Date: 20070528

File: 561-34-107

Citation: 2007 PSLRB 56

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PAULINE PUNKO

Complainant

and

CUSTOMS EXCISE UNION DOUANES ACCISE

Respondent

Indexed as
Punko v. Customs Excise Union Douanes Accise

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

REASONS FOR DECISION

Before: Beth Bilson, Board Member

For the Complainant: Pauline Punko

For the Respondent: Krista Devine, Public Service Alliance of Canada

Heard at Calgary, Alberta,
January 23 to 25, 2007.

I. Complaint before the Board

[1] Pauline Punko filed a complaint under section 190 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). In outlining her complaint at the outset of the hearing, she cited paragraphs 190(1)(*e*) and (*f*), which read as follows:

> ***190.****(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(*e*) the employer or an employee organization has failed to comply with section 117 (duty to implement provisions of the collective agreement) or 157 (duty to implement provisions of the arbitral award);*
>
> *(*f*) the employer, a bargaining agent or an employee has failed to comply with section 132 (duty to observe terms and conditions). . . .*

[2] It became clear from the evidence and arguments from both parties at the hearing, however, that the complaint under section 190 of the *Act* properly relates to paragraph (*g*), which requires that the Public Service Labour Relations Board ("the Board") examine and inquire into any complaint stating that an "employer, an employee organization or any person has committed an unfair labour practice" as defined in section 185. Among other unfair labour practices, section 185 refers to that specified in section 187, which reads as follows:

> ***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.*

[3] In this case, the Public Service Alliance of Canada (PSAC) is the bargaining agent certified to represent Ms. Punko. The Customs and Excise Union Douanes Accise (CEUDA) is the component of the PSAC that carries out certain of the obligations of the PSAC with respect to the specific group of employees which included Ms. Punko at the time of the events that are the subject of her complaint. In the interests of clarity, because the evidence tendered by the parties addressed the conduct of the CEUDA and its representatives, and because Ms. Punko engaged briefly in interaction with another component, the Union of Tax Employees (UTE), this decision will refer to the CEUDA as

the organization whose conduct gave rise to the complaint, and which allegedly failed to comply with the duty to represent Ms. Punko fairly.

II. Summary of the evidence

A. For the complainant

[4] Ms. Punko gave sworn evidence on her own behalf outlining the events that led her to file the complaint against the CEUDA. She had been an employee of the Government of Canada since 1991 and in 2001 was working in the Tax Services Office in Edmonton. Early in 2001 she responded to a posting describing a job offered by the Canada Customs and Revenue Agency (CCRA) in its Visitor Rebate Program. Since the terms of the posting have some significance in relation to this complaint, it is worth quoting this document in some detail, as follows (Exhibit U-1):

> ***ASSIGNMENT/SECONDMENT, ACTING***
>
> ***Classification:*** *CR-04 (anticipatory staffing)*
>
> ***Position Title:*** *Customs Clerk Visitor Rebate Program*
>
> ***Department or Agency:*** *Canada Customs and Revenue Agency*
>
> ***Location:*** *Edmonton, Alberta*
>
> ***Organization:*** *Customs*
>
> ***Salary:*** *$33,768-$36,449 per year*
>
> ***Tenure:*** *Indeterminate*
>
> ***When may I apply?*** *On or before February 8, 2001. . . .*
>
> ***What are the functions?*** *Providing information to non-resident visitors regarding the Visitor Rebate Program. Reviewing and processing rebate receipts. Inspection with the likelihood of exportation of goods. . . .*
>
> ***Notes:***
>
> *Conditions of Employment:*
>
> *Must be willing to work shift work, including early morning shifts; must accept work assignments within the district; must have a valid driver's license or personal mobility normally associated with possession of a valid driver's license within the limits of the CCRA Travel Policy.*

. . .

[5] Ms. Punko testified that, from the use of the terms "indeterminate" and "anticipatory staffing" in the posting notice, she understood that the position described was of long-term duration. She was interviewed for the position, and her application was successful.

[6] The position in the Visitor Rebate Program was located at Edmonton Airport, and Ms. Punko began to work there in March 2001. Within a couple of days of her arrival, on March 14, 2001, she was given a letter of offer (Exhibit U-2) for an "acting appointment" to run from March 12 to September 7, 2001; Ms. Punko signified on the same date that she was accepting the offer. Subsequent letters of offer were issued for acting appointments to run from September 7 to November 30, 2001 (Exhibit U-3), from November 30, 2001, to January 18, 2002 (Exhibit U-4), and from January 18 to March 1, 2002 (Exhibit U-5). With the exception of the letter referring to the period from November 30, 2001, to January 18, 2002, which she accepted verbally, Ms. Punko's signature was on each of the letters to indicate her acceptance of each offer. March 1, 2002, was the last day on which Ms. Punko was employed in the position with the Visitor Rebate Program.

[7] In her evidence, Ms. Punko said that she and her fellow employees in the Visitor Rebate Program at Edmonton Airport worked in a kiosk that was located centrally. The operational hours at the kiosk were posted as 05:00 to 21:00, and it was indicated to the employees by their supervisors that they would be working on a variable shift schedule. Although Ms. Punko was not initially sure what that meant, it was eventually explained to her that the work was covered by a "Variable Shift Scheduling Agreement" (VSSA), which meant that the employer could schedule the employees both for longer shifts and for more days of work in sequence than would be permitted under the usual scheduling arrangements. Ms. Punko testified that in fact the schedules were changed a number of times, and that she was scheduled to work for 10- to 12-hour shifts and for periods that sometimes covered usual days of rest or statutory holidays; she might then have had several days off in a row.

[8] Ms. Punko stated that she found the work very interesting and enjoyed working in an environment where she was able to assist travellers in a positive way with a Canadian government program. She said that one problem that soon became evident to her and her fellow employees was that no arrangements had been made to provide

relief to them for meal or other breaks. The employees were reluctant to eat at the kiosk, and this created difficulties for them during the longer shifts. She said that it was also difficult to arrange to use the washroom, and that any absence of longer than a couple of minutes caused resentment in nearby businesses because travellers would inquire when the kiosk would be open. She said that her supervisor told her that she should take her meal break at the end of her shift. Customs officers and other employees in related positions did not provide any relief; indeed, it was her evidence that she understood that at one point their bargaining agent had given them instructions not to perform such duties.

[9] On some occasions customs officers were involved in the Visitor Rebate Program. Ms. Punko stated that although they did the same work in the Program as she and her fellow employees in the CR-04 classification, the customs officers were classified initially as PM-02 employees and ultimately reclassified to PM-03, which meant their pay was considerably higher. She said that they received the same training materials concerning the verification process (Exhibit A-2) and performed functions designated with the same 495 code (Exhibit A-1).

