Date: 20050913

File: 561-34-13

Citation: 2005 PSLRB 140

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

KATHERINE MCCONNELL

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
McConnell v. Professional Institute of the Public Service of Canada

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson

For the Complainant: Stephen G. Jenuth, Counsel

For the Respondent: Chris Rootham, Counsel

(Decided without an oral hearing.)

Complaint before the Board

[1] Katherine McConnell was employed as an Auditor at the Canada Customs and Revenue Agency (CCRA) in Calgary, Alberta, and was represented by the Professional Institute of the Public Service of Canada (PIPSC). This decision concerns preliminary issues of timeliness and jurisdiction in a complaint filed under section 23 of the *Public Service Staff Relations Act* (*PSSRA*). On March 15, 2004, Ms. McConnell filed a complaint against the PIPSC alleging a breach of its duty of fair representation pursuant to subsection 10(2) of the *PSSRA*. The initial complaint was not accepted by the Public Service Staff Relations Board (the PSSRB) because the complainant instructed the PSSRB not to forward a copy of the complaint to her former employer, the CCRA. An amended complaint was filed on April 28, 2004, and this amended complaint was sent to the PIPSC by the PSSRB on July 5, 2004. Further amended complaints were filed on September 15, October 1 and 12, 2004. In addition, an amended complained dated March 15, 2004, was also received on October 4, 2004. These amended versions of the complaint were provided to the PIPSC on November 3, 2004. The employer, the CCRA, was advised of the complaint by the PSSRB on November 22, 2004, and replied on December 6, 2004, that it did not wish to file any submissions. A further amended complaint was received on November 4, 2004. The additional allegations in this amended complaint have no bearing on my decision.

[2] On April 1, 2005, the *Public Service Labour Relations Act* (the "new *Act*"), enacted by section 2 of the *Public Service Modernization Act,* S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 39 of the *Public Service Modernization Act*, the Public Service Labour Relations Board (PSLRB) is seized with this complaint, which must be disposed of in accordance with the new *Act*.

[3] Ms. McConnell was terminated from her employment with the CCRA in 2000. Her complaint, broadly speaking, concerns the representation and/or lack thereof allegedly provided by the PIPSC with regard to her termination of employment, her workers' compensation claim, her human rights complaints and various other legal issues related to her employment and dealings with her bargaining agent. Among other corrective action, the complainant is seeking an apology from the PIPSC.

[4] The PIPSC filed its reply to the complaint on November 18, 2004. The PIPSC submitted that it had represented Ms. McConnell in a responsible and professional manner and had not violated its duty of fair representation. The PIPSC also raised two

preliminary issues: first, that the complaint should be dismissed because it is untimely and second, that what is now the PSLRB does not have jurisdiction over Ms. McConnell's allegations concerning the handling of her workers compensation and human rights complaints or the ordering of an apology. The respondent requested that these issues be dealt with through written submissions. In her December 6, 2004, response to the submissions of the PIPSC, the complainant made no comment on proceeding by way of written submissions.

[5] On March 5, 2005, Ms. McConnell advised the PSLRB that she had retained a lawyer to represent her. By letter dated March 17, 2005, the PSLRB advised Ms. McConnell's counsel and counsel for the respondent that the issues of timeliness and jurisdiction would be dealt with by way of written representations. In correspondence to the PSLRB dated March 21, 2005, the complainant stated that she would have preferred to have the timeliness issue addressed at an oral hearing. In this correspondence, she also asked for an extension of time to file written submissions until May 31, 2005. The request for an extension was granted. The respondent's submissions were filed on June 28, 2005. Ms. McConnell asked for an extension of time to file her reply submissions and this was granted by the PSLRB. The final submissions of the complainant were submitted on July 11, 2005.

[6] In its submissions of June 28, 2005, the respondent requested that, in the alternative, the PSLRB issue an order requiring further particulars from Ms. McConnell prior to an oral hearing.

Background and chronology

[7] There is no dispute over the salient facts for determining the preliminary matters at issue. In her reply submissions, the complainant adopts the facts set out in the respondent's submissions, with enumerated disputes as to certain facts and some additional facts. Consequently, I have set out below the respondent's account of the facts, followed by the complainant's additions and exceptions. I have edited the submissions and removed those parts that are more properly considered as argument (and are covered in the parties' arguments).

[8] Medical documents were filed with the PSLRB by the complainant as an attachment to her final reply submissions. The respondent was therefore not formally provided with an opportunity to make submissions on those medical reports, nor did

it seek to do so. However, given my conclusions on the effect of these medical documents, this is not, in my view, an important omission.

Respondent's summary

Ms. McConnell began working for CCRA on or about 1992. By 2000, she was acting as Team Leader in the Calgary, Alberta, Tax Service Office of the CCRA. In 1999 and 2000, Ms. McConnell became involved in a number of disputes against her employer and her co-workers. These disputes included the following:

- a harassment complaint filed against her by a subordinate;
- a grievance that she filed concerning the conduct of the investigation of that harassment complaint;
- Ms. McConnell's own harassment complaint filed against four senior CCRA officials for terminating a secondment agreement after she went on sick leave on February 1, 2000;
- a human rights complaint also about the termination of the secondment;
- a grievance filed concerning her entitlement to acting pay at a higher classification level for the period between 1997 and 1999 (which grievance was not filed until June 22, 2000);
- a dispute over CCRA's failure to provide a formal performance appraisal since 1997 (although Ms. McConnell originally intended to file a grievance over this matter, she subsequently informed the Institute that she filed a human rights complaint instead);
- a dispute with CCRA about whether Ms. McConnell must return from sick leave; and
- two appeals under section 21 of the *Public Service Employment Act* against appointments in CCRA.

