Date: 20110131

File: 561-02-475

Citation: 2011 PSLRB 7

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CHERINE RUSSELL

Complainant

and

CANADA EMPLOYMENT AND IMMIGRATION UNION

Respondent

Indexed as
Russell v. Canada Employment and Immigration Union

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

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Complainant: Herself

For the Respondent: Jerry Kovacs, Public Service Alliance of Canada

Decided on the basis of written submissions
filed July 12, August 10 and October 1, 2010 and January 11 and 12, 2011.

I. Complaint before the Board

[1] On June 4, 2010, Cherine Russell ("the complainant") filed a complaint against the Canada Employment and Immigration Union (CEIU or "the respondent") under paragraphs 190(1)(*a*), (*b*), (*c*), (*d*), (*e*) and (*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). She stated the details of her complaint as follows:

> *In Sept 2008 a grievance was filed against management for harassment. Grievance* [*sic*] *was given to Val Fargey to submit. She never did.*

The complainant did not specify the corrective action that she sought from the Public Service Labour Relations Board ("the Board").

[2] The respondent maintains that the complaint is untimely and that it does not reveal an arguable case for violations of the *Act*. It asks the Board to dismiss the complaint without requiring submissions from the respondent.

[3] This decision addresses the objections raised by the respondent to determine whether further proceedings are required.

II. Correspondence and submissions

[4] The Registry of the Board ("the Registry") asked the complainant for details showing ". . . how [her] complaint relates to paragraphs 1(*a*) to (*e*) . . ." of the *Act*. The complainant responded on July 12, 2010 by email and on July 19, 2010 by mail, filing copies of several emails but no written statement explaining their meaning or significance.

[5] On my direction, the Registry sent the following letter to the complainant on July 23, 2010:

> . . .
>
> *I acknowledge receipt of your complaint dated June 4, 2010, in respect of the above-cited matter, in which the* ***Canada Employment and Immigration Union*** *is named as a respondent.*
>
> *I have been directed, by the Board Member assigned to review your file, to advise you as follows:*
>
> *As the complainant has not provided any information, as requested by the Registry of the Public Service Labour*

> *Relations Board, that establishes how the matter complained of relates to subparagraphs 190(1)*(a) *through* (e) *of the* Public Service Labour Relations Act *("the* Act*"), the complaint is dismissed as regards those subparagraphs.*
>
> *With respect to subparagraph 190(1)*(g) *of the* Act, *the complainant is directed to provide* ***no later than August 6, 2010,*** *a more detailed statement of the nature of the alleged unfair labour practice so that the Board Member may satisfy himself that the complaint is properly filed under subparagraph 190(1)*(g)*. The statement must also establish how the complaint complies with the time limit provided under subsection 190(2) which reads as follows:*
>
> > **190.** (2) Subject to subsections (3) and (4), 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.
>
> *On the basis of the statement to be provided by the complainant, the Board Member will decide whether to dismiss the complaint without further submissions or to proceed with the complaint following the Board's normal procedures. If the Board Member decides that the complaint will proceed, the Registry of the Board will seek the position of the respondent regarding the complaint. The Board Member will then determine whether to proceed to schedule an oral hearing on the matter.*
>
> . . .
>
> [Emphasis in the original]

[6] My reasons for dismissing the complaint as regards paragraphs 190(1)(*a*) to (*e*) of the *Act* are outlined in the following section.

[7] In a telephone conversation with the Registry on July 28, 2010 (as summarized in notes taken by the registry officer), the complainant indicated that she had further email documentation of her communications with the respondent and that she had hired counsel. She also stated that she had already supplied the Board with information and that, concerning the issue of timeliness, ". . . she had received nothing in writing from her union until May 2010, telling her that her grievances were not submitted."

[8] Counsel for the complainant wrote to the Board on July 28, 2010, requesting a copy of the complaint, a copy of the Board's letter of July 23, 2010 and an extension of time ". . . to provide a response regarding sub-paragraphs 190(1a – 1e) prior to dismissing the complaint regarding those paragraphs."

