**Date:** 20090624

**File:** 561-24-323

**Citation: 2009 PSLRB 80**

*Public Service Labour Relations Act*

Before the Public Service Labour Relations Board

BETWEEN

**GAIL HAGER, DONNA HENRY AND LINDA WOODS**

Complainants

and

**STATISTICS SURVEY OPERATIONS AND THE MINISTER RESPONSIBLE FOR STATISTICS CANADA**

Respondents

Indexed as
*Hager et al. v. Statistics Survey Operations and the Minister responsible for Statistics Canada*

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 Complainants:*** John Haunholter, Public Service Alliance of Canada

***For the Respondents:*** Robert Lindey, counsel

Heard at Winnipeg, Manitoba,
June 3, 2009.

## I. Complaint before the Board

[1] Gail Hager, Donna Henry and Linda Woods ("the complainants") allege that they were removed from a work assignment because of their membership and participation in the activities of the bargaining agent. The issue to be determined in this case is whether the respondents named in the resulting complaint — the Statistics Survey Operations ("the employer") and the Minister responsible for Statistics Canada — committed an unfair labour practice.

[2] The complaint was filed with the Public Service Labour Relations Board ("the Board") on June 4, 2008 under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). The complainants stated the issue in dispute and the corrective action sought as follows:

> *On or about March 28, 2008, the complainants were removed from their duties as part of the Core North Team, performing survey work for Statistical Survey Operations, an agency of Statistics Canada, because of their membership and participation in the activities of the union.*
>
> [corrective action]
>
> *A declaration that the employer, Statistical Survey Operations (Statistics Canada) has committed an unfair labour practice.*
>
> *That the complainants be immediately reinstated to the Core North Team and be compensated for any and all lost wages and benefits.*
>
> *Any additional remedy deemed appropriate by the Board.*

[3] The Chairperson has appointed me as a panel of the Board to hear and determine the matter.

## II. Preliminary matter - objection to jurisdiction

[4] On May 7, 2009, counsel for the respondents wrote to the Board indicating the respondents' intention to object to the Board's jurisdiction to consider the complaint. The respondents submitted the following two grounds for their objection: (1) the complaint does not reveal a *prima facie* case that the respondents committed an unfair labour practice, and (2) Ms. Woods failed to submit a complaint within the 90-day limit specified by the *Act*.

[5] On my behalf, the Board's Registry requested that the complainants provide their position on the objection to jurisdiction by May 22, 2009. By the close of business on that date, the Registry had not received a submission from the complainants. On May 26, 2009, the Registry contacted the complainants' representative and received from him a copy of an email sent to counsel for the respondents that purportedly represented the complainants' position on the objection to jurisdiction. In that email, the complainants' representative stated the following:

. . .

> *Hager, Henry and Woods were filed interviewers for 14, 5 and 6 years, respectively. In 2006 SSO created a 'Core North Team' to travel and conduct surveys in the north. However, all three were removed from this team. On March 28, 2008 Hager and Henry were advised; it may have been in December 2007 that Woods as having been told that it was a better option for her to come off the team at that time or face job loss in March. . . .*
>
> *The employer had indicated that it had wanted to start rotating interviewers in and out of the team; however, according to the complainants, rather than rotate interviewers, the employer hired new teams to perform the work, and has redistributed the survey work to other SSO employees (in addition to their other caseload). The complainants have seen their hours of work reduced, and consequently their income and benefits.*
>
> *It is also alleged that the supervisor disclosed to two other interviewers that Hager and Henry were removed from the Core North Team because they had pushed too hard on the overtime issue. This employer has apparently taken steps in terms of having work performed on days of rest without contract remuneration being paid. The employer is alleged to have made work arrangements with other employees to work at lesser rates and has instructed employees not to discuss such arrangement. It would be our intention to call witnesses to speak to that point.*
>
> . . .
>
> [*Sic* throughout]

[6] I reviewed the email and directed the Registry to write to the parties as follows:

. . .