[10] In October 2001 it was brought to the attention of the employer that the employees could not continue to work on a variable shift schedule, and that employees must be placed on a regular shift schedule as provided in the collective agreement between the CEUDA and the CCRA. Ms. Punko said that she understood it to be the CEUDA that was requiring that the variable shift schedule be eliminated, or, as she put it, was “turning her into a shift worker.”

[11] In October 2001 there was also a posting for an indeterminate position in the Visitor Rebate Program that was to begin in March 2002; this position was described in terms similar to the position Ms. Punko was then occupying. She made inquiries with Human Resources as to whether it was necessary for her to apply for the position, as she then understood that her own position was an indeterminate/anticipatory staffing position. She was informed that if she wanted to obtain the posted position, she would have to enter the competition again, as her existing position was an acting one.

[12] One of the requirements for the newly posted indeterminate position was that applicants write a test; Ms. Punko said that she was advised that she would have to take the test if she wished her application to be considered. She told a Human Resources officer that she had a vision problem for which she wished accommodation.

The officer she spoke to assured her it would be noted. When she went to the test centre, she mentioned her vision problem and was told to select a seat with sufficient lighting. She found all of the lighting inadequate, she said, but proceeded to write the test anyway. She was later informed that she had failed the test; she said that she was so upset by this that she destroyed the notice.

[13] She then made further inquiries about her status in a letter to Human Resources dated February 5, 2002 (Exhibit A-13). She received a letter in response from Mona Berry, Assistant Director, Human Resources, dated February 12, 2002 (Exhibit U-6). Ms. Berry stated that although the original posting for the Visitor Rebate position had used the term "indeterminate," this was unfortunately an error, and it was clear from the heading ("Assignment/Secondment, Acting") that the position would be temporary. Ms. Berry went on:

. . .

> *You asked, "Why was I changed to ACT-2139 as originally I was positioned as indeterminate as TLM-3001?" Barb Hoff-Morin advised you and Joyce Boettcher, your union representative, that your letter of offer dated March 14, 2001 was issued using the Temporary Lateral Move process number. When that process was initiated, it was Customs Management's intent to offer only temporary positions on either an Acting or Temporary Lateral Move basis. As you were a CR-03, you could only be offered an Acting appointment. Lateral moves can only occur between equivalent level positions.*

. . .

[14] In the letter, Ms. Berry then turned to the posting of the indeterminate CR-04 positions that had occurred in October 2001. She said this posting was initiated when Customs management decided that there was a need for long-term staff in the Visitor Rebate Program at the airport. She said she had investigated the issue of accommodation for the test and had been assured that the person in charge had advised Ms. Punko at the outset that:

. . .

> *. . . if a candidate experiences physical and/or psychological indisposition of sufficient severity to interfere with his or her test performance, it is the candidate's responsibility to inform the Test Administrator that he or she cannot continue the testing session. A candidate who chooses to continue a testing*

> *session despite physical and/or psychological indisposition must accept the test results and the accompanying retest restrictions.*
>
> . . .

[15] Ms. Berry indicated that this was a standard pre-test instruction, and that it was Ms. Punko's responsibility to advise the test administrator that she would be unable to write the exam. The letter concluded:

> . . .
>
> *I regret that you feel you have been disadvantaged in this process by Human Resources. My review of the matter, however, leads me to conclude that there is nothing further that I can do with respect to this completed selection process. In the future, if you require large print material or other accommodation when being tested, please ensure that you make all Selection Boards and Human Resources Consultants clearly aware of this requirement at the time of your application and before writing any tests.*
>
> . . .

[16] At that point, then, the representatives of the employer took the view that Ms. Punko was in a temporary position that would end on March 1, 2002, and that she had failed to qualify for consideration for the indeterminate position posted in October 2001. When the temporary position ended, according to the testimony of Ms. Punko, the employer did not assist her identifying another position to which she could move after March 1, 2002, and it was necessary for her to take the initiative to find a different job. She was able to get a position with the Tax Services Office in Edmonton, although it was at a lower level than the position she had held there earlier and the position in the Visitor Rebate Program.

[17] Ms. Punko testified that she encountered an uncongenial working environment in the Edmonton Tax Services Office, and this led her to move to a position in the Tax Services Office in Calgary in 2005, where she was still working at the time of the hearing.

[18] Her evidence was that shortly after she moved to the Edmonton Tax Services Office, she approached a representative of the UTE, a component of the bargaining agent for the employees in that office, to pursue her concerns about the course of events related to her previous position in the Visitor Rebate Program. As a different

component had represented her at the time the events occurred, she was referred by the UTE to the CEUDA. She said she had some initial difficulty making contact with the local president, Steve Pellerin-Fowlie, and that he did not seem to understand her concerns. He referred her to another officer of the CEUDA, and she was passed on to several different bargaining agent representatives without getting any satisfactory response. She felt that no one was taking her seriously or making an effort to understand the nature of her concerns. One of her primary concerns, as she expressed it, was that no one would provide her with a copy of the VSSA that had covered her while she was working at Edmonton Airport.

[19] When in due course Ms. Punko was able to communicate with representatives of the CEUDA, she expressed a variety of concerns. She had raised some questions with Brian Monahan, Administrative Superintendent, Customs Operations, about whether she had been paid properly during her time at the airport. In a memorandum dated March 7, 2002 (Exhibit U-14), presented during the cross-examination of Ms. Punko, Mr. Monahan had responded with some information about the basis on which her pay had been calculated.

[20] At the same time, a series of email messages dated March 8 and March 11, 2002 (Exhibit A-12), between Ms. Punko and Karen Peitsch, one of the CEUDA representatives who was dealing with her at the time, show that she had also raised the issue of why she had not been appointed to an indeterminate position in the Visitor Rebate Program. Another CEUDA representative, Christine Hill, the chief steward at the Tax Services Office, accompanied Ms. Punko to a meeting with Ms. Berry. Though Ms. Punko did not specify the date of this meeting, it seems to have taken place before May 9, 2002, when Ms. Hill forwarded to Ms. Punko an email from Ms. Berry. In her own email message (Exhibit U-9), Ms. Hill indicated that she had sought advice from a technical advisor at the CEUDA headquarters and had been told the following:

. . .

> *• On March 14, 2001 – You signed & accepted an offer of an acting position that clearly identifies specific dates (March 12, 2001 to September 7, 2001) you would be acting for. By signing this offer you accepted the related terms and conditions. By signing this letter you are agreeing to the specifications of acting assignments. This means you acknowledged that you understood what an acting*

> *assignment was and what the terms of the acting position were at that time.*
>
> *• There were 3 acting assignment offers signed by you. CEUDA would be unable to argue that you were unaware the acting position was not a term position.*
>
> . . .

