Date: 20110819

File: 561-02-450

Citation: 2011 PSLRB 107

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

LISE SUZANNE JUTRAS OTTO

Complainant

and

RAYMOND BROSSARD and ALEX KOZUBAL

Respondents

Indexed as
Jutras Otto v. Brossard and Kozubal

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

REASONS FOR DECISION

Before: Stephan J. Bertrand, Board Member

For the Complainant: Herself

For the Respondents: Helen Nowak, Public Service Alliance of Canada

Heard at Winnipeg, Manitoba,
March 8 to 10, 2011.

I. Complaint before the Board

[1] On March 23, 2010, Lise Suzanne Jutras Otto ("the complainant") filed a complaint under paragraph 190(1)(*g*) of *the Public Service Labour Relations Act* ("the *Act*") in which she complained that Raymond Brossard and Alex Kozubal ("the respondents"), two representatives of her bargaining agent, the Public Service Alliance of Canada (PSAC), acted in an arbitrary manner when they failed to transmit her harassment grievance to the second level of the grievance process and to process a grievance about her rejection on probation. Although the complaint form refers to a single formal grievance dated July 14, 2009, the evidence at the hearing established that this grievance was meant to include, rightly or not, both the harassment and the rejection on probation grievances.

[2] Paragraph 190(1)(g) of the Act reads as follows:

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

Section 185 of Act defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).

[3] The provision of the *Act* referenced under section 185 that applies to this complaint is section 187, which provides as follows:

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

That provision was enacted to hold employee organizations to a duty of fair representation, a duty that, according to the complainant, the respondents did not fulfill.

[4] The respondents' conduct, according to the complainant, amounted to a breach of their duty of fair representation, for which she is requesting financial compensation.

The respondents denied any violation of section 187 of the *Act* and raised a week or so before the hearing an objection that the complaint was untimely.

II. Hearing

[5] After testifying for approximately thirty minutes, the complainant requested the exclusion of the respondents' witnesses, over what she referred to as controversial evidence to come. The respondents' representative did not oppose the request, and I granted it. At the lunch break, I noticed that, despite the fact that the respondents' reply referred to the PSAC as the respondent, the complaint form specifically referred to Messrs. Brossard and Kozubal as the sole respondents. I then adjourned the hearing for the remainder of the day to allow the respondents' representative to debrief them about the testimony heard in the morning, which amounted to approximately thirty minutes of background information from the complainant, and to allow their representative to obtain their permission to continue with the hearing. The next day, I was informed that both respondents had been properly debriefed and that they consented to continue with the hearing.

A. Summary of the evidence

[6] At the hearing, I heard the testimonies of the complainant and the respondents.

[7] The complainant was hired at Indian and Northern Affairs Canada (INAC) on November 10, 2008 as an independent assessment process (IAP) support officer with the Indian Residential Schools Adjudication Secretariat (IRSAS), a position classified PM-3. Although not new to the public service (she had worked for several federal departments in the past), the complainant had left the public service to pursue private-sector opportunities and was therefore considered an outside appointee when she joined INAC. As is customary for newly appointed public servants, the complainant was subject to a one-year probation period.

[8] The complainant stated that she felt early signs of what she perceived as harassment from co-workers and a supervisor, which she allegedly reported to her sector manager, in January 2009. According to the complainant, she was often on the receiving end of unkind remarks allegedly aimed at her French Canadian origins. However, I note that there was little, if any, independent evidence to support these statements.

[9] The documents that the complainant filed indicate that INAC had on more than one occasion expressed concerns about her behaviour and work performance. Those work-related concerns were apparently discussed during meetings between the complainant and her sector manager, which were held on January 23 and February 5 and 26, 2009.

[10] In early May 2009, the complainant's then supervisor advised her that certain tasks and duties were being removed from her responsibilities and that that would continue until she could meet with Acting Director of Client Services Management. On May 5, 2009, the complainant emailed Mr. Brossard, a labour relations officer with the PSAC's National Component, located in Ottawa, to alert him of that development and to request the presence of a union representative at the upcoming meeting with the acting director. In cross-examination, the complainant confirmed that that was the first time she contacted her bargaining agent.

