Date: 20050706

File: 561-2-59

Citation: 2005 PSLRB 70

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

VIRGINIA JAKUTAVICIUS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Jakutavicius v. Public Service Alliance of Canada

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

REASONS FOR DECISION

Before: Sylvie Matteau, Vice-Chairperson

For the Complainant: John R.S. Westdal, Counsel

For the Respondent: Edith Bramwell, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
February 15 to 18, 2005.

Complaint before the Board

[1] On November 26, 2003, Ms. Virginia Jakutavicius filed a complaint against the Public Service Alliance of Canada (PSAC), alleging a breach of the duty of fair representation under subsection 10(2) of the *Public Service Staff Relations Act.* The complaint relates to two grievances filed in May of 2000. The first was for non-payment of overtime for the period from February to April 2000, in contravention of Article 28 of the collective agreement, and the second was for a classification review of the position that the complainant occupied from April 1998 to May 2000.

[2] It is the complainant's submission that the PSAC:

1. Failed to advise her of her right to seek judicial review of the reply given at the final level to her classification grievance, despite repeated requests for such information;
2. Failed to support her in an application for judicial review of the final-level reply to her classification grievance after confirming that she possessed such rights; and
3. Refused to approve the referral of her overtime grievance to adjudication, despite the fact that she had indicated that she was willing to retain independent representation at her own cost.

She submitted that these actions constitute a breach of the duty of fair representation, in that they were arbitrary, discriminatory and in bad faith.

[3] The complainant seeks a declaration from this Board that:

. . .

i) the PSAC has violated its duty to fair representation;

ii) the PSAC provide its approval to refer the overtime grievance decision to the PSSRB;

iii) she be compensated for the lost opportunity of having the classification grievance decision judicially reviewed by the Federal Court - Trial Division; and

iv) such further and other orders that the Board deems just.

[4] Mediation was attempted after the complaint was received at the Board and the parties requested to hold the complaint in abeyance for four months after that.

[5] At the request of the respondent, and with agreement from the complainant, I have heard the evidence and arguments of both parties as to the determination of the complaint, reserving jurisdiction on the remedies for a later date, if need be. The remedies sought by the complainant include such measures as the reimbursement of costs incurred by the complainant to seek an extension of time to file a judicial review application of the final-level reply to her classification grievance.

[6] The application for an extension of time to file an application for judicial review was filed on September 3, 2003 (Exhibit 19), and denied by the Federal Court on October 24, 2003 (Exhibit 25). That decision was appealed and the filing of an application for judicial review was allowed on August 9, 2004 (Exhibit 26). An application for judicial review was filed on September 23, 2004, and, at the time of this hearing, the complainant and this Board were notified that the employer would consent to an order allowing the application.

[7] Ms. Jakutavicius testified on her own behalf and Ms. Gaby Lévesque testified on behalf of the respondent.

[8] On April 1, 2005, the *Public Service Labour Relations 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 Board continues to be seized with this complaint.

Summary of the evidence

[9] The complainant testified that she has been a member in good standing of the PSAC since 1992. In the spring of 1998, her substantive position was Chief, Coordination and Briefing, in the Department of Human Resources Development, which was classified at the PM-06 group and level. In April 1998, she was asked by her supervisor, the Director General, Strategic Policy and International Labour Affairs (the "Director General"), to assume the role of Acting Director, Federal-Provincial and Client Relations (the "Acting Director's position") for a period during which the incumbent of that position was to be seconded to another position. The responsibilities of the Acting Director's position would be in addition to those of her substantive position (the "combined positions"). She was offered the title of Acting Director. This, however, did not address her concern for adequate compensation under the circumstances.

[10] She raised this issue with the Director General, considering that the new, combined positions would necessitate significant amounts of additional work and demands on her time. She was told that, upon confirmation from the incumbent of the Acting Director's position that he would not return to that position, there would be a formal combination and reclassification of the combined positions.

[11] In order to address the issue of compensation, an interim arrangement was made with the Director General, whereby the complainant agreed to take on the combined positions and receive overtime compensation for hours worked in excess of 37.5 hours per week. Key to the complainant's acceptance was the fact that she was not required to obtain pre-authorization of such overtime. She worked without incident or question in relation to overtime pay for approximately 22 months. Exhibits C-1, C-2 and C-3 provide a record of all the overtime claimed during that period.

[12] Change occurred in January of 2000. Ms. Jakutavicius testified that her overtime for the latter month was mostly related to the preparation and organization of the Federal-Provincial-Territorial Ministers of Labour meeting, which took place at the end of January 2000. When she submitted her overtime claim, she was told by the Director General that he was no longer approving overtime payment requests that had not been pre-authorized. This was confirmed by e-mail dated February 7, 2000, from the Director General to Ms. Jakutavicius, in which the Director General also suggests that she seek an appointment with the Assistant Deputy Minister, Labour (the "ADM, Labour") (Exhibit C-4).

[13] Ms. Jakutavicius met with the ADM, Labour, on February 18, 2000. She explained to him the arrangement that she had made as of April 1998 with the Director General. In response, the ADM, Labour, apparently told her that overtime should not be the instrument used in such circumstances and that the work done should be reflected in the base salary. She said that he then indicated to her that he would ask for a review of the classification of the combined positions and that, in the meantime, she would have to ask for pre-authorization of all overtime. He also agreed to sign and authorize her overtime for the month of January 2000.

[14] Not satisfied, on February 24, 2000, the complainant asked, by e-mail (Exhibit C-5), for another appointment with the ADM, Labour, to discuss both progress of the classification process for the combined positions and the requirement to obtain pre-authorization of all overtime.

[15] She received a written answer from the office of the ADM, Labour, on March 1, 2000 (thread of e-mails found in Exhibit C-5). It confirmed that all overtime needed to be pre-approved by her immediate supervisor and that the ADM, Labour, had agreed to have the classification of the combined positions assessed.

[16] Ms. Jakutavicius felt singled out by the unusual condition of needing her overtime to be pre-authorized, unlike any other director, acting or otherwise. As stated in a further e-mail (on that same thread (Exhibit 5)) to the office of the ADM, Labour, on March 27, 2000:

. . .

> *. . . Rightly or wrongly, it is my view that at a "Director's" level, the position is invested with a certain decision-making authority which would include the latitude to decide whether extra hours outside regular working hours are needed to get the job done.*

. . .

[17] A few weeks later, the Director General was replaced by the Director of the Office for Inter-American Labour Cooperation (the "new Director") on an interim basis. Ms. Jakutavicius testified that the new Director was not always available for overtime authorization purposes, and that, moreover, when she was, the complainant did not necessarily know ahead of time that she was going to need to work overtime and, as such, need pre-authorization.

[18] The complainant then explained that, at some point, on a Friday, she had to ask the new Director for pre-approval of overtime, over the coming weekend. They had a disagreement. When she indicated to the new Director that she planned to work on the Sunday because it was more convenient for her than to work on the Saturday, the new Director indicated that she would not approve overtime on a Sunday, at double the rate, but only on a Saturday, at one and a half times the rate. The new Director asked Ms. Jakutavicius to describe her own philosophy on overtime. As Ms. Jakutavicius found it very demeaning to ask for overtime in the first place, the new Director's comments regarding her own philosophy of overtime resulted in great discomfort for the complainant. Ms. Jakutavicius re-emphasized that this requirement does not exist for any other director. Frustrated, she never went back to ask for pre-authorization of her overtime after this incident.