Ms. McConnell went on disability leave from February 2000 until September 2001. At that time, she was put back on full pay, but was not assigned any duties. Since her disability leave was the result of stress caused by her Calgary workplace, she refused to return to the Calgary workplace and was instructed not to return by the CCRA. Eventually, the CCRA terminated Ms. McConnell for "medical incapacity" in September 2002.

Ms. McConnell has commenced a civil action against CCRA concerning her dismissal, alleging that the dismissal was unlawful and/or a disguised disciplinary dismissal without cause.

The Institute first assigned David Riffel to represent Ms. McConnell. Mr. Riffel represented her in a number of matters, including appeals under the *Public Service Employment Act (PSEA).* He drafted grievances and negotiated with CCRA management on her behalf. However, Ms. McConnell was dissatisfied with Mr. Riffel's

representation of her, and instructed him to cease his representation. In July 2000, she requested that the Institute hire an external lawyer to represent her. She subsequently modified her demand and requested that Robert Fredericks (a lawyer employed by the Institute as a representative) become her representative.

The PIPSC's manager of Representational Services, Georges Nadeau, responded to her request and instructed another PIPSC representative, Lee Bettencourt, to review Ms. McConnell's entire file and determine what steps should be taken. Mr. Bettencourt prepared his report and submitted it to Georges Nadeau on September 6, 2000. His report recommended a number of different steps on the various disputes that Ms. McConnell had with her employer. He also recommended that the Institute not hire outside legal counsel to represent Ms. McConnell. Mr. Bettencourt inadvertently sent Ms. McConnell an earlier draft of his report. That earlier draft contained a number of inappropriate comments about Ms. McConnell. Mr. Nadeau apologized for Mr. Bettencourt's comments and agreed that they were inappropriate. He also agreed to set aside the report in its entirety and assign Robert Fredericks to be her representative, as requested.

Ms. McConnell thanked Mr. Nadeau for his apology, but demanded that the Institute provide her with all documents relating to her file and prepare a report detailing any conversations that Mr. Bettencourt had with CCRA management about her case. Ms. McConnell refused to cooperate with her chosen representative until these matters were dealt with to her satisfaction.

She was provided with a copy of her file by the PIPSC. Mr. Nadeau also responded to her request for information about any conversations that Mr. Bettencourt had with CCRA management. Ms. McConnell remained unsatisfied and refused to give her assurances that she would cooperate with her chosen representative.

The President of the Institute, Steven Hindle, then began to correspond directly with Ms. McConnell. Ms. McConnell sent a number of letters to Mr. Hindle about her case, complaining about the Institute's quality of representation. Mr. Hindle responded by summarizing the steps that the Institute had already taken to comply with her demands, and reiterating that the Institute would not hire outside legal counsel to represent her. Ms. McConnell was not satisfied with this response and again refused to promise to cooperate with her chosen representative.

Ms. McConnell then took the final step of informing her employer that the Institute no longer represented her. As a result of her refusal to agree to cooperate with her chosen representative, and her decision to inform CCRA that she was unrepresented, Mr. Hindle concluded that the Institute could no longer represent Ms. McConnell. This decision was sent to Ms. McConnell on November 21, 2000, and became effective on December 1, 2000.

Ms. McConnell took no steps to appeal or otherwise challenge the Institute's decision not to represent her until August 19, 2002. At that time, she filed a Statement of Claim in the Alberta Court of Queens Bench against the Institute. She amended her claim on October 10, 2003, and a copy of the amended claim is on file with the PSLRB.

Ms. McConnell served her Statement of Claim on the Institute on October 21, 2003. She obtained a court order permitting late service of her Statement of Claim on July 30, 2001.

The PIPSC brought a motion to dismiss the Statement of Claim for want of jurisdiction. The PIPSC agreed to adjourn the motion *sine die* while Ms. McConnell sought legal advice and legal aid funding. A defence has not yet been filed.

Mr. Riffel has retired. Some of his notes from 1999 are not available, and his recollection of events has faded over time. He lost those notes sometime prior to October 2003.

At the time, the PIPSC had a policy of not representing members who file human rights complaints. It assisted them in preparing the original complaint and provided some strategic advice from time to time, but it did not represent its members before the Canadian Human Rights Commission or the Canadian Human Rights Tribunal. There was some discretion for the Institute to assist members with human rights cases where those complaints were particularly compelling for reasons of precedent, or raised issues of importance to the bargaining unit or Institute as a whole. The PIPSC reviewed Ms. McConnell's human rights complaints and concluded that they were not compelling enough to warrant an exception to the policy. The PIPSC alleges that Ms. McConnell was aware of this policy when she commenced her human rights complaints.

Complainant's additional facts and disputed facts

In addition to the disputes listed in the Institute's submission, Ms. McConnell has, without the aid of counsel, also commenced the following actions and raised the following concerns in relation to this matter and the circumstances surrounding her dismissal from CCRA:

i) numerous requests and follow-ups with Access to Information and Privacy (ATIP);

ii) numerous inquiries to the Office of the Privacy Commissioner regarding conduct of ATIP;

iii) numerous communications to the Prime Minister's Office regarding conduct of the higher-ups at the CCRA;

iv) numerous complaints to Minister Cauchon after Ms. McConnell's complaints were referred to his office from the PMO;

v) complaints to the Minister of National Revenue;

vi) complaint to the Law Society of British Columbia regarding Ronald M. Snyder;

vii) several complaints addressed directly to the Chair of the Canadian Human Rights Commission (CHRC);

viii) several complaints addressed directly to the Chair of the CCRA;

ix) disagreement with Dr. Jorgenson over the completion of her fitness evaluation; and,

x) several new complaints against the CCRA made to the Canadian Human Rights Commission in May 2005.

