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Files: 566-34-5754
and 561-34-464

Citation: 2013 PSLRB 11

Public Service Labour Relations Act

Before an adjudicator and a panel of the Public Service Labour Relations Board

BETWEEN

DAVID GRAY

Grievor and Complainant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Complainant

and

CANADA REVENUE AGENCY

Employer and Respondent

Indexed as
Gray and The Professional Institute of the Public Service of Canada v. Canada Revenue Agency

In the matters of an individual grievance referred to adjudication and a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator and a panel of the Public Service Labour Relations Board

For the Grievor and Complainants: Harinder Mahil, Professional Institute of the Public Service of Canada

For the Employer and Respondent: Pierre Marc Champagne, counsel

Heard at Victoria, British Columbia,
March 7 and 8, 2012.

I. Grievance referred to adjudication and complaint before the Board

[1] David Gray was, at the relevant time, employed by the Canada Revenue Agency (CRA or "the employer") in Victoria, British Columbia, as a tax avoidance auditor, classified AU-03, in the Aggressive Tax Planning Section of the International and Large Business Directorate. On March 30, 2010, he filed a grievance alleging a violation by the employer of clause 43.01 of the collective agreement concluded between the CRA and the Professional Institute of the Public Service of Canada ("the union") for the Audit, Financial and Scientific employees bargaining unit; expiry date December 21, 2011 ("the collective agreement"). Mr. Gray alleged that he was discriminated against by the employer because of his union activity. The grievance was referred to adjudication on August 24, 2011 (PSLRB File No. 566-34-5754).

[2] The details of the grievance as stated on the grievance form are as follows:

> *On 19 March 2010, I discovered that, once again, I had been temporarily struck off strength as a result of having taken more than 6 consecutive days of union leave without pay, with the result that I was not credited with that service for purposes of calculation of my superannuation and my T4 has been erroneously amended. I take union leave in order to cover my absence from the workplace while I perform the duties that I am required to perform as a Vice-President of the Professional Institute of the Public Service of Canada, which is the duly-certified bargaining agent for my bargaining group, among others. The CRA's actions have prejudiced my pension and constitute discrimination and retaliation against me for my lawful activities as an official of my union.*
>
> *The CRA's actions against me have been taken in contravention of my rights as defined by my Collective Agreement in general, and specifically in contravention of my rights as defined by Article 43, clause 43.01.*
>
> . . .

[3] Clause 43.01 of the collective agreement reads as follows:

> ***43.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted, or membership or activity in the Institute.*

[4] On May 12, 2010, Mr. Gray and The Professional Institute of the Public Service of Canada filed an unfair labour practice complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"), which named the CRA and its commissioner, Linda Lizotte-Macpherson, as respondents (PSLRB File No. 561-34-464). The corrective actions sought included declarations that the CRA contravened paragraph 186(1)(*b*) and subparagraph 186(2)(*a*)(iv) of the *Act*.

[5] The complaint reads in part as follows:

. . .

> . . . [T]*he Canada Revenue Agency (CRA) retaliates against me and other union officials who take more than six consecutive days of union leave without pay, by causing them to be struck off strength temporarily. While I do not expect to be paid by the CRA when I take union leave without pay, I do expect to be able to count this service as pensionable time under the provisions of the Public Service Superannuation Act. However, the termination by the CRA of my employment during these times of union leave without pay, has meant that I cannot count this time as service for the purposes of calculation of my pension, thereby prejudicing my future retirement. In addition my T4 has been amended erroneously and retroactively in violation of CRA policy. The CRA has refused to change their discriminatary and retalitory practice.*
>
> . . .
>
> [*Sic* throughout]

[6] With the parties' agreement, the Public Service Labour Relations Board ("the Board") joined these two matters for the purposes of the hearing. The evidence led by the parties was common to both the grievance and the complaint.

[7] At the outset of the hearing, Mr. Gray and the union withdrew the unfair labour practice complaint against Ms. Lizotte-Macpherson, leaving the CRA as the sole respondent.

[8] In essence, Mr. Gray contested the employer's application of its leave without pay (LWOP) policy to him, alleging that this caused him several inconveniences.

II. Summary of the evidence

A. For Mr. Gray

[9] Mr. Gray has been employed by the CRA since 1985 and holds the professional designation of Certified General Accountant. He has been a union activist for several periods since 1992 and, since 2008, has held office in the union as a part-time vice-president. He stated that he was one of four vice-presidents, two of whom are full-time and two, including Mr. Gray, part-time. He explained that being a part-time vice-president meant that he did not have to move to Ottawa, where the union's main office is located. Mr. Gray said that approximately 50% of his work time was devoted to union business.

[10] Mr. Gray testified that, from 2001 to 2008, he was never struck off strength during periods in which he had taken more than six working days of LWOP for union business. He stated that the first occurrence was in February 2010, relating to LWOP he had taken in November 2009. Mr. Gray said that, while he was in Ottawa on union business in February 2010, he received a call from Susan Clozza, Assistant Director, Audits, in the Vancouver Island Tax Services Office (TSO). Ms. Clozza told Mr. Gray that he would be temporarily struck off strength, effective immediately, and that the overpayment he owed would be recovered by the CRA. According to Mr. Gray, when he requested an explanation, Ms. Clozza was unclear and said she would contact him. He said she sent an email about one week later, which was not helpful to him. Mr. Gray referred to the CRA's *Guidelines for the Recovery of Salary Overpayments*, dated August 4, 2010 (Exhibit G-10).

[11] Mr. Gray stated that being struck off strength with little explanation by the employer caused him "massive" problems and great stress. When some explanation was provided, he received an amended T4 slip. Mr. Gray said that for 2009, he received seven T4 slips, which meant that he filed seven tax returns in one year. That caused problems when he remortgaged his home, as his bank requested T4 slips and notices of assessment. Mr. Gray contacted Ms. Clozza and asked that she arrange for a representative from the compensation group to provide an explanation. On March 16 and 17, 2010, Mr. Gray had a telephone discussion and an email exchange with Christian Welch of the Compensation Client Service Centre (CCSC) in Winnipeg (Exhibit G-1). Mr. Gray said that it did not assist him, as no explanation of the struck off strength policies was provided.