[11] Mr. Brossard responded by telling the complainant that he would ask Mr. Kozubal, a regional vice-president located in the same building as the complainant in Winnipeg, to assist her. Mr. Kozubal had never met the complainant before and was not familiar with the IRSAS, which was a relatively new initiative. According to Mr. Brossard, the fact that Mr. Kozubal had agreed to assist the complainant meant that Mr. Brossard would merely provide additional guidance if required. In his own words, he had "given the ball" to Mr. Kozubal and never really became involved in the complainant's representation, something that would eventually, unfortunately, be accurate.

[12] Although made aware that Mr. Kozubal was not bilingual, the complainant was not opposed to his representation for the meeting with the acting director but indicated to Mr. Brossard that she would prefer a bilingual representative should a grievance be filed, given that a considerable number of work-related documents were in French.

[13] On or about May 6, 2009, the complainant provided Mr. Kozubal with what she referred to as a thick stack of documents, which included correspondence to and from and notes of conversations with INAC representatives, as well as other documentation. Mr. Kozubal indicated that he took the documents with him to review them and that he returned them to the complainant the next day. Although the complainant filed a considerable number of exhibits at the hearing, she opted not to file the entire stack of

documents that she had provided to Mr. Kozubal, in particular the notes reflecting what had transpired during the meetings with INAC representatives.

[14] The complainant met with Mr. Kozubal for the first time on May 11, 2009. The complainant discussed the removal-of-duties issue and informed Mr. Kozubal of a harassment issue involving her supervisor. According to Mr. Kozubal, the primary issue that needed to be dealt with was the performance issue, but he nevertheless raised the complainant's harassment issue when he met with her supervisor, a meeting he had arranged to obtain a better understanding of the role and responsibilities of IAP support officers and of the IRSAS in general. Shortly after the meeting, it was agreed that, since the upcoming meeting with the acting director would address the complainant's recent performance evaluation rather than deal with discipline, Mr. Kozubal would not attend but would be available should the meeting turn into a disciplinary process. Mr. Kozubal suggested to the complainant that she should request a copy of her performance evaluation review before the meeting, which she did, although to no avail.

[15] The meeting with the acting director took place on May 27, 2009 and primarily served to inform the complainant that she was not meeting the requirements of her position and that her performance was unsatisfactory in many specific areas. All of this was contained in a letter, dated May 27, 2009 from the acting director, which officially served to warn the complainant that, if she failed to satisfactorily address those work-related issues, she could be rejected on probation. In addition, the complainant was told that she would not resume her full job duties and responsibilities until she completed additional training, some of which she had already completed, and that she was expected to work closely with her supervisor.

[16] Shortly after the meeting, the complainant attempted to set up a meeting with Mr. Kozubal. She sent him a copy of the acting director's letter, along with an email that she had recently received from her supervisor as further proof that she was being harassed. The complainant stated that she sought Mr. Kozubal's advice and feedback but that none was provided.

[17] According to the complainant, the work relationship with her supervisor was deteriorating and was beginning to take a toll on her health. The complainant stated that she resorted to taking stress leave during June 2009. She also felt that she had no choice but to file a grievance against her supervisor. She approached Mr. Brossard,

since she received no response or support from Mr. Kozubal at that time. In his testimony, Mr. Kozubal indicated that he was on leave and on travel status for both union and non-union duties at that time. In the meantime, INAC was attempting to set up a meeting to review an action plan with the complainant.

[18] On July 14, 2009, with the assistance and support of Mr. Kozubal, the complainant filed a grievance seeking a harassment-free work environment. Although the grievance indicated that allegations would follow, none did. The complainant claimed that no request for allegations was ever made by either INAC or her bargaining agent. However, an email dated July 16, 2009 from Mr. Brossard does refer to the need to prepare written detailed allegations to support the grievance. The respondents made no further references to such allegations until June 2010. Mr. Brossard indicated that he was never provided with any allegations and that it was the complainant's responsibility to forward them directly to INAC.

[19] According to the complainant, Mr. Kozubal never showed any interest in discussing the harassment grievance. Mr. Kozubal stated that, since most of the documentation was in French, and since the subject matter was about using French in the workplace, he should not have been expected to handle this grievance given that he did not speak French. Nevertheless, he helped the complainant prepare the grievance form and ensure that it was presented to and acknowledged by the proper individuals.

[20] According to Mr. Kozubal, it was a challenge determining which component of the PSAC should handle the harassment grievance because of the unusual relationship between INAC and the IRSAS. Mr. Kozubal testified that he was not sure whether the Regional Component or the National Component of the PSAC should handle it but stated that, after discussing the issue with Mr. Brossard, he understood that the National Component, in Ottawa, would handle it.