The civil claim against the PIPSC was commenced on August 19, 2002, and currently stands adjourned *sine die* by consent.

The initial refusal by the PIPSC to represent Ms. McConnell concerned only grievance procedures, not civil claims, claims before the Workers' Compensation Board, or the CHRC.

The PIPSC was fully aware that it was required by the collective agreement between the PIPSC and the CCRA to represent Ms. McConnell in these matters and the PIPSC has acknowledged this duty in correspondence to Ms. McConnell. Contrary to the Institute's submission, it was the Institute, not Ms. McConnell, who decided that the Institute would not represent Ms. McConnell.

Additional background information

[9] Two psychologist reports prepared in August and September of 2002 were filed with the complainant's last submission. These medical reports also refer to other diagnoses prepared by other physicians. In July of 2000, she was diagnosed as having an "adjustment disorder that was chronic with mixed anxiety and depressive mood". This problem was diagnosed as "mild". In September 2001, it was indicated that her condition would undoubtedly improve significantly with a return to work at the "earliest possible juncture". In April 2002, she was similarly diagnosed, but with "mild to moderate impairment in social and occupational functioning". Two doctors agreed that she did not suffer from any "acute or chronic major mental disturbance that would impede her immediate return to work". The report prepared in August of 2002 agreed with this assessment and concluded that a return to work at a different work location was advisable.

[10] In her amended complaint filed on October 1, 2004, Ms. McConnell alleged that she had recently advised the PIPSC counsel that she wanted representation for a wrongful dismissal from the CCRA. In her further amended complaint of October 12, 2004, she stated that she had asked for representation for her human rights complaint.

Summary of the arguments

[11] The full submissions of the parties are on file with the PSLRB. The submissions below have been edited for style only. The initial submissions of the respondent on jurisdiction, dated November 18, 2004, are included for completeness.

Initial submission of the respondent (November 18, 2004)

Sections 10 and 23 of the *PSSRA* do not contain any express limitation periods. However, the PSSRB has held that complaints must be filed within a reasonable time frame following the events on which they are based. When complaints are not filed within a reasonable time, the complainant bears the burden of establishing that circumstances which are exceptional or outside of their control prevented them from acting any sooner: *Walcott v. Turmel*, 2001 PSSRB 86; and *Harrison v. Public Service Alliance of Canada*, PSSRB File No. 161-2-725 (1995) (QL).

Ms. McConnell has filed her complaint almost four years after the Institute refused to represent her. This delay is unreasonable. This delay is also prejudicial to the Institute. The delay hinders the Institute's presentation of a full and complete answer to Ms. McConnell's complaint because of the natural erosion of the memories of its main witnesses (in particular, Mr. Riffel). The onus is now on Ms. McConnell to present exceptional circumstances to justify this delay.

A bargaining agent's duty of fair representation does not extend to matters which are outside of its exclusive representation of a member. Therefore, the Institute's duty does not extend outside of the *PSSRA*. Ms. McConnell's human rights complaints, civil actions, and WCB claim are all outside of the scope of that Act: *Lai v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 33; *Re Barnard v. British Columbia Government and Service Employees' Union, and Point Hope Shipyard Co. Ltd.,* [1997] B.C.L.R.B.D. No. 6; *Lavoie v. Office and Professional Employees International Union, Local 343 and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700,* [1981] 3 Can. LRBR 43.

The PSSRB therefore does not have jurisdiction over Ms. McConnell's complaint to the extent that it relates to any steps taken before the Canadian Human Rights Commission, WCB matters or in the civil action against the CCRA and SunLife.

Ms. McConnell also requests that the PSSRB order three Institute officers to provide an apology in a nationwide publication. The Institute's position is that there is no need for further apologies. Even if an apology were warranted, the PSSRB does not have the jurisdiction to order an apology and such an award would be a violation of the freedom of expression guaranteed in the *Canadian Charter of Rights and Freedoms*: *Stevenson v. Canada (Canadian Security Intelligence Service)*, 2003 FCT 341.

For the complainant

The complainant agrees that there are no express limitation periods relevant to this matter contained in the *PSSRA* or its successor legislation the *Public Service Labour Relations Act (PSLRA).* The complainant further agrees that there must be an

explanation for the delay on the part of the complainant. It is denied, however, that the delay in this matter is unreasonable or that the delay has prejudiced the Institute.

The complainant filed a Statement of Claim against the Institute in August of 2002. Amongst other allegations in the Statement of Claim are allegations of a failure to represent the complainant fairly. Accordingly, the Institute knew it was the subject of a complaint at that date. Thus, it is respectfully submitted that an analysis of the reasonability of the delay must look to the date of filing of the Statement of Claim, not the date of filing a complaint.

Regarding the issue of prejudice, it is respectfully submitted that any prejudice or inability to meet the claims of the complainant is the fault of the Institute for which the complainant should not be held responsible.

Once the Statement of Claim was filed, the Institute was put on notice that legal action was being taken against it. The allegations in the Statement of Claim are the same as those of the complaints herein. Further, the civil matter, as aforementioned, is not yet resolved and has been adjourned *sine die* by consent. Under these circumstances, it is respectfully submitted that the Institute, having knowledge of the existing claims against it, had a duty to preserve evidence and all manner of record that may aid in its defence of these claims in order that it not prejudice itself. Accordingly, any prejudice suffered by the Institute is its own fault, and not the fault of any delay on the part of the complainant.

