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*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

KASIA KOWALLSKY

Complainant

and

**PUBLIC SERVICE ALLIANCE OF CANADA,
NYCOLE TURMEL, DANIEL FISHER, GABY LÉVESQUE AND SUSAN O'REILLY**

Respondents

Indexed as
Kowallsky v. Public Service Alliance of Canada et al.

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

REASONS FOR DECISION

Before: Georges Nadeau, Board Member

For the Complainant: Herself

For the Respondents: Chris Buchanan, counsel

Heard at Vancouver, British Columbia,
March 21 to 23, 2006.

REASONS FOR DECISION

Complaint before the Board

[1] Kasia Kowallsky (“the complainant”) is employed at the Department of Citizenship and Immigration (CIC). She filed on August 20, 2004, a complaint under section 23 of the former *Public Service Staff Relations Act (PSSRA)* alleging that the Public Service Alliance of Canada (PSAC) and its representatives Nycole Turmel, Gaby Lévesque, Susan O’Reilly and Daniel Fisher had failed to comply with subsection 10(2), which requires a bargaining agent to act in a manner that is not arbitrary, discriminatory or in bad faith. The complainant alleged in particular, that the bargaining agent was grossly negligent in the administration of the complainant’s grievances, that it violated provisions of the collective agreement applicable to the Program and Administrative Services Group, that it withheld and dismissed information pertaining to errors made during the National Classification Review (NCR) project, with detrimental financial consequences imposed upon the complainant, and that it supported the employer when it breached various provisions of the *PSSRA*, the *Public Service Employment Act*, the collective agreement, the *Financial Administration Act*, and the Treasury Board’s policies and regulations.

[2] The bargaining agent, on behalf of all respondents, indicated that it had fulfilled its obligation of fair representation. It gave full consideration to the complainant’s grievances, reviewing all the relevant documentation, assessing the merit of the case and communicating its findings, requesting additional information, and withdrawing its support for the grievance crucial to the outcome of the case when the complainant did not provide the information sought. At no time did the bargaining agent or its representative act in a manner that was arbitrary, discriminatory or in bad faith.

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

Summary of the evidence

[4] Ms. Kowallsky started her employment at the CIC in January 1997, and on April 1, 1998, was deployed to a term client services representative (CSR) position within the CIC’s Admission office in Vancouver, British Columbia. The complainant occupied this position on a term basis until July 3, 2003, when she was offered an

indeterminate appointment to the same position effective April 1, 2003. In February 2004, she, along with all other remaining CSR's, was informed that she was being deployed from her CSR position to a CIC services assistant position. She was advised that if an employee did not consent to a deployment, the position the employee occupied would be abolished and the individual would be declared surplus. She accepted the deployment.

[5] The grievances for which Ms. Kowallsky claimed the bargaining agent and its representatives have failed in their duty of fair representation were initiated in July 2002. They stemmed from the results of the NCR project that the CIC conducted in 2001. Those results were communicated to employees in March 2002. In summary, the complainant was dissatisfied that the CSR position she occupied was not reclassified to a higher level, while what she felt to be similar positions in other call centres were reclassified. She has maintained that the position description for CSR positions used in the NCR project was outdated, and that it was not prepared using the Universal Classification Standard (UCS) format. The complainant provided in evidence a number of documents related to the UCS and to the UCS's work-description-writing process.

[6] Ms. Kowallsky indicated that the CIC's Admission office in Vancouver was mainly composed of the Vancouver call centre and the so-called program sites. The program sites include units such as Citizenship, Business, Inland, Visitors, Refugees and Registry. At the time the grievances in issue were filed, the complainant worked in the Business unit. CSR was a unique position to the Vancouver region. Functions performed by a CSR in the Vancouver call centre would reflect the duties performed by a call centre agent, while the responsibilities of a CSR in the program sites would reflect duties of a CIC counsellor's assistant. Positions within the call centre would remain non-rotational, while positions in other units (program sites) would rotate.

[7] Following the NCR project, the CIC proceeded to reorganize the workplace and replace the CSR positions (CR-04) in the Vancouver call centre with call centre agent positions (CR-05). Employees in these positions were invited to compete for these positions. Employees who occupied positions in program sites did not have this opportunity. In cross-examination, Ms. Kowallsky confirmed that she had been screened out of the competition for these call center positions as the employer had set

a condition that disqualified her. She did not possess the required experience working in a call centre.

[8] In March 2002, Ms. Kowallsky asked for a copy of her current and complete statement of duties. Having not received a document to her satisfaction, she filed three grievances on July 15, 2002: a work description grievance, an acting pay grievance and a classification grievance. The two last grievances were held in abeyance pending the result of the work description grievance.

[9] The work description grievance was denied at all levels of the grievance procedure and was conditionally referred to adjudication on August 29, 2003, with a recommendation to proceed to mediation. If mediation failed, the bargaining agent would review the file to determine if it was ready to proceed to adjudication.

