Date: 20070910

File: 561-02-87

Citation: 2007 PSLRB 95

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CAROLE LAPLANTE

Complainant

and

TREASURY BOARD
(Department of Industry and the Communications Research Centre)

Respondent

Indexed as
Laplante v. Treasury Board (Department of Industry and the Communications Research Centre)

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

REASONS FOR DECISION

Before: Léo-Paul Guindon, Board Member

For the Complainant: Herself

For the Respondent: Karl G. Chemsi, counsel

Heard at Ottawa, Ontario,
November 20 and 21, 2006.
(P.S.L.R.B. Translation)

I. Complaint before the Board

[1] Carole Laplante ("the complainant") was Manager of the library at the Communications Research Centre (CRC) of Industry Canada (IC) when she filed a complaint on September 14, 2005 with the Public Service Labour Relations Board ("the Board"). Her complaint is based on paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the new *Act*"), which reads as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[2] "Unfair labour practice" is defined in the new *Act* as follows:

> *DIVISION 12*
>
> *Unfair Labour Practices*
>
> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

[3] Subsection 191(3) of the new *Act* defines the burden of proof as follows:

> *191(3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[4] The complaint was filed with the Executive Director of the Board in a letter dated September 14, 2005, the details of which follow:

> [Translation]
>
> . . .
>
> *I am filing the attached complaints and placing them in abeyance while awaiting the results of grievances regarding allegations that to date have been dealt with in a somewhat summary manner. This complaint concerns the role of Industry Canada (IC) management and that of its Communications Research Centre (CRC) in the same conflict*

as that which gave rise to complaints 561-02-38, 62 and 63 against the union (PSAC), which have already been filed with the PSLRB.

I request that all of my allegations be accepted given the excessive delays in processing the initial complaints, in which all of the allegations were found to be unfounded, the lack of support that I received during this conflict (both from the union and from management), the extended sick leave, the complaints and grievances that I filed within the specified periods, and management's irresponsible attitude in this matter. The escalation of this dispute could have been avoided if there had been a preliminary analysis of the three harassment complaints in September 2003 to verify that the allegations were based on facts and that they met the definition of harassment.

The grievances concern the actions or omissions of management representatives: Veena Rawat (Acting President, CRC), Richard Lachapelle (then Acting Director, Human Resources, CRC), Carol Brooks (former HR Director, CRC), Ms. Cathy Downes (Director General, HR, Industry Canada (IC)), Nicole Cusson (former Director, Labour Relations, IC), and Richard Momy (Director, Labour-Management Relations). Some of these people are no longer employed at IC, but the Department is still responsible for their actions.

The attached documents contain a reworked version of all of my grievances. . . .

. . .

Unreasonable delays	*On August 5, 2005, I received the investigation reports on three harassment complaints filed against me 26 months earlier in May 2003. The time limit on such investigations under IC's policy is 60 days, and under Treasury Board's policy it is 90 days.*
Human rights	*These reports exonerate me from about 15 allegations. Significant public expenditures and the negative repercussions of those complaints could have been avoided if Ms. Downes had, as she is supposed to, verified if there was enough evidence to open the investigations. The complaints included, among other things, allegations about my health. By accepting them,*

Ms. Downes violated my right not to be discriminated against because of a disability.

Procedural fairness

My repeated requests for a preliminary analysis of those complaints were ignored until March 9, 2005 when it was finally confirmed that there would be none. Ms. Downes knew or should have known that such an analysis was required since less than three months before the complaints were filed against me, the Department was found guilty by a Federal Court judge in a similar case.

Gross negligence

PSMA

An initial series of investigations was discontinued after the preliminary reports were filed in July 2004. Ms. Downes did not seize the occasion to review her decision to avoid more delays and unfortunate consequences, in the spirit of the Public Service Modernization Act, *which she is responsible for implementing. As a result of the complaints against me, I was relocated and removed from all of my duties on my return from extended sick leave in November 2004. I was not consulted before that decision.*

Procedural fairness

Abuse of authority

A few weeks earlier, Mr. Lachapelle contacted me with a transfer offer; he was reviewing the level of the position and talked about the assignment in a positive manner. I preferred to retain my position. CRC and IC management then removed me from all of my duties and imposed on me the duties of its November 17, 2004 offer. These duties are at more of a strategic level than my incumbent position. Management did not consider my ability to meet such a challenge in the following four to six months, without any budget or assistance, while defending myself against abusive complaints and trying to recover from depression. Management only looked at the complainants' interests, who were

PSLRA 186(2): Bad faith

Human rights (disability)