[21] In the email, Ms. Hill went on to say that issues of this kind concerning staffing decisions were subject to a recourse process and could not be grieved by the CEUDA. She noted that Ms. Punko had failed to pursue this recourse process on the two occasions it had been open to her to do so, and that it would have been open to Ms. Berry to refuse to discuss the matter with her on that basis. Ms. Hill gave her opinion that it might be possible to grieve some procedural aspects of the decision of the employer not to appoint Ms. Punko to an indeterminate position at the CR-04 level in the Tax Services Office in Edmonton. Ms. Hill pointed out, however, that the employer had never made a commitment to such a course of action; it had only been raised by the CEUDA as a possible solution to the issues raised by Ms. Punko. Ms. Hill's email concluded with a reference to the issues Ms. Punko had raised concerning possible back pay for her time at the airport and an offer to check on the status of this issue.

[22] Shortly after that email message, on May 21, 2002, Ms. Punko filed a grievance (Exhibit U-10) seeking to be appointed to an indeterminate CR-04 position. She testified that, accompanied by Ms. Peitsch, she attended a meeting with Bill Reich, Director, Edmonton Tax Services. She said that Ms. Peitsch seemed intimidated by Mr. Reich, and that she herself had done most of the talking on her own behalf. Mr. Reich denied the grievance, saying in part:

> . . .
>
> *With reference to the GST Visitor Rebate Program, it is clear to me that there were two different competition processes to staff the CR-04* position. . . . *Unfortunately the tenure incorrectly showed indeterminate [in the posting]. . . . It is not possible to appoint you to a CR-04 position merely because you thought you were an indeterminate CR-04. From discussions with another candidate, it is evident that others were quite clear that these were not permanent positions. It appears that discussions to this effect took place in your presence.*

. . .

[23] Ms. Punko was unable to say what became of the grievance after its denial. She did not think that the CEUDA had taken any steps to pursue it further. When, in cross-examination, she was presented with an email message from Ms. Peitsch dated June 19, 2002 (Exhibit U-13), inquiring whether she wished to have the grievance taken further, she said that she could not remember receiving such a message; she indicated that she did not have ready access to email in her position at the Edmonton Tax Services Office.

[24] In her testimony, Ms. Punko indicated that during that period she continued to pursue her concerns about the way she had been paid while working in the Visitor Rebate Program. Under cross-examination, she acknowledged receiving a letter dated June 10, 2002, from Mr. Monahan (Exhibit U-15). In this letter, Mr. Monahan stated that the position of the employer was that, with the exception of a number of hours referred to in his earlier memorandum to her (Exhibit U-14), she had been correctly paid during her time at Edmonton Airport. Mr. Monahan stated:

. . .

> *While not an authorized VSSA agreement, it was a VSSA agreement that was in place at the Edmonton Airport traffic operation prior to you* [*sic*] *arrival here. The shift schedule was discussed with all the CR's coming to work at the booth, and was, to our understanding, in agreement with them. Payment of the overtime that you are requesting would, in fact, affect your overall hours of work and the extra days off, above the two per week would not have been possible.*

. . .

[25] On July 18, 2002 (Exhibit U-17), a grievance was submitted on behalf of Ms. Punko stating: "I grieve the employer's refusal to pay overtime, meal allowances and travel time." Ms. Punko testified that she had received some documentation, and had had some discussion with the CEUDA representatives, about the amounts that might be owing to her from her time in the Visitor Rebate Program. She was present at a couple of meetings between the CEUDA and management representatives, and understood that, although the CEUDA was putting forward a claim for overtime payments on her behalf, the employer was also intending to claw back payments related to days of rest. She knew that the CEUDA representatives and management were both making efforts to calculate the amount that might be owed to her (or that

she might owe to the employer), and that at one point an "independent review" of the estimates was carried out.

[26] This grievance was under consideration for a lengthy period, extending beyond her move to Calgary in 2005. She received a copy of the response at the third level of the grievance process dated August 18, 2005 (Exhibit U-25), that contained the following statement:

. . .

> *I understand that you worked on a variable shift schedule (VSSA) while at the Edmonton International Airport until it was brought to management's attention that, in your case, the VSSA schedule was in contravention of the collective agreement.*

. . .

[27] The document also indicated that the employer was entitled to recover the overpayment that had been made to her. Ms. Punko testified that she had received a cheque for $3,463.12 but had decided not to cash it until her grievance reached a satisfactory conclusion from her point of view. After she started working in Calgary, the employer indicated that they were intending to deduct this amount from her pay cheques within a short period of time. She sought the assistance of the UTE representatives in her workplace, who were able to arrange for a longer-term repayment amount. Nonetheless, she testified that when management informed her of their intention to recover the money she was forced to cash in some investments to meet this requirement.

[28] Ms. Punko also made a request for information under access to information legislation and obtained some of the documentation relating to her employment situation. This included an email message (Exhibit A-11) sent by one management representative to another (copied to the CEUDA representatives) dealing with the change from the VSSA schedule the employer had instituted for the Visitor Rebate Program to a shift work schedule. It contained the following statement:

. . .

> *I had some discussions with Peter Wilton (CEUDA Exec. Steward, EIA Traffic Ops.) about the planned schedule last Thursday afternoon/evening. Discussion had also occurred with Donna Mikolajcyk (2d VP CEUDA Alberta) on the*

> *schedule. It was the union's position that they wanted these employees returned to the standard shift schedule as soon as possible – which is February 25. Peter had agreed to support the 0500 and 1300 start times until consultation could occur at the authorized levels (which we assumed could be easily done prior to the posting of the new schedule – which must be posted by March 3 in order to meet the 15 day minimum posting requirement in article 25.16).*
>
> . . .
>
> [Emphasis in the original]

[29] Ms. Punko interpreted this as providing confirmation of her understanding that it had been the CEUDA that had brought an end to the VSSA scheduling.

[30] In her testimony, Ms. Punko described the effects of this process on her. She indicated that the confusion surrounding the nature of her position in the Visitor Rebate Program, as well as the scheduling issues, had been very stressful. The move back into the Tax Services Office was unwelcome, and she felt that she had been subjected to harassment and prevented from doing her job adequately. Her decision to move to Calgary had been disruptive and she had thus incurred considerable expense; the recovery from her salary by the employer had also had a financial impact. It had been necessary to put on hold certain legal issues related to her personal life. Her health had been affected. Through all of this sequence of events, she had experienced frustration and stress in her dealings with the CEUDA, which she perceived as dealing with her in a disrespectful, offhand and incompetent manner.

