Date: 20120105

Files: 561-02-357, 401 and 429

Citation: 2012 PSLRB 2

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CHRIS HUGHES

Complainant

and

DEPARTMENT OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

Indexed as
Hughes v. Department of Human Resources and Skills Development

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

REASONS FOR DECISION

Before: Margaret E. Hughes, Board Member

For the Complainant: Himself

For the Respondent: Chris Bernier, counsel

Heard at Victoria, British Columbia,
October 13 to 14, 2010 and May 2 to 5 and August 17, 2011.

I. Complaints before the Board

[1] Chris Hughes ("the complainant") alleged that the Department of Human Resources and Skills Development ("the respondent" or "HRSDC") committed unfair labour practices against him. Mr. Hughes filed four complaints with the Public Service Labour Relations Board ("the Board") between May 6, 2008 and October 1, 2009, but only the last three are before me (PSLRB File Nos. 561-02-357, 401 and 429). In each complaint, he alleged that the respondent violated paragraph 190(1)(*g*) of the *Public Services Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act* (*PSMA*), S.C. 2003, c. 22, in that it committed an unfair labour practice within the meaning of section 185.

[2] Paragraph 190(1)(*g*) of the *PSLRA* provides as follows:

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

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

[3] In all three complaints before me, the complainant alleged that a violation of section 186 of the *PSLRA* occurred. All three mention, in some way, the respondent's failure to transfer or deploy him to another work site as he requested or its failure to continue to offer him, after his term appointment expired on June 27, 2008, either a new term or indeterminate appointment while it offered some to other, less-qualified candidates. The respondent allegedly acted as it did because he expressed aspirations to become a member of his union executive or because it wished to retaliate for him filing an unfair labour practice complaint against it earlier in his employment (PSLRB File No. 561-02-320) ("the abandoned complaint").

[4] In the first of the three unfair labour practice complaints before me (PSLRB File No. 561-02-357) ("the September 19, 2008 complaint"), the complainant alleges violations of section 186 of the *PSLRA*. However, he does not specify which provision of section 186 has been infringed, although he later alleged conduct covered by

subsection 186(2). In the attachments to the second complaint before me (PSLRB File No. 561-02-429) ("the December 22, 2008 complaint"), he alleges that the respondent committed unfair labour practices under subparagraphs 186(2)(*a*)(i) to (iv), while the attachment to the third complaint before me (PSLRB File No. 561-02-401) ("the October 1, 2009 complaint") identifies only subparagraphs 186(2)(*a*)(ii), (iii) and (iv).

[5] Paragraph 186(2)(*a*) of the *PSLRA* provides as follows:

> ***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
>
> *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iv) has exercised any right under this Part or Part 2;*

[6] The respondent requested initially that the Board dismiss the three complaints before me because they are staffing complaints in essence, which means that they are within the exclusive jurisdiction of the Public Service Staffing Tribunal (PSST). The respondent also submitted that, in the alternative, they be dismissed because they are untimely. The respondent later requested that the Board dismiss them because they do not demonstrate, on their face, a breach of section 186 of the *PSLRA*.

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

II. Background and specifics

[8] The complainant was a term employee with the respondent. He was appointed to a clerk position, classified CR-04, in the Common Experience Payment Program ("the CEPP") in Victoria, British Columbia, at the Pandora Street work location ("Pandora Street"). His term was from September 13, 2007 to March 7, 2008. It was extended twice, first to March 28, 2008, and later to June 27, 2008. He was informed by letter dated May 20, 2008 that his term would not be extended beyond June 27, 2008.

[9] On May 6, 2008, the complainant filed the abandoned complaint with the Board, in which he alleged that the respondent committed an unfair labour practice by denying his transfer requests to the Government Street work location in Victoria ("Government Street") so that he might become eligible to run for an executive position with his union. He later withdrew the complaint by letter dated June 13, 2008. Approximately a year later, on July 13 2009, he sought to revoke his withdrawal letter and to have the abandoned complaint reinstated. The Registry of the Board ("the Registry") informed him by letter dated July 15, 2009 that his request was refused because, when a complaint is withdrawn, the Board is no longer seized of it, and the matter cannot be reopened. In his three complaints before me, the complainant often refers to the abandoned complaint as his "first complaint." The complainant filed the September 19, 2008 complaint with the Board under section 190 of the *PSLRA*. He alleged that the respondent violated section 186 by not renewing his term appointment and by continuing to block his requests for a transfer to Government Street, allegedly betraying an anti-union animus. Although the complainant emailed his complaint to the Registry on September 19, 2008, the Registry received the original complaint only on November 6, 2008.

[10] The September 19, 2008 complaint reads as follows:

. . .

> *. . . This is a complaint under Section 186, Unfair Labour Practice. HRSDC has had an anti union animus towards me since I started working at HRSDC in Sept 2007. I immediately stated my intention to join the union and local management was aware of this and blocked my transfer requests. This led to a first complaint. I withdrew the first complaint for health reasons.*

> *After I filed the first complaint HRSDC retaliated against me by ending my work term and continued to deny my transfer requests to work in another office. They had a duty under the CHRA to transfer me. A transfer would allow me to run for the union executive. Due to my history as a government whistleblower, human rights advocate and staffing advocate, HRSDC did everything they could to block my transfers and end my employment.*
>
> *I was in two valid hiring pools, CR-03 and CR-04, there were lots of job openings but HRSDC refused to extend my contract. My contract ended June 27, 2008 and the retaliation and unfair labour practice was ongoing from approximately February 2008 to June 27, 2008. This occurred in Victoria BC.*
>
> . . .

As remedy, the complainant sought to be made whole. He sought reinstatement into his job, lost wages and benefits, and an apology.

[11] The Registry asked for the respondent's position on the September 19, 2008 complaint on November 10, 2008. The respondent replied on November 25, 2008 that the Board did not have jurisdiction to order it to offer the complainant another term appointment or to transfer him to another position. The complainant opposed the respondent's objection by letter dated December 17, 2008. The Registry then advised the parties that the issue of jurisdiction would be brought to the Board's attention and that they should raise it at the outset of the hearing to be conducted in relation to the complaint.

[12] The complaint filed the December 22, 2008 complaint, in which he alleges that the respondent continued to commit an unfair labour practice by refusing to employ him after the end of his term appointment because he had sought to become a union officer or representative. Due to an administrative error, the Registry acknowledged receipt of the complaint only on December 16, 2009.

[13] The attachment to the December 22, 2008 complaint reads in part as follows:

> . . .
>
> *Since filing two previous Unfair Labour Practice Complaints against HRSDC they "refuse to employ" (Section 186, 2, a, i, ii, iii and iv) me even though I am in two valid hiring pools. The hiring pools I am in are for a CR-04 Service Delivery Agent that can be used to staff similar positions in Victoria,*

> *Nanaimo and other places on Vancouver Island. I am also in a CR-03 pool that can be used to staff in Victoria.*
>
> *The first complaint I filed when HRSDC blocked my transfer to another work unit in Victoria that would enable me to run for union executive. This complaint was withdrawn for health reasons. The second complaint was filed when HRSDC retaliated against me for the first complaint when the [sic] ended my employment ("continue to employ") and blocked many more requests to transfer work locations. This complaint is still active.*
>
> *This complaint revolves around HRSDC refusing to employ me since that time. It is* ***ongoing*** *since June 27, 2008 to present. Dozens of jobs have opened up in Victoria, Nanaimo and are at HRSDC at the CR-03 and CR-04 level. HRSDC is ignoring the hiring pools I am in as they don't want to hire me because I sought to be a union executive, I filed complaints under the PSLRA, and I "may testify" under the act at upcoming hearing on the earlier complaint.*
>
> . . .
>
> *The respondent also took discriminatory action against the complainant in a new CR-04 competition from September to November 2008. Even though the HRSDC had passed the complainant on the exact same or very similar competition in 2007 they refused to accept a reference from Tim O'Neill in 2008. Prior to filing the PSLRB complaints HRSDC did accept Mr. O'Neill's reference in 2007. The complainant was asked to provide three references PRIOR to an interview when other candidates did not have to do this. Don Campbell and Kathleen Allen spearheaded this unfair labour practice incident and both knew I had filed complaints under this act and sought union office. Jacky Smith refused to give a complete reference in retaliation for the unfair labour practice complaint during this competition.*
>
> . . .
>
> [Emphasis in the original]

The complainant initially requested as a remedy that the respondent be prosecuted under section 205 of the *PSLRA* and that the Board order it to appoint him as a term CR-04 employee in Victoria or as an indeterminate employee there or in Nanaimo, along with financial compensation as outlined. The complainant later withdrew his request for prosecution.

[14] The complainant filed the October 1, 2009 complaint, which is mostly blank and has notations that the reader should see an attached document. In that document, the

complainant states in part as follows:

. . .

> *This fourth complaint is for the respondent's **ongoing refusal to employ** due to the complainant's earlier complaints filed under PSLRA contrary to section 186 (2) (a) ii, iii and iv from December 2008 to present.*
>
> *This entire period the respondent could have and should have re-hired the complainant due to staff shortages in Victoria and Nanaimo. The complainant was in two valid hiring pools and fully qualified for positions at the CR-03 and CR-04 level. These pools were good until March 31, 2009 and June 30, 2009. The **employer never informed the complainant the pools expired** and the "alleged" expiration of the pools is second hand information from the complainant's union. The expiration of the pools is an unfair labour practice as they should have been extended to August/September of 2009. The union informed the complainant on July 21, 2009.*
>
> *The employer expired the pools to avoid hiring the complainant. The employer ignored the pools the complainant was in and hired from newer pools over the last year.*
>
> *The employer should have re-hired the complainant through "casual" or non advertised staffing at the CR-03, CR-04, PM-01 or PM-02 level given the serious staffing shortfall at HRSDC and the given the complainant's work history, test scores and willingness/readiness to work **at any point over the last year (and ongoing).***
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[15] The Registry asked for the respondent's position on the October 1, 2009 complaint, which the respondent provided on October 20, 2009. The respondent submitted that the Board had no jurisdiction to consider the complaint because it deals with staffing matters. In the alternative, the respondent asked the Board to request that the complainant provide details of how its alleged failure to appoint him to a position from an eligibility list constituted an unfair labour practice. It also submitted that the complaint was untimely.

[16] On October 29, 2009, the complainant took the position that the Board may

review staffing matters for evidence of an anti-union animus that constitutes an unfair labour practice. He indicated his intention to file a motion that the Board consolidate all three complaints before me. He also requested an order for the production of documents held by the respondent. The respondent objected to the production request and again argued that the Board did not have jurisdiction to deal with what are in essence its staffing decisions. It asked the Board to dismiss the complaints without a hearing.

[17] I refused to dismiss the complaints before me and ruled that the Board has the authority, and indeed a duty under subsection 190(1) of the *PSLRA*, assuming other jurisdictional requirements are satisfied, to hear an unfair labour practice complaint involving staffing decisions. Those decisions include a decision to not renew a specified term appointment if it is alleged that the reasons behind it were prohibited discriminatory practices by the respondent, in contravention of the *PSLRA*.

III. Preliminary issues

A. Production of documents

[18] The complainant, in correspondence with the Registry before the matter was assigned to me, sought the production of extensive documentation, encompassing all the respondent's staffing decisions for any CR-03 and CR-04 positions in Victoria, Nanaimo or other southern Vancouver Island locations for January 2008 to October 2009. The request potentially involved hundreds of positions, filled by competitions run by different hiring managers. In a fax sent February 22, 2010, the respondent alleged that the complainant's request was too broad and that it was a fishing expedition and asked that it be denied.

[19] At the Board's request, the Registry notified the parties on March 31, 2010 that the complainant's request for disclosure was legitimate but that it needed to be narrowed down. The parties were encouraged to try to resolve the disclosure issues by April 30, 2010. If they could not, the complainant was required to submit a detailed, narrower request of the list of documents to be disclosed and their relevance to the complaints before me. The parties were informed that the Board would then decide what should be disclosed.

[20] This case was assigned to me in August 2010. A pre-hearing conference call was

held on September 8, 2010. The participants included the complainant, counsel for the respondent, Registry personnel and me. As a result, an "Order for Production of Documents" was issued on September 9, 2010 for some of the documents requested by the complainant.

[21] The parties were encouraged to continue to attempt to determine the other documents relevant to the complaints before me in an effort to narrow the potential number of the respondent's staffing decisions made during the stipulated period that the complainant was challenging as unfair labour practices.

[22] A second pre-hearing conference call was held at the request of the parties on October 7, 2010, during which the respondent presented an adjournment request that the complainant strongly opposed. He asserted that he was prepared and anxious to proceed with his case and that he would suffer economic hardship were the hearing postponed. The respondent's adjournment request was denied. The parties were encouraged to continue to work on narrowing down the issues and the production request for the documents relevant to the complaints before me.

[23] At the beginning of the hearing, substantial time was spent reviewing documents and trying to clarify the respondent's selection processes that the complainant was contesting and, by so doing, narrowing his broad disclosure request to documents relevant to the complaints before me.

[24] After substantial discussions and document reviews, the complainant agreed that, if the respondent provided him with unredacted copies of the master assessment summary spreadsheets for each competition and the related staffing rationales for the CR-03 and CR-04 competitions in which he was involved during the relevant period, he would know his marks and where he stood in the competitions, and he would be able to substantiate his claims of anti-union animus and unfair labour practices. The complainant, after reviewing the unredacted copies, was to inform the respondent of the particular selection processes he was challenging. The parties agreed that, as there is a separate selection manager for each competition, a narrowing of the number of competition selection processes being challenged would narrow the number of witnesses for both the complainant and the respondent, which would be advantageous to both parties. The respondent stated in its letter to the Registry of January 6, 2011 that the documents were provided to the complainant, which he confirmed in his December 15, 2010 email to the Registry.

[25] The complainant ultimately identified 11 staffing decisions made by the respondent that he alleged were possible unfair labour practices, although he also stated that all but four or five of the 11 might just have been staffing decisions.

[26] The complainant sent two emails and attachments to the Registry on December 15, 2010. In his second email, the complainant claimed that, to make his arguments on remedy, he needed more documents, namely, all contracts and paperwork for candidates in the CR-04 and CR-03 staffing pools that were rolled over to indeterminate appointment based on the Treasury Board's *Term Employment Policy* ("the *Term Employment Policy*"). In its January 6, 2011 reply, the respondent opposed the complainant's broad document request, arguing that it had provided the agreed upon documents and that, since the documents provided did not substantiate the complainant's claim, he wished to engage in a fishing expedition.

[27] On January 28, 2011, I ruled that the complainant's request for additional documents "[i]n order to make [his] argument on remedy" was premature and that I would hear arguments on the merits of the unfair labour practice complaints before me before ruling on the need for the disclosure of the additional documents about remedies.

[28] In his second email of December 15, 2010, the complainant also requested the disclosure of the memos written by all CR-04 candidates during the assessment phase who were subsequently appointed to positions in Victoria. The complainant stated that he received an undated anonymous threatening letter at some unspecified time in the past, which he attached to his email, and that the memos would allow him to compare the handwriting of the candidates with that of the letter writer. Then he could identify the writer of the threatening letter and question him or her as to why the letter was mailed to him. In its email reply of January 6, 2011, the respondent opposed the disclosure request on the grounds that the anonymous letter is not relevant to the complaints before me and should not be admitted. The respondent submitted that the complainant did not suggest that it sent the anonymous letter or that it was in any way involved in its sending. The respondent submitted further that the anonymous letter was not reliable.

[29] In his January 6, 2011 rebuttal, the complainant submitted that the anonymous letter had as a return address the HRSDC Victoria office. He argued that the letter was designed to intimidate him and that he had ". . . the right to see if the letter writer was

a coworker [*sic*] and whether the coworker [*sic*] was acting alone or at the direction of management. . . ."

[30] After considering the request and noting that the anonymous letter attached to the complainant's December 15, 2010 second email did not contain a return address, I ruled that the complaints before me involved unfair labour practices alleged to have been committed by the respondent. These complaints allege that the respondent continually refused to employ or to continue to employ the complainant in violation of paragraph 186(2)(*a*) of the *PSLRA*. They also allege that it discriminated against him with respect to employment because he sought to become an officer or representative of an employee organization or because he exercised a right under the *PSLRA* to file an unfair labour practice complaint and planned to testify at the hearing. The complainant did not suggest that the respondent sent him the anonymous letter or that it was in any way involved in its sending.

[31] I also noted that the complaints before me have been before the Board for several years and before me since August 2010 and that no suggestion was made until the complainant's email of January 6, 2011 that any anonymous letter he received at an unspecified date was sent by a co-worker who might have been acting under the respondent's direction. The complainant's request implied that one of his fellow candidates sent the letter and that he would like to ask the author why it was sent. I determined that, based on the parties' submissions and the materials filed to date, the anonymous letter was not relevant to the proceedings. I denied the complainant's disclosure request.

B. Timeliness of the complaints

1. History

[32] In its correspondence of January 15, 2010 with the Registry, the respondent submitted that, among other things, the complainant's December 22, 2008 complaint was untimely as it stated that the events leading to it had been ongoing since June 27, 2008. That was five months before its filing, well outside the 90-day mandatory statutory limit set out in subsection 190(2) of the *PSRLA*, and it should be dismissed on that basis. Subsection 190(2) reads as follows:

> ***190.*** *(2) . . . 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.*

[33] On August 30, 2010, the Registry, at the Board's request, invited the parties to make written submissions on the respondent's objection to the timeliness of the December 22, 2008 complaint. The respondent filed its submission dated September 27, 2010, and the complainant filed his submission dated September 28, 2010.

[34] The parties corresponded again, through the Registry, on October 4, 5 and 6, 2010, in an attempt to clarify the errors and confusion on both sides about the Board's file numbers and the corresponding timeliness arguments that had been submitted.

[35] At the hearing, the parties spoke to their submissions. In the process, the respondent broadened its timeliness objection to include all three complaints before me. Both parties then spoke to the broadened timeliness objection.

[36] In his first email sent December 15, 2010, the complainant raised an entirely new line of argument about the timeliness of his September 19, 2008 and December 22, 2008 complaints based on the applicability of subsection 19.4(4) of the *Public Servants Disclosure Protection Act* (*PSDPA*), S.C. 2005, c. 46. Subsection 19.4(4) reads as follows:

> ***19.4*** *(4) If the Commissioner decides not to deal with a complaint and sends the complainant a written notice setting out the reasons for that decision,*
>
> *(*a*) subsection 19.1(4) ceases to apply; and*
>
> *(*b*) the period of time that begins on the day on which the complaint was filed and ends on the day on which the notice is sent is not to be included in the calculation of any time the complainant has to avail himself or herself of any procedure under any other Act of Parliament or collective agreement in respect of the measure alleged to constitute the reprisal.*

[37] The complainant informed the Registry that, after he withdrew the abandoned complaint, he filed a reprisal complaint with the Public Sector Integrity Commissioner (PSIC) on June 19, 2008. He added that he filed an amended complaint on September 29, 2008, and that he was informed on October 29, 2008 that the PSIC had decided to not deal with his complaint. The complainant argued that, based on the

PSDPA's wording, particularly paragraph 19.4(4)(*b*), the PSIC's decision to not deal with his reprisal complaint meant that the September 19 and December 22, 2008 complaints had no timeliness issues.

[38] In an email reply sent on January 6, 2011, the respondent objected to the complainant's new argument, submitting that the presentation of evidence and arguments about the preliminary issue of timeliness was completed at the October 2010 hearing and that the issue was before me for determination. The respondent submitted that the complainant had many opportunities since January 2010 to raise the fact of his reprisal complaint under the *PSDPA* and its impact on the complaints before me and that he chose not to. In addition, the complainant did not raise it during the two-day hearing in October 2010.

[39] The respondent further submitted that, should I consider the *PSDPA*, I should do so in only two limited respects. First, it argued that the complainant focused on subsection 19.4(4) and ignored the wording and ramifications of subsection 19.1(4), which precluded him from commencing any procedure under any other Act of Parliament in respect of the measures alleged to have constituted the reprisal while his complaint was before the PSIC. Subsection 19.1(4) reads as follows:

> ***19.1*** *(4) Subject to subsection 19.4(4), the filing of a complaint under subsection (1) precludes the complainant from commencing any procedure under any other Act of Parliament or collective agreement in respect of the measure alleged to constitute the reprisal.*

[40] Second, the respondent argued that inconsistencies appeared between the reprisal complaint documentation and the complainant's first email of December 15, 2010 about his medical condition at the relevant times and that I should consider them when assessing his credibility.

[41] In his January 6, 2011 email reply, the complainant submitted that the *PSDPA* is legislation, that its provisions directly affect the statutory time limit for filing an unfair labour practice complaint and that the Board cannot ignore statutes, whether or not they were raised and argued. He argued that ". . . [t]his is in the same vein as an un-cited [*sic*] Court case or a Court case that issued after a hearing but before and [*sic*] adjudicator issues a decision. . . ." He further submitted that, since the PSIC declined to investigate his complaint, he was free to file the original of his September 19, 2008 complaint on November 6, 2008 and ". . . the PSLRB does not need to '*back date*' it to

September 19, 2008 based on [his] email given the provisions of the PSDPA."

[42] As I had not issued a decision on the respondent's preliminary objection to the timeliness of the complaints before me, I agreed to receive evidence and hear arguments at the beginning of the continuation of the hearing on May 2, 2011 on the applicability and impact of the provisions of the *PSDPA* on the complaints.

2. Summary of the arguments

a. For the respondent

[43] The respondent's initial argument was that the December 22, 2008 complaint was untimely on its face. In it, the complainant stated that the respondent's unfair labour practices had been ongoing since June 27, 2008. Since that was almost five months before the December 22, 2008 filing date, the complaint was clearly outside the 90-day mandatory time limit prescribed by subsection 190(2) of the *PSLRA*.