Procedural fairness	*demanding physical and line separation. I informed Ms. Rawat and Richard Lachapelle that the Federal Court had already ruled that it was reasonable for a person in my situation to carry out their duties if there was no contact with the complainants. Ms. Rawat did not want to reconsider her decision, even though she compromised the respect to which I was entitled from my employees.*
Human rights (disability) *PSLRA 186(2): Intimidation Bad faith*	*Veena Rawat based this decision on an agreement with Ms. Cusson and Ms. Downes and the TB harassment policy. They maintained that it had not been necessary until then to separate me from the complainants because I was on extended sick leave and my absence did not greatly affect the department for which I was responsible. In my view that seems like discrimination based on disability. Moreover, on November 17, 2004, Ms. Rawat told me on several occasions that, if she were in my place, she would go along with the agreement between HR and IC.*
PSLRA 186(2): Bad faith and damage to my dignity and reputation	*CRC and IC management did not try to minimize the impact of my removal from my duties after my return to work. Management should have known that that decision could be detrimental to my reputation since I am in charge of a service for researchers. Ms. Rawat waited two months before informing them of my "temporary assignment". There was a huge controversy following the cancellation of one of my services and I had to deal with complaints, requests for information that management no longer allowed me to deal with and other embarrassing questions. I will provide the evidence during a hearing.*

PSEA 51(6)(b)	*After I was exonerated of all of the allegations presented against me, Ms. Rawat refused, without consulting me, to reinstate me in my duties, which did not require any contact with the complainants (i.e. budget management, service planning, contact with clients). This contravenes the* Public Service Employment Act*.*
Conflicts of interest	*On July 26, 2005, I asked HR/IC to ensure that the follow-up on all of the investigation reports would be assigned to an impartial person. To date, this request has been denied. Ms. Rawat and Ms. Downes are extremely involved in this matter, either by directly supervising the initial complainants or in making the decisions that are the subject of complaints. They still plan to decide how to resolve the conflict, despite the apparent conflict of interest.*
Procedural fairness	*I filed a harassment complaint against Ms. Rawat on December 12, 2004, which was denied by Ms. Downes on February 1, 2005, without considering most of my arguments. I also asked the person responsible for the file at the Department of Justice to include my harassment complaints against the three complainants in their ongoing investigations. Ms. Downes received a copy of that request but the complaints were handled separately.*
Procedural fairness	*On January 2 and 8, 2004, CRC HR convinced me not to file a complaint even though I felt harassed by abusive procedures, because they assured me that my point of view would be considered during the investigations. The preliminary reports from the first investigation did not do this. I therefore filed complaints against the complainants in November 2004 to ensure procedural fairness. The findings of these investigations should be available in a few weeks.*

Bad faith	*On March 24, 2005, I made a request under the* Access to Information Act *and the* Privacy Act *to support my defence during the harassment investigations under way at that time. I did not receive the documents until September 8, 2005, when they were no longer of use for that purpose. In the context of the entire matter, this seems like bad faith to me.*
Abuse of authority *Basic rights*	*From the beginning of the conflict, and for months, HR/CRC knew that I did not know the allegations and facts alleged against me. I informed Lyse Bossy on May 28 and June 3 and 4, 2003 and Richard Lachapelle on May 29 and June 4, 2003 of this but they did not get them for me so that I could prepare my defence. According to them, it was "business as usual" because there were no formal complaints.*
*PSLRA 186(1)(*a*)* *Interference in union business*	*During the harassment investigations, I learned that CRC Human Resources suggested to the PSAC local representatives that the grievances against abuse of authority be replaced with harassment complaints and that my grievances be placed in abeyance to encourage mediation. I had already agreed to mediation before witnesses a few days before the grievances were filed. This intervention amounts to interference in union business.*
TB policies	*Ms. Downes agreed to suspend these grievances even though the Treasury Board policy against harassment allows only one procedure.*

I was greatly affected by the lack of support and the abusive, unjust and unfair nature of this dispute. To fully understand the impact, you must also consider the union's role (PSAC) in this matter. I was on certified sick leave for 37 weeks and I am still being treated to help me manage the anxiety and depression caused by this conflict. Such inconsiderate treatment affected my self-confidence and my trust in management.

> *It is difficult for me to consider returning to work with individuals who find me overly demanding and do not want to work with me. After over 26 years as a manager in the federal public service, I feel like I have been deprived of the ability to finish my career in a service to clients that I like, with the respect that the quality of the reputation of my services should have assured me.*
>
> *I am still hoping that each opportunity to send a clear message on the seriousness of the PSMA and the new PSLRA will bring about a change in the organizational culture to one that is truly based on respect.*
>
> . . .

[5] In the details of her complaint, the complainant denounced the employer's unfair labour practice and referred to subsections 186(1) and (2) of the new *Act* as well as paragraph 51(6)(*b*) of the *Public Service Employment Act*. Those provisions read as follows:

> [*Public Service Labour Relations Act*]
>
> ***186.****(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall :*
>
> *(*a*) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*
>
> *(*b*) discriminate against an employee organization.*
>
> *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*

> *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
>
> *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iv) has exercised any right under this Part or Part 2;*
>
> (b) *impose, or propose the imposition of, any condition on an appointment, or in an employee's terms and conditions of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Part or Part 2; or*
>
> (c) *seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from*
>
> *(i) testifying or otherwise participating in a proceeding under this Part or Part 2,*
>
> *(ii) making a disclosure that the person may be required to make in a proceeding under this Part or Part 2, or*
>
> *(iii) making an application or filing a complaint under this Part or presenting a grievance under Part 2.*

[*Public Service Employment Act*]

51(6) No person may be deployed without his or her consent unless

. . .