[19] As for the classification issue, Ms. Jakutavicius testified that she had assumed that her work in the combined positions would be retroactively reorganized and compensated. Although she had been told in the past that the incumbent of the position had to resign before the classification assessment could proceed, it appeared, through dialogue with the ADM, Labour, that this was not necessary and that a temporary re-classification was imminent. No time lines were discussed in this regard.

[20] On May 19, 2000, the complainant received an all-staff notice advising her that the "Coordination and Cabinet Briefing Unit", then in Strategic Policy and International Affairs, would be reporting to the Director, Labour Program Corporate Services, in the office of the ADM, Labour, effective May 23, 2000 (Exhibit C-7). This meant for Ms. Jakutavicius that her substantive position was being transferred to the office of the ADM, Labour. She had no advance notice of this change. It also meant that the duties of the combined positions that she was performing were clearly being split. In her view, this was a clear indication that the ADM, Labour, had no intention of reclassifying the combined positions.

[21] She met with her bargaining agent representative, Ms. Jane Hanson, on that same day. Later, on May 24, 2000, she signed two grievances relating to the classification review of the combined positions and the overtime for February, March and April 2000 (Exhibit C-8). She also chose to remain in the Acting Director's position. She had no interest in working in the office of the ADM, Labour.

[22] The two grievances moved forward in the grievance process between June 22, 2000, and the final replies from the ADM, Human Resources Branch, on May 6, 2003. The complainant was accompanied and represented by her bargaining agent at the second (she herself, as an acting director, was the first level of the grievance process), third and fourth levels of the grievance process.

[23] When asked to comment on the grievance process, the complainant testified that, at the second level, the new Director tried to negotiate an informal settlement. She could not accept the terms proposed to her at that time. Her opinion of the third-level replies is that the ADM, Labour, was not providing her with a neutral hearing or decision. He had been the instigator of the decisions being grieved. Her overtime grievance was partially allowed at that point; her overtime claim for the month of February 2000 was approved. As for the grievance on the classification review, the ADM, Labour responded on October 10, 2002 that he maintained his

previous decision, namely, that he was prepared to submit a work description to classification review. This description would be prepared by the grievor and approved by management. It would be based upon the duties that the new Director requested the complainant to perform during the period of her assignment (Exhibit C-11).

[24] In her answer dated October 23, 2000, also filed under Exhibit C-11, the complainant requested that her classification grievance proceed to the next level and ". . . be reviewed by a third party external to the Labour Program." This concern was also raised prior to the hearing of the grievances at the final level. On December 16, 2002 (Exhibit C-12), the complainant wrote to her bargaining agent's representative, Linda Vaillancourt, enquiring about what the next step would be in the event that her grievance would be denied. She wrote:

. . .

> *. . . If the staff relations officer simply upholds the Labour Program management decision, what are the next options available to me?*

. . .

[25] As she did not get an answer to this question in the reply e-mail from Ms. Vaillancourt on December 17, 2002, the complainant asked her question once more. On December 18, 2002, Ms. Vaillancourt provided the following information:

. . .

> *With regards to the classification grievance, that is not an adjudicable type of grievance and therefore, cannot be referred to adjudication. If we can't come to any agreement as to the contents of the job description in hopes of getting it classified, then there is nothing further that we can do. . . .*

. . .

[26] On December 19, 2002, Ms. Vaillancourt confirmed to the complainant:

. . .

> *. . . once the ADM issues the response that will be final as the classification grievance is not adjudicable (decision is final and binding) and as far as the overtime grievance goes, we cannot prove that they did not respect the collective agreement. Therefore, that grievance cannot go anywhere further either, unfortunately. I know this is not what you want to hear, but I have to be honest with you.*

[27] On December 20, 2002, the complainant asked about the grounds on which a case can generally be forwarded to adjudication. In the end, both Ms. Jakutavicius and Ms. Vaillancourt agreed to postpone that decision until the hearing at the final level of the grievance process, then scheduled for January 22, 2003. In conclusion, the complainant stated that Ms. Vaillancourt had always been a "straight shooter" with her and that she had told her that "there was no place to go" with her grievances after the final level of the grievance process.

[28] The complainant received the final-level reply on May 14, 2003, via mail. She had been made aware of the reply on May 12, 2003, through voice mail and e-mail from Ms. Vaillancourt. After reviewing a faxed copy of the reply, the complainant wrote again to her representative, Ms. Vaillancourt, on May 13, 2003, stating:

. . .

> *. . . I believe there is a basis for challenge of the decisions the way they actually read.*
>
> *I would like to set up a meeting with you, at your convenience and at your office, to discuss this further. . . .*

. . .

[29] On May 14, 2003, the complainant received a reply to this e-mail, advising her that Ms. Vaillancourt was no longer active in her file and that it had been forwarded to Gordon Prieur, the Coordinator of Membership Representation, National Component, PSAC. On May 15, 2003, she was further informed that an officer would be assigned to do a complete analysis and review of the merits of the case, thereafter making a decision as to whether or not the PSAC would provide representation. She was advised that this final decision was up to the PSAC (Exhibit C-14).

[30] On May 15, 2003, the complainant asked for a meeting with Mr. Prieur. She met with Mr. Prieur sometime after this.

[31] On June 10, 2003, the complainant wrote to Mr. Prieur to inquire whether he could confirm the calendar date by which she would have to respond to the final-level replies on her grievances. She commented:

. . .

> *I just want to make sure that we do not miss the date by which time I have to provide notice that it is my intention to challenge those Final-level Decisions. . . .*

. . .

[32] On June 11, 2003, Mr. Prieur confirmed that the thirty-day "appeal deadline" would be June 27, 2003.

[33] On June 28, 2003, in an e-mail to Mr. Prieur, the complainant wrote (Exhibit C-15):

. . .

> *Friday, June 27, has come and gone, and since I haven't heard or received anything from you, I am assuming that the Grievance and Arbitration Unit has requested an extension to respond to my Employer's Final Decision. Would you be able to confirm this for me and what the new target date is? . . .*

. . .

The answer came via reply e-mail on July 3, 2003, whereby Mr. Prieur informed her that:

. . .

> *It is with heavy heart that I inform you, I have received word late today that the Alliance will not support a referral* [to adjudication]*. You will be receiving a copy of their motivated decision by mail as you have been ccd.*

. . .

[34] After reading the PSAC's decision, dated July 2, 2003 (Exhibit C-16), the complainant found herself in disagreement with its analysis. Furthermore, she appeared uncertain if she had been properly represented by the PSAC, as a senior manager. Therefore, she wanted a second opinion. In her words, she was not "100% confident" that the PSAC was representing her "best interests".

[35] On July 7, 2003, she then initiated a new series of e-mail correspondence to Mr. Prieur (Exhibit C-17), the essence of which being that she wanted a second opinion to the July 2, 2003 PSAC's decision. After acknowledging that an extension of time had

been obtained on her behalf by PSAC's representatives, she specifically asked whether her attorney would have the right to pursue her case at adjudication, or whether it would have to be in another forum. Mr. Prieur answered on July 8, 2003, that her ". . . attorney can pursue ALL legal avenues that he should consider appropriate including the PSSRB if he should chose [*sic*]. . . ."

