Date: 20091221

File: 561-02-181

Citation: 2009 PSLRB 177

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CHANTAL RENAUD

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Renaud v. Canadian Association of Professional Employees

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

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Complainant: Herself

For the Respondent: Lise Leduc, counsel

Heard at Ottawa, Ontario,
November 3 and 4, 2009.
(PSLRB Translation)

I. Complaint before the Board

[1] On September 24, 2007, Chantal Renaud ("the complainant") filed a complaint against the respondent, the Canadian Association of Professional Employees (CAPE), her bargaining agent, under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The complainant alleged that the respondent committed an unfair labour practice within the meaning of section 187 of the *Act* by failing to fulfill its duty of fair representation. In the complaint form, the complainant set out her criticisms of the respondent as follows:

> [Translation]
>
> . . .
>
> *Unfair representation complaint*
>
> *On August 13, 2007, the respondent, the CAPE, refused to apply for an extension of time for referring my grievance to adjudication.*
>
> *By that refusal on August 13, 2007, the CAPE also refused to correct an error that it had committed in June 2006 by failing to refer my grievance to adjudication within the time limit.*
>
> *On August 13, 2007, by refusing to apply for an extension of time and by refusing to correct its error, the CAPE acted in a manner that was arbitrary, discriminatory or in bad faith with respect to my representation, in violation of section 187 of the Public Service Labour Relations Act, S.C. 2003, c. 22.*
>
> . . .

[2] The respondent raised an objection about the admissibility of the complaint, alleging that it had been filed outside the 90-day period set out in subsection 190(2) of the *Act*.

[3] At the November 3, 2009 hearing, I informed the parties that I would first rule on the objection about the admissibility of the complaint and that the hearing would deal only with that objection.

II. Summary of the evidence

[4] The events that gave rise to this complaint began in 2004 and unfolded as follows.

[5] The complainant filed grievances on December 8, 2004 and on March 21, 2005 alleging that the employer had subjected her to discrimination. Her grievances were founded on article 16 (No Discrimination) of her collective agreement (between the Treasury Board and the CAPE (Economics and Social Science Services Group)). The complainant's grievances were dealt with at the different levels of the employer's grievance process. On June 16, 2006, the employer dismissed them at the final level.

[6] In addition, on December 7, 2004, the complainant filed a complaint with the Canadian Human Rights Commission (CHRC) in which she made essentially the same allegations as in her grievances. On May 9, 2005, in accordance with its discretionary authority under paragraph 41(1)(*a*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*), the CHRC decided not to rule on the complainant's complaint and declared that she first had to exhaust the grievance processes available to her.

[7] When the complainant filed her grievances and her complaint with the CHRC, she was advised by Jean Ouellette, a labour relations officer for the respondent. In 2006, Mr. Ouellette was promoted, and the complainant's case was transferred to Lionel Saurette, his successor as a labour relations officer.

[8] Mr. Saurette stated that he analyzed the complainant's files in June 2006. He explained that, under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former *Act*"), it was accepted law that a grievance consisting essentially of an allegation of discrimination in violation of the no-discrimination article of a collective agreement could not be referred to adjudication unless another provision of the collective agreement was involved and that instead a complaint containing the allegation of discrimination had to made to the CHRC.

[9] Mr. Saurette stated that, given the case law, his opinion was that it was not possible to refer the complainant's grievances to adjudication. Nevertheless, in May 2006, he and the employer attempted to negotiate a settlement of the complainant's grievances, but the parties were unable to reach an agreement. Mr. Saurette stated that, after the employer dismissed the complainant's grievances at the final level of the internal grievance process on June 16, 2006, he recommended that the complainant conditionally refer her grievances to adjudication. Mr. Saurette explained that conditionally referring a grievance to adjudication means directing the case to adjudication in order to further redirect it to the mediation services of the Public Service Labour Relations Board ("the Board") to attempt to negotiate a

settlement. When a conditional reference to adjudication does not result in a settlement, the grievance is withdrawn. Mr. Saurette stated that he had a telephone conversation to that effect with the complainant on June 26, 2006 and that he informed her that they had 40 working days to refer the grievances to adjudication, i.e., until July 25, 2006. Mr. Saurette stated that, during that conversation, the complainant told him that she had asked the CHRC to reactivate her complaint, to which the CHRC agreed, and that she was more interested in pursuing her complaint with the CHRC than in referring her grievances to adjudication.

[10] Mr. Saurette added that the CAPE could not refer a grievance to adjudication without the employee's authorization. He stated that, as a result, on July 11, 2006, he attempted to contact the complainant to ask her, before the July 25, 2006 deadline, if she had decided to refer her grievances to adjudication. Mr. Saurette stated that he did not reach the complainant but that he left a message asking her to contact him again. He stated that the complainant never returned his call and that, as a result, the complainant's grievances were not referred to adjudication. Mr. Saurette's notes, which were adduced in evidence, substantiate that telephone call.