[9] Acting again on my direction, the Registry notified the complainant's counsel that I would not grant an extension of time with respect to paragraphs 190(1)(*a*) through (*e*) of the *Act* because I had already ruled concerning those paragraphs. I did grant an extension until August 13, 2010 for counsel for the complainant to respond to the questions posed in the Board's letter of July 23, 2010 about paragraph 190(1)(*g*) and the issue of timeliness. The Board did not receive any submission from the complainant's counsel by August 13, 2010.

[10] On August 10, 2010, Jerry Kovacs, a representative of the Public Service Alliance of Canada, wrote to the Board on behalf of the respondent, requesting that the Board dismiss the complaint as untimely and as failing to reveal the basis of a *prima facie* violation of the *Act*, without requiring the respondent to file a reply.

[11] Acting on my further directions, the Registry left voicemail messages for the complainant's counsel, or his assistant, on August 24 and 27, 2010, to determine whether the complainant's counsel would be making a late submission. The Board did not receive a response to either contact.

[12] On September 13, 2010, the Registry once more called the office of the complainant's counsel. Given a new telephone number for him, the Registry Officer once more left a voicemail message asking whether counsel for the complainant would be making written submissions. The Board did not receive a response to that message.

[13] On September 21, 2010, the Registry Officer wrote to the complainant's counsel, with a copy to the complainant, indicating that the Board's repeated attempts to determine whether the complainant's counsel would respond to the Board's letter of July 23, 2010, had been unsuccessful. The letter notified counsel for the complainant that the Board intended to proceed to rule on the complaint based on the documents on file.

[14] On September 24, 2010, the complainant sent an email to the Registry, outlining her unsuccessful attempts to contact her counsel, who had purportedly left his law

firm without making arrangements with the complainant for continuing her representation. She requested another extension to ". . . get this mess straightened out . . ." and to find out who was representing her. The respondent did not object to the request, although it expressed concern that the Board not entertain any further requests to delay. The Registry communicated my decision to grant the request to the parties and, on my direction, reiterated to the complainant the questions that she was required to address.

[15] The complainant submitted the following on October 1, 2010:

. . .

> *A grievance was filed in September 2008 and given to Val Fargey, Union Regional President. In October 2008 I went on long term disability. In October 2009 I met with the local President Travis Lahnaloop, my manager and my Director. My manager was not aware of a grievance I had filed against him. Travis told me to discuss the issue with Lorraine Diapper. I spoke with her on the phone and explained the situation with her. She asked me to put it in an e-mail. I didn't hear back from her until January 2010. She sent me an e-mail asking if the matter had been resolved. I sent her an e-mail back informing her that I hadn't heard from anyone. I asked her if my grievance had been filed. She told me it had not. I asked her what the next step was. She told me to contact Steve McCuais. I tried sent Steve a few e-mails but he didn't respond. I called him on the phone and he explained he didn't want a paper trail. He told me my grievance could still be heard. I filed a complaint with this Board in April before speaking with Steve because he hadn't responded to my e-mails, however in May 2010 Travis cc'd me on an email he sent to Steve which confirmed my grievance was not going to be heard. At this point I retained an attorney. I again re-submitted my complaint.*
>
> *In summary, the first time I was told my grievance was not submitted was in late January or early February. The first faxed complaint was filed April 5th. I was told by Steve McCuais in May that my grievance would be heard which was not true. I received the first written confirmation that not only was my grievance not filed but that there was nothing they could do for me in May 2010.*
>
> *I would also like to board to know that union members involved in this grievance were told by myself of a mental illness I suffer from and while I was on LTD I had sent several e-mails to the union reps requesting the status of my grievance and informing them of my availability. I made it*

> *very clear to them that it was detrimental to my health to have this issue resolved before I returned to work.*
>
> . . .
>
> [*Sic* throughout]

The complainant did not indicate whether she had been assisted by counsel in her submissions and provided no direction that she would be represented by counsel in the future.

[16] On October 15, 2010, the Board asked the respondent to reply to the complainant's submissions no later than November 1, 2010. On October 27 and November 12, 2010, the Board granted the respondent two successive requests for an extension of the time limit for submitting its reply. On November 29, 2010, the respondent requested an extension for a third time, asking that the Board set January 10, 2011, as the new due date. The Board granted the request but specified in its letter of November 29, 2010, ". . . that no further requests for extension of time will be considered."

