Date: 20070920

File: 561-02-74

Citation: 2007 PSLRB 100

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CHARLENE COX

Complainant

and

CLAUDE VEZINA

Respondent

Indexed as
Cox v. Vezina

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Complainant: Herself

For the Respondent: Tim Gleason, counsel

Heard at Vancouver, British Columbia,
July 4 to 6, 2007.

I. Complaint before the Board

[1] On September 1, 2005, Charlene Cox ("the complainant") filed a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*") in which she alleged that Claude Vezina, a representative employed by the complainant's bargaining agent, the Canadian Association of Professional Employees (CAPE), and CAPE itself ("the respondents") had committed an unfair labour practice within the meaning of section 185 of the *Act*.

[2] The complainant works as a paralegal in the Aboriginal Litigation Section of the Department of Justice and is located in Vancouver, British Columbia. Her position is classified in the Economics and Social Science Services Group at the SI-03 level.

[3] The sections of the *Act* to which the complaint referred read as follows:

. . .

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> . . .
>
> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> . . .

[4] The complainant summarized her allegation in a submission appended to her complaint form:

. . .

> *I make this complaint because I believe that CAPE , and its labour relations officer, Claude Vezina, handled my situation in a manner that was arbitrary and in bad faith. I was repeatedly threatened with termination yet Claude demonstrated a non-caring attitude towards my interests. He did not respond to my phone calls or emails. He filed 3*

> *grievances on my behalf but he never reviewed the material I sent him, he never discussed it with me nor did he ask me any questions. He did not make a presentation at any level of the grievance process. He told me he made a full presentation at the second level but . . . that was not true. At the final level I had to make my own presentation because Claude knew nothing about my situation and was unable to contribute anything. No evidence was presented by my manager throughout the grievance process. Claude took no action to obtain copies of any existing evidence so if there was any I was denied an opportunity to see it and to respond. Claude filed the grievances, after much persuasion, then I never heard from him. When the deputy minister's decision came down and I lost all 3 grievances, Claude told me nothing could be done. I later learned that that was not true. I was forced to seek the advice of a lawyer because my union refused to respond to my requests for information and to advise me of my rights. I knew there must be a limitation period and needed advice from someone as to what I could do, if anything, as soon as possible.*
>
> *I believe the union's inaction or superficial action shows a total abdication of its responsibilities, that the problem is not a lack of communication, but rather a lack of representation.*
>
> . . .
>
> [*Sic* throughout]

[5] As corrective action, the complainant asked that ". . . another labour relations officer be assigned to my file; CAPE reimburse me for legal fees; anything else the Board deems appropriate [*sic*]."

[6] Counsel for the respondents replied to the complaint on November 24, 2005. He denied:

> . . .
>
> *. . . all of the allegations levelled against them by the Complainant. In fact, the Respondents state that the Complainant received excellent representation and advice from the Union and all of its representatives . . . .*
>
> . . .

[7] The complainant replied to the submission from the respondents' counsel on December 9, 2005.

[8] The Public Service Labour Relations Board ("the Board") appointed a mediator in February 2006 to assist the parties in exploring the possibility of a voluntary resolution of the dispute. The mediation process was not successful.

[9] The Chairperson referred the complaint to me for hearing and determination in my capacity as Board Member.

[10] At a pre-hearing conference conducted on June 25, 2007, the complainant confirmed that her allegation concerned the duty of fair representation expressed under section 187 of the *Act*:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

During the pre-hearing conference, I explored once more, also without success, the possibility of resolving this matter on a voluntary basis.

[11] At the hearing, the complainant clarified that her allegations of a violation of section 187 of the *Act* applied only to Mr. Vezina ("the respondent") and not to the CAPE. I have, therefore, removed the name of the CAPE as a respondent in this matter.

II. Summary of the evidence

[12] The complainant and the respondent were the only witnesses at the hearing. The parties tendered a total of 54 exhibits.

[13] The complainant's testimony consisted substantially of her presentation of a written "Summary of Evidence" (Exhibit C-1) originally attached to Form 16 ("Complaint under Section 190 of the Act"). For the sake of brevity, I have reproduced this summary throughout the text below, adding further information from the complainant's oral evidence where appropriate, and identifying associated exhibits. In some areas, the complainant read from documents that she placed on the record and added very limited, or no, supplementary testimony.

[14] The complainant related that she had faced a very serious situation in her workplace after the employer had appointed two new managers. She related that these individuals displayed hostility towards her in meetings, yelled at her and accused her

of things that she had not done. She described the experience as "terrorism" or "workplace violence." Not knowing exactly what was happening to her, she turned to the Internet and discovered information on a phenomenon called "mobbing." From her perspective, the descriptions of "mobbing" that she found on the Internet described exactly what she was experiencing (Exhibit C-4).

[15] The complainant contacted her bargaining agent for assistance in dealing with the "mobbing" problem as well as in addressing other concerns. One of these concerns was a draft Performance Review and Employee Appraisal Report (PREA) prepared by her manager, Patrick Walker. She had two conversations with the respondent, who was located in Ottawa at CAPE headquarters, about these issues. According to the complainant, the respondent said he was not going to do anything. She then followed up with both the respondent's supervisor at the CAPE, Claude Danik, as well as with Bertrand Myre, who was Mr. Danik's acting replacement, providing them with further information about "mobbing" (Exhibits C-2 and C-3):

. . .

> *June 17, 2004 – email to Bertrand Myre at CAPE regarding my conversation with Claude Vezina, that he said he would file grievances for me, then later said he had no intention of doing so. I then forward my email to Claude Danik, supervisor of the labour relations officers, who responded that Claude Vezina was working with me. I responded that It would be nice to hear from Claude Vezina.*
>
> *June 22, 2004 – my email to Bertrand Myre at CAPE about my situation at work. and that Claude has still not contacted me.*

. . .

[16] The complainant testified that, despite assurances from these individuals that the respondent would provide assistance to her, he did not contact her. Meanwhile, Mr. Walker indicated to the respondent in an email dated July 12, 2004, that he was not prepared to alter the "Does Not Meet" rating in her PREA with which she disagreed. She again tried to contact the respondent for assistance in filing a grievance against her PREA (Exhibit C-4):

. . .

> *July 12, 2004 – I beg Claude Vezina to file the grievance. I also forward my email to Bertrand Myre because Claude Vezina had never been in touch with me.*

. . .

[17] On September 1, 2004, the complainant contacted a vice-president of the CAPE, Derek Brackley, to express concerns about the respondent's handling of her PREA grievance as well as of a second grievance concerning a written reprimand she had received in the interim. She testified that she had sent the respondent a detailed letter to assist him in challenging this disciplinary measure (Exhibit C-11). She emailed Mr. Brackley again on September 12, 2004, and reported to him that the respondent had laughed at and refused her request that he contact Mr. Walker to put a stop to the threats, harassment and "mobbing" that she was experiencing (Exhibit C-5):

. . .

> *September 1, 2004 – I email to Derek Brackley expressing concerns about Claude Vezina showing no interest in my situation and Derek responding that he will speak to Claude. I replied that I had been told by someone (at CAPE) that Claude would call Patrick and put a stop to how he was treating me but Claude refused. [*Note*: I had been told by several people that in the past that a phone call by the union to an abusive manager had been a very effective way of putting a stop to disrespectful treatment. I believe Bertrand Myre had been one of the people who did that for a CAPE member.*

. . .

[18] On September 12, 2004, the complainant received further discipline from her employer in the form of a two-day suspension without pay, and subsequently grieved this action (Exhibit C-12).

[19] The complainant continued to contact representatives of the CAPE about her situation (Exhibits C-6 and C-7):

. . .

> *September 14, 2004 – email to Claude Danik about how serious my situation is and that more needs to be done, and could the union have their lawyer do something. He responds*

> *that he will discuss it with Claude Vezina, and on September 18 I reply that I am terrified of being fired.*
>
> *September 17, 2004 – I email Derek concerned that Claude did not make a presentation at the first level nor did he submit any of my documents, and I wonder whether that is the practice. Derek responds that it is usual to not make a presentation at the first level when it is the immediate supervisor against whom a grievance is filed. [Note: in my case, the first level was the supervisor of my supervisor.]*
>
> . . .

[20] The complainant described what ensued in the grievance process, and the respondent's role in these events:

> . . .
>
> *October 21, 2004 – my email to Claude (Exhibit C-8) asking about the status of my grievances.*
>
> *November 15, 2004 – email from Claude (Exhibit C-9) asking for my grievances to be reactivated and all 3 heard at the same time.*
>
> *January 9, 2005 – my email to Claude (Exhibit C-10) asking him to call me with the results of the grievance presentation. January 15 – I have not heard from him so I follow up.*
>
> *January 17, 2005 – Claude tells me "I related the information on the files". Also attached are copies of the responses of B. Burns stating no information was presented and my union representative did not bring any additional information to her attention. The letters of reprimand, the grievances that were filed, and my letters to Claude Vezina enclosing my documents disputing the allegations against me are also attached. At no time throughout this process did Claude discuss with me the process, the documents I provided to him, he did not ask me any questions or clarify anything or ask for other documents. [*Note: *Less than a week before the presentation before the Deputy Minister in May 2005 Claude told me he had never looked at my documents.]*
>
> . . .

[21] On January 29, 2005, the complainant sent an email to a local CAPE steward, Mardie Campbell, whom she had consulted on occasion throughout the grievance process. Speaking of the second-level hearing, the complainant indicated that the

respondent had been "brilliant" in getting on the record an admission with respect to training, as evidenced by the second-level decision (Exhibits C-31 and C-35). The grievance process continued:

. . .