[10] The grievance was initially assigned to Ms. O'Reilly, who was a term alternate dispute resolution officer within the Representation section at the PSAC. A string of emails indicated Ms. Kowallsky was aware that Ms. O'Reilly had been assigned to the case. The complainant forwarded additional documentation to Ms. O'Reilly and asked her if she was aware of rumors circulating at the time that incumbents of CSR positions would be deployed to the CIC assistant positions. Ms. O'Reilly replied that the complainant should ask the employer or her local union representative, as she was not aware of such offers of deployment.

[11] The evidence also indicated that the PSAC Representation section ensures representation once a case is referred to adjudication. The Canadian Employment and Immigration Union (CEIU) component of the PSAC, provides representation with the employing department through local, regional and national representatives.

[12] Ms. Kowallsky had assumed the task of representing a group of CSR employees that had presented grievances in relation to the classification and work descriptions of their respective positions. Correspondence presented in evidence indicated that on October 8, 2003, the complainant emailed Ms. O'Reilly, asking that the latter provide her with a rationale for referring her grievance to mediation. The complainant believed that this information would influence her approach and presentation as the grievances of the group were similar to her own. Ms. O'Reilly replied that she did not have a rationale and had not fully explored Ms. Kowallsky's grievance. She had referred the grievance to adjudication on the basis of "missing content". She had no information

regarding a group grievance and she advised Ms. Kowallsky she should contact the local or the CEIU for assistance with regard to that matter. Further emails showed that she was contacted by Sam Wiese, a CEIU national representative. Eventually, the complainant was informed that Julie Paul had taken the lead within the CEIU with regard to the classification group grievances. The complainant expressed to Ms. Paul her concerns that Ms. O'Reilly, the officer she had been referred to in Ottawa, had sent her back to the region and that she eventually had been referred back to the CEIU. The complainant indicated she needed clarification on whether the "missing content" used to describe the basis for the referral to adjudication referred to her submission or the work description. Eventually, the complainant proceeded with the presentation of the group grievance to the employer representative designated within the CIC without obtaining a reply to her questions.

[13] On December 15, 2003, Ms. O'Reilly sent Ms. Kowallsky an email in order to set a telephone meeting for early January 2004. On Tuesday, January 6, 2004, Ms. O'Reilly sent an email to the complainant requesting clarification with regard to the documents on file and requesting that the complainant send her a list of the duties she felt were missing from the description. The complainant sent her a 14-page document by fax, followed by an email, indicating some of her opinions on the issue giving rise to her grievance. Ms. O'Reilly replied back on January 19, 2004, that, because of a conflict, she would not make it to Vancouver and that, rather than having further delays in the complainant's case, the file would be assigned to a coworker of Ms. O'Reilly, Mr. Fisher. Mediation had been set to take place on Monday, February 2, 2004.

[14] Mr. Fisher contacted Ms. Kowallsky to indicate he was reviewing the documentation, and suggested that they meet at the Delta Hotel on the Saturday morning prior to the mediation. The meeting took place and, although the accounts of this meeting by the complainant and Mr. Fisher differ, both in terms of establishing how long it lasted and the extent of the discussions that took place, there is no doubt that the case and mediation were discussed and that the Representation section's appreciation of the chances of success at adjudication were communicated.

[15] The mediation was not successful. According to Ms. Kowallsky, the CIC was unwilling to discuss the issue. In emails that followed (Exhibit C-5, at pages 29 to 32), she expressed her frustration at the representation provided by Mr. Fisher, as he, in response, attempted to explain the mediation process and the difficulties in

proceeding with the case. Not satisfied with the response, the complainant emailed Mr. Fisher's superior, Ms. Lévesque, as well as Patty Ducharme, the Regional Vice-President, and other local officers.

[16] Mr. Fisher formalized his review of the case and communicated the results to Ms. Paul, who had requested the referral to adjudication. The four-page memorandum (Exhibit C-5, at pages 53 to 57) dated March 1, 2004, outlines the assessment and the reasons put forward by Mr. Fisher to withdraw the case from adjudication. However, it also provides Ms. Paul with an opportunity to submit “. . . new information in support of the grievance, more specifically, material in support of Sister Kowallsky having exercised decision-making/delegated authority in the capacity of a CR-04.” The deadline for submission was set for the following March 10th.

[17] Ms. Kowallsky sent an email to Mr. Fisher and Ms. Lévesque on March 8, 2004 (Exhibit C-5, at page 58), indicating that she believed that the PSAC erred in assessing her case. She argued that the CSR position was never reviewed during the NCR project. She added that the CSR's functions and factors were already found in the CR-05 evaluation report. She expressed the opinion that the bargaining agent representatives concentrated on the work classification and not on the work description, and concluded that she is “. . . willing to discuss the missing contents and classification review's errors with an Adjudication Officer (preferably regional), once Mr. Fisher is removed from this case.”