Finally, it is to be borne in mind that the complainant has not been sitting on her rights. The complainant has in fact made concerted efforts to utilize every possible path of recourse available to her and has taken full advantage of her rights as a citizen in a democracy, going so far as to attempt to apprise the Prime Minister's Office (PMO) of these matters. Consider the list of actions taken contained in this submission as well as that of the Institute.

It has been held that where a complainant is legitimately busy pursuing other avenues of recourse including civil claims, further grievances, and trials at Federal Court, a lengthy delay in bringing a complaint under the *PSSRA* is no ground for dismissing the complaint (*Teeluck v. Public Service Alliance of Canada*, 2001 PSSRB 45).

Indeed, it is respectfully submitted that it is grossly unfair and a breach of natural justice for the complainant to be penalized for taking the time to exercise all of her rights. This is especially so considering the innumerable delays that one will experience when bringing the number of complaints, concerns, and applications as the complainant has.

The Institute argues that the PSSRB (now the PSLRB) lacks jurisdiction in respect of the complainant's claims involving the CHRC and WCB because the scope of the duty of fair representation is limited to matters under the jurisdiction of the *PSSRA*. The duty of fair representation has consistently been interpreted to include all aspects of the employer-employee relationship, but nothing else. Accordingly, in order to assess the scope of the duty of fair representation, the character of the claims needs to be assessed.

The Federal Court in *Boutilier v. Canada (Treasury Board)*, [1998] F.C.J. No. 1635, determined that in order to decide whether or not jurisdiction regarding a complaint lies with the PSLRB or the CHRC depends upon whether or not the claim is properly characterized as a human rights matter, in which case the claim will be brought before the CHRC, or whether the claim is essentially a matter of employer-employee relations, in which case the PSLRB will take jurisdiction. Accordingly, it is respectfully submitted that the scope of the duty to represent the complainant is a matter that must be determined at a hearing and not as a preliminary matter in light of the decision of the Federal Court in *Boutilier* (*supra*), since the characterization of the claim will depend upon facts found by the PSLRB. Further, it is respectfully submitted that the characterization of the complaints must be assessed for each of the claims alleged by Ms. McConnell in order to determine whether or not the PSLRB has jurisdiction.

The powers conferred upon the PSLRB under the *PSSRA* and the *PSLRA* confer a wide discretion in making awards. Under subsection 23(2) of the *PSSRA*, the PSLRB may make an order requiring an employee organization to "take such action as may be required" in respect of remedying a complaint. Similarly, under section 192 of the *PSLRA* in respect of a complaint, the PSLRB may make "any order that it considers necessary." Accordingly, if the PSLRB feels that it is necessary to order an apology from the Institute, it has the statutory authority to do so.

It is respectfully submitted that any ordered apology should be presumed to be genuine, provided that the complainant is successful on her cause. To presume that such an apology would not be genuine would be to presume that the Institute is callous and ignorant of the plight of its members who suffer when the Institute fails in its duty of fair representation. It is to presume that the Institute does not truly care that employees receive fair representation which, it is respectfully submitted, is simply not the case.

Based upon the foregoing, the complainant respectfully requests that the PSLRB grant an Order mandating the following:

(a) that the claims by the Institute that the complaints are untimely be dismissed;
(b) that the PSLRB will determine jurisdiction regarding WCB and CHRC claims at the hearing; and
(c) that the PSLRB does have authority to order an apology.

<u>For the respondent</u>

Sections 10 and 23 of the *PSSRA* did not contain any express limitation periods. However, the PSSRB has held that complaints must be filed within a reasonable time frame following the events on which they are based. When complaints are not filed within a reasonable time, the complainant bears the burden of establishing that circumstances which are exceptional or outside of their control prevented them from acting any sooner: *Walcott v. Turmel* (*supra*) and *Harrison v. PSAC* (*supra*).

In *Harrison* (*supra*), the complainant delayed in filing his complaint for 35 months – from May 14, 1991, until April 6, 1994. The PSSRB concluded that this delay was unreasonable, and required an explanation. The complainant explained that he was an alcoholic and was unable to prepare the complaint until July 1993. The PSSRB did not accept this explanation, in part because the complainant prepared a human rights

complaint in July 1992. However, the PSSRB went on to state that even if the complainant was not in a proper mental or physical state to file a complaint until July 1993, the 10-month delay in filing his complaint subsequent to that date was still unreasonable and required a "convincing explanation."

In *Walcott* (*supra*), the PSSRB dismissed a complaint filed 40 months after the events complained of. The PSSRB set out the rules respecting delay as follows:

> *[C]omplaints should be filed within a reasonable time frame following the events on which they are based. When such is not the case, the complainants bear the burden of establishing that circumstances which are exceptional or outside of their control prevented them from acting any sooner.*

Although the *PSSRA* had no limitations period for complaints, the new *Public Service Labour Relations Act* has a 90-day limitation period for complaints by members against their bargaining agent. The *Canada Labour Code* and Alberta's *Labour Relations Code* both also contain 90-day limits for a complaint. These statutory limits indicate the normal delay that is considered to be acceptable in filing complaints of this nature. Any delay beyond 90 days should only be excused if the complainant provides a clear, cogent, and convincing explanation for the delay.

The Institute ceased representing Ms. McConnell on December 1, 2000. She then waited until August 19, 2002, to file a Statement of Claim containing the same allegations as are before this Board. She then waited until October 21, 2003, to serve the Institute with a copy of this Claim. She could only wait this long because of a court order sought and received on July 30, 2003. Thus, the first time that the Institute was presented with a complaint by Ms. McConnell was October 21, 2003 – almost 35 months after they ceased to represent her.