[21] Mr. Kozubal further stated that his focus was on resolving the ongoing performance issue and that, once it was resolved, the complainant could then have pursued the harassment matter. The primary goal, according to Mr. Kozubal, was to ensure that the complainant continued to be employed, because a harassment grievance would drag on for a long time and would not be resolved before the end of the complainant's probation. He felt that INAC might be contemplating a rejection on probation and wanted to focus on performance rather than harassment. He admitted in cross-examination that the thought of informing the complainant about his

understanding that Mr. Brossard was handling the harassment grievance and that Mr. Kozubal was not involved with it never crossed his mind.

[22] In his testimony, Mr. Brossard indicated that he always understood that Mr. Kozubal was handling the harassment grievance. He did not communicate that understanding to the complainant.

[23] Shortly after she filed her harassment grievance, the complainant was summoned into another meeting with her supervisor to discuss the complainant's allegedly inappropriate use of a tape-recording device during a conversation with her supervisor, which was quickly followed by a letter of disapproval from her supervisor on July 17, 2009. The complainant did not deny that her action was meant to put an end to her supervisor's harassing behaviour. Mr. Kozubal did not condone the complainant's action. Shortly after the incident, he expressly communicated his disapproval to both the complainant and her supervisor at a meeting that took place on July 23, 2009 by way of a conference call. The purpose of that meeting was to address both the letter of July 17, 2009 and the complainant's allegedly inappropriate reaction to it. Mr. Kozubal participated, as he felt that the invitation had a disciplinary tone. He described the meeting as unpleasant and clearly showcasing the animosity between the complainant and her supervisor.

[24] The complainant was away on vacation from July 24 to August 10, 2009. On her return, she was again summoned to another meeting with her supervisor to review an assessment that covered the complainant's performance for the period of June 23 to July 22, 2009. The complainant forwarded the performance assessment, which essentially rated her overall performance as unsatisfactory, to both Messrs. Brossard and Kozubal.

[25] The complainant stated that her supervisor subsequently provided her with a new action plan designed to help her improve her work performance for the review period of August 11 to September 10, 2009. Her supervisor also warned the complainant in writing that a failure to significantly improve her work performance could result in a rejection on probation.

[26] The new action plan and other exchanges between the complainant and her supervisor were discussed at a short meeting with Mr. Kozubal on August 14, 2009, during which the complainant went over the performance assessment with him and

indicated that it did not accurately reflect her performance. During her testimony, the complainant stated that she wanted to discuss her harassment grievance with Mr. Kozubal at that time but that he preferred to focus on the performance issues and on how she could improve on that front. According to the complainant, the performance issue was a "cover-up" designed to conceal the harassment issue. She stated that she always expected the respondents to do more about her harassment grievance, but they never did.

[27] On August 20, 2009, while at home on sick leave, the complainant received a phone call from her supervisor and took exception to it. She wrote a confrontational letter on August 24, 2009, which in turn led to another meeting with her supervisor on August 27, 2009, during which the complainant was provided with an opportunity to explain the tone and the content of her letter. At that time, the complainant was still on leave. Mr. Kozubal was present to assist the complainant. He described the tone of the complainant and her supervisor as very aggressive, and he felt uncomfortable during the entire meeting. Afterward, the complainant was told that she was to remain on leave with pay for the following week, from August 31, 2009 until at least September 4, 2009. Coincidentally, the complainant was issued a reprimand letter on August 27, 2009 in connection with the incident that lead to the July 17, 2009 letter of disapproval.

[28] On September 3, 2009, the complainant was once again summoned for what would turn out to be the last meeting with her supervisor, to be held the next day. Mr. Kozubal was once again present. At the meeting, the complainant was provided with a letter informing her that she was being rejected while on probation, terminating her employment at INAC. The justification for rejecting the complainant was her unsatisfactory performance and her unsuitability. She was advised of her right to file a grievance if she felt that the rejection on probation was unwarranted.

[29] Following the September 3, 2009 meeting, the complainant met with Mr. Kozubal to go over what had just transpired. She was upset and felt that things would not have escalated to such an extreme had he acted on the harassment grievance. The complainant stated that, at that time, Mr. Kozubal reassured her that the PSAC could now fully concentrate on her grievance. The only grievance the complainant had filed up to that point was her harassment grievance.