> *The Board has been unable, based on the documents filed to date, to understand clearly the position taken by the*

> *complainants on the issue of jurisdiction. Further submissions are required. Accordingly, the issue of jurisdiction will be addressed as part of the hearing scheduled to begin June 3, 2009.*
>
> *The complainants' representative will be required at the outset of the hearing to identify specifically the prohibition(s) stated in section 186 of the* Public Service Labour Relations Act *that is the subject of the complaint and to state precisely the nature of the alleged violation of that prohibition. The Board may then require submissions from the parties as to whether the complainants have made out a prima facie case that the respondents have violated that prohibition. The complainants' representative will also be required to indicate specifically the date on which complainant Woods knew of the act, omission or other matter giving rise to the complaint and to respond specifically to the respondents' objection that the complaint is untimely in respect of complainant Woods.*
>
> *The Board will also require submissions as to whether the "Minister responsible for Statistics Canada" is properly a respondent in a complaint alleging a violation of a prohibition under section 186 of the* Act.
>
> *On the basis of the preliminary submissions, the Board will decide how the hearing will then proceed. The parties should be prepared to present evidence relating both to the issue of jurisdiction and to the merits of the complaint at the same time if the Board decides to proceed in that fashion.*
>
> . . .

[7] Counsel for the respondents wrote to the Board again on May 28, 2009 to request that it immediately convene a pre-hearing conference to deal with the issue of jurisdiction or that, in the alternative, it limit the hearing in Winnipeg the following week to the issue of jurisdiction. Citing the complainants' alleged failure to identify the specific prohibition of the *Act* violated by the respondents and their alleged failure to provide an adequate response to the jurisdictional objection, the respondents submitted that they were entitled to receive full disclosure of the details of the complainants' allegations in order to prepare and present a defence.

[8] On my behalf, the Registry wrote to the parties as follows:

> . . .
>
> *On the direction of the Board Member who is seized of this case, the Registry has not proceeded to ask for the complainant's position in writing on the respondent's request*

> *outlined in its letter of May 28, 2009, as would be the normal practice. Unfortunately, the Board Member's schedule will not permit him to convene a pre-hearing conference or consider further submissions on the matter prior to the scheduled convening of the hearing next week.*
>
> *The previous correspondence from the Registry dated May 26, 2009, indicated that the Board Member intends to address issues related to the question of jurisdiction at the beginning of the hearing. The Board Member accepts that the duty of fairness in this case requires that the complainant make clear the details of its allegation of an unfair labour practice, especially in light of the possible application of a reverse burden of proof under subsection 191(3) of the Public Service Labour Relations Act ("the* Act*") should the complaint involve a prohibition stated in subsection 186(2) of the* Act*. The failure to date of the complainant to make more precise the nature of its cause of action has been noted by the Board Member.*
>
> *In light of the circumstances, the Board Member directs that the hearing will proceed according to the instructions outlined in the letter of May 26, 2009, with the exception that the Board member will consider a request for adjournment after considering the preliminary matters . . . if he judges at that time that an adjournment is appropriate to ensure procedural fairness.*
>
> . . .

**III. <u>Preliminary matter - complainants' clarification of the allegation</u>**

[9] As outlined in the directions given to the parties, I asked the complainants at the beginning of the hearing to clarify the allegation that they were making against the respondents. The following summarizes the statement made on behalf of the complainants in response to my request.

[10] The complainants indicated that the Statistics Survey Operations created a group, the Core North Team, to conduct survey work in Canada's north. The three complainants were seasonal employees and were part of that group. They were subject to the collective agreement, had become bargaining agent members and were involved in the bargaining agent's local executive. In those capacities, they expressed views to the employer about how the collective agreement functions and applies — ". . . things that strong union members would be known for . . . all done lawfully." The collective agreement is between the Statistical Survey Operations and the Public Service Alliance of Canada, effective December 1, 2007 through November 30, 2011 ("the collective

agreement"). (Note that the parties identify the employer as "Statistical Survey Operations" in the collective agreement as opposed to "Statistics Survey Operations," the term listed under Schedule V of the *Financial Administration Act*, R.S. 1985, c. F-11. This decision adopts the latter form.)

[11] The complainants explained that they were told, unbeknownst to each other, that they were no longer to be part of the Core North Team. There was strong speculation at that time that their removal from the group was not in keeping with any business plan but was instead driven by the complainants' membership or activity in the bargaining agent. The employer did not provide the three complainants with a reason for removing them from the team.