The Institute immediately took steps to defend against her Claim by bringing a motion to strike the Claim on the grounds that it should have been brought before this Board. That motion was filed on November 2, 2003, and immediately served on Ms. McConnell. Ms. McConnell then waited until March 15, 2004 – another 133 days – to file a complaint with this Board. Her complaint was rejected for what the Institute presumes was technical non-compliance with the rules of this Board.

Even ignoring the period of time after March 15, 2004, Ms. McConnell has delayed almost 40 months in bringing her complaint. Ms. McConnell's written submissions make no attempt to explain why it took her until August 19, 2002, to file a Claim, until October 21, 2003, to serve it, and until March 15, 2004, to file a complaint with the PSSRB.

Ms. McConnell has submitted that any prejudice or inability to meet her claims is the fault of the Institute because the Institute should have taken steps to preserve evidence once the Statement of Claim was filed. However, Ms. McConnell did not file her Statement of Claim until August 19, 2002, and did not serve it on the Institute until October 21, 2003. She has not explained this initial 35-month period of delay. The Institute reasonably relied upon the expiry of the usual 90-day period in which it is reasonable to file complaints, as well as the two-year limitation period applicable in Alberta for civil claims. Once those periods expired, it was reasonable for the Institute

not to take steps to preserve evidence. There was no reason to preserve the evidence lost prior to October 21, 2003. Therefore, the prejudice suffered by the Institute is not its own fault, but is solely the fault of Ms. McConnell's decision to delay informing the Institute of her claim until October 21, 2003.

Ms. McConnell also relies upon the decision of the PSSRB in *Teeluck,* (*supra*) to justify her delay, alleging that her busy letter-writing campaign justifies the delay in this case. *Teeluck, (supra)* is easily distinguishable from this case for four reasons:

(i) The total delay in *Teeluck* was only 14 months, compared to almost 40 months in this case.
(ii) The delay in *Teeluck* did not hinder the bargaining agent's presentation of its case. In this case, the delay has caused prejudice.
(iii) The complainant in *Teeluck* was unrepresented. Ms. McConnell has been unrepresented for some periods since December 1, 2000, but she has also been represented during other periods.
(iv) The complainant in *Teeluck* was unfamiliar with the "exigencies and ramifications of the relevant legislation." Ms. McConnell has never indicated that she was unaware of the possibility of bringing a complaint under the *PSSRA*.

Ms. McConnell has filed her complaint almost three and one-half years after the Institute refused to represent her. This delay is unreasonable. This delay is also prejudicial to the Institute. The delay hinders the Institute's presentation of a full and complete answer to Ms. McConnell's complaint because of the natural erosion of the memories of its main witnesses (in particular, Mr. Riffel). The onus is now on Ms. McConnell to present exceptional circumstances to justify this delay, and she has failed to meet that onus.

Ms. McConnell has complained about the way that the Institute handled her grievances. That complaint is within the jurisdiction of the PSLRB. However, Ms. McConnell has also complained about the Institute's refusal to assist her with matters outside of the grievance procedure, including:

(i) human rights complaints against CCRA;
(ii) problems with workers compensation; and
(iii) a civil claim against SunLife (her insurer) and the CCRA.

A bargaining agent's duty of fair representation does not extend to matters which are outside of its exclusive representation of a member. Ms. McConnell may file human rights complaints, workers compensation complaints, or civil suits without the approval or assistance of the Institute. Therefore, the Institute's duty only extends to those matters within the *PSSRA*, because those are the only matters over which it has the right of exclusive representation (*Lai v. PIPSC, (supra); Barnard, (supra)*; *Lavoie v. OPEIU, Local 343*, (*supra).*

Ms. McConnell has submitted that the duty of fair representation includes all aspects of the employer-employee relationship. She has cited no authority for this proposition, and the Institute is unaware of any such authority. On the contrary, the duty of fair representation exists because of a union's right of exclusive representation. If a member has the right to proceed individually, then the union has no duty of fair representation towards that member.

The PSLRB therefore does not have jurisdiction over Ms. McConnell's complaint to the extent that it relates to any steps taken before the Canadian Human Rights Commission, WCB matters, or in the civil action against CCRA and SunLife.

Ms. McConnell also requests that the PSLRB order three Institute officers to provide an apology in a nationwide publication. The Institute's position is that there is no need for further apologies. Even if an apology were warranted, the PSLRB does not have the jurisdiction to order an apology, for the same reasons that such power is also denied to the Canadian Human Rights Tribunal in *Stevenson v. Canada (CSIS)*, (*supra).*

Should the PSLRB conclude that it does have the authority to order an apology in the appropriate case, the Institute reserves its right to argue that a forced apology in this case would violate section 2(b) of the *Charter of Rights and Freedoms*, and would not be saved by section 1 of the *Charter*.

The Institute seeks an order dismissing Ms. McConnell's complaint for undue delay.

In the alternative, the Institute seeks an order circumscribing the scope of her complaint. Ms. McConnell's complaint should be limited to the Institute's representation of her during the grievance process. Further, her request for an apology should be struck as being outside of the jurisdiction of this Board.

Finally, the Institute is also concerned about the absence of details in Ms. McConnell's complaint. The PSLRB should require Ms. McConnell to provide more details about her complaint so that the Institute can prepare an adequate response. Ms. McConnell has made a number of very serious allegations, including libel, deceit, and collusion with the employer. The more serious the allegation, the more important it is for the complainant to provide particulars to allow a respondent to prepare a reply. The Institute can only provide a complete response after receiving a complete complaint.

Therefore, should the PSLRB not dismiss her complaint on jurisdictional grounds at the outset, the Institute requests that Ms. McConnell be ordered to provide details of her allegations before the matter proceeds to a hearing.