B. For the respondent

[31] The CEUDA called two witnesses: Don Davoren, First Vice-President and President of the CEUDA for Alberta, who was involved in these events at various points, and Laurel Randle, a technical officer at the CEUDA headquarters in Ottawa. Mr. Davoren's recollection was that Ms. Punko had first contacted him shortly before she left the Edmonton Airport to return to the Tax Services Office. Their initial conversation was about her concerns with the way she had been paid and the changes made to the shift schedule. Mr. Davoren said that he referred Ms. Punko to Ms. Hill. His next contact with the complainant concerning her pay grievance came when it was going to the third level. He had a number of conversations with her about the approach to take with the grievance. He recalled that she was concerned about whether Ms. Hill had provided her with adequate representation up to that point and whether

management was treating her fairly. He advised her that the CEUDA would push for a re-examination of the hours she had worked and what she had been paid to ensure that she had been treated fairly. He testified that he had had extensive contact with Ms. Hill, and that she had spent many hours working from Ms. Punko's timesheets to create a spreadsheet that would accurately capture the amount of compensation for the hours Ms. Punko worked. In this process it was necessary to reconstruct from the actual hours Ms. Punko had worked a picture of what the situation would have been had she been working on a shift basis for the entire time she was employed at the Edmonton Airport.

[32] Mr. Davoren testified that this reconstruction of the hours worked by Ms. Punko on the basis of a shift work schedule was very complicated and presented a number of issues — such as those involving rest days and meal breaks — that needed to be taken into account. Mr. Davoren said that he was often in touch with Ms. Hill as the process unfolded and was also in fairly regular contact with Ms. Punko because they needed to have her reaction to the calculations that were being made. At one point, for example, Ms. Punko raised a question about whether source deductions already made had been considered. Mr. Davoren said that he and Ms. Hill also sought advice from Ms. Randle, who was assigned to this file.

[33] During this same period, management was also conducting its own calculations and responding to concerns raised by the CEUDA. The initial calculation by the employer had been that Ms. Punko owed them more money than they owed her; the risk that this might be the result of pursuing a grievance had been communicated to Ms. Punko as early as September 2002 in an email message from Ms. Hill (Exhibit U-21) that read in part as follows:

. . .

> *1. The bottom line risk in continuing the grievance is that your position will not be successful & you will be faced with repayment of an amount determined that could be as high as $4300.00. You are solely responsible for the repayment. All the union can help you with will be how much is paid each pay cheque.*

. . .

[34] Mr. Davoren acknowledged that the process had taken a long time, which he attributed to the complexity of the issues and the difficulty the parties had in agreeing on the amount due Ms. Punko. Even when the CEUDA and the employer were both satisfied that they had arrived at an accurate set of calculations, Ms. Punko continued to have reservations. Mr. Davoren said that although the CEUDA and the employer were eventually able to agree that the amount owed to Ms. Punko was greater than the amount the employer would be clawing back, the issue of how the money would be paid remained. He said that he made representations at both the local and the regional level that a net cheque should be issued to Ms. Punko. He was advised that the computer accounting system (CAS) used by the employer made this impossible; the program would only recognize separate procedures for issuing the cheque for overtime to Ms. Punko and recording the debt owed to the employer. The same computer program made it necessary to attribute the payments made to Ms. Punko to notional periods arising during her employment. It was decided to record these periods as "leave without pay" (even though Ms. Punko had in fact been working during these times) because this would not trigger any tax or benefit implications. Mr. Davoren said that the CEUDA had inquired into this and been assured that it was merely a "paper transaction" that would have no impact on pension or other benefits for Ms. Punko; it did not, as she seemed to think, represent an alteration of her employment records.

[35] In the end, Mr. Davoren said the CEUDA had to accept that it was impossible to have a net cheque issued to Ms. Punko, and that the requirements of the CAS necessitated both a payment to Ms. Punko and a recovery from her. He advised Ms. Punko that when she received the cheque, she should immediately pay the amount owed to the employer as a lump sum. As she continued to have reservations about the amount being paid, she chose not to do this.

[36] Under cross-examination Mr. Davoren denied that he had advised Ms. Punko that she should not move to Calgary or that he tried to prevent her from going. He said that he had advised her that there were no CEUDA representatives in the workplace she was going to in Calgary; he told her this in order to prepare her for possible additional delays in dealing with her outstanding grievance.

[37] Ms. Randle testified that she has been a CEUDA technical officer since 2002. Prior to this, she had been a customs officer and had been involved in negotiating a number of VSSAs. She said that a VSSA represents a departure from the scheduling provisions in the collective agreement and must therefore be negotiated between the bargaining agent and management. A VSSA is sometimes requested by an employer because it wishes to have flexibility in scheduling employees in certain kinds of atypical work situations; on the other hand, the combination of longer shifts with longer periods of time off that often characterizes a VSSA may suit some employees, so it is sometimes requested by groups of employees. In any case, it is not open to an employer simply to put a variable schedule in place without negotiating a VSSA with the bargaining agent.

[38] Ms. Randle was asked for advice at an early stage by the CEUDA representatives handling Ms. Punko's grievances. She could not remember who had initially contacted her, but said she recalled having examined some jurisprudence on related issues. She recalled expressing some concern with the timeliness of the grievances. By the time she was approached, she understood that Ms. Punko was back in the Tax Services Office, and she feared that the 25-day time limit for filing grievances might have expired.

[39] With respect to the issues captured in the grievance about whether Ms. Punko should have been placed in an indeterminate position, Ms. Randle recalled expressing concerns about whether the CEUDA would have any basis for grieving a staffing issue. Despite pressure from the CEUDA to negotiate staffing issues, the employer had insisted on excepting them from the collective agreement.

[40] With respect to the grievance on the overtime payment issues, Ms. Randle testified that although she does not usually become substantially involved in a grievance until the fourth level, which she often handles, in this case she had been involved from an early stage. Mr. Davoren and Ms. Hill had asked her advice on a number of issues, and Ms. Hill had sent her successive versions of the spreadsheets asking for her opinion.

[41] In December 2004 Ms. Punko wrote to her and asked, among other things, whether there had been a response from the third level (Exhibit A-20). Ms. Randle inquired about this in an email dated January 12, 2005, sent to Mr. Davoren and Ms. Hill (Exhibit U-26), in which she also asked to have the file forwarded to her so that

she could consider the next steps. On January 26, 2005, she wrote to Ms. Punko (Exhibit U-27) advising her that she should make an access to information request. Over the following months, Ms. Randle was in contact with Ms. Punko on numerous occasions, usually by email; these interchanges included another inquiry about the third level response from Ms. Punko on July 19, 2005, and a reply from Ms. Randle that she had not yet seen it (Exhibit U-33).