[30] When asked why she did not grieve the rejection on probation, the complainant stated that Mr. Kozubal had reassured her that her existing grievance, the harassment grievance filed on July 14, 2009, would also cover the rejection on probation and that the matter would most likely be handled by "Ottawa," referring to the PSAC's National Component, where Mr. Brossard was located. Mr. Kozubal did not contradict those facts when he testified. Since the complainant had already told Mr. Brossard that she did not want Mr. Kozubal to represent her in a grievance because he was not bilingual, she expected Mr. Brossard to represent her, but she kept writing to or copying Mr. Kozubal, given his knowledge of her file.

[31] In an email dated September 8, 2009, Mr. Brossard asked Mr. Kozubal to ". . . see if the grievance could be heard at the second level." It is unclear which grievance he was referring to, but according to the evidence, the only existing grievance involving the complainant at that time was the harassment grievance. When he testified, Mr. Brossard could not recall if Mr. Kozubal ever followed up on that request.

[32] When asked whether he had referred the grievance to the second level, Mr. Kozubal indicated he had not; nor had he informed Mr. Brossard or the complainant. He also confirmed that he did not ask INAC about the status of the grievance, because he assumed that Mr. Brossard was handling it. Mr. Kozubal also confirmed that he never contacted Mr. Brossard to verify whether his assumption had been correct. Mr. Kozubal admitted that it was an error on his part but indicated that he bore no ill will toward the complainant. He qualified his actions or inactions as no more than "mere miscommunication."

[33] On September 23, 2009, the complainant wrote to both respondents to update them on two access to information requests that she had made and to seek further advice about how to proceed, particularly whether she should grieve the rejection on probation separately. Although she received out-of-office replies from both respondents, the one from Mr. Kozubal indicating that he would be away from September 8 to 24, 2009, and the one from Mr. Brossard indicating that he would be away until October 5, 2009, neither replied to the complainant's email of September 23, 2009 when they returned.

[34] At that time, the complainant stated that she had health issues and that she relied heavily on the respondents for assistance and guidance on what to do next.

However, it should be noted, that no medical evidence was provided in support of her alleged health issues.

[35] The complainant followed up with emails to both respondents on October 26 and 28, 2009, which again did not generate any responses. Mr. Kozubal stated that he had seen the complainant's emails but that he did not respond because he was away when they were sent, and he assumed on his return to the office that Mr. Brossard had already responded. As for Mr. Brossard, he could not recall with any degree of certainty whether he had responded but indicated that, if he did not, which certainly appears to be case, he "must have assumed that [Mr. Kozubal] had dealt with it." In cross-examination, Mr. Brossard indicated that he assumed that Mr. Kozubal was handling all the complainant's outstanding issues and referred to any potential erroneous assumptions on his part as a "simple miscommunication" between himself and Mr. Kozubal. When asked if he had verified whether Mr. Kozubal had responded to the complainant and had handled her grievance, he stated that could not remember.

[36] In cross-examination, the complainant admitted she had not read the relevant collective agreement and that she was not aware that she could have filed a grievance against her rejection on probation without the support of her bargaining agent. In any event, there was no need to, according to the complainant, because she had been led to believe that all issues, including the rejection on probation, would be covered by the existing harassment grievance, a statement that Mr. Kozubal did not deny during his testimony.

[37] On December 17, 2009, the complainant left voice mail messages to both respondents, informing them that she had received documents through access to information. According to her, no one called her back. Mr. Brossard recalled being on leave at that time and listening to the complainant's voice message only in January 2010 but could not recall whether he returned her call. He added that he could not recall any contact with the complainant until June 2010.

[38] The complainant stated that she spent most of January and February 2010 going through boxes of documents that had been generated by her two access to information requests. She once again emailed the respondents on March 10, 2010, demanding to know why her grievance, which in her mind combined the harassment issue and the rejection on probation, was not progressing and why neither of the respondents were

returning her phone calls or replying to her emails. She did not receive any response and eventually filed this complaint on March 23, 2010.

[39] The complainant did not hear from either respondent until June 21, 2010, when Mr. Brossard wrote to her to follow up on the harassment grievance and to request to be provided with detailed allegations about the nature of the grievance. He enclosed a letter that he had received from INAC on June 14, 2010, seeking that information. According to Mr. Brossard, it was the responsibility of INAC to seek the detailed list of allegations directly from the complainant, and it was the complainant's responsibility to provide the information directly to INAC. Nevertheless, I note that the letter of June 14, 2010 from INAC was addressed to Mr. Brossard and did not copy the complainant.