Reply of the complainant

While the respondent is correct that the complaint relates to the failure to represent the complainant in 1999 and 2000, the failure continued. The complainant continued to request that the respondent represent her into the year 2004 regarding the continuation of her grievances before this Board, and her claim before the WCB.

It is alleged by the respondent that Ms. McConnell failed to co-operate with her chosen representative, Robert Fredericks. It was the Institute with which Ms. McConnell took issue, not Mr. Fredericks. In fact, Ms. McConnell and Mr. Fredericks enjoyed a good working relationship.

The Institute submits that it is prejudiced because of the delay. The nature of the alleged prejudice consists of the fact that Mr. Riffel is now retired, some of his notes from 1999 are not available because they were lost by him prior to October 2003, and his recollection of events has faded over time. It is submitted that the facts offered by the Institute are insufficient to establish that it has been prejudiced.

Regarding the issue of Mr. Riffel's retirement, it is submitted that his retirement has no bearing on the issue of prejudice. Whether or not Mr. Riffel is retired does not affect his recollection of events, nor the presence of any documents relating to the matter. The fact that he is retired is background only to the issue of prejudice and bears no substantive weight.

Regarding the point that some of his notes from 1999 are lost, it is to be noted that only *some* of his notes from *1999* are lost. It is respectfully submitted that given the temporal scope of the matter and the number of individuals involved, the loss of some of Mr. Riffel's notes from 1999 does not prejudice the Institute to such a degree, if at all, as to justify denying the complaint of Ms. McConnell.

The submission of the respondent throughout refers to events occurring in 1999 and 2000. The respondent's submission states clearly that the event that forms the basis of this complaint, the Institute's failure to properly represent Ms. McConnell, occurred on November 21, 2000, and did not take effect until December 1, 2000.

Accordingly, the events that ultimately led to the divorce between Ms. McConnell and the Institute occurred at the end of 2000. Since the only notes lost were notes from 1999, there should exist 11 months of notes on the part of the Institute chronicling the events leading up to that point. Additionally, as there are no other allegations of lost information, presumably all notes relating to this matter after December 1, 2000, are still available. This is not to mention the remainder of the notes from 1999 that are still available.

It is clarified by the respondent that Robert Fredericks was the one assigned to represent Ms. McConnell after Mr. Riffel. Based upon the respondent's submissions, the change in representation occurred no earlier than September 2000. Hence, at the time the Institute withdrew its representation of Ms. McConnell, Mr. Riffel was no longer representing her. Thus, it is respectfully submitted, as there is no allegation that the notes of Robert Fredericks are missing, presumably all of his notes, which should detail the events immediately preceding the critical time in question, remain available.

Finally, it should be considered that of the notes from 1999, those that are no longer available are not available due to the inadvertence of Mr. Riffel himself. The respondent's submissions state that Mr. Riffel lost those notes sometime prior to October 2003.

It is respectfully submitted that while the facts presented by the respondent detail when Mr. Riffel knew the notes were lost, they do not make clear even the rough period when the notes were actually lost. On the facts submitted by the respondent, it could be the case that the notes were lost in early 2000. It is thus respectfully submitted that the respondent has failed to establish that any prejudice in respect of lost notes has been caused by the complainant. If the notes were lost prior to, or even shortly after, December 2000, the Institute would not have had them even if the complaint was brought within a month of the Institute's withdrawing representation.

Finally, it is respectfully submitted that since the notes were lost due to Mr. Riffel's own inadvertence, the complainant is not responsible for any prejudice that may result. Ultimately, it was not the complainant who caused the loss of notes, no matter when the notes were lost.

The respondent argues that the delay in *Teeluck, (supra),* did not hinder the bargaining agent's presentation of its case, while in this case it has. As described above, there is little if any prejudice to the respondent in this matter. Thus it is respectfully submitted that *Teeluck, (supra),* is not distinguished on that basis.

The respondent also submits that Ms. McConnell, unlike the complainant in *Teeluck, (supra),* has at times been represented by counsel. While it is true that at times Ms. McConnell has been contact with counsel, in the matter before the Board, Ms. McConnell was not represented until March 29, 2005. It was on March 29, 2005, that the Legal Aid Society of Alberta granted coverage to Stephen G. Jenuth in respect of this matter. Prior to that date, Ms. McConnell was unrepresented. In fact, Ms. McConnell was unrepresented at the time she made the complaint in this matter.

The respondent further suggests that unlike the complainant in *Teeluck, (supra)*, Ms. McConnell has not indicated that she was unfamiliar with the "exigencies and ramifications of the relevant legislation." Ms. McConnell, prior to bringing her complaint was unfamiliar with the "exigencies and ramifications of the relevant legislation". She only began the process of beginning to understand the legislation at the time she sought to bring her complaint.

Further, Ms. McConnell has been very involved in pursuing her rights in this matter. Not only was she unfamiliar with the exigencies and ramifications of the legislation surrounding this complaint, but she was actively grappling with the exigencies and ramifications of the legislation surrounding all of her other legal proceedings.

Included in these actions was a complaint against the CCRA and the Human Rights Commission which began on November 18, 2000, and continues to this day. Currently, the appeal of the decision to deny an application for judicial review is set to be heard in the Federal Court of Appeal no later than the end of this year.

It is this same volume of effort put in by Ms. McConnell that justifies bringing a complaint at this time. While it is true that the delay in *Teeluck*, (*supra)*, was only 14 months, it is also true that Ms. McConnell has been at least as active as if not more active than the complainant in *Teeluck, (supra).*

It should also be noted that while the complaint about the Institute in this matter was brought before the PSSRB 40 months after the events giving rise to it, the first complaint against the Institute was made in August 2002 when the Statement of Claim was filed, 21 months after the events giving rise to the complaint occurred.