[18] Ms. Kowallsky wrote an email dated April 8, 2004, to Ms. Turmel, National President, PSAC (Exhibit C-5, page 60), requesting the removal of Mr. Fisher. In this email, she argued that the complexity of the case greatly exceeded his knowledge and experience on this subject. She commented that Mr. Fisher's expectations to be provided with evidence detailing examples wherein the complainant was called upon to and did exercise delegated authority, as found in the CR-05 work description, “is preposterous”. She restated her claims that the CSR position was never reviewed, and again requested that her case be assigned to another officer. On May 13, 2004, Ms. Turmel replied (Exhibit C-5, page 61) by indicating that, after reviewing the reasons set out in Mr. Fisher's assessment, she was satisfied that the bargaining agent understood the issues, properly researched and assessed the relevant jurisprudence, and came to a well-considered conclusion in the analysis of the merits of the

complainant's grievance. She confirmed that the grievance had been withdrawn from adjudication on April 14, 2004.

[19] As a consequence of the withdrawal of the work description grievance, the classification grievance was rejected by the employer on the basis that no classification decision had been made. The matter was not pursued further. As for the acting pay grievance, no evidence was tendered with regard to the outcome.

Summary of the arguments of the complainant

[20] Ms. Kowallsky submitted that, in accordance with section 187 of the new *Act*, an employee organization should not act in an arbitrary, or discriminatory way, or in bad faith. She brought to my attention an extract from an "Alberta Government Bulletin" that indicated that it is arbitrary for a union to only give superficial attention to the facts or matters at issue; it is arbitrary to decide without concern for the employee's needs and interests; it is arbitrary not to investigate, or to make no effort to discover the circumstances surrounding a grievance; and it is arbitrary if a union fails to assess the merit of an employee's grievance. The union should thoroughly investigate all the facts and evaluate the probable outcome of arbitration.

[21] Ms. Kowallsky argued that the number one issue was whether the bargaining agent did make an effort in finding all the circumstances surrounding the grievance, and whether the bargaining agent investigated or gave only superficial attention to the facts.

[22] Ms. Kowallsky was of the opinion that the bargaining agent did not investigate and only gave superficial attention to her case. Ms. O'Reilly was provided evidence of the classification results in July 2003, yet, from the email exchanges, Ms. O'Reilly appears to have referred the grievance to mediation without properly reviewing the file. On January 19, 2004, Ms. O'Reilly was not aware of the title of the position that the grievor occupied, and, if she had attempted to investigate or had paid minimal attention to what the complainant was trying to deliver, she would have discovered that the allegation that the position had not been reviewed had merit. The complainant sent to Ms. O'Reilly work descriptions, and copies of evaluation notes that did not mention the existence of a CSR position. The complainant argued that she tried to draw Ms. O'Reilly's attention to the evaluation reports.

[23] Ms. Kowallsky indicated that the work description for the CSR position appeared to be outdated. It is shorter and different from the CIC assistant position that appeared to have been written in more detail. The complainant maintained that the work description for the CSR position, the position she occupied at the time, did not reflect the duties performed by all employees.

[24] Ms. Kowallsky maintained that this position's work description was used to staff positions in the call centre, as well as positions outside of it. The complainant knew that duties that reflected call centre activities were missing. She knew that the duties performed in various units (Citizenship, Business, Refugees, Registry) were not reflected in the work description.

[25] When Ms. Kowallsky compared the evaluation reports of the CSR position and the CIC assistant position, she discovered that the work descriptions were significantly different, yet the evaluation reports were identical. The evaluation report contained the same errors with regard to the point rating and similar inconsistencies in applying the benchmark position.

[26] Ms. Kowallsky indicated she was aware that Ms. O'Reilly was a classification officer who had participated in the development stages of the UCS. The complainant expected Ms. O'Reilly would have used her knowledge and experience to assist her. Ms. O'Reilly did not respond to the complainant's initial submission. The complainant indicated that she had at the same time been attempting to get attention from the PSAC regional office, but was informed that the three grievances were the proper procedure to address the issue.

[27] Ms. Kowallsky stated that she was at the time a shop steward and an acting local president. She was asked to represent a group of employees who had also filed grievances regarding the same situation. She was also aware of an appeal that some of the CSRs had filed with the Public Service Commission (PSC), and she was concerned about the outcome of that case.

[28] Ms. Kowallsky indicated that she believed there was a different procedure or recourse available that had not been used. She indicated that the bargaining agent should have intervened in March 2003 when the results of the NCR project were released, or even at the time of the competition. The work descriptions were incomplete and the competition was an unfair process. According to the complainant,

the bargaining agent should have intervened by providing evidence of the duties performed by the CSR or, maybe, by filing a complaint to the PSC as the situation related to staffing activities. The complainant argued that nothing was done.

[29] Ms. Kowallsky indicated that she had proceeded with her individual grievances, as she was advised by her bargaining agent and, at the time, was trying to get the attention of the Representation section, which she believed had the power to determine her fate. Had the PSAC intervened, the complainant argued, it would have come to the conclusion that the evaluation report could not have been created.

[30] Ms. Kowallsky added that the standard procedure in reviewing the classification of a work description involves three steps. The first step is to update the description with the current duties. The second step is to match the content of the work description with the appropriate factors of the classification standard. The third step is to apply the standard by comparing the benchmark position to the functions described in the standard. In order to assist in this exercise, the complainant argued that the Treasury Board created a “mapping tool”. The mapping tool provided evaluators with a guide on how to connect the elements of the current standards with the factors of the classification standard. The complainant argued that these required elements are not present in the CSR description, and it is, therefore, impossible to identify the proper factors and evaluate the position.