[36] On July 9, 2003, the complainant asked Mr. Prieur to respond to another of her earlier questions: ". . . If the PSSRB does not have the jurisdiction to hear the classification grievance, then which forum would have the authority to do so? . . ." The same day, Mr. Prieur responded:

. . .

> *The jurisdiction question would be up to your attorney as this would be the legal route that "he or she" considers appropriate. It would be inappropriate for us to suggest legal avenues as it would be speculative on our part. Your attorney would be qualified to answer and support the avenue he would council* [*sic*]. . . .

. . .

[37] The complainant then went on to hire an attorney. Her attorney entered into a dialogue with the analyst who had signed the PSAC's July 2, 2003 decision. Further to these discussions, the complainant received a letter dated September 2, 2003, from Ms. Gaby Lévesque, the Coordinator, Representation Section, Collective Bargaining Branch, PSAC (Exhibit 18). In this letter, Ms. Lévesque acknowledged the discussions and confirmed that:

. . .

> *. . . Since it is our opinion that the collective agreement was not violated, the PSAC cannot approve referral of this* [overtime] *grievance to adjudication.*

. . .

[38] Furthermore, Ms. Lévesque informed the complainant that:

. . .

> *The grievance concerning classification can be pursued to judicial review before the Federal Court - Trial Division without the approval or support of PSAC. We consider that such an application will not be successful and do not*

> *recommend you pursue this matter. Should you choose to proceed on your own, however, we must advise this will be entirely at your own expense. . . .*
>
> . . .

[39] The complainant's attorney filed an application for an extension of time to file an application for judicial review in the Federal Court the following day, September 3, 2003 (Exhibit 19).

[40] On September 10, 2003 (Exhibit C-20), the complainant wrote back in response to Ms. Lévesque's letter of September 2, 2003. She indicated that she had been ". . . unaware of the strict time-limit for filing an application for judicial review. . . ." and that it was her understanding that her ". . . ability to file such an application may have been jeopardized as consequence of missing the deadline." She also requested that the PSAC reconsider its decision not to allow her attorney to proceed to adjudication with the overtime grievance.

[41] Ms. Jakutavicius received from Ms. Lévesque an answer dated September 30, 2003 (Exhibit C-21), confirming the PSAC's position. On October 24, 2003 (Exhibit C-22), the complainant provided Ms. Lévesque with further information and comments regarding the PSAC's decision and its process. Ms. Lévesque's final answer, dated October 29, 2003 (Exhibit 23), concluded:

> . . .
>
> *Again, I regret any confusion or misinformation you claim to have received regarding the possibility of judicial review for your classification grievance but, as I explained in my letter of September 30, 2003, this is not an option we routinely recommend to grievors.*
>
> . . .

[42] The complainant's response, dated November 19, 2003 (Exhibit C-24), remained unanswered.

[43] The complainant pointed out that she took exception to Ms. Lévesque's comment regarding "confusion or misinformation". In her opinion, the PSAC simply failed to provide her with any information regarding the possibility of judicial review for her classification grievance. She only became aware of the latter process through her legal counsel. She also pointed out that, at the time of her correspondence with

Mr. Prieur, it had to be clear to him that she already intended to contact an independent legal counsel, although she had not done so yet.

[44] Under cross-examination, the complainant confirmed that, prior to 1998, her designation was Chief, Coordination and Briefing, at the PM-06 group and level. She also confirmed that the Acting Director's position was classified at the PM-06 group and level. The title that she was offered as compensation for taking on the combined positions was that of Acting Director. Referring to Exhibit C-6, she pointed out that all other heads of units were mostly directors at the EX-01 group and level. She further explained that her assumption was that the combined positions, when reclassified, would be at the EX-01 group and level. At the time, she perceived this as an opportunity and was confident about the conditions agreed upon with the Director General. She confirmed that she did not involve her bargaining agent's representative in these negotiations.

[45] Ms. Jakutavicius further explained that the requirement to have overtime hours pre-approved was humiliating and degrading to her, when applied to a director-level position. As mentioned earlier in her testimony, she felt that, as a director, she should have been invested with the authority and responsibility to complete work in the time that she deemed necessary, without having to ask for overtime pre-approval.

[46] There was, however, some confusion in the complainant's testimony as to her awareness of the fact that, as an employee at the PM-06 group and level, her overtime was to be pre-authorized and that the arrangement that she had made with the Director General was in violation of the collective agreement. She acknowledged that, as a PM-06, she did come under the collective agreement, but that she was not aware of the technicalities. She was, in her opinion, acting as a director. She became aware of the fact that the pre-authorization was an obligation under the collective agreement only after her meeting with the ADM, Labour. She insisted that she acted in good faith when she negotiated her arrangement with the Director General, expecting that the situation would be quickly resolved by the promised classification review of the combined positions.

[47] Ms. Jakutavicius was also asked about the motivation behind a Director General's request that her official overtime sheet not describe the nature of the overtime work. She routinely provided him with a description of the tasks that she had accomplished, using the overtime sheets. Her understanding was that he would

have difficulty justifying this information on the overtime sheets, if asked. He had asked her to provide a separate time sheet, without her annotations (Exhibits C-1, C-2 and C-3).

[48] The complainant also admitted that, after the disagreement with the new Director on February 24, 2000, she did not go back to ask for any more pre-authorization. It was her choice to proceed without the pre-authorization of overtime from that point onward. She explained that, in her understanding, all she had to do was to let the new Director know orally in advance of her intention to do overtime; it was not to ask her permission. She did not expect the new Director to refuse or to say on which day she could do the overtime or not. The issue of pre-approval was not addressed in her discussions with the Director General in 1998. She was to claim it and submit it on a monthly basis. There was no requirement for pre-approval or explanations, although she voluntarily provided them later.

[49] When the requirement for pre-approval of overtime was put to her, Ms. Jakutavicius felt that it was a punitive measure, both demeaning and humiliating. Although the bargaining agent claims that the collective agreement was not breached, she explained that, in her case, the spirit of the collective agreement had been breached. Furthermore, as she was essentially performing the duties of two managerial positions, her expectations were that a reclassification of the combined positions would bring her into the EX group, especially considering that all other managers were already in the EX group. In her opinion, the combined positions, once officially merged, must obviously be reclassified; it was not just a hope.

[50] She also confirmed that the process of review for the combined positions had already been initiated at the time. The review was based on the existing description of the two positions. She was assisted by Ms. Vaillancourt in this process. In June 2002, after Ms. Vaillancourt's intervention, the complainant finally received the comments from the new Director. She did not have a chance to include her input in the descriptions, but her response was filed as part of her grievance.

[51] The complainant also acknowledged that the overtime arrangement was in lieu of compensation, in the event that she would not ultimately get appointed to the reclassified combined positions or that the combined positions would not actually be reclassified. She also acknowledged that it was a worthwhile opportunity. She made the assessment at the time and still believes that a *bona fide* assessment process will

result in the upgrading of the combined positions, when merged into one. In her opinion, the Acting Director's position and her own substantive position each warranted reclassification.