[44] The respondent argued that the key issue for me to determine under subsection 190(2) of the *PSLRA* was when the complainant knew, or ought to have known, of the circumstances underlying his complaint. As it was clear on the face of the December 22, 2008 complaint that, at the very latest, he knew of the circumstances giving rise to it on June 27, 2008, well outside the 90-day time limit, I should dismiss it. The Board has no jurisdiction to extend the 90-day limit.

[45] The respondent submitted the following decisions to assist my analysis of the timeliness issue: *Roberts v. Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN)*, 2010 PSLRB 96; *Forward-Arias v. Union of Solicitor General Employees and Public Service Alliance of Canada*, 2010 PSLRB 81; *Larocque v. Professional Institute of the Public Service of Canada,* 2010 PSLRB 77; *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN*, 2010 PSLRB 7; *Hérold v. Public Service Alliance of Canada and Gritti,* 2009 PSLRB 132; and *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14.

[46] The respondent submitted that the case law supports the following propositions: that the Board has no jurisdiction to modify or extend the 90-day limit; that a complainant's lack of knowledge of that limit is no justification for extending it; that, if a complainant knew of the circumstances giving rise to his or her complaint, a

medical condition that prevented him or her from filing within the limit is no justification for extending it; and that the Board's only discretion is determining when the complainant knew, or ought to have known, of the action or circumstances giving rise to the complaint.

[47] The respondent then expanded its timeliness objections to include all three complaints before me. It argued that the September 19, 2008 complaint was also untimely for two reasons. First, it argued that, on its face, it was clear that the complainant knew of the circumstances underlying his unfair labour practice complaint "since February 2008," but he did not email his complaint to the Board until September 19, 2008, clearly outside the 90-day period.

[48] The respondent's second argument was that, even if the complainant did not know of the circumstances underlying the September 19, 2008 complaint until his employment ended on June 27, 2008, his complaint was not properly before the Board because the Registry did not receive the original by mail until November 6, 2008. The respondent argued that, although the complaint was emailed within the 90-day period, his delay in forwarding the original of the complaint meant that he failed to satisfy the requirement in section 3 of the *Public Service Labour Relations Board Regulations* ("the *Regulations*"), SOR/2005-79, to forward the complaint "as soon as possible." Section 3 reads as follows:

> ***3.*** *(1) If an initiating document is sent by fax to the Executive Director, the original of the document and a copy shall be sent to the Executive Director as soon as possible.*
>
> *(2) The initiating document sent by fax is deemed to be received on the date of the fax transmission if its original and a copy are sent in accordance with subsection (1).*

[49] The respondent argued that, if the September 19, 2008 complaint is valid, then I am dealing with an ongoing unfair labour practice and that it was not necessary for the complainant to file more complaints. The issue would be determining the appropriate remedy. However, if the September 19, 2008 complaint is not valid, then the December 22, 2008 and October 1, 2009 complaints, which claimed that the retaliation and the unfair labour practice were ongoing since June 27, 2008, were untimely.

b. <u>For the complainant</u>

[50] The complainant submitted that the September 19, 2008 complaint, dated and emailed on that date, was timely. He mailed the original to the Registry on November 6, 2008. He argued that that mailing satisfied the "as soon as possible" forwarding requirement in section 3 of the *Regulations* because of his medical condition at that time and because of the Registry's error of not formally responding to an accommodation request that he had made.

[51] The complainant noted that he stated the following in the September 19, 2008 complaint:

. . .

> *This is an inconcise/incomplete statement of each act due to the fact I am recovering from retinal detachment surgery. I am filing this to make sure I meet the 90 day limit and I will perfect my complaint when I have medical clearance from my eye doctor. I am to limit my use of the computer at this stage so I am making a brief complaint. . . .*

. . .

[52] The complainant also noted that his covering note read as follows:

. . .

> *Due to my medical condition, recovering from eye surgery due to a retinal detachment, please accept my scanned PDF files of my Unfair Labour Practice Complaint.*
>
> *I would prefer not to have to mail in another copy due to my medical condition. Please advise if the PDF version will be accepted.*

. . .

[53] The complainant testified that, by this covering note, he was asking for accommodation in the form of not having to mail the original complaint to the Registry. The Registry did not interpret the covering note in that way and did not respond until he emailed on October 30, 2008, inquiring about the status of his complaint. He was told that he had to mail the original complaint, which he promptly did. The Registry received it on November 6, 2008.

[54] The complainant also argued that, although the September 19, 2008 complaint

refers to ongoing unfair labour practices from approximately February 2008 to June 27, 2008, only when his term appointment expired was he sure that the respondent was not going to extend his term or offer him a new term or indeterminate appointment. Thus, June 27, 2008 is the earliest date from which to apply the 90-day time limit.

[55] The complainant argued that, although he received a letter from the respondent informing him that his term appointment would not be extended, he continued to apply for positions with the respondent. He argued that he could not reasonably have known about staffing that occurred after he left the respondent's employ. Only when his union emailed him sometime in July 2008 and when he received materials in October 2009 under his access-to-information request did he become aware that the respondent continued to appoint other candidates from the CR-03 and CR-04 staffing pools, but not him. Since he was better qualified than some of the individuals being appointed, it was an unfair labour practice. Accordingly, he argued, the triggering event for the 90-day time limit was the summer email from the union, which means that the September 19, 2008 filing was clearly within the 90-day limit.

[56] The complainant argued that the December 22, 2008 complaint had to be read in conjunction with the September 19, 2008 complaint, which describes unfair labour practices by the respondent ongoing from May 2008 to September 19, 2008. The December 22, 2008 complaint, although it mentions the unfair labour practice as having been ongoing since June 27, 2008, really covers the period of September 19, 2008 to December 22, 2008, since the respondent's unfair labour practices continued.

[57] The complainant argued that his medical evidence was intertwined with his evidence on the merits and asked that he not be required to provide it twice.

[58] After a preliminary hearing of the parties' arguments and submissions on the timeliness issue, I reserved on the respondent's objection and heard evidence on the merits of the complaints.

3. Decision

[59] The respondent had the burden of proof for the timeliness objection.

[60] The complaints before me were filed between September 19, 2008 and October 1, 2009. They were consolidated for this hearing at the complainant's request.

[61] The parties eventually agreed that the crucial issue is the timeliness of the September 19, 2008 complaint. The respondent argued that, if the September 19, 2008 complaint is valid, then the December 22, 2008 and October 1, 2009 complaints, which cover September 19, 2008 to December 22, 2008 and December 22, 2008 to October 1, 2009 respectively, are unnecessary. If the September 19, 2008 complaint is timely and well founded, I will have to determine an appropriate remedy for a continuing unfair labour practice over the entire contested period. However, if it is not timely, then the other two complaints, which allege unfair labour practices "on-going since June 27, 2008," are untimely.

[62] The complainant agreed with the respondent's timeliness analysis and testified that he filed the December 22, 2008 and October 1, 2009 complaints to be safe and to ensure that the Board would consider the respondent's continuing refusal to employ or re-employ him from June 27, 2008 to October 1, 2009.

[63] Subsection 190(2) of the *PSLRA* requires that a complaint ". . . 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 parties agreed that the Board's jurisprudence interpreting that legislative provision holds that the 90-day time limit refers to 90 calendar days and that it is mandatory. The Board has no jurisdiction to expand or extend the 90-day limit. The Board's only discretion is determining the triggering event for the start of the 90-day period, which is the date on which the complainant knew, or ought to have known, of the facts giving rise to the complaint. That is a factual issue.

[64] The first issue to determine is the filing date of the September 19, 2008 complaint. It was emailed to the Board on that date. The Registry treats an emailed initiating document as if it were faxed under section 3 of the *Regulations*. The original complaint was not mailed to the Board until November 6, 2008.

[65] The complainant's arguments that the September 19, 2008 complaint is timely are confusing for two reasons. First, he alleged that several staffing decisions made by the respondent's managers during the first half of 2008 were unfair labour practices. Although some of those decisions were clearly made outside the 90-day time limit, the Board must consider them to establish the important historical context in which these complaints must be viewed. Second, the complainant argued that, in what must be an alternative argument, the Board had no need to "back-date" his complaint to

September 19, 2008 and that it could consider it as being filed on November 6, 2008, when he mailed the original to the Registry.

[66] Applying section 3 of the *Regulations* to the facts before me, I find that the September 19, 2008 complaint was filed when the complainant emailed it to the Registry, provided that his mailing of the original on November 6, 2008 satisfies the *Regulations*' requirement of submitting the original "as soon as possible."

[67] The complainant submitted that he mailed the original complaint on November 6, 2008, which was "as soon as possible." The covering note to his September 19, 2008 email reads as follows:

. . .

> *Due to my medical condition, recovering from eye surgery due to a retinal detachment, please accept my scanned PDF files of my Unfair Labour Practice Complaint.*
>
> *I would prefer not to have to mail in another copy due to my medical condition. Please advise if the PDF version will be accepted.*

. . .

The complainant argued that, given the physical disabilities that arose from his retinal surgery, he requested accommodation from the Registry in the form of waiving the regulatory requirement that he forward the original complaint to the Registry and that the Registry dropped the ball on his accommodation request. He testified that, when he contacted the Registry in late October 2008 for the status of the September 19, 2008 complaint, he was informed that the *Regulations* required that he mail the original of the complaint, which he promptly did. The Registry received it on November 6, 2008.

[68] The respondent argued that the complainant did not enter medical evidence confirming that the impact of his retinal surgery made him extremely light sensitive and that it prevented him from going outside and engaging in normal activities, such as mailing the September 19, 2008 complaint to the Registry on that day.

[69] I agree that the medical evidence was skimpy at best. However, it was not contested that the complainant suffered from substantial visual impairment at this time, and it is not crucial to my decision. This is not a case in which the complainant

argued that the nature and severity of his medical condition at the crucial time was such that the mandatory 90-day limit set out in subsection 190(2) of the *PSLRA* has to be extended, as the complainant argued in *Exeter*, referred to by the respondent. The complainant in this case argued that, despite his medical condition, he filed the September 19, 2008 complaint within the 90-day time limit when he emailed it on September 19, 2008. Since he asked for accommodation at that time for mailing the original to the Registry, he met the "as soon as possible" requirement when he mailed it immediately after he was informed that his accommodation request was "denied."

[70] Reading the complainant's email of September 19, 2008, I find that, although the wording of his request for accommodation in the form of a waiver from having to mail the original complaint to the Registry could have been clearer, he believed that he was asking for that accommodation. When he was informed later that such a waiver was not possible, he promptly mailed the original. Therefore, I conclude that the complainant met the "as soon as possible" filing requirement of subsection 3(1) of the *Regulations* and that the September 19, 2008 complaint is to be considered as filed on the date of his email of September 19, 2008.

[71] However, the determination of the filing date by itself does not make the September 19, 2008 complaint timely within the meaning of subsection 190(2) of the *PSLRA*. The complaint is timely only if the action or circumstances that gave rise to it occurred within 90 days of the filing date. The respondent argued that the crucial issue is when the complainant knew, or in the Board's opinion, ought to have known, of the action or circumstances giving rise to that complaint. The respondent argued that it was before the mid-June 2008 start of the 90-day period.

[72] The respondent argued that I must distinguish between the possible impact of the complainant's eye condition on filing his September 19, 2008 complaint from any possible impact of the condition on his alleged knowledge of the action or circumstances that gave rise to the complaint. First, the respondent argued that the September 19, 2008 complaint, on its face, makes it clear that he was aware of the alleged unfair labour practices "from approximately February 2008," which is well outside the 90-calendar-day limit, working back from the September 19, 2008 filing date. Second, the respondent argued that it informed the complainant in a letter dated May 20, 2008 that his term appointment would not be extended when it expired. Therefore, an alleged unfair labour practice complaint based on his term appointment

not being extended is also outside the 90-day period.

[73] The crucial paragraph of the September 19, 2008 complaint reads in part as follows:

. . .

> *I was in two valid hiring pools, CR-03 and CR-04, there were lots of job openings but HRSDC refused to extend my contract. My contract ended June 27, 2008 and the retaliation and unfair labour practice was ongoing from approximately February 2008 to June 27, 2008. . . .*

. . .

[74] The complainant argued that, throughout May and June 2008, he was still working to secure a transfer to Government Street, to have the decision to not extend his term appointment reversed by more senior management and to secure another term or indefinite term appointment from the many CR-03 and CR-04 positions allegedly available. He argued that the crucial date in his complaint is when his term ended, June 27, 2008, which is within the 90-day period, working back from the September 19, 2008 filing date. He also argued that, although he knew that CR-03 and CR-04 were positions available and was suspicious that the respondent was offering appointments to other candidates from the CR-03 and CR-04 pre-qualified staffing pools that he was part of, he did not know it for a fact until he received an email from his union in July 2008. However, I note that the union communications that the complainant introduced in evidence are not dated July 2008. One is dated June 27, 2008 and is a response to the complainant's request for information on the respondent's staffing from the CR-03 and CR-04 pools as well as casual appointments (Exhibit 11) while the other is dated July 21, 2009 and concerns the expiry dates of the CR-03 and CR-4 pools (Exhibit 39).

[75] The contested paragraph from the September 19, 2008 complaint can be read in different ways. I accept, on a balance of probabilities, the complainant's testimony that he was not sure of the respondent's alleged retaliation of not offering him a further appointment until June 27, 2008. That was when his term appointment expired; the senior management that he had contacted for assistance had not intervened, and he had not been transferred to Government Street or re-employed in any capacity. The respondent's position was unambiguous at that time. That makes June 27, 2008 the triggering event for the 90-day time limit.

[76] The cases cited by the respondent are distinguished from the facts of this case. The situation differed in *Éthier,* in which the complainant knew of the facts underlying the complaint early on but waited until he thought that he had sufficient evidence to make the complaint. It is also not a situation of allowing the complainant to use his 2009 access-to-information request to extend the mandatory 90-day time limit. The complainant knew on June 27, 2008 of the respondent's unambiguous position that it did not agree to his requests for a transfer to Government Street, a term extension or a new term or indeterminate appointment and I find that the September 19, 2008 complaint is timely.

[77] In *Forward-Arias*, the complainant argued that her medical situation prevented her from acting on a violation of the *PSLRA* that occurred several years earlier. In addition, unlike in *Hérold*, the complainant in this case did not ask for an extension to the 90-day time limit based on ignorance of his right to file an unfair labour practice complaint.

[78] My finding that the September 19, 2008 complaint is timely does not mean that the many alleged unfair labour practices that the complainant argued at the hearing are all within the allowed period. That issue will be dealt with as each alleged unfair labour practice is considered on its merits.

[79] I also note, without deciding the complainant's alternative timeliness argument, that under paragraph 19.4(4)(*b*) of the *PSDPA*, the September 19, 2008 complaint is timely because the 90-day clock in the *PSLRA* stops once a reprisal complaint is filed under the *PSDPA*. It starts again once the PSIC decides the reprisal complaint.

[80] The correspondence from the PSIC's office, date stamped October 29, 2008 and entered as an exhibit by the complainant, notes that he filed an initial reprisal complaint with the PSIC on June 19, 2008. That complaint was amended after he forwarded additional information on September 29, 2008 and again on October 10, 2008. The complainant was informed in the October 29, 2008 correspondence from the PSIC that it had determined that it would not proceed with an investigation into his reprisal complaint. Reasons were given for that decision.

[81] I also note that the complainant never revealed to the Board that he filed a reprisal complaint with the Office of the PSIC until he sought to provide an alternative timeliness argument on December 15, 2010. I do not accept the complainant's

testimony that he did not breach the provisions of the *PSDPA,* as he did not know of its prohibition against accessing redress mechanisms under other federal legislation while his reprisal complaint about those matters was before the PSIC. That testimony does not line up with his testimony about what prompted him to contact the Registry on October 30, 2008 to inquire about the status of the September 19, 2008 complaint. It also is inconsistent with the complainant's email reply of January 6, 2011 to the Registry, in which he states that he filed a formal complaint with the PSIC in mid-June 2008, after he withdrew the abandoned complaint and a harassment complaint he had filed with the respondent. He stated that he did not want any other recourse mechanisms in play that would have allowed the PSIC to decline his reprisal complaint. He was referring to subsection 19.3(2) of the *PSDPA*, which precludes the PSIC from dealing with a complaint if a person or body acting under another Act of Parliament is dealing with its subject matter.

[82] The complainant also noted another reason for not sending the original of the September 19, 2008 complaint to the Registry until November 6, 2008, in addition to his medical condition and his request for accommodation. He "was also probably waiting for" the PSIC's decision on his June 19, 2008 reprisal complaint.

[83] The complainant testified that the October 29, 2008 letter from the PSIC prompted him to email the Registry on October 30, 2008 about the status of the September 19, 2008 complaint. He rather confusedly argued that the PSIC's denial of his reprisal complaint on October 29, 2008 left him free at that time to file an unfair labour practice complaint, that the Board could consider his November 6, 2008 mailing of his original complaint as the time of filing and that the Board should not "back-date" his filing to September 19, 2008.

[84] The Registry does not "back-date" filings. As noted, the *Regulations* provide that, if an initiating document is faxed to the Registry, and the original is sent as soon as possible, the faxed document is deemed received on the date of its transmission. The Registry treats emailed initiating documents the same way.

[85] I agree with the respondent that the September 19, 2008 complaint appears to violate the provisions of subsection 19.1(4) of the *PSDPA*, which provides that ". . . the filing of a complaint under subsection (1) precludes the complainant from commencing any procedure under any other Act of Parliament or collective agreement in respect of the measure alleged to constitute the reprisal." However, as the PSIC has

informed the complainant that it had determined to not proceed with an investigation into his reprisal complaint filed under the *PSDPA,* I will consider the merits of the three complaints before me, because they are timely under the provisions of the *PSLRA*.

C. Burden of proof

[86] On August 30, 2010, the Board set dates for written submissions on the applicability of subsection 191(3) of the *PSLRA* ("the reverse-onus provision"). Subsection 191(3) reads as follows:

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

The parties were asked to address whether the three complaints before me reveal, on their face, an arguable case of a violation of the *PSLRA*. The parties were asked to specifically address whether, if the Board considered all the facts alleged in the complaints as true, there is an arguable case that the respondent contravened the unfair labour practice legislative provisions of the *PSLRA*.

[87] On September 28, 2010, the Registry received the respondent's written submissions dated September 27, 2010 and the complainant's written submissions dated September 28, 2010. The parties also spoke to their submissions at the beginning of the hearing in October 2010.

1. Summary of the arguments

a. For the complainant

[88] The complainant argued that there was an arguable case of unfair labour practice based on knowledge that the respondent's managers possessed about his whistle-blowing activities at the Canada Border Services Agency (CBSA) and based on the timing of its May 20, 2008 decision to not extend his term appointment. The respondent's knowledge of his whistle-blowing allegedly arose from his interview on the CBC "National News" on October 1, 2007, about a month after he began working as

a CR-04 clerk on the CEPP. The complainant submitted that the timing of the respondent's decision to not extend his term is suspect because it was made 14 days after he filed the abandoned complaint. That would have been just after Human Resources (HR) would have notified the respondent of that complaint.

[89] The complainant further argued that he sought first in January 2008, and again in May 2008, to be transferred from Pandora Street to Government Street so that he would be eligible to run for a union executive position in the local at Government Street. He alleged that the respondent blocked his transfer because it wanted to keep a weak union executive in place and that it did not want a talented, knowledgeable, militant, tenacious union president in Victoria. The complainant submitted that numerous email exchanges, which he had accessed through a request under the *Privacy Act*, R.S.C., 1985, c. P-21, established that the respondent's managers knew of his union aspirations, transfer requests and staffing issues in May, June and July 2008. He argued that he had further proof and evidence that he would tender at the hearing.

[90] The complainant referred me to the following decisions in support of his argument that he had established an arguable case that the respondent violated the *PSLRA* and that the reverse-onus provision should apply: *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37; *Hager et al. v. Statistics Survey Operations and the Minister responsible for Statistics Canada*, 2009 PSLRB 80; *Lamarche v. Marceau*, 2004 PSSRB 29; and *Plourde* v. *Wal-Mart Canada Corp.*, 2009 SCC 54.

[91] The complainant submitted that *Quadrini* supports the proposition that, if the Board has any doubt as to what the facts, assumed to be true, reveal, then it must err on the side of finding that there is an arguable case for the required link between the exercise of the complainant's rights under the *PSLRA* and the respondent's retaliation. Thus, it must preserve the complainant's opportunity to have his or her complaint heard in a proceeding that respects the reverse-onus provision and that will be decided on the basis of the formal evidence that the parties will present on the merits.

[92] The complainant also argued that *Plourde* held that the onus of proof was reversed in the *Canada Labour Code*, R.S.C., 1985, c. L-2, to level the informational playing field between employees and employers, given the inevitable evidentiary difficulty for employees attempting to prove that an employer's conduct was motivated by anti-union animus. As there are many legitimate reasons to dismiss an employee, he or she can experience difficulty establishing that his or her discharge was

because of union activity. Similarly, the complainant argued, once employees show that an action has been taken against them and that they are exercising rights under the *PSLRA*, the reverse-onus provision should apply. When the respondent decided to not extend the complainant's term appointment, he had expressed union president aspirations and had recently filed the abandoned complaint.

b. <u>For the respondent</u>

[93] The respondent submitted that the Board's jurisprudence makes it clear that the complainant must make an arguable case before the reverse-onus provision applies.