[17] In its letter of November 29, 2010, the Board also sought clarification from the complainant based on its review of her submission of October 1, 2010, as follows:

> . . .
>
> *. . . In her email dated October 1, 2010, the complainant states:*
>
> > ***I filed a complaint with this Board in April before speaking with Steve because he hadn't responded to my e-mails, however in May 2010 Travis cc'd me on an email he sent to Steve which confirmed my grievance was not going to be heard. At this point I retained an attorney. I again re-submitted my complaint.***
> >
> > ***In summary, the first time I was told my grievance was not submitted was in late January or early February. The first faxed complaint was filed April 5th. . . .***
>
> *The complainant indicated that she filed a complaint with this Board in April, specifically April 5th; however, after a search of the Board's records we were unable to find a record of a complaint filed by the complainant on April 5th. The complainant is therefore asked to provide clarification*

> *on this first complaint (for example the transmittal method, date sent, recipient, etc.)* ***by December 13, 2010****.*
>
> [Emphasis in the original]

[18] The complainant subsequently informed the Registry that she had mailed a copy of the fax transmittal confirmation for her first complaint with her June complaint. The Registry conducted a comprehensive search of its electronic and hard-copy records and found no evidence of a fax from the complainant on, or about, April 5, 2010. The Registry then asked the complainant for a copy of the April fax transmittal sheet. The complainant replied as follows by email on December 14, 2010:

> *I'm looking for it but can't find it. I left the office on or about June 8 and did not return until September 10th to clean up my desk. When I was away I received a call to from* [*sic*] *your office to mail the original copy of my complaint. I told the lady who had called me that I wanted to change the date on the complaint from April to May. She said it was okay as long as I fax it first and then mail it. I had a co-worker do all this for me as I could not physically enter the building. My co-worker has searched her desk and insists she mailed the fax copy along with the original for proof. She has been scanning documents for me and I am looking at the scanned documents and it does not appear that she has scanned the fax receipt. I work from her now* [*sic*] *and I have looked everywhere. The co-worker who I had fax and mail the documents is a trusted friend and I know that she would not have thrown anything out. The only thing I can do now is start my search again. I am positive this document was not thrown out.*

In a second email on the same date, the complainant stated as follows:

> *. . . I also noticed on my copy of the complaint I mixed up the dates. It's not July 4th, 2010. It's April 7th, 2010. I mixed up the day and month . . ."*

[19] On January 10, 2011, the final due date for submissions from the respondent, the respondent wrote to the Board requesting a fourth extension of time. The respondent's representative stated that he sought the extension ". . . in order to take into account my unavailability during the recent end-of-year holiday as well as an upcoming leave." On January 11, 2011, the Board denied the request for the reasons outlined in paragraphs 31 to 34.

[20] After being notified that the Board had denied its request — and on the same day that it received the notice — the respondent sent the following submission to the Board by email and asked that the Board and complainant accept its late filing:

> *The PSAC, its Component Union CEIU, and its representatives assert that they have provided and continue to provide the Complainant with diligent, fair, good-faith representation in her disputes with her employer (Treasury Board and its Department, Service Canada). She has been regularly and diligently represented by Union representatives Cathie Herman, Colleen Fagon, Val Fargey, and Travis Lahnalampi.*
>
> *These Union representatives have made consistent and positive effort to represent the Complainant regarding complaints of personal harassment (by managers* [two names]*) and, later, after the time frame mentioned in the Complaint, in matters relating to disability and accommodation.*
>
> *The Respondents assert that the Complaint – even as supplemented by the additional e-mail particulars provided – fails to disclose a* prima facie *violation of the Act and that it fails to seek any particular remedy. The Respondents request that the Complaint be dismissed by the Board without a hearing.*
>
> *The Complaint appears to focus on purported failure of the Respondents to file a grievance by the Complainant in September 2008. This is not factually accurate.*
>
> *The Respondents began assisting the Complainant more than 5 years ago in respect of workplace harassment allegations. Union representative Val Fargey assisted the Complainant in or about 2005 when Ms. Russell (the Complainant) informed Ms Fargey that she believed she was being treated unfairly by a manager,* [Person X]*. The unfair treatment included unfair work allocation in the group where the Complainant was employed. In addition, the Respondent's representative Ms Fargey also assisted the Complainant in obtaining necessary accommodations in respect of disability. Ms. Fargey negotiated with managers to ensure that the Complainant was moved from an inner-office environment to a place near a window, so as to permit accommodation of disability.*
>
> *Not long after that, in or about 2005/06, the Complainant became totally disabled and was absent from the workplace on long term disability leave. Upon her return, some six to eight months later, the troublesome manager (in respect of*