[12] Mr. Gray next referred to the first-level grievance reply from the employer (Exhibit G-2). Although no formal hearing was held, he explained the situation to his manager, Jan Williams. Mr. Gray disagreed with the following statement on the reply concerning his T4 slip:

. . .

> *In regards to your amended T4, having identified an overpayment from 2009, the CCSC has applied the provisions in the CRA Employer's Guide and issued the appropriately amended T4. I am satisfied that the proper procedures have been followed and that your T4 is correct.*

. . .

[13] Mr. Gray stated that, following that reply, he received three or four amended T4 slips. He then referred to the CRA's 2009 *Employers' Guide – Filing the T4 Slip and Summary* (Exhibit G-3), particularly the section on page 22 titled, "Repayment of salary or wages by an employee," and that on page 23 titled, "Salary paid in error." In the latter section, the example provided states that, in cases of salary overpayment to an employee, the T4 slip may be amended to reduce the total employment income, the Canada Pension Plan (CPP) and the Employment Insurance (EI) earnings by the amount of the overpayment. The example also states that the amount of CPP, EI and income tax deducted should not be adjusted.

[14] In preparation for the third-level grievance hearing, an exchange of emails took place between May 6 and May 15, 2010, involving Mr. Gray, his union representative and an employer labour relations representative (Exhibit G-4). At the invitation of the employer's representative, in an email dated May 15, 2010, Mr. Gray set out the errors that he believed had occurred in his compensation. Following a review by a compensation specialist, Mr. Gray received an email dated July 12, 2010 (Exhibit G-5), setting out the specialist's findings. Mr. Gray stated that that was the first explanation he had received since he had raised the issues concerning his compensation.

[15] In preparation for the final-level grievance hearing, Mr. Gray summarized the problems he was experiencing in an email to his union representative dated April 14, 2011 (Exhibit G-6), who in turn forwarded it to the assistant commissioner of the CRA's Human Resources Branch on May 2, 2011. It is convenient to reproduce

excerpts from that email. Although lengthy, they set out the difficulties Mr. Gray testified to concerning his compensation.

. . .

> *In Sept, Oct, Nov and Dec 2009 and to date, I reported LWOP for Union purposes as I have done off and on for the last seventeen (17) years on my time sheet as I had been instructed. For some reason in this particular instance the leave exceeding six days triggered a reaction from the pay office that has not happened in the previous seventeen years (despite having LWOP exceeding 6 days on a number of occasions in each year). Their action was to contact my supervisor in December 2009 who was about to go on vacation and was going to deal with it on his return. He was unclear on how to address it on his return and CCSC was not helpful and ultimately CCSC circumvented him, his supervisor and went to my ADA (brand new in the job) who was told it was an emergency and had to be dealt with immediately, whereupon she contacted me. This was my first contact. She informed me that they would be striking me off strength and recovering the money at 100% and provided me with some information although since it was third hand through CCSC and her personal research, it was of limited help.*
>
> *In the meantime, in January 2010 they compounded the problem by ceasing recovering any LWOP from Cheques for January and Feb 2010.*
>
> *I now refer you to the Bulletin referred to by CCSC in their email titled "Guidelines for the Recovery of Salary Overpayments" dated April 2, 2009. It states that money is to be recovered from salary payments or benefits payable or from a third party pursuant to an assignment. This does not give them authority to recover amounts paid on my behalf to Superannuation, CPP, Tax or EI which is what happened. In addition it states that the recovery of overpayments must not cause a negative or zero entitlement to the employee (something that was in existence from March 2010 to August 2010). The recovery amount limits can be overruled if approved by the employee or deemed to be the employees fault, clearly not the case as I filed my timesheets as instructed.*
>
> *CCSC did its first adjustment on March 10, 2010 which reversed Superannuation, Tax, CPP and El in 2009 and 2010 and gave me credit for this against amounts owed by me. This creates superannuation problems I will get to later, it also creates an amended T4 which while an*

argument can be made for the amendment of the salary, nowhere can they justify the CPP, El, Superann or tax revision especially as the Employers guide clearly states NOT to do this.

On March 17, 2010 they do a second amendment which is done differently and this time does not amend the 2009 Superann but does adjust the salary, CPP, El and Tax resulting in another amended T4. . . .

On June 17 they amend the T4 again, to adjust the PA (pension adjustment) amount back to the original T4 effectively acknowledging the first adjustment was incorrect but not rectifying the Superann deductions.

On June 30 they refund my medical and union dues for Nov 2009 (no explan until July 12, 2010 email below)

On July 15 they amend my T4 yet again for the medical and union adjustments.

In a letter dated July 6, 2010 they say I have underpaid superannuation by $1226.75 and must repay it and it will be done in ten installments unless I contact them with instructions, which are irrelevant, since deductions were input prior to the letter being sent to me and show up on the July 21 paycheque. Please note that the superannuation recoveries are a direct result of the mistakes made on the Mar 10 and 17 adjustments that I had been concerned about and had been told that they were correct, yet now the inference is it is my fault.

In September 2010 my Tax Return is reassessed to take into account the first three amended T4's. I had filed my original tax return in March 2010 based on the T4's I had at that time.

. . .

As to the November 11, 2009 payment of the stat, this is finally paid on December 3, 2010 after being ordered to be paid by Pacific Asst Commisioner in October 2010. No amended T4 is issued for this and the stated reason is because it is paid in 2010. . . In addition in paying this they erroneously deduct superann from the cheque despite the fact that I have paid full superann in 2009 which includes this amount.

On January 19, 2011 and Feb 2, 2011 the medical and union dues erroneously refunded to me on June 30, 2010 are rededucted.

In Feb 2011 another amended T4 is issued for 2009 to reinclude the redeductions of the medical and union dues noted above however the amount in Box 14 for Salary is not corrected.

In March 2011 I follow up on my request for LWOP for July of 2011 and I am again referred to LWIA or to take my one year personal needs LWOP. I respond that I have other plans for my 1 year LWOP, I have already used my three month LWOP and I am only requesting it as LWOP rather than LWIA to make it administratively easier for them. I suggest they contact Compensation regarding the feasibility of me going on LWIA. Compensation reports that LWIA is not an option for me since the first time I am absent on union leave without pay for more than six days it will kick it out of the system.