[11] The complainant admitted to having a conversation with Mr. Saurette during which he recommended that she refer her grievances to adjudication. She admitted that her answer was that she preferred to pursue her complaint with the CHRC, as Mr. Ouellette had recommended to her when she filed her grievances and her complaint. The complainant added that Mr. Saurette was newly assigned to her case and that she preferred the recommendations that Mr. Ouellette had given her. In addition, she denied that Mr. Saurette told her that there was a time limit for referring her grievances to adjudication, and she denied receiving a message from Mr. Saurette on July 11, 2006.

[12] Testifying about the complainant's complaint with the CHRC, Mr. Saurette stated that, although the CAPE does not have a mandate to represent its members before the CHRC, it has agreed to act as a consulting resource when members file complaints with the CHRC, in particular by helping them write the relevant documents. Mr. Saurette stated that he provided the complainant with that type of support. On August 20, 2006, the complainant sent Mr. Saurette a draft document that she intended to submit to the CHRC. Mr. Saurette stated that he discussed the content of that document with the complainant on August 24, 2006. On the fax cover page of the

document that the complainant had sent him, Mr. Saurette noted that he had a conversation with her on August 24, 2006 during which they discussed changes to the document that she had sent him. He also noted the following: "[translation] In addition, she understands that the grievances are terminated and that I will close the files."

[13] The complainant acknowledged that she discussed with Mr. Saurette the documents that she was to submit to the CHRC, but she denied that Mr. Saurette told her at any time that her grievance cases were terminated and that the CAPE would close its files.

[14] On October 27, 2006, the CHRC sent a letter to the complainant. In that letter, the manager of investigations informed her that the investigation into her complaint was complete and that he was going to send her the investigation report to be submitted to the CHRC for a decision so that she could make her submissions. The investigation report included a recommendation that the CHRC not rule on the complainant's complaint, as follows:

> [Translation]
>
> . . .
>
> ***Recommendation***
>
> *10. It is recommended that, under paragraph 41(1)(d) of the* Canadian Human Rights Act*, the Commission not rule on the complaint because:*
>
> - *the issues that the Commission would address in an investigation have already been investigated during the grievance process.*
>
> . . .

[15] On October 31, 2006, the complainant emailed the CHRC investigation report to Mr. Saurette. On November 6, 2006, the complainant sent Mr. Saurette the draft submissions that she had prepared for the CHRC. Her submissions were eventually sent to the CHRC.

[16] On February 9, 2007, the CHRC sent a letter to the complainant informing her that it had decided not to rule on her complaint because "[translation] the other recourse has made it possible to rule on the allegation of discrimination." The letter

also noted the complainant's option, if she was not satisfied with the CHRC's decision, of applying for a judicial review of the decision to the Federal Court under subsection 18(1) of the *Federal Courts Act*.

[17] On February 20, 2007, the complainant emailed Mr. Saurette and Mr. Ouellette, informing them of the CHRC's decision and requesting their advice. The email reads in part as follows:

> [Translation]
>
> . . .
>
> *What's going on? Why has the Commission rejected my case?*
>
> *At present, I am registered in a course on labour law. I have discussed my case with my professor, and he has suggested a few possible solutions (see MS Word document). However, he is a bit hesitant because he has the impression that the Commission no longer wants to deal with my case . . . but the May 2005 letter reads as follows:*
>
> > *"The Commission accepts the complaint, but the complainant should exhaust the other appeal or grievance process available to her. That said, if you are not satisfied following the decision, you must contact the Commission as soon as possible."*
>
> *Jean, right from the start you always advised me to go to the Canadian Human Rights Commission, and this summer Mr. Saurette advised me to go to adjudication.*
>
> *Can we go to adjudication after the CHRC's decision not to make a ruling? What is my recourse?*
>
> *Or do we go to the Federal Court to defend our case with the Commission and plead my case? But that might be difficult.*
>
> *We need to make an informed decision by the end of February. I am counting on your experience, expertise and knowledge so that justice is done in my case since I really have been the victim of discrimination because of my physical handicap. I want justice to be done in my case.*
>
> . . .

[18] Mr. Saurette stated that, when the CAPE has to determine whether it will apply for a judicial review of a decision or support such an application, it seeks the opinion

of a legal firm, which it did for the CHRC's decision. Based on the legal opinion that it received, the CAPE decided not to support an application for a judicial review of the CHRC's decision.

[19] Mr. Saurette stated that he had a telephone conversation with the complainant on February 28, 2007, during which he informed her that the CAPE would not support an application for a judicial review of the CHRC's decision and that it would make no further representation in her case. Following his conversation with the complainant, Mr. Saurette noted as follows: "[translation] . . . I told her that, according to what we see in the file, our representation stops here. We will not support an application to the FC. She will think about it and get back to us."