> *(b) the deputy head of the organization in which the person is employed finds, after investigation, that the person has harassed another person in the course of his or her employment and the deployment is made within the same organization.*

[6] The complainant included correspondence in her complaint related to the following items:

(a) the harassment complaints that three employees of the library filed against the complainant in fall 2003;

(b) the harassment complaint that the complainant filed against Veena Rawat, President, CRC, following the harassment investigations;

(c) the lack of a report on the preliminary investigation at the time that the employees' harassment complaints were filed;

(d) two grievances that the complainant filed on March 15 and 31, 2005 against Cathy Downes, Director General, Human Resources, Industry Canada;

(e) an allegation of conflict of interest against Ms. Rawat and Ms. Downes in following up on the recommendations of the investigation reports of the September 2003 harassment complaints;

(f) her request to integrate her harassment complaint against the employees with their complaints; and

(g) a statement of supplementary grievances related to management's representatives' actions or omissions. This statement largely reiterates the wording of the appended document setting out the details of her complaint filed with the Board on September 14, 2005.

[7] The employer raised a preliminary objection to the Board's jurisdiction over the complaint filed by the complainant. Arguments on this issue were adduced by the parties based on the specific allegations in the complaint and the appended documentation. The complainant adduced additional allegations of facts during her oral and written arguments. No evidence was adduced by the parties on those

allegations of facts. For that reason, no conclusions on the truthfulness or accuracy of those facts will be rendered in this decision.

II. Summary of the evidence and arguments

A. Preliminary objection to jurisdiction

[8] At the beginning of the November 20, 2006 hearing, counsel for the employer ("the respondent") raised a preliminary objection to the Board's jurisdiction to hear the complainant's complaint under section 190 of the new *Act*. The respondent stated that the allegations described in the complaint and the incidents leading to the complaint cannot be related to situations giving rise to a complaint under section 186 of the new *Act*.

[9] With respect to the allegation of interference in union business under paragraph 186(1)(*a*) of the new *Act*, the respondent submitted that the complainant cannot file that type of complaint. The prohibitions in the new *Act* regarding interference in union business were established by Parliament to protect employee organizations and not individual employees. Only the employee organization may complain that the employer interfered in its business when the employer allegedly suggested to the representative of the Public Service Alliance of Canada (PSAC) that the grievances against abuse of authority be replaced with harassment complaints.

[10] Decisions on this question, rendered under sections 8 and 9 of the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former *Act*"), set out this principle. Those decisions apply to this complaint since the prohibitions prescribed in sections 8 and 9 of the former *Act* are the same as those in subsection 186(1) of the new *Act*. The employer cited the following Board decisions: *Reekie v. Thomson*, PSSRB File No. 161-02-855 (19981222); *Buchanan v. Correctional Service Canada*, 2001 PSSRB 128; and *Feldsted et al. v. Treasury Board and Correctional Service Canada*, PSSRB File Nos. 161-02-944, 947 and 954 (19990429).

[11] The other incidents set out in the complainant's complaint cannot be related to any of the circumstances described in subsection 186(2) of the new *Act*, which lists the actions that the employer may not take and that constitute unfair labour practices. The explicit wording of paragraphs 186(2)(*a*), (*b*) and (*c*) of the new *Act* covers all of the circumstances that may give rise to a complaint of unfair labour practice.

[12] In the absence of a specific allegation by the complainant indicating which action prohibited under the new *Act* the respondent apparently violated, the respondent is unable to prepare a defence.

[13] In reading the complaint, the respondent understood that its trigger is the harassment complaint that three CRC library employees filed against the complainant in May 2003.

[14] After the complaint was filed, the complainant was absent for health reasons until fall 2004. On her return to work, the complainant filed a harassment complaint against the three library employees. In accordance with the harassment policy, the respondent arranged for the three employees not to work with the complainant for the duration of the investigation. The respondent assigned the complainant specific tasks in the library that were not carried out with the three employees.

[15] It appears that the complainant was not satisfied with the conditions of her return to work, and she filed complaints and grievances against the managers involved in her case.

[16] All of the harassment complaints were found to be unfounded in 2005 based on the investigations. The complainant does not appear satisfied with the results.

[17] None of these circumstances is linked to the prohibitions specified in paragraphs 186(2)(*a*), (*b*) and (*c*), which are related to the complainant's membership or participation in an employee organization. None of the allegations in the complaint concerns the employer's failure to comply with prohibitions related to the complaint's participation in a proceeding under Part 1 or 2 of the new *Act*. The actions alleged against the employer could not have been motivated by the complainant filing her grievances because the grievances were filed at the same time as the complaint.

[18] The grievances that the complainant filed object to the same events forming the basis of her complaint. Accordingly, the Board should apply subsection 191(2) of the new *Act*, which states:

> *(2) The Board may refuse to determine a complaint made under subsection 190(1) in respect of a matter that, in the Board's opinion, could be referred to adjudication under Part 2 by the complainant.*

[19] According to the respondent, the complainant must word her grievance in a manner that allows the respondent to defend itself.

B. Complainant's Rebuttal

[20] The complainant submitted that Parliament wanted to include in the new *Act* all possible recourse in the event of work-related conflicts. Thus, paragraph 186(1)(*a*) should be applied since the complainant did not receive the support of the union or of the employer in the circumstances described in the complaint. According to the complainant, the Board must consider her complaint, even though it is not being filed by a union, because the new *Act* provides a complete regime for the resolution of work-related disputes.