whom the Union was providing assistance in relation to the personal harassment matter) had left the workplace.

In or about 2006-08, there were further major changes: the Complainant's workplace was shifted to a different location, and at another point the Complainant again became totally disabled and was away from the workplace on long term disability leave. The Union's representative Cathie Herman provided diligent and good faith and effective representation in the Complainant's return to work and in obtaining necessary accommodations to deal with the Complainant's disability (such as work location, and therapeutic lamp).

In or about 2008, the Complainant advised the Union representatives that she was being personally harassed by managers [two names]. *The Complainant met with union representatives, including Val Fargey and Colleen Fagon and Cathie Herman. The Complainant did provide a grievance form that alleged personal harassment by those managers. (There was no disability-related matter attached to the personal harassment allegations at that point. Disability/accommodation issues were a separate matter, and it is only in the Complainant's e-mail addition to her Complaint that she now speaks of a link between the two.)*

The Complainant specifically and expressly stated that she had more and further information (alluding to documents) that she wished to provide the Union representatives "so that you'll have it all when you put in the grievance", and clearly indicated that she understood that further information would be provided before she filed this personal harassment grievance with the employer.

That further information was never provided. Nonetheless, the Union representatives continued to meet with the employer to demand resolution of the personal harassment situation. In particular, Val Fargey met with and communicated with the employer's Director [name] *in order to review the core issues of work allocation and the type of unfair supervisory attention by managers* [two names]. [The named Director] *undertook to conduct investigation, and union representatives Cathie Herman and Colleen Fagon took over the matter for the Union at that point.*

At or around this time, the Complainant again became totally disabled and left the workplace again on long term disability leave. The Union representatives, including Val Fargey and incoming Local Union President Travis Lahnalampi continued to represent the Complainant's interests. Upon the Complainant's return to work, she again voiced concern that she was being harassed by the same managers. The Union continued to represent her in finding resolution of the problem and it continued to represent her in

> *respect of accommodation of disability. The Union remains committed to assisting her in these and any other workplace matters.*
>
> *With respect, the Complaint fails to disclose any* prima facie *violation of the section 190 and should be* <u>*dismissed*</u> *without a hearing. There is no evidence that the union or its representatives acted in a manner that is arbitrary, discriminatory or in bad faith.*
>
> *The applicable standard to be applied to a trade union under the duty of fair representation was set out by the Supreme Court of Canada in* Canadian Merchant Service Guild v. Gagnon *[1984] 1 SCR 509; and see also* Dumont et al. v. PSAC *[2008] PSLRB 70. In essence, the complainant must establish that the Union, in representing her, exercised its discretion in bad faith, acted in a discriminatory or hostile manner toward her, or dealt with her workplace issues in a high-handed arbitrary manner. The Union must not engage in serious negligence, but retains the right to err.*
>
> *The Respondents respectfully submit that the complainant has failed to establish any facts that support any such manner of unfair representation.*
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[21] Before the Board had an opportunity to contact the complainant for her views on whether it should receive the respondent's late submissions and for her comments on their contents, she filed the following statement by email:

> . . .
>
> [The respondent's reply] *was submitted after the deadline of January 10, 2011 and should not even be considered, however I would love to clarify a few things because Mr. Kovacs was misinformed on a few matters.*
>
> *In regards to Val Fargy representing me due to "being treated unfairly" by* [Person X]*. That NEVER happened. I loved* [Person X]*. I never had any complaints about her. She was the best manager I ever had. The problems began when* [Person X] *left and* [Person Y] *took over. At the time just prior to* [Person X] *leaving I had been diagnosed with a tumor in my brain.* [Person X] *was aware and so were the other two supervisors* [two names]*. I started taking a lot of time off work due to severe headaches, migraines and medical appointments. My sick leave was depleted and in order to make up a full day's leave I asked my manager for*

2 hours annual leave (5.5 hours sick and 2 hours annual). He denied this. Val Fargey advised me to file a grievance and she handled the grievance.