> *February 4, 2005 – email to Claude (Exhibit C-13) regarding trouble faxing forms to him. I also left him phone messages but he never responded*
>
> *February 19, 2005 – email to Claude (Exhibit C-14) asking for information about a presentation to the Deputy Minister.*
>
> *February 26, 2005 – email to Claude (Exhibit C-15) regarding our conversation that he had said I would be making the presentation to the DM, and that I do not know how. I also sent an email complaining about it to my shop steward, and she forwarded my email to Derek Brackley. Derek did not respond.*
>
> *May 4, 2005 – presentation of 3 grievances before the Deputy Minister. It was clear Claude had not reviewed any of the materials I sent him as he was unable to make a presentation. I had to do all the speaking and I was not prepared.*
>
> *May 25, 2005 – decision of the* [Associate] *Deputy Minister received (Exhibit C-16).*

. . .

[22] The Associate Deputy Minister denied the complainant's grievances against her PREA and the written letter of reprimand, but partially allowed her third grievance by substituting a written reprimand for the two-day suspension (Exhibit C-17).

[23] According to the complainant, the respondent told her in a follow-up conversation that she had no avenue for appeal against the Associate Deputy Minister's decision:

. . .

> *May 26, 2005 – email to Claude (Exhibit C-18), sent high priority, for him to call me. We spoke briefly, and all he said was there was nothing he could do.*
>
> *May 26, 2005 – I email Derek Brackley (Exhibit C-19) about the DM decision, and that Claude had said there was nothing that could be done, that there was no avenue to complain to*

> *the Public Service Commission, Federal Court or Labour Relations Board. I wonder whether Claude is being truthful with me. Derek does not respond and I follow up several times. Claude Vezina responds that my situation is not a case where the Federal Court would intervene as there are no grounds. [I do not agree. I was denied natural justice and Claude never attempted to obtain copies of whatever evidence my manager claimed to be relying on so that I could challenge it. The SCC has clearly stated that the employer must prove their statements.]*
>
> . . .

[24] The complainant then sought advice from an independent lawyer:

> . . .
>
> *June 7, 2005 – as my union refuses to do anything for me or to give me information, and seems not to care that I have 3 documents threatening to fire me and that I can now be fired without any reason, I meet with a lawyer to find out what my rights are and to see whether there is anything I can do.*
>
> *June 7, 2005 – I advise Derek and Claude that his comments are inconsistent with the Federal Court decisions I read and I ask for more information.* [*sic*] *I also advised that I had checked with a lawyer who advised I could appeal under the PSSRA, and that the PSLRB had advised me an appeal could go to them, but the union must bring it. My email was ignored (Exhibit C-22).*
>
> . . .

[25] On June 7, 2005, the complainant contacted Ms. Campbell to complain once again that no one at CAPE headquarters was responding to her about taking further action. The complainant told Ms. Campbell ". . . I think I have pestered them too much and now they are ignoring me" (Exhibit C-21):

> . . .
>
> *June 7, 2005 – I advise my shop steward that no one had responded to my emails. There was a time limit within which an appeal could be made, and the lawyer was going to help me do it myself, but the act says it must be done by the union.*
>
> . . .

[26] During spring 2005, the complainant was also in contact with the respondent concerning her contention that the complainant's position was underclassified at the SI-03 level:

. . .

> *May 9, 2005 – email to Claude (Exhibit C-22) regarding my job classification, filing another grievance, and the deadline.*
>
> *May 18, 2005 – email to Claude (Exhibit C-23) that I had left him messages and that it was too late to courier the grievance documents to me, that he would have to fax them. They were faxed to me May 19, 2005.*
>
> *May 24, 2005 – email to Claude (Exhibit C-24) advising him that a desk audit was not an objective review of my work. He did not respond.*

. . .

[27] The complainant filed two "classification" grievances, one against the SI-03 level of her position and the second claiming that her statement of duties was not complete and current:

. . .

> *June 10, 2005 – letter from Debbie Neergaard (Exhibit C-25) regarding my classification grievance. I never heard from Claude about his conversation with Debbie, or about this letter.*
>
> *June 10, 2005 – email to Claude, no response (Exhibit C-25).*
>
> *June 29, 2005 – I advise Debbie, copied to Claude, that I still have not heard from Claude (Exhibit C-25).*
>
> *July 22, 2005 – email from Donna Penney (Exhibit C-27) about setting up a meeting, and my response that I do not know the process or what documents are required, copied to Claude. No response from Claude.*

. . .

[28] On July 25, 2005, a classification policy advisor from the Department of Justice advised the complainant that management was proceeding to schedule a grievance committee meeting to consider her classification grievance (Exhibit C-28). The

complainant replied and indicated that another employer representative had agreed to the complainant's request to hold this matter in abeyance (Exhibit C-29).

[29] On August 9, 2005, the complainant informed CAPE headquarters that the respondent had replied neither to correspondence from the employer regarding her classification grievances nor to her own requests to him for information about the classification grievance process. She also outlined her detailed criticisms of the respondent's actions, or lack thereof, in representing her in respect of her three other grievances. She asked, in particular, that the CAPE assign another representative to assist her, and identified Claude Archambault as a possibility (Exhibit C-33):

. . .

> *August 9, 2005 – I received a letter from Ottawa about* [the classification grievance] *process, stating that I could be demoted. I sent an email to the president and vice-president of the union, and the supervisor of the labour relations officers, that I had not heard from Claude at all on this grievance, and I explained how he handled my other grievances. I request another labour relation's officer be assigned to my file, and to consider Claude Archambault*
>
> *August 12, 2005 – email response from Bertrand Myre that does not adequately respond to my concerns of Claude's failure to communicate with me or to take my situation seriously and my request for someone else to represent me.*

. . .

[30] On September 1, 2005, the complainant filed her complaint with the Board. The CAPE subsequently assigned Mr. Archambault to work with the complainant on her outstanding classification issues and on other matters (Exhibit C-34).

[31] Cross-examination of the complainant was extensive and provided further information about the history of the complainant's grievances and her interaction with the respondent. I have limited the following summary to the evidence that I have judged most important to determining how the respondent represented the complainant's interests, or that best illustrated the complainant's perspective on the problems she faced.

[32] The complainant responded to questions about the nature of her concerns about "mobbing" in her workplace (Exhibits R-2 and C-3) by confirming that she had

felt at the time that she contacted the CAPE for assistance that various of the lawyers around her were acting unethically and dishonestly, that they were responsible for creating a toxic work environment, that they had ganged up on her and persistently told lies about her. She agreed with counsel for the respondent that she believed at the time that at least 10 lawyers were engaged in a conspiracy against her. She conceded that she subsequently discovered through several access to information (ATIP) requests that there had not necessarily been a united front against her. However, she nonetheless maintained her contention that she ". . . was literally being terrorized."

[33] The complainant acknowledged that the PREA that had been the subject of her first grievance (Exhibit R-4) contained allegations that she had difficulties interacting with team members, outlined concerns about her communication skills and serious lack of dispute resolution skills, and also alleged that she frequently became defensive in the workplace and blamed others. She maintained that the PREA was entirely unfounded in all of these allegations.

[34] The complainant reconfirmed that she learned that Mr. Walker would not revise her PREA and that she then forwarded his response to the respondent in Ottawa on July 12, 2004, at 19:49., or 22:49 Ottawa time (Exhibit C-4). She asked him in the email: "Now will you file the grievance? PLEASE?" That same evening at 23:35 Vancouver time (02:35 in Ottawa) she sent a message to Mr. Myre at CAPE headquarters stating that:

> *. . .* [the respondent] *has never been in touch with me. Something had* [*sic*] *to be done about my situation, and it has to be done now . . . .*

[35] Questioned about the accuracy of her email to Mr. Myre, the complainant accepted that it was untrue and misleading to say that the respondent had "never" been in touch with her. She agreed that the respondent had advised her about how to reply to the earlier draft PREA and had told her that her draft comments on the PREA were fine. When asked whether the respondent had guided her to attach these comments to the final version of the PREA, she replied "I guess so," but then testified that she could not recall him advising her to prepare a response, and did not know whether she had taken the initiative on this point or had been told to do so by someone else. She stated that she had no recollection of several conversations with the respondent in which, according to counsel for the respondent, he had outlined a plan to proceed first by preparing a written response to the PREA, giving the manager the opportunity to make changes, and then, as necessary, by filing a grievance.

[36] Counsel for the respondent asked whether the complainant's charge that the respondent displayed an uncaring attitude toward her case was based on his alleged failure to respond to telephone calls and emails. She agreed that this was, in part, the reason. She stated that she did not know whether the respondent had not cared or had not understood her situation. She felt that he had not understood the literature on "mobbing" that she had referred to him. According to her, he had failed to respond to her contacts at a time when ". . . everyday I was going out of my mind, basically running around crying 'Help, help!'"

[37] The complainant concurred that the respondent had filed a grievance regarding the PREA within the time limit, and that he had never missed a time limit in advancing this grievance through to the final level. She testified that she could not recall that the respondent had sent her filing material on July 13, 2005, the day after the complainant's email to him forwarding Mr. Walker's final-level response. Counsel for the respondent then referred the complainant to her own letter of July 16, 2004, that acknowledged the respondent's immediate reply (Exhibit R-10). The complainant agreed that she had suffered no adverse consequences from the respondent's advice on when to file a grievance.

[38] The complainant testified that the respondent had filed, within the time limit, grievances on her behalf with respect to the classification of her position and her statement of duties (Exhibits R-7 and R-8). She later withdrew these two grievances because she ". . . just didn't know whether it was worth pursuing, and didn't think it could be a fair process." She concurred with counsel for the respondent's suggestion that her withdrawal of these grievances had nothing to do with the respondent.