In April 2011 another amended T4 is issued for 2009 (version 7) which now reflects the corrected amounts under their erroneous method (see opening statement references to Income Tax Act).

In April 2011 the amount of superann erroneously deducted in December 2010 relating to the payment of the stat from November 11, 2009 is refunded to me.

We now stand nineteen months after CCSC identified there was a problem and 7 amended T4's later to conform to their erroneous method of dealing with amounts paid in one year and repaid in another. It should be noted that this issue was self correcting in the past seventeen years and only became a problem when they made it one.

. . .

On April 13, 2011 I finally get a call from compensation and we have a pleasant exchange about where we stand to date. I agree to give them permission to increase the amount they are recovering from my pay (from the 50% max) to help them stay more current. This will require manual interventions from them every few months as the 50% is a default. It is worth noting that the delay in the recoveries have not been caused by me (I file my timesheets on time) but by their system and them not contacting me to authorize greater recoveries until today. I caution them to make sure that they leave enough salary to pay the superann, medical, union dues, death benefit and disability and to ensure it is done correctly this time.

I am informed that I will receive an amended T4 for 2010 for the amounts recovered in 2011 which will result in my

> *Tax Return being amended for 2010 since I filed it in March (amended T4 will not be generated until May 2011).*
>
> . . .
>
> [*Sic* throughout]

[16] Mr. Gray referred to the employer's final-level reply to his grievance (Exhibit G-8), which states in part as follows:

> . . .
>
> *The practice of temporarily striking off strength employees who are on leave without pay for more than six consecutive days is a requirement of Public Works and Government Services Canada's pay manual, in compliance with Service Canada's requirements on issuing a record of employment, which is pursuant to the* Employment Insurance Regulations. *The CRA is bound to administer this requirement.*
>
> . . .

[17] Mr. Gray stated that the CRA never issued him a record of employment.

[18] During the hearing, the employer conceded that Mr. Gray received seven amended T4 slips between January 1, 2010 and mid-2011. Mr. Gray stated that there was a lack of communication from the employer and that he should have been contacted by someone who understood his situation, rather than the patchwork approach that was taken to his issues. As mentioned in the email, Mr. Gray said that only in April 2011 did he receive a call from a compensation officer, who explained what had occurred and how his issues would be resolved.

[19] At the request of Ms. Clozza in February 2010, Mr. Gray prepared a document listing the dates on which he had taken LWOPs for periods of greater than six consecutive days from 2008 through January 2010 (Exhibit G-9). He said that he was temporarily struck off strength five times in 2010 and three or four times in 2011. He received two T4 slips each in 2010 and 2011, as well as a T4A slip in 2011.

[20] Mr. Gray stated that he had concerns about the amount of LWOP he had taken in relation to the amount of such leave permitted for the purposes of pensionable service. He explained that, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the maximum LWOP permitted to be treated as pensionable service (excluding certain

leaves such as child care and unpaid sick leave) was five years. In response to a query he made in 2008, Mr. Gray had received a letter from the CCSC dated January 25, 2008 (Exhibit G-11), informing him that he had 3 years and 177 days remaining of the allowable 5-year maximum. In April 2011, Mr. Gray submitted a request for an updated balance of his leave. The reply from the CCSC dated May 27, 2011 (Exhibit G-11) stated that, as the LWOP he had taken was as a full-time paid union official, it did not count against the five-year maximum pensionable limit. Mr. Gray stated that the CCSC did not realize he was not a full-time union official. At this point in the hearing, counsel for the employer stated that the employer did not dispute that there were ongoing issues concerning Mr. Gray's pay and his LWOPs.

[21] Mr. Gray said that, after he attempted to obtain explanations from the CCSC, he was provided with a document titled, *Commencing Leave Without Pay (LWOP), More Than Six Days Checklist for Employees* (Exhibit G-13). He testified that it was the first time he had seen such a checklist. He referred to the second item on the checklist, which states that the CCSC must be advised at least four weeks before the effective date of a LWOP. Mr. Gray said that he was often unable to meet that requirement, as he was not usually provided four weeks' notice of the union business he had to attend to.

[22] Mr. Gray stated that, since February 2010, he has devoted approximately 100 hours of his own time to attempting to find and correct errors to his compensation made by the employer. He testified that he suffered stress and anxiety as a result of his difficulties. He said that each amended T4 slip was akin to being reaudited and that changes were never fully explained by the employer. He had to verify each pay stub for errors. He provided as examples three pay stubs, dated March 10 and 19, 2010 and November 9, 2011 (Exhibit G-12). He testified that whenever he questioned his pay stubs, the employer initially took the position that it was correct and then amended his stubs when he pointed out its errors. In 2012, he had received three T4 slips as of the date of the hearing.

[23] In cross-examination, Mr. Gray acknowledged that he was not a pay and compensation specialist. He stated that he had an understanding of T4 slips beyond the knowledge of a compensation specialist.

[24] Asked whether he had expertise in the application of pay and compensation policies to his circumstances, Mr. Gray did not reply directly, stating that he does only what the employer asks him to and that the employer is in the wrong.

[25] In re-examination, Mr. Gray stated that his expertise in T4 slips was gained from his earlier experience as a payroll auditor.

B. For the employer

1. Testimony of Ms. Williams

[26] Ms. Williams has occupied the position of Manager of Income Tax at the CRA's Vancouver Island TSO in Victoria since the beginning of 2007. She had been a team leader, income tax since 2002. She stated that Mr. Gray's team leaders report to her.

[27] Ms. Williams stated that she has known Mr. Gray since 1988 or 1989 and that she has had a good working relationship with him. She said that Mr. Gray never reported directly to her.

[28] Ms. Williams said that she first became aware of Mr. Gray's grievance when she heard a comment that he did not want to present it at the first level, as he felt she could not resolve it. She asked Mr. Gray to allow her to try. She was aware that Mr. Gray was experiencing T4 slip problems and told him that she was not an expert in that area. Ms. Williams stated that she had prepared the first-level grievance reply.