[52] Ms. Jakutavicius explained that she has endeavoured to bring her situation to someone who would review it. Even if the decision was to be confirmed, at least she would have an explanation and closure as to why the combined positions would not be reclassified. In her opinion, the employer was using the collective agreement to punish her and have her leave. When asked what article of the collective agreement was being used against her, the complainant was not in a position to respond.

[53] As regards the present complaint, Ms. Jakutavicius was asked if there had been any problems in the representation that she received from the bargaining agent during the grievance process, including the fourth level. The complainant acknowledged that she could not criticize the representation services provided by the PSAC in the persons of Ms. Hanson and Ms. Vaillancourt. On many occasions, in the correspondence, the complainant even thanked and acknowledged the efforts made by, and commended the representation received from, Ms. Vaillancourt.

[54] The complainant found objectionable that she was not informed of her right to judicial review in a timely manner and disagrees with the PSAC's assessment of her grievances. She insisted that she should be allowed to proceed to adjudication with her overtime grievance. She felt that her acting director assignment has influenced the opinion or the assessment of her case by the PSAC.

[55] Ms. Lévesque testified on behalf of the respondent. She explained the approval process to determine whether a grievance should proceed to adjudication. She explained that the Component Service Officer involved at the final level of the grievance process makes the decision to refer the grievance to the approval process or not. The grievance is then received by the Coordinator, Representation Section, for a preliminary analysis. Based on the issue arising from the grievance, the Coordinator then refers the grievance to a Grievance Analyst. The Grievance Analyst goes through the grievance and documentation to assess the merits, the jurisdiction and the case law involved, in order to determine whether or not the grievance should be referred to adjudication.

[56] The Grievance Analyst then makes a recommendation as to whether the grievance should be referred to adjudication. If it is determined that the grievance should be referred to adjudication, it is sent back to the Coordinator, who writes to the PSSRB and assigns a Case Officer to the case. If there is a recommendation not to refer the grievance to adjudication, then the analyst writes a letter explaining the reasons for that recommendation. That letter includes information such as the possibility that the grievor can refer the grievance to adjudication without the support of the PSAC in cases of discipline and termination. In other cases, no reference is made to possible further avenues of redress.

[57] In this case, the two grievances followed the process described above, with Ms. Nancy Milosovic assigned as Grievance Analyst. When Ms. Lévesque reviewed her letter, it made sense to her. She felt that it was clear and, when she reviewed the file, Ms. Lévesque came to the same conclusions as the Analyst.

[58] Ms. Lévesque placed the PSAC's work in context: "what we do is police the collective agreement". In this case, the complainant had expectations; promises had been made to her. However, the PSAC had to look at the situation from the point of view of its role of policing the collective agreement.

[59] Ms. Lévesque went on to explain that, in this case, Ms. Jakutavicius had carved out a special arrangement with the Director General. Because the arrangement was outside of the collective agreement, when management decided that it would no longer honour that arrangement, there was nothing that the PSAC could do. The opposite would have been an easy and clear-cut case for the bargaining agent. If the complainant had gone on asking for overtime, which under the collective agreement had to be pre-approved, and then had not been paid, the PSAC would have stepped in with a clear role.

[60] Ms. Lévesque also explained that the PSAC has responsibilities towards its membership, which pays union dues. These union dues have to be put to work for the membership as a whole. If a grievance is referred to adjudication, with no chance of succeeding, it is the PSAC's view that the effect is negative for the membership as a whole.

[61] With regard to the classification grievance, Ms. Lévesque stated that it is clear by law and jurisprudence that it was not an adjudicable grievance. It came under the full

purview and authority of management. Despite the fact that it was not a matter of interpretation or application of the collective agreement, the PSAC, as is often the case, provided assistance and representation in that grievance process up to the final level.

[62] Ms. Lévesque declared that she was very sympathetic to the complainant's case and that, in her opinion, the complainant had been treated unfairly. However, the bargaining agent could not do anything because it did not have the tools to help in these matters. In her opinion, the PSAC could have been of help in the beginning when the complainant negotiated her arrangement, but, when promises in an arrangement outside the bounds of the collective contract were broken, there was nothing it could do. She attempted many times to explain the PSAC's position to the complainant. Acknowledging that she did consider recommending judicial review to the complainant, she decided against it because, as far as the PSAC is concerned, this is not a remedy.

[63] Ms. Lévesque went on to explain that the Federal Court would not, by itself, reclassify an individual's position, but would simply order the administrative body to proceed *de novo* with the administrative review process. For that option to be exercised, a flaw in the process or a breach of natural justice needs to be proven. The Federal Court would only look at how the decision was made; it would not look at the merits of the case. It would not order or force a reclassification.

[64] Ms. Lévesque, in a practical sense, took the view that the Federal Court would simply have provided the administrative body with an opportunity to say no, more effectively, to the reclassification. As such, the respondent is of the opinion that, had it recommended judicial review, it might have misled the complainant and encouraged further procedures at unnecessary cost.

[65] Referring to Mr. Prieur's e-mail of July 9, 2003 (Exhibit C-17), to the complainant, Ms. Lévesque commented that, technically, Mr. Prieur was right; Ms. Jakutavicius could go to adjudication with her own attorney. However, knowledge of jurisprudence and the law would, in her opinion, dictate little possibility of success with either grievance. Ms. Lévesque concluded by saying that she was disappointed that the complainant felt the way that she did. She regretted that the complainant did not understand the motivation behind the PSAC's decision. When asked if she would do anything differently today, Ms. Lévesque answered "no".

[66] During cross-examination, Ms. Lévesque acknowledged that somebody should have told the complainant that the judicial review process option existed for her. Maybe this would have been important to her. She insisted, however, that omitting to do so was not a mistake because it is not a practical recourse; it is not a remedy. Furthermore, once a grievor has hired an independent attorney, the PSAC no longer provides legal advice to that member.

[67] Ms. Lévesque also explained that the PSAC only has recourse to the Federal Court to have PSSRB or adjudication decisions judicially reviewed. She could not see ever suggesting a Federal Court review of a reply given at the final level of the grievance process on an issue that is not adjudicable. The cost incurred for benefits to be gained by this process would not warrant this option. In her mind, it made no sense to tell members of an option and then have to explain why it is not a practical one. It would jeopardize the relationship with the members.

[68] Ms. Lévesque concluded by saying that judicial review is not something that is automatic. In her words: "the bar is pretty high". In other words: "it is about making decisions the right way, not about making the right decision; so a different path does not mean a different decision".

Summary of the arguments

Complainant's Arguments

[69] The complainant argued that the evidence demonstrates that she had entered into an arrangement with the Director General in the spring of 1998. At the time, she had agreed to take on a significant amount of duties and new work, as long as her concerns for compensation would be recognized. A satisfactory arrangement was entered into. It provided for financial compensation by means of the payment of overtime, which did not need to be pre-approved. It also meant that her substantive position would be combined with the Acting Director's position that she was asked to fulfill on an interim basis. Her understanding was that the combined positions would be officially combined or merged and reclassified retroactively. The timing of this process was dependent on when the incumbent of the Acting Director's position would officially leave his position.