[94] The respondent argued that a mere allegation by the complainant that it did not offer to extend his term or offer him another appointment as retaliation for his interest in being a member of the union executive is not sufficient to establish an arguable case that it violated the *PSLRA*.

[95] The respondent offered the following decisions to assist my analysis: *Quadrini*, *Laplante v. Treasury Board (Department of Industry and the Communications Research Centre)*, 2007 PSLRB 95; and *Bouchard v. Treasury Board (Canada Economic Development)*, 2009 PSLRB 49.

[96] The respondent argued that *Quadrini* supports the proposition that there has to be some substance to an unfair labour practice complaint for the Board to have jurisdiction and that it is not enough for a complainant to make accusations and then rely on the inability of the other party to disprove them. The respondent submitted that, applying *Quadrini*, if I assumed that all the facts alleged in the September 19, 2008 complaint were true, no arguable case could be made that it contravened the subparagraphs of paragraph 186(2)(*a*) of the *PSLRA*. Therefore, the complaint should be dismissed for that reason alone.

[97] The respondent argued further that, applying *Bouchard*, a complaint is admissible only when the complainant can establish that the respondent's actions might have constituted an unfair labour practice within the meaning of the *PSLRA*. In this case, the complainant alleged only that the respondent did not offer him a term appointment as retaliation for his interest in becoming a member of the union executive. The complainant offered no proof of that allegation or that the respondent's denial of his request for reassignment to Government Street was due to his interest in

joining the union executive rather than due to its operational constraints. Similarly, the complainant offered no evidence for his allegation that the respondent continued to refuse offering him an appointment as reprisal for filing earlier unfair labour practice complaints.

[98] The respondent submitted that the complaints before me fail to establish any link between the unfair labour practice allegations and the facts and that, as such, they do not reveal an arguable case that it contravened paragraph 186(2)(*a*) of the *PSLRA*.

[99] The respondent argued that these are staffing grievances masquerading as unfair labour practice complaints and that the PSST has the exclusive jurisdiction to deal with staffing matters under the *Public Service Employment Act* (*PSEA*), enacted by sections 12 and 13 of the *PSMA*. The facts show that the complainant's term appointment was not extended a third time and that, after his term expired, he was not offered a new term or indeterminate appointment. The respondent submitted that no facts were presented that it made its staffing decisions for other than legitimate business and operational reasons. It requested that the complaints be dismissed.

[100] I reserved on the applicability of the reverse-onus provision. I determined that, whether or not it applied, I would hear formal evidence on the merits of the complaints. I also determined that the complainant would present his case first, in accordance with established Board jurisprudence, because the sparseness of the alleged facts made it difficult for the respondent to know in sufficient detail the nature of the allegations against which it had to mount a defence.

c. <u>Respondent's additional argument</u>

[101] At the end of the presentation of the evidence by the parties, the respondent argued that the test for the application of the reverse-onus provision was elevated. It argued that, had the Board applied the case law when the applicability of the reverse-onus provision was first argued as a preliminary matter, the test was whether the complaints, on their face, if the Board assumed the facts to be true, revealed an arguable case that the respondent contravened the subparagraphs of paragraph 186(2)(*a*) of the *PSLRA*. If not, the Board should dismiss the complaints.

[102] The respondent argued that, since the parties have presented their formal evidence, the test to be applied now is whether the complainant established a *prima*

facie case on the evidence that he presented. The respondent argued that I no longer need to assume that the allegations are true. I can, and should, determine whether the reverse-onus provision applies using the facts established by the evidence. It submitted that the evidence did not establish a *prima facie* that it had contravened any of the subparagraphs of paragraph 186(2)(*a*) of the *PSLRA*. The complainant's evidence, at most, shows mere speculation that a link existed between the alleged unfair labour practices and an anti-union animus or retaliation motive by the respondent's managers, who made the several challenged staffing decisions. Therefore, the reverse-onus provision does not apply, and the complaints should be dismissed.

2. Decision

[103] Both parties cited *Quadrini* as setting out the applicable jurisprudence for applying the reverse-onus provision.

[104] In my view, the complaints before me, on their face, show a reasonable link to the prohibitions listed in subparagraphs 186(2)(*a*)(i) to (iv) of the *PSLRA*. Were I to assume that all the allegations in the September 19 and December 22, 2008 and October 1, 2009 complaints are true, an arguable case could be made that the respondent contravened paragraph 186(2)(*a*).

[105] I agree with *Quadrini* that, when conducting the required assessment, I must be cognizant that, if I have any doubt about what the facts, assumed to be true, reveal, then I must err on the side of finding that there is an arguable case for the required link that the respondent contravened paragraph 186(2)(*a*) of the *PSLRA*, and I must preserve the complainant's opportunity to have his complaints heard in a proceeding that respects the reverse-onus provision.

[106] An initial reading of the complaints led me to conclude that it is at least possible that the respondent declined to transfer the complainant to Government Street and that it declined to extend his term appointment, or to offer him a new term or indeterminate appointment, because of his well-known aspirations to become a union executive member or because he exercised his right to file unfair labour practice complaints.

[107] Adopting the well-stated reasoning in *Quadrini*, which stated that, ". . . [w]hile there may well be different and more probable explanations for the sequence of events

alleged to have occurred by the complainant . . .", I am unable to conclude that there is no reasonable way to argue that a link exists between the respondent's decision to not grant the complainant's transfer request and its decision to not extend his term appointment for a third time, or to not offer him a new term or indeterminate appointment, to his exercise of the right to file unfair labour practice complaints under the *PSLRA*. On that basis, I am obliged to find that the complainant's September 19 and December 22, 2008 and October 1, 2009 complaints reveal an arguable case that the respondent contravened paragraph 186(2)(*a*). Determining whether a contravention of that provision in fact occurred must be made based on the evidence that the parties present on the merits.

[108] Given that the complaints before me, on their face, reveal an arguable case that the respondent contravened paragraph 186(2)(*a*) of the *PSLRA*, the reverse onus-provision falls on it to establish on a balance of probabilities that its decision to refuse to transfer, employ or re-employ the complainant was not motivated by his steps to become a union officer or representative or by his filing unfair labour practice complaints or that he might testify at a hearing. The respondent must prove on a balance of probabilities that its challenged staffing decisions were a reasonable exercise of its managerial authority.

IV. Summary of the evidence

[109] I informed the parties during the September 2010 pre-hearing conference call that, whether or not the reverse-onus provision applied, the complainant would present his evidence on the merits first at the October 2010 hearing because the sparseness of his allegations made it difficult for the respondent to know, in sufficient detail, the nature of the complaints against which it had to defend itself. By presenting his case first, the complainant had to provide the further particulars of his case before the respondent proceeded with its proof.

[110] The October 2010 hearing dealt mostly with the preliminary issues, including many about the production of documents. Once the presentation of the evidence started, the complainant immediately asked for an adjournment so that he might better prepare his case and so that the parties might work on an agreed statement of facts. His request was granted, on the understanding that, when the hearing resumed, the parties would be required to present their evidence and arguments.

[111] The hearing continued on May 2, 2011. On May 3, the parties presented an agreed statement of facts about CR-04 selection process 2007-CSD-EA-BC-SC-425 ("the CR-04 Process") and CR-03 selection process 2007-CSD-EA-BC-SC-411 ("the CR-03 Process"). An addendum to the agreed statement of facts was presented on May 4, 2011. Since the agreed statement of facts lists candidates by names, along with their test scores, and since those specifics are not required in this decision, I have chosen to not incorporate the agreed statement of facts in this decision. I will refer to it when appropriate.

[112] The parties worked cooperatively to determine a list of witnesses, given the breadth of the complainant's allegations about the respondent's staffing decisions and the difficulty he had narrowing down the staffing actions that he was challenging, due to his lack of data about the specifics of the respondent's staffing practices in CR-03 and CR-04 positions in Victoria and Nanaimo during the contested period. The complainant argued that, until he could examine particular witnesses, he knew only that he had been part of two external pre-qualified staffing pools (open to the general public), that he had applied for many positions over the contested period and that he was a productive worker with no discipline record. He also knew that the respondent had made job offers to other candidates whom he believed had lower marks and were less qualified that he was, so there had to have been misconduct on the respondent's part. The details of the respondent's staffing actions that would come from the testimonies of the witnesses would show a pattern of the respondent not offering the complainant an appointment because he was engaged in activities protected under the *PSLRA*.

[113] The complainant testified himself, and four other witnesses were called. The complainant introduced 63 exhibits, and the respondent submitted 14.

A. <u>Complainant's testimony</u>

[114] I have summarized the complainant's testimony, to the extent possible, in chronological order of the events rather than in the order in which the testimony was presented. I have also abbreviated or eliminated some of the allegations that he made against individuals not called as witnesses and for which no evidence was adduced by the parties.

[115] The complainant, despite my repeated instructions and cautions, had difficulty

presenting his evidence of the facts as opposed to his beliefs, opinions and arguments on their significance.

[116] The complainant testified that his employment history with the federal government formed an important background to the complaints before me and that it needed recounting, even though it fell well outside the period at issue or it involved redress mechanisms that he had accessed other than under the *PSLRA*. He said that it was necessary to fully appreciate the complaints before me and the retaliation against him.

[117] The complainant was a public servant for 10 years, from 1995 to 2005, employed in Victoria, first as a collections officer, classified PM-01, with the former Canada Customs and Revenue Agency (now the Canada Revenue Agency, or "CRA") and then as a customs inspector, classified PM-02, with the CBSA, until he resigned in December 2005.

[118] The complainant testified that, during his employment at the CRA, he was involved in stopping an illegal garnish issued by the CRA and in ensuring that the affected employee received a refund. As a result, in his words, he was eventually "forced to resign."

[119] The complainant worked for three summers, between 2002 and 2004, at the CBSA. He spoke out about the CBSA's use of immature students and the illegal staffing that he observed. He also expressed concerns about the CBSA's alleged racism against a minority Canadian. He testified that he filed two staffing complaints in summer 2004 that the PSST upheld and that the discrimination matter was currently before the Canadian Human Rights Commission (CHRC). He testified that he had been a witness before the CHRC in 2005 and again in 2008 and 2009.

[120] The complainant testified that he filed an age discrimination complaint against the CBSA in January 2005 because he was in a qualified staffing pool and was not appointed even though people younger than him were appointed from the pool.

[121] The complainant introduced two one-page documents, each titled "Investigation Case Report", dated May 30 and 31, 2006 respectively, by the Public Service Commission (PSC) about his complaints under the *PSEA*, concerning two different 2003 selection processes that were to create a pre-qualified staffing pool of candidates from

both inside and outside the public service for customs inspector positions, classified PM-02, at the CBSA. The PSC's conclusion was that both complaints were founded (Exhibit 7).

[122] The complainant testified that two of the respondent's managers interviewed him in August 2006. He provided them with copies of his CRA internal affairs complaint and his staffing complaints at the CBSA and told them that he had won both. He testified that he did so to demonstrate that he was a good employee who, after the whistle-blowing, did not get promotions and who was forced out.

[123] The complainant testified that, in October 2006, he received a call from HRSDC's HR unit and was asked for references. He testified that he told them that all his team leaders over the previous 10 years refused to provide references because he was blacklisted. He requested accommodation. He wanted HR to use his written performance reviews and a reference from Tim O'Neil, a former colleague and an acting team leader, and testified that, because of his grievances with the CRA and the CBSA; HR gave him the requested accommodation and did not require the usual current references.

[124] The complainant testified that, in February 2007, he filed a staffing complaint of some form. When asked about its relevance, he testified that "they" knew that he knew how to use different recourse mechanisms successfully and that "they" did not want a union leader who did, so "they" did not appoint him. The complainant testified that, sometime in summer 2007, he qualified into two staffing pools, the CR-03 and CR-04 Process pools, so in July 2007, he dropped his February 2007 staffing complaint.

[125] In September 2007, the respondent appointed the complainant as a term employee to work in a clerk position, classified CR-04, on the CEPP at Pandora Street. He was appointed by Jim Quinn, senior manager of the Victoria Payment Centre and manager of the CEPP team leaders, including the complainant's team leader, Ms. Smith.

[126] The complainant's term appointment was from September 13, 2007 to March 7, 2008. It was extended twice, first to March 28, 2008, and then to June 27, 2008.

[127] On appointment, the complainant was provided with a letter from the respondent that outlined the terms and conditions of his employment. His letter of offer of employment contained standard term appointment provisions, including one

stating that there was no guarantee that the term would be extended and a provision that, were his term not extended, he would receive 30 days' written notice.

[128] The complainant testified that, after the respondent appointed him, his concerns about immature students at the CBSA made it onto the CBC "National News" on October 1, 2007 and that he was interviewed and featured. The complainant testified that, the next day, the minister responsible for the CBSA ordered a misconduct investigation over inappropriate website postings. It has become known as the "CBSA *Facebook* scandal."

[129] The complainant testified that, on October 26, 2007, Kim Bergh, one of the respondent's managers responsible for Old Age Security/Canada Pension Plan (OAS/CPP) operations, sent a communication to all employees about a new social networking policy (Exhibit 19). He warned employees that they should watch what they said on social networks and that some comments could lead to dismissal.

[130] The complainant testified that he was happy with his CEPP experience, that he often worked overtime, that he was a good performer and that he had been referred to by one manager as the rock star of the team or as the "go-to" guy. He testified that he had no discipline on his file.

[131] The complainant testified that in January 2008 he wanted to run for an executive position in a union local election that was scheduled for February 27, 2008 at Government Street.

[132] The complainant testified that, at that time, different union locals represented HRSDC employees at different work sites. Although the CEPP employees at Pandora and Government Streets were served by the same union, each location had separate union locals. A requirement for employees running for union office was that they had to be physically located at the work site where the election was to be held.

[133] The complainant emailed Mr. Quinn in January 2008 and requested an urgent transfer to work at Government Street so that he could run for a union executive position. The complainant testified he made it clear that the sole reason he was seeking the transfer was to run in the upcoming election. The respondent unreasonably refused his request.

[134] The complainant testified that he also sent an urgent deployment request to

Mr. Bergh for deployment to Government Street so that he could run in the upcoming February 2008 union local election.

[135] The complainant introduced as evidence a map showing that Pandora and Government Streets are only a few blocks apart.

[136] In the abandoned complaint, the complainant alleged that the respondent's refusal to transfer or deploy him to Government Street so that he could be eligible to run for a union executive position was an unfair labour practice. He alleged that there was no reason, other than his union aspirations, to deny his request and that it was illegal for the respondent to prevent him from running for a union executive position.

[137] The complainant withdrew the abandoned complaint. He testified that he did so for health reasons and because the election had taken place, so a transfer was no longer needed.

[138] On February 1, 2008, the complainant had an altercation with a co-worker, whom I will identify as "IM." The complainant believed that IM had publicly belittled him because the altercation took place in an open office area in front of two other co-workers. The complainant testified that he was upset and that he emailed Ms. Smith to discuss the matter with her immediately. When Ms. Smith did not reply, he went to see his union president and requested his assistance in obtaining an immediate meeting with her. The complainant testified that the union president then put a note on Ms. Smith's desk requesting that she meet with the complainant immediately. Ms. Smith met with the complainant later that day.

[139] The complainant testified that, when he met with Ms. Smith, he showed her a copy of the Treasury Board's *Policy on Prevention and Resolution of Harassment in the Workplace* ("the Harassment Policy") and pointed out where he felt that IM had crossed the line. He demanded accommodation in the form of physical separation. In response, Ms. Smith changed his work location and duties so that he would not interact daily with IM. In March 2008, IM moved to a position at Government Street.

[140] The complainant testified that he found out in mid-March that he did not receive his requested transfer to Government Street. Later, he attributed it to the fact that Ms. Smith provided a reference that contained an unfair depiction of his altercation with IM.

[141] Although Ms. Smith's reference was dated February 11, 2008, the complainant testified that he did not learn of it until mid-April 2008. The complainant testified that Ms. Smith's comment in her reference that he sought assistance from the union local president to set up a meeting with her, rather than talking to her first, showed anti-union animus and retaliation on her part towards him because she was commenting on what he had a right to do – that is, to speak with his union president whenever he wished. The complainant testified that Ms. Smith's comments in her reference about how he handled his harassment dispute with IM were inappropriate. He wanted the comments changed. When Ms. Smith refused to change her comments, the complainant consulted Mr. Quinn in mid- to late April 2008.

[142] Mr. Quinn told the complainant to meet with Ms. Smith and try to resolve the matter. The complainant found Mr. Quinn's response unacceptable. He wanted Mr. Quinn to talk to Ms. Smith about her reference, which the complainant felt had cost him his transfer to Government Street, and he wanted Ms. Smith to submit a corrected reference. Mr. Quinn's response was that he had worked with Ms. Smith for over 10 years when she was the union president and that he had a good working relationship with the union. The complainant testified that Mr. Quinn did not agree to take any corrective action with respect to the reference.

[143] The complainant testified that he emailed Mr. Bergh on April 30, 2008. He introduced his email as an exhibit (Exhibit 30). He informed Mr. Bergh of all the redress actions that he had outstanding at that time and offered to meet, to resolve the issues early. He noted that his email specifically stated that he had filed a human rights complaint against HRSDC about employment issues covering August 2006 to the time of his complaint. He informed Mr. Bergh that he had also filed the abandoned complaint with the Board about the denial of his repeated requests to be transferred to Government Street so that he could run for the union executive and that all his requests, in his opinion, had been unreasonably denied. He referred to having to amend his human rights complaint to include Ms. Smith's inappropriate comments in her reference. He stated that a fourth issue was a staffing complaint that he was soon to file with the PSST. Mr. Bergh did not reply.

[144] The complainant testified that he was informed in mid-May 2008 that the union local president at Government Street had resigned, triggering an election within 60 days. He immediately renewed his request to be immediately transferred or deployed

to Government Street. He testified that the respondent unreasonably blocked all his requests and alleged that it did so because it did not want a knowledgeable person who knew how to use the redress mechanisms as a union executive member at Government Street.

[145] The complainant testified that he complained to Ms. Smith about a toxic work environment, that he requested time off for counselling and that she granted his request.

[146] The complainant testified that the respondent retaliated to the abandoned complaint by giving him a termination letter two weeks later. The letter was dated Friday, May 20, 2008 and was sent by Priority Post, but the complainant testified that he did not receive it until Monday, May 23, 2008. It was signed by Ann Milne, a senior executive from the Alberta region, and was effective June 27, 2008, when his term appointment was to expire.

[147] On May 22, 2008, the complainant emailed Andy Netzel, the regional executive head and Mr. Bergh's superior. He testified that he told Mr. Netzel that he had a deployment request on file with Mr. Bergh so that he could work at Government Street and therefore be eligible to run for union office and that Mr. Bergh had not answered his email of three weeks earlier. The complainant also told Mr. Netzel that he had already filed the abandoned complaint because of the denial of his earlier transfer request and that he would file another unfair labour practice complaint were his request for a transfer or deployment to Government Street denied. The complainant entered in evidence his email exchanges with Mr. Bergh and Mr. Netzel to support his testimony (Exhibits 30, 32, 35 and 36). The complainant testified that he wanted Mr. Netzel to intervene and grant his deployment request.

[148] The complainant testified that he also met with Mr. Quinn on May 26, 2008. The complainant was upset that he still had not been transferred to Government Street, despite his many requests, and that he was being laid off with a termination letter. He testified that Mr. Quinn told him that he could go home on leave with pay until June 2 or 3, 2008, when a meeting had been scheduled with Ms. Milne.

[149] The complainant wrote to Mr. Netzel on May 26, 2008 (Exhibit 36), complaining about Mr. Quinn, Ms. Smith and IM and informing Mr. Netzel that he was filing a formal harassment complaint with him against Mr. Quinn, Ms. Smith and IM over their

handling of the harassment that he suffered from IM and over Ms. Smith's unfair reference. He testified that he wanted Mr. Netzel, as the delegated manager, to get involved and to straighten everything out.

[150] On May 29, 2008, the complainant emailed a list of items to Ms. Milne that he wanted to discuss with her at their upcoming meeting (Exhibit 37). Ms. Milne replied, stating that the meeting would be by phone, not in person, and that she would talk only about the non-extension of his term appointment, not his many outstanding legal actions. The complainant testified that he was angry because he had understood that Mr. Quinn said that he could discuss all his outstanding matters with Ms. Milne. The complainant testified that the fact that Ms. Milne would not discuss his list of issues was evidence of her anti-union animus and that it showed that the real reason for laying him off was a pretext.

[151] The complainant testified that Ms. Milne said that, due to his health problems, he could stay home on leave with pay until his term appointment expired.

[152] The complainant testified that he filed a reprisal complaint with the Office of the PSIC on June 19, 2008. The PSIC has jurisdiction to administer the reprisal protection provisions of the *PSDPA*. He introduced that complaint as Exhibit 12, which shows that the PSIC had determined to not investigate it. The PSIC's decision is not dated, but the cover letter is date stamped October 29, 2008.

[153] The complainant testified that, in mid-June 2008, he emailed Claude Jacques, manager of the respondent's Corporate Security Section, alleging that the respondent had retaliated against him as a whistle-blower and requesting that a criminal investigation be launched against Mr. Netzel, Mr. Quinn, Don Campbell (an AOS/CPP manager), Mr. Bergh, Ms. Smith and Ms. Milne for the "criminal conspiracy of blacklisting and harassment." He adduced the email as Exhibit 40, which shows that he emailed his request on June 16, 2008 and that Mr. Jacques replied on September 30, 2008 denying his request, with reasons.

[154] The complainant testified that he qualified into two valid staffing pools and that he applied to over a hundred positions both before and after his term appointment ended. The respondent did not reappoint him into either a term or indeterminate appointment. Therefore, he filed the September 19, 2008 complaint (Exhibit 3).