[29] With respect to the issue of being struck off strength for LWOPs of greater than six days, Ms. Williams stated that her supervisor, Ann Wellman, Assistant Director, Audit, was advised by the CCSC that Mr. Gray should have been struck off strength during such absences to avoid salary overpayment. When Ms. Williams learned that Mr. Gray's team leader was not submitting the appropriate forms to the CCSC via a computer web form, as all pay actions were to be done, she directed him to do so. She said that that was part of a team leader's duties, as soon as it was known that the LWOP would be greater than six consecutive days. Ms. Williams stated that that policy applied to all employees, whether or not they were union representatives.

[30] Ms. Williams then referred to an email dated January 18, 2010 sent to Ms. Wellman from Richard Lafrance, the assistant director, compensation, in Winnipeg, concerning Mr. Gray, which Ms. Wellman forwarded to her on the same day (Exhibit E-1). She stated that she learned from that email that Mr. Gray's team leader was not submitting the LWOP web forms. The following extract from the email set out the issue:

. . .

> *The issue is, this employee was on Union business from October 30th to December 12th. For any periods of Leave without Pay (LWOP) exceeding 6 days (for any reason) it must be reported to compensation on the 7th day. At this point with no paperwork submitted, David has been overpaid by the CRA for this entire time. Until we receive the Temporary Struck off Strength (TSOS) template, we cannot begin recovery actions. In addition, if any other LWOP periods greater than 6 days have occurred since that time, his overpayment will be growing.*

. . .

[31] Asked whether in fall 2009 there were any issues between CRA management and the union, Ms. Williams replied that she did not recall any grievances being filed. She believed that the union was bargaining at that time and that it was involved in a job action in which its members did not complete time sheets, except for leave requests. In 2010, there were no major issues with the union. She had discussions with Mr. Gray, but nothing made her feel that there was any animosity.

[32] In cross-examination, Ms. Williams stated that she learned of the issue concerning Mr. Gray on January 18, 2010. She did not speak to Mr. Gray about it at that time, and to her knowledge, neither did Ms. Wellman. She had never dealt with the issue before Mr. Gray's grievance.

[33] In re-examination, Ms. Williams stated that she directed Mr. Gray's team leader to submit the web forms to the CCSC after the January 18, 2010 email.

2. <u>Testimony of Sarahdelle Galera</u>

[34] Sarahdelle Galera is a compensation and pay specialist who has been, since September 2009, a compensation manager supervising between 10 and 15 employees. Before that, she had been a team leader in the CCSC.

[35] Ms. Galera explained the system for dealing with LWOPs of more than six consecutive days. She said that employees fill in time sheets through a computer application called the Corporate Administrative System (CAS). Employees would also fill in time sheets for LWOPs. As the compensation agents are connected to the CAS, they receive reports about LWOP time sheets filled in by employees. Compensation agents review those reports weekly and identify LWOPs of more than six days and refer

them to Ms. Galera's group. Once that group confirms that a LWOP of more than six days has been taken by an employee, the employee's immediate supervisor is informed that such a LWOP must be reported through web forms instead of time sheets. Ms. Galera stated that only team leaders or administrative officers can submit a LWOP web form on behalf of an employee. She testified that the instructions for dealing with a LWOP of more than six days originated with Public Works and Government Services Canada (PWGSC), which administers all pay and benefits for the CRA and other government agencies. The agents in her group are trained in such matters. Ms. Galera referred to a CRA Workplace Relations and Compensation Directorate training document comprising 20 pages and dated March 6, 2009, titled "Temporarily Struck-Off Strength (T-SOS)" (Exhibit E-2). She stated that LWOPs of more than six days for union activities are not treated any differently than LWOPs taken for any other reason.

[36] Ms. Galera stated that the practice of striking employees off strength was in force when she arrived in the compensation group in 2005. She referred to a memo dated October 22, 1997 (Exhibit E-6), concerning LWOPs of greater than five days, issued by the employer's compensation group to assistant deputy ministers, directors general and directors. Ms. Galera said that striking off strength arises out of Part 1 of the *Employment Insurance Regulations,* SOR/96-332, of which subsection 14(1) provides the following about the interruption of earnings:

> ***14.*** *(1) Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.*

[37] Ms. Galera also referred to subsection 19(2) of the *Employment Insurance Regulations,* which states as follows: "Every employer shall complete a record of employment, on a form supplied by the Commission, in respect of a person employed . . . in insurable employment who has an interruption of earnings." Ms. Galera then referred to the PWGSC's *Compensation Directive 2007-008* dated April 4, 2007 (Exhibit E-4), the subject of which was the introduction of an automated and electronic process for web-based records of employment. Section 3.1 of that

directive refers to the requirement under the *Employment Insurance Act,* S.C. 1996, c. 23, and its regulations for records of employment.

[38] Ms. Galera stated that the CRA issued compensation information bulletins to all employees via email. She referred to three of those bulletins: the second edition, issued in February 2006, the fifth edition, issued in May 2006, and the ninth edition, issued in April 2007 (Exhibit E-5). The second edition dealt with the process for recovering funds resulting from LWOPs, i.e., time-related recoveries. The fifth edition contained the following:

. . .

> *In December, employees reporting more than six full consecutive days of leave without pay on their timesheet will receive the following message:*
>
> > *"Entries exceed maximum allowable leave without pay, contact your manager."*
>
> *Managers are asked to ensure that these employees are Temporarily Struck Off Strength (T-SOS). . . .*

. . .

[39] The ninth edition of the bulletin (April 2007) to employees stated the following under the headings "Reminder! On-going Leave Without Pay":

. . .

> *Please remember that all leave without pay must be reported in a timely fashion in order to avoid overpayments. If you are away for a period of more than six consecutive days, your manager must advise the Compensation Client Service Centre (CCSC) in order to suspend your account.*
>
> *Note that timesheets should not be entered for periods in excess of six consecutive days for reason of leave without pay as it will create delays, overpayment and does not notify the CCSC. The leave without pay Webform should be completed as soon as possible and forwarded to the CCSC. . . .*
>
> *Overpayments will be recovered as per the CRA guidelines for recovery of salary overpayments upon return to work or you can make arrangements to repay while on leave without pay.*

. . .