[42] On August 2, 2005, Ms. Punko wrote to Ron Moran, the CEUDA National President (Exhibit U-34), indicating that she no longer wished to be represented by the CEUDA. Her letter stated in part:

. . .

> *CEUDA Union Representation has failed to bargain with good faith and failed to observe terms and conditions and failed to follow the implement provisions of collective agreement and toward a arbitral award. CEUDA Union representation have imposed a financial penalty "Recovery of Overpayment" imposing me to pay incorrect amount. "Recovery" resulted from Union failing to observe terms and conditions of collective agreement & Public Service Relations Act.*
>
> *I require a Independent Representative Labour Litigation Lawyer to continue with my complaint. I designate CEUDA Union to step away from my grievance representation and to forward to me all my copies of Union proceeding.*
>
> *Due to lack of Union representation and failed to compile my grievance properly, as CEUDA Union should be responsible and held responsible to make payment for all costs; legal expense, disbursement expense, contingence, as per subordinate support measures acquirement in the involvement of my Labour Dispute Settlement.*
>
> . . .
>
> [*Sic* throughout]

[43] Mr. Moran responded in a letter dated August 3, 2005 (Exhibit U-35). He pointed out that unfair labour practice complaints against the CEUDA would have to be made to the Board and not to the CEUDA. He also indicated that it was not the practice of the CEUDA to assign private counsel and concluded by asking for confirmation that Ms. Punko wanted the CEUDA to cease providing "any and all representation of your related grievances."

[44] In a further letter dated August 12, 2005 (Exhibit U-36), Ms. Punko indicated that she had received a copy of the third level reply and wished the CEUDA to proceed with the grievance to the fourth level. It is clear from this letter that Ms. Punko continued to be in disagreement with the disposition of her grievance that had been made by the CEUDA:

. . .

> *I received my 3rd Level Grievance reply from the Prairie Region Office, and as I will mention and keep mentioning that in all this length of time we are at the beginning of what my grievance prevails and as I have always pointed it out that it is what I worked and how I was placed to do my work with "Operation Requirements" and was told to follow. I disagree with* ***UNION agreeing with ER*** *that I am only a* ***SHIFT Worker****. I worked VSSA as per Supertendent documentation to me and I could willingly get co-workers to file the same to say they were VSSA. I disagree with Don Davoren telling me to pay back this Garnishee (Overpayment Recovery) and as a Representative not taking the solidarity to stop the garnishee done by Edmonton Human Resources as to my issues are still outstanding of pay. This is all to create hardships on me of $479.71 (Garnishee "Overpayment Recovery") was done and to be in contingent, consecutive paydays and Garnishee was done August 10, 2005 (Don Davoren informed me by phone that RECOVERY was happening) and last time was in December, 2004. Don Davoren tells me pay-it-up to Human Resources when it was including twice deductions for Source Deductions, totally incorrect payroll procedures, and paying back to days that I had worked as stated LWOP, again unfair payroll practise. I had to do my own footwork on this matter as my Union was not there and refusing to represent me for the garnishee.*
>
> . . .
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[45] The third level reply signed by the employer's representative on August 2, 2005 (Exhibit U-25), represented, according to Mr. Davoren, the agreement reached between the employer and the CEUDA concerning the correct amount for the overtime payments to Ms. Punko and thus referred to the grievance as being "allowed." The grievance concerning the compensation issue had also included a claim by Ms. Punko for travel expenses because her job required her to travel to Edmonton Airport, which

was a considerable distance from her home; the issue of travel expenses had not been resolved in the course of the settlement related to overtime payments.

[46] On August 16, 2005, Ms. Randle emailed Ms. Punko (Exhibit U-38) indicating that the grievance had been forwarded to the final level and asking for some specific information. After further contact with Ms. Punko, Ms. Randle attended a meeting with a management representative in October 2005 to discuss the grievance. After further information on the travel expense question was provided by Ms. Randle, management issued a reply dated November 15, 2005 (Exhibit U-42), declining to take any further corrective action beyond that set out in the third level reply.

[47] Following the final stage of the grievance procedure, in cases involving a financial penalty it is possible for a grievance to be referred to adjudication, and Ms. Randle explored this option. She referred it to the PSAC for review by a grievance and adjudication analyst. On January 24, 2006, Nathalie St. Louis of the PSAC provided a response (Exhibit U-43) indicating that the grievance would not be referred to adjudication. This decision was based on an interpretation of article 32 of the collective agreement and on a conclusion that Ms. Punko had not been required by her employer to travel on business outside her headquarters area. The response also alluded to the timeliness issue and the fact that the employer had been willing to extend the time so that the grievance could be addressed.

[48] Having received this response, Ms. Punko contacted the PSAC to ask them to reconsider referring the matter to adjudication. Though this was a somewhat unusual request, the PSAC agreed to seek an extension of time for referral to adjudication in order that they could reassess her file. In a letter dated March 7, 2006 (Exhibit U-44), Jacquie de Aguayo, Coordinator, Representation Section, Collective Bargaining Branch of the PSAC, wrote to Ms. Randle to inform her that a decision had been made, after a review of the file, to confirm the previous decision not to proceed to adjudication. A copy of this letter was sent to Ms. Punko.

[49] Ms. Randle testified about a number of conversations she had had with Ms. Punko. Ms. Punko raised with her what she described as a concern about “equal pay.” By this, she was referring to the question of whether the job she was doing at Edmonton Airport should have been classified as a PM-02 rather than a CR-04 job. On that issue, she made some of the same points she repeated at this hearing: that some of the work she and her co-workers did was covered in the training manual also used

by customs officers and that some of the tasks included in the job description had a code number that applied to work done by customs officers. Ms. Randle said she explained to Ms. Punko that the fact that customs officers and the Visitor Rebate Program clerks did some of the same tasks did not make their positions equivalent; customs officers are rotated through a variety of tasks and some may overlap with the duties performed in other positions. Ms. Randle said that she tried to convey to Ms. Punko that the options for challenging staffing matters are very limited and that her failure to employ the main mechanism available — the use of the recourse process to obtain personal feedback — had restricted the possibilities open to the CEUDA.

[50] Ms. Randle also said that she felt Ms. Punko had confused her concern about whether she should have been receiving PM-02 level compensation with her concern about the elimination of the VSSA. She tried to explain to Ms. Punko that these were separate issues, and that the representation provided by the CEUDA had ensured that there was a net gain for her when the change from the VSSA occurred. At the time of the final level of the grievance procedure, it was her understanding that the issue of compensation had been explored thoroughly and had been resolved in a way that was as favourable to Ms. Punko as it could be; the only outstanding issue at that time was that of travel expenses, which was a relatively minor matter.