[21] According to the complainant, her complaint relates to a personal harassment situation that the collective agreement does not cover. Subparagraph 186(2)(*a*)(iii) of the new *Act* covers such a complaint because its points arise from the harassment complaints that the three library employees filed against the complainant and from the harassment complaints that she in turn filed against them.

[22] In the complainant's view, the facts and circumstances are clearly described in the complaint, and the respondent was previously informed of them through a variety of correspondence. The complainant established a chronology of events at the hearing, explaining that the entire file reveals the three library employees' dissatisfaction with some of her decisions that affected them. That dissatisfaction was communicated to the complainant's supervisor on May 23, 2003.

[23] Despite the complainant's requests, the supervisor did not want to tell her the employees' allegations, recommending that she settle the matter with them. The complainant ended a meeting on this matter with the employees, in the presence of a union representative, when the possibility of harassment was raised. The employer and the complainant met on June 10 and 11, 2003. The complainant was informed of the employees' complaints and was asked to give her version of the facts. The employer found on August 5, 2003 that there was a conflict and that it was not harassment.

[24] The employees filed harassment grievances alleging abuse of authority against the complainant on August 8, 2003. At the end of August, the PSAC representative changed the employees' grievances to harassment complaints on the recommendation of the employer's Human Resources representative. Those proceedings against the

complainant affected her health, and she was on sick leave from August 16 to September 10, 2003. She extended her leave in the form of annual leave until October 5, 2003. The complainant learned of the harassment complaints at the end of August 2003.

[25] On her return from sick leave, the complainant was removed from all of her library duties and was assigned to special projects in information management in another building. This deployment was made without consulting her and without her consent. The library employees were transferred to other sections.

[26] The complainant filed a complaint against Ms. Rawat on December 15, 2004 contesting the decision to remove her from her duties in the library because of the harassment complaints that the employees filed. This complaint was summarily dismissed, the employer claiming that the decision conformed to the harassment policy.

[27] According to the complainant, the employer did not conduct a preliminary analysis of the employees' complaints before conducting an investigation, which was assigned to Ms. Piette. To ensure that her version of the facts was heard, the complainant filed a harassment complaint against the employees. She requested that the investigation of her complaint take place at the same time as that of the employees' complaints, which the employer refused to do.

[28] A report on the employees' complaints was presented on August 8, 2004, and the complaints were dismissed in November 2004. A report was filed in November 2004 regarding the harassment complaint that the complainant filed, and a decision dismissing the complaint was issued in January 2005.

[29] The complainant was involved in the investigations into the complaints despite being absent because of illness from January 14 to September 6, 2004. Her absence was extended as special leave until October 20, 2004. After returning on a gradual basis, she resumed full-time work on November 20, 2004.

[30] The complainant filed a complaint on February 1, 2005 alleging that Ms. Downes dismissed the harassment complaints without considering all of the evidence and without conducting a thorough examination of the files.

[31] She also alleges that the employer acted in bad faith because it did not act on her January 2005 access to information request until March 2005. A subsequent access to information request made on March 24, 2005 was responded to in September 2005.

[32] The complainant submitted that the employer did not respect her basic rights when it refused, in May 2003, to inform her of the allegations that the employees had brought against her. During the investigation of the harassment complaints, the employer questioned the complainant, who was then on sick leave, about her memory losses and mood shifts, discriminating against her with respect to her employment on the basis of her disabilities.

[33] In the complainant's view, all of these circumstances constitute harassment by the employer who discriminated against her and failed to comply with paragraph 186(2)(*a*) of the new *Act* because she filed complaints against the employees, as set out in subparagraph (iii).

C. Respondent's Rebuttal

[34] The complainant alleges that the employer contravened the prohibitions in subparagraph 186(2)(*a*)(iii) of the new *Act* during the procedures used in the labour-management relations problem at the CRC library. The complainant alleges that the employer harassed her during those procedures. The employer applied the procedure set out in Treasury Board's P*olicy on the Prevention and Resolution of Harassment in the Workplace*, and its actions cannot constitute unfair labour practice within the meaning of the new *Act*.

[35] The respondent objected to the complainant adding circumstances or items that occurred after her complaint.

[36] The respondent referred to the following Board decisions, which support the principle that the complainant must first show that the employer's actions constitute unfair labour practices within the meaning of the new *Act* before the reversal of the burden of proof, provided for in subsection 191(3) of the new *Act*, can be applied: *Duclos v. Bujold*, 2006 PSLRB 98, *Hamelin v. Treasury Board (Solicitor General Canada - Correctional Service Canada*, PSSRB File No. 161-02-591 (19910815), and *Sabiston v. Government of Canada, Department of National Defence Management and Representatives*, PSSRB File Nos. 161-02-280 to 288 and 289 to 299 (19830609).

D. Complainant's response to the respondent's rebuttal

[37] The hearing was adjourned on November 21, 2006 to allow the complainant, who was not represented and did not have any legal or labour relations training, to perform research to respond to the respondent's arguments.