[31] Ms. Kowallsky argued that the process of updating a work description involves inputting tombstone data, which is basic information about the employee who occupies the position. The next step should be to identify client-service results and the key activities and, finally, to describe the work under each factor applicable to the current standard that applies to the work description. The work description for the CSR position proves that the employer did not take those steps during the NCR project. According to the complainant, this was the second time the CIC failed to address the CSR position situation. She argued that an attempt at updating the work description had been started in 1999. She believed that, at that time, the CIC should have addressed the CSR position situation that existed inside the call centre in other units and outside it.

[32] During the NCR project, the CIC neglected to follow the Treasury Board’s guidelines and policies. The CIC did not review the work description, and concentrated on levels. As a consequence of these actions, the CSR position was excluded from the

review. Ms. Kowallsky argued that regional bargaining agent representatives should have come to that conclusion, and that having not done so, they neglected the situation.

[33] Ms. Kowallsky argued that, with regard to her individual grievance, it was the Representation section that showed reckless disregard for her interests. She indicated that the CIC failed to address her situation on two occasions and presented her with work descriptions that reflected outdated formats used in 1997 or prior to the release of the recent versions.

[34] Ms. Kowallsky also believes that if Ms. O'Reilly had reviewed the file when it was initially sent to her, the bargaining agent would have been able to address the situation of the whole group. The complainant added that, as Mr. Fisher had mentioned, the Representation section did not dismiss the information. It received the information but put aside the information that might be relevant to the circumstances surrounding the complainant's grievance.

[35] Ms. Kowallsky is of the view that the PSAC accepted the CIC's version, which, in the complainant's opinion, was an arbitrary act. The complainant indicated she had the impression that since she did not work in the call centre, the PSAC was of the opinion that she was not entitled to the work description used in the call centre.

[36] Ms. Kowallsky was of the opinion that the PSAC was damaging her reputation by implying that she was trying to seize the opportunity to get reclassified and gain financial benefits. She added that she was not responsible for the position the CIC had placed her in. She was deployed in April 1998 to a CSR position and occupied this position prior to, during and after the classification review.

[37] Ms. Kowallsky indicated that the procedure involved in the work description review required that the CIC update the description with the current duties performed by every employee who may occupy the position. The employer assigned various duties to CSRs and a properly reviewed work description would have included duties of call centre agents as well as duties described in the CIC's services assistant work description. If the CIC had addressed the situation at the appropriate time and deployed the CSRs to duties outside the call centre, the complainant would have been provided with an opportunity to verify the work description.

[38] Ms. Kowallsky argued that if the PSAC representatives, Mr. Fisher and Ms. O'Reilly, had responded to her allegations, they would have arrived at the conclusion that properly described duties assigned to her position could be found in the CIC officer work description. The complainant added that the proper wording used by experienced evaluators would be to monitor compliance of clients to the terms and conditions imposed by others, including visa officers overseas. This work constitutes between 80 to 90 percent of the time spent by the complainant while performing her duties.

[39] The PSAC's reckless disregard, lack of investigation and superficial attention placed Ms. Kowallsky in a position where she could not exercise her rights under the collective agreement. The complainant added that she believed that Mr. Fisher's tone and actions, throughout the process of handling the file, showed hostility. He agreed with the CIC's version and was unwilling to listen to the complainant. The complainant is also disappointed with the coordinator of the Representation section and with the National President of the PSAC, because neither of them came back with the question "... Why do you think the position was not reviewed . . . ?" Instead, the complainant was placed in a position where, as a single immigrant mother, she had to choose between her dignity and the time she could spend with her daughter.

[40] Ms. Kowallsky believed that she was not given the proper attention and was not properly represented. She believed that the bargaining agent violated section 187 of the new *Act* and did not show interest or concern. She stated that the Representation section has a great responsibility when assessing individual or group grievances. The bargaining agent's representatives were responsible for determining the fate of an employee and should have applied a high standard when reviewing the circumstances of an employee. The bargaining agent did not apply this standard when it handled the complainant's grievance, and, as a result, the complainant had to proceed with the current action in order to clear her name. She argued that the time frame, communications and expectations placed on the complainant amounted to conduct that was arbitrary, discriminatory and in bad faith.

[41] Ms. Kowallsky argued that she was presented with an outdated work description that violated article 55 of the collective agreement, as it was not a complete and accurate work description. She added that she believed both the PSAC and the CEIU are responsible for what happened to the CSR position work description. The complainant

brought forward to the bargaining agent evidence of the CIC's wrongdoing, and she is of the opinion that there are 43 employees who have been deprived of retroactive pay.

[42] Ms. Kowallsky requested that her grievances dealing with the work description and acting pay be reinstated and forwarded to adjudication, and that she be paid for loss of wages and benefits and damages for pain and suffering. She asked that the PSAC be ordered to assume financial responsibility for legal costs that may be involved in representing the interests of the CSR group. She also asked that I remain seized of the matter.

