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File: 561-34-30

Citation: 2008 PSLRB 27

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

ROBERT JOHN KRANIAUSKAS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA, UNION OF TAXATION EMPLOYEES AND NICK STEIN

Respondents

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

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

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Complainant: Himself

For the Respondent: Daniel Fisher, Public Service Alliance of Canada

Heard at Windsor, Ontario,
August 20 to 22, 2007, and February 12 to 14, 2008.

I. Complaint before the Board

[1] On October 13, 2004, Robert John Kraniauskas ("the complainant") filed a complaint under section 23 of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Ac"*) that accused the Public Service Alliance of Canada (PSAC), the Union of Taxation Employees (UTE) and Nick Stein (collectively, "the respondents") of violating paragraph 23(1)(*a*) of the former *Act* by failing to observe the prohibitions in place under subsection 10(2).

[2] The provisions of the former *Act* cited by the complainant read as follows:

. . .

> ***23.*** *(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(*a*) to observe any prohibition contained in section 8, 9 or 10;*

. . .

> ***10.*** *(2) No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit.*

. . .

[3] The complainant stated the details of his complaint in the following terms:

. . .

> *That on February 12, 2002 Mr. Stein was involved in a conference call with senior management wherein he used his Union position to cause me harm.*
>
> *On February 13, 2002 in a confidential conversation with my Assistant Director, I shared information I received regarding the possible harassment of myself. This information was discussed in a conference call on February 14, 2003. I allege that Mr. Stein shared this information with others to my determent.*
>
> *On or about April 26, 2002 Mr. Stein completed a grievance form in his own hand, alleging harassment against me by* [Ms. X] *a PIPSC member. Mr. Stein signed the form as though*

> [Ms. X] *was not a represented employee. I allege that this action was a direct attack on me.*
>
> *I allege that from February 11, 2002 to present, the PSAC and Mr. Stein have failed to comply with the spirit and intent of the Agencies policy on Preventing and Resolving Harassment as well a the unions own Policy 23A PSAC Anti-Harassment Policy.*
>
> *On November 1, 2002 Mr. Stein provided a reply on the Fact-Finding report of Sondra Sullivan in respect to the harassment complaint. Again, in this correspondence he directly attacked me. Mr. Stein signed the submission Nick Stein Regional Vice President, Union of Taxation Employees. I allege that Mr. Stein used his union status to negatively influence management.*
>
> *On September 13, 2004 Mr. Jim Chorostecki, Ontario Regional Coordinator for the PSAC and Harassment Complaint Coordinator notified me that he had found my complaint unfounded. I allege that this was arbitrary, discriminatory and in bad faith as neither Mr. Chorostecki nor anyone else from that office, for that matter, contacted me in any manner in respect to his investigation.*
>
> . . .
>
> [*Sic* throughout]

[4] As corrective action, the complainant requested that “. . . the PSAC be required to compensate the complainant for lost opportunities, salary, benefits and damages from February 12, 2002.”

[5] At the time of the events in 2002 referenced in his complaint, the complainant was Manager of Administration, Finance and Administration Division, Windsor, Ontario Region, Canada Customs and Revenue Agency (“the Agency”). His position was classified MG-03. The complainant was a member of the Customs Excise Union Douanes Accise (CEUDA), a component of the PSAC.

[6] On April 1, 2005, the *Public Service Labour Relations Act* (“the new *Act*”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to subsection 39(1) of the *Public Service Modernization Act*, a complaint filed with the Public Service Staff Relations Board prior to April 1, 2005, must be dealt with by the Public Service Labour Relations Board (“the

Board") under the relevant provisions of the new *Act*. A registry officer of the Board conveyed this information to the parties by letter dated June 2, 2005.

[7] The relevant provisions of the new *Act* are found in sections 190, 185 and 187:

. . .

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

. . .

[8] Mr. Stein replied to the complaint in a letter received by the Board on June 17, 2005:

. . .

> *To the best of my knowledge I was approached by* [Ms. X], *a twenty (20) year colleague and friend of the Canada Revenue Agency*. [Ms. X] *is a member of the Professional Institute of Public Service of Canada (PIPSC).* [Ms. X] *came to me to ask my advice with respect to the harassment process within the CRA knowing that as Regional Vice-President of the Union of Taxation Employees (PSAC) I've had experience in these matters. After consultation with her and subsequent discussion with PIPSC, it was decided that I would assist/represent her in the filing of a grievance/complaint.*

[10] At the beginning of the hearing, the respondents' representative requested, without objection from the complainant, that the name of the person Mr. Stein assisted in filing a harassment grievance against the complainant be maintained in confidence given the sensitive circumstances of the situation. I agreed to refer to that individual as "Ms. X" in the text of this decision and in any quotation from an exhibit where her name appears.

[11] The respondents' representative also gave notice that the respondents object to my jurisdiction under section 187 of the new *Act* to consider any elements raised in the complaint that refer to internal matters within the PSAC, citing *Bracciale v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88.

II. <u>Summary of the evidence</u>

[12] The complainant and Mr. Stein were the only witnesses at the hearing. The parties submitted a total of 47 exhibits.

[13] The complainant explained at the beginning of his testimony that his case was primarily based on documents drawn from some 2000 pages provided to him by the employer on November 25, 2005, May 2, 2006, and August 15, 2007, in response to an access to information (ATIP) request.

[14] In the course of the complainant's testimony, the respondents' representative objected on a number of occasions to the admissibility of documents secured by the complainant through the ATIP process on the grounds that they represented hearsay, lacked relevance, were incomplete or were subject matter outside the Board's jurisdiction. The complainant replied that the documents addressed actions of the respondents that formed the basis for his complaint and that he should be permitted to expose those actions.

[15] Paragraph 40(1)(*e*) of the new *Act* affords the Board considerable flexibility in admitting evidence that may not meet the formal standards of a court of law:

> ***40.*** *(1) The Board has, in relation to any matter before it, the power to*
>
> . . .
>
> (e) *accept any evidence, whether admissible in a court of law or not;*

The requirements of procedural fairness nevertheless remain paramount. Where the admission of proposed evidence risks causing prejudice to a party by suggesting facts without a reliable foundation, there is a clear limit to the flexibility that a Board Member should exercise.

[16] In this case, I ruled that a number of the documents tendered by the complainant during his testimony were inadmissible. Some of the problematic documents contained obvious hearsay evidence and, in some cases, double hearsay. The complainant wanted, for instance, to enter into evidence several “briefing notes” sent by a regional human resources representative to senior Agency officials about the harassment allegations made against the complainant. Those notes purportedly summarized harmful comments made by Mr. Stein about the complainant to the human resources representative. The complainant was not a party to the conversations during which the alleged comments were made and only learned of them as a result of his ATIP request well after filing his complaint with the Board. The complainant was not in a position to prove that Mr. Stein actually made the reported comments nor how and why the human resources representative wrote what she did. I advised the complainant that the “best evidence” rule suggested that he consider a different approach. He had the option of calling the author of the briefing notes as a witness, who could then be questioned about the context, reliability and veracity of the statements made in the proposed exhibits. Given that the respondents’ representative had provided an undertaking to call Mr. Stein as a witness, the complainant also had the option to put questions to Mr. Stein in cross-examination to determine whether conversations occurred and what was said. I provided similar explanations when I ruled that other proposed exhibits were inadmissible.

[17] Proceeding with his testimony, the complainant outlined his understanding that a meeting occurred on February 11, 2002, between five employees who reported to the complainant, two other employees from a different work unit, the complainant’s director and his assistant director. The complainant was excluded from the meeting. During that encounter, the “group of seven” employees expressed concerns about the complainant and indicated to the Director and Assistant Director that there were a number of issues on which they could have taken formal action against the complainant but had not done so to date.

[18] The following morning, Assistant Director Deborah Lowry told the complainant that a meeting had occurred where employees discussed issues involving him. Ms. Lowry advised him to "lay low and not say anything." The complainant testified that he abided by those instructions.

[19] The complainant referred to an email addressed to Director Steve Hertzberg from Mr. Stein dated February 13, 2002 (Exhibit C-1). Mr. Stein wrote that the complainant ". . . has been dealt with before on his management style or lack of. . ." and reported that the complainant was removed from a previous supervisory role and placed elsewhere in a team leader position in a different area. Mr. Stein continued by writing that:

. . .

> *It appears now that his management style is once again becoming very disturbing to my members. This must stop now & not be allowed to passed* [*sic*] *on to another CCRA division. First Customs, then Windsor TSO now Windsor F&A. I would suggest that the 3 strike rule might be applicable.*

. . .