[12] The complainants stated that they have no documentary evidence to establish the reason for their removal from the Core North Team. They had received an indication from a bargaining agent member who was also a manager that ". . . complaining or pushing too hard on things will put you in a bad place."

[13] According to the complainants, they were the most experienced and competent members of the team, and it made no economic sense to remove them from the assignment. It seemed to the complainants that ". . . union executive members, those who speak and advocate the most . . ." were affected by the reconfiguration of the Core North Team.

[14] The complainants alleged that there are "indicia" that their bargaining agent activity ". . . has come back at them." They are asking the Board to infer that their activity in the bargaining agent was ". . . at least a consideration."

[15] At the conclusion of the statement, I asked the complainants to indicate the provision of the *Act* under which their allegation fell. They replied that the respondents had discriminated against them as members or officers of an employee organization, contrary to subparagraph 186(2)(*a*)(i). That subparagraph reads as follows:

> ***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*

> *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> > *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
> >
> > *. . .*

**IV. Preliminary matter - summary of the arguments on jurisdiction**

**A. For the respondents**

[16] The respondents argued that a statement to the effect that the employer discriminated against the complainants is not sufficient to establish a *prima facie* case that the employer violated the *Act*. They referred me to the approach outlined in *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37, at para 21, as follows:

> ***21.*** *. . . In my view, the question of whether the complaint on its face shows a reasonable link to the prohibitions listed in subparagraphs 186(2)(*a*)(iii) or (iv) of the new* Act *is primordial. It goes directly to jurisdiction in the very first instance. If, taking all of the facts alleged in the complaint as true, no arguable case can be made that the respondents have contravened subparagraphs 186(2)(*a*)(iii) or (iv), then the complaint may be dismissed for that reason alone. Other jurisdictional issues and the respondents' alternative argument that the complaint should be dismissed as frivolous and vexatious, as well as some or all of the applications made by the complainant, may or will be before the PSLRB if the precondition of a* prima facie *basis for the complaint is satisfied. My decision on procedure reflects my understanding of the nature of the analysis required by the new* Act*, viewed in the context of the case law.*

[17] According to the respondents, asking the Board to draw an inference that they contravened a prohibition is not good enough. There has to be some link between a bald allegation and the facts. The complainants have not stated facts that reveal such a link. Certainly, the facts that the complainants do allege do not meet the test in *Quadrini*. The Board cannot take jurisdiction based solely on something that the complainants infer.

[18] The respondents maintained that the requirement to establish a link between the allegation and the facts is particularly important in view of the reverse burden of proof that subsection 191(3) of the *Act* imposes in the case of an alleged violation of subsection 186(2). Under the reverse burden of proof provision, the respondents are deemed to have contravened the *Act* and are required as a result to prove that they did not. That reverse onus is a heavy burden that the Board should not apply based solely on inferences or vague references from a complainant.

[19] The respondents submitted that they are entitled to be aware of the case that they have to meet. They referred me to the decision of the Canada Industrial Relations Board (CIRB) in *Wilson v. ADM Agri-industries Ltd.*, [2000] CIRB no. 99, as cited in *Quadrini* at paragraph 29 as follows:

> ***29.*** *In* Wilson v. ADM Agri-industries Ltd.*, [2000] CIRB no. 99, the CIRB offered what I believe to be a crucial caveat. For the reverse burden of proof required by subsection 98(4) of the* Code *to apply, there must first be* prima facie *substance to the complaint. Examining a situation where it felt uncertain about the basis for an unfair labour practice complaint filed against a trade union, the CIRB summarized the approach taken under the* Code *in those circumstances:*
>
> …
>
> [13] At the start of the hearings, the Board declared that the circumstances of the complaint were somewhat vague and did not appear to constitute *prima facie* evidence of union activities leading to the complaint. Section 98(4) places the burden of proof on the employer. However, as the Board found in *Canada Post Corporation* (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426), "notwithstanding the burden of proof provisions of section 188(3) [now section 98(4)] of the *Code*, there has to be some substance to a complaint upon which a contravention of the *Code* can be founded. It is not enough for a complainant to throw out accusations, then sit back and rely on the inability of the other party to disprove them." The Board has the authority to decide whether the complainant has established the required elements of a prima facie case, before the burden of proof can be shifted to the employer. This rule was applied as well in the following decisions: *CHUM Western Ltd., Radio CKVN* (1974), 3 di 18 (CLRB no. 6); *Radio Ste-Agathe (CJSA) Inc.* (1975), 8 di 8; and 75 CLLC 16,154 (CLRB no. 39); *Air Canada* (1975), 11 di 5; [1975] 2 Can LRBR 193; and 75 CLLC