Given the efforts expended by Ms. McConnell in pursuing this matter and acting diligently on all her rights, the delay of 21 months is not excessive and is proportionate to the efforts and delay expended by the complainant in *Teeluck, (supra).*

Finally, it is respectfully submitted that mere delay absent serious prejudice does not provide grounds for dismissing the complaint. In *Teeluck, (supra),* in likening the matter before it to the similar situation faced in arbitration cases, the PSSRB held:

> *This principle of undue delay is akin to the equitable doctrine of laches, and in labour cases, arbitrators may decline to deal with a dispute on the basis of undue delay as a matter of discretion after considering the effects of and any explanation for the delay. Mere delay alone will not suffice to bar arbitration (or further proceedings), as a critical factor will be prejudice to the party objecting such that the delay will have caused an inability to deal with the dispute in a fair manner (See Brown and Beatty, at 2:3210, at pages 2-107 to 2-108).*

Finally, the respondent has alleged that Ms. McConnell has failed to explain the delay in her filing of the Statement of Claim. There are several reasons for that delay. The first reason is that throughout, the complainant has been very active in pursuing legal remedy. The complainant by necessity had to file some claims later than others. The second reason is that, as aforementioned, the complainant was unfamiliar with the relevant legislation. Ms. McConnell was under the reasonable belief that she had a valid claim against the Institute in civil court. Under the *Limitations Act*, R.S.A. c. L-12 s. 3(1), Ms. McConnell had two years to file her claim. The claim was filed on August 19, 2002, a full two and one-half months before the limitation period would expire.

In addition, Ms. McConnell has been hindered, though not totally incapacitated, throughout the ordeal by severe depression. The psychologists' reports relating to 2000 and 2002 (on file with the PSLRB) state that she was at those times depressed. Ms. McConnell continues to be depressed to this day.

The complainant's complaint is in any event not limited to the matters which occurred in the year 2000.

Reasons

[12] This decision addresses the preliminary issues of delay and jurisdiction and does not address the merits of Ms. McConnell's complaint. Ms. McConnell has been pursuing legal action on a number of fronts since her termination of employment from the CCRA in 2000. However, it was only in 2004 that she first filed a complaint against her former bargaining agent alleging a breach of its duty of fair representation under subsection 10(2) of the *PSSRA*. For the reasons set out below, I have concluded that this is an excessive delay that warrants the dismissal of this complaint. The bargaining agent has also objected to the Board's jurisdiction over certain aspects of the complaint and sought further particulars. In light of my ruling on the issue of delay, it is not necessary to rule on these additional objections.

[13] The parties do not agree on the length of the delay. The complainant alleges that the events complained of continued after 2000. However, it is common ground that the PIPSC declined to represent Ms. McConnell further, effective December 1, 2000. This is when the critical event that triggers the complaint occurred and is the date from which the length of the delay should be determined. However, the complainant notes that the PIPSC was served with a Statement of Claim that included all the allegations subsequently contained in the complaint to the PSSRB. Although the Statement of Claim was filed on August 19, 2002, it was not served on the respondent until October 21, 2003. This is almost three years after the decision of the PIPSC no longer to represent her was communicated to Ms. McConnell. Ms. McConnell then waited until March of 2004 before first attempting to file her complaint. In my view, the delay in advising the respondent of the allegations against it was excessive whatever date is used – the date that the Statement of Claim was served on the PIPSC or the date that the complaint was filed. I note, however, that the PIPSC invited a complaint to the PSSRB by stating in its motion to strike the Statement of Claim that the appropriate venue was the PSSRB. Accordingly, I am prepared to consider the date of October 21, 2003, as the date on which the respondent was aware of allegations of a breach of section 10 of the *PSSRA*.

[14] The *PSSRA* did not provide time limits for the filing of complaints such as Ms. McConnell's. The new *PSLRA* does provide for a 90-day time limit for the filing of complaints. Although the transitional provisions provide that complaints are to be dealt with according to the new *Act*, this does not have the effect of retroactively applying time limits. In the absence of a statutory time limit, one must look to administrative law principles and jurisprudence, including the jurisprudence of the PSSRB. George Adams in *Canadian Labour Law* (quoted in *Horstead v. PSAC* (PSSRB File No. 161-2-739 (1995) (QL)) states:

> *… The labour relations tribunal is intended to provide a speedy, inexpensive and efficacious forum for the resolution of labour relations disputes. Therefore, to serve this purpose the tribunal must administer its procedure in a fashion that discourages delay as much as possible…. On the other hand, the need for expeditious proceedings must be balanced against the need to ensure that meritorious claims are heard and the requirements of natural justice are met.*

[15] The PSSRB has dealt with delay in the filing of complaints on a number of occasions and the general principle was summarized as follows by Yvon Tarte, Chairperson, in *Walcott, (supra)*:

> *…complaints should be filed within a reasonable time frame following the events on which they are based. When such is not the case, the complainants bear the burden of establishing that circumstances which are exceptional or outside of their control prevented them from acting sooner. They must establish that the delay in filing their complaints is not unreasonable.*

[16] In *Teeluck, (supra)*, the test was applied somewhat differently. Relying on labour arbitration jurisprudence, the board member stated that:

> *Mere delay alone will not suffice to bar arbitration (or further proceedings), as a critical factor will be prejudice to the party objecting such that the delay will have caused an inability to deal with the dispute in a fair manner.*
>
> *…*
>
> *… the bargaining agent has not indicated to this Board that the delay of more than one year after the arbitration decision [the matter complained of] will hinder in any way its presentation of a full and complete answer to the complaint filed against it. Mere delay alone will not suffice to bar these proceedings unless prejudice to [the bargaining agent] can be proven, which it has not.*