[20] The complainant stated that Mr. Stein knew that what he wrote in the February 13, 2002, email was untrue. The complainant's prior assignment to the team leader position had been an acting promotion (Exhibit C-2). The subsequent appointment to the complainant's current position as manager of administration in the Finance and Administration Division was a permanent promotion (Exhibit C-3). The complainant outlined that Mr. Stein had opposed one of his earlier acting assignments, an action that had led to the removal of the complainant from that position and his assignment elsewhere.

[21] Mr. Hertzberg wrote to Mr. Stein on February 22, 2002 (Exhibit C-5), to advise him about discussions on the employer side concerning the involvement of the Agency's Office of Dispute Management (ODM) in addressing the issues raised by Mr. Stein in his February 13, 2002 email. Mr. Stein replied on February 26, 2002, that the option of involving the ODM was not acceptable (Exhibit C-6). He stated:

. . .

> *As I said in my previous email, the 3 strike rule appears to be the only corrective action. I have been advised that no "Formal" complaints have been made against this individual. If you wish I can obtain from UTE & CEUDA details of what has happened in the past. The fact that a "formal" complaint was never filed (if true) does not been* [*sic*] *there were no concerns raised & that management dealt with the issue . . . This individual is being allowed to continue his detrimental actions while the membership & the organization suffers. It must stop now, not later. . . .*

. . .

[22] The complainant reported his understanding that as of the date of that correspondence, none of the "group of seven" had requested union representation. The complainant indicated that he was well aware that there were many concerns among employees in the organization about various issues. He described the workplace environment as poisonous. He stated that he had been recruited into his managerial role to help address the workplace problems and that he himself had met as early as fall 2001 with the Assistant Director to urge that specific steps be taken to correct the difficulties, including engaging a psychologist to meet and work with staff. As to the ODM initiative proposed by Mr. Hertzberg in April 2002 to address employee concerns, the complainant stated that only he and one other person accepted the invitation to participate. The initiative was cancelled due to lack of interest.

[23] On April 8, 2002, the complainant sent an email to his employees inviting them to meet with Ms. Lowry or with Ms. Lowry and himself to discuss "any matters" during Ms. Lowry's forthcoming visit (Exhibit C-9). Mr. Stein on the same date wrote to Marlene Underwood, the Agency's regional human resources representative, to tell her that the complainant's invitation would not work (Exhibit C-10), saying that ". . . [t]his guy doesn't get it. . . . When he realizes he is part of the problem, we can move on. . . ."

[24] Ms. Lowry came to Windsor on April 12, 2002, and met with some members of staff individually and some accompanied by the complainant. At one of the latter encounters, staff member Allan Bellemore told them that he was no longer part of the "group of seven" and that Mr. Stein did not represent him. The complainant later discovered as a result of his ATIP request that Mr. Stein told Ms. Underwood at about that time that none of his members wanted to file a formal complaint. In the

complainant's view, the matters raised at the original meeting of February 11, 2002, should have ". . . died a natural death . . ." at this point.

[25] Mr. Stein wrote to Assistant Commissioner Ruby Howard on April 23, 2002, to protest delays in addressing the situation (Exhibit C-11). He told her that ". . . [t]his is not going away . . . as I said earlier, the 3 strike rule should apply here . . . ." He concluded by warning that ". . . I will advise my members & any other employee to persue [*sic*] any avenue they have as the employer is in clear contractdiction [*sic*] to the CCRA harassment policy." To the complainant's knowledge, this reference to "harassment" was the first time the term had been used in any document or at any meeting. As of that date, the complainant was not aware that any grievance or complaint had been filed.

[26] The first reference to the filing of a grievance against the complainant appeared in an April 29, 2002, email from Mr. Stein, again to the Assistant Commissioner (Exhibit C-12). Mr. Stein wrote that the complainant ". . . is being allowed to continue to create a poisoned work environment. . ." and alleged that management was trying to "sweep [the situation] under the rug." The Assistant Commissioner officially informed the complainant that he was the subject of a harassment grievance in a letter dated May 24, 2002 (Exhibit C-15). She indicated that she had decided to transfer him to a "physically distant" location while the employer made efforts to address the situation. The complainant testified that he continued to perform the duties of his position after his relocation and understood that he could return to his normal work site when his work so required.

[27] Ms. X filed the grievance, dated April 26, 2002, and Mr. Stein signed it (Exhibit C-16). Ms. X worked in a separate section and did not report to the complainant. She was a member of a bargaining unit represented by the Professional Institute of the Public Service of Canada (PIPSC). The complainant expressed his view that Mr. Stein violated the former *Act* by filing a grievance on behalf of a member of another union. He stated that based on the facts as he knew them on May 26, 2002, he felt that he was the subject of an attack by his own bargaining agent. He understood that none of the "group of seven" had been willing to file a complaint. He believed that the situation in the workplace was improving and that he was doing everything within his authority to address the problems that existed. But for Mr. Stein's involvement, there would never have been a grievance filed against him. Mr. Stein went outside his

own union to find an employee, represented by a different bargaining agent, who was willing to take formal action.

[28] The complainant outlined that he returned to his normal work location on several occasions for work-related purposes. After one of the visits, Mr. Stein complained to the employer about the complainant's presence because the employer had ". . . assured [him] that this was not to happen until the process had concluded. . ." (Exhibit C-17). On November 1, 2002, Mr. Stein complained further about emails that the complainant sent to a group of employees including Ms. X (Exhibits C-18 and C-19).

[29] On December 13, 2002, Mr. Stein wrote to the Assistant Commissioner while the harassment complaint investigation was still ongoing (Exhibit C-20):

. . .

> *. . . normally I do not communicate with you directly prior to you making your decision in these matters. However, I ask that you take note on this information.*
> *When I first contacted you, I mentioned the 3 strike rule in the case of the* [complainant] *& my view on that has not changed. I have contacted your office with concerns about many situations that I believe are relevant. These include breaches of security, statements by the* [complainant] *& the general feeling of the employees in F&A in Windsor. I am fully aware that without members substantiating these allegations they are just hearsay but I felt it important to bring what I am hearing to your office's attention.*
> *When I returned to the office this week I was advised that some of the employees in F&A Windsor have met with their local union rep (CEUDA) about the* [complainant]. *In fact CEUDA has been in contact with the F&A director about these concerns. While I can not comment directly on these concerns I feel that the F&A director should bring these to your attention given the situation.*

. . .

[30] The complainant stated that he and Mr. Stein "have history." Mr. Stein represented an employee in a harassment complaint against him in 1998. Management's investigation subsequently determined that the harassment allegations were unfounded.

[31] In February 2003, the employer upheld Ms. X's harassment grievance. It suspended the complainant without pay for five days in March 2003 and then assigned

him to a position in a different division at the same classification level but without management duties. No longer assigned supervision responsibility, the complainant lost his entitlement to performance pay under the Agency's performance pay plan. In March 2004, he transferred to a PM-03 team leader position in the Audit Division.

[32] On June 18, 2004, the complainant reached an agreement with the Agency in response to 69 grievances that he filed against the findings of the investigation into Ms. X's harassment complaint. The parties used the Agency's alternate dispute resolution (ADR) procedure to reach a settlement whose terms were, and are, confidential. The complainant testified that a PSAC representative assisted him to the extent of signing his grievances but that thereafter he conducted his own representations through to signing the settlement.

[33] On June 22, 2004, the complainant filed a harassment complaint against Mr. Stein with Cheryl Lucier, a PSAC Ontario Council Representative (Exhibit C-21). Ms. Lucier forwarded the complaint to PSAC National President Nycole Turmel (Exhibit C-22). On August 9, 2004, Gerry Halabecki, PSAC Ontario Region Executive Vice-President, wrote the complainant to request clarification as to whether he was filing an official allegation of harassment against Mr. Stein or seeking damages from the PSAC (Exhibit C-23). Jim Chorostecki, a PSAC staff member, then contacted the complainant on August 19, 2004, and requested that he complete and file the PSAC's Harassment Complaint Process form, a request with which the complainant complied that day (Exhibit C-24). Later the same day, Mr. Chorostecki sought clarification from the complainant concerning the actions of the alleged harasser, Mr. Stein (Exhibit C-25). The complainant replied, providing further details (Exhibit C-26).

[34] Mr. Chorostecki informed the complainant on September 13, 2004, that he had concluded that the facts did not support the allegation of harassment (Exhibit C-28). He forwarded a copy of his findings to the complainant and notified him of his right to appeal to the PSAC Executive Committee (Exhibits C-29 and C-30). The complainant testified that no one from the PSAC talked with him or interviewed him during the investigation. He exercised the appeal option in an email to Ms. Turmel on September 13, 2004 (Exhibit C-31).