[70] The evidence shows that the PSAC was not informed of that arrangement. However, the evidence shows that the complainant's intention was not to undermine or

subvert the collective agreement. Ms. Jakutavicius did not think that she was doing anything wrong. This arrangement worked satisfactorily for a period of 22 months. The complainant submitted worksheets and was compensated for the overtime submitted, despite the fact that she had not asked for pre-approval of this overtime.

[71] In February 2000, without warning, the complainant received notice that there would be no more overtime without pre-authorization. She was informed that this was done on orders from the ADM, Labour.

[72] The evidence also showed that the complainant was taken aback because she was notified of this new requirement only days after having completed a special project. She had recently put many hours of overtime into a successful Federal-Provincial-Territorial Ministers Conference in January of 2000. This was no thanks for a job well done. She also viewed this as an attack on her credibility and her reputation. She had always provided explanations and never claimed overtime for work at the office and she even under-reported her overtime.

[73] Ms. Jakutavicius did not feel that it was proper to require director-level personnel to ask for permission to do overtime. Furthermore, it was impractical. At the director level, one cannot always anticipate overtime. In her eyes, there was no reason to impose this requirement, which was used as a punitive device. She alleged that she was being bullied and that this was an attempt to force her out.

[74] Also in evidence is the fact that, as a result of the February 18, 2000 meeting with the ADM, Labour, there was a commitment to see the combined positions reclassified. Then, on May 19, 2000, there was an all-staff announcement that the positions occupied by the complainant were split in two. There were no preliminary discussions or notification to her.

[75] At that point, the complainant turned to her bargaining agent for assistance. Two grievances were filed by the complainant, with the guidance of the PSAC's representative.

[76] Both grievances were filed in a timely manner. The breach of the arrangement was brought to the attention of the complainant on May 19, 2000. The grievances were completed and filed on May 24, 2000. They were submitted to the Director General, who was out of the office until June 23, 2000. In accordance with the collective

agreement, the grievances were presented within the 25 days thereby required. Both grievances were timely.

[77] Upon receiving the third-level replies to her grievances, the complainant raised her concerns regarding the impartiality of the process and requested review ". . . by a third party external to the Labour Program. . . ." (response dated October, 2000 – Exhibit 11), at the next level. This issue was also raised at the time in the correspondence with the PSAC's representative.

[78] When she received the replies at the final level of the grievance process, the complainant kept enquiring about her rights to move her grievances to adjudication. She clearly communicated her intentions to proceed further and inquired as to the appropriate forum, if it was not adjudication.

[79] In response, the complainant received the letter from the Grievance Analyst and subsequent letters from the Coordinator, Representation Section. There was no mention of the possibility of judicial review in response to her request for information about alternative forums until she informed the PSAC that she intended to retain her own attorney. In her opinion, at this point, communications from the PSAC became even more obscure. After being informed that the PSSRB had no jurisdiction, she was advised that: "[y]our attorney can pursue ALL avenues . . . including the PSSRB. . . ." (Exhibit 17). Furthermore, only on September 2, 2003, did the complainant receive confirmation that she could proceed to judicial review before the Federal Court ". . . without the approval or support of PSAC. . . ." (Exhibit 18).

[80] Although the PSAC maintained its position that her application for judicial review would not be successful, the complainant argued that it is a question of semantics and that judicial review does provide an option, whether it is called redress or not. In her opinion, the reply to her classification grievance at the final level of the grievance process contains an error reviewable in law and she had the right to file a judicial review application within 30 days (paragraphs 18.1 (2) *c*) and *d*) of the *Federal Courts Act*).

[81] All that the complainant ever wanted was to have an independent third party review the process and quash the reply, subsequently sending it back for a new reply, ideally with some direction. She wanted a new hearing and a reply based on the merits, not on a procedural technicality. That is the form of redress that she was seeking. She

did not expect the Federal Court to re-classify her positions. The PSAC did not see this as a real option, although the timeliness of the grievances, a procedural motive, was a factor mentioned as the basis of both replies.

[82] The complainant did not accept the motivation behind the PSAC's decision that, in the end, the exercise would be pointless due to its view that the reply, even if it was quashed and re-issued following a new hearing, would result in the same ruling. In the complainant's opinion, if the reply had been based on the merits of the cases, it would have been different.

[83] In conclusion, the complainant submitted that the PSAC failed in its duty of fair representation towards her in that the PSAC and Ms. Lévesque acted ". . . in a manner that is arbitrary, discriminatory or in bad faith in the representation of. . . ." the complainant, who is an employee in the unit.

[84] The Supreme Court of Canada, in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, set out the test to determine duty of fair representation with the following principles are set out:

. . .

> 1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> 2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> 3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> 4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> 5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity*

> *and competence, without serious or major negligence, and without hostility towards the employee.*
>
> . . .

[85] In a subsequent decision of the Supreme Court of Canada, *Centre Hospitalier Régina Ltée. v. Québec (Labour Court),* [1990] 1 S.C.R. 1330, the Court referred to *Gagnon* (*supra*) in the following manner:

> . . .
>
> *As Gagnon pointed out, even when the union is acting as a defender of an employee's rights (which in its estimation are valid), it must take into account the interests of the bargaining unit as a whole in exercising its discretion whether or not to proceed with a grievance. The union has a discretion to weight these divergent interests and adopt the solution which it feels is fairest. However, this discretion is not unlimited. Simply saying that the union has the right or power to "sacrifice" any grievance, which it feels is valid at that stage, during negotiations with the employer, in order to obtain a concession of better working conditions or other benefits for the bargaining unit as a whole, would be contrary to the union's duty of diligent representation of the employee in question. On the other hand, completely rejecting the possibility that the union and the employer may settle a great many grievances in negotiations for a new collective agreement, or on other occasions, would be to ignore the reality of labor relations. . . .*
>
> . . .

[86] In applying these principles, the balancing process should take into account the following elements:

1. Damage to the reputation and integrity of the complainant;

2. The fact that the requirement for pre-authorized over time was imposed in a punitive and insulting way;

3. The loss of pay suffered by the complainant for the over time done;

4. The fact that the bargaining agent acknowledged that the employer was dishonest and that the situation was unfair;

5. A concern that the bargaining agent acted with bias towards this employee.

[87] The complainant concluded that, as regards her overtime grievance, the PSAC should have allowed the grievance to proceed to adjudication and that, by not doing so, its actions or inactions were arbitrary and constituted a breach of its duty of fair representation according to the principles set out by the Supreme Court of Canada.

[88] As regards her classification grievance, the complainant had a right to know that she had the option to proceed to judicial review before the Federal Court. Considering that she was not satisfied with the final reply to this grievance, and despite the fact that she had asked on many occasions what recourse was available to her, she was not notified of other options.

[89] In Ms. Jakutavicius' opinion, the answer was simple. However, the complainant did not get a clear answer from her bargaining agent. In her estimation, the PSAC's concerns for cost, the kind of redress that judicial review would provide to the complainant, and the PSAC's image itself were not legitimate and tainted the type and amount of involvement that the PSAC lent to her case.

[90] What should have been considered was the impact on the complainant, her reputation, the fact that her career was stalled and the fact that she was looking for an independent third-party review of the process through which she had just been.