[40] Ms. Galera then referred to a CRA document dated July 17, 2009 concerning a CCSC procedure titled, "Processing Services – Temporarily Struck Off Strength (T-SOS)" (Exhibit E-7). It was version 16.0 of the procedure. The document history forming part of the exhibit indicates that version 1.0 was issued on July 8, 2005. Ms. Galera stated that compensation agents use it as a reference. Although the document refers to a checklist as one of the steps in the procedure, Ms. Galera said that it was not the document that was introduced as Exhibit G-13. She said that Exhibit G-13 is the document to be completed by an employee before leaving on a LWOP.

[41] Turning to Mr. Gray's problem in fall 2009, Ms. Galera stated that the correct dates of his LWOP were from October 30 to December 6, 2009. She said that Mr. Gray had reported the LWOP for greater than six days on a time sheet. A CCSC agent identified it as a LWOP of greater than six days, and it was reported to Ms. Galera's team. One of her staff then emailed Mr. Gray's team leader on December 14 or 15, 2009, informing him that the manager of an employee going on such a LWOP was responsible for submitting a web form and that such a LWOP could not be reported on a time sheet. Ms. Galera said that they awaited the web form, which did not arrive. That caused Mr. Lafrance to become involved, and he contacted Ms. Wellman. Only toward the end of February did Ms. Galera's group become able to process Mr. Gray's LWOP.

[42] Ms. Galera then addressed the issue that, historically, Mr. Gray had uneventfully taken many LWOPs of more than six days. She said that the CCSC was formed in 2005 and that the Victoria TSO came within her group's responsibility in June 2006. At that time, many things were missed, due to the CAS. By way of example, Ms. Galera said that, in February 2009, Mr. Gray had 12 or 13 days of LWOP. He entered all those dates on his time sheet at the same time, and his manager approved it on the same day. Those 12 or 13 days were held in the CAS because that system limited Ms. Galera's group to viewing only 5 days at a time. As only five working days showed in the CAS report, a problem was not flagged. Ms. Galera said that the CAS was modified so that, if a report showed only five days of leave, the agent involved would have to research further to determine whether any additional days of LWOP had been granted. She stated that the problem that caused the change in approach was not unique to Mr. Gray, as there were inconsistencies in that some LWOPs of more than six days were identified and others were missed. Ms. Galera said that, for the 2011-2012 fiscal year, although the team that refers LWOP cases to her group reported 114 LWOPs of more

than six days, only 102 of the employees involved were temporarily struck off strength.

[43] As a clarification of the problems encountered by Mr. Gray with his pay stubs, Ms. Galera explained that employees' paycheques are prepared by the pay office two weeks in advance, so that their pay is current. Thus, a paycheque dated March 14 would have been prepared two weeks earlier. Therefore, if an employee proceeds on a LWOP on March 7, he or she is already overpaid, because the cheque has been prepared.

[44] Questioned as to why Mr. Gray did not receive a correct T4 slip for 18 months, Ms. Galera said many aspects were involved. The CAS results go to the PWGSC pay office, which prepares T4 slips for all employees based in British Columbia. That office makes decisions about amending T4 slips.

[45] Asked if the situation affected Mr. Gray's accumulation of pensionable time, Ms. Galera stated that all LWOPs taken by Mr. Gray for periods of less than three months automatically count toward his pension. She said that, from 2009 to the date of the hearing, Mr. Gray's total LWOPs had no effect on his pension and that being temporarily struck off strength for union activities does not count against the five-year maximum. Ms. Galera stated that, to identify a LWOP for union activities, an employee must indicate "Union Leave" in the "Other Reasons" section of the web form.

[46] In cross-examination, Ms. Galera said that Mr. Gray used the correct procedure when he filled in his time sheets. The next step was that his manager had to create a web form for the LWOP. If a LWOP of fewer than six days is reported, then the overpayment is recovered manually. She said that the CAS informs the PWGSC when necessary and of how many days to recover. A recovery is made through the PWGSC only when an employee is temporarily struck off strength.

[47] Ms. Galera was referred to Exhibit G-10, the *Guidelines for the Recovery of Salary Overpayments*. She stated that the document had been modified since its issuance on August 4, 2010. Ms. Galera was then referred to a section on page 2 of the document titled, "Recovery Over an Extended Period for Active Employees," which reads in part as follows:

. . .

> *An employee who owes the CRA money as a result of a salary overpayment whether through an administrative error or another type of error must be contacted either by phone or e-mail and advised of the recovery prior to any deductions being taken from their salary. . . .*

. . .

[48] The document then sets out a table indicating the percentages of net pay to be recovered and the recovery periods. Ms. Galera stated that that section did not apply to Mr. Gray's situation, as no error had been committed. The CCSC followed procedure by contacting his manager in December 2009 and requesting that he submit the web form. It was processed when the CCSC received it in February 2010.

[49] As for records of employment, Ms. Galera stated that they are issued for all interruptions of earnings. She said that, as stated in *Compensation Directive 2007-008* (Exhibit E-4), since its effective date of April 4, 2007, paper copies of records of employment are no longer required.

[50] Referred to the training document in Exhibit E-2, Ms. Galera agreed that, as stated in slide 52 of that exhibit, benefits letters should be sent to employees proceeding on LWOPs so that they are kept aware of their benefits and entitlements. She stated that Mr. Gray did not receive a benefits letter because, by the time the web form for being temporarily struck off strength was processed, he was no longer on a LWOP.

[51] Ms. Galera acknowledged that the T4 slips issued by the PWGSC are based on the entries in the CAS generated by the CRA. She stated that Mr. Gray's pay stub dated March 19, 2010 in Exhibit G-12 is not a regular pay stub but an overpayment stub.

III. Summary of the arguments

[52] In this summary of the arguments of the parties, I have referred only to the authorities cited by the parties that I consider relevant to determining the matters before me.

A. <u>For Mr. Gray</u>

[53] At the outset, Mr. Gray and the union conceded that they had no case under paragraph 186(1)(*b*) of the *Act*.