[20] Mr. Saurette stated that he had no further conversations with the complainant after February 28, 2007.

[21] On March 9, 2007, on her own initiative, the complainant submitted an application for a judicial review of the CHRC's decision to the Federal Court.

[22] On March 14, 2007, the CAPE sent a letter to the complainant, formally informing her of its decision not to support an application for a judicial review. The letter reads in part as follows:

> [Translation]
>
> . . .
>
> *I am writing to inform you of the Canadian Association of Professional Employees' (CAPE) decision on your request that it submit an application for a judicial review to the Federal Court contesting the Canadian Human Rights Commission's (CHRC) February 2007 decision not to rule on your complaint.*
>
> *Following a thorough analysis of your case by our legal counsel, our opinion is that an application for a judicial review of the CHRC's decision would have only minimal chances of success before the Federal Court. Since you did not make a referral to adjudication, no further recourse is available to you for your complaint. In the circumstances, our opinion is that it would not be in the CAPE's best interests to provide you with representation for the complaint that you filed with the CHRC.*
>
> *We understand that this is not your desired response.*

> *Unfortunately, the circumstances do not allow us to do otherwise.*
>
> . . .

[23] On March 14, 2007, the complainant emailed Mr. Saurette, asking him to explain the following sentence to her, which she said she did not understand: "[translation] Since you did not make a referral to adjudication, no further recourse is available to you for your complaint."

[24] On March 15, 2007, Mr. Saurette responded by email as follows:

> [Translation]
>
> . . .
>
> *In other words, you have exhausted your recourses, in the following sense: you filed two grievances but did not refer them to adjudication, and thus, that recourse ended in July 2006. You also filed a complaint with the CHRC, which decided not to rule on your complaint, and thus, that recourse ended in February 2007.*
>
> *Of course, you have the recourse of submitting an application for a judicial review to the Federal Court contesting the CHRC's decision. But, as our letter states, the CAPE maintains the following:* In the circumstances, our opinion is that it would not be in the CAPE's best interests to provide you with representation for the complaint that you filed with the CHRC.
>
> . . .

[25] The complainant stated that she discussed her situation and her case with her labour law professor after the end of the spring 2007 academic semester. She stated that she realized from those discussions that she had not been well represented or well directed by her bargaining agent and that her grievances should have been referred to adjudication. She stated that her professor also advised her to withdraw her application for a judicial review to the Federal Court because she would incur considerable costs. The complainant withdrew her application for a judicial review by the Federal Court.

[26] On May 31, 2007, the complainant used the CAPE's internal complaint procedure (Protocol 2 - Member Representation) and filed a complaint with Mr. Ouellette in his capacity as the CAPE's director of labour relations. In her

complaint, the complainant criticized the respondent, in particular, for not persuading her to refer her grievances to adjudication, for giving her poor advice when the CHRC dealt with her complaint, for not supporting her application for a judicial review of the CHRC's decision, and for not transferring her case to her new bargaining agent. In her criticisms about referring her grievances to adjudication, the complainant wrote as follows:

> [Translation]
>
> . . .
>
> *5) In July 2006, Mr. Saurette should have insisted that we go to adjudication because "the grievance belongs to the union." I followed Mr. Ouellette's recommendation to go to the Canadian Human Rights Commission. I now realize that Mr. Saurette should have prevented me from going to the Canadian Human Rights Commission. Because "the union has control of the grievance," the union should have forced me to go to adjudication instead of to the Canadian Human Rights Commission.*
>
> . . ..

[27] As corrective action, the complainant asked the CAPE to file an application with the Board for an extension of time for referring her grievances to adjudication. She wrote in part as follows:

> [Translation]
>
> . . .
>
> *As you know, the Canadian Association of Professional Employees has a duty to provide services to all its members.*
>
> *Paragraph 3 of Protocol 2 states the following:*
>
> > If a member considers that his or her case has been dealt with in an arbitrary manner
>
> *In my case, I consider that the union dealt with my case in an arbitrary manner as described in the attached Appendix A.*
>
> *I have already discussed the problem with labour relations officer Mr. Lionel Saurette, with no result. Therefore, I now submit the case under Protocol 2 - The Protocol of Member Representation.*
>
> *Therefore, I request that my two grievances, No. 675-3-282*

> *and No. 675-3-283, be referred to adjudication with the Public Service Labour Relations Board.*
>
> *I am aware that, having received a response at the final level on June 25, 2006, the 40-day time limit has expired. However, it occurred because the Canadian Association of Professional Employees advised me to go to the Canadian Human Rights Commission instead of to adjudication.*
>
> *Therefore, I ask the Canadian Association of Professional Employees to obtain an extension of time under paragraph 12(a) of the Public Service Labour Relations Board Regulations (SOR/2005-79).*
>
> *What I now want is to have the opportunity to obtain an impartial and public adjudication hearing, to call my numerous witnesses, and to eventually obtain justice.*
>
> . . .