[35] The complainant did not hear back from Ms. Turmel until October 20, 2005 (Exhibit C-32), and the appeal process was not finalized until February 3, 2006 (Exhibit C-34). The authors of the appeal decision found that the complainant should

have been given the opportunity to discuss the details of his case with the original PSAC investigator. The review process nonetheless concluded that ". . . the outcome of the investigation would not have been different had this omission not occurred."

[36] The complainant stated that the harassment complaint against him by Ms. X, supported and advanced by Mr. Stein, had severely affected his reputation and that nothing ". . . can give me back five years of life." He was placed in "purgatory" for a year and lost performance pay as well as the opportunity to be considered as a candidate for promotional opportunities. He offered the results of several tests that confirmed his qualifications for responsibilities at a higher level and provided two examples of staffing competitions to which he did not apply because he failed to meet the requirement for "significant" experience in two consecutive years (Exhibit C-35). According to the complainant, the shortfall in his "significant" experience was the direct result of having his managerial experience broken by his reassignment to non-management duties in the wake of the harassment finding against him.

[37] The respondents' representative cross-examined the complainant at considerable length. The following points canvassed during the cross-examination are, in my view, most relevant to the decision I must make.

[38] The complainant confirmed that he understood that different members within the PSAC are represented by different components and that situations arise where one component may take a different view of an issue than another. The complainant outlined his own work history, which included periods as a CEUDA member and times when he was excluded from the bargaining unit as a manager. Subsequent to the discipline he received as a result of the harassment complaint, he eventually moved to a position represented by the UTE.

[39] Asked whether he was aware that the bargaining agent had taken a position in an earlier appeals process that resulted in his being removed from a position, the complainant responded in the affirmative and suggested that "the union wanted me out." Asked whether there had been a history of complaints, problems or issues raised about him, the complainant replied that there was indeed a common thread and then posed the question: "Who was the representative [in those occurrences]?" His answer was, "Mr. Stein."

[40] The complainant agreed that he was familiar with the employer's harassment policy and had, in fact, given training to employees on the policy as part of his duties as a manager. He accepted the proposition put to him by the respondents' representative that harassment is a highly serious and sensitive issue that can often be divisive in the workplace and that there is seldom a "one size fits all" solution for a harassment situation. He recognized that employees might choose, given the sensitivity of the circumstances, to go to their bargaining agent representatives first to address their concerns rather than talking with their managers. He agreed that it was their right to do so. He also agreed that, in this case, it was incumbent on Mr. Stein as a bargaining agent representative to be open to employees who wished to raise issues and that part of his mandate was to respond to what his members were telling him. Later, he indicated that he well appreciated that some employees might have been extremely reluctant to voice their concerns directly to him or to otherwise confront him.

[41] While it was the right of employees to go to Mr. Stein to talk about their concerns, the complainant testified that Mr. Stein, as a UTE official, should have directed employees who were members of the CEUDA to their own component. Asked to identify the authority for this requirement, the complainant referred to subsection 10(1) of the former *Act*. He concurred that in his workplace, members of the CEUDA and UTE worked side by side, often performing the exact same duties. They also worked with members of the PIPSC.

[42] At the time of the harassment grievance, the complainant stated that he felt that management was harassing him and that management had violated its own harassment policy. In his view, his Director and Assistant Director mishandled the situation. He was not oblivious to the problems that existed but felt that the situation became more poisoned because management allowed employees to air their concerns in the way they did at the meeting of February 11, 2002. Had the Director and Assistant Director not mishandled events and dealt with things "in the proper manner," the situation would have been alleviated. Later, his concerns with management were relieved as a result of the successful ADR process. He testified emphatically that he was not guilty of harassment because he knew "that I did nothing wrong." He maintained that the investigation report was in error.

[43] The complainant agreed with the respondents' representative that it was management, not Mr. Stein, who had the authority to initiate a harassment investigation and who made the decision to do so. He insisted, however, that "all of this happened because of the grievance."

[44] In response to a question of clarification from me, the complainant stated that his complaint was limited to the circumstances surrounding the respondents' representation of Ms. X. He noted that none of the events from February 11, 2002, to April 10, 2002, had involved Ms. X. It was only in April 2002 that Mr. Stein solicited Ms. X to file the grievance.

[45] The complainant agreed with the respondents' representative that Mr. Stein made no representation to the employer that it should terminate the complainant's employment.

[46] The complainant testified that he did not contact his bargaining agent when the employer informed him about the grievance because he did not see a need to do so. He stated, "I didn't view it as necessary at the time." He agreed that he could have gone to the bargaining agent immediately but confirmed that he made his own decision not to seek assistance. He argued that there should have been "responsible unionism" in the situation, meaning that the bargaining agent should have come to him. According to the complainant, the failure of the bargaining agent to come to him was part of its violation of section 187 of the new *Act*.

[47] The respondents' representative referred to the complainant's response to the harassment investigator's fact-finding report (Exhibit R-1). The complainant wrote that the original discussions about the grievance took place between management and Mr. Stein ". . . without my being offered any representation to defend my position and most importantly my rights." The complainant initially answered in the negative when asked whether the bargaining agent was legally obligated to contact him and offer representation once it became aware of the circumstances that gave rise to the harassment grievance. He then modified his response several times, saying finally that when discipline is being discussed, you have the right to representation. He stated that the bargaining agent should have ensured that right when it was urging the employer to discipline him. Later, the complainant stated that "he entrusted the union to ensure my rights were represented" and that Mr. Stein should have told him to contact the bargaining agent.

[48] Pressed once again about why he did not consider contacting the bargaining agent himself, the complainant reiterated that he “did not require union involvement at the time.” He did not “require any assistance.” More specifically, the complainant confirmed that he never called Mr. Stein. When he eventually saw that Mr. Stein had signed Ms. X’s grievance form, the complainant did not talk with him. Asked why, the complainant replied, “Why would I? It served no purpose.”

[49] The respondents’ representative posed a series of questions about the complainant’s use of the PSAC internal harassment complaint process. The complainant stated that he filed his PSAC complaint because he had been a victim of union harassment. He asserted that the employer disciplined him based on the information given to it by the bargaining agent. The complainant held Mr. Stein and the people he was representing responsible for the situation. Asked to clarify whether it was only Mr. Stein who was the subject of his complaint to the PSAC, the complainant indicated that he had called Ms. Lowry to ask who the PSAC was in this situation and that she had replied that it was Mr. Stein. The complainant specified, however, that his complaint to the PSAC was also against the PSAC given that he had received a document identifying Mr. Stein as national vice-president of the PSAC (Exhibit C-21). In his words, Mr. Stein embodied the PSAC. The complainant waited until June 2004 to file his complaint in the PSAC internal process because he felt it important to clear his name with the employer first.

[50] The complainant testified that he expected the PSAC to contact him once it received his complaint. He had hoped that the PSAC would show a willingness to resolve the situation. To the suggestion by the respondents’ representative that his complaint lacked information, the complainant answered that he expected follow-up contacts if the investigator found the information too sketchy. The complaint document was a statement of his allegations, and the complainant expected that details would be discussed in the course of the investigation. Asked whether it was in fact true that the PSAC investigator had twice contacted him for information (Exhibits C-25 and C-26), the complainant responded in the affirmative but maintained that the information provided was only a substantiation of his allegations and that he was, in effect, completing the complaint form. He contended that the investigation conducted by the PSAC met his definition of “arbitrary.” He confirmed that PSAC officials later interviewed him by telephone as part of the appeal process and agreed

that the PSAC did turn its mind to the situation, although only after the complainant filed a duty of fair representation complaint with the Board.

[51] The respondents' representative asked whether the complainant was aware that the PSAC *Policy on Anti-harassment in the Workplace* (Exhibit R-3) might have applied to the situation involving Ms. X and that the PSAC might not have been able to represent him under that policy. The complainant answered in the affirmative.

[52] Concerning the complainant's testimony that he was not able to meet the "significant experience" qualification in subsequent staffing competitions as a result of the harassment grievance and his reassignment to non-management duties, the complainant agreed that he never received anything from the employer informing him that he was prohibited from applying. He also agreed that he may have misconstrued the experience factor stated in one of the competitions (Exhibit C-35) and apparently had been in a position to apply.

[53] In re-examination, the complainant again addressed his reasons for not seeking representation from the bargaining agent. He reiterated that his assistant director told him to "lay low" and that he believed that she, the Director and Mr. Stein were taking care of the situation. Once the employer formally notified the complainant about the harassment allegation against him, he felt that the employer's harassment policy (Exhibit C-36) required that he not talk with anyone, including the union, about the case.