[51] In reference to another issue raised by Ms. Punko, Ms. Randle said that she had tried to reassure Ms. Punko that, although the attribution of some of the compensation to the "leave without pay" category had been agreed on because of the requirements of the CAS, this was simply a way of inducing the system to produce the desired compensation and did not have the consequence, as Ms. Punko put it, of "changing her employment records." She had also tried to explain to Ms. Punko that there was no point in referring the grievance to the fourth level before a third level response had been received, as it would simply have been sent back by the employer.

III. Summary of the arguments

A. For the complainant

[52] The essential point made by Ms. Punko in her argument was that the CEUDA had a responsibility to provide her with effective representation and that it failed to carry out this responsibility. She listed a number of concerns with the representation provided to her by the CEUDA representatives, including their overt disrespect for her, their failure to respond in a timely way or to provide clear answers to her questions,

their failure to advocate forcefully on her behalf, their unwillingness to consider her concerns and their incompetence at handling her grievances.

[53] She traced many of her difficulties back to the elimination of the VSSA arrangement for the duties she was performing at Edmonton Airport, and she argued that her bargaining agent had been responsible for initiating this decision without any regard to the implications for employees such as herself. As a result, she argued that she had been put in a position where she had to enter into a lengthy process concerning the calculation of her compensation, a process not competently managed by the bargaining agent. She argued that the CEUDA had allowed her to be submitted to the overpayment recovery insisted on by the employer and had done nothing to stop her losing her job at the airport or to help her find another equivalent job. The consequences to her had been serious in terms of financial hardship, ill health, psychological suffering and personal inconvenience.

[54] She argued that the function of the bargaining agent should be to ensure that the employer cannot make decisions that put her at a disadvantage, such as the decision concerning whether she should have been given an indeterminate position in the Visitor Rebate Program, and to ensure that she is able to gain all of the information required when she is unable to obtain it through personal approaches to management.

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

[55] On behalf of the CEUDA, Krista Devine argued that the basic standard that must be met by a bargaining agent in representing its members is that set out by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. In that decision, the Court examined the evolution of the duty of fair representation, both in common law and in statute, and summarized their conclusions as follows:

. . .

> *The following principles, concerning a union's duty of fair representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *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.*
>
> . . .

[56] Ms. Devine also referred me to the following statement contained in the decision of the Board in *Cloutier and Rioux v. Turmel and the Public Service Alliance of Canada*, 2003 PSSRB 12, at para. 18:

> *[18] The complainants would like to dictate to their bargaining agent <u>the timing</u> of the meeting between them and their bargaining agent in preparation for the hearing into their complaint and <u>the amount of time</u> to be spent on the meeting. I deem that it is up to their union to decide when and how long to work on their file. I understand that the complainants would like to have as much attention as possible paid to their case. However, it is up to the bargaining agent to decide on the process (people, time and money) for representing them. . . .*
>
> [Emphasis in the original]

[57] Ms. Devine also noted that the Board has recognized that a bargaining agent is called upon to make judgments about how grievances should be addressed and that considerable scope must be given to the bargaining agent to weigh various considerations in arriving at those judgments. In *Nowen et al. v. UCCO-SACC-CSN*, 2003 PSSRB 98, the Board made the following comment, at para. 68:

> *[68] Bargaining agents and their representatives are given fairly wide latitude in the settlement of grievances (*Richard and Public Service Alliance of Canada, *2000 PSSRB 61 and* Lipscomb and Public Service Alliance of Canada, *2000 PSSRB 66). In* Trade Union Law in Canada *(MacNeil, Lynk and Engelmann), the principle is summarized as follows:*
>
> > A union which fully turns its mind to the grievance, after having made a thorough investigation, and concludes that it should not be arbitrated because it believes there is little likelihood of success will have fulfilled its obligations, even if a board might have reached a different conclusion. *[para. 7.480]*

[58] Ms. Devine argued that the standard established in the jurisprudence concerning the duty of fair representation requires a bargaining agent to be conscientious and diligent in representing its members; it does not, however, require that a bargaining agent do everything a member may desire or provide the degree of attention the member may think is warranted.

[59] In any case, the evidence showed that the CEUDA did not stint in its representation of Ms. Punko. Ms. Devine summarized the evidence relating to the interaction between Ms. Punko and the CEUDA representatives and argued that, contrary to the allegations of Ms. Punko, this evidence revealed that the bargaining agent had devoted considerable time and resources to addressing her concerns, that they had pursued issues on her behalf even when they were not confident that the matters were arbitrable and that they had succeeded in obtaining some compensation for her despite the questions of timeliness and arbitrability that surfaced.

IV. Reasons

[60] In *Gagnon*, the Supreme Court of Canada explained that the duty of fair representation was recognized by the courts as a logical corollary of a legislative regime that conferred on certified unions exclusive representational rights for their members. On the one hand, the legislation allowed for the consolidation of the bargaining power of individual employees through union representation; it also meant, however, that it was no longer possible for individual employees to negotiate directly with their employers. Because of the dependence of individual employees on union representation as a means of addressing issues concerning terms and conditions of employment, the courts concluded that unions should be required to represent all employees even-handedly and conscientiously.

[61] The character of the duty of fair representation has been described in various ways; the passage reproduced above from *Gagnon* is an often-quoted Canadian example. An American case dealing with the same issue, *Vaca v. Sipes*, 386 U.S. 171, summarized the duty in these terms at page 190:

. . .

> *A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.*

. . .

[62] In *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217 v. Ross Anderson*, [1975] 2 Can LRBR 196, the British Columbia Labour Relations Board observed that the formulation in *Sipes* of the standard of representation was used when the duty was embodied in collective bargaining legislation in British Columbia; it should be noted that the same terminology is used in section 187 of the *Act*, the provision that concerns us in this case. In *Rayonier*, the British Columbia Labour Relations Board expanded on the meaning of these terms in the following way, at pp. 201-202:

. . .

> *. . . 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 (which are illegal under the Human Rights Code) 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.*

. . .

[63] This standard has been interpreted to accommodate the fact that, though a bargaining agent has a responsibility to each employee in the bargaining unit, it also has a responsibility to provide effective representation to bargaining unit employees collectively. This requires that the bargaining agent be able to balance the interests of employees across the bargaining unit, decide how to allocate resources for various

purposes and make pragmatic assessments of which issues should be pursued with the employer. The bargaining agent cannot be expected to drop everything in order to pursue the interests of a single employee or to guarantee that every decision it makes accords with that employee's wishes; it can only be expected to consider issues affecting the individual employee fairly and in a conscientious manner. In a recent decision, *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13, the Board made the following comment:

. . .