This is when it all went down hill.

[Person Y] *questioned my absences. I had to provide several doctor's notes.* [The two supervisors] *had both decided to move me to a window seat because I was suffering from depression and it was obvious. The union had nothing to do with my move to a window.*

Over some time there were meetings with the manager and activities going on in the office and I was told I wasn't allowed to sit where I was seated and needed to move. At that time the only office with a window was the Glen Erin office and I chose the option of a lamp instead of moving. I then went on sick leave for one month. [Person Y] *would not allow me back to work without a Health Canada assessment. This took another 5 months. I was on leave for 6 months - not on disability leave. I have only been on disability leave once.*

Once I returned from this leave after a few months I was stressed and started taking time off. This was my accumulated vacation leave I was taking and family related. I was called into a meeting because the manager was concerned about my leave. This is where the union accompanied me to this meeting and AGREED it was harassment. I informed Cathie Herman I wanted to file a grievance immediately. She advised me she would be on vacation and asked Colleen Fagon to file the grievance. Colleen didn't. Val had suggested I request my ATIF file. I did and then we met in September and filed the grievance. I had questioned the contents of the information I received because [name] *was now my supervisor and I knew her to be deceitful (we had our problems in the past). I informed Val there would be more documents coming. I was advised by Val a meeting had been set up with the director* [name] *that upcoming Thursday. I told her I would bring the rest of the ATIF. The meeting was cancelled. I spoke with Cathie Herman and she said Val didn't need the rest of the information I had received from my ATIF. At the point since a meeting with* [the Director] *was scheduled I assumed my grievance was submitted.*

I went on LTD November 2008 and returned October 2009. When I returned there were some DTA issues and Travis (local President) handled the issues. At this time during a meeting with my manager and the Director the manager informed us he did not know anything about a grievance being filed against him. During my time on LTD I sent several e-mails to the union members asking the status of my

> *grievance as it was detrimental to my well being that this matter be resolved prior to me returning to work. This was not done.*
>
> *In March 2010 Travis and I met with two managers. Travis was a witness to the bullying and threatening behavior. I left work in June and didn't return to the Courtney Park office. Travis was present when I met with the Director in July to discuss my DTA to work from home which was granted.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[22] On receiving its copy of the complainant's email, the respondent immediately replied, stating that it regretted the erroneous comments about Person X and asking that the Board disregard those portions of its submissions. (I have redacted Person X's name in both submissions. I have also removed the names of other persons who appear not to be representatives of the respondent and whose specific identity is not material to my decision at this time.)

III. Reasons

A. Dismissal of the complaint under paragraphs 190(1)(*a*) to (*e*) of the *Act*

[23] The letter sent to the complainant on July 23, 2010, indicated that I had dismissed the complaint under paragraphs 190(1)(*a*) to (*e*) of the *Act*.

[24] Each of paragraphs 190(1)(*a*) through (*e*) of the *Act* refers to prohibitions stated elsewhere in the statute. Complaints filed under paragraph 190(1)(*a*) allege that the employer has failed to comply with section 56, which reads as follows:

> ***56.*** *After being notified of an application for certification made in accordance with this Part, the employer may not, except under a collective agreement or with the consent of the Board, alter the terms and conditions of employment that are applicable to the employees in the proposed bargaining unit and that may be included in a collective agreement until*
>
> > *(a) the application has been withdrawn by the employee organization or dismissed by the Board; or*

> (b) *30 days have elapsed after the day on which the Board certifies the employee organization as the bargaining agent for the unit.*

[25] Complaints filed under paragraph 190(1)(*b*) of the *Act* allege that the employer or a bargaining agent has failed to comply with section 106, which reads as follows:

> ***106.*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> (a) *meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> (b) *make every reasonable effort to enter into a collective agreement.*