[54] Mr. Stein began his testimony by explaining his role as a UTE regional vice-president and, more particularly, the nature of his involvement as a regional vice-president in harassment cases. He outlined that his principal contacts in such situations were the regional assistant commissioner and his or her staff and that he would not ordinarily interact with local managers. UTE members frequently contact him directly for assistance and advice. His normal practice is to provide guidance and to refer them to local bargaining agent representatives for action as necessary at the first and second levels of the grievance process.

[55] Mr. Stein's involvement in this case began when he was approached several months prior to the events of February 2002 by local UTE representatives and told that there was a problem in the Finance and Administration Division in Windsor. Following his normal practice, he urged the representatives to try to resolve the problem at the

local level. Mr. Stein stated that CEUDA members from the Finance and Administration Division had also contacted him directly regarding the same situation. He instructed them to follow the bargaining agent's harassment policy and work to settle the problem at the workplace level.

[56] After being kept informed of unsuccessful attempts to resolve the situation locally, Mr. Stein decided that it was in the best interests of his members for him to contact the Regional Assistant Commissioner directly and to urge her to take action. Ms. Howard, in turn, referred the matter to the complainant's director, Mr. Hertzberg.

[57] Mr. Stein was not asked to participate in Mr. Hertzberg's meeting with concerned employees on February 11, 2002. While Mr. Stein had talked with at least three of the employees who were there, he had no direct knowledge of the meeting at the time it occurred nor who actually attended. After the meeting, he learned that the employer was suggesting involving the ODM in the situation, an option that he thought would not succeed given that employees distrusted ODM staff "out of Ottawa." He contacted Ms. Howard once more and urged her to become engaged in the problem (Exhibit C-6). According to Mr. Stein, his contact was certainly not an effort "to get Mr. Kraniauskas." He felt that local management was not able to resolve the situation and was concerned that none of the employees involved had taken more formal action because they felt intimidated and were afraid of the consequences of filing a harassment complaint. In those circumstances, Mr. Stein believed that intervening with Ms. Howard was appropriate and required.

[58] Mr. Stein discussed his reference to a "three-strike rule" in his email to Ms. Howard (Exhibit C-6). He stated that "this was the third trip down the road on harassment" with the complainant. When the complainant originally came to the Windsor Tax Services Office (TSO) from the customs side of the organization, local PSAC officials told Mr. Stein that the move was the result of a harassment matter, although he was not given details. Later, local representatives brought to Mr. Stein's attention new allegations of harassment against the complainant in the context of a selection process. No formal complaint was filed at that time, and the matter was resolved informally. The third strike, according to Mr. Stein, was the complainant's subsequent role in causing a poisonous work environment in the Finance and Administration Division, the situation that led to Ms. X's harassment grievance. For Mr. Stein, there was "enough evidence in front of [him]" to persuade him that

something had to be done. He concluded that the complainant was the cause of the problem. In previous harassment situations, he knew that the employer had sometimes decided to separate an alleged harasser from affected employees. He felt that the same approach was now required until the employer completed a full investigation in accordance with its policy (Exhibit C-36). He insisted that his email to Ms. Howard did not ask that she fire the complainant, only that she remove him from his position until management "did its job."

[59] When the complainant invited employees on April 8, 2002, to attend a meeting with either Ms. Lowry or Ms. Lowry and himself (Exhibit C-9), Mr. Stein wrote to Ms. Underwood that employees would not participate in a meeting with the complainant (Exhibit C-10). He denied that his email was an attack on the complainant and, instead, described it as an effort to alert management that the proposed meeting could not work. According to Mr. Stein, very upset employees told him on more than one occasion that they were afraid of what the complainant might do to them if they encountered him.

[60] Mr. Stein sent a further email to Ms. Howard on April 23, 2004, stating that delays were unacceptable and that her efforts to delegate the problem to the complainant's director were also unacceptable (Exhibit C-11). On April 29, 2004, he again sent a message to Ms. Howard (Exhibit C-12), because it seemed to him that nothing had changed in the workplace despite his previous representations. According to information about the complainant provided to him by his members, the "whole sexist and authoritarian comments had not improved."

[61] Mr. Stein described Ms. X as a long-time employee whom he had known for the better part of 30 years. He had had several discussions with her during which she outlined the problems that she had encountered with the complainant. He viewed her as an advocate for other employees who did not want to pursue formal action, and he was willing to respond positively to her request for assistance in filing a grievance against the complainant provided that her bargaining agent agreed to the arrangement. He stated that he did, in fact, secure the required approval from that bargaining agent.

[62] When Ms. X filed her grievance, the employer questioned Mr. Stein about his status. He testified that he made it clear to the employer that he had signed her grievance form as an individual, not as a bargaining agent representative (Exhibit C-16). He acknowledged, nonetheless, that his title as a PSAC representative "does not go far

from [his] name." He referred to an April 3, 2003, email from a representative of the PIPSC as confirmation after the fact that the latter had approved his role as Ms. X's representative (Exhibit R-4).

[63] Mr. Stein stated that he did not take lightly the role of representing an employee against a PSAC member. However, he felt that he had a strong obligation to take action to advance the best interests of his members and to follow up on the commitment of the bargaining agent and the employer to a workplace free from harassment. He believed at the time that the complainant was fully aware of his rights, knew the process and could have availed himself of PSAC representation had he wanted to do so. In hindsight, Mr. Stein suggested that he could have taken the further step of having local PSAC officials advise the complainant that PSAC representation was available to him. If it was an error in judgment not to do so, he was prepared to admit the error but insisted that he had not acted in a vindictive or capricious manner.

[64] Mr. Stein asserted that his responsibility in the situation was to urge the employer to do the right thing; that is to say, to conduct an independent investigation. Such an investigation did subsequently occur, and the employer found that the complainant was guilty of harassment. Asked whether he had used his status as a CEUDA regional vice-president to influence management negatively against the complainant, Mr. Stein replied that he used his status as he would have in any situation to help represent an employee. In that regard, he explained his November 1, 2002, email to Heather Jefferys as his effort to expedite the investigation process (Exhibit C-19). As to his December 13, 2002, email to Ms. Howard (Exhibit C-20), he stated that he had wanted her to be fully aware of what was happening in the workplace while waiting for the investigation report, acknowledging that the information he was conveying to her was hearsay.

[65] Mr. Stein outlined that his participation in the PSAC internal investigation was limited to that of a respondent. He answered questions put to him by Mr. Chorostecki and later attended a meeting in Ottawa with John Gordon and others. At that session, he provided information to them about the general context of the workplace where the harassment allegations were made and about the circumstances of his representing Ms. X.

[66] Concluding his examination-in-chief, Mr. Stein stated that, to the best of his knowledge, the PSAC never refused representation to the complainant. To the contrary,

the latter had received representation when he requested it. Throughout the period relevant to the complaint, the complainant never approached Mr. Stein for assistance or to discuss the situation nor did Mr. Stein ever take any action to influence the PSAC not to represent the complainant in those circumstances. He explained that it was never an easy decision to represent an employee in filing and pursuing a harassment grievance, particularly against a member, but that he had supported Ms. X in this case because management had not acted properly to resolve the situation.

[67] In cross-examination, the complainant challenged Mr. Stein about the circumstances surrounding the alleged "first strike" when the complainant moved to the Windsor TSO. Mr. Stein testified that three individuals had indicated to him at the time that the complainant and another manager had exchanged positions as a result of a previous harassment situation. He agreed with the complainant that he was not aware of any situation where an alleged harasser removed from a workplace was in fact promoted during the period of "removal," as the complainant had been. Questioned about what Mr. Stein had called "a similar situation" — the "Sue Parks matter" — Mr. Stein admitted that the only information that he had received about that incident was hearsay (Exhibit C-11). Pressed further, Mr. Stein stated that he presented the "first strike" to Ms. Howard as a fact because he believed that she would have been intimately involved in any such situation and would have been in a position to know whether Mr. Stein's "inference" was right or wrong.

[68] The complainant asked Mr. Stein about the alleged "second strike." Mr. Stein indicated that an employee had filed a harassment allegation against the complainant in the context of a staffing selection process. The complainant asked Mr. Stein when exactly the allegation had been made by the employee and what her detailed allegations were. Mr. Stein replied to both questions that he could not recall.

[69] As to the alleged "third strike," the complainant asked Mr. Stein how many UTE members worked in the Finance and Administration Division as of February 2002. Mr. Stein answered that he did not know. The complainant asked how many of his members had complained to Mr. Stein about him. Mr. Stein said that he had personally talked with at least three but then conceded that only one may have been a UTE member. Questioned about what that one member had alleged about the complainant, Mr. Stein said that he could not recall the details.