[38] When the hearing resumed, the complainant submitted that her complaint sets out the facts and circumstances giving rise to it and that the employer must assume its responsibility under subsection 191(3) of the new *Act*. She referred to the following decisions: *Chaves v. Treasury Board (Correctional Service Canada)*, 2005 PSLRB 45, and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 (QL).

[39] The respondent pointed out that those decisions actually support its position, because they state that the complainant must first show that the complaint meets the criteria prescribed in the Act before the reversal of the burden of proof can be applied.

[40] The hearing was adjourned again to allow the complainant, at her request, to continue her research and adduce new arguments in writing. The respondent could then respond to those arguments in writing, while allowing the complainant a written rebuttal.

E. Complainant's written arguments (December 8, 2006)

[41] In short, the complainant argued that Treasury Board's *Policy on the Prevention and Resolution of Harassment in the Workplace* applies to all employees of the federal public service. According to the complainant, the employer has the responsibility to ensure that this policy and its related directives are applied by its managers.

[42] She concluded that harassment is part of the discrimination set out in subsection 186(2) of the new *Act*, the values and principles that form the basis of the policy on harassment being the same as those forming the basis of the new *Act*. She submitted the following:

[Translation]

. . .

By the employer's definition, harassment is a labour relations problem. There is a clear parallel between the harassment policy that applies to the federal public service and the new Act, which governs labour relations in the same public service . . . .

*The employer may not deploy me without my consent (209.(1)(*c*)(ii)), apply sanctions or disciplinary measures, even disguised, discriminate against me with respect to employment, intimidate me (186(2)(*a*) and (*c*)), seek to prevent me from revealing information obtained under the* Access to Information Act *and* Privacy Act *during an investigation (186(2)(*c*)(ii) and prevent me from filing complaints (186(2)(*c*)(iii)),*

- *because I was the subject of harassment complaints (186.(2)(*a*)(ii)),*
- *because I filed complaints and grievances (186.(2)(*a*)(iii)),*
- *because I was on sick leave for a long time (226.(1)(*g*)),*
- *because I defended my right to be treated with dignity, fairness(justice), integrity and respect (preamble based on section 7 of the Charter);*
- *or because I am seeking remedy for my sick leave, for the unique and unfair treatment, and for the damage to my reputation and my health (192.(1) and 1(*b*)).*

. . .

[43] The complainant submitted that subsection 133(6) of the *Canada Labour Code* is similar to subsection 191(3) of the new *Act* in terms of the reversal of the burden of proof. She pointed out that this reversal of the burden of proof applies to all unfair labour practices done by the employer (section 185 of the new *Act*) that are the subject of complaints or grievances, not only to complaints related to occupational health and safety.

[44] She emphasized that the facts in *Chaves* are different from those in the present case. She submitted that the Board has jurisdiction with respect to her complaint because, unlike *Price v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 47, the Canadian Human Rights Commission decided not to rule on her complaint on May 19, 2006. The grievances that she filed on March 16 and 31, 2005 and those of September 14 and December 10, 2005, which covered such matters as the discrimination, were dismissed at the final level of the grievance process on

June 16, 2006 and were referred to adjudication by the PSAC almost five months later. The Board has jurisdiction to rule on the discrimination allegations specified in the complaint under paragraph 226(1)(*g*) of the new *Act*. If the Board cannot do so, the complainant asked it to exhaust the grievance process as it did in *Witherspoon v. Treasury Board (Department of National Defence)*, 2006 PSLRB 102. As a result of the adoption of the new *Act*, the Board now has jurisdiction to hear such a complaint, contrary to the legislative circumstances in *Cherrier v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 37.

[45] With respect to the question of impartiality, the complainant cited *Fortin v. Treasury Board (Citizenship and Immigration Canada)*, 2001 PSSRB 101.

[46] In keeping with *Dubreuil v. Treasury Board (Correctional Service of Canada) et al.*, 2006 PSLRB 20, she asked that the new facts be incorporated in her complaint because they do not change its nature.

F. Respondent's reply to the complainant's written arguments

[47] The complainant did not indicate in her written arguments any decisions contradicting the principle established in C*haves*. That principle was confirmed in *Boivin v. Canada Customs and Revenue Agency,* 2003 PSSRB 94, and *Brisson and Roy v. VIA Rail Canada Inc.*, [2004] CIRB no. 273. Applying the principle to this matter means that the reversal of the burden of proof provided for in subsection 191(3) of the new *Act* cannot be applied unless the complainant shows, in the first place, that her complaint is based on situations described in subsection 186(2).

[48] According to the employer, the complainant must show that it acted because the complainant participated as a witness in a proceeding under Part 1 or 2 of the new *Act* (subparagraph 186(2)(*a*)(ii)); she made an application or filed a complaint under Part 1 of the new *Act* or a grievance under its Part 2 (subparagraph 186(2)(*a*)(iii)); or she exercised any right under Part 1 or 2 of the new *Act*. In the employer's opinion, paragraphs 186(2)(*b*) and (*c*) of the new *Act* with respect to membership or participation of a person in an employee organization cannot be applied in the context of this complaint.