[54] Mr. Gray argued that, as a union official since 1992 and part-time vice-president since 2008, he has taken LWOPs to fulfill his duties, some of which were for more than six days. He entered time sheets and was paid during his absences. The amounts were recovered later. He said that he did not experience any difficulties until 2010. Although the employer's policy had been in effect for a number of years, it had not been applied to him. His problems began when he took a LWOP in November 2009. He entered it on his time sheets, and in February 2010, he was temporarily struck off strength retroactive to the leave period. Mr. Gray testified that management did not know what to do with his problem and cited the email from Mr. Lafrance to Ms. Wellman (Exhibit E-1).

[55] Mr. Gray underscored the fact that he had not been cross-examined on his assertion that he had devoted 100 hours of his own time to his pay problems, which were ongoing. He referred to page 3 of Exhibit G-6, where he stated the following: ". . . I will not even mention the enormous amount of time spent by myself and others to attempt to sort this out when a little communication would have made it a tremendous amount less frustrating and time consuming."

[56] In referring to the six T4 slips and one T4A slip issued to him by PWGSC, Mr. Gray submitted that the problem stemmed from how the employer's policy was applied to him. As his employer, the CRA was responsible for ensuring that his problems were rectified. He submitted that he would not have experienced the problems were he not a member of the union executive. He stated that, as a result of the problems and the uncertainty concerning his pensionable service, he would have to decide whether to continue with his union office.

[57] Mr. Gray raised the issue of the employer's failure to issue him with a record of employment, pointing out that, contrary to the reply at the final level of the grievance procedure (Exhibit G-8), he was never issued a record of employment. The employer, in testimony, explained its failure to provide him with this document. Although this issue seemed to be of some importance to Mr. Gray, he failed to explain how these facts

were in any way connected with the employer's alleged failure to comply with either the *Act* or the collective agreement.

[58] In support of his argument, Mr. Gray cited *Lamarche v. Marceau*, 2004 PSSRB 29 (*Lamarche 2004*) (application for judicial review allowed: *Lamarche v. Canada (Attorney General)*, 2005 FCA 92). In *Lamarche 2004*, the complainant alleged that the employer refused to consider his application for a team leader position on the grounds of his unavailability because he held a national position with the union.

[59] The Federal Court of Appeal referred the matter back to the Board for reconsideration before a different panel. The decision of that panel was *Lamarche v. Marceau*, 2007 PSLRB 18 (*Lamarche 2007*). Mr. Gray cited paragraph 67 from *Lamarche 2004* as follows:

> *[67] Quite some time ago, through its then Chairperson Mr. Finkelman, the Board adopted a test for determining whether such action did take place (*Gennings and Milani *(Board File No. 161-2-87) (QL)). According to this test, a complainant must establish that:*
>
> (i) discriminatory action against the employee was taken with regard to that person's employment or one of that person's conditions of employment;
>
> (ii) the discriminatory action was taken because the employee was a member of an employee association or was exercising a right under the Act; and
>
> (iii) the discriminatory action was taken by the person named in the complaint as the respondent.

[60] Although *Lamarche 2004* was set aside on judicial review, the "Finkelman test" referred to was not invalidated.

[61] Mr. Gray submitted that he was adversely affected because of his union activities. He referred to section 5 of the *Act*, which states as follows: "Every employee is free to join the employee organization of his or her choice and to participate in its lawful activities." He submitted that that provision was similar to section 6 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (*PSSRA*), and that it should be interpreted similarly. He referred to *Stonehouse v. Canada (Treasury Board)*, PSSRB File No. 161-02-137 (19770524) (QL), at paragraph 47, which reads as follows:

> *47. If the rights granted to employees by section 6 are to be taken seriously, as I think Parliament intended, then the prohibitions against the violation of the exercise of these rights must be zealously guarded and defended by this Board. . . .*

[62] Mr. Gray submitted that the employer's manner of applying its LWOP policy to him had a detrimental effect on him over a two-year period despite the fact that he had brought the problem to the attention of senior officials. He also cited the following decisions in support of his argument: *Hager et al. v. Statistical Survey Operations (Statistics Canada)*, 2011 PSLRB 79; and *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37. Mr. Gray referred to paragraph 45 of *Quadrini*, which reads as follows:

> ***45*** *It has been and continues to be fundamental to the integrity of the labour relations systems created by the new* Act *and the former* Act *that persons who have exercised rights accorded to them under those laws did so, and can continue to do so, without fear of reprisal. Were it otherwise, given the possibility of the misuse of authority in the relationship between individual persons and employers, the chilling effect of reprisal action on the exercise of vested statutory rights could undermine the effective force of those rights.*

[63] Among the remedies sought by Mr. Gray were that his complaint be upheld and that the CRA be ordered to cease and desist from applying the LWOP policy. He also sought a declaration that the CRA contravened subparagraph 186(2)(*a*)(iv) of the *Act* and that it be ordered to pay general, punitive and aggravated damages to him. In oral argument, Mr. Gray requested that his stress and anxiety and the 100 hours spent trying to correct the problems be compensated accordingly. With respect to the grievance, he sought that corrections be made to his superannuation account, that correct T4 slips be issued and that he be made whole.

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

[64] The employer stated that Mr. Gray was in a situation that might have created frustration. Although employees proceeding on LWOPs generally provide notice as far in advance as possible, Mr. Gray testified that he had to take LWOPs for union activities on short notice. The employer stated, that in Mr. Gray's submission, he stated that he wanted greater clarity and reliability in how his pay was processed. The employer stated that that was a communication problem. The employer argued that, although

Mr. Gray submitted that how the employer's LWOP policy was applied to him over a two-year period was detrimental to him, he did not submit any evidence as to why the employer's policy was detrimental, and that there was no link between his pay problems and his union activities.

[65] The employer submitted that paragraph 190(1)(*g*) of the *Act* was not intended to be a catch-all recourse for dissatisfied employees. It further submitted that the evidence adduced by Mr. Gray did not come within the ambit of subparagraph 186(2)(*a*)(iv) of the *Act*, as he did not proffer any evidence of the exercise of his rights under Part 1 or Part 2 of the *Act*. The employer argued that the complaint was filed after the grievance and that since the event that gave rise to the grievance necessarily preceded the grievance, there can have been no reprisal. The employer submitted that, as there was no evidence of a reprisal by the employer against Mr. Gray, there is no arguable case, and the complaint should be dismissed on that basis.