[91] Also submitted in support of the complainant's arguments are two decisions of this Board: *King and Waugh v. Canada Customs and Revenue Agency*, 2005 PSSRB 3, and *Savoury v. Canadian Merchant Service Guild,* 2001 PSSRB 79. In the latter case, the bargaining agent had failed in its obligation to advise the complainant of his right to proceed to adjudication on his own and of the time limit within which to do so. In paragraph 148 of its decision, the Board explains:

> *I fail to see how a bargaining agent in our modern age of rights would omit to advise a member of his or her right to proceed to adjudication personally and without the assistance and support of the bargaining agent. This to me seems so basic a duty owed to a member. A member has the right to disagree with his bargaining agent and to take the case further on his own time and money.*

[92] As regards her overtime grievance, the complainant is asking that this grievance be allowed to proceed to adjudication, preferably with representation from the PSAC, or independently, and if the latter, that the PSAC pay for the cost of independent representation.

[93] As regards her classification grievance, considering that her right to judicial review has now been recovered, the complainant is asking for her costs associated with the process of recovery. It stands to reason that, considering the past history, in the event that judicial review is successful, she will then request proper independent representation at the final level of the grievance process. The PSAC should pay for this independent representation.

The Respondent's Arguments

[94] For the PSAC, this is fundamentally a case of choices that people make and the consequences that they carry. The complainant made the choice to enter into an arrangement with her Director General. She made the choice not to seek PSAC's representation at the time, even if she had some concerns regarding her compensation. She made the choice, later on, not to seek pre-authorization for her overtime, even though her employer said that it would no longer pay for it without this requirement. She made the choice to work for 22 months at a level that she knew was inaccurate.

[95] In March 2000, when the PSAC became aware of this situation, it started to make choices of its own. It chose to provide the complainant with representation. It chose to provide the complainant with guidance and helped her with the grievance forms. It chose to assist her and represent her through the grievance process up to the final level. It then chose not to refer the overtime grievance to adjudication, preferring, in fact, not to endanger the interests of its membership by proceeding further with these grievances and providing the complainant with financial support at the expense of its members. It chose, as a longtime practice, not to inform the complainant of any of the extraordinary remedies available at that time, namely, judicial review before the Federal Court.

[96] A thorough analysis of the two grievances was done by an experienced and competent Grievance Analyst and was reviewed by the Coordinator, Representation Section. The PSAC and its representatives did not act in an arbitrary, discriminatory manner or in bad faith.

[97] Although the complainant received somewhat vague information from Mr. Prieur, the information provided is still correct. Even though his correspondence may not have been helpful to the complainant, these actions do not meet the standards for arbitrariness, discrimination or bad faith.

[98] There are two issues arising from the complainant's grievances and the role of the PSAC differs in each case. In the case of overtime, this issue is within the legislated mandate of the bargaining agent. It is an issue that is covered by the collective agreement and it is adjudicable. In the case of the classification grievance, it is the opposite. Management has a right to determine this issue. It is not adjudicable, it is not covered by the collective agreement. It is with this in mind that the PSAC made its decisions regarding representation of the complainant in further proceedings.

[99] Addressing the overtime grievance first, the respondent argued that, although the complainant was asking to be treated like all other members of the PSAC, she expected the PSAC to help her in her difficulties regarding the arrangement that she negotiated outside of the collective agreement, despite the fact that she feels that the collective agreement is beneath her.

[100] The respondent pointed out that the requirement for pre-authorization of overtime was not negotiated with the intention of humiliating or being demeaning for its members.

[101] Acknowledging the unfairness of this situation from the point of view of the complainant, and having expressed sympathy, the respondent argued that the PSAC cannot provide the complainant with better conditions than other members have. Despite the fact that there was an arrangement outside of the collective agreement, the PSAC did provide representation to the complainant, in good faith, at all levels of the grievance process. Furthermore, a full analysis was made to determine whether the PSAC should proceed to adjudication with this overtime grievance.

[102] The decision in this regard was made on the basis of the case, precedents and law. The Grievance Analyst determined that there was no breach of the collective agreement. The grievance was based on an arrangement between the complainant and the Director General, outside of the collective agreement. In the Grievance Analyst's opinion, with no breach of the collective agreement, this grievance would not be successful before an adjudicator. The respondent also considered the possible repercussions of an adjudication decision and its impact on its membership. Finally, it considered its responsibility towards the monies contributed by its members to accomplish its mandate.

[103] The PSAC's decision not to pursue this case can in no way be considered arbitrary, discriminatory or made in bad faith. On the contrary, representatives of the PSAC were very patient with the complainant and provided good and careful analysis of the case. The PSAC is entitled to make a decision with regard to adjudication measures and it did so on the merits of the case. This authority goes to the very core of the PSAC's exclusive authority with regard to adjudication. The PSAC is the sole gatekeeper for the benefit of the membership as a whole. The fact that one member wants to "go at it alone", even at his or her own cost, should not be a factor in a decision made by the PSAC.

[104] With regard to the classification issue, the standard for scrutiny of the PSAC's actions should be lower because this matter is outside the context of the collective agreement. The PSAC provides representation in such matters as a courtesy, as it does in matters related to human rights. It is not, however, in its mandate or according to its practice to offer, in these circumstances, representation concerning extraordinary measures such as judicial review.

[105] The complainant has known since 1998 that her position was not properly classified. The respondent disagrees with the complainant's position that she became aware of the problem with her classification in May 2000, when she received the Labour-Branch-wide e-mail, telling her of the changes to the combined positions. The respondent maintains that the complainant chose not to do anything about this situation and chose not to consult the PSAC until 2000.

[106] At the time, it was not an unreasonable gamble, considering that the complainant was successful in arranging for what she felt was a proper compensation through the overtime scheme. It is understandable that she would welcome this opportunity to work at a director's level.

[107] However, in the respondent's words: "suddenly, the grounds shifted". "The house of cards" built outside the collective agreement fell apart, unlike conditions that, negotiated through a collective agreement, would have provided a "solid house".

[108] The classification grievance was dismissed on the grounds of timeliness. In the PSAC's opinion, that is probably correct. There was no ground for judicial review.

[109] The duty of fair representation is an obligation to treat members fairly, without arbitrariness, discrimination or bad faith, but it does not mean that the respondent has an obligation to do things perfectly. The respondent has a right to be wrong as long as it has done a fair, complete and careful review and analysis of the case.

[110] As far as the balance test enunciated by the Supreme Court of Canada is concerned, the respondent pointed out that this is not a case where the complainant has lost her employment or her position or her right to overtime. She made her choice, made an arrangement and it fell apart. She admitted having made the choice not to seek further pre-authorization of her overtime. The complainant was compensated for the overtime in January and February of 2000.

[111] The complainant admitted that the arrangement was not something that the PSAC had negotiated. She admitted that this was a private arrangement; despite that fact, the PSAC did provide representation for both grievances up to the final level of the grievance process.

[112] Commenting on the case law presented by the complainant, the respondent pointed out that it relates to issues central to collective agreements. It is not the case with either of the two grievances that are the subject of this complaint.