[28] On June 5, 2007, Mr. Ouellette wrote to the complainant, informing her that he was satisfied that the CAPE had not dealt with her case in an arbitrary manner.

[29] On June 19, 2007, the complainant submitted her complaint to the next level of the CAPE's internal complaint procedure, i.e., to Claude Danik, Executive Director, CAPE. On June 27, 2007, Mr. Danik responded as follows:

> [Translation]
>
> . . .
>
> *. . . Specifically, you state that the work was performed in an arbitrary manner and you ask that the CAPE obtain an extension of time to refer your grievances to adjudication.*
>
> *I have carefully read your letter as well as the summary that you attached (Appendix A). I have requested and examined the CAPE's files containing the information and documentation about your grievances and your complaint. I have carefully read the opinions of our legal counsel.*
>
> *It appears that the Association prepared and presented well-documented grievances. The files also indicate that you were indeed in contact with your labour relations officer to discuss both the merits of your claims and the administration of the recourses. I also see that our labour relations officer wisely referred to our legal counsel. Based on all the facts observed, I cannot find that the CAPE decisions in your cases were arbitrary. I am confident that the Association carefully conducted your cases to their conclusions and that it made its decisions with your best interests in mind.*

. . .

[30] On July 3, 2007, the complainant sent her complaint to CAPE president José Aggrey. On August 13, 2007, Mr. Aggrey refused her request. His letter reads in part as follows:

> [Translation]
>
> . . .
>
> *I have examined your letter and its appendix. I have also examined some of the documentation in your files. Based on this examination, I am convinced that the CAPE did not deal with your case in an arbitrary manner. I consider that the CAPE provided you with professional representation services. In its representation, the CAPE took your interests and concerns entirely into account.*
>
> . . .

[31] On September 24, 2007, the complainant filed this unfair labour practice complaint.

III. Summary of the arguments

A. For the respondent

[32] The respondent submitted that the events that gave rise to the complaint occurred in July 2006, when the complainant's grievances were not referred to adjudication. The respondent submitted that the complainant specifically criticized it for not having persuaded her in July 2006 to refer her grievances to adjudication instead of pursuing her complaint with the CHRC. Therefore, the respondent argued that the alleged wrongdoing by the complainant goes back to July 2006 and that the 90-day period in which to file a complaint began at that point, specifically, on July 25, 2006, i.e., the expiry of the time limit for referring the grievances to adjudication.

[33] The respondent argued that the 90-day period set out in subsection 190(2) of the *Act* is mandatory and that the Board is not authorized to extend it. On that point, the respondent cited *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78, and *Cunningham v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2009 PSLRB 96.

[34] The respondent also cited *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100, in which the adjudicator noted that the period began as soon as the complainant knew of the alleged wrongdoing and that any subsequent discussion or negotiation could not extend it.

[35] The respondent noted that the only reason that the complainant gave for not filing her complaint within the time limit was her ignorance of it. The respondent argued that ignorance of the *Act* is no excuse. The *Act* clearly provides that the period begins when the person knew or ought to have known of the circumstances giving rise to the complaint. On that point, the respondent cited *Hérold v. Public Service Alliance of Canada and Gritti*, 2009 PSLRB 132.

[36] The respondent also referred to the events of February 2007, when the complainant was informed that the CHRC would not rule on her complaint and that the respondent would not support an application for a judicial review of that decision and that it was ceasing all representation in her case. The respondent added that, on February 28, 2007 and on March 14, 2007, it clearly informed the complainant that it was ceasing all representation in her case and that it would not support an application for a judicial review of the CHRC's decision. The respondent argued that, at the latest, the 90-day period for filing a complaint against it began at that point.

[37] The respondent argued that the CAPE's internal complaint procedure, which the complainant used in May 2007, cannot extend the period for filing a complaint under subsection 190(2) of the *Act*. The respondent added that the only circumstances under which a member may use its internal complaint procedure before filing a complaint are set out in paragraphs 188(*b*) and (*c*).

[38] Finally, the respondent referred to *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27, which upheld that, under the aegis of the former *Act*, a discrimination allegation had to be the subject of a complaint to the CHRC and not a grievance.

B. For the complainant

[39] The complainant submitted that her complaint was filed within the 90-day period set out in the *Act* and that that period began on August 13, 2007, when the respondent dismissed her complaint of inadequate representation and refused to apply to the Board for an extension of time for referring her grievances to

adjudication.