16,164 (CLRB no. 45); and *Provost Cartage Inc.* (1985), 61 di 77 (CLRB no. 517).

[20] The respondents contended that they find themselves facing the same vague allegation that the CIRB encountered in *Wilson.* The complainants apparently have some suspicion that the respondents acted in a discriminatory fashion, but their allegation has no "meat." The respondents argued that there ". . . has to be some substance to the complaint . . ." as the CIRB required in *Wilson.*

[21] In summary, the respondents asserted that the complainants have not demonstrated acts, conduct or words on the part of the respondents that meet the *prima facie* test. As a consequence, the Board should not accept jurisdiction to hear the complaint.

[22] The respondents also referred me to *Laplante v. Treasury Board (Department of Industry and the Communications Research Centre)*, 2007 PSLRB 95, at para 81.

**B. <u>For the complainants</u>**

[23] The complainants argued that it would subvert the intent of the *Act* if they were required to present all of their case to establish a violation of the *Act* on a *prima facie* basis. In their words, the case ". . . is what it is." The complainants do not have a piece of paper or any oral indication from the respondents as to why they were removed from the Core North Team. All they have is the respondents' decision.

[24] The complainants maintained that their "theory" about what occurred has credibility and is enough to establish a *prima facie* case. The facts are irrefutable. The complainants were good workers but, at different times, each of them had challenged the respondents about the application of the collective agreement. They were part of the team, but then they were removed without receiving a reason. The team continued in place after their removal, and the number of employees involved actually increased. The evidence that the complainants will provide about what occurred will give the Board comfort that the complaint is well founded.

[25] The complainants referred me to *Social Science Employees Association v. Frank Claydon*, *Secretary of the Treasury Board*, 2002 PSSRB 101, and *Lamarche v. Marceau*, 2007 PSLRB 18. The former decision, according to the complainants, stands for the proposition that the Board can infer intent where the employer fails to provide a compelling business reason for a decision.

**C. Respondents' rebuttal**

[26] According to the respondents, challenging the application of the collective agreement is not an activity that can give rise to a complaint under subsection 186(2) of the *Act*. They referred me to the Board's finding in *Hamelin v. Treasury Board et al.*, PSSRB File No. 161-2-591 (19910815), that a refusal of rights under the collective agreement was not itself proof of an unfair labour practice because the refusal did not hinge on the complainant's membership in an employee organization.

[27] According to the respondents, the complainants have not established the required nexus between the acts or words of the respondents and the alleged discriminatory treatment. Therefore, they have failed to establish a *prima facie* case.

[28] If the Board finds that it has jurisdiction to hear the complaint, the respondents will find themselves in the same situation of not knowing the details of the allegation against which they must defend, as described in *Gignac v. Fradette*, 2009 PSLRB 18, at para 31 and 32, as follows:

> ***31.*** *The complainant met his initial burden of proof by demonstrating that part of the facts alleged against the respondent actually occurred. The burden of proof is therefore reversed, and it is the respondent's responsibility to prove that those facts do not constitute unfair labour practices within the meaning of the* Act *and, more specifically, within the meaning of its subparagraph 186(2)(*a*)(i). Among other things, there is no question that the complainant was called to a disciplinary interview in January 2008, that there was controversy within the management committee about his dual role and that a security investigation took place into his daughter's presence at the QPC. What remains to be determined is whether those incidents are unfair labour practices.*
>
> ***32.*** *Despite this, I agreed to have the complainant adduce his evidence first to allow the respondent a full defence. It would have been illogical to proceed otherwise given that the respondent needed to know exactly of what he was accused before presenting his defence.*

**D. Complainants' final comments**

[29] Because the respondents introduced new case law in rebuttal, I provided the complainants with an opportunity to comment on the decisions.