[26] Complaints filed under paragraph 190(1)(*c*) of the *Act* allege that the employer, a bargaining agent or an employee has failed to comply with section 107, which reads as follows:

> ***107.*** *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> (a) *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
>
> (b) *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

[27] Complaints filed under paragraph 190(1)(*d*) of the *Act* allege that the employer, a bargaining agent or a deputy head has failed to comply with subsection 110(3), which reads as follows:

> ***110.*** *(1) Subject to the other provisions of this Part, the employer, the bargaining agent for a bargaining unit and the deputy head for a particular department named in Schedule I to the* Financial Administration Act *or for another*

> *portion of the federal public administration named in Schedule IV to that Act may jointly elect to engage in collective bargaining respecting any terms and conditions of employment in respect of any employees in the bargaining unit who are employed in that department or other portion of the federal public administration.*
>
> . . .
>
> *(3) The parties who elect to bargain collectively under subsection (1) must, without delay after the election,*
>
> *(*a*) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> *(*b*) make every reasonable effort to reach agreement on the terms.*

[28] Complaints filed under paragraph 190(1)(*e*) of the *Act* allege that the employer or an employee organization has failed to comply with section 117 or 157, which read respectively as follows:

> ***117.*** *Subject to the appropriation by or under the authority of Parliament of money that may be required by the employer, the parties must implement the provisions of a collective agreement*
>
> *(*a*) within the period specified in the collective agreement for that purpose; or*
>
> *(*b*) if no such period is specified in the collective agreement, within 90 days after the date it is signed or any longer period that the parties may agree to or that the Board, on application by either party, may set.*
>
> . . .
>
> ***157.*** *Subject to the appropriation by or under the authority of Parliament of any money that may be required by the employer, the parties must implement the provisions of the arbitral award within 90 days after the day on which the award becomes binding on them or within any longer period that the parties may agree to or that the Board, on application by either party, may set.*

[29] My review of the statement of the details of the complaint and of the emails that the complainant subsequently provided to the Board found nothing that conceivably revealed subject matter relating to any of the sections of the *Act* the violation of which

may be alleged in complaints under paragraphs 190(1)(*a*) to (*e*). Under paragraph 190(1)(*a*), a bargaining agent is not a proper respondent. Paragraphs 190(1)(*b*) through (*d*) relate to the collective bargaining process. Paragraph 190(1)(*e*) concerns the implementation of a resulting collective agreement.

[30] In the absence of any arguable case for a breach of paragraphs 190(1)(*a*) through (*e*) of the *Act*, I dismissed the complaint with respect to them without further submissions.

B. Respondent's fourth request for an extension of time

[31] The respondent's representative stated that he sought the fourth extension of the deadline for the respondent's reply to the complaint ". . . in order to take into account my unavailability during the recent end-of-year holiday as well as an upcoming leave."

[32] When the Board granted the respondent's third request for an extension on November 29, 2010, it clearly indicated to the respondent that it would not consider a further request for an extension. The resulting final deadline of January 10, 2011, set by the Board, conformed exactly to the respondent's request. The Board was entitled to assume that the respondent proposed January 10, 2011, as the deadline for its reply in full knowledge that the end-of-the-year holiday period interceded. Therefore, I did not accept that the "recent end-of-year holiday" was a valid reason for the respondent's failure to comply with the January 10, 2011, deadline. I also was not satisfied that an unspecified "upcoming leave" offered a satisfactory reason for the Board to make the exceptional decision to alter for a fourth time a deadline that it plainly characterized as final in its November 29, 2010, letter.

[33] The respondent knew about the requirement to reply to the complainant's submission since October 15, 2010. I took particular note that the respondent's representative himself urged that the Board enforce timelines when he commented in an earlier correspondence, dated September 24, 2010, about a request by the complainant for an extension, as follows:

. . .

> *. . . the respondent submits that (i) any extension granted must be to a specific deadline, and (ii) that, given previous extensions and opportunities for submissions, that any*

> *extension should be the final extension, after which the Board will proceed to rule on the complaint based on the documents on file.*
>
> . . .