[40] Contrary to what was alleged in the respondents' reply dated May 12, 2010, Mr. Brossard clarified in his testimony that he never indicated to the complainant that he or the PSAC was unwilling to represent her in her harassment grievance or that there was no basis to pursue her grievance. In fact, he stated that no determination had ever been made with respect to either the harassment grievance or the rejection on probation.

B. Summary of the arguments

1. For the complainant

[41] As for the timeliness objection, the complainant explained why she indicated two separate dates in her complaint form, namely, December 17, 2009 and March 3, 2010, as the dates on which she knew of the act, omission or other matter that gave rise to her complaint. She clarified that those dates represented her last two attempts to obtain some form of response from the respondents, by phone on December 17, 2009 and by email on March 3, 2010, and that she realized that the respondents were failing to comply with their duties shortly after March 3, 2010, at which time she considered the respondents' conduct as completely unacceptable. According to the complainant, that explanation makes her complaint timely.

[42] The complainant argued that both respondents acted in an arbitrary fashion by failing to pursue her harassment grievance and by failing to protect her interests by filing a separate grievance to challenge her rejection on probation.

[43] According to the complainant, all references to her grievance after September 4, 2009 are meant to cover both the harassment and the rejection on probation issues for the following two reasons: first, because of Mr. Kozubal's statement that her harassment grievance would cover the rejection on probation issue; and second, because of the respondents' failure to respond to her inquiry as to whether she should grieve the rejection on probation separately.

[44] Although the complainant felt reassured that nothing could fall through the cracks and that her interests would be protected, given that she had two union representatives at her disposal, she contended that what transpired was the complete opposite.

[45] The complainant argued that she was unfamiliar with the grievance process and that she relied heavily on the respondents, which is why she provided Mr. Kozubal with a significant amount of documentary evidence and why she attempted in December 2009 to arrange to have the respondents' review the documentation received through access to information. She added that she was not aware that she could pursue her grievances on her own.

[46] According to the complainant, the respondents' contention that their actions amounted to no more than simple miscommunication is not a valid defence. The complainant stated that she always intended to pursue the harassment grievance and to contest her rejection on probation, and that her numerous emails and phone calls to the respondents are evidence of that intent.

[47] The complainant argued that, if the respondents genuinely intended to represent her interests in the harassment grievance, they would have responded to her numerous emails and would have requested her allegations, but they did not. No list of allegations was requested by either the respondents or INAC until June 2010. The complainant contended that by then she was surprised that nothing had been done about both her harassment grievance and her rejection on probation and felt that it was too late to demand a harassment-free workplace, given that she was no longer employed and that she was out of time to grieve the rejection on probation.

[48] According to the complainant, the harassment grievance had been prepared with the support of Mr. Kozubal and was presented to INAC by Mr. Kozubal. The fact that INAC suddenly wrote to Mr. Brossard almost one year after her grievance was filed to

request the list of allegations is, according to the complainant, indicative of a cover-up designed to conceal the fact that the respondents had done nothing to pursue the grievance for an entire year and to allow them an opportunity to appear involved.

[49] The complainant feels that the respondents were grossly negligent in her representation and treatment and that she was purposely left in limbo.

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

[50] On the timeliness objection, the respondents' representative offered few arguments. In a nutshell, she argued that the complainant should have known of the act, omission or other matter that gave rise to the complaint shortly after September 4, 2009, the date of the rejection on probation. She added that the fact that no one responded to the complainant's emails and telephone calls in September, October and November 2009 should have provided her with sufficient knowledge to file her complaint by at least that time. The complaint was filed on March 23, 2010, which was according to the respondents, clearly outside the prescribed time limit. I am uncertain as to what specific event in November 2009 should have triggered a reaction from the complainant, as further communications in December 2009 and March 2010 were also ignored.

[51] The respondents argued that responding to the performance issue was more important than pursuing a harassment grievance that would drag on beyond the complainant's probationary period and that, in any event, the complainant had provided little, if any, allegations in support of her harassment grievance. The respondents also contended that they never refused to represent the complainant in her harassment grievance; nor was such a determination ever made by either of them. Instead, they maintained that miscommunication was the justification for their inaction and omissions. In addition, the respondents argued that nothing prevented the complainant from pursuing her harassment grievance on her own or from filing a grievance to contest her rejection on probation without the support of her bargaining agent. While I am unsure of what is meant by pursuing a grievance, I note that the complainant could not, according to subsection 208(4) of the *Act*, present her harassment grievance without the approval of and representation by her bargaining agent.