[30] The complainants stated that *Hamelin* and *Gignac* do not change what the Board must do. The respondents have not provided reasons for the decision to remove the complainants from the Core North Team. The *Act* requires the respondents to meet their burden of proof and to address the complaint. That burden is light. It could be addressed by a letter indicating the reasons for the original decision. Given the case that the complainants have made, the respondents are not in a situation where they are unable to provide a full and complete defence.

[31] In closing, the complainants argued that the preponderance of evidence would show that the respondents' decision was tainted by motives related to the complainants' membership or activity in the bargaining agent.

## V. Reasons - objection to jurisdiction

[32] The complainants allege that the respondents committed an unfair labour practice when they removed the complainants from the Core North Team. They believe that their membership or activity in the bargaining agent was a reason for the respondents' decision. The complainants claim that they have met the requirement to establish a *prima facie* case that the respondents' decision contravened the prohibition expressed in subparagraph 186(2)(*a*)(i) of the *Act*. That provision reads as follows:

> ***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> > (a) *refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
> >
> > > *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
> >
> > . . .
>
> [Emphasis added]

Using the language of the statute, I re-express the complainants' claim as an allegation that the employer discriminated against them with respect to employment because they were members and officers of an employee organization.

[33] Since this is a complaint alleging a violation of a prohibition stated in subsection 186(2) of the *Act*, subsection 191(3) applies. It reads as follows:

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

Applied to this case, subsection 191(3) requires the respondents to prove that, on a balance of probabilities, they did not discriminate against the complainants with respect to employment because they were members or officers of an employee organization. Stated differently, the respondents have the burden to prove that their decision to remove the complainants from the Core North Team was for a business reason rather than for their memberships or roles in the bargaining agent.

[34] As outlined in *Quadrini*, the reverse burden of proof feature operates as long as the complainants have made a *prima facie* case that the respondents have breached the identified prohibition under the *Act*. *Quadrini* outlined the question to be posed as follows:

> ***32.*** *At heart, the issue of a* prima facie *case here is one of common sense. Were it the case that a person could simply file a complaint stating his or her conviction that there has been a violation of subsection 186(2) of the new* Act *and, by doing so, trigger the legal requirement that the respondent prove the contrary, the possibilities for vexatious litigation would be substantial. An allegation of a breach of subsection 186(2) must be reasonably arguable on its face. As stated earlier, the threshold is the following: taking all of the facts alleged in the complaint as true, is there an arguable case that the respondents have contravened subparagraphs 186(2)(*a*)(iii) or (iv) of the new* Act*?*

Following that approach, my task in considering the respondents' objection to my jurisdiction to hear this complaint is to answer the following question: "Taking all of the facts alleged in the complaint as true, is there an arguable case that the

respondents discriminated against the complainants with respect to employment because they were members and officers of an employee organization?

[35] So as not to frustrate the legislator's intent that ". . . the written complaint is itself evidence that the failure actually occurred . . .", the *prima facie* test must be applied in a fashion that errs on the side of allowing a complaint to be heard on its merits unless there is no arguable case to be made, presuming the facts as alleged to be true. As the complainants have argued, it is certainly not appropriate to require them to reveal all the facts on which their case is based as a precondition to crossing the *prima facie* threshold. What is required are facts sufficient to establish an arguable link between the respondents' decision to remove the complainants from the Core North Team and their memberships in the bargaining agent or their roles on its local executive.

[36] The respondents maintain that the complainants have not provided facts that demonstrate that link. For the respondents, the complainants have offered nothing more than an inference or a suspicion. They argue that a *prima facie* case requires something more concrete and factual — or that, in the alternative, they are entitled to know more about the facts alleged by the complainants if they are to be compelled to defend their decision.