Summary of the arguments for the respondents

[43] Counsel for the respondents began his arguments by indicating that the PSAC was coming to the hearing to ask for closure, not for the sake of the bargaining agent, but for the sake of Ms. Kowallsky. He indicated that she had spent considerable time, effort and emotional commitment on this issue for a number of years. He indicated that what was more unfortunate was that she had been unable to accept the advice of the bargaining agent to the effect that the grievance that she had filed did not have merit. The bargaining agent's failure, if there was one, has been its inability to convey to the complainant that she does not have a legal recourse that would be successful. Counsel hopes that the present decision will give her that closure.

[44] Counsel for the respondents noted that he understood from Ms. Kowallsky's remarks that she felt defamed and that she believed that the PSAC has maligned her in some way. To the contrary, throughout the grievance procedure and afterwards, the PSAC has been respectful and considerate of her concerns.

[45] In her closing argument, Ms. Kowallsky expressed concerns that the PSAC was defaming her by suggesting she was doing this for money. In response, counsel for the respondents indicated that the purpose of her three grievances was to increase the classification and to get her additional money. As Mr. Fisher testified, counsel added, there was nothing wrong with that. The PSAC represents individuals seeking acting pay or reclassification of their positions. The disappointing circumstances in the present case are that the complainant's circumstances did not have sufficient merit for the PSAC to proceed with her grievance.

[46] Counsel for the respondents indicated that in her submissions Ms. Kowallsky raised new grounds and issues that were not part of the complaint and were untimely.

He pointed to the argument that the PSAC should have done something in 2002 with respect to the UCS system. There was no grievance filed on that matter. He also indicated that the Board was not seized with an issue from the 43 CSRs. The complainant can only raise her rights, not the rights of others. The complainant has no authority with respect to the other employees, and they have not come to this Board with concerns with respect to the conduct of their bargaining agent.

[47] Counsel for the respondents argued that he believed that, upon examination of the evidence, the Board should conclude that the PSAC took Ms. Kowallsky's grievance seriously, examined the relevant facts and listened to what she had to say. The PSAC applied its view of the law to the facts and concluded that the grievance did not have merit. The PSAC clearly advised the complainant of what was needed in order for the work description grievance to be successful. From the beginning, the complainant was informed that she needed to identify the missing duties she performed that were not in the work description. In September 2002 an email (Exhibit R-1) from Ms. Paul gave her that advice. It was repeated in the January emails from Ms. O'Reilly and by Mr. Fisher. It was also contained in the emails sent by the PSAC Regional Vice-President (Exhibit C-5, at page 36) and by Cathy Sand, CEIU National Union Representative (Exhibit C-5, at page 49). Throughout the proceedings, the PSAC made it clear to the complainant that it needed to know what she was doing. Counsel for the respondents noted that the complainant herself understood what was required and that she was in the best position to identify the duties (Exhibit C-5, at page 18). She provided a list of duties on September 23, 2002, but from that day on has not identified the additional duties she claimed were not in the work description.

[48] Counsel for the respondents indicated that for years Ms. Kowallsky had failed to appreciate that the people who work in the call centre do a different job than she does. Throughout the grievance procedure, the complainant was trying to add to her work description duties that were performed by employees in a different job. Counsel for the respondents indicated that the complainant's work description as a CSR can be found under Exhibit C-2, at page 49, and although there are similarities it is not an identical job to the one in the call centre (Exhibit C-2, at page 55). Counsel for the respondents noted that the appeal board decision also confirmed that the Vancouver CSR position, although similar, was in fact a different position from that of the Call Centre Agents (Exhibit C-3, at page 8). Counsel for the respondents indicated that the

complainant acknowledged that she would not qualify for the position because of her lack of experience in the call centre.

[49] With regard to the issues surrounding Ms. Kowallsky's deployment and what happened to her in 2003, counsel for the respondents argued that these issues are not connected to the complainant's complaint and there was nothing the PSAC could do about them.

[50] Counsel for the respondents noted that, upon reviewing the arguments put forward by Ms. Kowallsky, it was apparent she was not complaining that the CIC was asking her to do something that was not in her work description, but that she wanted to be in a different position and afforded the opportunity to work in the call centre.

[51] Counsel for the respondents argued that in the letter of intent to withdraw the grievance from adjudication Mr. Fisher set out his understanding of the additional duties Ms. Kowallsky was claiming were not captured by her work description. Mr. Fisher provided the CEIU and the complainant over a month to come up with additional information that might affect the PSAC's view of the chance of success of the grievance at adjudication. No such information was forthcoming, and the PSAC was left with no option but to withdraw the grievance.

[52] Counsel for the respondents indicated that it was important to point out that on January 31, 2004, it was Ms. Kowallsky's attitude that changed towards her bargaining agent. It was the complainant who became hostile with the PSAC and uncooperative at times. In his testimony, Mr. Fisher indicated that he understood that the complainant was unhappy in the circumstances. She was being told something she did not want to hear, that the grievance would be unsuccessful. Counsel for the respondents noted examples of the emails in evidence from February, March and April 2004, where the complainant set out her hostility and also noted the PSAC's responses which were always professional and polite.