[39] The complainant further agreed that the respondent had filed grievances within the time limit regarding both of the disciplinary measures she had subsequently received (Exhibits R-11 through R-13).

[40] Counsel for the respondent asked a series of questions about the complainant's contention that the respondent did not answer emails and telephone calls. She qualified her earlier testimony by saying that this was "generally true," that she ". . . believed it's accurate . . ." but had not said "every single one." According to her, the respondent ". . . did respond to a few, but the majority, no." When challenged to indicate how many times the respondent had failed to reply to her contacts, the complainant could not specify, but characterized the frequency of contacts as "the

bare minimum." She testified that she had not kept a record of the number of non-responses, and later that she ". . . was not saying that he never had discussions with me."

[41] The complainant acknowledged that, for example, the respondent had replied to her email sent on Saturday, January 15, 2005, on the following Monday morning (Exhibit C-10). Concerning a different occasion, she disputed whether the conversation that had occurred with the respondent could be called a "discussion" because a discussion ". . . involves more information and reasons." Regarding her statement in the email of June 7, 2005, that ". . . [n]o one is responding to me . . ." (Exhibit C-21), she agreed that the respondent had, in fact, replied, but that she had not known it at the time because the reply may have gone to her home email address. She accepted that her statement that ". . . they are ignoring me . . ." was not true and acknowledged writing at the time that perhaps she pestered them too much.

[42] The complainant agreed that she had spoken with the respondent about the employer's final-level reply to her first three grievances, but denied that he had provided any information on appeal options or on why these options would not work in her case. She insisted that the respondent had simply said "No" when asked about proceeding further. Pressed further on this point, the complainant first said that she could not recall whether the respondent had said that the *Act* prevented the union from advancing her case, but later maintained that he had not, and that she had only secured this information from her lawyer. Still later, she testified that "perhaps" the respondent may have told her, but that she had then followed up with her lawyer to obtain specific information. She stated that she had not believed the respondent's advice or had not been sure about it, and that ". . . it seemed [to her] that there must be something [she] could do . . . ." Later, she stated that it was not so much a case of not believing the respondent but, rather, a "trust issue."

[43] The complainant explained that she had wanted the CAPE to hire a lawyer to "smarten up" the lawyers in her workplace about her "mobbing" problem while, at the same time, the respondent pursued her grievances. The complainant agreed that she had written that the contact with the lawyers at work "had to be a lawyer" (Exhibits R-14 and C-6). She acknowledged that the respondent's supervisor had advised her to consider mediation as an approach to addressing her concerns (Exhibit R-15). She agreed that the respondent did discuss the mediation process with

her, that she agreed to participate, that the respondent proceeded to set up the mediation and did participate in the mediation session albeit without achieving a successful result.

[44] After the mediation failed, the complainant agreed that she had accepted the proposal to group her three grievances at the second-level hearing. She first vaguely recalled, but then said that she could not recall, discussing the approach to the second-level hearing with the respondent. She agreed that she had talked with the respondent about addressing training issues at the hearing, but would not say that this had been the agreed strategy. Asked whether the respondent had discussed his presentation with her both before and after the hearing, the complainant replied that she was not sure what the question meant, but conceded that there had been communication before and after. She insisted that the respondent did not make a full presentation to the employer at the hearing, but acknowledged that she had not attended, having changed her mind about participating at the last minute due to stress. She based her contention that the respondent had failed to make a full presentation on the wording of the employer's second-level reply (Exhibit C-35), although she accepted that this document did not say explicitly that there was "no presentation." She agreed that the document did say that, as a result of the respondent's presentation, the author had gone back and researched the training situation before rendering her decision.

[45] Regarding the final-level hearing on May 4, 2005, the complainant maintained that the respondent had said very little, introduced her and let her do all of the talking. She maintained that the respondent ". . . knew nothing about the material." She denied that they had earlier planned an approach to the hearing and discussed her role in talking about specific points. She said that she had been "shocked" by what had occurred. Shown an email dated two and one-half months earlier to the respondent, she agreed that she had known in February about the possibility of her making a presentation at the hearing and had expressed concerns about doing so (Exhibit C-15). Counsel for the respondent suggested that his client had then called the complainant in reply to her email and had indicated that he would make the presentation. The complainant did not accept this suggestion, but agreed that she had subsequently sent the respondent detailed information to help him prepare and that she had wished him "good luck" in his presentation (Exhibit R-2). She also agreed that the final-level reply

mentioned "documentation provided by your union representation" (Exhibits C-16 and R-18).

[46] Counsel for the respondent suggested that it was not true that the complainant had lost all three grievances as she maintained. The complainant replied that ". . . in [her] mind [she] lost and was still being punished." She nonetheless agreed that one of her grievances had been partially allowed, that the letter of suspension without pay had been removed and that she had been reimbursed for lost wages.

[47] The complainant again confirmed that the respondent had discussed with her what could be done about the employer's decision in response to her emails and telephone contacts after the final-level decision, but held to her contention that he had given her no details and "just said no." She disagreed that later communication from the CAPE had explained the reasons why the bargaining agent was not prepared to advance her grievances to adjudication or to the Federal Court (Exhibit C-33). She said that the response did not provide ". . . the specific reasons I was looking for." Counsel for the respondent put it to her that she had then gone to a lawyer because she did not like the answer she had received from the respondent (Exhibit C-19). The complainant denied this, stated that it was the failure of the respondent to provide reasons that had led her to seek independent advice, and indicated that ". . . it didn't make sense [to her] that there was nothing we could do." She indicated that she did not subsequently proceed with her lawyer to seek judicial review of the decision because he had told her ". . . he could do it but it would cost something like $20,000."

[48] In re-examination, the complainant introduced two ATIP requests that she had submitted on December 7, 2005, and the responses to these requests, to find out what documents had been presented by the respondent at the second-level hearing, what "notes of statements or questions" had been made by the employer about the respondent's presentation at the final-level hearing, and what documents had been supplied to the employer by the respondent after the meeting (Exhibits C-36 and C-37). I noted at the hearing the objection of counsel for the respondent to the admission of these documents on the grounds that, in the absence of the author of the ATIP replies as a witness, there would be no opportunity to test the meaning and validity of any statements contained in these replies. For purposes of this decision, I have determined that the two exhibits in question did not provide evidence on which I can rely.

[49] The respondent testified on his own behalf. He indicated that he had represented employees for several different bargaining agents for over 18 years, the last five and one-half with the CAPE. He outlined that each labour relations officer employed by the CAPE is assigned a portfolio of departments and agencies involving 2,000 to 3,000 members, 80 percent of whom work in the National Capital Region. The respondent's portfolio has included the CAPE's members in British Columbia for the last three and one-half years.

[50] The respondent recounted that his first involvement with the complainant occurred sometime in June 2004, when she contacted him regarding a PREA. He stated that he took the same approach to this contact as he takes with all PREA cases, advising the complainant to identify the issues of concern in the PREA and convey these concerns in writing to the responsible manager. He outlined that it was not the CAPE's practice to become involved in the actual drafting of such comments. If the manager did not amend the PREA to the satisfaction of the member, the CAPE would consult with the member about filing a grievance. The respondent testified that in the complainant's case, he departed somewhat from normal practice by agreeing to review the complainant's draft PREA comments before she sent them to the manager. He told her to allow one or two weeks for a reply. He indicated to her that, if the response was not positive, they would proceed to look at filing a grievance.

[51] The respondent maintained that he had had numerous conversations with the complainant throughout the ensuing grievance process and that these conversations had consumed an enormous amount of time. He stated that, in terms of the number of contacts and time spent, his experience with the complainant ranked in the top five of all situations he had known while at the CAPE, if not "number one." As to the allegation that he did not reply to many emails from the complainant, the respondent testified that his workload had made it difficult to respond to all emails in writing, that he preferred telephone conversations, which were more efficient, and that these conversations allowed him to discuss secondary questions posed by members and to supply more information.

[52] The respondent said that, in the case of the complainant, he had talked with her at least three times per week on average over a period of six to seven months, with many of the discussions lasting 45 minutes to an hour. Often, according to the respondent, the complainant raised the issue of "mobbing" during these conversations

and regularly sent him information about this phenomenon. Each time they discussed this problem, the respondent advised her that he needed her to document the facts of what occurred, that the CAPE's approach was to work within the redress procedures most appropriate to these facts, and that her situation suggested the possibility of filing harassment complaints. He indicated that she never supplied him with the detailed information that might support a harassment complaint. He believed that the complainant had gone ahead and filed complaints, but had not asked the respondent for representation in these actions.

[53] The respondent reported that he discussed the possibility of mediation with the complainant, given her concern that the grievance process was not moving fast enough. She initially resisted, but agreed after several conversations. The respondent also discussed with her grouping her three grievances, an option to which she did not object. Mediation occurred on November 2, 2004, but was unsuccessful. The respondent proceeded to contact the employer's staff relations officer to move forward with the grievance process. Both agreed that there was no need for a first-level reply and that the grievances be referred directly to the second level for hearing.

[54] The respondent had several discussions with the complainant in preparation for the hearing and had reviewed information provided by her. The respondent testified that he had felt, based on his experience with such cases, that the likelihood the employer's position would move at the second level was not high. He discussed how to approach the hearing with the complainant and suggested that, given the person who would be hearing the case, it might be best to focus in particular on training issues related to the complainant's performance evaluation. Several days before the hearing, the respondent talked with the complainant once more again outlining the proposed approach as well as the complainant's role in providing specific details during the course of the respondent's presentation. The complainant indicated that the approach was fine.