Clearly, the expectation that a final deadline — indeed all deadlines — should be respected applies to all parties.

[34] As previously indicated, I denied the fourth request for an extension of time.

C. Should the Board receive the respondent's late submission?

[35] In principle, I have considerable sympathy for the complainant's position that the Board should not consider the respondent's late submission. However, in practice, the issue of receiving the respondent's late submission has little significance. The ruling that follows identifies a need for an oral hearing on both the issue of timeliness as well as on the merits of the complaint. I can reach that decision two ways, either on examination of the complainant's submissions taken alone or on consideration of the respondent's late reply.

[36] For that reason, I need not formally rule on whether the respondent's submissions of January 11, 2011, should be considered.

D. Timeliness of the complaint

[37] The *Act* establishes the filing deadline for a section 190 complaint as follows:

> ***190.*** *(2) Subject to subsections (3) and (4), 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.*

The case law of the Board is clear that a Board member has no discretion to alter the 90-day filing period.

[38] Analyzing the timeliness of the complaint is complicated to some extent by the complainant's contention that she first submitted her complaint in early April 2010. The Registry has no electronic or physical evidence of any complaint submitted before it received the complainant's Form 16 on June 4, 2010. While there is no way to discount with absolute certainty the possibility that the Board may have received a

complaint in April 2010 and then lost it, I judge that possibility unlikely. My judgment is reinforced by the complainant's inability to provide proof of an April filing and by her second email of December 10, 2010, in which she stated that she ". . . mixed up the dates. It's not July 4th, 2010. It's April 7th, 2010. I mixed up the day and month . . . ." In my view, the complainant's statement does not clarify the situation and unfortunately introduces the possibility that she may have "mixed up" dates elsewhere in her submissions.

[39] When the complainant filed her Form 16 on June 4, 2010, she identified May 2010 as the date on which she knew of the ". . . act, omission or other matter. . ." giving rise to her complaint. By that specification, it is unclear how she could have first submitted her complaint on April 7, 2010 as claimed — before the purported May 2010 triggering event. Furthermore, the complainant argued in her July 28, 2010, telephone conversation with the Board's registry officer that ". . . she had received nothing in writing from her union until May 2010, telling her that her grievances were not submitted." That account conforms with the date specified in her Form 16 filed on June 4, 2010.

[40] According to the complainant's account, May 2010 marks the confirmation by Steve McCuais, another CEIU representative, that her grievance ". . . was not going to be heard" and that ". . . there was nothing [the CEIU] could do for [her]." Assuming once more that the complainant's account is factual, her complaint may be timely if I accept that it was proper for her to wait until she received Mr. McCuais' purported confirmation to file her Form 16. Unfortunately, without more detailed proof, evaluating that proposition is problematic. Adding to the uncertainty is the complainant's statement in her submission of October 1, 2010, that Lorraine Diapper, apparently a CEIU representative, informed her in January 2010 that her grievance had not been filed. If that is true, it might be argued that the complainant knew, or could have known, in January 2010 of the ". . . act, omission or other matter . . ." that gave rise to her complaint.

[41] In my opinion, neither the respondent's late submission nor the complainant's reply to it offer further assistance for determining the timeliness issue.

[42] On balance, it would appear that I am not in a position to identify definitively the event that gave rise to the complaint on the basis of the submissions to date. There also remains possible controversy regarding the date on which the complainant filed

her complaint with the Board. Therefore, I decline to rule on the respondent's objection to the timeliness of the complaint without further evidence and arguments.

[43] In leaving the issue of timeliness undecided, I wish to specify that I do not foreclose the possibility that the evidence could reveal a date other than the complainant's May 2010 interaction with Mr. McCuais or her January 2010 conversation with Ms. Diapper which properly defines the period within which the complainant should have filed her Form 16.

[44] I rule that an oral hearing is required to consider the timeliness of the complaint.