> *[69] . . . the duty of fair representation does not require the bargaining agent to take the direction of individual members when deciding what grievances to pursue, when to negotiate extensions of time and what grievances to settle. Finally, an individual member of a bargaining agent has the right to representation, but that is not an absolute or unlimited right. It does not mean, for example, that the member can insist that the bargaining agent provide a representative whenever he wants one. As long as the bargaining agent is not arbitrary or discriminatory or acting in bad faith when it exercises its judgment in these matters, it is entitled to distribute the limited resources of the organization in a reasoned fashion.*

. . .

[64] In this case, Ms. Punko alleged that there were serious breaches of the duty of the bargaining agent to represent her fairly. She claimed that the bargaining agent did not treat her concerns seriously, that they showed no respect for her, that they neglected to respond to her and that they did not take sufficient steps to address the complex issues she raised. She held them responsible for the change in the scheduling of her work in the Visitor Rebate Program and argued that they did not pursue vigorously enough her claim that she should have been placed in an indeterminate job. All of these are serious allegations.

[65] Thanks in part to the miracle of modern technology, I was provided with a significant amount of documentation that sheds light on the dealings between Ms. Punko and representatives of the CEUDA, much of which took place through email. I also heard oral testimony from Ms. Punko and representatives of the bargaining agent. After assessing this evidence as a whole, I have concluded that it does not support Ms. Punko's claim that the bargaining agent failed to represent her fairly.

[66] According to Ms. Punko's testimony, it was around the time she left the position at Edmonton Airport and moved to the Tax Services Office at the beginning of March 2002 that she made efforts to establish contact with a representative. After she was directed to the CEUDA as the appropriate contact – and it is not clear how long her initial inquiries with the UTE took – she stated that she was passed through a series of CEUDA representatives who showed little interest in her concerns and who failed to take any steps to address them for a significant period of time. This is inconsistent with the evidence provided by the emails, which show that as early as March 8, a week after her last day at the airport, Ms. Peitsch had been identified as the representative Ms. Punko should get in touch with and that by March 11, Ms. Peitsch had responded.

[67] By her own account, the concerns raised by Ms. Punko covered a range of issues and were somewhat complicated. Ms. Hill, another representative who was involved in Ms. Punko's case, apparently thought the issues were so difficult that she sought the assistance of a CEUDA technical officer; by May 2, 2002, she had received an answer to her inquiries and was relaying the answers to Ms. Punko.

[68] At that point, since the employer had not fully responded to the questions Ms. Punko had raised about her entitlement to overtime pay, the major issue being addressed by the CEUDA was that of whether she had any claim to an indeterminate position. The ideal resolution of this issue from Ms. Punko's point of view was for her to be placed in an indeterminate position at the CR-04 level in the Visitor Rebate Program (though she continued to press the issue of whether PM-02 or PM-03 would be the more appropriate classification). She did, however, discuss with Ms. Berry the possibility of being placed in a different workplace at the CR-04 level.

[69] From the PSAC's and the CEUDA's point of view, there were a number of factors that placed severe limits on its ability to advocate a resolution of this issue that would be favourable to Ms. Punko. The employer took – and continued to take – the position that this was purely a staffing issue, which was not amenable to the grievance procedure under the collective agreement. They acknowledged that an unfortunate mistake had been made in the posting for the position to which Ms. Punko had responded, but maintained that this did not create any entitlement to an indeterminate position. They further argued that she had signified that she understood the actual nature of the position by signing a series of offers for successive terms in the position.

She had failed in her effort to qualify for the indeterminate position in the same job when it came open and had not pressed any complaint she might have had about the accommodation provided for her to write the qualifying test.

[70] Ms. Punko had also failed to make use of the recourse process in relation to the posting of both her term position and the indeterminate position, a process that the employer argued was the only avenue open to her. From her testimony, it is clear that Ms. Punko thought that the notices posted with respect to the recourse process presented opportunities for other employees to raise issues about her appointment to the term positions. She did not understand them as a chance for her to raise her own concerns about the term appointments or the eventual appointment of others to the indeterminate positions. All the same, the position of the employer that the recourse procedure represented the only vehicle for raising the kinds of issues Ms. Punko wished to put forward constituted a barrier for her representatives when it came to considering how to pursue the issue.

[71] The CEUDA representatives also had concerns about whether the time had elapsed during which they could file a grievance should they have decided to do so. The 25 days permitted under the collective agreement had clearly expired, and they could not be sure whether this would be an obstacle that could be overcome.

[72] Despite all of their reservations about whether the grievance could be pursued to a successful conclusion, the CEUDA did file a grievance concerning the appointment issue on May 21, 2002, asking that Ms. Punko be placed in an indeterminate CR-04 position, without specifying where. Any issue of timeliness did not prevent the CEUDA from being able to raise the substantive issues concerning the appointment, at least at the second level, and obtaining a response to these questions from the employer. After the second level response dated June 10, Ms. Peitsch inquired whether Ms. Punko wished the grievance to be taken to the next level and apparently received no response. Ms. Punko said that she did not recall receiving this email message, and gave as the reason that she did not have regular access to email at her workplace. She did not, however, give the CEUDA any indication that she wished to be contacted some other way and, given that both before and after this date there was a significant amount of email communication between Ms. Punko and the CEUDA representatives, it was not unreasonable for the CEUDA to assume that this method of communication was

effective and to conclude that she was not interested in having the grievance taken to the next stage. In any case, this grievance was not pursued any further.

[73] During this period discussion was also going on about the compensation issue, and on June 21, 2002, the CEUDA filed a grievance on behalf of Ms. Punko concerning this question. It was clear to the CEUDA representatives from the outset that pressing for compensation for overtime pay had inherent risks, given that it would open the door to claims by the employer for sums to be recovered from Ms. Punko. Indeed, the CEUDA representatives warned her of this possibility in September 2002, while they were preparing for the consultation with the employer at the first level. They also pointed out that there was an issue of timeliness in relation to this grievance.

[74] It rapidly became clear that the reconstruction of the period of Ms. Punko's service based on an ordinary shift schedule rather than a variable shift schedule would be quite complicated. In the course of this reconstruction effort, the CEUDA representatives spent a considerable amount of time ensuring that they had access to accurate information and that their calculations of the amounts due Ms. Punko were as complete as possible. They drew extensively on the expertise of Ms. Randle, consulted frequently with Ms. Punko and incorporated her input into the positions they presented to the employer, assessed the proposals put forward by the employer, pressed for an independent assessment of the situation, and ultimately succeeded in obtaining a net monetary gain for Ms. Punko. This was a complicated and tortuous process, and it was a period of several years before the CEUDA and the employer could agree that they had created the most accurate picture possible of Ms. Punko's situation during the year she was in the Visitor Rebate Program.