[53] Counsel for the respondents argued that the bargaining agent was not in the business of compelling Ms. Kowallsky to supply information. The bargaining agent gave the complainant the opportunity between March 1, 2004, and April 14, 2004, to indicate why Mr. Fisher's analysis was wrong. It was an opportunity the complainant chose not to accept, or information she was unable to provide. The bargaining agent

had understood her theory, but did not agree with it. The law is as it is with respect to work descriptions, and the PSAC cannot change that.

[54] Counsel for the respondents noted that the UCS project was abandoned in May 2002 and Ms. Kowallsky filed her grievance in July 2002. The mapping tool developed for the UCS, and mentioned in the complainant's arguments, is not significant, as the UCS was not in force and the mapping tool is really a classification tool. The complainant cannot differentiate between what is a work description grievance and what is a classification grievance.

[55] Counsel for the respondents indicated that the evidence showed that in July 2003, Ms. Kowallsky knew that Ms. O'Reilly had conduct of the case. The complainant knew whom to contact and how to contact her. None of the requests made to Ms. O'Reilly were left unanswered. Contact was established in August and September 2003, and further contact occurred in November, December and January. Evidence also showed that Ms. O'Reilly contacted the complainant in sufficient time to prepare for the mediation. Ms. O'Reilly sought out information with regard to the complainant's position and duties, a prudent step to update her information. It is also important to note that, at the time, the complainant responded without expressing any specific concern.

[56] Counsel for the respondents responded to the fact that Ms. Kowallsky, in her remarks, suggested that the referral of her grievance to mediation was improper. Counsel argued that the referral was done to preserve the complainant's right to pursue the case. It did not prejudice the complainant in any way. In any event, any shortcomings of Ms. O'Reilly were cured by Mr. Fisher's intervention.

[57] Counsel for the respondents noted that the transfer of the grievance file to Mr. Fisher two weeks before the date set for mediation was not unusual. Mr. Fisher was able to prepare in a timely fashion for the mediation. Mr. Fisher had experience in this area and, even though it is important from Ms. Kowallsky's point of view, it is not a complex area. Mr. Fisher indicated that, if he had not been able to prepare in time, he would have sought an adjournment. The PSAC would not prejudice a grievor because of the need for an internal transfer.

[58] Counsel for the respondents argued that Mr. Fisher's conduct was exemplary. He contacted Ms. Kowallsky in a timely fashion. He reviewed the file and worked on it

prior to leaving Ottawa. He reviewed the documentation provided by the CEIU and the complainant. He met the complainant two days before the planned mediation session for a period lasting several hours.

[59] Counsel for the respondents noted that Ms. Kowallsky made allegations against the CEIU. However, in her complaint, she did not assert any misconduct by agents of the CEIU. In the same vein, although during this hearing she raised concerns about the support she had received with regard to a group grievance, there is no mention of such in her complaint. In her own assessment of the presentation of the group grievance, she acknowledged that it went well. In any event, this was not related to the inability of the bargaining agent to respond to her grievance; it was in relation to the assistance she wanted as a bargaining agent representative. There is really no issue before this Board that the representation, with regard to the group grievance, was inadequate or wanting in any fashion.

[60] In reviewing the allegations brought forward by Ms. Kowallsky, counsel for the respondents argued that these all fell under the heading of arbitrariness, as the complainant has not indicated any bad faith or discrimination. She is taking issue with the manner in which the PSAC assessed her grievance.

[61] Counsel for the respondents referred me to *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70, where Vice-Chairperson Matteau cited *Re City of Winnipeg v. Canadian Union of Public Employees, Local 500*, 4 L.A.C. (4th) 102, in which alternative definitions of the notion of “arbitrariness” are found to include (at pages 117 and 118):

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

[62] He urged me to conclude that the bargaining agent did take a reasonable view of the issue and arrived at a thoughtful judgment, as found from Mr. Fisher’s analysis throughout and, in particular, in the March 1, 2004, letter.

[63] Counsel for the respondents noted that labour boards have given greater or lesser scrutiny to allegations of violations of the duty of fair representation depending on the nature of the grievance. Counsel added that this was not a discharge case and that the current dispute is not amongst the more significant types of grievances. Furthermore, Ms. Kowallsky was deployed in 2004, and one could argue that it did not make much sense to pursue a grievance that may have been incomplete for a two-year period.

[64] Labour boards have also recognized the bargaining agent's gatekeeper function, which allows it to focus its limited resources to maximize the effects. The duty of fair representation is not equivalent to an insurance policy for bargaining agents' errors or omissions. Even if a bargaining agent made an error in its appreciation of a grievance, it can be wrong. Counsel for the respondents added that, clearly, the Board does not assess the quality of representation. It will only determine if the steps the bargaining agent took were reasonable. The PSAC provided Ms. Kowallsky with ample opportunity to provide additional information in support of her grievance.