[55] The day before the second-level hearing, the complainant contacted the respondent to tell him that she did not want to be present because she was "stressed out" about the situation. They agreed that the respondent would proceed with the hearing according to the proposed approach.

[56] The employer's second-level reply denied the grievances (Exhibit C-35). The decision surprised neither the respondent nor, it seemed to him, the complainant.

They had together anticipated that the best chance for progress was at the final level, which is why the CAPE often recommends waiving the second step of the grievance process. They discussed what the respondent had presented to the employer at the hearing, and that the employer's representatives, for their part, had not raised any additional points. The complainant indicated that she was happy that the respondent had raised training as an issue and that training had been clearly mentioned in the employer's written reply. The complainant said nothing at the time that indicated any concern with what had transpired.

[57] In preparation for the final-level hearing, the respondent asked the complainant to prepare notes of the issues that she would like to have raised. He explained that they would follow the same approach to this hearing as previously discussed for the second level, with the respondent leading the presentation and asking the complainant to provide details on specific points. The respondent stressed that he never said to the complainant that it was her responsibility to make the presentation. In the days leading up to the hearing, the complainant provided the respondent with very detailed notes, which they discussed at length by telephone, with the respondent trying to identify which items among the many raised by the complainant were of greatest importance to her.

[58] The final-level hearing took place in Ottawa on May 4, 2005. The complainant participated by teleconference. The respondent testified that he opened the presentation and that on the first occasion he asked the complainant to comment, she started to talk and would not stop, doing exactly what the respondent had suggested she not do. He tried to intervene a number of times and guide the presentation forward according to their plans, but the complainant persisted. In the end, however, the respondent felt that the employer had received a thorough presentation of the three cases. As the hearing closed, the employer asked if the respondent would share a copy of the presentation. The respondent discussed this request with the complainant after the hearing and they agreed that he should do so. The respondent also discussed with the complainant a subsequent request from the employer for copies of three emails. The complainant assisted the respondent in supplying the requested information.

[59] Looking back over the whole process, the respondent offered his opinion that the amount of preparation and consultation that had occurred with the complainant

had been very substantial. She had sent him a great deal of material throughout the period which he had always reviewed. He had talked with her many times about this material and the information attached to her grievances files. Frequently during their conversations, the complainant had indicated her desire to file additional grievances against specific individuals in the workplace. The respondent had told her that he did not support that approach, but had said that she could file harassment complaints with his assistance if she provided a factual summary of her allegations. According to the respondent, the complainant did not do so.

[60] The complainant called the respondent several times after the employer issued its final-level reply (Exhibit C-16). According to the respondent, the complainant was obviously very unhappy about the decision and wanted to do something about it. The respondent explained the available redress options and why he did not feel that anything further could be done. He undertook, nonetheless, to discuss the situation with his colleagues at the CAPE and get back to her.

[61] The respondent's conversations with his supervisor, co-workers and counsel at the CAPE focused, in particular, on whether a grievance that originally challenged a two-day suspension without pay could be referred to adjudication, given that the employer had reduced the penalty to a written reprimand as a result of the final-level hearing. Several Board decisions appeared to suggest the negative, leading the CAPE representatives to a consensus that the complainant's grievance on this subject was not adjudicable. They also agreed that the option of judicial review was not viable, given that the employer's decision on the three grievances did not appear to be unreasonable, in error, based on bad faith or procedurally flawed.

[62] The respondent testified that he contacted the complainant, explained to her that the CAPE had examined all of the options and reached the conclusion that nothing more could be done. The complainant was clearly very unhappy with this news and asked whether the matter could, instead, be pursued with the Public Service Commission (PSC). The respondent outlined the PSC's role and why referring the matter to the PSC was not an option. He then suggested to the complainant that she might, nevertheless, want to explore the possibility of pursuing her cases before the Board or in the courts, without the CAPE's support. He advised her to contact these bodies to be certain about deadlines and filing procedures. The respondent recalled

that there was also some brief discussion about the complainant consulting her own lawyer.

[63] Asked about the complainant's contention that he had displayed a non-caring attitude towards her, the respondent denied the charge and suggested that it might, instead, reflect her belief that he had not "bought into" the "mobbing" issue. He stressed his conviction that the bargaining agent had to work within the available redress processes. The complainant wanted to address a conspiracy of "mobbing" by grieving against a long list of persons. The respondent instead counselled her to consider the option of harassment complaints, an option that the complainant never pursued with him. Asked whether, to his knowledge, Mr. Archambault had filed "mobbing" grievances on the complainant's behalf once he had been assigned to assist her, the respondent replied in the negative.

[64] In cross-examination, the complainant asked for specific details about the many conversations that the respondent testified he had had with her, and the concerns that they had discussed. The respondent outlined that the complainant had, for example, frequently called him after her meetings with her managers or with staff, and sometimes before these meetings as well. Often, she sought to have a bargaining agent representative attend these meetings or participate by teleconference. Much of the content of the meetings, as reported by the complainant, concerned work assignments and her workload. She also wanted to discuss her conviction that the employer was lying and trying to make her look bad at these gatherings. Other subjects of conversation between the complainant and respondent included comments from the employer about the complainant's communication skills, as well as her range of concerns relating to the workplace environment. The respondent reiterated that it was unusual for him to spend as much time on the telephone with a member as he had done with the complainant.

[65] Pressed for further specifics, the respondent reported that many of their conversations centred around the events that gave rise to the complainant's various grievances, particularly the grievance concerning her PREA. The respondent testified that the complainant had also wanted, on one occasion, to talk about a list of the supervisors against whom she wished to file grievances. As indicated earlier, the respondent said that he had explained to her the need for facts, supporting documents and witnesses as a basis for any specific action.

[66] The respondent conceded that there were occasions when he did not respond to emails from the complainant that followed their telephone conversations, because he felt that she was asking the same questions and raising the same issues that they had already discussed. He also stated that he felt the complainant's approach was always to attack the department as much as possible in an effort to make it look bad. The respondent believed that the CAPE would not entertain the "mobbing" grievances as she urged, but would continue to use the best avenues available to it to pursue the complainant's concerns where the facts supported action. He noted that the CAPE had over time filed at least 10 grievances on the complainant's behalf on this basis.

[67] The complainant asked whether the respondent had ever met with the complainant's supervisor, Mr. Walker. The respondent answered that he had not.

[68] Questioned why it would not have been worthwhile to convene a first-level hearing for the complainant's grievances, the respondent replied that they had discussed the process in detail and clearly agreed not to use the first-level process. He reported that the complainant herself had said that management would never change anything at the first level.

[69] The respondent stated that the approach he advised for the second-level hearing was the usual approach he took with most cases. His practice was to work with the member in preparing for the hearing, to go through every document supplied by him or her, to take the lead at the hearing and guide the employer through the principal elements of the case, and to ask the member to comment on specific issues as appropriate. The respondent testified that the complainant had indicated during their preparatory discussions that training was the main area of focus, since she felt that her manager was lying about this issue. The respondent reported that the complainant had expressed to him her opinion that, if they were able to get the training issue on the record, it would provide support for the case at the next level. In response to further questions about the actual conduct of the hearing, the respondent stated that he had led the employer through the information that the complainant had given him, with a specific focus, as agreed, on the training matter.

[70] The complainant asked the respondent whether he had ever reviewed the documents she sent him for the final-level hearing (Exhibit R-2). He replied that he had indeed done so, that they had discussed these documents on two or three occasions and that she had made revisions to the documents on his suggestion. He had

highlighted areas with her in the documents on which they should focus at the hearing, and she had agreed. He confirmed that he had prepared brief notes for his presentation based on her documents and on their discussions.

[71] The respondent repeated that the complainant had taken the opportunity of his first invitation to her to comment at the final-level hearing to go on and on despite his efforts to intervene. It was clear to him that she had wanted to read everything that was in her documents and that she did, in fact, take the opportunity to say everything she had wanted to say. In a telephone conversation after the hearing, the complainant told the respondent that she was quite happy about the presentation.

[72] The complainant asked the respondent whether he had requested any Federal Court decisions when he reviewed her recourse options with his colleagues at the CAPE. The respondent recalled examining two decisions at the time and reported that he had discussed the case law, as well as the *Act*, with his colleagues. Pressed to identify the specific decisions he had consulted, the respondent answered that he did not believe that he had an obligation to provide the decisions to the complainant.

III. Summary of the arguments

A. For the complainant

[73] The complainant referred me at the outset of her argument to the Supreme Court of Canada's leading decision in *C.M.S.G. v. Gagnon*, [1984] 1 S.C.R. 509, in which the Court described a union's obligation "to fairly represent" in the following manner:

. . .

> *. . . The representation must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee. When, as is true here, 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. This discretion, however, 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 of its consequences for the employee on the one hand and the legitimate interests of the union on the other. In short, the union's decision must not be arbitrary, capricious, discriminatory or harmful.*

. . .

The Court went on to note favourable commentary from the British Columbia Labour Relations Board (BCLRB) in *Rayonier Canada (B.C.) Ltd. v. International Woodworkers of America, Local 1-217*, [1975] 2 Can LRBR 196, at 201-2:

. . .

> *. . . The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex . . . or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

. . .

[74] The complainant provided to me definitions of the terms "arbitrary" and "bad faith" that she said were taken from the website of the BCLRB:

> *A union acts arbitrarily when handling a grievance if its conduct is superficial, capricious, indifferent or in reckless disregard of an employee's interest.*
>
> . . .
>
> *Bad faith involves decisions influenced by personal hostility, revenge or dishonesty.*
>
> [Given orally by the complainant]

The complainant argued that the respondent's conduct fit within these definitions.