[49] The complainant criticized the employer for assigning her tasks that separated her from the employees who had filed harassment complaints against her, and she based her complaint on subsection 186(2) of the new *Act*. That event took place well

after the complainant filed any grievance. At the hearing on November 20 and 21, 2006, the complainant submitted that her grievance is based on the fact that she filed a harassment complaint in September 2004. However, a harassment complaint is not specified in Part 1 or 2 of the new *Act* and cannot be filed under that provision.

[50] The complaint should be dismissed because it does not relate to the cases covered by sections 185 and 186 of the new *Act*.

G. Complainant's comments on the respondent's reply

[51] The complainant submitted the following in a document filed with the Board on December 22, 2006:

> [Translation]
>
> . . .
>
> *I believe that the PSLRB has jurisdiction to hear my complaint and my grievance of discrimination based on my disability because this case and the facts set out in the complaint result from the employer's breach of its obligations and from disguised discipline:*
>
> *- under its Policy on the Prevention of Harassment in the Workplace and under section 7 of the Charter, the principles of respect, dignity, fairness (including impartiality)*
>
> *- under the preamble to the PSLRA, to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment, and commitment . . . to mutual respect and harmonious labour-management relations . . . essential to a productive and effective public service*
>
> *- under paragraph 186(2)*(a) *of the PSLRA, to not discriminate in employment or conditions of employment, not to intimidate or discipline for any of the reasons under subparagraphs (i) through (iv) to provide a workplace free from discrimination*
>
> *- under subparagraph 209.(1)*(c)*(ii) of the PSLRA, to provide a workplace free from discrimination under the CHRA.*
>
> . . .

[52] She reiterated that her complaint clearly describes the why and how of the employer's failure of its legal obligations and that the principle established in *Chaves* must apply, the employer having been informed that it was acting in contravention of

its legal obligations. The complainant appended to her comments a nine-page chronological table describing the events that occurred between May 26, 2003 and December 14, 2006. That table indicates that the initial reason for her complaints is the lack of procedural fairness that led to abuse and disguised disciplinary action, which compromised her health, reputation and the respect to which she was entitled.

[53] According to the complainant, to determine the essential character of the dispute, it is necessary to determine whether the factual context of the complaint is illegal with respect to labour relations and whether the employer's failures with respect to its obligations are unfair labour practices. She referred to *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, which establishes the following principle:

. . .

> *. . . Looking at the nature of the dispute, one must determine its essential character, which is based upon the factual context in which it arose, not its legal characterization. . . .*

. . .

[54] She pointed out that the reason she gives in her complaint is different from that related to the application under the *Canadian Human Rights Act* and to her grievance of discrimination based on disability.

III. Reasons

A. Summary of the allegations

[55] The complainant identified the events (procedures or claims) that gave rise to her September 14, 2005 complaint. The employer's (CRC and IC agents) actions that triggered the allegations set out in the complaint relate to those events. Analyzing those events and related allegations will allow me to determine the nature of the complaint and whether the Board may be seized with it under the provisions of subsection 190(1) of the new *Act*.

[56] On May 26, 2003, the complainant was informed that three CRC library employees had complained about her. The complainant alleged that Lyse Bossy, CRC Human Resources Advisor, and Richard Lachapelle, Acting Director, CRC Human Resources, abused their authority and did not respect her basic rights (preventing her

from preparing a defence) when they refused to provider her with the complaints when she asked for them in May and June 2003.

[57] The employer found that a conflict existed and suggested a meeting between the parties to resolve the situation. The meeting was unproductive. The three employees filed harassment grievances against the complainant on August 12, 2003. The complainant was absent because of illness from August 13 to September 12, 2003 and was then on annual leave for a week after that. The employer suggested to the union representative that the grievances be changed to harassment complaints. The complainant alleged that this action by the employer constitutes interference in union business, which is prohibited by paragraph 186(1)(*a*) of the new *Act*. She also alleged that Ms. Downes did not respect Treasury Board's policy that does not allow a grievance to be suspended.

[58] The three CRC library employees filed harassment complaints against the complainant on September 19, 2003. The complainant's request to the employer for a preliminary analysis of the complaints was denied, which is the basis for an allegation against Ms. Downes concerning failure to respect procedural fairness. An allegation of discrimination on the basis of disability was made against Ms. Downes because she accepted complaints containing certain allegations mentioning the complainant's health.

[59] The complainant was absent because of illness from January 14 to September 8, 2004. She was also absent on paid leave from October 8 to 12, 2004 and then on sick leave until October 22, 2004. The complainant returned to work on a gradual basis until November 26, 2004. She participated in the investigation into the harassment complaints during her absence. She was informed of the investigation's failure on August 17, 2004, the investigator having withdrawn from the case. The complainant alleged that Ms. Downes did not take advantage of this opportunity to take steps to reduce the negative impact of the complaints and to resolve them, in contravention of the *Public Service Modernization Act*.

[60] The complainant filed harassment complaints against the three employees in November 2004. Her request to combine the investigation into those complaints with the investigation under way into the employees' harassment complaints was denied. The complainant alleged that this denial was contrary to procedural fairness.