[40] The complainant stated that in July 2006 she was convinced that she had to pursue her complaint with the CHRC. On that point, she stated that she relied on the recommendations that Mr. Ouellette made to her and that she had the impression that Mr. Saurette was not very familiar with her case. The complainant criticized Mr. Saurette for not being more forceful with her in July 2006 in explaining that it was better for her to refer her grievances to adjudication than to pursue the complaint process with the CHRC. She also argued that grievances belong to the bargaining agent and that, given her refusal to refer her grievances to adjudication, the respondent should have taken the initiative of referring her grievances to adjudication in July 2006.

[41] The complainant further argued that at no time did she understand or had she been informed that, by not referring her grievances to adjudication in July 2006, she was abandoning them. The complainant argued that she believed that the CHRC would deal with her grievances.

[42] The complainant stated that she was surprised and confused when she received the CHRC's decision in February 2007. She stated that she understood from that decision and from a March 2007 telephone conversation with the case investigator that the CHRC believed that her grievances had been heard by an adjudicator and that she had received financial compensation. She stated that she asked Mr. Saurette and Mr. Ouellette for advice. She stated that she would have liked to have had the respondent support and represent her in the application for a judicial review but that, because of the respondent's refusal, she had to abandon that recourse for a lack of financial resources.

[43] The complainant stated that she consulted the professor of her labour law course during the winter 2007 semester and that she also consulted a lawyer in private practice. She argued that she realized from those consultations that the CAPE had not represented her well and that it should have referred her grievances to adjudication instead of referring her to the CHRC. The complainant argued that that was what led her to file a complaint about representation under the CAPE's internal complaint procedure and to ask the respondent to submit to the Board an application for an extension of time for referring her grievances to adjudication.

IV. Reasons

[44] Subsection 190(2) of the *Act* provides as follows that a complaint under subsection 190(1) must be made within 90 days:

> *. . . a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[45] The Board has repeatedly ruled that the time limit is mandatory and that it is not authorized to extend it (*Castonguay*; *Cunningham*; *Panula v. Canada Revenue Agency and Bannon*, 2008 PSLRB 4; *Dumont et al. v. Department of Social Development*, 2008 PSLRB 15; and *Cuming v. Butcher et al.*, 2008 PSLRB 76).

[46] In ruling on the respondent's objection, I must determine at what point the complainant knew, or ought to have known, of the circumstances giving rise to her complaint. The complainant criticized the respondent for not referring her grievances to adjudication in July 2006. She also criticized it for not submitting to the Board, in August 2007, an application for an extension of time for referring her grievances to adjudication. Although both criticisms have to do with actions or omissions by the respondent about the same grievances, I am of the opinion that the events of July 2006 and of August 2007 occurred in different circumstances and, for the purposes of this complaint, must be considered separate ". . . action[s] or circumstances giving rise to the complaint." I will return to that point later in this decision.

[47] First, I will consider the events of July 2006. Although some aspects of the evidence are contradictory with respect to the facts about not referring the complainant's grievances to adjudication, one aspect that I consider to be material in this case is not contradictory: the complainant and Mr. Saurette had a conversation during which Mr. Saurette recommended that the complainant refer her grievances to adjudication, to which she responded that she had asked the CHRC to reactivate her complaint and that she preferred to pursue the complaint process rather than refer her grievances to adjudication. Based on that conversation, I conclude that the complainant knew or at the very least ought to have known that her grievances would not be referred to adjudication. Yet, she criticized the respondent for not persuading her to refer her grievances to adjudication or for not referring them itself. The period for filing a complaint began at that point, and clearly, the portion of the complaint

filed in September 2007 was filed outside the time limit.

[48] The complainant argued that she did not know that there was a time limit for referring her grievances to adjudication and that she realized only in fall 2007 after the CHRC rendered its decision and after she consulted her law professor and another lawyer that the respondent had committed an error by not referring her grievances to adjudication. The complainant argued that the circumstances giving rise to her complaint occurred at that point.

[49] With respect, I disagree. The circumstances giving rise to the complaint correspond to the criticism against the respondent, i.e., the alleged failure to provide fair representation, and not to the fact that, at one point, the complainant was informed that she might have been badly represented and that she could initiate recourse against the respondent. In *Cuming*, the Board ruled out such an argument, indicating that the wording of subsection 190(2) of the *Act* did not make it possible to conclude that knowledge of the circumstances occurred when the complainant was informed of the existence of the recourse. A complainant's ignorance of his or her rights can neither delay the point at which a period begins nor extend the duration of that period. Parliament chose to set a strict time limit along with an objective criterion for determining the starting point, which is when the complainant knew, or ought to have known, of the circumstances giving rise to the complaint. In this case, the complainant invoked her ignorance of the time limit for referring her grievances to adjudication, her ignorance of the repercussions of not referring her grievances to adjudication and her ignorance of the fact that the respondent was negligent in not recommending the proper approaches to her. In my opinion, at the end of July 2006 the complainant should have known that her grievances would not be referred to adjudication. That was when the 90-day period began.