[65] Counsel for the respondents referred me to the following decisions rendered by adjudicators of the Board with regard to work descriptions: *Brown v. Canada Customs and Revenue Agency*, 2003 PSSRB 5; *Barnes v. Canada Customs and Revenue Agency*, 2003 PSSRB 13; *Currie et al. v. Canada Customs and Revenue Agency*, 2004 PSSRB 75; *Hughes v. Treasury Board (Natural Resources Canada)*, 2000 PSSRB 69; *Rondeau v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-27295 (19970220), and *Taylor v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-20396 (19901221).

[66] Counsel for the respondents noted that one of Ms. Kowallsky's concerns was the form of the work description, rather than its content. Counsel noted that the CIC had no obligation to provide a work description that conformed either to the UCS format or to any other format. The only obligation under the collective agreement is for the employer to provide a current and complete description of the duties. The issues of whether or not the position was assessed within the NCR project or whether the UCS format was used are not significant.

[67] Counsel for the respondents noted that the PSAC representatives whom Ms. Kowallsky contacted by email always responded in a timely fashion. He added that the complainant had suggested that a classification expert would have been better

suitied to conduct the review of her file. Counsel stated that if I reviewed the evidence provided by Mr. Fisher I would find that he discussed his opinion with a classification officer.

[68] Addressing the issue of remedy, counsel for the respondents noted that the Board has no authority to award costs for the proceedings or to award damages to Ms. Kowallsky. There is no evidence of links to any medical condition, no unjust enrichment of the CIC at the expense of the complainant and no demonstrated loss of wages or benefits.

[69] Counsel for the respondents requested that the complaint be dismissed.

Summary of the reply of the complainant

[70] In reply, Ms. Kowallsky argued that no restrictions exist in section 190 of the new *Act* as to whether the complaint refers to a group case or an individual case. Section 187 of the new *Act* refers to the bargaining agent's actions in the representation of any employee.

[71] Ms. Kowallsky noted that on January 19, 2004, she sent an email advising Ms. O'Reilly about the merit and circumstances of her grievance. The complainant noted that she addressed the individual aspects of her circumstances that applied to her work description, and also how this work description met the requirements of article 55 of the collective agreement with respect to the group. The complainant argued that she was part of the group of individuals who occupied CSR positions. A proper review would require going back to March 22, 2002, and assessing whether the work description was complete for all employees occupying those positions.

[72] Ms. Kowallsky added that she was not trying to add call centre duties to her work description. She was trying to address the issue that in March 2002, the work description should have included duties of a call centre position. The March 22, 2002, work description was incomplete. The complainant is certain she was performing duties of a higher-classified position when she monitored the progress of entrepreneur clients as 80 to 90 percent of her daily activities.

[73] Ms. Kowallsky is of the view that the requirement imposed by Mr. Fisher to identify the missing duties was impossible to meet, as he had made an error in assessing the merit of her grievance. If Mr. Fisher had discussed with the complainant

the duties and the information provided, he would have discovered that the so-called delegated authorities were evaluated and compared to the statistical clerk position classified at the CR-05 group and level. Statistical reports were part of the list of duties provided by the complainant.

[74] In response to the allegation that Ms. Kowallsky had changed her attitude when Mr. Fisher took conduct of the case, the complainant responded by saying Mr. Fisher had already assessed that there was no chance of success. He was the one who demonstrated hostility towards the complainant.

[75] Ms. Kowallsky noted that all the people involved gave the complainant only superficial attention, concentrating on the individual case and imposing conditions that were impossible to meet. On March 8, 2004, the complainant wrote to the PSAC Coordinator and National President, requesting that another representative be appointed to her case. This request was ignored.

[76] With respect to the UCS format, Ms. Kowallsky added that the CIC continued to use that format despite the fact that the UCS project had been abandoned. The CSR position has not been classified since 1993 and was not reviewed during the NCR project.

[77] Ms. Kowallsky argued that if Mr. Fisher had come to Vancouver prepared to discuss her grievance he would have made arrangements for a conference room where proper discussions could have taken place regarding the grievor's duties and overall situation.

[78] Ms. Kowallsky added that the deployment that occurred in February 2004 cannot be viewed as management's response to the work description, as the description does not describe her duties and violates her rights with respect to retroactive payments. The PSAC is really providing an excuse to the CIC to deploy CSR incumbents to other positions.

[79] Ms. Kowallsky brought my attention to the following cases: *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Nagy v. Plaza 500 Hotels Ltd.*, 2005 CanLII 7057 (BC L.R.B.) and *Walker v. Motion Picture Studio Production Technicians*, 2005 CanLII 12496 (BC L.R.B.).

[80] Ms. Kowallsky indicated that, although many people were involved in the evaluation of her grievance, she only received superficial attention. She received no assistance when she presented the group grievance, and had to prepare and research on her own. The PSAC did not provide her with representation on her work description grievance, her classification grievance or her acting pay grievance. She added that she had to ask for judicial review to clarify the deployment issue, and that the response she received did not address her concerns.

[81] Ms. Kowallsky added that the PSAC concentrated on the individual grievance and did not want to look beyond. The complainant spent time on sick leave without pay as a result of the actions of the respondent.