[113] In support of the respondent's position, reference was made to the following decisions: *Bingley v. Teamsters Local Union 91 and Purolator Courier Ltd.,* (2004) CIRB Decision No. 291; *Lipscomb v. Public Service Alliance of Canada et al.*, 2000 PSSRB 66; *Sophocleous v. Pascucci and Richey,* PSSRB File No. 161-2-861 (1998) (QL).

[114] In closing, the respondent maintained that there is no evidence that the complainant was treated arbitrarily, in a discriminatory manner or in bad faith. On the contrary, she received more attention than most members, in the PSAC's attempt to satisfy her concerns and provide her with information and reassurance. The respondent saw no grounds and no interest for its membership in bringing the overtime grievance to adjudication. In the case of classification, because of the nature of the grievance and the role of the PSAC in this regard, the standard of review of its duties of fair representation should be lower. In conclusion, there is no evidence that the respondent has acted towards the complainant in a manner that is arbitrary, discriminatory or in bad faith.

[115] The PSAC will represent the complainant in her classification grievance if her judicial review application is allowed, but will object to the representation by private counsel. The respondent reserved the right to make representation on the remedies that the complainant is seeking at a further stage of these proceedings, if the case requires it.

Further Submissions

[116] Further to an agreement between the parties, the complainant provided, subsequent to the hearing, the second-level replies to her grievances and her responses to those replies. The respondent commented on these documents by letter dated March 10, 2004, and the complainant filed a rebuttal on March 24, 2004. I have read these documents and comments.

Reasons

[117] The complainant acknowledged having received satisfactory representation from the PSAC representatives through all levels of the grievance process. Both grievances having been denied (the replies at the final level are dated May 6, 2003), the complainant wanted to pursue other avenues of redress. On May 15, 2003, the complainant was informed by the respondent, in response to her request about further avenues, that this would depend on the PSAC's review of her case. This is what gave rise to the present complaint.

[118] After analysis and review of the two grievances and the final-level replies, the PSAC, on July 2, 2003, provided the complainant with a written opinion, which indicated that it would not support the referral of the overtime grievance to adjudication. In addition, it advised her that, as an adjudicator would not have jurisdiction to hear classification disputes, the PSAC would not support a referral of the classification grievance to adjudication. The respondent did not inform the complainant of any other option at that time, although it knew that she wished to pursue the matter further.

[119] The circumstances of this case show that the complainant had made her own arrangement with her Director General, without consulting with her bargaining agent at the time. The respondent, acknowledging very little disagreement with the facts and the chronology presented by the complainant, voiced regrets that no avenue of redress under the collective agreement could provide remedy for the situation in which the

complainant found herself. It was submitted that it is not the role of the bargaining agent to defend such arrangements.

[120] The PSAC maintained that the decision not to pursue the grievances further was based on the careful review and analysis of the situation, taking into account the balance of interests and consequences for the complainant and those of its membership, but not in discrimination or bad faith, and stands by its evaluation of the cases.

[121] The question before me is to determine whether or not the respondent is in breach of its duty of fair representation in its handling of the complainant's two grievances. The onus is on the complainant to prove arbitrariness, discrimination or bad faith. The role and responsibilities of the respondent are different with each grievance; I will therefore examine the complaint as it relates to each grievance.

[122] First, as regards the circumstances surrounding the overtime grievance, I have found nothing in the evidence before me that, in all reasonableness, could bring me to conclude to a failure in the duty of fair representation. With regard to the overtime grievance, the complaint must fail. The analysis and follow-up of the grievance were done diligently and thoroughly, based on the case law, experience and common sense. The complainant was provided with a copy of the analysis. There is no evidence of arbitrariness, discrimination or bad faith. There is no evidence, as suggested by the complainant, that the respondent acted differently or with intent of reprisal against her because she had made her own arrangement with her Director General outside the collective agreement, or because she held a managerial position.

[123] The respondent had discretion to determine whether or not it would pursue such a grievance to adjudication. Many decisions from various labour boards have confirmed this principle and its limitations. The Board, in *Teeluck v. Public Service Alliance of Canada,* 2001 PSSRB 45, summarized them at paragraph 80:

> *. . . A union may therefore choose to defend one set of interests to the detriment of another, by reason that the union is not obligated to defend one member absolutely, and does so sometimes to the conflicting rights of other members. The union's ability to make such a choice, like all of its decisions regarding the representation of its members, is qualified by the avoidance of arbitrariness, capriciousness, discrimination and by the application of integrity, rightfulness, competence and fairness.*

[124] In *Delorme v. Canadian Association of Communication and Allied Workers and CNCP Telecommunications, Montreal, Quebec,* (1983) 52 di 46, the Canada Labour Relations Board reviewed the case law and stated that:

. . .

> *. . . there is nothing wrong with a conclusion reached in good faith that a grievance could not be won at arbitration and therefore could properly be dropped; a union is justified in not going to arbitration if it has reasonably considered the grievance and, having reasonably turned its mind to the matter, has concluded that it has no merit; and in this respect, even though the Board may have the view that the union made a wrong decision, it will not interfere with a decision properly arrived at. . . .*

[125] The respondent is allowed to make a mistake in its evaluation of the case. The duty of fair representation is not the equivalent of an insurance against error and omissions. Courts and labour boards have addressed this issue a number of times. In *Quesnel v. Ontario Public Service Employees Union and Ministry of the Attorney General,* [2004] OLRB Rep. January/February 133 (QL), the Ontario Labour Relations Board commented in these terms:

. . .

> *. . . the mere fact that a union representative has made a mistake in the way in which it has processed a grievance on behalf of an employee does not necessarily mean that the union has breached its standard of fair representation, even where that mistake has resulted in prejudice to the employee(s) concerned . . . .*

. . .

[126] Having no obligation to take grievances to adjudication, and in the absence of arbitrariness, discrimination or bad faith, the PSAC should be allowed its full discretion to make these decisions, as it has exclusive rights regarding the collective agreement. What is important is that the respondent gave careful consideration to the possibility of taking this grievance to adjudication and did a thorough and fair analysis before deciding not to.

[127] Second, as regards the classification grievance, the same principles apply to the decision made by the respondent not to support further procedures. The respondent also met the *Gagnon* (*supra*) test in this matter. Further to the same satisfactory

representation provided to the complainant throughout the grievance process, again, by the complainant's own admission, the same careful analysis was done as regards adjudication, as was done with the overtime grievance.

[128] In *Lipscomb* (*supra*), the Board was deciding a similar complaint in the context of a rejection on probation, a matter that is not adjudicable, as in this case, and expressed the following at paragraph 18:

> *The Board must allow fairly wide latitude to a bargaining agent in the representation of its membership pursuant to the PSSRA. The Board does not accept the complainant's position that the right to representation contained in section 10 (2) of the PSSRA is practically absolute and cannot be denied except in the most trivial cases. Such a view is contrary to the ruling of the Supreme Court of Canada in Gagnon (*supra*).*

[129] I find that I must come to the same conclusion in the present case as the Board did in *Lipscomb* (*supra*), as regards the decision made by the respondent not to pursue this classification grievance to adjudication.

[130] I then come to the conclusion that there was no arbitrariness, discrimination or bad faith in the actions and decisions of the respondent regarding its evaluation of the two grievances and its decision not to pursue them to adjudication.