[155] The complainant testified that he continued to apply for CR-03 and CR-04 positions with the respondent for which he was qualified in the two staffing pools, from September to December 2008. However, despite being qualified and having been a top performer in his previous positions, he did not obtain an appointment. Thus, he filed the December 22, 2008 complaint (Exhibit 2).

[156] The complainant testified that, when he applied for a CEPP position in summer 2007, HR accepted a reference from Mr. O'Neil, dated sometime in summer 2007, before Mr. Quinn appointed the complainant. The complainant introduced Mr. O'Neil's reference letter in evidence (Exhibit 15). It shows that Mr. O'Neil's reference was emailed to the potential hiring manager on July 19, 2007. It states that Mr. O'Neil was the complainant's direct supervisor at different times between 2001 and 2006. However, when the complainant applied for positions in 2008 and 2009, HR insisted on a reference from his most recent team leader, Ms. Smith.

[157] The complainant filed a complaint with the minister responsible for HRSDC ("the Minister") in February 2009. On March 24, 2009 (Exhibit 10), he received a reply stating that both staffing pools in which he was qualified were still active. He testified that, not long after that letter, the pools were expired, and he was not informed of it.

[158] On July 13, 2009, the complainant sought to have the abandoned complaint reinstated. The Registry informed him by letter dated July 15, 2009 that it could not.

[159] The complainant filed the October 1, 2009 complaint, in which he alleged the respondent's ongoing refusal to employ him since June 27, 2008 was because he filed unfair labour practice complaints some time earlier. He alleged that the respondent never informed him that the CR-03 and CR-04 staffing pools into which he was qualified expired. He testified that he received that information from his union only on July 21, 2009 (Exhibit 39). He alleged that the respondent expired the pools to avoid offering him an appointment.

[160] The complainant testified that a member of the respondent's HR staff, Nancy Lam, an operations coordinator in Processing and Payment Services, in a note (Exhibit 47) to Elaine Li, an HR consultant and resourcing person, stated that he was in the staffing pools and that he might complain. He stated that that was evidence that the staffing pools were expired as retaliation against him for his unfair labour practice complaints.

[161] In cross-examination, the complainant agreed that the he knew that, as a term employee, the respondent was not required to extend his term appointment and that it was so stated in his letter of offer of employment. He agreed that he had received a non-extension of term letter, not a termination letter, and that his term had been extended twice. The complainant also agreed that he received the letter stating that his term would not be extended. That was at least a month before the term expired. He agreed that he knew of at least three other CEPP employees who also were not renewed at that time.

[162] When asked why the respondent would have extended his term appointment twice if it had anti-union animus against him, the complainant testified that there was work to be done, that he was a good performer and that he had a good working relationship with Mr. Quinn. He agreed that Mr. Quinn had shown anti-union animus against him only after the complainant filed a harassment complaint against him, Ms. Smith and IM in May 2008.

[163] On cross-examination, the complainant testified that Ms. Smith was not in her office when he emailed her about his altercation with IM. With no response from her after 30 to 45 minutes, he visited his union president, seeking assistance for an immediate meeting with Ms. Smith. He testified that she met with him within two hours of his email.

[164] On cross-examination, the complainant agreed that Ms. Smith passed away before the hearing and that she had been the union local president for over 10 years before assuming the CEPP acting team leader role. He also agreed that he had a good working relationship with Ms. Smith until he found about her reference.

[165] On cross-examination, the complainant confirmed that Ms. Smith did not refuse to talk to him but that she did not respond to his email as quickly as he would have liked. For that reason, he consulted the union local president.

[166] The complainant testified that Ms. Smith showed her anti-union animus towards him when she commented negatively on his role in the IM altercation, which blocked his transfer to Government Street.

[167] On cross-examination, the complainant acknowledged that the Harassment Policy states that one should first speak with the alleged offending co-worker. If the

matter is not resolved, one should then contact the team leader. However, the complainant insisted that the Harassment Policy does not require him to act in this way.

[168] On cross-examination, the complainant agreed that he had emailed Ms. Smith, stating that the IM matter was resolved. However, he testified that he sent his email before he received a copy of her reference. He testified that he would not have written that the matter was resolved had he known how she described his actions.

[169] The complainant testified that he understood that Ms. Smith forwarded his note to Mr. Quinn stating that his altercation with IM had been resolved and that Mr. Quinn thought that the matter was settled.

[170] The complainant also agreed in cross-examination that Ms. Smith was union president for many years (between 10 and 13 years) until approximately 6 months before the complainant's altercation with IM, when she accepted the position as the acting manager and his team leader, to help implement the CEPP. The complainant also agreed that he got along well with Ms. Smith until he learned of her comments about the harassment incident in her reference. The complainant also confirmed that Ms. Smith could not be called by either party as a witness as she had passed away before this hearing.

[171] In cross-examination, the complainant acknowledged that his union was not as supportive as it should have been with his transfer and deployment requests.

[172] The complainant agreed that Ms. Milne stated that she would be open to mediation after his outstanding human rights complaint was resolved.

[173] When asked on cross-examination why he thought Ms. Milne's refusal to discuss his list of demands was a pretext and that it constituted anti-union animus, the complainant answered that Mr. Quinn had told him that he could discuss all his issues with Ms. Milne, but she would not. He admitted that he did not know if Mr. Quinn had informed Ms. Milne of that fact.

[174] The complainant testified in cross-examination that he was given leave with pay from the time he filed the harassment complaint on May 26, 2008 until his term appointment expired on June 27, 2008. Although he was satisfied with the accommodation in the form of leave with pay as it was better than leave without pay,

he was not completely satisfied with the accommodation, as he would have been happier had he been accommodated by being transferred to Government Street and assigned meaningful work there.

[175] The complainant agreed in cross-examination that the Minister had no obligation to notify him when the staffing pools were expired. However, he insisted that the Minister should have notified him as a courtesy, given their history. He agreed that by history he meant the Minister's reply letter to him of March 24, 2009. However, seven days later, the CR-03 staffing pool was closed. The complainant testified that the CR-04 pool was closed several months later.

[176] The complainant testified that he filed the October 1, 2009 complaint after he learned from the union on July 21, 2009 that the staffing pools had been expired. The complainant argued that the CR-04 pool was set up as indefinite and that, maybe, so was the CR-03 pool. The complainant argued that, because the respondent closed the pools before he was appointed when jobs were still available, it was evidence of retaliation against him. He argued that, when the respondent closes a pool that still contains qualified people and job openings still exist, and it is aware that he has filed several unfair labour practice complaints, it constitutes a refusal to appoint him because, once a pool is closed, he cannot be appointed unless he qualifies for a new pool.

B. Ms. Li's testimony

[177] Ms. Li's job is to provide staffing advice and guidance to management. She has been employed in that position for approximately four years. She holds a Bachelor of Commerce degree with an HR speciality, and she is a Certified Human Resources Professional.

[178] Ms. Li testified about how the HRSDC staffing process works when a manager wishes to fill a vacancy or one that is anticipated.

[179] A sub-delegated manager with a vacancy, or an anticipated vacancy, in his or her area speaks with the HR consultant assigned to the manager's area of responsibility about the manager's options. They include whether to advertise the position externally (to the general public) or to keep it internal to the public service or whether to fill the vacancy by deployment or by an acting appointment. The manager or executive

director then consults the Vacancy Management Committee (VMC), which, although it has formal terms of reference, is designed to manage staffing for the region as a whole, on requests from executive directors. Its emphasis is on budget matters.

[180] If the sub-delegated manager or executive director receives approval, the hiring manager then sends a staffing request to HR and works with an HR consultant to fill the vacancy. HR professionals, such as Ms. Li, do not attend VMC meetings.

[181] Ms. Li testified that, in the selection process, the selection board chairperson is the sub-delegated manager responsible for the overall process. The hiring manager who has a vacancy (or anticipates one) may wish to use the staffing pool of pre-qualified candidates, regardless of whether the hiring manager initially set up and ran the pool process. A staffing request can include a particular pool.

[182] Ms. Li testified that, for example, if an advertised external process is approved, statement-of-merit criteria are developed for the position that contains a list of essential qualifications that all candidates must meet to be considered along with an asset qualifications list that details the desirable qualifications for the position.

[183] Ms. Li gave the following as examples of merit criteria that are often listed: education; experience; ability and skills; personal suitability; operational requirements based on the business needs of the manager, such as a willingness and ability to work overtime; organization needs, such as employment equity; the specifics of the conditions of employment, such as an enhanced reliability security clearance; credit check; and official language proficiency, which must be in place at the beginning of the employment and then maintained.

[184] Ms. Li testified that the hiring manager has decision-making power over the statement-of-merit criteria. She testified that, if a manager wishes to include criteria that HR advise against, such as a statement that might be perceived as discriminatory, then HR work with the manager to try to resolve the matter. However, at the end of the day, it is the manager's decision, but in such cases, HR note the matter in the file. She testified that she did not see any notes in any file she reviewed for this hearing indicating that such a situation occurred.

[185] Normally, HR suggest that the sub-delegated manager use more than one assessment tool for each competency in the statement-of-merit criteria, for example,

an interview, a written test and references. Normally, references are requested at the end of the selection process.

[186] Ms. Li testified that HR then advise management how to develop the criteria on which the manager or selection committee will measure the merit criteria. The HR system automatically screens out applications by non-Canadians (because the *PSEA* prescribes a preference for Canadians). Staff then screen for the listed qualifications, such as essential education and experience, as stated in the advertisement.

[187] The selection process includes an assessment of the candidates, which includes a written test or interview and a requirement to provide references. HR immediately send a result letter to applicants not qualified for the staffing pool. Once everyone is assessed, HR send result letters to all candidates meeting the essential criteria stated in the advertised merit criteria.

[188] The chairperson of the selection board, who is the sub-delegated manager responsible for the overall process, and the assessment team are responsible for preparing a report detailing the events of the selection process from the advertisement through the creation of a qualified staffing pool for the type of position, and an assessment summary report, which is a assessment summary report listing all the candidates qualified into the pool. Their names are listed in alphabetical order. The candidates are not ranked, but a set of marks is listed for each person, created from the assessed merit criteria.

[189] Ms. Li testified that Exhibit 17 is an example of an assessment summary report, taken from the CR-04 Process. It lists the candidates and the required competencies in the statement-of-merit criteria across the top. It has a pass or fail column and on the right side, an appointment column that allows HR to track appointments made from the staffing pool, and it specifies whether the person, when appointed, was offered a term or indeterminate appointment.

[190] Ms. Li described how a sub-delegated manager makes an appointment from the staffing pool. If the manager has a vacancy, the manager can consult the pool of qualified candidates, use a deployment to fill the vacancy or appoint a priority person. Ms. Li testified that, under the *PSEA*, candidates are not ranked based on their total scores.

[191] Ms. Li testified that managers can weight different competencies in the statement-of-merit criteria to fill their particular needs, a practice referred to as determining the "right fit" for the position. Ms. Li gave as an example that a manager might choose the competency of high interpersonal skills as the right fit for the position. Assuming that that competency was listed in the statement-of-merit criteria and assessed in all candidates, the manager will probably look at the skill assessment and choose the person with the highest score on that competency. If more than one candidate had the highest score on that competency, the manager will look at other assessed competencies such as ability to work under pressure and keep going until he or she finds the best-fit candidate for the vacancy.

[192] Ms. Li testified that the sub-delegated manager, after determining the right fit for the position, fills out and submits a staffing request form for HR that specifies the candidate chosen and the selection rationale, along with financial coding for the budget from which HR are to take the funds. HR review the staffing request form to ensure that all essential information is included and that the selection rationale makes sense for any interested third parties should the staffing be contested or if the PSC reviews the staffing decision for compliance with appointment policies.

[193] Ms. Li testified that, if the manager cannot explain the selection rationale completely or appropriately, HR try to have it done properly. Once the staffing rationale is approved, a letter of offer of employment is prepared for both the sub-delegated manager and the candidate to sign. The letter of offer lists matters such as: the position's title, group and level; its location; the relevant business line (i.e., unit); whether the appointment is a term or indeterminate and if it's a term appointment, it will specify the terms and state that employment is not expected to exceed the term; information about the union the employee will belong to or that it is not a unionized position; links to the *Values and Ethics Code for the Public Service* and policies and information about how employees can access their leave; and any conditions of appointment, such as the required security clearance.

[194] After both the delegated manager and the candidate have signed the letter of offer of employment, the candidate takes the oath of office and the signed letter of offer goes into the staffing file in HR. HR then note in the appointment column of the spreadsheet that the candidate has accepted or declined the offer of employment and lists whether the employee has been appointed on a term or indeterminate basis.

[195] Ms. Li testified that, if another manager wants to staff a vacant position in another location with candidates of the same group and level, that manager has a number of options, including using the established staffing pool, deploying someone, or appointing another employee, classified at a lower level, as acting in the position. Ms. Li also testified that, if the sub-delegated manager who set up the pool has another vacancy, the manager is not obliged to use the pool, although it generally would make sense to use it. The manager can use a different selection rationale than was used for the earlier vacancy as long as the assessed competencies in the statement-of-merit criteria are used again, including the operational requirements (such as a drivers licence or ability to travel) and the organizational needs. The emphasis is on transparency. Merit criteria must have been advertised and assessed for all candidates.

[196] Ms. Li testified that, for a term appointment, a delegated manager has options when choosing a candidate. The manager can consider the candidate's performance in his or her current position, consider candidates with a specific skill, and consider references from current supervisors. Although a manager can examine candidates' marks in the staffing pool out of which they were originally offered appointment, Ms. Li testified that she recommends that sub-delegated managers use candidates' current performance combined with a reference from their current team leaders, because often candidates develop more skills and experience than they had on their initial pool staffing.

[197] Ms. Li testified that she was not in the HR Vancouver office when the complainant applied for the CEPP term position and was appointed by Mr. Quinn. However, she understood that the complainant's position was that all his team leaders over the 10-year period before summer 2007 had refused to provide a reference for him because he was blacklisted and therefore required accommodation. Based on that, HR granted him the accommodation that he requested and allowed him to submit an older reference from Mr. O'Neil, which referred to the complainant's employment between 2001 and 2006, rather than one from his most recent team leader.

[198] Ms. Li testified that, when the complainant applied for a transfer or deployment in 2008 or for new positions later that year, circumstances were different. The complainant had had recent work experience with the CEPP team leader, Ms. Smith. Nothing justified disregarding the more up-to-date reference from his most recent team leader. Ms. Li testified that he was treated the same as other candidates with

respect to references. Any differential treatment the complainant received was in the accommodation granted to him in summer 2007 in response to his request. HR at that time waived the standard requirement for a work assessment from his current or most recent team leader.

[199] Ms. Li testified that every term employee receives a letter stating whether his or her term appointment has been extended, and a date is specified if the term is extended.

[200] When asked about the facts that a manager may consider when determining whether to extend an employee's term appointment, Ms. Li testified that the manager generally would extend the term if there is work but not if the employee is not working out, the position no longer exists or the employee is part of a sunset program for which the funding has run out. Ms. Li testified that, under the *Term Employment Policy*, term employees receive at least one month's written notice that their terms will not be extended.

[201] Ms. Li identified Exhibit 33 as the letter specifying that the complainant's term appointment would not be extended, which she prepared. It notified the complainant that his term appointment would not be extended. It provided the complainant with the minimum one-month notice required by the *Term Employment Policy*.

[202] Ms. Li testified that the CEPP was a sunset program.

[203] Ms. Li testified as to the process involved when an employee transitions from a term to an indeterminate appointment. She testified that an employee appointed on a term basis can be switched to an indeterminate status only if the initial staffing pool was advertised as being for term and indeterminate appointments. If so, then there usually is an advertised process, and the person has to apply for the indeterminate appointment.

[204] Ms. Li testified that, in the past, when each province had its own staffing pools, the pools often did not have expiry dates, but that there is now a Western Region that encompasses British Columbia, Alberta, Saskatchewan, the Yukon and the Northwest Territories. HR determined that it is better management to set expiry dates on the pools. When the expiry date nears, HR ask the sub-delegated manager responsible for the advertised process and pool whether the pool is still needed or whether the group

and level need to be changed and the pool expired. When a pool is expired, it may still contain candidates.

[205] In cross-examination, Ms. Li testified that she works in Vancouver as part of an HR resourcing team of approximately eight consultants and that her unit has no people working in Victoria. In 2008-2009, she was part of an HR resourcing team of approximately seven consultants, and she did not work with labour relations at that time.

[206] Ms. Li testified that she never worked with Ms. Milne or with Mr. Quinn during the complainant's two term appointment extensions in 2008. She drafted the letter that his term would not be extended (Exhibit 33). She worked in the Edmonton office at that time, as shown on the bottom of the letter.

[207] In cross-examination, Ms. Li testified that she is in staffing, not labour relations, and that she did not start handling staffing actions for OAS/CPP positions in Victoria until later in 2008. She first heard of the complainant's complaint when the labour relations branch contacted her about the rationales for the challenged staffing decisions.

[208] In cross-examination, Ms. Li testified that she was not aware of any ministerial complaints filed by the complainant. When asked when she first became aware that the complainant wanted to be appointed from the CR-03 and CR-04 staffing pools in 2008 and 2009, she replied that it was when the PSC contacted her after the complainant asked it to launch an investigation into his qualifications in the CR-04 Process. She testified that the PSC's questions and her answers would have been placed in the HR file.

[209] Ms. Li testified that she is an excluded employee, that she has had no problems with the union and that she was not aware of the complainant's desire to run for a union position.

[210] On cross-examination, Ms. Li testified that she was not the HR consultant when the staffing process for the processes in Exhibit 16 (which include the CR-04 Process and the CR-03 Process at issue here) was run, so she was not aware of anything about the process that was not in the file, which she read in response to the complainant's access-to-information request. She testified that his request asked for the rationales

used for the staffing processes at issue and that it did not provide his name.

[211] In cross-examination, Ms. Li testified that she had not been part of determining whether the complainant was qualified for the "466 Process" listed in Exhibit 16. She repeated that she was not an HR consultant when the process was run, so she was not aware of anything not in the file. She testified that she had the notes in the CR-04 Process file when she received the access-to-information request on that file, that the request was for staffing rationales and that it did not provide the name of the person who made it.

[212] In cross-examination, when asked how a hiring manager obtains the names of qualified candidates, Ms. Li testified that, if an HR consultant is involved, and the manager wants to appoint a candidate through a particular staffing pool, then HR help the manager determine the best fit. HR then draw names from the pool.

[213] Ms. Li testified on cross-examination that she did not work with Dianne Ginter on the staffing pool referred to in the agreed statement of facts and that she did not know whether, in 2007-2008, managers had access to the relevant pools or assessment summary reports. Ms. Li testified that the practice of HR has changed; they no longer list candidates' names in the pools, just their marks.

[214] When asked about how she prepared for the hearing, Ms. Li responded that she went through the agreed statement of facts and the staffing file to make sure that agreed statement of facts was accurate.

[215] On cross-examination, Ms. Li agreed that a term appointment can be ended early with 30 days' notice and that an acting appointment can end earlier than stated in the letter of offer of employment. As an example, she stated that budgets can end, causing terms or acting appointments to end early. Ms. Li also testified that, if a term accepted by a candidate in the staffing pool expires, a manager can offer a new term appointment to the same candidate as long as the pool is still active.

[216] In cross-examination, Ms. Li testified that no HR practice allows managers to take the results from one pool process and "roll people over who aren't now in indefinite terms" into a new staffing pool, as the complainant argued should have been done for him, but it is an option that managers can choose. However, she has seen it happen only about three times because it is difficult to do since the assessed

statement-of-merit criteria have to be the same for both pools. They usually are not.

[217] Ms. Li testified about Exhibit 16. She stated that HR never make the assessment summary staffing spreadsheets. The sub-delegated manager prepares the assessment summary report, and the role of HR is to update the appointment information column.

[218] Ms. Li testified that, with respect to Exhibit 19, the CBC "National News" story, she did not recall seeing the show but she saw the article. However, she does not recall when and if she made the connection to the complainant at that time, although she does now.

[219] In response to the complainant's question suggesting that CR-03 and CR-04 staffing pools were expired because Ms. Delgaty, the sub-delegated manager of the CEPP and Mr. Quinn's supervisor, was out to get him, Ms. Li testified that she only knew Ms. Delgaty professionally, that she has never met her outside of work and that she has never met Mr. Delgaty's husband. Ms. Li also insisted that she initiated the change that set expiry dates on staffing pools as part of her "clean-up pools" project aimed at better HR management of the pools. Ms. Li testified that she wrote Ms. Delgaty, the sub-delegated manager for some of the pools, and sought approval to have the CR-04 pool expire on a specific date, rather than continue as an indefinite pool. Ms. Delgaty accepted her recommendation (Exhibit 53). She also noted that the four pools listed on page 2 of Exhibit 48 (the CR-04 Process, the CR-03 Process and two others) expired on March 31, 2009, not just the two pools that the complainant was part of, and that those four pools were not just for the Victoria area.

[220] On cross-examination on Exhibits 47, 48 and 49, Ms. Li testified that the emails in question were exchanged at a time when Ms. Lam worked for OAS/CPP and Mr. Bergh, that Ms. Lam's reference to the complainant was about the fact that the complainant at that time had several outstanding staffing complaints, and that Ms. Li's email reply to Ms. Lam made clear that the expiration of the staffing pools was an HR initiative to better manage the pools and had nothing to do with the complainant.