[75] The complainant also offered as guidance *Campbell v. Teamsters Local Union 938 v. United Parcel Services Canada Ltd.*, [1999] CIRB no. 8, which found a breach of the duty of fair representation based on the union's lack of communication with the complainant and its failure to investigate his case fully.

[76] The complainant described her situation in the workplace as unusual and serious (Exhibits C-3 through C-6), reflective of a phenomenon called "mobbing" that she had researched using online reference sources: *"Now There's a Name For It: 'Mobbing' in the Workplace"*, http://www.womans-net.com/ and http://en.wikipedia.org/wiki/Mobbing. According to the complainant, her experience as a victim of "mobbing" started when a

new lawyer was appointed to a management position in her workplace. The serious problems that ensued caused the complainant to contact her bargaining agent for assistance.

[77] The complainant argued that the evidence, taken as a whole, established that the respondent did not take the complainant's situation seriously, and that his representations on her behalf were superficial and his attitude indifferent. She noted the respondent's statement in his testimony that he did not "buy into mobbing," and also that he thought the complainant's situation was "funny." As the complainant had tried to secure the respondent's assistance to deal with her problems, the latter had not responded to telephone calls and emails (Exhibits C-2, C-3 and C-22), and had not kept her advised of the status of her grievances (Exhibits C-7, C-8, C-10, C-19, C-22, C-23, and C-25 to C-27). According to the complainant, they had very few discussions throughout the grievance process, and the respondent would not make "even a single telephone call" to her manager to see whether he could put a stop to the alleged mobbing problem. She asserted that the respondent did not hear her desperate pleas for help (Exhibits C-4 and C-6).

[78] Though the respondent completed the necessary paperwork to file the complainant's initial three grievances, he filed two of them right before the limitation date (Exhibits C-2 and C-23). The grievance process was very slow, leading the complainant to think that the assistance of a lawyer might help improve her work environment, as the lawyers causing her problems in her workplace might be more likely to listen to another lawyer. The respondent and the CAPE did not agree to the complainant's request for a lawyer.

[79] The evidence shows that the respondent did not make presentations at the hearings on the complainant's three grievances. His testimony that he did make full presentations (Exhibit C-10) was not truthful. Though the complainant sent documents to the respondent in preparation for the hearings, no documents were presented at the hearings. There is no record of any notes, statements, or questions presented by the respondent before or during the second-level hearing, nor were any documents provided to him by the employer (Exhibit C-37). The same pattern applied at the final-level hearing. Only after the final-level hearing did the respondent provide any documents to the employer, and then only the draft material prepared by the

complainant (Exhibit C-36). For his part, the respondent did not provide any work product, notes, summaries or anything else he might have prepared.

[80] During cross-examination, the respondent again and again failed to provide any specific information in support of his claim that he had had many long conversations with the complainant during the grievance process. Though he stated that he had received requests from the complainant to file numerous grievances, he gave no evidence to prove his statement. It did not happen.

[81] It is clear from the respondent's testimony that he takes his direction from the employees he represents and neither assumes control of the process nor advises the employees of their rights. The respondent spoke of a strategy at the second-level hearing to focus on the issue of training, but the evidence does not support this contention. Given the work environment faced by the complainant, it is not believable that there would have been an agreement, as the respondent alleged, to focus only on training. Regarding the final-level hearing, the respondent was unable in cross-examination to identify the key points he had made in his presentation. He testified that the complainant had refused to stop talking and had not followed the plan, but there was no information about such a plan and no evidence of any documentation used at the hearing other than the material prepared by the complainant herself. While the respondent stated that there was considerable unnecessary information in this material, he nevertheless forwarded it to the employer after the hearing. He also testified that he forwarded other documents on May 11, 2005, but he produced no evidence to support this allegation.

[82] When the final-level decision was received, the complainant spoke to the respondent about avenues for appeal. The respondent said there were none (Exhibit C-19), provided no reasons for this conclusion and no information to the complainant about her rights or about why he said this. He said it was up to the complainant to make further inquiries, to explore her rights and decide for herself what to do. Because the respondent was not forthcoming, the complainant had no choice but to speak to a lawyer about her rights.

[83] According to the complainant, she sent the respondent many emails and letters with respect to the complainant's classification grievances. Because the respondent never replied to any of these, the complainant was forced to represent herself. Ultimately, she asked the employer to hold the grievances in abeyance (Exhibits C-37,

C-29 and C-30), where they remained until she later advised Mr. Archambault, who had replaced the respondent, not to proceed with them (Exhibit R-9).

[84] The complainant concluded her argument by stating that she was very happy with Mr. Archambault's subsequent work on her behalf, that there had been dramatic changes in her workplace as a result, but that she lived in fear that his temporary assignment to her case would end. She asked that I issue an order requiring that Mr. Archambault remain her representative. The complainant also asked that I order reimbursement of the $444.60 in legal expenses that she incurred.

B. <u>For the respondent</u>

[85] The respondent's representative stated that he had no quarrel with the case law cited by the complainant, or with the BCLRB definitions of the terms "arbitrary" and "bad faith" that she offered. He argued that there was no evidence that the respondent breached any duty to represent the complainant fully and fairly according to the standards described in the jurisprudence.

[86] According to the respondent's representative, the following facts are not in dispute and form a conclusive basis for dismissing the complaint: the respondent filed all of the complainant's grievances and did so within the prescribed timelines; he advanced all of the grievances through the steps of the grievance procedure as required by the collective agreement; he participated in a day-long mediation in an effort to resolve all of the grievances, and participated in grievance hearings at the second and final levels; and he never compromised the complainant's ability to pursue her cases.

[87] It was also undisputed that, after receiving the final-level decision, the respondent had considered all of the relevant circumstances and consulted with his bargaining agent colleagues, with his supervisor and with counsel. Based on this process, he made a reasoned decision that the bargaining agent would not pursue the complainant's grievances to adjudication or to judicial review. The Board should not look behind the correctness of this decision. What matters is that the respondent did not act arbitrarily in making his decision.

[88] The respondent had advised the complainant both orally and in writing of the decision not to proceed further. He gave reasons for the decision, indicating to her that

the *Act* prevented the CAPE from proceeding to adjudication to challenge the results of the final-level decision. He informed her that she could pursue her case on her own and advised her that she should verify applicable time limits with the Board or the Federal Court. He discharged his duty to the complainant. The evidence shows that the complainant had, in fact, already sought independent legal advice, informed the respondent that she had done so, and told him that she knew about her rights and about time limits (Exhibit C-19). Her own testimony confirmed that she chose not to pursue her case any further because of cost, and not because of anything that the respondent did or did not do. On these facts alone, the Board can, and should, dismiss the complaint. Nothing in the respondent's actions prejudiced the complainant's rights. It was her decision not to proceed further on her own. It was her decision to obtain independent legal advice. Paying for that advice is not part of the CAPE's obligation under the *Act*.

[89] Counsel for the respondent argued that the "mobbing" literature introduced by the complainant has very little evidentiary value, if any, other than to illustrate that the complainant was obsessed with the idea of "mobbing" and could not distinguish between what she read online and her own work situation. When the respondent asked the complainant to identify the specific facts of her treatment in the workplace, she did not do so, and thus failed to advance a basis on which the bargaining agent could pursue concrete action. The respondent discussed with the complainant the option of filing harassment complaints with the support of the bargaining agent in preference to grievances concerning "mobbing," but she never supplied the relevant facts and never pursued this option. The bargaining agent rightly focused on those areas where the complainant did provide a factual basis for action, and pursued her concerns and interests diligently through the redress processes that were appropriate given the facts.

[90] The complainant made many allegations about the respondent's representations on her behalf, or lack thereof, none of which were supported by the evidence.

[91] The complainant stated that the respondent thought her situation was "funny," but this allegation depends upon accepting an account given by the complainant in an email (Exhibit C-5) that had nothing to do with the respondent and was not copied to him.

[92] The complainant alleged that the respondent would not make a single call to her manager (Exhibit C-6). There is no evidence that the complainant ever asked the respondent to take such action. It was clear, instead, that she had wanted to have a lawyer contact her manager. In her words, ". . . it has to be a lawyer."

[93] The complainant argued that she had made several desperate pleas for assistance that the respondent had ignored, but the exhibits to which she referred to support this contention (Exhibits C-4 and C-6) were neither addressed to the respondent nor copied to him. When the complainant asked the respondent to file grievances on the PREA, the written reprimand and the two-day suspension without pay, he did so immediately.

[94] The complainant maintained that she was forced by the respondent's inaction to represent herself in respect of the classification grievances. The evidence established that the complainant knew that the CAPE was pursuing a common strategy to deal with the classification issues raised by all of its members at the Department of Justice. The evidence further proved that the complainant subsequently withdrew her classification grievances because they had no merit. The complainant testified that this decision had nothing to do with the respondent. On this basis alone, any complaint concerning the respondent's handling of the classification grievances must fail.

[95] The complainant charged that there was no agreement to waive the first level of the grievance procedure and that the respondent did not make presentations on her behalf at the second and final levels. To the contrary, there was uncontroverted evidence of a waiver agreement at the first level, made with the complainant's knowledge and consent. The evidence also confirms that the respondent did make presentations at the hearings and did present documents (Exhibit C-16). As to the allegation that there was no record of any notes, statements or list of questions prepared by the respondent, or of the documents forwarded by the respondent to the employer on May 11, 2005, the complainant never asked him to produce these materials. It was the complainant's onus to prove these allegations, but she did not.