[66] The employer submitted that, if I concluded that Mr. Gray's complaint implicitly came within the ambit of subparagraph 186(2)(*a*)(i) of the *Act*, then Mr. Gray would have to show a *prima facie* case to trigger the application of the reverse onus provision of subsection 191(3). The employer also submitted that there was no link between Mr. Gray as a union member and his pay situation and that there was no documentary or testimonial evidence adduced to that effect. Accordingly, the complaint should be dismissed on the basis that no *prima facie* case was made out by Mr. Gray.

[67] The employer argued that the issue to be decided is not whether how the employer dealt with Mr. Gray's pay was correct. It further argued that, distinct from *Lamarche 2007*, in this case, the employer did not use Mr. Gray's leave situation as a pretext for discriminating against him. The employer referred to *Lamarche 2004*, in which the adjudicator stated at paragraph 77 that, according to the "Finkelman test," there must be evidence of a causal relationship as a basis for a finding of discrimination. The employer submitted that no evidence of a causal relationship was presented in this case. It argued that there was no evidence that the employer used its pay system to discriminate against Mr. Gray and that his pay situation was a consequence of his union activities.

[68] Citing *Hager et al.*, the employer submitted that its witnesses were credible and that there was no evidence of anti-union animus on its part. It argued that, even if I accepted Mr. Gray's testimony that he was a victim of its pay system and that he was

thus detrimentally affected, it is insufficient to support an unfair labour practice complaint. In support of its argument, the employer cited *Kérouack v. Gravel*, 2011 PSLRB 109.

[69] The employer further submitted that the issue to be determined concerns Mr. Gray's pay treatment and his T4 slips. The employer argued that the recourse of an unfair labour practice complaint cannot be used to circumvent the normal manner of contesting the pay system, which the employer asserts is the grievance procedure. In support of its argument, the employer cited *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128, and *Larocque v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 77.

[70] With respect to the grievance filed by Mr. Gray, the employer stated that, as it was specific to the no-discrimination clause of the collective agreement, it was not entirely dissimilar to his unfair labour practice complaint. The employer argued that Mr. Gray must first present *prima facie* evidence of his allegations before the employer is required to provide an explanation that it did not act in a discriminatory manner. In this regard, the employer cited *Veillette v. Canada Revenue Agency*, 2010 PSLRB 32. The employer submitted that it did not treat Mr. Gray differently from any other employee and that, in fact, he seeks to be treated differently.

[71] With respect to the corrective measures sought by Mr. Gray, the employer stated that, concerning the compensation for the 100 hours that he testified to spending on correcting T4 slip errors, those hours were a consequence of the pay system. The employer submitted that, unless I conclude that it subjected Mr. Gray to discriminatory treatment, no such compensation should be awarded. As for the alleged pain and suffering, the employer stated that no such evidence was adduced. The employer asserted that there was no evidentiary basis on which to order the remedies sought and that both the complaint and the grievance should be dismissed.

C. Rebuttal of Mr. Gray

[72] Mr. Gray emphasized that he was not cross-examined about his testimony that he had sustained pain and suffering as a result of errors in the employer's pay system.

[73] With respect to the causal link between his pay situation and his union activities, Mr. Gray asserted that he took LWOPs to fulfill his duties as a union official.

He stated that he should not have to face such difficulties due to his union position and the employer should not attempt to impede his freedoms under section 5 of the *Act*.

IV. Reasons

1. Unfair labour practice complaint (PSLRB File no. 561-34-464)

[74] Mr. Gray alleged that the CRA committed an unfair labour practice within the meaning of section 185 of the *Act*, which reads as follows:

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

[75] Mr. Gray's complaint alleged that the CRA discriminated against him because of his position as a union official. Mr. Gray's specific allegation in his complaint is that in the application of its pay policy, the CRA discriminated against him on the basis of his membership in the union and his participation in its activities. Particularly, he alleged that the CRA retaliated against him and other union officials who take LWOPs for union activities of more than six consecutive days by temporarily striking them off strength.

[76] The corrective action sought by Mr. Gray includes declarations that the CRA contravened paragraph 186(1)(*b*) and subparagraph 186(2)(*a*)(iv) of the *Act*. As stated earlier in this decision, in view of Mr. Gray's concession that he had no case under subsection 186(1), the remaining allegation is that the CRA contravened subparagraph 186(2)(*a*)(iv), which 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*
>
> *. . .*
>
> *(iv) has exercised any right under this Part or Part 2 . . .*

[77] Mr. Gray's complaint alleged that, by being temporarily struck off strength during the LWOP he took for more than six consecutive days for union activities, those days could not be calculated for pension purposes. Ms. Galera addressed that allegation. She testified that, for any employee, LWOPs of less than three months are automatically counted as pensionable time. She further stated that, since 2009, all the LWOPs taken by Mr. Gray had no effect on the accumulation of his pensionable time.

[78] The burden of proof in an unfair labour practice complaint under subsection 186(2) of the *Act* is set out in subsection 191(3) 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.*

[79] The Board's case law is that a complainant must make an arguable case for a violation of subsection 186(2) of the *Act* before the reverse onus is engaged; see *Quadrini*, *Manella* and *Hager et al*. As the Board stated in paragraph 32 of *Quadrini*: ". . . [T]he threshold is the following: taking all of the facts alleged in the complaint as true, is there an arguable case that the respondents have contravened subparagraphs 186(2)(*a*)(iii) or (iv) of the new *Act*?"

[80] In this matter, the CRA objected to the Board's jurisdiction to hear Mr. Gray's complaint on the basis that on its face, the complainant had not made out a *prima facie* case. The CRA also argued that, among other things, on the merits of the complaint, Mr. Gray had failed to meet his onus of proof that the CRA had violated subparagraph 186(2)(*a*)(iv) of the *Act*.

[81] Having heard the evidence, I must determine whether Mr. Gray's complaint is founded. For the purposes of my analysis, I will set aside the issue of whether or not Mr. Gray has made out a *prima facie* case and will instead focus my reasons on the complaint's substantive issues.