[221] A sentence in the email of January 5, 2009 from Ms. Lam to Ms. Li (Exhibit 48) reads as follows: "Chris Hughes is in the 425 staffing pool [the CR-04 Process] and if the pool is terminated may cause him to raise a complaint." Ms. Li testified that she understood that Ms. Lam's comment referred to the fact that the complainant, at that time, had at least three outstanding staffing complaints and that she was raising the

question of whether closing the CR-04 Process pool before the complainant was appointed might lead to another complaint.

[222] As for Exhibit 50, Ms. Li stated that she did not know why the respondent later decided to extend the CR-04 Process staffing pool to June 30, 2009. However, Exhibit 50 clearly shows that management can, and did, extend one of the pools the complainant was in, which was created in 2007, beyond March 31, 2009.

C. Ms. Delgaty's testimony

[223] From 2005 to 2009, Ms. Delgaty was the director of payments and processing for HRSDC, initially for British Columbia, and later for Alberta, the Yukon and the Northwest Territories as well. It was a shared position. In June 2007, Ms. Delgaty assumed the additional responsibility of being the lead director for the CEPP in Victoria.

[224] Ms. Delgaty assumed the position of Regional Director General for the Prairie Region for the CBSA in January 2011. She has been a career public servant since 1980, holding positions with the CBSA for approximately 20 years and then with the respondent for approximately 10 years until she accepted her current appointment. During those 10 years, she always worked in Vancouver, except for 10 months when she worked in Manitoba.

[225] Ms. Delgaty started working in staffing in 1982. From 2003 to 2007, she was involved mostly in mid-management recruitment. After 2007, she was asked to limit her staffing activities to management recruitment, primarily at the PM-05 and PM-06 groups and levels. Given her extensive staffing experience, she is often called on for staffing advice.

[226] When Ms. Delgaty assumed responsibility for the CEPP, approximately 125 employees had to be appointed and trained within a two-month period. This required creating qualified staffing pools, selecting candidates, securing security clearances for them and training them so that they could begin receiving and processing claims into the system by mid-September 2007.

[227] Ms. Delgaty testified that the CEPP was a "finite program" and that its role was to process *Indian Residential Schools Settlement Agreement* claim applications into the system within a specified time and to process the payments once the claims had been

evaluated and approved by the Department of Indian Affairs and Northern Development. The CEPP did not evaluate the applications. Because the CEPP was finite, employees were appointed on a term basis.

[228] Ms. Delgaty testified that she was the sub-delegated manager for the CR-04 Process, which was used to appoint candidates to CEPP positions. Her responsibilities were to coordinate the process, to ensure that the advertisements were posted, to ensure that the tools would assess the candidates' essential qualifications and to review the selection board reports (prepared on the selection processes) created by the sub-delegated manager or the selection board chair.

[229] Ms. Delgaty testified that she signed off on the pre-hiring candidate list for the CEPP and that the CR positions were generally fairly generic and so were the assessment tools.

[230] Ms. Delgaty testified that she created a recruitment unit to handle the staffing of all processing and payments units and that she had responsibility for overall compliance with staffing policies.

[231] Ms. Delgaty testified that she has never met the complainant and that she had never heard his name before he joined the CEPP in September 2007. She recalled that the new staff members were pointed out to her when she and her boss, Ms. Milne, went to Victoria in September 2007 for the official CEPP launch. She may have introduced herself to some of them, but she did not meet the complainant. Mr. Quinn did not provide any information about the new staff except to identify them as new appointments. The first time she came across the complainant was when she saw his name in print in the CBC "National News" story in October 2007.

[232] Ms. Delgaty testified that the next time she encountered the complainant was around April 2008, when one of her managers called her about a staffing problem or conflict that involved an allegation that the complainant was misusing government equipment. She had nine managers reporting to her, whom she encouraged to call her if a staffing problem came up that might result in discipline. She advised the manager to find out how to find facts.

[233] Later in April or early May 2008, Ms. Delgaty received an email from Mr. Bergh about CEPP staffing actions. She then followed up by calling her boss, Ms. Milne, who

advised Ms. Delgaty that she was handling the communications with the complainant and that Ms. Delgaty was not involved. Ms. Milne was a member of the VMC during the time period. Ms. Delgaty, although involved in CEPP staffing, was not involved with the VMC.

[234] Ms. Delgaty recalled another contact from Mr. Quinn at that time about an employee who wanted to transfer from Pandora Street to Government Street. She made several comments, as follows: the CEPP was a finite program and would soon wind down because the claims had started to dwindle — no term appointments were being extended; and the complainant was appointed to do CEPP work at Pandora Street and there was no business need for him to work at the other office. Ms. Delgaty also noted that in July 2008 a specialized processing unit would be set up in Calgary and that, by August 31, 2008, the residual CEPP claims would be handled there.

[235] Ms. Delgaty testified that the complainant initiated the email exchange in Exhibit 52. The complainant's email was about the CR-04 Process. He raised concerns about its validity, noted that he was not chosen and suggested that some inappropriate staffing actions were happening.

[236] Ms. Delgaty testified that she received an email from Ms. Li, whom she did not know, stating that it was time to expire the staffing pools. That email was her only information when she agreed to the expiration of the pools.

[237] Ms. Delgaty testified that she was uncomfortable with the complainant's reference, in his staffing complaints, to her husband, who had no connection with the respondent, and to the complainant's allegations about her staff committing violations. She had no knowledge of any of it.

[238] Ms. Delgaty testified that, in October 2007, she and her husband discussed the CBC "National News" story as she had been a summer student at the CBSA and that she thought that it was too bad that the CBSA had not been able to respond.

[239] Ms. Delgaty next communicated with the complainant in 2008 about a couple of staffing files that were the subject of staffing complaints that he had filed. Ms. Delgaty was not working at HRSDC at that time as she was out of the office from mid-September 2008 to April 2009. She testified that she next communicated with the complainant when she received a vicious letter from him in early October 2009, which

made accusations against her and her husband. I upheld an objection by the complainant and ruled that evidence of his communications with Ms. Delgaty after October 1, 2009, when his last unfair labour practice complaint was filed, was not relevant. However, he later introduced his communication with Ms. Delgaty of October 7, 2009 as evidence (Exhibit 52).

[240] Ms. Delgaty testified that she oversaw the creation of the CR-04 Process and the appointments made from it. It appeared that the complainant alleged anti-union animus against him because her husband was in management at the CBSA at the time of the CBC "National News" story, the respondent failed to extend his term appointment and failed to approve his transfer request to Government Street.

[241] Ms. Delgaty testified that she had experience with unions, that she had been a union member for two years, that she had worked with a variety of unions over the past 29 years and that she believed that good union-management relationships were crucial.

[242] In cross-examination, Ms. Delgaty testified that she did not take action to resolve the complainant's many complaints set out in his email of April 30, 2008 to Mr. Bergh (Exhibit 30), as she interpreted the situation as being beyond resolution at that point, and that she contacted her boss, Ms. Milne, about the next steps. She was advised that, as she testified, Ms. Milne would handle future communications with the complainant.

[243] In cross-examination, Ms. Delgaty testified that she did not know why her name was not on the complainant's non-extension letter (Exhibit 33), rather than Ms. Milne's name, because she was in charge of the CEPP. However, what he received was a standard non-extension letter.

[244] Ms. Delgaty testified that she lived in Vancouver for the entire 10 years in which she worked for the respondent, except for 10 months in which she worked in Manitoba. She testified that, while she was an employee of the respondent for the ten-year period, she was not located at HRSDC from mid-September 2008 to April 2009.

[245] In cross-examination, Ms. Delgaty testified that the VMC was chaired by the HR Director and that all executive directors were members. Although she did not recall all

the executive directors at any one time, as the membership of the VMC changed over time, it would have included her boss, Ms. Milne.

[246] Still in cross-examination, Ms. Delgaty confirmed her testimony that she did not converse about new staff with Mr. Quinn at the CEPP launch party in Victoria except to have them introduced. She testified that she never heard the message that the complainant put on his phone in May when he went on leave about callers leaving personal messages for him, but Mr. Quinn told her about it. The concern, as she recalled it, was that business messages left by clients for the complainant's attention were not being dealt with in the complainant's absence. She had no knowledge of whether the complainant was on leave at that time.

[247] In cross-examination, Ms. Delgaty testified that the complainant's work was on the CEPP, that it was winding down and that residual claims would be handled in the Calgary office. She understood that some employees subsequently found positions in other business lines after the CEPP wound down. She was not the hiring manager in those cases, and she was not privy to the staffing details of other business lines.

[248] When asked on cross-examination if financial reasons were behind her decision to not agree to the complainant's request for a transfer from Pandora Street to Government Street, Ms. Delgaty testified that she advised, and did not direct, Mr. Quinn that the complainant was appointed to the CEPP at Pandora Street, that the CEPP was winding down, that the complainant's term appointment was expiring, that residual claims would be handled in the future from the Calgary office and that it did not make business sense to transfer him to another work location under those circumstances.

[249] Ms. Delgaty testified on cross-examination that Mr. Quinn raised the complainant's union aspirations with her but only in the context of why he wanted to move to another building. She testified that she did not consider his union aspirations in her advice to Mr. Quinn. Her decision was that it did not make good business sense to transfer him in the circumstances. Her advice would have been the same no matter who applied for a transfer.

[250] Ms. Delgaty testified on cross-examination that she did not recall being informed of any complaints that the complainant filed against the respondent before his email of April 30, 2008 to Mr. Bergh (Exhibit 30). She testified that she was not

informed of the complainant's harassment complaint against Mr. Quinn and that she had never seen the complainant's non-extension letter until the day on which she testified at this hearing. She testified that her work does not involve getting down to that level of information about CR-classified positions. She knew that all the term appointments for the CEPP positions were expiring on the same date.

[251] In cross-examination, Ms. Delgaty testified that she was not aware of any complaints the complainant had filed against the respondent until the complainant's email of April 30, 2008 to Mr. Bergh (Exhibit 30).

[252] Ms. Delgaty testified that she was not aware of the two complaints that the complainant filed against the CBSA (Exhibit 7) until she received a letter from him dated October 7, 2009 (Exhibit 52) and that she had never seen the Exhibit 48 email exchange between Ms. Li and Ms. Lam before the day on which she testified at this hearing.

[253] Ms. Delgaty testified in cross-examination that she had no knowledge of who was left in the staffing pool when she agreed to the suggestion from Ms. Li to expire it. She does not work at that level of detail. Ms. Li advised her that the managers had finished with the pool or had used the pool to their desired extent and that they had newer pools. She accepted Ms. Li's recommendation that she expire the pools. She testified that it is always good to have newer pools to reflect changing criteria that are important to new positions.

[254] When asked in cross-examination if she was ever informed that the complainant filed a complaint with the Minister in about February 2009, Ms. Delgaty testified that the Minister's office did not contact her about background information on the complainant and that she had not been available in February 2009. As she had testified, she did not work at HRSDC from mid-September 2008 until late April 2009. The only contact she had about the complainant's complaints was when he challenged her staffing actions. She was required to produce documentation under a production order. After that, she was contacted when she was informed that her presence was required at this hearing.

[255] In cross-examination, Ms. Delgaty confirmed her earlier testimony that she was aware of the CBC "National News" story on the CBSA and that she had discussed it with her husband. The complainant implied but never asked Ms. Delgaty directly that,

because her husband was a top executive at the CBSA in 2008-2009, the staffing decisions to not offer the complainant an appointment and her decision to expire the staffing pools was some form of payback for the embarrassment her husband suffered because of that CBC story.

[256] Ms. Delgaty testified that, as a sub-delegated manager, she has access to the assessment summary staffing spreadsheets, as would the person delegated to run her recruitment unit and the selection process. She testified that a staffing file is not generally shared with management unless the managers were part of the selection board. She testified that the recruitment unit compiles the selection criteria and that the list goes to HR, after which an initial pre-qualified staffing pool is created. The file then goes to HR. She testified that she has no access as a manager to selection board files except for the files on which she is involved with staffing.

[257] Ms. Delgaty testified that managers have the right to know who is in a qualified staffing pool (Exhibit 13, for example). However, when a manager submits his or her selection rationale to HR to draw names from a pool to determine the right fit for the vacancy or position, HR draw the names.

[258] Ms. Delgaty testified that, since the *PSEA* came into force in 2005 managers or HR no longer rank candidates. HR pull or cull names in the staffing pool based on the selection criteria that the manager supplies.

[259] In reply, Ms. Delgaty clarified that, when the *PSEA* came into force, it was not common for a hiring manager and HR to discuss the statement-of-merit criteria and the staffing pool. Now that the managers and HR have more experience with the *PSEA*, they consult more often. However, the bottom line under the *PSEA* is that the selection is governed by how a given candidate rated on the competencies and whether he or she would be the best fit for the position.

D. Mr. Bergh's testimony

[260] Mr. Bergh retired from HRSDC in December 2008 after a 35-year public service career.

[261] From 2003 until his retirement, Mr. Bergh was the director of pension operations for British Columbia, Alberta, the Yukon and the Northwest Territories. He had approximately 550 staff working for him and was responsible for delivering about

$16 billion worth of benefits to recipients in several programs, such as the OAS/CPP and disability benefits. Since he was the director, he worked at Government Street.

[262] Mr. Bergh's involvement with the CEPP grew over time. He testified that, at the beginning, all executives in the broader region were responsible for supporting the *Indian Residential Schools Settlement Agreement* mail-in claims process. His organization grew because it had extensive experience dealing with mail-in claims and payments-out processing. He became specifically involved with supporting the CEPP staffing processes by releasing some of his key staff to support it and by providing mail operations and processing support in Victoria.

[263] Mr. Bergh testified that he retired in 2008. Given the passage of time, he has limited memory of some of the details of the CEPP CR-04 versus CR-03 staffing processes in Victoria. He believes that Ms. Delgaty was the overseer and that she had signing authority for CR-04 staffing processes. However, as she was located in Vancouver, if questions arose and she was not available, Mr. Bergh was on the ground in Victoria and could be called on for assistance. He would have overseen and would have had signing authority for CR-03 positions. His staff got the CR-03 Process going.

[264] For Exhibit 17, Mr. Bergh testified that, as the sub-delegated manager responsible for the CR-03 Process, he would have had access to the assessment summary spreadsheet. He would only have seen it initially. The spreadsheet custodian would have been the HR resourcing person. It would have been kept in Vancouver or Edmonton. He testified that he would not have had electronic access to the spreadsheet and that he would have been unable, as manager, to change it. If he wished to access it later for an internal competition, it would have been possible, but he would not have been restricted to staffing from it.

[265] Mr. Bergh was not on the panel for the CR-04 staffing pool. His role was to identify a manager to lead the staffing process. He was part of discussions about the best staff to develop the tools to assess statement-of-merit criteria and, most likely, his staff would discuss the tools with him and HR.

[266] Mr. Bergh testified that he thought that he had never seen the complainant before the hearing, although their paths may have crossed in the hallway at work. His email contact with the complainant was about the complainant's deployment request (Exhibit 28). Mr. Bergh testified that he did not recall that particular email but that it

describes a deployment process like he would envisage happening.

[267] Mr. Bergh testified that, when a deployment request is received, after considering whether there is an operational need, the manager or person responsible for staffing follows a best-practice principle of considering experience, knowledge, skills and personal suitability to determine if the person seeking deployment is a good fit. He testified that, although it was not a best practice, he thought that it was probably legal to just deploy the person within or between units as long as the person was at the same level, although he could not recall if that meant the position level or the salary level.

[268] Mr. Bergh testified that he recalled the complainant's deployment request and that his first impression was that it was odd. Generally, if one is seeking an employment opportunity, one puts forward how one might assist the organization if deployed. That did not appear in the complainant's request, as he recalled. The sole reason the complainant gave for his deployment request to Government Street was so that he could run for union executive there.

[269] Mr. Bergh testified that he did not think that the complainant's request for deployment, so that he could run for union executive at a different site, was the purpose of a staffing process that is, he believes, to fill an operational need if one exists. In addition, he questioned what his role should have been with respect to the existing union leadership. He recalled that the context for the deployment request (or email) was that it was sent during a time of a jurisdictional battle between two competing unions. The National Health and Welfare Union represented HRSDC employees at Government Street, while the Canada Employment and Immigration Union represented those at Pandora Street. Because of a ruling by either the Board or the Treasury Board, in future, all HRSDC employees were to be served by only one union. The complainant's deployment request struck Mr. Bergh as raising the issue of management maybe interfering in internal union business. An employee's choice of union representation did not affect management or operations. He felt that it was none of his business.

[270] Mr. Bergh testified that Exhibit 28 is his email acknowledging the complainant's deployment request and stated that it is standard practice to acknowledge a deployment request with a communication to the sender.

[271] Mr. Bergh testified that he was not involved in not extending the complainant's term appointment. Mr. Bergh testified that, with respect to the email that the complainant sent him on April 30, 2008 (Exhibit 30), it looked to him like the complainant had no end of complaints. However, because the complainant was not his employee, and the issues raised were not his, he really did not know what the complainant asked for. He probably would have referred it to the person in the chain of command responsible for the CEPP. He certainly would not have let the email just sit around.

[272] Mr. Bergh testified that his first impression of the email that the complainant sent him on April 30, 2008 (Exhibit 30) was that whoever sent it was prone to initiating the complaint processes at every opportunity, which would not endear that individual to him. He could not see the value in that communication for the sender.

[273] Mr. Bergh testified that, as an executive manager, he interacted with the union. As an example, he mentioned a union request for a room in which it could conduct its elections. He testified that it would be good if the union counted bright people among its members. However, he played no role in how his staff chose their union executive and it would not matter to him who ran for union executive positions.

[274] In cross-examination, Mr. Bergh testified that he did not recall the CEPP employees chosen for other appointments when their terms ended. He agreed that CEPP team leaders and managers identified "high flyers." When it came time for him or his unit to offer an appointment, the identified high flyers would have been considered. Mr. Bergh testified that, at the relevant time, he was classified EX-01, which is above PM-05, and that he was not intimately involved in staffing decisions.

[275] In response to a question about the email that he sent to all employees in fall 2007, after the CBC "National News" story (Exhibit 19), about his staff being careful about what they posted on *Facebook* and other social networks, Mr. Bergh stated that it is not appropriate to use the HRSDC name and logo in that way.

[276] When asked in cross-examination about the available staffing options for an employee at Pandora Street wishing to move to Government Street, Mr. Bergh testified that a deployment is one obvious option. However, at the time of the complainant's request, there was probably no need for a CR-04 or a CR-03 at Government Street.

[277] In cross-examination, Mr. Bergh testified that he had never been the subject of an unfair labour practice complaint of anti-union animus or alleged interference with the union and he was not aware of any such complaints in his directorate. He was also unaware of whether anyone other than the complainant had filed a human rights complaint against his directorate.

[278] Mr. Bergh testified that he was aware of many grievances that were filed over the years. He was involved in PSST investigations into complaints about staffing processes that he had been involved in. He is fine with employees accessing recourse mechanisms available to them. He also testified that, with the size of his operations, which involved approximately 550 employees reporting to him, he did not have day-to-day input on his managers' staffing decisions. His was responsible for the process. If an error occurred or a challenge was raised to the process, he would try to fix the process.

[279] In cross-examination about the email that the complainant sent to him on April 30, 2008 (Exhibit 30), Mr. Bergh testified that he did not believe that he refused to meet with him to discuss his deployment request. However, he probably would not have been heavily involved in the process of a person seeking deployment to his directorate, given the size of his staff and his management role.

[280] In cross-examination, Mr. Bergh testified that, although he believes in resolving problems early if the employee with the problem comes to him or to the team leader to discuss it, once the employee begins a process, such as filing an unfair labour practice complaint, the card has been laid, and he does not intervene. His job is not to facilitate a person getting a union position but to get the job done.

[281] Mr. Bergh testified that the VMC is a senior executive group working at the regional level and that he was not a member. The VMC was a product of austerity in the organization, and its decisions were based on budgets. In 2008, he thought that Ms. Milne attended the meetings for the Payment Processing Group. He testified that, when he needed to staff a vacancy, following the approval of the staffing request at the VMC meeting, his managers and team leaders, rather than him, would get the paperwork rolling with HR.

[282] In re-examination, Mr. Bergh explained that, referring to Exhibit 44 (the complainant's email to a CPP team leader about not being selected for an OAS/CPP

position in which he stated that, "[i]f I do not hear from you by tomorrow I will be contacting my MP"), he would interpret the complainant's email as a threat to engage his Member of Parliament or to file a ministerial complaint. He read it as a threat to embarrass the CPP team leader or his unit and to get him to respond quickly and to not follow the normal process. He stated that things do not work that way. The normal process is outlined at the end of page one of Exhibit 44. As for the action to take, Mr. Bergh did not want to reward threats.

E. Mr. Quinn's testimony

[283] Mr. Quinn retired in June 2009 after approximately 33 years of public service. Before he retired, he served as the service manager for Regional Shared Services in Vancouver and later as the senior manager for the CEPP responsible for the Payment Centre in Victoria. During the period covered by the complaints before me, Mr. Quinn supervised the team leaders, including the complainant's CEPP team leader, Ms. Smith.

[284] Mr. Quinn testified that he became involved in the CEPP in late fall 2005 and into 2006 once it was determined that the one centre for processing CEPP claims would be established in Victoria. He was one of two HRSDC managers in Victoria at that time.