[50] Therefore, I conclude that the complainant's complaint cannot cover the events of July 2006 since those events occurred well before the 90-day period prior to the complaint being filed.

[51] Although this decision does not deal with the merits of the case, I consider it helpful to add that the complainant's argument that the respondent should have referred her grievances to adjudication despite her refusal to do so, on the grounds that grievances belong to the bargaining agent, does not hold up under the *Act*. Under the federal public service labour relations system, a grievance belongs to the grievor,

not to that person's bargaining agent. Section 209 of the *Act* clearly provides that "[a]n employee" may refer his or her grievance to adjudication under the prescribed circumstances. In certain circumstances, the employee must obtain approval from his or her bargaining agent to represent the employee at adjudication (subsection 209(2)), but even in those cases, the employee, and not his or her bargaining agent, is responsible for referring the grievance to adjudication.

[52] I will now consider the events of 2007. I consider it helpful to place in context certain events that clarify the overlap between the complaint with the CHRC, the grievances, and the different actions of the complainant and the respondent that resulted in the September 24, 2007 complaint.

[53] First, a word about the legal context that existed when the complainant filed her complaint with the CHRC and when she filed her grievances. The complainant stated that, in spring 2007, she realized that she should have referred her grievances to adjudication in July 2006 instead of filing a complaint with the CHRC. She also stated that, at the same time, she realized that the respondent had given her poor advice in July 2006 on that matter. In my opinion, the evidence in this case shows that the complainant's understanding of her situation at the time was reasonable and that the respondent's recommendations were just as reasonable.

[54] The complainant filed her grievances and her complaint with the CHRC in December 2004, before the *Act* came into force. Under the provisions of the former *Act*, and in accordance with the case law of that time, an employee alleging discrimination in violation of the *CHRA* could not, *a priori*, file a grievance but, instead, had to file a complaint with the CHRC. In addition, the CHRC had discretionary authority to decide either to deal with the complaint or to refer the complainant to the grievance process. In *Boutilier*, the Federal Court of Appeal wrote as follows:

. . .

> *[17] . . . Parliament also chose, by virtue of subsection 91(1) of the* Public Service Staff Relations Act*, to deprive an aggrieved employee of the qualified right to present a grievance in circumstances where another statutory administrative procedure for redress exists. Accordingly, where the substance of a purported grievance involves a complaint of a discriminatory practice in the context of the interpretation of a collective agreement, the provisions of the*

> Canadian Human Rights Act *apply and govern the procedure to be followed. In such circumstances, the aggrieved employee must therefore file a complaint with the Commission. The matter may only proceed as a grievance under the provisions of the* Public Service Staff Relations Act *in the event that the Commission determines, in the exercise of its discretion under paragraphs 41(1)(*a*) or 44(2)(*a*) of the* Canadian Human Rights Act*, that the grievance procedure ought to be exhausted.*
>
> *[18] She went on to explain that the CHRC may, if it chooses, send the matter to grievance pursuant to subsection 41(1) [as am. by S.C. 1995, c. 44, s. 49] of the CHRA [at pages 475-476]:*
>
> *Paragraphs 41(1)(*a*) and 44(2)(*a*) of the* Canadian Human Rights Act *constitute important discretionary powers in the arsenal of the Commission, as it performs its role in the handling of a complaint, and permit it, in an appropriate case, to require the complainant to exhaust grievance procedures. Paragraphs 41(1)(*a*) and 44(2)(*a*) also indicate that Parliament expressly considered that situations would arise in which a conflict or an overlap would occur between legislatively mandated grievance procedures, such as that provided for in the* Public Service Staff Relations Act*, and the legislative powers and procedures in the* Canadian Human Rights Act *for dealing with complaints of discriminatory practices. In the event of such a conflict or overlap, Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(*a*) and 44(2)(*a*), to determine whether the matter should proceed as a grievance under other legislation such as the* Public Service Staff Relations Act*, or as a complaint under the* Canadian Human Rights Act*. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.*
>
> . . .

[55] In that context, Mr. Ouellette's December 2004 recommendation to the complainant to file, in parallel, both a complaint with the CHRC and grievances with her employer was in accordance with the state of the law.

[56] On May 9, 2005, the CHRC decided not to rule on the complainant's complaint, stating that she first had to exhaust the grievance process. That decision changed the context and legitimized the complainant's use of the grievance process. Under its discretionary authority, the CHRC ruled that the complainant first had to exhaust the

grievance process, thus allowing her to refer her grievances to adjudication.

[57] However, the situation did not remain that simple, as I will explain.

[58] The grievance process is exhausted only when a grievance has been referred to adjudication and an adjudicator has dealt with it. Theoretically, then, and in accordance with the May 9, 2005 CHRC decision, the complainant was required to refer her grievances to adjudication and to await the adjudicator's decision before again submitting her case to the CHRC. However, in June 2006, after the employer dismissed her grievances at the final level of the grievance process, but without her grievances having been referred to adjudication, the complainant asked the CHRC to reactivate her complaint, to which it agreed.