[131] However, the complainant specifically reproaches to the respondent the fact that she was not informed in time of her right to judicial review of the final-level reply to her classification grievance, even without the support of the PSAC. A question then remains: considering the numerous correspondences by the complainant to the respondent's representatives, where she asked questions about process, forum and deadlines as early as December 2002 (Exhibit C-12), prior to the final-level replies to her grievances in May 2003; considering her insistence that she wanted to take the matter further (Exhibit C-15); and considering her follow up correspondence; why was she not told of her right to judicial review in time? Is this a legitimate error or omission or does it represent arbitrariness and a breach of a bargaining agent's duty of fair representation?

[132] It should first be pointed out that, even if the respondent does not routinely consider judicial review in the case of a final-level reply regarding a classification grievance, members have a right to know of that possibility and to make their own

decision in this regard. The duty to inform the complainant of an available recourse was not, as such, contested by the respondent and is recognized in any case. Rather, the respondent submitted that, because these issues do not come under its narrower mandate (collective agreement), a different standard of scrutiny should be exercised. I have taken this into consideration.

[133] The concept of "arbitrariness" is one of the most difficult to define and often appears to overlap with that of "negligence". In *Re City of Winnipeg and Canadian Union of Public Employees, Local 500,* 4 L.A.C. (4th) 102, the arbitrator summarized alternative definitions of "arbitrariness" found both in doctrine and jurisprudence to include:

. . .

> *. . . ". . . capricious"; ". . . without reason"; ". . . at whim"; ". . . perfunctory"; ". . . demonstrate a failure to put one's mind to the issue and engage in a process of rational decision-making". . . or a failure ". . . to take a reasonable view of the problem and arrive at a thoughtful judgment about what to do after considering the various relevant conflicting consideration". . . .*

. . .

[134] The last two definitions are most helpful in the case at hand. I must now give the circumstances of this particular case careful examination and consideration with these elements in mind.

[135] The complainant is a determined individual. She was seeking redress for a situation that she found most unfair. After 22 months and the success of an important national conference, she did not expect the events that followed. She was determined to take this as far as she could in order to have someone look at her situation without the bias that she perceived was rampant in the grievance process. Her feelings and drive are understandable. She conveyed these thoughts and feelings throughout her sustained and regular correspondence with the respondent's representatives.

[136] The respondent recognized at the hearing that it would have been wise to inform the complainant of her right to judicial review while maintaining, at the same time, that this omission did not elicit its liability. It did not inform her so because the judicial review process had, in its opinion, little chance of success and, in any case, that forum would not provide the complainant with the solution that she was seeking.

Furthermore, that avenue of redress is not normally mentioned to grievors because it is not a process considered by the respondent in similar cases. Judicial review is an avenue that it will consider mainly when it disagrees with an adjudication decision.

[137] Although the assessment of the case by the respondent is no longer in question, the information that it provided to the complainant was incomplete from her point of view and it was finally provided too late and only at the insistence of the complainant and her attorney. This brings about the question as to whether the complainant was relying solely on the information provided by the respondent. The complainant had given notice to the respondent, on June 10, 2003 (Exhibit C-15), of the possibility that she would retain her own legal counsel. The respondent explained that, when a member hires his or her own legal counsel, it no longer provides advice or information to that member. However, the representatives of the respondent kept on answering her many questions. When the complainant asked more precise questions about her attorney's possible involvement early in July, the respondent finally referred her to her new legal counsel for more information.

[138] At this point, Ms. Jakutavicius received conflicting information as to her rights to proceed to adjudication (Gordon Prieur, Exhibit C-17). To add to her confusion, in her own July 7, 2003 correspondence, the complainant confirmed that she was aware of a time extension obtained on her behalf by the representative of the PSAC, up to July 28, 2003. However, she was not informed that this had not protected her standing as far as the time limit for judicial review was concerned.

[139] In my opinion, the fact that the complainant informed the respondent of her intention to retain her own legal counsel did not change the situation because, by that time, the time limit for filing an application for judicial review of the May 6, 2003 final-level reply had already run out.

[140] The question finally becomes: in the case at hand, did the complainant establish that the respondent's actions, or more specifically its omission to inform her in time of her right to judicial review without support of the respondent, were of such a nature that they qualify as arbitrary?

[141] In this determination, the intent is not an element that the complainant needs to establish. In *Noël v. Société d'Énergie de la Baie James et al.,* [2001] 2 S.R.C. 207, at pages 230-231, the Supreme Court of Canada has noted that "arbitrariness" or "serious

negligence" involve acts which, while not having to be motivated by malicious intent, nevertheless must exceed the limits of a ". . . discretion reasonably exercised".

[142] In the instant case, considering that the respondent knew as early as December 20, 2002 of the complainant's intention of contesting an expected unfavourable reply at the final level of the grievance process, considering her further correspondence and clear expression of that intention immediately following the issuance of the final-level replies to her grievances, considering that she could have decided to proceed to judicial review on her own after evaluating the risks of engaging her own funds, the respondent should have clearly informed the complainant of her options in order for her to do so in a timely manner and so as not to jeopardize her rights. The respondent's decision not to so inform the complainant, despite her requests, is arbitrary. It is not a " . . . discretion reasonably exercised" (*Noël* (*supra*)). The respondent followed its general practice or policy, as explained by the respondent's witness, of not considering or informing members of the possibility of recourse to the Federal Court in the case of classification grievances. Having done this despite the clear requests for such information by this particular member is a blind application of a general practice and is therefore arbitrary, demonstrating ". . . a failure to put one's mind to the issue and engage in a process of rational decision-making. . . ." (*Winnipeg* (*supra*), emphasis added).

[143] Furthermore, the decision was made without consideration for the consequences of the case at hand. The complainant had clearly voiced her intention to pursue her case. Consequences of the blind application of the general practice were foreseeable: it would affect her right to judicial review. As such, the action can also be qualified as arbitrary in failing ". . . to take a reasonable view of the problem and arrive at a thoughtful judgment about what to do after considering the various relevant conflicting considerations. . . ." (*Winnipeg* (*supra*), emphasis added). The respondent's considerations for its mandate, membership, reputation and resources do not outweigh the considerations for the circumstances of this individual case, considering the right of the complainant to proceed without the support of the respondent in any case.

[144] I must therefore conclude that, in the specific circumstances of this case, the respondent acted in an arbitrary manner in failing to advise in a timely fashion the complainant of her right to seek judicial review of the classification grievance reply at

the final level of the grievance process without the PSAC's support, despite repeated requests for such information.

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

(The Order appears on the next page)

Order

[146] The complaint is granted, in part, with regard to the respondent's breach of duty of fair representation in its failure to advise in a timely manner the complainant of her right to seek judicial review of the reply given to her classification grievance at the final level of the grievance process, despite repeated requests for such information on her part. All other allegations of breach of the duty of fair representation are dismissed.

[147] Unless the parties notify the Board that they have come to an agreement as to the remedy directly linked to this particular breach of duty in the 90 days following the date of this decision, the Board's Director, Registry Operations and Policy is directed to schedule a continuation of the hearing of this complaint in order for me to hear the parties on the issue of remedy.

July 6, 2005.

Sylvie Matteau,
Vice-Chairperson