[61] The complainant was removed from her duties in the CRC library and assigned to special projects on her return from sick leave in November 2004. She alleged against Ms. Rawat and Mr. Lachapelle that the deployment was made in bad faith, that it constituted an abuse of authority and that it did not respect procedural fairness (subsection 186(2) of the new *Act*). Nicole Cusson, Director, Labour Relations at IC at the time and Ms. Downes were involved in the decision to remove the complainant from her duties at the library in keeping with the harassment policy. That decision negatively impacted the complainant's reputation.

[62] On December 12, 2004, the complainant filed a harassment complaint against Ms. Rawat with respect to her removal from the duties of her position in the CRC library and her assignment to special projects. The complainant alleged abuse of authority, breaches of the *Public Service Employment Act*, natural justice and human rights, conflict of interest, intimidation and damage to her reputation as a result of that decision.

[63] According to the complainant, the employer showed bad faith in responding slowly to her requests for access to information in January and May 2005.

[64] On February 1, 2005, Ms. Downes dismissed the complainant's complaint against Ms. Rawat after a preliminary analysis conducted by Michel Létourneau. The complainant alleged that there was an appearance of conflict of interest in that decision. She filed a grievance against Ms. Downes on March 15, 2005 opposing the decision.

[65] The harassment complaints that the employees filed against the complainant were dismissed on August 5, 2005. The complainant objected after Ms. Rawat did not reinstate her to her library duties following the dismissal of the employees' harassment complaints. Ms. Downes would be in a conflict of interest if she were responsible for the follow-up on the file and Richard Momy, Director, Labour Management Relations, refused to intervene. The employer did not handle the complaints within the prescribed time (60 days under IC's policy; 90 days Treasury Board's policy).

[66] The complainant filed her complaint with the Board on September 14, 2005 and reactivated her March 16 and 31, 2005 grievances against Ms. Rawat and

Ms. Downes. She added complementary grievances repeating in large part the allegations of her complaint.

[67] The complainant's harassment complaints filed against the three employees were dismissed in December 2005.

B. Ruling on the Preliminary Objection

[68] The employer submitted that the allegations refer to events that cannot be subject to a complaint under paragraph 190(1)(*g*) of the new *Act*, denouncing unfair labour practices within the meaning of section 185. An unfair labour practice is anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1) of the new *Act*. I agree with the employer's argument that an unfair labour practice complaint must be based on a breach of the prohibitions set out in the provisions of section 185.

[69] To decide the preliminary objection, I must determine whether the allegations of the complainant's complaint can be considered prohibitions under the new *Act*.

[70] First, in none of the circumstances raised by the complainant did the employer or a person acting on its behalf refer, directly or indirectly, in any way, to the complainant's membership in an employee organization or to her participation in an employee organization's activities as a member or officer or as its representative. The complainant's complaint therefore does not relate to the prohibitions set out in subparagraph 186(2)(*a*)(i) or paragraphs 186(2)(*b*) or (*c*), which relate to involvement in an employee organization.

[71] Second, the complaint alleges that the employer interfered in union business by suggesting to the library employees' representative that the grievances be changed to harassment complaints, in contravention of paragraph 186(1)(*a*) of the new *Act*. That allegation has no basis, since the exception provided in paragraph 186(4)(*b*) specifically allows the employer to receive representations from, or hold discussions with, representatives of an employee organization. Within the meaning of subsection 186(5) of the new *Act*, no breach of paragraph 186(1)(*a*) occurs if there is no evidence that the employer apparently used coercion, intimidation, threats, promises or undue influence when it expressed its point of view. Accordingly, the part of the complaint based on paragraph 186(1)(*a*) of the new *Act* is dismissed.

[72] Furthermore, the complainant cannot file a complaint of interference in union business; only an employee organization or a person that it authorized may do so. I agree with the conclusions in *Reekie*, *Feldsted* and *Buchanan* cited by the employer with respect to sections 8 and 9 of the former *Act*. Since the prohibitions against the employer's interference in union business in the new *Act* are the same as those under sections 8 and 9 of the former *Act*, the reasoning established in those decisions applies to this case.

[73] I now have only to determine whether the complainant's allegations show a failure by the employer to comply with the prohibitions prescribed in paragraph 186(2)(*a*) of the new *Act* for the reasons given in its subparagraphs (ii), (iii) and (iv).

[74] The complaint does not describe any specific situation showing that the employer's actions might have been based on one of the reasons specified in subparagraphs 186(2)(*a*)(ii) to (iv). The complaint alleges actions by the employer or its representatives that allegedly show unreasonable delays, gross negligence, bad faith and intimidation in the handling of files and breaches of the rules of natural justice, procedural fairness or human rights.

[75] Those allegations do not relate to actions showing that the employer acted in that way because Ms. Laplante may have testified or otherwise participated in a proceeding under Part 1 or 2 of the new *Act*. The complaint's allegations relate to harassment complaints that are not filed under the new *Act* but under the Industry Canada and Treasury Board harassment policies. The library employees filed harassment complaints against Ms. Laplante and, subsequently, Ms. Laplante filed similar complaints against them.

[76] The employer's decision to remove Ms. Laplante from her duties in the library was made in keeping with Treasury Board's *Policy on the Prevention and Resolution of Harassment in the Workplace* and Industry Canada's *Guide on the Prevention and Resolution of Harassment*. The prohibitions against unfair labour practices in the new *Act* do not include actions taken by the employer in response to recourse taken under harassment policies. Parts 1 and 2 of the new *Act* do not cover such recourse against harassment, and it cannot constitute an unfair labour practice within the meaning of section 185 of the new *Act*.