[96] The complainant rejected the respondent's testimony that he had had numerous conversations with her during the course of processing her grievances, but the only evidence offered by her in rebuttal was her saying so. Here, the issue of witness recall is crucial. On many occasions, the complainant's testimony was vague about her interaction with the respondent. In response to questions in cross-examination, she

repeatedly answered that she could not recall specifics or that she depended only on what the exhibits said and not on her memory. The respondent, by contrast, recalled very clearly that there were many conversations. In terms of frequency and length of contact, the respondent testified that his experience with the complainant was "in the top five" of all members he had dealt with during his time with the CAPE. The complainant herself referred to the fact that she "pestered" the respondent. On the issue of the frequency of contacts, the Board must prefer the respondent's clear recall to the complainant's vague testimony and lack of recall.

[97] The complainant disputed the respondent's testimony that they had agreed that he would focus on the training issue at the second-level hearing. However, after the second-level hearing, the complainant wrote that the respondent was "brilliant" at the hearing, as he had succeeded in placing on the record aspects of the training issue. To be sure, the complainant never complained about the respondent's performance at the second-level hearing, or about his other representations, until more than six months had passed, after the respondent and the CAPE decided not to pursue her case following the final-level decision. Clearly, the complaint was lodged in reaction to this decision, and was not about the respondent's earlier representations.

[98] Counsel for the respondent provided me with evidence that, in his view, showed that the complainant was frequently unreasonable in her expectations of the respondent. He outlined as an example the complainant's reaction on July 12, 2004, when she received an email from Mr. Walker in which he indicated that he would not change the "does not meet" rating in her PREA (Exhibit C-4). She sent an email to the respondent that evening at 19:49 that read, "Now will you file the grievance? PLEASE?" Less than four hours later, at 23:35 — in the middle of the night for the respondent, given the time zone difference — the complainant emailed CAPE headquarters stating:

. . .

> *I am forwarding this to you because Claude has never been in touch with me. Something has to be done about my situation, and it has to be done now . . . . I do not want to have a nervous breakdown but I am very close. Would someone please call me . . . .*

. . .

The complainant immediately went over the respondent's head to complain, did not copy the email to him and yet expected him to respond. In cross-examination, the complainant conceded that her allegation that the respondent "never" responded was false.

[99] The respondent's representative objected strenuously to the complainant's statement that there was "dramatic workplace change" after Mr. Archambault was assigned to her case. No evidence was tendered by the complainant to support this statement, and no opportunity was given the respondent to cross-examine on matters, such as this, that occurred after the complainant filed her complaint. Had subsequent developments been at issue in the evidence, the respondent would have led evidence to establish, for example, that the CAPE is currently pursuing an action before the Federal Court on the complainant's behalf.

[100] The totality of the complainant's evidence indicates that she is unreliable, unreasonable, prone to exaggeration and misstatement of the facts, prone to blaming others when she does not get her way, and prone to making allegations about the respondent falsely without first dealing with him or even copying her emails to him. She was not a credible witness and, as shown above, did not substantiate her allegations. The respondent's testimony, on the other hand, was marked by a clear recall of events. He fully, fairly and completely represented the complainant. He had regular contact with her. He regularly gave her advice and guidance. He provided comprehensive representation at a level beyond the requirements of the duty of fair representation.

[101] The respondent's representative referred me to the following case law: *Ford v. Public Service Alliance of Canada*, PSSRB File No. 161-02-775 (19951218); *Cloutier and Rioux v. Turmel and Public Service Alliance of Canada*, 2003 PSSRB 12; *Hébert v. Public Service Alliance et al.*, 2005 PSLRB 62; *Archambault v. Public Service Alliance of Canada*, 2003 PSSRB 56; *Richard v. Public Service Alliance of Canada*, 2000 PSSRB 61; and *Kowallsky v. Public Service Alliance of Canada et al.*, 2007 PSLRB 30.

[102] According to the respondent's representative, the case law reveals the basic principles observed by the Board in deciding complaints alleging unfair representation by a bargaining agent: A complainant has no absolute right to have his or her preferred course of action pursued by the bargaining agent. The only question that matters is whether the bargaining agent has acted in a discriminatory or arbitrary manner or in

bad faith. Whether or not the complainant disagrees with a decision taken by his or her bargaining agent, or its conclusions or strategies, is irrelevant. If the bargaining agent has considered the relevant circumstances, it is entitled to weigh a number of factors in deciding whether and how far to represent an employee. The Board allows the bargaining agent wide latitude in exercising this discretion.

[103] The respondent's representative concluded that the Board should not find any indication in the evidence of a lack of communication on the part of the respondent with the complainant. She did not prove any allegation of bad faith or any issue of revenge or bad motive. There was, in summary, no violation of the *Act*. The Board should dismiss the complaint.

C. Complainant's rebuttal

[104] The complainant rebutted the respondent's arguments by making a series of statements among which were the following: there was no evidence that the complainant was obsessed with "mobbing" or that she was unable to distinguish reality from the Internet; the fact that the respondent did not buy into "mobbing" showed his indifference to the complainant's situation; the complainant was not told about any national strategy for handling classification grievances at the Department of Justice until much later; the evidence proves that the complainant did not know about a strategy to focus on the training issue at the second-level hearing, or about any strategy; it was not the case that there were many communications between the complainant and the respondent as the respondent alleged; the complainant was never given the opportunity to challenge the factual basis of the employer's decisions; the respondent's allegations about the complainant's character had no basis in the evidence and are not the issue; the respondent did not give the complainant any details or rationale about his decision not to proceed to adjudication or to the courts; the complainant did not know her rights; the respondent's failure to meet with Mr. Walker represented an element of arbitrariness; there was no evidence to support the contention that the complainant was in "the top five" in terms of time spent by the respondent with members; and the respondent exhibited bad faith when he stated that presentations took place when they did not.

[105] In response to the respondent's argument that the complaint was only filed because the respondent decided not to proceed further with the grievances after the final-level reply, the complainant stated that her complaint ". . . arose primarily from

the respondent's handling of her classification grievances." She reconfirmed that she was alleging bad faith in the respondent's actions. As to the allegation of arbitrariness, she cited the respondent's decision not to proceed to adjudication or to the courts, his failure to respond to telephone calls and emails, and his failure to advise her of the status of her grievances as the elements of "arbitrariness."

IV. Reasons

[106] The complainant has alleged that the respondent violated section 187 of the *Act*. Section 187 prohibits a representative of a bargaining agent from conducting representations on behalf of an employee in a bargaining unit in a manner that is arbitrary, discriminatory or in bad faith:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[107] At the times material to her complaint, the complainant was an employee in a bargaining unit certified by the CAPE. The respondent was a representative of the bargaining agent and was authorized and assigned to represent the complainant.

[108] During the course of the hearing, the complainant alleged that the respondent's representations on her behalf were both arbitrary and in bad faith. She did not allege discrimination on his part. The complainant's onus in her complaint, therefore, was to prove, on a balance of probabilities, that the respondent represented her in a fashion that was either arbitrary or in bad faith, or both.

[109] In a growing line of decisions, the Board has adopted broadly consistent standards in weighing evidence in complaints under section 187 of the *Act*, as did the former Public Service Staff Relations Board under a similar provision of the *Public Service Staff Relations Act* (subsection 10(2)). The Board's decisions have followed closely the seminal guidance given by the Supreme Court, starting in 1984 in *Gagnon*. The standards were summarized recently in *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13:

. . .

[49] The judgment in Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, is commonly used to explain the principles underlying the duty of fair representation:*

. . .

> 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 of 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. (at 527).

. . .

[50] A subsequent judgment of the Supreme Court of Canada, Centre hospitalier Régina Ltée v. Québec (Labour Court)*, [1990] 1 S.C.R. 1330 at 1349, discussed these principles in more detail at para. 38:*

. . .

> 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 weigh these divergent interests and adopt the solution which it feels is fairest.

. . .

> *[51] The decision of* James W.D. Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000 *(2003), 91 CLRBR (2d) 33 (BCLRB),citing an earlier decision,* Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can LRBR 196 (BCLRB), is also instructive. The actions of a union must not be in bad faith in the sense of personal hostility, political revenge or dishonesty. There can be no discrimination, including unequal treatment of employees, whether on account of such factors as race and sex (which are prohibited grounds under the* Canadian Human Rights Act*) or simple personal favouritism. And a union cannot act arbitrarily by disregarding the interests of one of the employees in a perfunctory manner. Rather, a union ". . . must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations."* (Rayonier*, at page 201-202).*
>
> *[52] Finally, Judd summarizes the difficult judgment that a bargaining agent must make:*
>
> . . .
>
> > ***42.*** When a union decides not to proceed with a grievance because of relevant workplace considerations - for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit - *it is doing its job of representing the employees.* The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of *[the duty of fair representation].*
>
> . . .
>
> [Emphasis in the original]

[110] I wish to underline, as in *Ford*, that the Board does not normally inquire into whether a decision made by a bargaining agent in representing an employee was correct. It examines the process by which the bargaining agent made its decisions, as well as its conduct along the way to those decisions, according the bargaining agent

considerable latitude throughout. As emphasized in *Archambault*, the results or outcomes of the bargaining agent's actions weigh heavily in the Board's inquiry. In essence, the Board asks whether the bargaining agent's actions harmed or prejudiced the employee.