[285] Mr. Quinn testified that the CEPP was not to be like the payment processing programs that HRSDC had earlier provided to other federal departments. HRSDC's role in the CEPP was to receive *Indian Residential Schools Settlement Agreement* applications beginning in about mid-September 2007 from an estimated 80,000 eligible applicants from across Canada and to complete them by confirming the identities of the applicants and by checking the proof of other eligibility requirements, such as residential school attendance. The applications, once received, were to be entered in a module for the CEPP in the grants and contributions sections. When the information on the applications was complete, the HRSDC's Victoria office was to forward the applications to the Department of Indian Affairs and Northern Development, whose staff would determine whether the applicants were eligible for the payments. The eligibility determination would be sent back to the Victoria office, which would then process the payments.

[286] Mr. Quinn testified that the *Indian Residential Schools Settlement Agreement* had been signed in approximately February 2007. It contained an opt-out period of about 90 days to allow those who wished to pursue their own legal action. However, if too

many opted out, the settlement would have collapsed, so its implementation did not begin until summer 2007.

[287] Mr. Quinn testified that the CEPP was a short-term but high-volume project and that, although it allowed for a four- or five-year claims period, management anticipated a high volume of work at the beginning. Approximately $1.9 billion was set aside for the CEPP payments. Management expected about 70,000 applications to be received between September 17, 2007 and the end of December 2007.

[288] Mr. Quinn testified that a need quickly arose to appoint approximately 125 individuals at the PM-01, CR-04 and CR-03 groups and levels in a short period and that staffing was done, and training phased in, throughout September and October 2007.

[289] Mr. Quinn testified that he reported to Ms. Delgaty, who was in charge of staffing. He could not recall when exactly he was trained as a delegate and received signing authority on the CEPP. He testified that, as a manager, he would have had access to an assessment summary report (Exhibit 17) but that the custodian of the report would have been HR, and he would not have been able to change it.

[290] Mr. Quinn testified as to his interactions with the complainant. Mr. Quinn met the complainant initially in 2005 when he applied for a CR-05 position in a competition in which Mr. Quinn was the sub-delegated manager. The complainant did not qualify for the position and requested an informal discussion with Mr. Quinn for feedback. Although Mr. Quinn was not required to meet with the complainant, he met with him to provide the requested feedback.

[291] Mr. Quinn offered the complainant a term appointment in September 2007 to a CR-04 position for the CEPP. The initial term was September 2007 to March 7, 2008. Mr. Quinn testified that he was involved in extending the complainant's term twice because work remained to be done.

[292] Mr. Quinn testified that, by March 2008, the number of new claimants had diminished and the CEPP was winding down. The decision had been made that the residual claims would be handled in the Calgary office, which was the centre for specialized payments processing. By March 2008, Mr. Quinn had reduced the number of his work teams at Government Street and had consolidated the employees he was responsible for back to Pandora Street, where he and most of the team were located.

The CEPP was wound down even more by mid-May and June 2008.

[293] Mr. Quinn also testified that, as the number of claims decreased, less clerical work was required at Pandora Street and more work was required at a higher level, such as from business consultants and CR-05s, for processing different types of claims, such as those involving wills and estates.

[294] In January 2008, Mr. Quinn received a request from the complainant to be transferred from Pandora Street to Government Street, so that he could do his CEPP work there. Mr. Quinn testified that, as of January 2008, he knew that the CEPP employees would be consolidated from Government Street to Pandora Street, where he was located, as the OAS/CPP operations at Government Street wanted for their own operations the space that they had loaned temporarily to the CEPP. Mr. Quinn contacted his boss, Ms. Delgaty, to discuss the complainant's transfer request. He was advised that there was no business reason for granting it. Mr. Quinn agreed that it did not make business sense to grant the request when they were consolidating CEPP staff at Pandora Street anyway.

[295] Mr. Quinn testified that he received an email from Mr. Campbell about an exchange between the complainant and a CR-04 group trainer. He testified that he did not solicit the email. It was sent to him for his information as a manager. He did not tell the complainant about it, as it was not important to him.

[296] Mr. Quinn testified that Mr. Bergh notified him that he had received a deployment request from the complainant. Mr. Quinn testified that the manager receiving the deployment request has the sole decision of whether to grant it but that it is operational courtesy for the receiver to let the requestor's manager know that he or she has an employee leaving.

[297] Mr. Quinn recalled dealing with a request from the complainant for medical accommodation in the form of reduced phone contact. The CEPP files dealt with sexual abuse at residential schools and with traumatized clients. A component of a CR-04 position in the CEPP entailed phone work to help fill in the blanks on client applications. The complainant requested that he not be required to make or return phone calls to clients. Mr. Quinn testified that the CEPP office had lots of work at that time that did not involve calling clients, such as problem solving and processing the applications through the system. Ms. Smith, the complainant's team leader, confirmed

the accommodation that the complainant requested (Exhibit 64).

[298] Mr. Quinn's next interaction with the complainant (Exhibit 65) was an email dated February 14, 2008 he sent to Ms. Smith, forwarded to Mr. Quinn, in which the complainant stated that his harassment issue with IM was resolved.

[299] Mr. Quinn's next interaction with the complainant occurred in late May 2008, when the complainant filed a harassment complaint against him, Ms. Smith and IM. Mr. Quinn testified that he was not sure why he was included in the harassment complaint. He thought that the matter between the complainant and IM had been satisfactorily dealt with according to the complainant's earlier email (Exhibit 65, February 14, 2008 email) that he sent to his team leader, Ms. Smith, which was forwarded to Mr. Quinn. Mr. Quinn testified that he also understood that the complainant's work duties had been modified by mutual agreement and that the conflict had been resolved.

[300] Mr. Quinn testified that he received notice of the harassment complaint (Exhibit 65) a day or so after the complainant received a letter from HR notifying him that his term appointment was not going to be extended (Exhibit 33).

[301] Mr. Quinn testified that he was involved in the decision to not extend the complainant's term appointment and that a number of other employees also did not have their terms extended. Mr. Quinn testified that the complainant's term was not extended a third time because the CEPP workload had diminished. There were fewer new claim applications, and the CEPP clerical work that the complainant had been doing was winding down. Additionally, a decision had been made that any residual claims work would be transferred by the end of September to the specialized processing centre in Calgary.

[302] Mr. Quinn testified that the complainant was granted leave with pay before the end of his term appointment. He stated that he thought it was done because of the harassment complaint that the complainant filed against him, Ms. Smith and IM. He believed that Ms. Milne initiated and communicated the leave.

[303] Mr. Quinn testified that he understood that a conflict arose involving the complainant providing his voice mail password to his team leader when he went on leave with pay so that others in the office could return calls to clients who left

messages on his phone. The complainant objected to sharing his password. Mr. Quinn testified that, although he did not think that the conflict had been resolved, a compromise was reached. The complainant agreed to provide his password to his union representative for use when the complainant was away.

[304] Mr. Quinn testified that, as for any other interactions with the complainant, he recalled that the complainant came to his office on several occasions to discuss different things, but he cannot recall any specifics of the conversations.

[305] Mr. Quinn also testified that, as for the reference prepared by Ms. Smith, the complainant's team leader, all team leaders would have been preparing references for their term employees at that time.

[306] Mr. Quinn testified that he had known Ms. Smith for over 10 years, that she had been the union local president for many years and that he had had a fairly good working relationship with her. He also testified that he had a good working relationship with Dave Conti, who took over as union local president after Ms. Smith. Mr. Quinn also testified that he had been a union executive member earlier in his government career and that he understood the roles that union and management play in the workplace.

[307] Mr. Quinn, in cross-examination, testified that about 125 people had to be appointed in early fall 2007. He agreed that management used a number of eligibility lists from which to appoint candidates at different levels. He testified that he did not recall why term appointments of different lengths were offered.

[308] Mr. Quinn testified in cross-examination that he recalled the CBC "National News" program, or a later newspaper article, about the CBSA but that he never discussed the article or program with Ms. Delgaty or with anyone else at work. He also did not recall having any conversation with Ms. Delgaty about the complainant at the CEPP launch party.

[309] Mr. Quinn testified on cross-examination that team leaders had a right to critique their employees. He agreed with the complainant that, in general, one co-worker should not publicly criticize another.

[310] Mr. Quinn was asked in cross-examination about the comment in Ms. Smith's reference that it would have been preferable had the complainant spoken to her first

about the IM conflict before going to the union president. Mr. Quinn agreed that an employee had the right to talk to his or her union president and that he would not have worded the comment as Ms. Smith did. He stated that he was not saying that Ms. Smith had been wrong.

[311] Mr. Quinn testified that the reference would have gone to the hiring manager at the OAS/CPP operations. However, he did not know who that would have been at the relevant time. Mr. Quinn also agreed in cross-examination that a negative comment in a reference can negatively impact an applicant. Mr. Quinn testified that he does not make deployment decisions; they are made by the receiving units.

[312] Mr. Quinn was asked in cross-examination about overtime on the CEPP. He testified that he did not recall whether the job posting stated that overtime was required. He stated that he kept track of overtime so that he could budget for it but that about 225 people were working for his units. The team leaders kept track of the overtime worked by individual employees. He did not recall whether the complainant had worked overtime.

[313] Mr. Quinn testified in cross-examination that he made decisions about term employees and that their team leaders were involved. He testified that he doubted that Ms. Milne would have been involved.

[314] As for the complainant's term appointment not being extended, Mr. Quinn testified that they no longer needed him, that they were in the process of reducing staff and that they wished to retain PM-01s and higher because of the increasingly complex nature of the work. He testified that he did not recall how many of the approximately 90 to 100 CR-04s or PM-01s were kept on.

[315] When asked in cross-examination whether Mr. Quinn or Ms. Delgaty made the February 6, 2008 decision to not grant the complainant's transfer request, Mr. Quinn replied that they had a conversation and determined that no business reason existed for the transfer.

[316] When asked in cross-examination why it took him six days to respond to the complainant's transfer request given that it was time sensitive, Mr. Quinn testified that, from the exhibits, it looked like he sent his emails from his Blackberry, so he probably was not in Victoria at that time but travelling.

[317] In cross-examination, Mr. Quinn testified that he did not send a letter to CEPP staff at Government Street, as requested by the complainant, to see if anyone was interested in swapping their position at Government Street with his at Pandora Street.

[318] Mr. Quinn, when asked in cross-examination if he had been satisfied with the complainant's work, testified that nothing had come to his attention in the relevant period about the complainant's work, either "good, bad or indifferent."

[319] Mr. Quinn was asked in cross-examination if he had manipulated the ranks of candidates. He testified that he accessed the assessment summary spreadsheets of candidates only through HR. He testified that he had neither the skill nor the desire to manipulate the spreadsheets of pre-qualified candidates.

F. Complainant's rebuttal evidence

[320] The complainant requested that he be allowed to call more witnesses, thus necessitating an adjournment and a resumption of the hearing at a later date. The Board noted that the October 2010 hearing had been adjourned at the complainant's request for more time to prepare his case and that the parties had been advised at that time that, when the hearing resumed on May 2, 2011, they would be required to present their evidence and arguments. The complainant had more than six months before the hearing resumed to prepare his case. I ruled that the evidence stage of the proceedings was completed and denied his request. I ruled that arguments would be heard, as previously agreed, starting the following morning.

G. Additional evidence

[321] Although argument was to begin on May 6, 2011, the complainant did not attend for medical reasons. At the start of the presentation of arguments at the resumption of the hearing on August 17, 2011, the complainant sought to introduce two new policy documents into evidence. He was informed that the witnesses had been excused and that the evidence stage of the hearing was complete. The hearing concluded on August 17, 2011.

[322] In November 2011, the complainant introduced two new requests to adduce additional evidence.

[323] On November 21, 2011, the complainant emailed a request, with attachments, to

recall Mr. Bergh so that he could question him on an email sent on June 21, 2007, regarding a complaint filed by the complainant with the PSC challenging a 2006 external selection process. This document is not directly relevant to the complaints before me, which are unfair labour practice complaints that involve actions by the respondent that allegedly occurred during the period of May 2008 to October 2009. Further, the complainant himself testified about the circumstances surrounding the staffing complaint that he filed in February 2007 and withdrew in July 2007. The complainant has not satisfied me of the benefit of reopening the hearing to hear Mr. Bergh about a document relating to a staffing complaint that has already been discussed at the hearing.

[324] The second and third documents attached to the complainant's November 21, 2011 request are emails and a fax exchanged by Ms. Li in November 2008 and an officer at the PSC in response to a request from the PSC for information on a staffing complaint filed by the complainant with the PSC related to a 2007 – CR-04 competition. Ms. Li forwarded a copy of the term appointment extension letter that had been given to the complainant in February 2008 and provided a meaning for the statement that the "CEP was a sunset program". The complainant now seeks to recall Ms. Li to question her on these documents. The evidence that they reveal is not new.

[325] At the resumption of the hearing in May 2011, the complainant extensively cross-examined Ms. Li. The witnesses at the hearing, including Ms. Li, used various labels to describe the CEPP. It was referred to as a sunset program, a finite program, a short-term project and a time-limited project. While the labels varied, all of the witnesses, including the complainant, agreed that the CEPP was a time-limited project.

[326] As noted above, at the resumption of the hearing on August 17, 2011, the complainant sought to introduce additional documents. I ruled that the evidence stage of the hearing was over and the witnesses had been excused and I denied the complainant's request. There is no basis provided by the complainant in his November 21, 2011 request that justifies a different approach. The complainant's request is denied.

[327] On November 28, 2011, the complainant submitted a second request that documents be admitted into evidence and that he be entitled to examine a new witness on those documents. The first documents are an email exchange between the complainant and counsel for the respondent during the period of November 2010 to

April 2007 regarding documents to be presented at the May 2011 hearing resumption and refer particularly to the 2007 - CR-04 Process (Victoria). The second documents are an email exchange between HR professionals regarding the tools used in the 2007 - CR-04 Process (Victoria) and include the list of potential candidates, by ranking. The third documents are an email exchange in November and December 2010 primarily between HR professionals, including Ms. Li, regarding the complainant's request for ranking information on candidates for the 2007- CR-04 Process and on staffing rationales for the appointment of some of the candidates who were selected.

[328] Evidence was presented at the hearing that, at least in a few instances, candidates who ranked lower than the complainant on some competencies in the statement-of-merit criteria were appointed by the respondent while the complainant was not. The new evidence that the complainant has requested to introduce is of the same ilk as evidence already presented at the hearing and does not satisfy me of the benefit of reopening the hearing to hear a new witness about documents relating to a staffing process that has already been discussed at the hearing. The evidence stage of the hearing is over and the complainant's November 28, 2011 motion is denied.

V. Summary of the arguments

A. For the complainant

[329] The complainant submitted that, during his CEPP employment, he received nothing but positive work reviews, he was never disciplined and he was either the top producer, or close to the top, in many of his jobs.

[330] The complainant submitted that, during the period covered by the complaints before me, roughly May 2008 to October 2009, many CR-03 and CR-04 positions opened at Government Street. The respondent repeatedly offered term or indeterminate appointment to candidates with lower marks and less qualification than him. That happened because of the respondent's anti-union animus.

[331] During his argument, the complainant identified for the first time 11 staffing decisions made by the respondent that he alleged were unfair labour practices because candidates with lower marks and less qualification than him, and who were not union activists, were appointed, while he was not. Although he had been told that those candidates were chosen because their competencies made them better fits for the

positions, the complainant alleged that the real reason was anti-union animus.

[332] The complainant submitted that the respondent's continuing failure to transfer him to Government Street in May and June 2008, as he had repeatedly requested, was due to the abandoned complaint. He initially requested the transfer in January 2008 solely because he wanted to run for an executive position with the union local at Government Street. He had to be employed at Government Street to run. He alleged that the respondent treated him differently after the abandoned complaint when he asked again later to be transferred, deployed or reappointed into a CR-03 or CR-04 position at Government Street. The complainant submitted that he made his later requests for a transfer or deployment both for his overall career advancement as well as for an opportunity to run for a union executive position in the future.

[333] The complainant submitted that CR-03 and CR-04 positions were available at Government Street and that the respondent had a duty to transfer or deploy him there as he requested unless it could prove that it was too expensive to transfer him to work there.

[334] The complainant also submitted that he was known as a whistle-blower and as an employee who knew how to successfully use the grievance process and other avenues of redress and that he was not afraid to use them. He referred to successful PSST complaints that he had made, outstanding human rights complaints, complaints to his union president and his Member of Parliament as examples. He submitted that he was viewed as a troublemaker and as a union activist. He argued that, as a result of those perceptions, the respondent failed to transfer or deploy him to Government Street as he had requested and had refused to reappoint him when his term appointment expired. He submitted that managers did not want him in their units or buildings.

[335] The complainant submitted that he was treated differently after he made the abandoned complaint. He gave many examples of the respondent's unfair labour practices and differential treatment, including: the non-extension letter he received that stated that his term appointment would not be extended; the respondent avoiding offering him an appointment in 2008 and 2009, even though he was in the pre-qualified staffing pool and he had better marks and was more qualified than other candidates chosen for the positions; the respondent making 167 job offers to candidates from other new pools; the respondent's refusal to assign him to acting

positions, even though he was the best qualified candidate; the respondent's refusal to let him use an old reference from a former colleague and retired team leader, even though it had been allowed when he was appointed to work on the CEPP; the unfair or incomplete reference letter provided by his then-current team leader and her refusal to rewrite it in accordance with his request; and the early expiry of the two pre-qualified pools of which he was a part, even though the job competencies had not changed.

[336] The complainant claimed that the differential treatment was due to anti-union animus because of the abandoned complaint, which challenged the respondent's refusal to grant his transfer request to Government Street so that he could be eligible to run for a union executive position. He argued that he received a non-extension letter two weeks after filing the abandoned complaint, so the non-extension letter is an unfair labour practice.

[337] The complainant submitted that, after a broadcast of the CBC "National News" program in October 2007, he was left in the dead-end, short-term CEPP even though he was one of the highest producers. He submitted that Ms. Delgaty caused it because of the embarrassment that the CBC story caused her husband, a senior CBSA executive at the time of the story, and he argued that she admitted in cross-examination that she had discussed the story with her husband.

[338] The complainant submitted that Mr. Bergh denied his second deployment request because he questioned whether allowing the complainant's transfer request to Government Street so he could run for a union executive position might be interfering with union business, as Mr. Bergh testified. The complainant alleged that Mr. Bergh had a "cosy" relationship with the union president and that he had appointed the ex-union president into a position for which the complainant was better qualified.

[339] The complainant submitted that he was frustrated at being blacklisted. Thus, when he told Mr. Bergh that he was going to consult his Member of Parliament if Mr. Bergh did not get him deployed to Government Street, Mr. Bergh misread the complainant's comment as a threat and refused to meet with him to resolve the matter or to investigate his complaints.

[340] The complainant submitted that the respondent never adequately explained why he was not the best fit for the many positions that he was qualified for that became available over the relevant period. He submitted that the managers manipulated the

selection criteria so that his name would not be chosen by HR from the staffing pool.

[341] The complainant referred me to a number of cases in support of his arguments, although he later withdrew several of them. The remaining cases included *Strike v. Public Service Alliance of Canada*, 2010 PSLRB 22; *Melnichouk v. Canadian Food Inspection Agency*, 2004 PSSRB 181; *Alberta Hospital Ponoka v. Alberta Union of Provincial Employees, Local 42, Chapter 1 and 3* (1997), 52 Alta. L.R. (3d) 1 (C.A.); *United Brotherhood of Carpenters and Joiners of America, Local 1669 v. Finn Way General Contractors Inc.*, 2011 CanLII 28357 (Ont. L.R.B.); *Carpenters Union, United Brotherhood of Carpenters and Joiners of America v. K.D. Clair Construction Ltd.,* 2008 CanLII 7517 (Ont. L.R.B.); and *Atchison v. Springs Canada Inc.*, 2004 CanLII 15388 (Ont. L.R.B.).

[342] The complainant stressed the *Carpenters Union, United Brotherhood of Carpenters and Joiners of America* case. He submitted that the respondent, like the employer in that case (which terminated an employee to discourage employees from participating in the normal activities of a union), should have recognized that this was a clear-cut case of an unfair labour practice and should have rescinded his termination letter, apologized to him and kept him as an employee.

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

[343] The respondent submitted that the complainant's allegations are in essence challenges to its staffing decisions.. The staffing issues raised by the complainant should be addressed through a staffing grievance. The PSST has exclusive jurisdiction over staffing grievances as prescribed under the *PSEA*.

[344] The respondent submitted that an unfair labour practice complaint must be based on a breach of the prohibitions set out in the provisions of section 186 and that none of the prohibited actions in paragraph 186(2)(*a*) occurred in his case. The staffing decisions that the complainant challenged, namely, the respondent's failure to grant his request for a transfer or deployment to Government Street or to appoint him after his term expired, refer to staffing decisions that are not unfair labour practices.

[345] The respondent submitted that it has presented sufficient evidence to displace the burden imposed on it by the reverse-onus provision. The test to apply is whether its actions were a reasonable exercise of its management rights. Its evidence showed

that the staffing decisions challenged by the complainant were the reasonable exercise of managerial authority based on an assessment of operational requirements.

[346] The respondent submitted that there is a disconnect between its staffing actions and the complainant's allegations of anti-union animus and that there is no evidence or causal link between the incidents that he complained of and anti-union animus. Although the evidence might have raised staffing issues, there is no evidence that the challenged staffing decisions were motivated by any anti-union animus or retaliation. The respondent submitted that there was no anti-union animus by its managers, who made the staffing decisions that the complainant is challenging based on operational needs and best-fit selection practices. Thus, the Board should dismiss the complaints.

[347] The respondent submitted that the complainant's case was vague, that it lacked clarity, that it was confused and that it constantly shifted. Hence, it was very difficult for the respondent to mount a response.