[17] The test in *Teeluck, (supra)*, puts the onus on the respondent to prove that there is some prejudice because of the delay. Where the delay is measured in months, this may be appropriate. However, in cases of lengthy delays, measured in years, there should be a presumption of prejudice to the respondent. The Ontario Labour Relations Board's approach is, in my view, the appropriate one in cases of extreme delay such as this:

> *Although the Board will normally require parties seeking to have an application dismissed for undue delay to provide evidence of specific prejudice resulting from the delay, in cases where the delay is extreme, the Board is prepared to assume that the elapse of a significant period of time is inherently corrosive of the memory of witnesses and therefore, that the ability of a party to prepare its defences to the allegations raised is significantly impaired. In such instances, the opposing parties need not establish prejudice because the prejudice is assumed. As the Board has on many*

> *occasions found, a delay of over 12 months' duration is considered extreme.*
>
> *Redpath Sugars, Division of Redpath Industries Ltd.,* [1997] O.L.R.D. No. 3600 (Q.L.)

[18] I have therefore assumed that there is prejudice to the respondent because of the lengthy delay. If I should be incorrect on the onus to demonstrate prejudice, the respondent in this case has shown that there would be prejudice, based on the fact that notes have been lost, and memories have faded.

[19] In *Teeluck, (supra)*, the board member relied, in part, on the fact that the complainant was unrepresented. The vast majority of complainants in duty of fair representation complaints are self-represented. While it is appropriate to provide some latitude to unrepresented complainants, especially when it comes to technical requirements of the regulations, it is not appropriate to excuse lengthy delays solely on this basis (see *Mohamed Yusuf v. United Steelworkers of America, sub. nom. Grand and Toy Limited,* [2004] O.L.R.D. No. 2972 (QL)). In addition, the section of the *PSSRA* dealing with the duty of fair representation and the right to file a complaint was clear and straightforward. In any event, the delay in *Teeluck, (supra)*, was 14 months, whereas the delay here was close to three years.

[20] Ms. McConnell has submitted that her depression is also a factor in the length of the delay. The medical reports she filed with the PSLRB do not support a finding that she was so incapacitated that she could not have filed a complaint. The fact that she was able to file human rights complaints, civil actions and pursue a number of other avenues during this same time period shows that she was more than capable of filing a complaint in a timely fashion (see *Harrison, (supra*)). Also, the reports indicate that her degree of impairment was "mild" or "mild to moderate" and she was capable of working. Furthermore, in submissions for the complainant, her counsel states that she was "hindered, though not totally incapacitated". Such a conclusion shows that she had the capacity to file a complaint within a reasonable time.

[21] Ms. McConnell also relies on the fact that she was busy with a plethora of complaints and other actions. This is not a sufficient reason to justify a delay of almost three years.

[22] The complainant also alleges that the requests for representation to the PIPSC continued into 2004. To the extent that those continued requests related to the original request for representation on her grievances and human rights complaints, they remain untimely. The decision of the PIPSC not to represent her on those matters was clearly communicated in 2000, and repeated requests on the same matters cannot re-start the clock. However, there are a number of additional requests that were made to the PIPSC that were not covered by its original refusal to represent the complainant. In particular, there are allegations that the complainant requested representation on a workers' compensation claim and on a judicial review action relating to a human rights claim, as well as on a wrongful dismissal action against the CCRA.

[23] It is alleged in the Statement of Claim against the PIPSC (filed on August 19, 2002) that the PIPSC refused to represent the complainant on her workers' compensation claim. Although it is not clear from the record when the refusal to represent her on this matter was communicated, it is clear that it was prior to August of 2002. Accordingly, I find this ground of her complaint to also be untimely.

[24] In her complaint, the complainant also refers to requests made to the PIPSC to represent her in Federal Court proceedings related to her human rights complaint, requests that were made "recently". However, these proceedings relate to the original human rights complaint that the PIPSC refused to represent her on. Accordingly, these recent requests are merely repetitions of the original request made to the PIPSC and remain untimely.

[25] The wrongful dismissal claim against the CCRA was filed after the Statement of Claim against the PIPSC was filed. The complaint alleges that the PIPSC also refused to represent her in this action. This refusal is more recent than the original refusal by the PIPSC, and could date from as late as sometime in 2004. The wrongful dismissal claim sets out identical grounds to those in the grievances and human rights complaints. The PIPSC's initial refusal to represent Ms. McConnell can be taken to include any subsequent versions of the same allegations. In this case, transforming grievances and human rights complaints into a civil action does not change the substance of the dispute, nor does it require the bargaining agent to issue a fresh refusal.

[26] In the amended complaint dated September 15, 2004, the complainant requested that the PSSRB order the PIPSC to assist her in filing other grievances concerning personal and sexual harassment against the CCRA. There is nothing on the record to show that requests to represent her on these matters were ever made to the PIPSC. Accordingly, I find that this request by the complainant cannot form part of her complaint against the PIPSC.

[27] In conclusion, Ms. McConnell has not demonstrated circumstances that are either exceptional or outside of her control that would justify a delay in pursuing a complaint against the PIPSC by close to three years. The prejudice to the respondent is significant and there are no overriding public policy reasons for allowing the complaint to proceed. I have therefore concluded that the complaint should be dismissed for delay.

[28] Given this conclusion, I do not need to rule on the other objections raised by the respondent on the scope of the complaint and on the need for further particulars.

[29] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page.)

Order

[30] That the complaint of Ms. McConnell against the PIPSC be dismissed for delay.

September 13, 2005.

Ian R. Mackenzie,
Vice-Chairperson