[52] In response to the complainant's claim that she was unfamiliar with grievance processes, the respondents argued that the complainant had been a public service employee for approximately 22 years.

[53] The respondents contended that the complainant has failed to establish any malicious or purposeful intent or bad faith on their parts. Each respondent assumed that the other was handling the complainant's grievance. According to the respondents, the only issue that I must determine is whether they acted in an arbitrary fashion and the fact that no representation decision was communicated to the complainant prevents me from finding that they did. In addition, the respondents argued that the relationship between INAC and the IRSAS created some confusion about the PSAC's internal structure, which would explain the miscommunication between the two respondents.

[54] The respondents contended that mistakes and misjudgment do not amount to gross negligence or arbitrary conduct. They referred me to *Alam v. Power Workers' Union - CUPE Local 1000,* [1994] OLRB Rep. June 627, para. 69, which reads in part as follows:

> *69. This is not to say that section 69 can have no application to the grievance process. But in order to trigger a breach of section 69, the union's action must be:*
>
> > *(a) "ARBITRARY" - that is flagrant, capricious or grossly negligent;*
> >
> > *(b) "DISCRIMINATORY" - that is, based on invidious distinction without labour relations rationale; or*
> >
> > *(c) "IN BAD FAITH" - that is, activated by ill-will, malice, hostility or dishonesty.*
>
> . . .

[55] The respondents also contended that what is expected of union representatives is not akin to a standard of perfection and that incompetence is not enough to establish serious negligence. They referred me to *United Steelworkers of America v. Butt,* 2002 NFCA 62, in support of that proposition.

III. Reasons

[56] The respondents raised as a preliminary issue that the complaint was inadmissible and that it should be summarily dismissed because it was not filed within the time limit set out in subsection 190(2) of the *Act*, which reads as follows:

> ***190.*** *(2) . . . a complaint under . . . 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.*

[57] The complainant claimed that she only realized that the respondents' conduct was inappropriate in March of 2010, following a series of communications directed at the respondents over the course of roughly six months. She clarified the meaning of the answers she provided under item 5 of her complaint form (where a complainant is asked to indicate the date on which he or she knew of the act, omission or other matter giving rise to the complaint) to my satisfaction and that evidence was not challenged in any meaningful way by the respondents.

[58] I am therefore satisfied, based on the evidence before me, that the date on which the complainant knew, or ought to have known, of the action or circumstances giving rise to her complaint was sometime shortly after March 10, 2010, which means that her complaint, which was filed on March 23, 2010 is timely. The complainant's email of March 10, 2010 confirms her realization that she was not receiving the representation services she had been promised. Until then, the complainant appeared to be under the impression that some form of representation would be forthcoming. The complainant's evidence on this issue is both credible and compelling.

[59] For the reasons that follow, I have concluded that the complainant has proven a breach of the duty of fair representation by the respondents and, hence, have determined that the complaint must be allowed.

[60] As stated by the Board in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, the burden of proof in a complaint alleging a violation of section 190 of the *Act* rests with the complainant.

[61] In *Halfacree v. Public Service Alliance of Canada,* 2009 PSLRB 28, at paragraph 17, the Board commented as follows on the right to union representation and rejected the idea that it was akin to an absolute right:

> *[17] The respondent, as a bargaining agent, has the right to refuse to represent a member, and a complaint to the Board is not an appeal mechanism against such a refusal. The Board will not second-guess the bargaining agent's decision. The Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision.*

As stated in *Halfacree,* the Board's role is not to determine whether the respondents' decision to represent the complainant was appropriate or correct, good or bad, or even with or without merit. Rather, its role is to determine whether the respondents acted in bad faith or in an arbitrary or discriminatory manner in the decision-making process associated with the representation issue.

[62] The discretion afforded to bargaining agents and their representatives in determining whether to represent employees in the bargaining unit is broad, but it is not absolute. The scope of that discretion was set out in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at p. 527. In that decision, the Supreme Court of Canada described the principles underlying the duty of fair representation as follows:

> . . .
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> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*
>
> . . .

