEA and the CUPTE the same benefit it has applied to its excluded and unrepresented employees in its policy as described in Exhibits S-2 (C-4) and S-3 (C-5) dealing with retroactive salary revisions.

[100] Pursuant to subsections 23(2) and 23(3)(ii) I order Tom Smith and the Secretary of the Treasury Board to cease the discriminatory practice against employees in the bargaining units represented by the SSEA and the CUPTE in the application of its policy, as described in Exhibits S-2 (C-4) and S-3 (C-5), dealing with retroactive salary revisions. The employer shall apply the more financially beneficial method of determining retroactive salary entitlement to employees in the bargaining units represented by the SSEA and the CUPTE as it did for unrepresented employees as per its bulletin of January 31, 2001, Exhibits S-2 (C-4). The complaints are therefore allowed to the extent indicated.

Evelyne Henry,
Deputy Chairperson.

OTTAWA, November 22, 2002.