[111] For the reasons outlined below, I have found that the complainant did not meet her onus to prove, on a balance of probabilities, a violation of section 187 of the *Act*. A reasonable observer with labour relations experience might "second guess" some of the decisions made by the respondent in the course of his representations on the complainant's behalf. In my view, however, nothing that the respondent did at the key stages of the grievance process, or his actions taken in their entirety, are sufficient grounds for a finding of arbitrary conduct or conduct in bad faith.

[112] In what follows, I examine separately the two groups of grievances in which the respondent was involved: the first composed of the three grievances concerning the complainant's PREA, her written reprimand and her two-day suspension without pay; the second composed of the two classification grievances. I then turn to discuss the complainant's statements concerning "mobbing."

A. <u>The three grievances</u>

[113] The basic facts before me depicted a grievance process for the initial three grievances that moved through its normal stages at a slow, though not atypical, pace, and without untoward incident. The grievor received a PREA dated June 4, 2004 (Exhibit R-4), with which she disagreed. On June 24, 2004, the complainant expressed her concerns about the PREA to her manager (Exhibit C-4). On July 12, 2004, the complainant learned that her manager would not accept the changes to the PREA that she had requested (Exhibit C-4). The complainant then contacted the respondent, who then filed a grievance on the complainant's behalf against the PREA. According to the evidence, filing occurred within the required time limit.

[114] The employer issued a letter of reprimand to the complainant on July 27, 2004 (Exhibit R-12). The complainant submitted a grievance against the employer's action on August 24, 2004, with the supporting signature of the respondent (Exhibit R-12). This filing also respected the required time limit. On September 14, 2004, the employer levied a two-day suspension without pay on the complainant (Exhibit R-13). The complainant once more grieved and her grievance was signed by the respondent on

September 20, 2004 (Exhibit R-16). As with the two previous grievances, the evidence is that the time limit for filing the third grievance was observed.

[115] On a date not specified in the evidence, the respondent and an employer representative agreed to waive the first-level hearings for some or all of the other grievances (there is some imprecision in the evidence on this point) and further agreed to group all three grievances at the second level of the grievance procedure (Exhibit C-9). Then, on November 2, 2004, the parties met in mediation in an attempt to resolve voluntarily the issues in dispute. Mediation failed. No evidence adduced at the hearing suggested any procedural irregularities in the transmission of the grievances through to the second level, or in the mediation exercise. Nothing indicated that the failure of mediation was attributable to actions on the part of the respondent.

[116] The respondent met with the employer for a second-level hearing on the three grievances on January 11, 2005. The employer issued its second-level reply on January 25, 2005, denying the grievances (Exhibit C-35). The grievances were referred to the third and final level within the required time limit. The employer convened the final-level hearing on May 4, 2005, which was attended by the respondent, and issued its reply on May 19, 2005 (Exhibit C-16). The reply maintained the employer's decision on the PREA and the letter of reprimand, but partially allowed the grievance on the two-day suspension without pay, substituting the lesser penalty of a letter of reprimand (Exhibit C-17).

[117] On June 17, 2005, the respondent informed the complainant that the CAPE could not refer her case to adjudication, and that he had concluded, after discussion with his colleagues, that there were no grounds on which the CAPE could rely to seek judicial review of the employer's final-level decision (Exhibit C-19).

[118] On these basic facts, was there any evidence of arbitrariness or bad faith, or of harm or prejudice to the complainant? In my view, there was none. The complainant's cases proceeded through the steps of the grievance procedure in a fashion that, I believe, most labour relations practitioners would find to be normal. The agreements to waive the first level and then to group the three grievances for purposes of the second level do not appear to have posed any problems, nor has any case been made that the decisions made regarding the process violated the collective agreement. There was no evidence that deadlines were missed or procedural errors committed. In the end, the procedure resulted in the employer partially allowing one of the

complainant's three grievances. As of the respondent's email of June 17, 2005, to the complainant, the complainant remained in a viable position to decide whether or not to proceed further, albeit without the support of her bargaining agent. She testified that she had decided not to go forward, and that this was primarily due to the estimated cost of doing so on her own.

[119] The respondent argued that the Board can and should stop at this point and find, on the basic undisputed facts, that the complaint is unfounded. To the extent that *Archambault* and other similar decisions have suggested that it is the results that ultimately count, the respondent's argument has merit. The complainant did receive partial relief through the grievance procedure. The respondent conducted the complainant's cases through the grievance process without any untoward incident or error. At the end of his involvement, the complainant retained whatever legal rights to further redress that were available to her in those circumstances. She could have chosen to continue. Instead, she decided voluntarily and independently, after further discussions with her lawyer, not to refer the matter to adjudication or apply for judicial review.

[120] That said, I do not agree with the respondent that there is no need to go further. The complainant made a number of allegations about the respondent's conduct in the course of the grievance procedure. These allegations included charges that the respondent never, or seldom, replied to the complainant's telephone calls and emails, that he did not provide her with the advice that she needed, that he did not keep her abreast of the status of her grievances, that he did not make presentations on her behalf at the two grievance hearings, that he did not provide her with reasons for his decision not to proceed further, and that he did not ensure that she was informed about her rights to further recourse. Although there can be no automatic presumption that any of these allegations, if proven, would necessarily establish a breach of section 187 of the *Act*, it remains necessary, in my view, to consider whether the evidence led in support of these allegations reveals any elements of arbitrariness or bad faith sufficient to support a complaint.

[121] In assessing those allegations, I have little more than the complainant's oral testimony and the diametrically opposed testimony of the respondent on which to base a finding. Some of the documents tendered as exhibits helped to establish the history of the case and something about who said what, to whom and when. Beyond

that, concrete corroborating evidence was scant. Much, then, depends on my assessment of the credibility of the two witnesses.

[122] My finding with respect to witness credibility rests both on the comportment of the complainant and the respondent while testifying, and on the classic test of credibility described in the widely cited case of *Faryna v. Chorney*, [1952] 2 D.L.R. 354, at 73:

. . .

> *. . . In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions. . . .*

. . .

[123] On these bases, I prefer the respondent's testimony. I found very troubling at the hearing the number of occasions in cross-examination on which the complainant indicated that she could not recall events from her own memory. Much of her testimony appeared to depend directly and exclusively on what was written in the exhibits. Repeatedly, when asked to set an exhibit aside for a moment and search her own memory, she could not or would not do so. Asked what happened at particular points in her interaction with the respondent, she persisted in pointing to what was written in exhibits as if these documents were the only source of her recollection. In argument she criticized the respondent for not recalling the specifics of what he had said to her or to the employer in different encounters, yet, in her own testimony, she was often unable to remember details. Equally troubling were the occasions on which the complainant changed her testimony, sometimes giving several different responses when counsel for the respondent repeated questions on the same point.

[124] The respondent, by contrast, readily recalled his interaction with the complainant throughout the period during which he handled her grievances. His answers, particularly in cross-examination, were clear, measured and consistent. While he could not, at several points, provide full details as to what exactly he had said either to the complainant or to the employer, he never wavered from the basic themes of his testimony. His recall neither depended on the documents before him nor revealed any significant inconsistency with what was depicted in those documents.

[125] Applying the *Faryna and Chorney* test, I am confident that a practical and informed person would find the respondent's testimony more in harmony with the preponderance of the evidence at hand, viewed reasonably, than they would the complainant's testimony. Consider, for example, the complainant's allegations that the respondent never, or seldom, answered her contacts, advised her, or kept her abreast of what was happening with her grievances. If these allegations were accurate, most, if not all, of the following actions or steps would have to have occurred without reciprocated contacts, either verbal or written, and without discussion: i) reviewing the complainant's comments on the PREA; ii) reviewing the letter of reprimand; iii) reviewing the letter conveying the two-day suspension; iv) formulating and signing the grievance presentation form on each of these matters; v) transmitting the grievances to the second level; vi) arranging the mediation; vii) arranging the second-level hearing date; viii) determining the approach to the second-level hearing; ix) assessing the second-level reply from the employer; x) transmitting the grievances to the final level; xi) arranging the final-level hearing date; xii) determining the approach to the final-level hearing; and xii) reviewing the final-level reply.

[126] I believe that the practical and informed person invoked in *Faryna and Chorney* would find that the respondent had to interact with the complainant for these purposes and did so on multiple occasions. The most basic exigencies of processing the complainant's grievances required more than "rare" contacts. At the very most, our practical and informed person might conclude that the respondent did not always answer the complainant's telephone calls and emails — something that he conceded in his own testimony — but that, on balance, the complainant overstated the difficulties she encountered in interacting with him.

[127] I find that the respondent's testimony was more harmonious with the realities of accomplishing the work that did occur, as well as with the rest of the evidence viewed as a whole. The respondent testified that he spoke with the complainant on average at least three times per week over a six- to seven-month period. He indicated that the frequency of these conversations was in "the top five" of his experience with the CAPE's members, "if not number one." This testimony accords well with the probable behaviour of a member who felt herself facing a persisting crisis in her workplace and who turned repeatedly to her bargaining agent for support.

[128] I do not doubt that the complainant believed that her conversations with the respondent should have been more frequent and in greater depth, but her perception of a shortfall does not establish arbitrariness or bad faith in the respondent's efforts. In the practical world of bargaining agent work, it is not unusual that the amount of time a representative can offer to an individual member falls short of what that member believes he or she needs. Any failure of the respondent to return the complainant's telephone calls or emails must be assessed in proportionate terms against that reality. The complainant stated herself in one email that ". . . I think I have pestered them too much and now they are ignoring me" (Exhibit C-21).