[59] It is surprising that the CHRC agreed to reactivate the complainant's complaint at that stage, since the grievance process was not yet exhausted, contrary to what the CHRC itself had called for in its May 9, 2005 decision. Nevertheless, I infer from the content of the CHRC's investigation report and the February 9, 2007 decision that the CHRC apparently thought that the complainant's grievances had been dealt with by an adjudicator and that, therefore, the complainant had exhausted the grievance process. My hypothesis is based on the following points set out in the investigation report on which the CHRC based its decision not to rule on the complainant's complaint:

> [Translation]
>
> . . .
>
> ***Background***
>
> *3. The complainant alleges that she was disadvantaged at work compared to the other employees because of her impairment . . .*
>
> *4. On May 9, 2005, the Commission notified the complainant that it could not rule until the other recourses had been exhausted. On June 26, 2006, not satisfied with the June 16, 2006 final-level response to the grievance, the complainant asked that complaint be reactivated.*
>
> ***Additional information***
>
> . . .

> *6. The second-level response to the grievance takes into account the issues that the complainant raised under the CHRA. That response was supported by an investigation and an analysis and is attached to this report.*
>
> *7. According to the June 16, 2006 final-level response, since the complainant did not adduce any additional facts, it was decided not to proceed to a hearing at the third level. The second-level dismissal decision was maintained.*
>
> *8. In accordance with Canada Post Corporation v. Barrette (2000), the Commission must consider an adjudicator's decision, not to determine whether it is bound by that decision but rather to determine whether, taking into account the adjudicator's decision, the issues raised under the CHRA have been addressed and dealt with.*
>
> ***Analysis***
>
> *9. Although the complainant may not be satisfied with the decision resulting from the grievance process, it appears that the issues raised by her complaint under the CHRA were addressed in that decision. When a complaint has been dealt with following a decision, the Commission's role is to ensure that the human-rights issues have been addressed and to check whether it is in the public interest to deal with the complaint. However, the second-level response to the grievance shows that the issues the Commission would address in an investigation have been dealt with.*
>
> ***Recommendation***
>
> *10. It is recommended that, under paragraph 41(1)(*d*) of the* Canadian Human Rights Act, *the Commission not rule on the complaint because*
>
> - *the issues that the Commission would address in an investigation have already been investigated during the grievance process.*

[60] From the investigator's reference to the decision in *Canada Post Corporation*, I understand that he believed that, as in that case, an adjudicator had dealt with the complainant's allegations of discrimination.

[61] The fact that in June 2006 the CHRC agreed to reactivate the complaint

apparently led the complainant to pursue the complaint process rather than the adjudication process.

[62] I do not have to determine whether, in this case, the respondent's recommendation to proceed to a conditional reference to adjudication of the complainant's grievances was reasonable, but one thing is certain: the CHRC's decision to reactivate the complaint when the grievances had not been referred to adjudication caused confusion about the jurisdiction of an adjudicator, in a context where Parliament did not allow the possibility of dual recourse in allegations of discrimination.

[63] The complainant's situation changed, however, when the CHRC rendered its February 9, 2007 decision. The complainant then found herself in the following situation: the CHRC had decided not to rule on her complaint on the grounds that her allegations of discrimination had been dealt with under the grievance process, while in fact the grievance process had not been exhausted and her grievances had never been dealt with by an adjudicator. The complainant expressed her dismay at that decision, which placed her in a situation where neither her complaint nor her grievances would be dealt with.

[64] Therefore, the complainant asked the respondent for advice. In her February 20, 2007 email to Mr. Saurette and Mr. Ouellette, she asked the respondent to inform her of her available recourse.

[65] The respondent refused to support an application for a judicial review of the CHRC's decision and refused to reactivate the complainant's grievances.

[66] Mr. Saurette stated that, on February 28, 2007, he had a telephone conversation with the complainant, during which he informed her that the CAPE would not support an application for a judicial review of the CHRC's decision and that it would make no further representation in her case.

[67] On March 14, 2007, the CAPE sent the complainant a letter formally informing her of its decision not to support an application for a judicial review.

[68] On March 14, 2007, the complainant emailed Mr. Saurette, asking him to explain the following sentence to her, which she said that she did not understand: "[translation] Since you did not make a referral to adjudication, no further recourse is

available to you for your complaint."

[69] On March 15, 2007, Mr. Saurette responded to the complainant that recourse to adjudication was no longer possible and that the only recourse remaining to her was a judicial review of the CHRC's decision, which the CAPE would not support.

[70] In the meantime, on her own initiative, the complainant submitted an application for a judicial review of the CHRC's decision. However, she later withdrew it.