[70] The complainant probed Mr. Stein's knowledge of the history of workplace problems and of the "poisonous environment" in the Finance and Administration Division in Windsor. Mr. Stein testified that he did not know what the climate was in the office when the complainant was assigned to the manager's role nor did he know why the complainant was assigned to that role. He indicated that he was not aware of the specifics of the "poisoned environment" at that time or whether the same or similar workplace problems had existed under the previous manager. He agreed that he did not know whether the complainant had tried to address the problems in the workplace or whether management and the union had ever worked together to resolve the situation. Regarding the latter, Mr. Stein stated that he did not tell local PSAC officials what to do.

[71] The complainant asked Mr. Stein whether he took any action between the meeting of February 11, 2002, and Ms. Howard's email of April 9, 2002 (Exhibit C-38), to try to resolve the situation at the local level, as Mr. Stein testified was his preferred approach. Mr. Stein replied that he had no recollection of making any specific suggestions to that effect. The complainant asked him whether he remembered informing Ms. Howard that his members did not want to submit formal complaints. Mr. Stein again stated that he could not recall but suggested that he could have done so because it was consistent with his earlier testimony about how his members were reacting.

[72] The complainant asked Mr. Stein what information Ms. X shared with him that convinced him that she should file a grievance. Mr. Stein related that Ms. X described being intimidated by the complainant, that he belittled her and that he looked down on her. Beyond that, he could not specifically recall every situation that Ms. X had mentioned. He agreed that Ms. X had never worked for the complainant. He also agreed that he did not supply any information in response to the April 26, 2002, request from Ms. Howard for further details (Exhibit C-41), believing that Ms. X had done so when she filed her grievance on that date, nor did he speak with his membership to obtain more information once the formal grievance process was initiated. Asked whether he continued to pursue the complainant's removal once the grievance was filed, Mr. Stein testified that he suspected that he would have reiterated his earlier requests to that effect had the opportunity arisen.

[73] The complainant reviewed with Mr. Stein the contents of his various subsequent emails to Ms. Howard and her staff (including Exhibits C-12, C-17, C-19 and C-20). Mr. Stein denied that he had breached confidentiality in any of those communications nor that his pattern of reporting on the complainant to senior management constituted harassment or revealed bad faith on his part. He stated that he felt that it was his duty to advise the Regional Assistant Commissioner or her staff of any information or developments that might be relevant to the investigation that she had initiated. He further asserted that all of his actions "without a doubt" conformed to the employer's harassment policy (Exhibit C-36).

[74] In re-examination, Mr. Stein's representative sought to introduce as evidence the harassment investigator's fact-finding report, purportedly to counter any allegation that Mr. Stein had acted arbitrarily. I denied the effort on the grounds that it was the behaviour of the respondents that was before me, not the merits of Ms. X's harassment grievance, the adequacy of the harassment investigation process or the investigator's findings. As described to me, it appeared that the report could shed very little light on what any respondent to the complaint under section 190 of the new *Act* had said or done other than to confirm that Mr. Stein had acted on Ms. X's behalf. I ruled that accepting the investigation report risked opening for debate the merits of the harassment allegation itself, a subject clearly not part of my mandate.

III. Summary of the arguments

A. For the complainant

[75] The complainant opened his argument by referring to subsection 91(4) of the former *Act*:

> ***91.*** *(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as bargaining agent, in the presentation or reference to adjudication of a grievance.*

[76] The complainant argued that the grievance that Ms. X filed against him was invalid because she was supported and represented in her action by Mr. Stein, an elected official of the PSAC, rather than by a representative of the PIPSC, the bargaining agent certified to represent her. Subsection 91(4) of the former *Act* specifically prohibited Mr. Stein from acting on behalf of the grievor, whether or not

Mr. Stein or the grievor had secured the consent of the PIPSC to that arrangement. If the employer had not accepted or processed Ms. X's grievance for that reason, the harassment investigation would never have occurred. Senior management, as well as the complainant himself, would have had the opportunity to continue to work to resolve the long-standing issues and problems in the Finance and Administration Division.

[77] The complainant contended that Mr. Stein violated several requirements of the employer's *Policy on Preventing and Resolving Harassment* (Exhibit C-36) in the course of the investigation into Ms. X's harassment grievance. The complainant argued that Mr. Stein was only permitted to participate in meetings between the investigator and Ms. X as an observer, not as a bargaining agent representative, and that he failed to take off his "union hat" during the process. Mr. Stein also repeatedly breached the policy's provisions concerning the protection of privacy by making representations regarding the complaint directly to Ms. Howard and to members of her staff such as Ms. Jefferys (Exhibits C-12, C-19 and C-20). Had Mr. Stein removed his "union hat," as the policy required, he would never have been able to communicate with Ms. Howard and Ms. Jefferys. He used his privileged access to those persons as an elected PSAC official not for the betterment of the bargaining unit he represented but, rather, to the detriment of the complainant.

[78] The complainant maintained that the employer's harassment policy obligated Mr. Stein to make Ms. X's concerns about the complainant's behaviour known to him once Mr. Stein became aware of them. Contrary to that requirement, Mr. Stein never approached the complainant or the complainant's supervisor to alert either of them to the alleged problem. According to the complainant, Mr. Stein never wanted to be part of a solution. Despite his professions that issues should be dealt with at the local level, Mr. Stein went to the opposite end of the spectrum and actively pursued an avenue that he himself described as being the most destructive for all persons involved.

[79] In response to a question of clarification from me, the complainant indicated that Mr. Stein's failure to comply with the employer's *Policy on Preventing and Resolving Harassment* was neither arbitrary nor discriminatory within the meaning of section 187 of the new *Act* but certainly did represent bad faith under that section.

[80] The complainant analyzed in detail the substance of Mr. Stein's communications with the employer and particularly his repeated reference to a "three-strike rule." The

complainant argued that the evidence demonstrated that Mr. Stein had concluded from the outset that the complainant was guilty. He was determined to dig up events and misinformation from the past — although there was nothing to dig up — to support that conclusion in a determined effort to get rid of the complainant. According to the complainant, Mr. Stein's words and allegations in his repeated messages to the employer clearly betrayed his continuing bad faith and animosity toward the complainant (Exhibits C-6, C-10, C-11, C-12, C-14, C-17, C-18 and C-20). Mr. Stein constantly depicted the complainant's management style to the employer in the most negative terms and "cherry-picked" information to try to make his case against him. It was Mr. Stein's persistent efforts that ensured that management took action against the complainant. In Mr. Stein's own words, ". . . [he did] not believe anything would have happened if not for [his] intervention in the matter" (Exhibit C-6). The complainant maintained that as a manager, he had always treated the union as a partner in dealing with issues. In the circumstances of the harassment complaint launched against him, however, it was his union "partner" who "didn't get it."

[81] The complainant drew specific attention to the "first strike" alleged by Mr. Stein; that is to say, the allegation that the complainant had been transferred in 1997 into the Windsor TSO in an exchange with another manager as a result of a previous incident of harassment involving the complainant. The complainant described Mr. Stein's representations to local management at that time to remove the complainant from the workplace as the "ultimate breach" of good faith. He alleged that Mr. Stein presented the allegation that harassment was the reason for the exchange of managers as a fact to the employer even though he did not know whether that allegation was true. Mr. Stein had not cared to find out what had actually occurred. Specifically, he was not aware that the complainant had been promoted at the time, an outcome that Mr. Stein agreed was not usual in a harassment situation.

[82] The complainant's "final argument" focused on the PSAC's handling of his own harassment complaint against Mr. Stein, a process that the complainant described as both arbitrary and exhibiting bad faith. He contended that the PSAC failed in the first stage of the process to take his complaint seriously and made a determination about its merits without contacting him for any information. The first-level decision also incorrectly identified the PSAC policy under which the complainant had filed his action. Arbitrariness and bad faith continued at the appeal stage. The appointed investigators met personally with Mr. Stein but only conducted a telephone interview

with the complainant, thus giving an unfair advantage to the former. According to the complainant, the PSAC investigators should have travelled to see him personally or had him travel to see them. After their work was completed, it then took Ms. Turmel until February 3, 2006, to issue an appeal decision.

[83] Regarding the respondents' objection to my jurisdiction to consider the circumstances of the PSAC harassment complaint process, the complainant argued that *Bracciale*, cited by the respondents at the outset of the hearing, found only that the Board was without jurisdiction to consider a "union matter" within the bargaining agent's own house where there was no employer involvement. That was not the case here. The events that led the complainant to use the PSAC harassment complaint process all took place within the employer's workplace, involved employer policies and were by nature part of the employee-employer-bargaining-agent relationship. As such, the Board has jurisdiction to consider all elements of the complaint.