[63] In *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79, the Board wrote the following at paragraph 126:

> *[126] . . . When a consideration is made in regard to arbitration, it is recognized that the employee does not have an absolute right to arbitration for the union enjoys considerable discretion in the making of this decision, but that discretion has limits based on the severity and impact of the disciplinary action upon the employee. . . .*

[64] Duty of fair representation complaints and the proof required to sustain an allegation of bad faith or arbitrary action have been canvassed in a considerable number of Board decisions. In *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, the Board referred to some of the leading cases in the following manner:

> . . .
>
> *[22] With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of* Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:*
>
> > The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary . . . .
>
> . . .
>
> *[23] In* International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "… a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."*
>
> . . .

[65] It is obvious that the interactions between the complainant and her supervisor had deteriorated to a point of no return in summer 2009, as evidenced by the tone of the correspondence filed by the parties and the testimony of Mr. Kozubal. While her supervisor appeared to view the core issue as a question of performance, the complainant viewed it as harassment and discrimination.

[66] Although the complainant sought assistance from the respondents only in May 2009, when some of her duties were removed, and although limited, if any, focus was on the harassment issue until that time, it does not mean that the complainant's harassment grievance had no basis.

[67] Mr. Kozubal testified that it was never his understanding that he was handling the harassment grievance. Moreover, no evidence was adduced showing that he clearly communicated that to the complainant or that he ensured that someone else would handle her case. According to an email dated September 8, 2009 from Mr. Brossard to Mr. Kozubal, Mr. Brossard asked Mr. Kozubal to ". . . see if the grievance could be heard at the second level." The only existing grievance at that time was the harassment grievance. When asked whether he sent the grievance to the second level, Mr. Kozubal testified that he did not and that he did not inform Mr. Brossard of his decision not to. He also confirmed that he did not ask INAC about the status of the grievance, because he assumed that Mr. Brossard was handling it. He admitted that he never contacted Mr. Brossard to verify whether Mr. Brossard was handling the grievance and responding to the complainant's emails. Whether the regional component or the National Component of the PSAC was responsible for handling the complainant's grievance was not the complainant's concern and should not minimize the seriousness of the respondents' failures.

[68] Mr. Kozubal failed to consider the potential connection between the performance and harassment issues, which involved the same two parties and that were closely related. He stated that he wanted to preserve the complainant's employment, but he completely ignored her harassment grievance against the same supervisor who had assessed her performance and ultimately terminated her employment. Although he described the July 23, 2009 meeting as unpleasant and as clearly showcasing the animosity between the complainant and her supervisor, he nevertheless took no action to ensure that the harassment grievance was being addressed in some fashion.

[69] The complainant did not contend that Mr. Kozubal failed to provide support for the performance issue, which eventually resulted in her rejection on probation. Rather, her complaint is about the fact that he did nothing to further the harassment grievance at a time when it was obvious that there was animosity between her and her supervisor, that he failed to recognize the connection between her harassment grievance and the performance issue, and that he did not protect her interests when she was terminated by failing to grieve the termination, contrary to what she had been led to believe.

[70] I find major flaws with the respondents' argument that responding to the performance issues was more important than pursuing the harassment grievance, which was destined to drag on beyond the complainant's probationary period, and that, in any event, the complainant had provided little if any allegations in support of it. First, it confirms that the respondents failed to see any potential connection or relevance between the harassment and performance issues, even though both involved the complainant and her supervisor. Second, it fails to recognize the substantial amount of documents that the complainant provided to Mr. Kozubal in May 2009, which he did not deny receiving and reviewing, as well as the complainant's attempts to provide boxes of documents received through access to information to the respondents in December 2009. Third, the respondents never informed the complainant that they needed additional information to fully analyze her chances of success; nor did they officially request additional information, other than the initial advice given to the complainant to prepare a list of allegations in July 2009. Fourth, even though the respondents stated that they wanted to concentrate on the performance issue to ensure that the complainant remained employed, once she was rejected on probation, they both quickly dropped the ball.

[71] The respondents' argument that nothing prevented the complainant from pursuing her harassment grievance on her own or from filing a grievance to contest her rejection on probation without the support of her bargaining agent, fails to take into account the fact that the approval of and representation by the bargaining agent was required under the *Act* to present the harassment grievance and that she had been led to believe that her harassment grievance would also address her rejection on probation. The respondents left the complainant in limbo for nine months, only to react some two months after the complaint was filed, and even then, without addressing the rejection on probation.