[75] There is no doubt that one of the complications in dealing with this grievance was Ms. Punko's fixed view that it was the CEUDA that had initiated an elimination of the VSSA under which she had been working and that it was therefore the CEUDA that had exposed her to the risk that the employer would seek to recover funds from her. The CEUDA denied that they were responsible for eliminating the VSSA. It is not clear who brought to the attention of the employer that no VSSA had been concluded — and there was no evidence that it was the CEUDA who first raised the issue — but once it was understood that there was no VSSA in place, neither the employer nor the CEUDA had any choice but to proceed to place the affected employees within the framework allowed by the collective agreement. In her evidence, Ms. Punko indicated that one of

her frustrations with the CEUDA representatives was that they were unwilling to supply her with a copy of the VSSA. The evidence of the witnesses for the respondent made it clear, however, that the reason for this was that there never was such an agreement, and therefore it was not possible to produce one for her review. I accept the respondent's evidence that they made efforts to explain this to her as they proceeded with the negotiation of the grievance.

[76] It is undeniable that the processing of the grievance concerning what compensation Ms. Punko should receive in relation to her time in the Visitor Rebate Program occupied an unusually lengthy period. This was partly because of the number of variables and the complexity of the information connected with the issue. It was necessary to consider how each of the hours she actually worked should be categorized, what allowance needed to be made for such things as rest days and holidays, how the calculations might impact on her benefits and tax liability, and what amount was due the employer for overpayment recovery. To deal with all of these issues, it proved necessary for the CEUDA representatives, particularly Ms. Hill, to do a lot of background work and data analysis to satisfy themselves that they were grasping the essential elements of the case being made and to consult both with Ms. Randle and with Ms. Punko. They exchanged a number of iterations of the material with representatives of the employer and obtained an additional assessment of the data by someone not connected with generating the original calculations. At nearly every stage, changes were suggested, and it was necessary to incorporate those changes into the calculations; some of them resulted from input from Ms. Punko herself. Even once the calculations had been agreed on, representatives of the CEUDA continued to pursue a number of issues, such as whether a net cheque could be issued and whether the way the overpayment recovery was recorded would have any impact on Ms. Punko's pension or benefits before they were willing to agree on the final settlement of the grievance.

[77] The time taken was long, but it cannot be said that the length of time was attributable to unreasonable delays or neglect on the part of the CEUDA representatives. Though these representatives may not have been as responsive and may not have achieved results as speedily as Ms. Punko may have wished, it must be remembered that Mr. Davoren, Ms. Peitsch and Ms. Hill were elected volunteer representatives, with jobs of their own, and in addition to this they had other members

to represent. The evidence does not establish that they were lax in handling the grievance or unmindful of the importance of the issues to Ms. Punko.

[78] In the end, having started from a position where they were concerned about the strength of the claim they could make on Ms. Punko's behalf, and about the element of timeliness, the CEUDA was able to persuade the employer to deal with the substance of the grievance rather than to rely on the timeliness issue and was able to obtain a settlement that represented a significant net monetary gain for Ms. Punko. Even after they had agreed with the employer on the amount of compensation for overtime hours, they explored the possibility of further pursuing to adjudication the remaining issues concerning travel expenses. Staff members of the parent organization, the PSAC, even agreed to consider the issue a second time based on the urging of Ms. Punko.

[79] Ms. Punko described vividly at the hearing how devastating this whole situation has been for her. When she applied for the position in the Visitor Rebate Program in the spring of 2001, she had in mind a career change and a permanent position in a new workplace. The mistake made by the employer in the original posting, which wrongly characterized the position as indeterminate, set in motion a chain of events that had very serious consequences for her. In the end, she failed to be given a permanent position in the Visitor Rebate Program; this meant that she no longer had a position in that Program and was forced to move back to a less desirable position in the Tax Services Office. She found that position and aspects of her working environment unsatisfactory and felt she would be better off moving to the Calgary office where she was working at the time of the hearing. During all of this time, she was involved in a grievance procedure that she found to be stressful. She traces many of these negative consequences first to what she saw as CEUDA's interference in the shift schedule that had been established for her and then to the unwillingness of her representatives to act forcefully on her behalf.

[80] One must have some sympathy for the disappointment, stress and frustration that has dogged Ms. Punko since her decision to apply for the position in the Visitor Rebate Program. I am not persuaded, however, that her negative experience over that time can be laid at CEUDA's door. Some important features of the situation — that staffing issues lie outside the scope of the collective agreement, that Ms. Punko accepted a series of term appointments, that she failed to avail herself of the recourse process available, that she failed to pursue the issue of accommodation during the

writing of the qualifying test for the indeterminate position, that the grievances were arguably untimely, that the employer had wrongly instituted a shift schedule that they were not entitled to put in place, that the CAS used by the employer meant that Ms. Punko faced a recovery process for the overpayment separate from the payment to her of the amount agreed for overtime payments – placed severe restrictions on the ability of the CEUDA to advocate on behalf of Ms. Punko. Although many of these limitations were evident to her representatives from the outset, they filed grievances in order to pursue the issues with the employer and had at least some modest success on the issue of compensation for her time at Edmonton Airport.

[81] There seem to have been some difficulties in communication between Ms. Punko and representatives of the CEUDA. Based on the evidence before me, however, I am persuaded that the CEUDA overall fulfilled its responsibilities to Ms. Punko in a professional and diligent manner. Despite her complaint that they failed to communicate with her almost completely, the email record suggests otherwise and indicates that Mr. Davoren, Ms. Peitsch, Ms. Hill, Ms. Randle and others made efforts to inform her about the progress of the grievances and the strategies that they were pursuing and to respond to her questions. When she complained that she had difficulty dealing with particular representatives, it is apparent that they made efforts to refer her to someone she might have more of a rapport with; Ms. Randle, for example, became involved at an earlier stage of the grievances than she normally would and provided a significant amount of feedback and advice to Ms. Punko. It cannot be said that the CEUDA representatives dealt with Ms. Punko unfairly or that they behaved towards her in a way that could be described as arbitrary, discriminatory or in bad faith, the standard set by the statute to establish a breach of the duty of fair representation. Though what happened to Ms. Punko was indeed unfortunate, I am not persuaded that the CEUDA violated its obligations towards her.

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

(The Order appears on the next page)

V. Order

[83] The complaint is dismissed.

May 28, 2007.

Beth Bilson,
Board Member