[84] At the conclusion of his arguments, I asked the complainant whether the duty owed by a bargaining agent representative under section 187 of the new *Act* is engaged when an employee does not request representation by the bargaining agent. He replied in the affirmative. According to the complainant, as soon as the bargaining agent was aware of a matter that affected him, it became its duty to represent him in accordance with section 187. In support, he cited the reference at paragraph 36 in *Richard v. Public Service Alliance of Canada*, 2000 PSSRB 61, to *Merchant Service Guild of Canada v. Gagnon et al.*, [1984] 1 S.C.R. 509. That reference, according to the complainant, holds that the bargaining agent has an obligation not to be arbitrary, capricious, discriminatory or abusive even when it decides not to represent an employee. He stated, "I am here because of the union's misrepresentation."

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

[85] The respondents' representative argued that the complainant has come to the Board to clear his name. This hearing, however, is not a forum for the complainant to challenge the harassment investigation or its results. The complainant's concerns in that regard were the subject of the 69 grievances that he filed. Those grievances are not before the Board nor are the details of any ensuing settlement agreement between the complainant and the employer.

[86] According to the respondents' representative, the complainant blames Mr. Stein for the employer's decision to discipline the complainant. He views Mr. Stein's actions as the basis for the employer's decision to investigate and for the conclusions flowing from that investigation. The investigation took place, however, because the complainant acted inappropriately. The results of the investigation (Exhibit R-2) led the employer to find him guilty of harassment and to subsequently impose discipline. Those results, findings and actions validated the concerns about the complainant's behaviour that Mr. Stein expressed to the employer on behalf of Ms. X and his union members in the workplace.

[87] The respondents' representative maintained that the complainant did not at the time, and does not now, accept responsibility for his actions. Notably, in the response to the investigator's fact-finding report that he submitted on October 21, 2002 (Exhibit R-1), the complainant actually blamed management for his problems:

> . . .
>
> *It is my assertion that in this instance, management aided in the unnecessary proliferation of the information that they received at the February 11th meeting. . . .*
>
> . . .
>
> *. . . when Mr. Hertzberg and Ms. Lowry met with the staff on February 11th, they failed to take the necessary precautions to ensure that my rights were protected as an employee and union member. Because of their actions of February 11th, the misrepresentation of facts and defamation of my character was discussed openly, slander by definition. . . .*
>
> . . .
>
> *After the meeting of February 11th, conference calls and an offer to bring in the representative from the Office of Dispute Management (ODM) were the only actions taken by management. When the offer to bring in the ODM garnered little response, it too was cancelled without any further action. I argue that it is this management error that has resulted in the complaint being filed.*
>
> . . .

[88] Mr. Stein faced a very difficult situation and had a difficult decision to make. His testimony demonstrated that he was not being vindictive. He took issue with the employer's lack of action and omissions in the face of expressed employee concerns

about harassment, as did the complainant, and made representations accordingly. All of his dealings with management were consistent with his role as an elected bargaining agent official. He conducted his representations with the sincere belief that it was his responsibility and obligation to deal with the harassment alleged by his members, both given the employer's anti-harassment policy and the bargaining agent's policies. It was the complainant's onus to prove that the grievance against him was filed only because of Mr. Stein's bad faith. He did not do so.

[89] Furthermore, the respondents' representative asserted that the complainant knowingly waived his rights to bargaining agent representation until after the employer imposed discipline. Only then did he seek bargaining agent support in filing 69 grievances against the employer. The complainant clearly testified that he did not need representation before that time. Indeed, the complainant argued that the employer's harassment policy (Exhibit C-36) precluded him from being represented by the bargaining agent during the investigation. Under section 187 of the new *Act*, the positive obligations owed by a bargaining agent or its representatives are not engaged when an employee has waived his rights to representation.

[90] The fact that Mr. Stein did not contact a local bargaining agent representative to suggest that he or she inform the complainant that he had the right to union representation may have been a mistake, as Mr. Stein admitted. It was not, however, a breach of section 187 of the new *Act*. The case law makes it clear that bargaining agent representatives should be permitted substantial latitude in their representations and that they are allowed to make mistakes. Even if it were a mistake, Mr. Stein's failure to initiate or arrange a contact with the complainant to discuss his representation rights did not have the affect of prejudicing the complainant's exercise of any such rights.

[91] As to the complainant's reference to subsection 91(4) of the former *Act*, the respondents' representative conceded that Mr. Stein was never acting as an individual when he represented Ms. X — other than when he signed the grievance form (Exhibit C-16) — but as an elected PSAC official. He acknowledged that the PSAC may not have had the right to present a grievance on behalf of an employee represented by a different bargaining agent but asked that Mr. Stein's decision be understood in the context of the local situation, his relationship with Ms. X and the fact that he sought and received permission from the PIPSC. In any event, the possibility that he did not

act in accordance with subsection 91(4) of the former *Act* does not mean that there was a violation of section 187 of the new *Act*.

[92] Concerning its jurisdictional objection, the respondents' representative referred me to *Bracciale* and to *Kowallsky v. Public Service Alliance of Canada et al.*, 2007 PSLRB 30. According to the respondents, the harassment action filed by the complainant against Mr. Stein under the PSAC's "policy 23" was purely an internal bargaining agent matter. As such, the case law under the former *Act* clearly establishes that the Board has no jurisdiction.

[93] In the alternative, the complainant did not adduce evidence that proves that the PSAC's treatment of him during the internal complaint procedure was arbitrary or discriminatory or that it exhibited bad faith. The PSAC undertook to investigate the complaint and then did so, reaching a decision after giving the complainant an opportunity to provide information. There was no evidence that the bargaining agent attempted to protect Mr. Stein. At the appeal stage, Ms. Turmel did find that the complainant should have been given a better opportunity to provide information during the initial investigation but then concluded that that shortcoming did not obviate the investigator's findings that the complainant had not been harassed (Exhibit C-34).

[94] The respondents' representative noted that the complainant failed to address the issue of remedy in his arguments. On the complainant's submission that he had incorrectly understood that remedy would be discussed separately at the end of the hearing, I allowed the complainant an opportunity to address corrective action in conjunction with any rebuttal arguments, with a corresponding right to comment accorded to the respondents.

[95] The respondents' representative closed his argument by referring me to the discussion of arbitrariness in the context of the duty of fair representation found in *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70.

C. <u>Complainant's rebuttal</u>

[96] The complainant argued that he did not take action to seek bargaining agent representation until it was necessary in the context of his subsequent filing of 69 grievances. He cited *Sophocleous v. Pascucci and Richey*, PSSRB File No. 161-02-861

(19981021), as supporting the proposition that bargaining agent representation is not permitted during a harassment investigation.

[97] The complainant sought to introduce discipline clauses from the collective agreement between the employer and the PSAC in support of the argument that an employee is entitled to bargaining agent representation whenever the employer discusses discipline. On objection from the respondents' representative, I ruled that excerpts from the collective agreement were not admissible in the context of the complaint before me. Under the new *Act*, matters related to the interpretation or application of a collective agreement are the subject of a reference to adjudication under section 209, not of a complaint under section 190. Furthermore, the complaint before me made no reference to a violation of the collective agreement. In my view, it would be both an error in law and a violation of procedural fairness were I to entertain any submissions on the meaning or impact of the collective agreement as part of my consideration of the merits of this complaint.

[98] The complainant asserted that he never waived his rights to bargaining agent representation as alleged by the respondents' representative. He suggested that bargaining agent representation is analogous to car insurance. He felt that as a dues-paying member of the PSAC, his interests were always protected in accordance with the requirements of the law.

[99] On the issue of remedy, the complainant asked that the Board order the respondents to pay the costs of obtaining professional actuarial advice to determine the value, owed him by the respondents, of the losses he experienced and the damage to his reputation that resulted from the respondents' violation of section 187 of the new *Act*. In response to a question that I posed, the complainant stated that he had no concrete evidence quantifying his loss.

[100] The respondents' representative replied that the complainant had sought a specific remedy in his original filing. He thus had the burden to quantify and qualify through evidence the corrective action that he claimed, but did not do so.

IV. Reasons

[101] The complainant's burden in this case is to prove, on a balance of probabilities, that the respondents violated section 187 of the new *Act*:

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

[102] The wording of section 187 of the new *Act* establishes the analytical framework for determining whether the complainant has met his burden. In my view, there are three components to the required proof. The first is not normally controversial but is nonetheless necessary: the complainant must prove the status of the respondent(s) as either an "employee organization that is certified as the bargaining agent for [the] bargaining unit" of which the employee is a member or as an "officer [or] representative" of that employee organization. Second, the complainant must show that the activities that are the subject of his complaint arose "in the representation of any employee in the bargaining unit." Finally, the complainant must demonstrate that the respondent(s) acted "in a manner that [was] arbitrary or discriminatory or that [was] in bad faith" in conducting representations.