[348] The respondent submitted that knowing of the complainant's whistle-blowing does not equate to anti-union animus by a manager. It submitted that, in a number of incidents, the complainant informed managers of his knowledge and skill in challenging staffing decisions. Then, when a staffing decision was made with which he did not agree, he claimed that the manager with that knowledge was motivated by anti-union animus.

[349] The respondent argued that the complainant asked for accommodation when it appointed him in September 2007 in the form of an exemption from the normal HR practice of requiring a reference from his most recent team leader. After he was appointed, he alleged that the respondent discriminated against him when it stated that it would not allow that exemption in 2008, when the circumstances had changed and did not justify another exemption.

[350] In summary, the respondent argued that the staffing decisions that the complainant challenged, namely, its refusal to transfer or deploy him as he wished, its failure to extend his term appointment, the expiry of the CR-04 staffing pool, and its failure to reappoint him after his term expired, are, at their core, staffing grievances masquerading as unfair labour practice complaints.

[351] The respondent argued that an employee does not have a right to a transfer, a

deployment or an extension of a term appointment just because he or she requests it. The respondent, as the employer, has the right to assign duties and make staffing decisions based on legitimate operational needs. The respondent met its burden of showing that the staffing decisions challenged by the complainant were not unfair labour practices, that they were based on operational needs and were not motivated by anti-union animus or retaliation. The complainant's desire to run for union executive did not create an operational need for the respondent.

[352] The respondent referred to the following Board decisions in support of its position: *Quadrini*; *Laplante*; *Hager et al.*, 2009 PSLRB 80; *Merriman and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN) v. MacNeil and Justason*, 2011 PSLRB 87; and *Hager et al. v. Statistical Survey Operations (Statistics Canada*), 2011 PSLRB 79.

C. Complainant's rebuttal

[353] The complainant submitted that the respondent's witnesses gave only vague answers as to why business decisions were made. They never explained why certain individuals, who had lower marks than him, received offers of appointment while he did not.

[354] The complainant agreed that, of the 11 complaints about staffing that he identified at the start of his argument, probably only four or five were unfair labour practices, and the rest were staffing decisions. However, he argued that the respondent did not explain how it was reasonable that he was not appointed, transferred or deployed as he requested, which the respondent should have done.

[355] The complainant further argued that he was not alleging that the managers manipulated the assessment summary reports but rather that they manipulated the statement-of-merit criteria, which would have eliminated him from the list of names that HR drew from the staffing pools.

VI. Reasons

[356] The issue to be determined in this case is whether the respondent met its burden, under the reverse-onus provision, of establishing on a balance of probabilities that it did not commit the unfair labour practices alleged in the three complaints before me. These complaints allege breaches of subparagraphs 186(2)(*a*)(i) to (iv) of the

PSLRA.

[357] The complainant alleged that the respondent committed unfair labour practices when it blocked his repeated requests to be transferred or deployed to other work units at Government Street, ended his term appointment, and refused to offer him a new term or indeterminate appointment.

[358] In the September 19, 2008 complaint, the complainant alleged that the respondent's refusal to transfer or deploy him and its ending of his term appointment were due to anti-union animus because he had sought to become an elected union official and to retaliation because he filed the abandoned complaint earlier in his employment with the respondent.

[359] In the December 22, 2008 and October 1, 2009 complaints, the complainant alleged that the respondent's continual refusal to re-offer him either a term or an indeterminate appointment from September 19, 2008 to December 2008 and from December 2008 to October 1, 2009 was retaliation for his filing of the two earlier unfair labour practice complaints, namely, the abandoned and the September 19, 2008 complaints. He also alleged anti-union animus because, he argued, the respondent did not want to appoint him because he had sought a transfer to Government Street so that he could be eligible for a nomination and a run for a union local executive position there.

[360] In the December 22, 2008 complaint, the complainant alleged that the respondent took discriminatory action against him by the references it required of him in his job search and by the unfair and incomplete reference his CEPP team leader provided in February 2008. Those discriminatory actions were allegedly retaliation because he filed two unfair labour practice complaints.

[361] The complainant, in a letter attached to the October 1, 2009 complaint, stated the following:

. . .

> *One of the reasons HRSDC is vehemently refusing to rehire the complainant and prevent him from being a union executive is due to their knowledge that the complainant is a documented federal whistleblower, has in-depth knowledge of labour law, human rights and the ability to use this information gained over the last eight years for the benefit of*

> *union members. HRSDC does not want a strong, knowledgeable and militant union executive in Victoria.*
>
> . . .

[362] The three complaints before me were filed under paragraph 190(1)(*g*) of the *PSLRA*. That paragraph refers to section 185, which defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).

[363] The September 19, 2008 complaint alleges a violation of paragraph 186(2)(*a*) of the *PSLRA*. The December 22, 2008 complaint alleges a violation of subparagraphs 186(2)(*a*)(i) through (iv). The October 1, 2009 complaint alleges a violation of subparagraphs 186(2)(*a*)(ii) through (iv). In his arguments, the complainant referred only to paragraph 186(2)(*a*).

[364] When enacting subsection 186(2) of the *PSLRA*, Parliament was concerned about protecting the interests of individual employees by listing the actions that employers may not take against employees and that constitute unfair labour practices. Paragraph 186(2)(*a*) reads as follows:

> ***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
>
> *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
>
> *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iv) has exercised any right under this Part or Part 2;*

[365] I believe that the *PSLRA*, as applied to the complaints before me, includes two essential conditions for an unfair labour practice under paragraph 186(2)(*a*):

> a) That the complainant be subjected to a refusal by the respondent to employ or continue to employ the complainant or to discrimination with respect to employment by the respondent; and
>
> b) That any such actions were taken by the respondent "because" the complainant has engaged in one or more of the listed protected activities in subparagraphs 186(2)(*a*)(i) to (iv).

[366] The prohibitions expressed in subparagraphs 186(2)(*a*)(i) through (iv) of the *PSLRA* are a vital element of the statutory regime. It is important to note that they do not speak of anti-union animus but that they instead focus on whether the employer's challenged actions were retaliation or reprisals for the complainant engaging in one or more of the prescribed protected activities. It is fundamental to the integrity of the labour relations system created under the *PSLRA* that persons who exercise the rights that it accords do so without fear of reprisal. As the Board sated in *Hager et al.*, 2011 PSLRB 79 at para 114: "Cases of this type often involve indirect evidence, an evaluation of context and a search for underlying patterns. Looking behind the stated reasons for a decision to discover whether other factors or influences were actually at play is always challenging."

[367] The complainant contended that the respondent committed reprisals against him because he carried out or sought to carry out protected activities within the meaning of subparagraphs 186(2)(*a*)(i) to (iv) of the *PSLRA*.

[368] The complainant, in his complaints and in his testimony before the Board, at times described the same action as both the form of reprisal action taken by the respondent and the reason for the challenged retaliatory action. He chose to simply refer to the provisions of paragraph 186(2)(*a*) of the *PSLRA* as a whole. I will discuss the complainant's allegations, as I understand them, in light of the requirements of the *PSLRA*.

[369] The complainant in the complaints before me and in his testimony referred to many unfair labour practices committed by the respondent since he was appointed in September 2007. However, I believe that the main form of retaliation that he alleged in

the complaints before me was the respondent's failure to transfer or deploy the him to another work site as he requested, its failure to continue to employ him when his term appointment ended, and its failure to offer a new term or indeterminate appointment.

[370] The complainant was in two external pre-qualified staffing pools, one for CR-04 service delivery agent positions, and one for CR-03 clerical support positions from some time in summer 2007 until the pools were expired in 2009. The complainant applied for many positions with the respondent between the end of his term appointment until the pools expired but was not successful.

[371] The complainant argued that he was qualified, that he was a productive worker with no discipline record and that there were lots of positions available with the respondent. The fact that he was not appointed means for him that misconduct occurred on the part of the respondent. He argued that the respondent selected candidates with lower marks and less experience than him, who were not union activists. He does not believe the respondent's explanation that the other candidates were a better fit than him for the many positions filled at the CR-03 and CR-04 levels during the contested period.

[372] The complainant alleged that the respondent's staffing decisions showed a pattern of refusal to employ him because of his history as a known whistle-blower and an alleged troublemaker, an individual with in-depth knowledge of labour law and human rights law, and someone with the ability and willingness to successfully use that information against employers.

[373] In support of his claim, the complainant testified about the numerous actions he took to redress wrongdoing in the respondent's workplace since it appointed him in September 2007. He entered related documentation into evidence. His actions included the following: filing a harassment complaint in May 2008 against IM, Ms. Smith and Mr. Quinn (Exhibit 36); filing a reprisal complaint in June 2008 with the Office of the PSIC (Exhibit 12); filing the abandoned complaint; making a request to Mr. Jacques in June 2008 to launch a "criminal conspiracy of blacklisting and harassment" investigation against local and regional HRSDC managers and HR personnel (Exhibit 40); making a number of staffing complaints with the PSST; filing a complaint with the Minister in February 2009 (Exhibit 10); and filing the complaints before me.

[374] Although the complainant's activities support his assertion of his ability and

willingness to use external recourse mechanisms, it is important to note that paragraph 186(2)(*a*) of the *PSLRA*, which provides my jurisdiction, is concerned only with retaliatory action taken by an employer for one or more of the reasons listed in subparagraphs 186(2)(*a*)(i) to (iv), which detail protected activities.

[375] Most of the complainant's documented recourse actions are not listed within the protections enumerated in subparagraphs 186(2)(*a*)(i) to (iv) of the *PSLRA*. However, unfair labour practice complaints are protected activity. The rest, it was argued by the complainant, show his union activism and provide the historical context in which I should view these complaints. On that point, I note that most, if not all, of the listed redress activities involve the complainant personally in furtherance of his employment situation and career goals and not general union activities.

[376] The respondent is a large organization. Initially, the complainant had difficulty identifying specific competitions over the contested period in 2008 and 2009 for which he alleged that the respondent engaged in retaliatory action by appointing candidates less qualified than him in retaliation for him engaging in protected activities.

[377] On the last day of the hearing, when presenting his final argument, the complainant identified 11 staffing decisions that were made by different managers of the respondent that he challenged, although he stated that probably only four or five were suspect and that the rest were probably just staffing decisions. However, he never identified the four or five.

[378] As stated earlier, the essence of these complaints is the respondent's refusal to transfer or deploy the complainant to Government Street, as he had repeatedly requested, and the respondent's refusal to continue to employ him or to re-employ him.

[379] I will examine each of the complainant's major allegations in turn to determine whether the respondent met its burden, under the reverse-onus provision, of disproving on a balance of probabilities the unfair labour practices alleged in the three complaints before me.

A. <u>Failure to grant a transfer or deployment</u>

[380] Subparagraph 186(2)(*a*)(i) of the *PSLRA*, abbreviated to fit the circumstances of the complaints, provides as follows that:

> *[n]either the employer nor a person acting on behalf of the employer . . . shall . . . refuse to employ or to continue to employ, or . . . otherwise discriminate against any person with respect to employment . . . because the person . . . is or proposes to become . . . [an] officer or representative of an employee organization . . . .*

Paragraph 186(2)(*a*) also provides in subparagraphs (ii), (iii) and (iv) that the employer shall not refuse to employ or to continue to employ or otherwise discriminate against any person with respect to employment because the person may testify or participate in a proceeding under the *PSLRA* or has filed a complaint or has exercised any right under the *PSLRA*.

[381] The complainant referred to the respondent's repeated denial of his requests to be transferred or deployed to Government Street as blocking his requests and constituting an unfair labour practice.

[382] As previously stated, the complainant made an urgent transfer and deployment request in January 2008 for the sole reason that he wished to become eligible to run in a union local election scheduled for Government Street on February 27, 2008. The denial of his request was the subject of the abandoned complaint. About a year later, he sought to revoke his withdrawal letter and have the abandoned complaint reinstated and he was informed that it could not be reinstated. The complainant was consistently reminded during the hearing that the respondent's denial of his transfer and deployment request in January 2008 is not before me. Nevertheless, that denial appears to be the starting point of major friction between him and the respondent. According to the complainant, it is evidence of the respondent's pattern of denying him a transfer because it wanted to keep a weak union executive in place at Government Street.

[383] In May 2008, the union local president at Government Street resigned, triggering the need for a new election within 60 days. Once more, the complainant requested that Mr. Quinn grant him an urgent transfer or that Mr. Bergh grant him an urgent deployment to Government Street so that he could become eligible to run in that election. The respondent's denial of those urgent requests is the subject of the September 19, 2008 complaint. In it, he states that the respondent had a duty to transfer him.

[384] The complainant's argument was not always clear, but he appeared to argue that

the respondent's denial of his second urgent transfer and deployment request was an unfair labour practice and that it was also evidence of anti-union animus motivating the respondent's continued refusal to extend his term appointment or to offer him a new appointment after June 27, 2008.

[385] In the September 19, 2008 complaint, the complainant states the following:

. . .

> *After I filed the [abandoned] complaint HRSDC retaliated against me by ending my work term and continued to deny my transfer requests to work in another office. They had a duty under the CHRA to transfer me. A transfer would allow me to run for the union executive. Due to my history as a government whistleblower, human rights advocate and staffing advocate, HRSDC did everything they could to block my transfers and end my employment.*
>
> . . .
>
> [Emphasis added]

Later in the complaint, the complainant states the following: "I emailed senior managers asking for the transfer and stating the refusal to transfer me and the ending of my contract was retaliation. . . ."

[386] The complainant's arguments involved only the second requirement of paragraph 186(2)(*a*) of the *PSLRA*. He alleged that the respondent had a legal duty to transfer him, given his clearly stated reason for wanting the transfer, and that the denial of his transfer and deployment requests was because of anti-union animus and retaliation. In his oral argument, the complainant refined this argument by submitting that it was the respondent's duty to transfer or deploy him as he requested unless it could prove that it was too expensive to let him move and work at Government Street.

[387] There is no dispute that Mr. Quinn appointed the complainant on a term basis beginning in September 2007 in a CR-04 position in the CEPP at Pandora Street and that the CEPP was time limited.

[388] Both parties adduced evidence of communications between the complainant and several managers about his continuing efforts to be transferred or deployed to Government Street as background to later communications between those parties, and others, in May and June 2008.

[389] The evidence shows that, when the complainant emailed a request to Mr. Quinn in January 2008 for an urgent transfer to Government Street for the stated sole reason of making himself eligible for a nomination and run for a union local executive position at Government Street during an upcoming election, management was in the midst of discussions about the next fiscal year and anticipating that the CEPP staff would be smaller and consolidated at Pandora Street. Mr. Quinn informed the complainant that he would not have a clear idea of the CEPP processing needs for some time (Exhibit 23).

[390] Mr. Quinn testified that, in March 2008, the CEPP work units were consolidated at Pandora Street, where his office was located. It was done partly because the OAS/CPP operations at Government Street needed their office space, which had been loaned temporarily to the CEPP, and partly because the CEPP claims were diminishing and it was winding down. The CEPP was wound down even more by May 2008.

[391] The respondent's witnesses, Mr. Quinn and Ms. Delgaty, testified that the complainant's request for a transfer from Pandora Street to Government Street was not granted because there was no operational need for the transfer at that time.

[392] Ms. Delgaty testified that Mr. Quinn contacted her to discuss the complainant's request and that she advised him, without ordering him to do anything, that the complainant had been appointed to work as a CR-04 clerk in the CEPP at Pandora Street; that his term appointment was expiring shortly; that the CEPP was finite; that it was winding down as new CEPP claims started to dwindle and that a management decision had been made that the residual claims would be handled by fall 2008 by the specialized payments processing office in Calgary; and that there was simply no business reason to transfer the complainant to Government Street as he requested.

[393] Ms. Delgaty testified on cross-examination that Mr. Quinn raised the complainant's union aspirations with her but only in the context of why the complainant wanted to move to another building. She testified that she did not consider the complainant's union aspirations in her advice to Mr. Quinn. Her decision was that it did not make good business sense to transfer the complainant in the circumstances and her advice would have been the same no matter who applied for a transfer.

[394] Mr. Bergh, who received the deployment request, testified that employees have

no right to deployment. The complainant's initial deployment request of January 2008 was immediately acknowledged and forwarded to the appropriate managers. The receiving unit had the right to determine whether it had an operational need for the deployment.

[395] Mr. Quinn, the complainant's senior manager at the relevant time, testified that Mr. Bergh informed him that the complainant had made a deployment request. Mr. Quinn testified that such a notification is standard operational courtesy, as the complainant did not copy Mr. Quinn on his deployment request, and that he had no say in whether the receiving unit would grant the request. Mr. Bergh's testimony confirmed that Mr. Quinn, as the complainant's supervisor, did not have a say in whether another unit would grant the request.

[396] In summary, I find credible and persuasive the evidence presented by the respondent's witnesses regarding their reasons for denying the complainant's transfer request to Government Street. I find that the respondent proved that, on a balance of probabilities, its decision to not transfer or deploy the complainant to Government Street following his May 2008 request was a reasonable exercise of managerial authority based on perceived operational requirements and that it was not motivated, in whole or in part, by retaliation for the complainant's desire to become eligible to run in a second local union election that was to be held sometime after May 14, 2008 or because he had filed the abandoned complaint.

[397] I note that the complainant consistently referred to the respondent's refusal to grant his transfer and deployment requests as blocking his transfer. I find that the respondent had no obligation to grant his requests just because he made them. The respondent's managers are entitled to consider the operational requirements of their units when reviewing a deployment request. The complainant's desire to be transferred or deployed to Government Street did not constitute an operational reason and did not impose a duty on the respondent to grant his request. Furthermore, the fact that the complainant requested a transfer or deployment to make himself eligible to run for a union local executive position did not create an entitlement to the requested action.

[398] I do not accept the complainant's argument that it is relevant that Pandora Street and Government Street were located only a few city blocks apart. They are two different work sites. I also find no merit in the complainant's argument that the respondent had a duty to transfer him to Government Street and to let him do his

CEPP work there unless it could prove it was too expensive to do so.

[399] In summary, I find credible and persuasive the evidence presented by the respondent's witnesses regarding their reasons for denying the complainant's transfer to Government Street. I find that the respondent met its burden to establish that, on a balance of probabilities, denying the transfer was a reasonable exercise of managerial authority based on perceived operational requirements and that it was not retaliation for his expressed desire to become a union executive member or because he had filed unfair labour practice complaints.

[400] The complainant further alleged that other senior managers he contacted — namely, Mr. Bergh, the manager to whom he sent his deployment request, Mr. Netzel, Mr. Bergh's boss and the person to whom the complainant testified he wrote to get Mr. Netzel to intervene and get his deployment request granted and his termination letter revoked, and Ms. Milne, Ms. Delgaty's supervisor — displayed anti-union animus and retaliation when they refused to meet with the complainant to discuss his offer to mediate or otherwise informally resolve his deployment request and other outstanding issues. The complainant entered as exhibits his communications with Mr. Bergh, Mr. Netzel and Ms. Milne (Exhibits 30, 32, 35, 36 and 37) in support of his argument.

[401] The complainant's email to Mr. Bergh is dated April 30, 2008 (Exhibit 30) and was sent before he filed the abandoned complaint. It serves as background to the complainant's email of May 22, 2008 to Mr. Bergh's boss, Mr. Netzel (Exhibit 32). Mr. Bergh testified that he did not believe that he had ever refused to meet with the complainant. The complainant's April 30, 2008 email to Mr. Bergh shows that the complainant did not specifically ask Mr. Bergh for a meeting. In the email, the complainant listed all the redress actions that he had initiated against different managers and the additional redress actions that he planned to initiate against other managers. Mr. Bergh testified that, after reading the email, he felt that the complainant's card had been laid and that he would not intervene at this point. He did not think that it made sense to meet with the complainant until the actions that the complainant had initiated were determined.

[402] Mr. Netzel was not called to testify. The complainant introduced as evidence his email to Mr. Netzel of May 22, 2008 (Exhibit 32), which listed his complaints and stated that he was open to mediation and early of resolution of his complaints. The complainant also introduced his communication to Mr. Netzel of May 23, 2008

(Exhibit 35), thanking Mr. Netzel for his quick response to the complainant's offer to mediate. In his email of May 23, 2008 to Mr. Netzel, the complainant requested accommodation by being moved immediately to Government Street. The complainant also introduced as evidence his letter of May 26, 2008 to Mr. Netzel (Exhibit 36), in which he filed a harassment complaint against Ms. Smith, Mr. Quinn and IM and made other serious allegations, ending with a statement that he was "open to early resolution." Whatever willingness to meet Mr. Netzel had expressed that prompted the complainant's thank you note of May 23, 2008, was not repeated after receiving the complainant's subsequent communications.

[403] I find unusual the tone and content of the complainant's email of April 30, 2008 to Mr. Bergh and emails of May 22, 23 and 26, 2008 to Mr. Netzel. I accept that it is not just a matter of the recipients misreading the emails, as the complainant suggested. A reasonable manager could perceive those emails as bullying, as an attempt to intimidate and as not in any way conducive to a face-to-face meeting to try to informally resolve the listed accusations and issues.

[404] Ms. Milne also was not called to testify, but the complainant testified that he emailed her on May 29, 2008 (Exhibit 37). He set out the items he wished to discuss, including: his harassment complaint against Mr. Quinn, Ms. Smith and IM; the abandoned complaint; his human rights complaint; his early termination; and his complaint about a staff training issue. Ms. Milne contacted him and said that she would meet with him on the phone, not in person as he wanted, and that she would discuss only the non-extension of his term appointment.