[37] I have considerable sympathy for the respondents' position. The complainants' explanation of their case suggested to me that their decision to file a complaint may have had more to do with the alleged failure of the respondents to explain the removal of the complainants from the Core North Team than with a firmly held conviction based on an analysis of events that the respondents discriminated against them because of their bargaining agent membership or activities. By characterizing their complaint as "an inference" or as based on "speculation," the complainants have left me to wonder whether they are using the vehicle of a complaint that engages the reverse burden of proof as a means to uncover the facts rather than state a case on the facts. When they argued that the respondents' burden of proof was light and could perhaps be satisfied ". . . by a letter indicating the reasons for the original decision," my concern increased.

[38] Is it an appropriate use of the complaint procedure to test a suspicion or an inference that the respondents acted improperly? Certainly, it is not unreasonable to view a complaint that alleges a violation of subsection 186(2) of the *Act* as a means

available to employees to hold their employer to account for its actions. However, the purpose of the *prima facie* test is to ensure the reasonable use of that accountability mechanism. In the end, the decision maker must return to the facts. To engage the respondent's burden to defend itself, the decision maker must first be satisfied that the facts alleged by the complainant — assumed to be true — reveal an arguable case.

[39] The basic facts alleged by the complainants in this case are relatively limited: (1) The complainants performed their duties on the Core North Team competently. (2) The respondents removed the complainants from the Core North Team. (3) The work of the Core North Team continued, and other employees were assigned to do the work previously performed by the complainants. (4) The respondents did not provide a reason for their decision. (5) The complainants were members of the bargaining agent and of its local executive. (6) They expressed strong views to the employer about the application of the collective agreement regarding overtime.

[40] The complainants also stated that there was speculation in the workplace that they were removed because of their bargaining agent roles. They mentioned an indication from a bargaining agent member, who was also a manager, that ". . . complaining or pushing too hard on things will put you in a bad place." I find both of those references too vague to be helpful when assessing whether the respondents have made an arguable case.

[41] If I assume that the basic facts summarized in paragraph 39 of this decision are true, do they provide a basis for an arguable case that the respondents contravened subparagraph 186(2)(*a*)(i) of the *Act*? In my view, they do, albeit tenuously. They establish at least the possibility that otherwise competent employees were removed from an assignment because, as members of the bargaining agent's local executive, they advocated a position on the application of the overtime provisions of the collective agreement that may have affected the respondents' views about their continued suitability for membership on the Core North Team. Whether that argument is the best interpretation of the facts, or even a good interpretation, is not relevant. It is sufficient to satisfy the *prima facie* test that there is at least an arguable case for the link between the respondents' decision and the complainants' bargaining agent roles.

[42] As a result, I do not accept the respondents' position that I lack jurisdiction to consider the merits of the complaint.

[43] I note that the respondents referred me to the *Hamelin* decision for the proposition that a refusal to grant rights under the collective agreement does not itself prove reprisal action for bargaining agent activity. I find that the situation examined in *Hamelin* differs from the complaint before me. Ms. Hamelin claimed that representatives of the employer denied her access to terms and conditions of employment provided by the collective agreement and that those representatives took illegal reprisal actions to prevent her from exercising her collective agreement rights. The allegation in this case is different and is founded on the complainants' bargaining agent roles — Ms. Hamelin did not have such a role. Taking the facts as proven, the complainants in this case apparently used their bargaining agent roles to advocate a position on the application of the collective agreement. The alleged reprisal action that is the subject of the complaint relates to their exercise of that role — which was not the case in *Hamelin*.

[44] I accept the respondents' alternative argument that they face a situation similar to the one described in *Gignac* where the sparseness of the facts alleged by the complainants made it difficult for the respondents to know in adequate detail the nature of the complaint against which they had to defend. Accordingly, I will adopt the same procedure determined by the adjudicator in *Gignac* of requiring the complainants to present their evidence first — in effect, to provide the further particulars of their case — before the respondents proceed with their proof. It is nonetheless important to be clear that that procedural requirement does not change the respondents' burden under subsection 191(3) of the *Act*.

[45] Although it had no impact on my ruling, I wish to note that the decision in *Social Science Employees Association* cited by the complainants was set aside at judicial review: *Canada (Attorney General) v. Social Science Employees Association et al.*, 2004 FCA 165.