[129] As to the record of email exchanges, the lack of documented replies from the respondent to a number of the complainant's messages might raise a concern, but it cannot be taken as conclusive proof that the respondent did not respond. The respondent testified that he normally preferred contacting the complainant (and other members) by telephone rather than attempting to reply to her numerous emails. Even at that, the record does include a number of email replies from the respondent to the complainant (for example, Exhibits C-9, C-10, C-19, R-6 and R-18). I am also persuaded by the evidence that the complainant sometimes held unrealistic expectations about the respondent's ability or availability to respond within a time frame acceptable to her. The example discussed by the respondent's representative in argument (para 98) was compelling to that effect.

[130] I have also concluded that the respondent's testimony was more credible than that of the complainant in respect of her further allegations that the former did not make presentations at the second- and third-level hearings, that he failed to provide reasons for not proceeding to adjudication or to the courts, and that he did not advise the complainant about her recourse options. At the very most, in my view, a practical and informed person might conclude that the complainant's evidence raised some doubt about how much the respondent said at the final-level hearing — the complainant had no direct knowledge of the second-level hearing — and how fulsome were his explanations when he discussed the results and redress options with the complainant at the end of the process. The complainant's onus, however, goes beyond raising doubt. She must prove her allegations on the balance of probabilities, and she did not do so to my satisfaction.

[131] Once the employer issued its final-level reply, the most important issue for this decision is whether the respondent actively turned his mind to the prospects for third-party redress and provided advice to the complainant based on an evaluation of the available options that was neither arbitrary nor made in bad faith. Although the complainant repeatedly stated in her testimony that the respondent simply said "no" to doing anything more, there was no other evidence at the hearing that lent credibility to her contention or suggested a violation of the *Act*. The respondent's testimony was credible in this regard. He stated that he and his CAPE colleagues did review the options, considered the key problem of adjudicability of the subject matter of the complainant's grievances, and assessed the grounds for judicial review of the employer's decision by the Federal Court. While I am prepared to accept as a possibility that the respondent may not subsequently have fully, or perhaps even adequately, explained to the complainant all the reasons for not proceeding further, this was, if anything, a shortfall in communications, not an instance of acting arbitrarily or in bad faith. Once more, whether the respondent made the correct decision is not the fundamental issue. The crucial point is that there is no credible proof of arbitrariness or bad faith in making a decision.

[132] Even if I were to set aside all of the preceding adverse findings, I remain unconvinced that the complainant emerged from her interaction with the respondent harmed or prejudiced by his actions. On the question of her resulting status for purposes of redress, the evidence clearly indicates that she consulted independent counsel at several points. If it were true that the respondent did not explain the complainant's recourse rights — which I do not believe the complainant has proven on a balance of probabilities — it is still not plausible, given her prior contact with her lawyer, that the complainant knew nothing about her recourse rights, as she insisted, when the respondent conveyed his decision to her. Moreover, according to her own testimony, the complainant's decision not to proceed further with her grievances on her own was based not on a legal issue concerning access to recourse options, but rather on the probable cost of pursuing the matter.

[133] For all of these reasons, I find that the complainant did not prove that the respondent acted arbitrarily or in bad faith in his representations on her behalf on the PREA and discipline grievances.

B. <u>The classification grievances</u>

[134] The evidence respecting the complainant's classification grievances (Exhibits R-7 and R-8) readily excludes it from consideration as proof of the complaint. The complainant testified that the respondent prepared and filed the two classification grievances on her behalf within the times limits established by the applicable collective agreement. After she filed her complaint at the end of August 2005, the CAPE assigned Mr. Archambault to act as her representative in these and other matters. In January 2006, Mr. Archambault withdrew the two classification grievances after the complainant told him that (Exhibit R-9):

. . .

> *. . . I don't feel there is any point to the classification grievance because since these grievances were filed I learned that everything has been controlled by the manager. . . . I do not see the benefit of proceeding . . . this process is already stacked against me, as well as all the other things the managers are doing to me, so I do not see how I could benefit.*

. . .

[135] The complainant reconfirmed in cross-examination that she withdrew the grievances because she ". . . just didn't know whether [they were] worth pursuing. I didn't think it could be a fair process." Critically, she testified that her decision not to pursue the classification grievances had nothing to do with the respondent.

[136] In rebuttal argument, the complainant seemed to take a different tack. She disputed the respondent's argument that she filed her complaint only when the respondent refused to refer the original three grievances to adjudication. She stated, instead, that the complaint against the respondent arose ". . . primarily from the handling of the classification grievances."

[137] Apart from the possible, if not apparent, inconsistency between her testimony and her rebuttal argument, it is very difficult to understand how the handling of two grievances filed in a timely fashion by the respondent, but then withdrawn voluntarily by the complainant for reasons that, in her own admission, had nothing to do with the respondent, could form the foundation for proving her complaint. While some of the complainant's general allegations against the respondent (for example, that he did not

answer her telephone calls and emails, or did not consult with, inform, or advise her) may have been meant to apply equally to the early phase of his representational work on her classification grievances, the point remains that the latter matters were very much a live issue at the time she filed her complaint and when the CAPE subsequently replaced the respondent with Mr. Archambault. The complainant, in my opinion, did not show how the respondent's actions at the outset of the classification grievances subsequently harmed her or prejudiced her case before the employer, or how they revealed specific elements of arbitrariness or bad faith. The complainant also failed to reconcile her allegations against the respondent with the reality that she, herself, voluntarily withdrew the classification grievances long after the respondent had left the scene. To be clear, her own testimony was that the respondent "had nothing to do" with this decision. As far as the classification grievances are concerned, I find no evidence of arbitrary action or action in bad faith.

[138] I rule, accordingly, that the complaint is without foundation in respect of the classification grievances.

C. "Mobbing"

[139] Some significant part of the complainant's dissatisfaction with the respondent appears to have been rooted in what she alleged to be his failure to appreciate her concerns about "mobbing" — in her words, he did not "buy into" mobbing — and to take forthright action with the employer to address "mobbing" in her workplace.

[140] It is not for me in this decision to judge whether, as a question of fact, the complainant did face circumstances in her work place that can be reasonably described as "mobbing," however that term might be defined. Were making such a decision part of my task, I would have had little or no concrete evidence before me about what exactly occurred, by whom, against whom, with what intent, and with what effect. The salient issue for this decision is, instead, how the respondent handled the situation once the complainant brought to him her concerns about "mobbing."

[141] The evidence established that the complainant undoubtedly did focus on the issue of mobbing on many occasions in her contacts with the respondent and with other representatives of the CAPE. There is also no doubt that she passionately held her convictions about this problem, as betrayed by the language she used at different times to describe the problem. In one of her earliest contacts with the CAPE, she

stated, "Today on the Internet I discovered there is a form of violence called WORPLACE MOBBING . . . It describes my situation perfectly" (Exhibit C-3). In the same email she provided the CAPE with a description of mobbing that included quite vivid language:

. . .

> *. . . The urge travels through the workplace like a virus, infecting one person after another. The target comes to be viewed as absolutely abhorrent, with no redeeming qualities . . . deserving only of contempt . . . Workplace mobbing is carried out politely . . .* [y]*et even without the blood, the bloodlust is essentially the same: contagion and mimicking of unfriendly, hostile acts toward the target; relentless undermining of the target's self-confidence; group solidarity against one and the euphoria of collective attack . . . .*

. . .

Elsewhere, the complainant spoke about the ". . . malicious conduct of my manager and the tactics he is using to terrorize me" (Exhibit C-6). She stated that there ". . . are evil people out there . . . they are defective human beings, and we have plenty of them at Justice" (Exhibit C-5). She observed, "You know how serious workplace mobbing is. I do not want to have a nervous breakdown, but I am very close" (Exhibit C-4).

[142] The respondent testified that his approach, and that of the CAPE, was to take action on a problem based on factual evidence brought forward by a member using the appropriate redress procedures. He explained that he had repeatedly asked the complainant for specifics about the problems she was facing in her workplace. He had advised her how they might proceed together using the vehicle of a harassment complaint to address her problems. According to the respondent, the complainant did not offer him evidence that would allow him to pursue the harassment complaint option on her behalf, despite his frequent efforts to refocus her on this approach as the most appropriate recourse available. She may well have asked him a number of times to file grievances that specified mobbing as their subject, or that targeted various perpetrators of the alleged mobbing behaviour. The respondent indicated, however, that he maintained throughout an approach, consistent with the CAPE's approach, which sought out a factual basis for her allegations and identified a redress response appropriate to the facts.

[143] My reading of the case law suggests that a bargaining agent representative must be accorded considerable latitude in this type of situation. The representative is entitled not to automatically accept what his or her member may want him or her to do. The representative may determine the best approach to pursuing a problem brought to him or her, weighing all of the circumstances at hand, as long as he or she makes a good faith effort to investigate the facts and decides in a reasoned fashion on a viable course of action. In this case, I find that the respondent's testimony was credible on this point. Whether or not he was correct in his determination that a harassment complaint was the appropriate way to proceed, presuming supportive information was provided by the complainant, is not relevant. The evidence convinces me, on balance, that he did conduct an evaluation of the available options based on what the complainant brought to him, and provided her with reasoned advice on a viable course of action, all without apparent bad faith or arbitrariness. Clearly, the complainant was very unhappy that the respondent did not "buy into" her concerns about mobbing. Clearly, too, she communicated her criticisms of him quite sharply to a number of the CAPE's officers and representatives, sometimes without sharing her comments with him. Her unhappiness and criticisms, however, do not themselves prove the respondent acted arbitrarily or in bad faith.

[144] As in the previous two sections, I find that the respondent did not breach section 187 of the *Act*.

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

(The Order appears on the next page)

Order

[146] The complaint is dismissed.

September 20, 2007.

Dan Butler,
Board Member