[405] The complainant testified that Mr. Quinn told him that he could discuss all his outstanding issues with Ms. Milne. That was not put to Mr. Quinn during his testimony. The complainant admitted in cross-examination that he did not know whether Mr. Quinn had so informed Ms. Milne. The complainant also admitted in cross-examination that Ms. Milne stated that she would be open to mediation after the complainant's outstanding human rights complaint was resolved. The complainant also testified that Ms. Milne said that, due to his health problems, he could stay home on leave with pay until his term appointment expired on June 27, 2008. In summary, I find, on a balance of probabilities, that the respondent's managers' decisions not to meet with the complainant in late May and June 2008 to try and informally resolve his transfer and deployment requests and other outstanding issues were not motivated by

anti-union animus.

B. Denial of term appointment extension

[406] The complainant alleged that the expiry of his term appointment was an unfair labour practice as it was retaliatory action for him seeking a union executive position and for filing the abandoned complaint.

[407] The complainant's letter of offer of employment was not introduced in evidence. However, the testimonies of the complainant and Mr. Quinn did not conflict as to the basic facts of his employment. Mr. Quinn appointed the complainant on a term basis as a CR-04 clerk to work on the CEPP at Pandora Street. The term was specified in the letter of offer, which included a standard non-extension of term provision.

[408] The CEPP was defined by Ms. Li as a sunset program, by Ms. Delgaty as a finite program, by Mr. Quinn as a short-term project and by the complainant as a time-limited project.

[409] The complainant testified that he knew that the respondent was not required to extend his term appointment and that it was clearly stated in his letter of offer of employment.

[410] The complainant's term appointment was extended twice.

[411] The complainant received a letter dated May 20, 2008 (Exhibit 33) stating that his term appointment would not be extended beyond June 27, 2008. It constituted the required one-month written notice that his term would not be extended. He consistently referred to the letter as his "termination letter" and the non-extension of his term appointment as his "termination."

[412] Not extending a term appointment is not a termination of employment, but it is an unfair labour practice within the parameters of paragraph 186(2)(*a*) of the *PSLRA* if the respondent's decision to not extend the complainant's term is discriminatory treatment in employment in contravention of the *PSLRA*.

[413] The complainant alleged that he was known as very pro-union and that many of the managers knew it because of the CBC "National News" story and because he had told several of them, including Mr. Bergh and Mr. Netzel in written communications,

about his whistle-blowing and other redress-seeking activities.

[414] The issue before me is whether the respondent has disproven that it did not extend the complainant's term appointment a third time because of his known desire to become a union executive member or because he filed the abandoned complaint.

[415] Mr. Quinn testified that he extended the complainant's term appointment twice because there was CEPP work to be done. He testified that, by May 2008, the CEPP clerical work was winding down, that a management decision had been made to transfer the residual claims to the specialized payments processing centre in Calgary by fall 2008, and that the CEPP work left in Victoria was more complex and required a higher skill level than had been required with the CR-03 and CR-04 positions, notably at the CR-05 and PM-01 levels. He gave as an example the need for employees with accounting experience to deal with wills and estate issues, as opposed to live clients, on the remaining files.

[416] When asked in cross-examination why Mr. Quinn would have extended his term appointment twice if he had anti-union animus against him, the complainant testified that he had a good working relationship with Mr. Quinn and that he was a good performer. The complainant alleged that Mr. Quinn had anti-union animus against him only after the complainant brought a harassment complaint against him and others. I note with interest that the complainant brought his harassment complaint against Mr. Quinn immediately after, and not before, he received his non-extension letter and that he subsequently withdrew that complaint.

[417] Mr. Quinn also testified that the complainant was not the only CR-03 and CR-04 CEPP term employee whose term appointment was not extended. The complainant, in cross-examination, acknowledged that he knew of at least three other CEPP term employees who did not have their terms extended.

[418] I also note that two of the managers whose actions were challenged as being motivated by anti-union animus or retaliation for the complainant filing the abandoned complaint, namely, Mr. Quinn and Ms. Smith, had past experience as union executive members. In addition, Mr. Quinn and Ms. Delgaty testified that, over their long public service careers, they had been union members at one time and that they had had good working relationships over the years with the unions. This evidence was not challenged in any way. I also note that the complainant accused Mr. Bergh of being

"cosy" with the union president.

[419] In summary, I find credible and persuasive the evidence presented by the respondent's witnesses regarding their reasons for not extending the complainant's term appointment a third time. I find that the respondent met its burden to establish that, on a balance of probabilities, not extending the complainant's term was a reasonable exercise of managerial authority based on perceived operational requirements and that it was not retaliation for his expressed desire to become a union executive member or because he had filed the abandoned complaint.

C. Unfair or incomplete reference

[420] The complainant alleged that his team leader, Ms. Smith, provided an unfair reference on February 11, 2008 that blocked his transfer and deployment requests to Government Street and that later cost him a new appointment at the CR-03 or CR-04 level. He learned of that reference only in April 2008. He alleged that the reference was an unfair labour practice and that it was also evidence of anti-union animus and retaliation, and was at least one of the reasons the respondent did not reappoint him after his term appointment expired.

[421] The allegation of Ms. Smith's unfair reference forms part of the December 22, 2008 complaint that was filed eight months after the complainant learned of the reference. However, even if I were to consider that this allegation somehow forms part of the September 19, 2008 complaint, it would still be untimely.

[422] As I have already found, the September 19, 2008 complaint is to be considered filed as of the date of the complainant's email of September 19, 2008. Nevertheless, I have also found that any allegation contained in the September 19, 2008 complaint is timely within the meaning of subsection 190(2) of the *PSLRA* only as far as the actions or circumstances that gave rise to it occurred within the statutory mandatory 90 days preceding the filing date.

[423] I reserved my decision whether all the unfair labour practices alleged in the September 19, 2008 complaint are timely. Based on the complainant's own admission that he learned of Ms. Smith's reference in April 2008, I find that the alleged unfair labour practice is outside the 90-day period preceding the filing of the September 19, 2008 complaint. This allegation is therefore untimely.

D. Request of reference from the complainant's then-current team leader

[424] The complainant also submitted that he was subject to differential treatment and retaliation during his job searches when HR did not accept a reference letter from his former acting team leader and instead insisted on a reference from his CEPP team leader. He argued that the action of HR was both evidence of differential treatment and retaliation and that it was an unfair labour practice.

[425] The complainant was not clear on the period covered by that unfair labour practice allegation. The reference was dated February 11, 2008, which is when he was seeking an urgent transfer or deployment to Government Street. That was well before he filed the abandoned complaint.

[426] However, the complainant testified that he applied for many other positions with the respondent at the CR-04 and CR-03 levels both before and after his term appointment expired and throughout the period ending with the October 1, 2009 complaint. He stated that HR requiring him to use a reference from Ms. Smith was an unfair labour practice.

[427] The complainant testified that, when he applied for a CEPP position in summer 2007, HR accepted a reference from Mr. O'Neil, dated sometime in July 2007 before Mr. Quinn appointed the complainant. However, when he applied for positions in 2008 and 2009, HR insisted on a reference from Ms. Smith.

[428] The complainant introduced Mr. O'Neil's reference letter in evidence (Exhibit 15). It shows that Mr. O'Neil's reference was emailed to the potential hiring manager on July 19, 2007. It states that Mr. O'Neil was the complainant's direct supervisor at different times between 2001 and 2006.

[429] Ms. Li testified that standard HR practice is to require a performance assessment or reference by an applicant's current or most recent team leader. The obvious reason is so that the prospective employer can have up-to-date information about an applicant as his or her skills and experience could have broadened or deepened since he or she was last appointed from the staffing pool. Ms. Li testified that references are considered when selecting candidates, along with other information, such as test scores and work experience.

[430] Ms. Li testified that she was not in the HR Vancouver office when the

complainant applied for the CEPP term position and was appointed by Mr. Quinn. However, she understood that the complainant's position was that all his team leaders over the 10-year period before summer 2007 had refused to provide a reference for him because he was blacklisted and therefore he required accommodation. Based on that, HR granted him the accommodation that he requested and allowed him to submit an older reference from Mr. O'Neil, which referred to the complainant's employment between 2001 and 2006, rather than one from his most recent team leader.

[431] The complainant's testimony supports Ms. Li's testimony on this point. He testified that he told HR in 2007 that he could not obtain a fair reference from his team leaders at the CBSA because of his whistle-blowing, which eventually resulted in the CBC "National News" story of October 2007, that he requested accommodation because of that fact and that HR granted it in the form of allowing him to use the 2007 reference letter of Mr. O'Neil, after which the respondent appointed him.

[432] Ms. Li testified that, when the complainant applied for a transfer or deployment in 2008 or for new positions later that year, circumstances were different. The complainant had had recent work experience with the CEPP team leader, Ms. Smith. Nothing justified disregarding the more up-to-date reference from his most recent team leader. Ms. Li testified that he was treated the same as other candidates with respect to references. Any differential treatment the complainant received was in the accommodation granted to him in summer 2007 in response to his request. HR at that time waived the standard requirement for a work assessment from his current or most recent team leader.

[433] In summary, I find credible and persuasive the evidence presented by Ms. Li regarding the reasons for requiring a reference from the complainant's most recent supervisor as part of his transfer request in spring 2008 and as part of his job search in 2008 and 2009. I find that the respondent met its burden to establish that, on a balance of probabilities, requesting current references was a reasonable exercise of managerial authority based on perceived operational requirements and that it was not retaliation because he had filed unfair labour practice complaints.

E. <u>Expiry of the pre-qualified staffing pools</u>

[434] The complainant was in two external pre-qualified staffing pools, one for CR-04 service delivery agent positions, and one for CR-03 clerical support positions from

some time in summer 2007 until the pools were expired in 2009. According to the agreed statement of facts, the CR-04 pool's validity period was indefinite when it was established. Later, it was set to expire on March 31, 2009 but was extended to June 30, 2009. The CR-03 pool expired on March 31, 2009 (Exhibit 53).

[435] The complainant submitted that the early expiry of the two pre-qualified staffing pools for CR-03 and CR-04 positions that he was part of was motivated by anti-union animus towards him. He accused Ms. Delgaty, the CEPP sub-delegated manager, of expiring the pools before he was offered another term or indeterminate appointment to ensure that he would not be appointed. He argued, without ever asking Ms. Delgaty directly, that she had done so because of his whistle-blowing on the CBSA that was reported on the CBC "National News." He submitted that the CBC story had embarrassed CBSA management and that Ms. Delgaty's husband was part of the CBSA's senior management at that time.

[436] The complainant also testified that something underhanded occurred in the timing of the staffing pools' expiries. He argued that he emailed the Minister in February 2009 and that he received a reply on March 24, 2009 (Exhibit 10), acknowledging that he was in the CR-03 and CR-04 pools. He found out from his union on July 21, 2009 (Exhibit 39) that the pools had been expired at the end of March 2009, which was just a few days after the Minister's reply, and no one had informed him about the expiry.

[437] The complainant admitted in cross-examination that the Minister was not legally required to inform him when staffing pools were expired. However, he argued that the Minister should have done so as a courtesy under the circumstances because of the Minister's recent correspondence with him.

[438] Ms. Li testified that, as part of her HR responsibilities, she initiated the expirations of the two staffing pools, along with several other pools, in March 2009. She outlined the business reasons for so doing.

[439] Ms. Li spoke in cross-examination about Exhibits 47, 48 and 49, which are emails primarily exchanged between Ms. Li and Ms. Lam and other HR staff between December 2008 and early January 2009 about Ms. Li's proposal to change the expirations of six staffing pools to March 31, 2009. A common expiry date was proposed for all six pools for fairness reasons.

[440] Ms. Li testified that the respondent's practices for staffing pools changed after the British Columbia, Alberta, Saskatchewan, the Yukon and the Northwest Territories Region HR offices were combined. Those regions had different policies for pool processes. After the amalgamation, HR moved to a common policy of setting expiry dates for staffing pools that could be extended if it were determined after discussions that the managers were still using them.

[441] Ms. Li testified that she later wrote Ms. Delgaty, the sub-delegated manager for some of the staffing pools, and sought approval to have the CR-04 pool expire on a specific date, rather than continue as an indefinite pool. Ms. Delgaty accepted her recommendation (Exhibit 53).

[442] The complainant subjected Ms. Li to a lengthy and vigorous cross-examination. She testified that she did not work in the respondent's Vancouver HR unit in 2008 and that she did not know the complainant at the time of his disputes with Mr. Quinn and Mr. Bergh about his transfer and deployment requests or during the time of the two extensions to his term appointment. She testified that she was first involved with the complainant when she was asked to review the HR file in response to his access-to-information request for the disclosure of staffing rationales and other information. However, she did not know at the time that it was the complainant that had requested the information.

[443] Ms. Li testified in cross-examination that she only knew Ms. Delgaty professionally, that she had never met her outside of work and that she had never met her husband.

[444] The complainant argued that the nature of the work did not change, so there was no need for HR to expire the staffing pools and conduct another process that assessed new criteria. He argued that a sentence in the email of January 5, 2009 from Ms. Lam to Ms. Li (Exhibit 48) was evidence that the expiry of the pools was retaliation. The sentence reads as follows: "Chris Hughes is in the 425 pool [the CR-04 Process] and if the pool is terminated may cause him to raise a complaint."

[445] Ms. Lam was not called as a witness. Ms. Li testified that she understood that Ms. Lam's comment referred to the fact that the complainant, at that time, had at least three outstanding staffing complaints and that she was raising the question of whether closing the CR-04 Process staffing pool before the complainant was appointed might

lead to another complaint.

[446] Ms. Lam's reply to Ms. Li, sent later that same day (Exhibit 48), contains the following paragraph: "Mr. Hughes has already asked for a PSC investigation from that process. It shouldn't be a concern, as the pool expiry has nothing to do with him. This is a way for us to manage our pools and do some real clean up."

[447] Ms. Delgaty testified that she was the sub-delegated manager on the CR-03 and CR-04 staffing pools at issue. She testified that she was the director of payments and processing for British Columbia, Alberta, the Yukon and the Northwest Territories at the relevant time. Since she worked at the director level, she did not do work at the level of detail that the complainant suggested. She testified that, as had Ms. Li, Ms. Li contacted her in 2009 with a recommendation that the pools be expired because they were no longer being used or because they no longer had the competencies managers were looking for. She accepted Ms. Li's recommendation. Ms. Delgaty also testified that she had no knowledge of who was left in the pools when she agreed to the recommendation of HR to expire them. I found Ms. Delgaty's testimony clear and credible.

[448] Ms. Delgaty acknowledged in cross-examination that she and her husband had discussed the CBC "National News" program when it aired. She testified that she had never met the complainant. Although the new CEPP staff was pointed out to her when she attended the official CEPP launch party in fall 2007 with her boss, Ms. Milne, and she may have spoken to some of them, she never met the complainant. The CEPP hiring manager, Mr. Quinn, never spoke to her about him at the party. Mr. Quinn confirmed as much in his testimony. Ms. Delgaty also testified that she did not speak with the complainant at any time after the launch party and that she did not interact with him until she received an accusatory letter from him in October 2009.

[449] The complainant objected to Ms. Delgaty testifying about his letter to her on the basis that he sent it to her on October 7, 2009 and that the October 1, 2009 complaint only covered the period up to October 1, 2009. Thus, the letter was sent after the expiry of the period at issue. I upheld the complainant's objection, but he later introduced the letter himself (Exhibit 52) in cross-examination as evidence to support his argument that email exchanges showed that the expiry of the staffing pools was directed at him.

[450] In summary, I find credible and persuasive the evidence presented by the respondent's witnesses regarding their reasons for expiring the pre-qualified staffing pools. I find that the respondent met its burden of proving that, on a balance of probabilities, the change to the expiry dates of the two staffing pools into which the complainant was qualified, from being unspecified to March 31, 2009, was initiated by HR for bona fide operational reasons as part of an initiative to clean up its existing staffing pools. I also find that it was a reasonable exercise of the respondent's staffing authority. The expiry was not retaliatory action taken because the complainant had exercised his right to file unfair labour practice complaints.

F. Failure to reappoint

[451] The complainant alleged that the respondent's failure to reappoint him during the relevant period was an unfair labour practice.

[452] The complainant argued that the respondent was not interested in offering him any appointment after his term appointment expired, for many different reasons. He described himself as a known whistle-blower, a known troublemaker, a human rights advocate, and an individual well known as skilful at redress mechanisms and as being unafraid to use them. He also included in his reasons the respondent's retaliation because he sought a union executive position and had filed several unfair labour practice complaints earlier in his employment.

[453] It is clear from the evidence that the respondent was not interested in appointing the complainant to a new position after his term appointment expired. However, the respondent is not required to appoint every candidate in the pre-qualified staffing pools.

[454] The complainant's evidence was that he was qualified in the CR-03 and CR-04 staffing pools, he had applied for well over a hundred positions during the contested period, many positions became available for which he was qualified, he was a productive worker and he did not have a discipline record. However, the respondent consistently appointed other candidates, some with lower marks and less qualifications than him. He believed that established misconduct in the staffing decisions.

[455] The evidence also showed that the complainant has exceedingly high

expectations that the respondent would meet his concerns, priorities and demands, positively and immediately, and he is quick to make serious accusations against managers who do not. The evidence, much of it introduced by the complainant, also shows a pattern of written communications with management that is, in tone and content, at best inappropriate, at times bullying, and certainly not conducive to being appointed by the recipients of the communications. Some examples are Exhibits 30, 32, 42 (at page 2) and 44 (at page 3).

[456] I have already ruled that, in accordance with the Board's jurisprudence, whether or not the reverse-onus provision applied, the complainant had to lead his evidence first at the hearing because the sparseness of the allegations about the challenged staffing decisions made it difficult for the respondent to know, in adequate detail, the nature of the complaints against which it had to mount a defence. By presenting his case first, the complainant had to provide the further particulars of his case before the respondent proceeded with its proof. On the last day of the hearing, at the start of the complainant's argument, the complainant identified 11 suspect staffing actions, although he stated that perhaps for only four or five was he better qualified than the person appointed and that the rest were probably just staffing decisions. However, he did not identify those four or five.

[457] Ms. Li gave detailed testimony on how the respondent's staffing process works when a manager wishes to fill a vacancy. She testified that the ranking of statement-of-merit criteria competencies was not the only information used by hiring managers to select a candidate for a position. Hiring managers are entitled to consider other information, such as references, performance information from the candidate's most recent team leader and the candidate's work experience, to select the best-fit candidate for the position. As a result, the candidate with the best mark on the tested statement-of-merit criteria competencies is not necessarily the candidate chosen.

[458] Ms. Delgaty testified that managers have the right to know who is in the qualified staffing pool. However, when a manager supplies his or her selection rationale to HR to draw people out of the pool for the right fit for the vacancy, HR draw the names, based on the statement-of-merit criteria, as a result of the staffing request. Ms. Li confirmed as much.

[459] The complainant submitted that the respondent's managers manipulated the statement-of-merit criteria so that HR would not choose his name from the staffing

pool.

[460] My jurisdiction does not include determining whether staffing protocols were followed or whether less-qualified candidates were chosen for positions for which the complainant was better qualified but was not selected as the best-fit or the right-fit candidate. My task is to weigh the competing depictions of what occurred to the complainant and decide whether the respondent proved its case, on a balance of probabilities, as required by the reverse-onus provision.

[461] The serious conflict began with the complainant's misunderstanding that he had a legal right to be transferred, at his request, to Government Street, when the sole or main reason for the transfer was so that he could run for a union executive position. The complainant insisted that the respondent's failure to transfer him was illegal and an unfair labour practice as well as evidence of interference with the union and anti-union animus. I already found that it was none of these things.

[462] I carefully examined the complainant's many allegations that the respondent's staffing actions were unfair labour practices because they were motivated by anti-union animus or by retaliation for him filing unfair labour practices. However, I am left with allegations relating to four or five unidentified staffing actions, which remain insufficiently detailed.

[463] In summary, I find credible and persuasive the evidence presented by the respondent's witnesses regarding how the respondent's selection and appointment processes work in general and why other candidates might have been offered appointments as the best-fit candidates even if they ranked lower on some competencies than did the complainant. The respondent cannot be required to prove more in the circumstances because of the lack of specificity provided by the complainant as to which particular staffing decisions were being challenged. I find that the respondent met its burden to establish that, on a balance of probabilities, not offering the complainant a new appointment was a reasonable exercise of managerial authority based on perceived operational requirements and that it was not retaliation for his expressed desire to become a union executive member or because he had filed unfair labour practice complaints.

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

(The Order appears on the next page)

VII. Order

[465] The respondent's objection to the Board's jurisdiction to hear an unfair labour practice complaint involving a staffing decision is dismissed.

[466] The complainant's request for disclosure of memos written during the assessment phase of January 2008 to October 2009 by all CR-04 candidates who were appointed subsequently to positions in Victoria is denied.

[467] The complainant's request to present evidence and arguments on the applicability and impact of the provisions of the *PSDPA* on the timeliness of the complaints is granted.

[468] The respondent's objection to the timeliness of the complaints is dismissed.

[469] The respondent's objection that the complaints reveal, on their face, no arguable case of violation of paragraph 186(2)(*a*) of the *PSLRA* is dismissed.

[470] I declare that the respondent bears the burden of establishing on a balance of probabilities that the failures to comply with subsection 186(2) of the *PSLRA* that are alleged in the complaints did not occur.

[471] The complainant's request to call more witnesses at the resumption of the hearing on May 2, 2011 is denied.

[472] The complainant's request to adduce new policy documents at the resumption of the hearing on August 17, 2011 is denied.

[473] The complainant's requests of November 21 and 28, 2011 to introduce additional evidence are denied.

[474] I declare that the allegation that Ms. Smith provided an unfair reference on February 11, 2008 is untimely.

[475] The complaints are dismissed.

January 5, 2012

Margaret E. Hughes,
Board Member