[72] Although the respondents argued that the complainant had been a public service employee for about 22 years and that, therefore, she should have been familiar with grievance processes, no evidence was led to suggest that she had filed a grievance in the past or that she was in fact familiar with the grievance process. In any event, as indicated earlier in this decision, she had been led to believe that the rejection on probation was covered by the harassment grievance. Furthermore, such an argument, if accepted, would surely always absolve bargaining agents when dealing with long-standing employees, a result that could not have been intended by the *Act*.

[73] Both respondents testified that they never expressed their unwillingness to represent the complainant with either the harassment grievance or the rejection on probation. Nevertheless, the fact remains that they simply did not address those issues in a timely fashion, which allowed the harassment issue to become moot and the rejection on probation issue to be unchallenged and untimely. I was not provided with any evidence that demonstrated that the respondents analyzed or reviewed the issues in any way, shape or form. The facts suggest that they initially misled the complainant and that they failed to clarify whether her harassment grievance would or could cover the rejection on probation. They did not get back to her on either issue. They did not inform her that she could grieve the rejection on probation without their support. They did not communicate any rationale for not pursuing the harassment grievance and for not filing a separate grievance to contest the rejection on probation. There was no decision-making process. In summary, the respondents' attitude toward the complainant was completely cavalier and irresponsible.

[74] The respondents' failure to provide some form of guidance to the complainant and failure to, at the very least, attempt to protect her interests in these matters amounted to no less than serious negligence, especially in light of the severity and impact of their inaction. They failed despite many opportunities to assist and despite the fact that the complainant had obviously placed her faith, trust and belief in both of them.

[75] The respondents argued that the relationship between INAC and the IRSAS created some confusion about the PSAC's internal structure, which would explain the miscommunication between the two respondents. I find that argument difficult to accept from representatives of the largest public service bargaining agent in the country, with considerable experience in the labour relations field. All that was

required was for either of the respondents to contact the other, by phone or email, and to inquire as to who would respond to and represent the complainant. That was not too much to ask in light of the serious nature of these matters.

[76] Mr. Kozubal often stated that the main objective was to keep the complainant employed since he saw a possible rejection on probation on the horizon, but when it happened, he did nothing to challenge it or try to preserve the complainant's employment.

[77] The respondents' representative made several arguments about the merits of the complainant's harassment grievance, or lack thereof. She similarly attacked the basis of a potential challenge to the complainant's rejection on probation. However, the complainant did not ask the Board to review the bargaining agent's exercise of its discretion to determine whether to represent her. As indicated above, no such decision-making process took place. She was led to believe that she was represented by the respondents. This is a case about negligence and about failing to take the required steps to analyze and examine the merits of an existing grievance and of a potential grievance. This case is about the respondents taking no steps whatsoever, notwithstanding the complainant's numerous requests for help.

[78] This is certainly not a case in which the respondents made a reasoned decision not to proceed further with a grievance after considering all the facts of the case, all the documentary evidence at their disposal and all the relevant law. Rather, this is a case in which the respondents dropped the ball and failed to take the necessary steps to carefully examine the evidence and to advise the complainant accordingly. Their cavalier approach toward the circumstances surrounding the complainant's issues was obvious during their testimony. Although a bargaining agent is not required to forward every case to the grievance process, as it is normally given fairly wide latitude when deciding whether to take a matter forward, it is nonetheless required to seriously examine the merits of each matter before making such a determination, on a case-by-case basis.

[79] While this is not a case in which the respondents acted in bad faith or with hostility toward the complainant, it is certainly a case about their negligent conduct, serious enough to be considered arbitrary. Therefore, it is apparent that the respondents failed in their duty to represent the complainant in both her harassment grievance and her rejection on probation. I simply cannot condone actions or inactions

that are not based on considerations relevant to the workplace but that rather are based on a blind abdication of responsibility. The respondents' inactions cannot be seen as mere miscommunication or incompetence. They amount to no less than careless actions that can be best characterized as serious negligence.

[80] For those reasons, I find that the complainant has established that the respondents' conduct amounted to a violation of the duty of fair representation and that they committed an unfair labour practice.

[81] Whatever remedy may be appropriate in the circumstances will be addressed at a later date.

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

(The Order appears on the next page)

IV. Order

[83] The respondent's objection to the timeliness of the complaint is dismissed.

[84] The complaint is allowed.

[85] A hearing will be scheduled as soon as possible to hear the parties on the issue of an appropriate remedy. In the meantime, I encourage the parties to attempt mediation of this issue.

August 19, 2011.

Stephan J. Bertrand,
Board Member