[71] The complainant then decided to use the CAPE's internal complaint procedure, under which she filed a complaint on May 31, 2007. According to that complaint, the respondent had not appropriately represented her, and she asked it to reactivate her grievances by submitting an application to the Board for an extension of time for referring her grievances to adjudication.

[72] In my opinion, the respondent's refusal to support the complainant's application for a judicial review and its refusal to submit an application to the Board for an extension of time for referring the complainant's grievances to adjudication constitute new "circumstances" that may give rise to an unfair labour practice complaint. In my opinion, a distinction must be made between the requests made to the respondent in February 2007 and the circumstances of July 2006, even though they are about the same grievances. The complainant's case changed between July 2006 and February 2007; the circumstances also changed. The CHRC's decision not to rule on the complainant's complaint led her to again ask the respondent for assistance and advice. She asked the respondent whether she should submit an application for a judicial review of the CHRC's decision or refer her grievances to adjudication. The respondent refused to support an application for a judicial review of the CHRC's decision or to reactivate her grievances. Those decisions led the complainant to file a complaint with the Board. In addition, for the purposes of calculating the period for filing a complaint under subsection 190(2) of the *Act*, those decisions constitute ". . . the action or circumstances giving rise to the complaint."

[73] Before filing an unfair labour practice complaint with the Board under section 190 of the *Act*, the complainant opted to use the CAPE's internal complaint procedure. In that complaint, the complainant alleged that she had been poorly represented, and she reiterated her request that the respondent submit an application to the Board for an extension of time for referring her grievances to adjudication.

[74] The respondent argued that using the CAPE's internal complaint procedure cannot extend the period for filing a complaint under subsection 190(2) of the *Act*. In my opinion, the 90-day period began only when the CAPE's internal complaint procedure concluded. It is true that, for an employee's complaint to be allowable, in subsection 190(3) Parliament requires that an employee exhaust internal recourses in the circumstances set out in paragraphs 188(*b*) and (*c*). That requirement does not prevent an employee, in other circumstances, from using an internal complaint procedure, if the bargaining agent has such a procedure, before filing a formal complaint under section 190. Although an employee who criticizes his or her bargaining agent for committing an unfair labour practice against him or her within the meaning of section 187 need not use the internal complaint procedure before filing a complaint with the Board, nothing prevents that employee from doing so.

[75] In providing an internal complaint procedure for members who consider that they have received unfair or arbitrary representation, the respondent encourages its members to use that procedure before filing a complaint with the Board. When a member uses that procedure, the respondent may not then argue that the procedure cannot have the effect of extending the period for filing a complaint. Were that the case, in many cases the procedure would be prejudicial to CAPE members, since those who used the procedure might then be faced with a limitation period preventing them from filing a complaint with the Board. Such a situation would be completely illogical.

[76] In my opinion, a distinction must be made between the situation in this case and the situations in *Cuming*, *Boshra* and *Shutiak v. Public Service Alliance of Canada*, 2009 PSLRB 29, in which the Board ruled that negotiations or attempts by a complainant to have the bargaining agent or the employer change the decision giving rise to the complaint cannot postpone the start of or extend the period for filing a complaint. In this case, the complainant did not merely attempt to have the respondent change its mind. She used the respondent's formal complaint procedure for members who consider that they have received inadequate representation.

[77] Therefore, I am of the opinion that the complainant's use of the respondent's internal complaint procedure postponed the start of the 90-day period available to her for filing her complaint. Therefore, the 90-day period began on August 13, 2007, when the respondent refused to agree to the complainant's requests at the final level of the CAPE's internal complaint procedure. Therefore, the September 24, 2007 complaint

was filed within the 90-day period set out in subsection 190(2) of the *Act*.

[78] That said, the complainant cannot cover the events of 2006 or the circumstances surrounding the July 2006 decision not to refer the grievances to adjudication because, with respect to those events, the complaint was filed outside the 90-day period set out in subsection 190(2) of the *Act*. On the other hand, the events of 2006 may be put forward as the context surrounding the events of 2007, which are covered in the complaint.

[79] With respect to the events of 2007, in her complaint the complainant criticizes the respondent for not agreeing to again submit an application to the Board for an extension of time for referring her grievances to adjudication. The complaint does not refer to the respondent's refusal to represent the complainant in her application for a judicial review of the CHRC's decision.

[80] Therefore, the Board will address the issue of whether, by refusing in August 2007 to submit an application for an extension of time for referring the complainant's grievances to adjudication, the respondent failed to fulfill its duty of fair representation of the complainant.

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

(The Order appears on the next page)

V. Order

[82] The respondent's objection is allowed in part. For the events of July 2006, the complaint was filed outside the time limit.

[83] The Board's Registry will be asked to set dates for a hearing of the complaint on its merits.

December 21, 2009.

PSLRB Translation

Marie-Josée Bédard
Vice-Chairperson