[103] Before turning to the first of the three elements, I note that the complainant offered clarification of the basis for his complaint during his testimony. He stated that his complaint was limited to the circumstances around the respondents' representation of Ms. X (paragraph 44 of this decision). He stated that the events from February 11, 2002, to April 10, 2002, had not involved Ms. X and that it was only in April 2002 that Mr. Stein solicited Ms. X to file the grievance.

[104] If I were I to accept this clarification as a modification of the original complaint, the effect would be to remove from consideration in this decision the allegations that appear in the first two paragraphs of the statement of the complaint. The allegations attacked the actions of Mr. Stein and the complainant's assistant director prior to April 2002:

. . .

> *That on February 12, 2002 Mr. Stein was involved in a conference call with senior management wherein he used his Union position to cause me harm.*
>
> *On February 13, 2002 in a confidential conversation with my Assistant Director, I shared information I received regarding the possible harassment of myself. This information was discussed in a conference call on February 14, 2003. I allege*

> *that Mr. Stein shared this information with others to my determent* [*sic*].

. . .

[105] While it would be procedurally appropriate, in my opinion, to hold the complainant to his clarification and remove these two paragraphs from consideration, I do not believe that doing so would substantially alter the fundamental issue that the complainant brought to the Board: did the respondents act arbitrarily, in bad faith or in a discriminatory fashion vis-à-vis the complainant in their representations concerning the harassment grievance brought by Ms. X against him? As a practical matter, evidence about what happened immediately prior to April 2002 — the subject of the first two paragraphs of the complaint — could provide useful context for examining that issue.

A. <u>Status of the respondents</u>

[106] The complainant identified three respondents: the PSAC, the UTE and Mr. Stein.

[107] The PSAC is an "employee organization that is certified as the bargaining agent for a bargaining unit" within the meaning of the new *Act* and thus comprises a proper respondent for purposes of section 187.

[108] The evidence indicated that the UTE is a component organization within the PSAC with its own elected officials who act as employee representatives in the name of both the UTE and the bargaining agent. The UTE is not itself an "employee organization that is certified as the bargaining agent for a bargaining unit." As an organization and not a person, the UTE also cannot be considered "an officer" of the certified employee organization for purposes of section 187 of the new *Act*, nor is it readily apparent that it can be treated as a "representative" of the certified employee organization for those purposes. The latter status is normally accorded to a person rather than entity.

[109] On that basis, there may be good reason to question whether the UTE is a proper respondent for purposes of section 187 of the new *Act*. In the end, however, the reasons below do not require that I make a formal finding on that point. As I did not receive specific submissions from the parties on the issue, I will leave it aside.

[110] I find that Mr. Stein, while holding office within the UTE, did in fact act as a representative of the PSAC in the circumstances of this complaint and is thus a proper respondent. Although he signed Ms. X's grievance as an individual, rather than as a bargaining agent representative, the respondents' representative did concede in argument that Mr. Stein was never acting as an individual in his representations on behalf of Ms. X and other employees. He identified himself as a PSAC representative in his actions and was apparently understood to be acting as such by both the employer and the complainant.

B. "Representation" within the meaning of section 187 of the new *Act*

[111] The relationship between a bargaining agent (or its officials and representatives) and the employees in the bargaining unit is multi-faceted. It can, and often does, involve interaction around many types of issues and situations. Section 187 of the new *Act* focuses on those aspects of that relationship that arise "in the representation of any employee in the bargaining unit." As has been made clear in the case law, this zone of activity is not unlimited. Some significant parts of the relationship between a bargaining agent and its members have been found to fall outside the Board's authority under that section of the law.

[112] As a precondition to examining the merits of the case before me, I must ascertain whether section 187 of the new *Act* appropriately applies to the activities that are the subject of the complaint. In that regard, the bargaining agent submitted a jurisdictional objection that challenged my authority to consider those aspects of the complaint relating to the internal affairs of the bargaining agent. There is also a second jurisdictional issue that must be resolved: is the duty of fair representation expressed in section 187 engaged in a situation where the complainant did not seek representation from the respondents?

1. Respondents' objection to jurisdiction

[113] The respondents objected to my jurisdiction under section 187 of the new *Act* to consider any elements raised in the complaint that referred to internal PSAC matters. The complaint to the Board included the following allegation:

. . .

> *On September 13, 2004 Mr. Jim Chorostecki Regional Co-ordinator for the PSAC and Harassment Complaint Co-ordinator notified me that he had found my complaint unfounded. I allege that this was arbitrary, discriminatory and in bad faith as neither Mr. Chorostecki nor anyone else from that office, for that matter, contacted me in any manner in respect to his investigation.*

. . .

[114] The evidence received in this case left no doubt that the process to which this allegation referred was the PSAC's internal harassment complaint mechanism. After the complainant resolved his concerns with the employer about the handling of the workplace harassment complaint against him, he turned to pursue concerns about the actions of Mr. Stein and the bargaining agent using the bargaining agent's internal procedure. His complaint to the Board alleged, among other faults, that the PSAC's handling of his case within its internal complaint mechanism was arbitrary, discriminatory and in bad faith.

[115] Past Board decisions have consistently held that the wording of section 187 of the new *Act* and subsection 10(2) of the former *Act* does not vest the Board with the authority to supervise the internal affairs of a certified bargaining agent. Starting with *Shore v. Bean and Gordon*, PSSRB File No. 161-02-732 (19941129), Board decisions have consistently made clear that the duty of fair representation applies only to dealings that an employee may have with his or her employer; see the summary of decisions in *Bracciale*.

[116] Although the genesis of the case before me was a workplace situation that clearly did involve the employer, the complainant's allegation about his treatment within the PSAC's internal complaint investigation process concerns decision-making processes that cannot be linked to the employer. How the PSAC conducted its own internal complaint investigation is, in my view, an entirely separate issue from how the respondents conducted themselves in representations to the employer that may have involved the complainant. In this jurisdiction (and in most others), legislative provisions that establish the "duty of fair representation" afford an employee an opportunity to have concerns about the latter type of activity reviewed by the Board. They do not create a role for the Board with respect to the former.

[117] To be sure, the new *Act* does authorize the Board to inquire into and make findings about certain aspects of the internal governance and operations of a bargaining agent, but that authority arises under section 188, not section 187:

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> . . .
>
> (b*) expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;*
>
> (c*) take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;*
>
> (d*) expel or suspend an employee from membership in the employee organization, or take disciplinary action against, or impose any form of penalty on, an employee by reason of that employee having exercised any right under this Part or Part 2 or having refused to perform an act that is contrary to this Part; or*
>
> (e*) discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has*
>
> *(i) testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2,*
>
> *(ii) made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iii) exercised any right under this Part or Part 2.*

[118] Under the previous legislation in effect when the complainant launched this action, there was no provision comparable to section 188 of the new *Act*. In that regard, the following comment made by the Board's Vice-Chairperson in his recent decision in *Laplante v. Murray et al.*, 2007 PSLRB 73, applies equally to the case before me:

[121] In those circumstances, was the duty of fair representation under section 187 of the new *Act* engaged, and, if so, how? Was the complainant entitled to protection against arbitrary, discriminatory or bad faith conduct by the respondents when, by his own admission, he never sought representation from any of the respondents at the times material to his complaint?

[122] The absence of a request for representation by the complainant makes the case before me highly unusual. In preparing these reasons, I attempted to identify and review relevant decisions issued by the Board and its predecessor since a formal "duty of fair representation" provision first came into effect in the legislation on June 1, 1993. Among those decisions where the conduct of a respondent in representing a complainant to the employer was at issue — as opposed to a matter involving the internal affairs of a bargaining agent — there appear to have been only two instances where, arguably, the complainant did not seek representation from the respondent. In the majority of cases, the respondent agreed to provide representation and the complainant subsequently alleged faults in the manner in which the respondent performed its representational duties. In almost all of the remaining decisions, the respondent refused to provide representation and the resulting dispute focused on whether its decision not to represent violated its duty to the complainant. Neither scenario applies here.

[123] Were I to accept that this is a proper case for review under section 187 of the new *Act*, my decision would, in effect, embrace the proposition that a bargaining agent owes a duty of fair representation to a member of the bargaining unit who has not come forward to request representation but who may be affected or is affected by the respondents' representation of another employee. Does this proposition hold up to scrutiny?