[77] The recourse provided in the new *Act* against an unfair labour practice involving a deployment must meet the criteria set out in paragraph 186(2)(*a*) of the new *Act*. Even though subparagraph 209(1)(*c*)(ii) of the new *Act* provides for the right to refer a grievance to adjudication that contests a deployment that was made without the employee's consent, that right is separate from the right determined in the case of unfair labour practices. Other recourse is available when deployments are made in breach of the *Public Service Employment Act*, but those remedies cannot be considered as grounds for an unfair labour practice complaint.

[78] The specific recourse provided in paragraph 186(2)(*a*) of the new *Act* may only be applied if the decision to remove Ms. Laplante from her duties in the library and to assign her tasks related to special projects was motivated by the fact that Ms. Laplante may have made an application or filed a complaint under Part 1 or 2 of the new *Act* (subparagraph (iii)) or that she may have exercised any right under Part 1 of the new *Act* (subparagraph (iv)). None of the circumstances that Ms. Laplante identified in her complaint indicate that the employer had such motivation. To base a complaint on those motives, the complainant not only had to allege a violation of the prohibitions in subsection 186(2), but also had to specify in her allegations the employer's acts, conduct or words that demonstrated the motives described in subparagraphs 186(2)(*a*)(ii), (iii) or (iv) of the new *Act*.

[79] Some of the allegations stem from the employer's reactions to the harassment grievances that the library employees filed against Ms. Laplante. The allegations of unreasonable delays, procedural unfairness, gross negligence, abuse of authority, bad faith, intimidation, conflict of interest and violation of basic rights can all be linked to those grievances. Those allegations do not specific the employer's acts, conduct or words that allegedly showed that it acted as it did because Ms. Laplante was a party to the grievances or that it intended to penalize her for that reason.

[80] I come to the same conclusion with respect to both the harassment complaints and the grievances listed by Ms. Laplante in this complaint, which she filed against certain managers. The circumstances described in the complaint do not state why, among the reasons set out in subparagraphs 186(2)(*a*)(ii) to (iv) of the new *Act*, those managers allegedly failed to comply with the prohibitions against unfair labour practices specified in paragraph 186(2)(*a*). Subsection 186(2) prohibits the employer from taking the action described in paragraph 186(2)(*a*) only for the reasons specified

in subparagraphs (ii) to (iv). The employer's actions can only constitute unfair labour practices in those circumstances.

[81] Even if I found that all of the circumstances that Ms. Laplante described in her complaint constitute harassment against her, the same reasoning would have to apply; Ms. Laplante would have to identify the employer's acts, conduct or words that allegedly demonstrate one of the reasons specified in subparagraphs 186(2)(*a*)(ii) to (iv) of the new *Act* for such harassment to constitute an unfair labour practice prohibited by the new *Act*.

[82] The complaint cannot be based on subsection 189(1) of the new *Act*, since Ms. Laplante did not allege that the persons might have acted in a way that might constitute a threat or coercion to prevent her from exercising any right under Parts 1 and 2 of the new *Act*.

[83] For all of these reasons, I allow the employer's preliminary objection. Ms. Laplante's complaint is not a complaint that the Board may decide under section 190 of the new *Act*.

C. <u>With respect to the burden of proof</u>

[84] Reversal of the burden of proof is provided for in subsection 191(3) of the new *Act* as follows:

. . .

> *If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[85] This complaint is limited to the prohibition specified in subsection 186(2) of the new *Act* prohibiting the employer from taking certain actions described in paragraph 186(2)(*a*) for one of the reasons in its subparagraphs (i) to (iv). The only logical interpretation that can be given to those provisions is that the allegations must necessarily specify those reasons for the reversal of the burden of proof to apply.

[86] Otherwise, any refusal by the employer to employ or to continue to employ, or any decision to suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other condition of employment, or to intimidate, threaten or otherwise discipline any person, could be subject to a complaint of unfair labour practice regardless of the reason for the employer's actions. The new *Act* states that the employer cannot take certain actions solely for the reasons given in its paragraph 186(2)(*a*) and not for any other reason.

[87] Consequently, the reversal of the burden of proof does not apply in all situations but only when the complainant alleges that the employer failed to comply with the prohibitions set out in subsection 186(2) of the new *Act* in the circumstances described in paragraphs (*a*), (*b*) or (*c*) of that subsection.

[88] In conclusion, the complainant must meet a precondition for the provision on the reversal of the burden of proof to apply. Before the employer can be required to prove that it did not contravene the prohibitions, the complainant must show that one of the circumstances described in subsection 186(2) of the new *Act* has been met. Without proof to that effect, the complaint is inadmissible and the reversal of the burden of proof cannot be applied. In this case, Ms. Laplante did not show that her complaint met the conditions for a complaint of unfair labour practice.

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

(The Order appears on the next page)

IV. Order

[90] The complaint is dismissed.

September 10, 2007.

P.S.L.R.B. Translation

Léo-Paul Guindon,
Board Member