E. Paragraph 190(1)(*g*) of the *Act* - the respondent's objection

[45] The respondent objected to the complaint on the grounds that the complainant failed ". . . to disclose the basis of a prima facie violation of the Act . . . ." [*sic*]

[46] A complaint properly filed under paragraph 190(1)(*g*) of the *Act* alleges an unfair labour practice within the meaning of section 185, which reads as follows:

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

[47] The provision of the *Act* referenced under section 185 to which the complaint apparently relates is section 187. It holds an employee organization to a duty of fair representation, 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.*

[48] A complaint under section 190 of the *Act* need not include the full details of the complainant's case when it is filed with the Board, as is made apparent by section 4 of Form 16 (*Complaint under Section 190 of the Act*), which asks for a "[c]oncise statement of each act, omission or other matter complained of . . . ." Nonetheless, a complainant is expected to provide sufficient information in Form 16 or, when subsequently asked for clarification, to reveal the essential subject matter of the complaint so that the Board can be satisfied (1) that it has been properly filed under

the identified paragraph of subsection 190(1), and (2) that there is, or could be, an arguable case for a violation of the provision of the *Act* to which that paragraph refers. As a matter of procedural fairness, the requirement to provide sufficient information is also vital to permit the named respondent to understand the basic dimensions of the case against which it must defend.

[49] I have examined very closely all the documents filed by the complainant and, particularly, her submission of October 1, 2010. While the significance of some of the material is difficult to evaluate, the complainant does offer a basic factual account, albeit limited, of what allegedly occurred. Assuming for the moment that those facts are true, the complainant apparently filed a grievance against her manager with union representative Val Fargey in September 2008. The words "filed a grievance" on their own normally connote the presentation of a grievance at the appropriate level of the grievance procedure. In this situation, I infer from the complainant's account that she probably referred information about the matter that she wished to grieve to her representative with the expectation that her representative would "submit" the grievance. Several times during her subsequent absence on LTD, she tried without success to determine the status of her September 2008 grievance by contacting CEIU representatives. On her return to work in October 2009, she discovered that her employer had no knowledge of that grievance. She then contacted Ms. Diapper on the advice of her union local president, to determine what had transpired, and she learned some time in January 2010 in a conversation with Ms. Diapper that no grievance had been filed. Further efforts with another representative, Mr. McCuais, to identify what could be done, ended in May 2010 with his alleged confirmation that her grievance ". . . was not going to be heard" and that ". . . there was nothing [the CEIU] could do for [her]."

[50] On the basis of those purported facts, I find that there is at least an arguable case that representatives of the respondent may have failed to follow through with her request in September 2008 that they file a grievance on her behalf against her manager and that they may have failed on several occasions to respond to her efforts to determine what had transpired. In at least that context, it is conceivable that her union representatives may have acted arbitrarily or in bad faith and that, accordingly, there may have been a violation of section 187 of the *Act*. It also remains an open question from the complainant's submissions as to whether Mr. McCuais' comportment as a

representative met the standard established by section 187 when he purportedly told the complainant in May 2010 that nothing could be done for her.

[51] If I were to consider the respondent's late submission, I would reach the same conclusion. There appear to be some statements of fact in the submission — or at least interpretations of the facts — that, if proven, could place the actions of the respondent's representatives in a different and more favourable light. In particular, the alleged failure of the complainant to follow through with her commitment to provide additional information relevant to the grievance could offer a reason why her representatives did not proceed in September 2008 or later to file a grievance as the complainant wished and anticipated. The other representational activities allegedly carried out by the respondent could also offer useful context for understanding the respondent's approach to the complainant's case.

[52] However, as with the issue of timeliness, I am not in a position in the end to rule on the merits of the complaint without the benefit of further evidence and arguments. As I am satisfied that the complainant has met the minimum requirement to make out an arguable case for a violation of section 187 of the *Act*, the matter must proceed to an oral hearing. Therefore, I dismiss the respondent's objection that the complainant failed to disclose an arguable case for a violation of the *Act*.

[53] Finally, I note the respondent's statement in its late submission that the complaint ". . . fails to seek any particular remedy." At the oral hearing, I will expect the complainant to make more specific the corrective action that she seeks from the Board if she meets her burden to prove her complaint.

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

(The Order appears on the next page)

IV. Order

[55] The Registry, in consultation with the parties, will set a date for an oral hearing to hear evidence and arguments on both the timeliness of the complaint and on its merits.

January 31, 2011.

Dan Butler,
Board Member