[124] Two decisions that did emerge from my search of the Board's jurisprudence provide some assistance. In *King v. Squires et al.*, PSSRB File No. 161-02-728 (19950317), the complainant was a union steward who had received a written reprimand from the employer. He represented himself at all levels of the grievance procedure in a grievance that alleged a violation of the "No Discrimination" article of the collective agreement. He did not advise the bargaining agent of his action. The respondent, a local bargaining agent president, learned of the grievance, advised the complainant that he did not have the support of the bargaining agent and then withdrew the grievance on behalf of the

bargaining agent. The adjudicator found that the respondent had not breached a duty of fair representation as alleged by the complainant because he did not bring his grievance to the bargaining agent's attention and give it ". . . an opportunity to act on his behalf." The adjudicator cited provincial case law to support his decision as well as the following excerpt from MacNeil, Link and Engelman, *Trade Union Law in Canada*, at 7.690:

. . .

> *Before an employee can complain about the quality of representation offered by the union, the employee is obliged to bring her or his grievance against the employer to the attention of the union, and to give the union an opportunity to act on her or his behalf* . . . .

. . .

[125] In *Horstead v. Public Service Alliance of Canada et al.*, Board File No. 161-02-739 (19950711), the adjudicator found himself without jurisdiction to consider a duty of fair representation complaint because the complainant did not establish that the respondent had failed to represent her in relation to her employer. The adjudicator stated, "She never submitted a grievance that could allow me to judge whether or not she was fairly or unfairly treated by her union."

[126] Those decisions suggest that there is an onus on an employee to bring his or her issue to the attention of the bargaining agent before an act of representation to the employer (or non-representation) can occur that may be subject to the statutory duty of fair representation. In the case at hand, there was no evidence of any impediment to the complainant approaching his bargaining agent for assistance, other than his own judgment. Certainly, the fact that the bargaining agent was representing another individual in a grievance against him cannot be taken as a bar to his requesting assistance from the same bargaining agent. It is also not the case that an employer policy on harassment can have the effect of preventing an employee from exercising any statutory right to bargaining agent representation that may exist.

[127] In *Laplante*, for example, the complainant's bargaining agent represented colleague employees who had accused the complainant of harassment, a situation quite similar to the case before me. In *Laplante*, however, the complainant actively sought representation from the same bargaining agent. One of the respondents named in her complaint was, in fact, the person appointed by the bargaining agent to provide

her assistance. The adjudicator accepted jurisdiction to determine whether the representation provided by the bargaining agent was conducted in a manner that was arbitrary, discriminatory or in bad faith.

[128] *Sophocleous,* cited by the complainant, is another example of a situation where an employee accused of harassment in a complaint supported by his own bargaining agent sought representation from the same bargaining agent. As in *Laplante*, the adjudicator found that the complainant's request for representation engaged the bargaining agent's duty of fair representation. The adjudicator proceeded on that basis to evaluate whether the representation provided by the bargaining agent violated its statutory duty.

[129] These types of situations are among the most difficult faced by bargaining agents. The broader case law has clearly held that a union's duty of fair representation applies to all employees in a bargaining unit. In meeting that duty, unions must sometimes weigh competing or opposed interests within the bargaining unit. Not infrequently, they face a politically charged decision as to who to represent, and to what extent. A considerable body of case law, to be sure, has evolved around fair representation requirements when bargaining agents weigh conflicting demands for representation. Most notably, the seminal decision of the Supreme Court of Canada in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, found that the duty of fair representation does not preclude a bargaining agent from representing the interests of one or some employees to the detriment of one or more others:

. . .

> . . . *a union must in certain circumstances choose between conflicting interests in order to resolve a dispute* . . . . *In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.*

. . .

[130] In the case before me, the complainant may well have had good reason to question the conduct of the respondents, or at least of Mr. Stein, in representing the conflicting interests of Ms. X in her grievance against the complainant. (I will comment briefly on this point in the final section of these reasons.) However, he cannot, in my view, ask that the Board review the respondents' conduct against the requirements of section 187 of the new *Act* without having himself engaged the respondents to represent him in a dealing with the employer. The respondents cannot be expected to have acted on his representational needs unless and until the complainant brought those needs to their attention. Indeed, the complainant's testimony was that he did not feel that he needed representation at that time. To that extent, I am unable to interpret section 187 of the new *Act* in the circumstances of this case as imposing a proactive duty of fair representation on bargaining agent representatives. It is not, in my view, a reasonable construction of that duty to require bargaining agent representatives to intuit the representational needs of a member of the bargaining unit in the type of situation examined here, and act on them. While I might be readily persuaded that as a matter of sound practice, the respondents should have notified the complainant of the action that they were supporting against him, and should have suggested to him that he consider asking for his own PSAC representative, I find no authority in section 187 to require those proactive steps as part of the duty of fair representation in these circumstances. It may have been a mistake not to do so, as Mr. Stein conceded, but it was not a legal obligation arising from section 187.

[131] In the absence of a request by the complainant for representation to any of the respondents named in his complaint, and in the further absence of any decision by him during the time period relevant to this complaint to file a grievance against the employer, the complainant has not proved that he was a party to a representation to the employer that engaged the respondents' duty of fair representation under section 187 of the new *Act*. The complainant's testimony was that he did have problems at that time with what the employer was doing, but he chose not to ask for any help from the respondents. He also had concerns with what the respondents were doing, although he appears to have focused on those concerns only later as he learned more about the circumstances surrounding the respondents' representation of Ms. X. The latter issues, whenever they were identified, were between the complainant and the bargaining agent, not the employer. He could have, and perhaps should have, pursued those concerns directly with the respondents at that time, as he did later. He could

have, for example, contacted the bargaining agent in spring 2002 and alleged a violation of the bargaining agent's policies regarding representation in harassment complaints. Even had he done so, however, how the respondents conducted themselves in their dealings with him would not have constituted a reviewable subject under section 187 if the complainant did not engage the respondents to represent him with the employer.

[132] I find, in summary, that the factual circumstances of the complaint do not reveal a situation where the respondents were requested to provide representation to the complainant in a dealing with the employer. As such, the duty of fair representation under section 187 of the new Act was not engaged. On that basis, the complaint must fail.

C. <u>Respondent Stein's conduct</u>

[133] As I have found that the complaint must fail on jurisdictional grounds, there is no requirement to proceed to determine whether the respondents conducted themselves in a manner that was arbitrary, discriminatory or in bad faith. Nevertheless, there is a unique element in the facts of this case that, I believe, requires comment.

[134] To the best of my knowledge, the Board has not previously considered a situation where a respondent has been challenged for actions representing the adverse interests of an employee whose position belonged to a different bargaining unit and who was represented by a different bargaining agent. In this case, it is uncontested that the respondent, Mr. Stein, acting in his capacity as a PSAC representative, supported an employee who was not a member of a bargaining unit represented by the PSAC and who, in fact, was represented by the PIPSC. In acting on Ms. X's behalf, Mr. Stein advocated the interests of a person for whom he had no legal entitlement to represent against the interests of an employee in a PSAC bargaining unit who could have chosen to engage, and then been entitled to, fair representation from the PSAC.

[135] The complainant argued that Mr. Stein's actions violated subsection 91(4) of the former *Act*. A virtually identical provision forms part of the current legislation:

. . .

> ***213.*** *No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any other employee*

> *organization in the presentation or reference to adjudication of an individual grievance.*

. . .

[136] Subsection 91(4) of the former *Act* and section 213 of the new *Act* reflect a vital tenet of the labour relations system created by both statutes. When the Board certifies a bargaining agent to represent employees in a bargaining unit, the grant of representational rights is exclusive for purposes, among others, of presenting individual grievances or referring such grievances to adjudication on behalf of those employees who seek representation or who must engage representation, depending on the subject of the grievance. No other employee organization may assume that responsibility. Were it otherwise, the potential for confusion and conflict in the conduct of employee representation would be very substantial.

[137] Mr. Stein testified that he sought the PIPSC's permission to represent Ms. X, although the respondents did not present clear evidence that the PIPSC granted such permission. That testimony is irrelevant. The prohibition contained in subsection 91(4) of the former *Act* and section 213 of the new *Act* is not one that can be set aside by agreement. The prohibition is mandatory and unambiguous.

[138] Had I jurisdiction to consider the merits of the complaint under section 187 of the new *Act*, the fact that Mr. Stein appears to have violated subsection 91(4) of the former *Act* could well have become a significant factor in weighing his conduct. Taken with other testimony that, on balance, depicted Mr. Stein as someone who presumed from the outset that the complainant was guilty as charged — of his "third strike" — and who then acted with single-minded determination to secure his removal from the workplace, there are, at the very least, serious grounds for concern about the propriety of respondent Stein's behaviour.

[139] Nonetheless, the jurisdictional ruling that I have made does not allow me to consider any formal finding regarding Mr. Stein's actions.

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

(The Order appears on the next page)

V. Order

[141] The complaint is dismissed.

April 29, 2008.

Dan Butler,
Board Member