**VI. Preliminary matter - timeliness**

[46] In the circumstances of this case, I have decided to hold in abeyance the employer's objection that Ms. Woods did not submit a complaint within the time limits required by the *Act*. As a practical matter, I have concluded that it would likely be difficult to separate the evidence that will allow me to determine the issue of timeliness from elements of the main evidence on the merits. In the interests of a more

efficient hearing, the evidence phases on the timeliness objection and on the merits will be consolidated.

## VII. Preliminary matter - identification of the respondent

[47] As reported above, I asked the parties on my own initiative for submissions at the hearing on whether the "Minister responsible for Statistics Canada" is properly a respondent in a complaint alleging a violation of a prohibition under section 186 of the *Act*. My reason for doing so was that it was not clear to me from the written record what the nature of the responsible Minister's involvement was, if any, in the events that gave rise to the complaint and whether the Minister should be named as a respondent in the absence of evidence of such involvement.

[48] At the hearing, the complainants submitted that their identification of the "Minister responsible for Statistics Canada" was consistent with the collective agreement between the parties. Clause 2.01 of the collective agreement defines the "employer" as follows:

> ***"Employer"*** *means the Minister Responsible for Statistics Canada and includes any person authorized to exercise the Minister's authority (Employeur)*
>
> [Emphasis in the original]

[49] Because they have never received a document from the respondents stating the reasons for the decision to remove them from the Core North Team, the complainants submitted that they were unable to identify as a respondent a specific person who made that decision on behalf of the employer. They were left with only the option of specifying the respondent in their complaint based on the collective agreement definition. They submitted that, under the collective agreement, the "Minister Responsible for Statistics Canada" was ultimately responsible for the actions of the employer.

[50] The respondents argued that it was not appropriate to name the "Minister Responsible for Statistics Canada" in the complaint because the complainants did not establish that the Minister was involved in the decision. The complaint concerns the assignment of work, and decisions about assigning work are made by employees in the organization, not the Minister. The collective agreement identifies the Minister as the employer not because he or she acts operationally as the employer but rather because

the law requires that a minister be identified as having statutory responsibility for a separate employer. The respondents contended that the complainants must properly name an individual respondent in a complaint under section 186 of the *Act* and that they now need to amend their complaint to designate the person or persons who allegedly breached the *Act*.

[51] On the basis of the words used in subparagraph 186(2)(*a*)(i) of the *Act*, I find that it is legally proper to identify "the employer" as a respondent in a complaint under that provision and that it is technically accurate in this case to list the "Minister Responsible for Statistics Canada" as that employer in the event that factual allegations of a violation of the *Act* are made against the Minister. That said, nothing in the facts alleged to date by the complainants, taken to be true, in any way suggests that the responsible Minister at the time that the complaint was filed had any involvement in the events that gave rise to the complaint. Barring future evidence from the complainants to the contrary, I find it sufficient and appropriate to limit the identification of the respondent henceforth to the "Statistics Survey Operations." I also find that there is no requirement under subsection 186(2) binding the complainants to go further and identify a specific person or persons ". . . acting on behalf of the employer . . ." as the respondent(s) of record. In the circumstances of this case, I accept that the complainants may not be able to do so.

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

*(The Order appears on the next page)*

## VIII. Order

[53] The respondents' objection to the Board's jurisdiction to consider the case on the grounds that the complainants have not established a *prima facie* case for a violation of subparagraph 186(2)(*a*)(i) of the *Act* is dismissed.

[54] A hearing on the merits of the complaint will be convened on dates to be determined by the Registry of the Board in consultation with the parties.

[55] At the hearing, the complainants will present their evidence on the merits first. Nevertheless, the reverse burden of proof requirement under subsection 191(3) of the *Act* will apply.

[56] The respondents' objection on timeliness in the case of Ms. Woods will be considered as part of the hearing.

[57] The respondent to the complaint shall be identified in the decision on the merits as the "Statistics Survey Operations" unless the evidence on the merits establishes the involvement of the "Minister Responsible for Statistics Canada" in the events that gave rise to the complaint.

June 24, 2009.

**Dan Butler,**
**Board Member**