[82] Ms. Kowallsky is asking the Board to review her complaint and address the reckless disregard and damaged reputation she has suffered. The complainant was not provided with a current and complete statement of duties.

[83] Ms. Kowallsky asked that the Board retain its jurisdiction to deal with the relief she was seeking.

Reasons

[84] Ms. Kowallsky has raised a number of issues in argument that take their source in the events that led to her complaint. However, a good number of these have little to do with what could be accepted as a valid basis for an allegation, filed in August 2004, that the bargaining agent or its representatives failed in their duty of fair representation or are untimely.

[85] For instance, Ms. Kowallsky raised the lack of support she received from the bargaining agent and its representatives when she acted in the Fall of 2003 as a representative of a group of employees who had filed a “group grievance”. This aspect of her complaint would also be untimely. Further, the support given by a bargaining agent to a person acting as a representative is not a matter which falls under the rubric of “representation of any employee”. Instead, it qualifies as an internal union matter. This complaint was filed under section 10(2) of the former Act, which equivalent provision is now found in s. 187 of the *PSLRA*. I am in agreement with the decision of Mr. Tarte in *Bracciale v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88, when at paragraph 22 he writes:

...

Although St-James (supra) predates the coming into force of subsection 10(2) of the Act, the line of reasoning developed by the Board in that decision has been followed in those subsequent to the adoption of that provision. In that case, the complainants challenged the decision made by an officer of their bargaining agent not to follow a course of action chosen by the majority of the membership at a general meeting. The Board considered the essence of the complaint and determined that it had no jurisdiction to hear the matter. In arriving at its decision, the Board made the following comments at pages 6 and 7:

...

It has been widely recognized that at least in the absence of specific provisions to that effect in its enabling statute, a labour relations board does not have supervisory authority to regulate the internal affairs of a bargaining agent. For example, George Adams, the former Chairman of the Ontario Labour Relations Board (now Mr. Justice Adams) stated the following in his text, *Canadian Labour Law* (1985) Canada Law Book, at page 721:

*Labour relations boards have made it clear that the statutory **duty of fair representation** does not apply to regulate the internal workings of trade unions. The duty applies only to a trade union in the representation of its members in terms of their relations vis-à-vis their employer. . . .*

...

[Emphasis in the original]

[86] The specific provisions of the *PSLRA* which provide for some Board scrutiny of internal union matters are new provisions which were not found in the *PSSRA*, and are not (and cannot be) a basis for this complaint.

[87] Another example is Ms. Kowalsky's argument that the bargaining agent should have intervened with the CIC in March 2003, when the results of the NCR project were made public. Whether or not the bargaining agent should have intervened with the CIC in March 2003, is not a matter for a duty of fair representation complaint filed in August 2004.

[88] Similarly, whether the CIC reviewed the position of CSR during the NCR project and the fact that the CIC did not use the UCS work description format are not situations which give rise to finding that the bargaining agent and its representatives failed in their duty of fair representation. Given the detailed explanations of the PSAC regarding their position, I find that the actions of the respondents were not arbitrary, discriminatory or in bad faith.

[89] In effect, only one issue in all the evidence presented gives rise to a timely complaint before the Board, and that issue is the refusal by the bargaining agent and its representatives to further pursue to adjudication Ms. Kowallsky's grievance on the content of her work description.

[90] I have reviewed the evidence surrounding the decision of the bargaining agent representative, Mr. Fisher, to refuse to pursue further Ms. Kowallsky's grievance. I am satisfied that this decision was not taken lightly. Mr. Fisher took the appropriate care in reviewing the documentation and circumstances presented by the complainant, as well as the arbitral jurisprudence, and communicated to the complainant in writing through her component the result of his assessment. The complainant was also provided with a final opportunity to present additional documentation, which she found impossible to meet. Whether the complainant agrees with Mr. Fisher's assessment or not is irrelevant. The evidence revealed that the decision was taken in a non-arbitrary fashion, in good faith and without discrimination. I therefore reject the complainant's submission outlined in paragraph 22 that the respondent did not investigate sufficiently the circumstances and only gave superficial attention to her case. Mr Fisher carried out all the necessary investigation prior to arriving at his conclusion. The complainant, as a bargaining unit member, does not have an absolute right to adjudication, particularly in cases involving the application of the collective agreement, as is the case here. The bargaining agent enjoys in these circumstances considerable discretion whether to take a case forward or not.

[91] I can understand Ms. Kowallsky's sense of frustration with regard to the circumstances she faced. However, she must recognize that the bargaining agent has no obligation to pursue cases for which it (the bargaining agent and its representatives) has fairly and genuinely determined there is no chance of success. I refer her to a quote from the Supreme Court decision in the *Gendron* matter: ". . . *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 consequence for the employee on the one hand and the legitimate interests of the union on the other". I have not been presented with any evidence that would lead me to conclude that the respondent's or bargaining agent's discretion was not exercised properly.

[92] None of the evidence submitted supports a complaint against the other bargaining agent representatives named as respondents.

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

(The Order appears on the next page)

Order

[94] The complaint is dismissed.

March 21, 2007.

**Georges Nadeau,
Board Member**