[82] Concerning the allegation that the CRA violated subparagraph 186(2)(*a*)(iv) of the *Act*, to establish that a violation of that provision occurred, a complainant must prove that any of the measures set out in paragraph 186(2)(*a*) were taken because the

complainant ". . . has exercised any right under this Part or Part 2 . . ." (see subparagraph 186(2)(*a*)(iv)). In other words, a complainant must show that, as a result of having exercised a right under Part 1 or 2 of the *Act*, he or she was subjected to a reprisal measure set out in paragraph 186(2)(*a*).

[83] I shall first address Part 2 of the *Act*, which deals with grievances. In his testimony, Mr. Gray did not specify that he exercised any right under Part 2 of the *Act*, related to grievances, for which the CRA took any of the measures set out in paragraph 186(2)(*a*) against him. On March 30, 2010, Mr. Gray in fact exercised his right to file a grievance, with the same subject as that of his complaint, which he filed two months later. Mr. Gray did not mention any other grievance in his testimony. Mr. Gray's problems that are the source of his grievance and complaint long predated the filing of the grievance. The grievance was the result of his issues with the CRA, not the source of it. Therefore, I conclude that Mr. Gray did not demonstrate that the CRA took any of the retaliatory measures set out in paragraph 186(2)(*a*) against him because he filed the present grievance.

[84] I turn now to the allegation that the CRA violated subparagraph 186(2)(*a*)(iv) of the *Act* because Mr. Gray exercised a right under Part 1. Mr. Gray argued that, in applying its LWOP policy to him, the CRA impeded his freedoms under section 5 of the *Act*, which states as follows: ". . . Every employee is free to join the employee organization of his or her choice and to participate in its lawful activities."

[85] To base such an allegation, Mr. Gray must specify the acts or conduct by the respondent that interfered with his freedom under section 5 of the *Act*. For the alleged violation to fall under subparagraph 186(2)(*a*)(iv), Mr. Gray must demonstrate that the respondent discriminated against him because he is a union official by applying its LWOP policy to him, thereby constituting a violation of Mr. Gray's section 5 freedoms.

[86] Mr. Gray was a long-standing member of the union and a union representative, and he participated in its activities and was elected to its executive. As stated earlier in this decision, Mr. Gray's complaint alleged that the effect of the application of the CRA's pay policy discriminated against him on the basis of his participation in the union's activities. He further alleged that the CRA retaliated against him when he took LWOPs for union activities for more than six consecutive days by temporarily striking him off strength. Mr. Gray did not argue that the respondent had prevented him from

joining the union or from participating in its activities, but did argue that its actions had made him reconsider his willingness to hold union office.

[87] Mr. Gray argues that the respondent's application of its LWOP policy to him was a consequence of his activities as a union officer. However, Mr. Gray's evidence did not reveal any link between his pay problems and his union activities; nor did he show that the respondent treated him differently in relation to other employees taking other types of LWOP for more than six consecutive days, such as maternity/parental leave, educational leave or sickness leave. Therefore, in the absence of a causal connection, I find that he failed to demonstrate that the CRA violated subparagraph 186(2)(*a*)(iv) of the *Act* by interfering with his section 5 freedoms.

[88] The complaint and Mr. Gray's evidence were based on his activity as a union official as the cause of the respondent's reprisal measures against him. Therefore, although Mr. Gray's complaint refers to subparagraph 186(2)(*a*)(iv) of the *Act*, in my view, the wording of the complaint also implicitly brings it within the ambit of subparagraph 186(2)(*a*)(i), which addresses motives related to union status or membership. That provision states 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 . . . .*
>
> . . .

[89] However, even under subparagraph 186(2)(*a*)(i) of the *Act*, Mr. Gray's evidence did not refer to anti-union animus by the CRA or to any motive on its part based on his status as a union officer or representative. Indeed, in argument and in rebuttal, Mr.

Gray argued that he would not have encountered the pay problems he did were it not for the fact that he was on the union executive. This is not the same as proving that he encountered the pay problems because he was on the union executive. In the framework of the Finkelman test, as stated in *Lamarche 2004* and cited by Mr. Gray, there was no causal relationship between Mr. Gray's status as a union official and the respondent's application of its LWOP policy to him.

[90] There is no doubt that Mr. Gray experienced a highly frustrating situation over an extended period, arising out of his LWOPs for union activities for the period of October 30 to December 6, 2009 and the difficulties with and the delay in the application of the temporarily struck off strength policy that required, among other things, the timely submission of a web form by Mr. Gray's immediate supervisor. He spent a great deal of time seeking clarification of the applicable policies from the respondent and was required to face seven amended T4 slips. That is abundantly clear from the lengthy excerpt from Exhibit G-6, reproduced earlier in this decision. Moreover, Ms. Galera testified to certain difficulties experienced by the CCSC in the application of the temporarily struck off strength policy. The factors contributing to the difficulties experienced by Mr. Gray include the nature of his union duties, which he testified did not always allow him to provide sufficient advance notice of his LWOPs of more than six consecutive days, and the respondent's pay process, in which paycheques are prepared two weeks in advance so that employees are paid on a current basis.

[91] However, it is clear from Ms. Galera's testimony and the documentary evidence that Mr. Gray's difficulties stemmed from the LWOP process and not from his status as a union member or officer. Both Ms. Williams and Ms. Galera testified that the LWOP policy for LWOPs of more than six days for union activities was not applied differently than LWOPs for any other reason, for example maternity or parental leave, disability leave, or educational leave. That uncontradicted testimony is supported by the documentary evidence, for example, slide 3 on page 2 of Exhibit E-2, a training document for the temporarily struck off strength policy. Another example is found in the ninth edition of the compensation information bulletins issued in April 2007 (Exhibit E-5), which Ms. Galera testified was emailed to all employees. That bulletin, which dealt with LWOP reminders, included the following:

. . .

> ***Reminder!***
>
> ***On-going Leave Without Pay***
>
> *Please remember that all leave without pay must be reported in a timely fashion in order to avoid overpayments. If you are away for a period of more than six consecutive days, your manager must advise the Compensation Client Service Centre (CCSC) in order to suspend your account. Note that timesheets should not be entered for periods in excess of six consecutive days for reason of leave without pay as it will create delays, overpayments and does not notify the CCSC. The leave without pay Web Form should be completed as soon as possible and forwarded to the CCSC. . . .*
>
> . . .
>
> [Emphasis in the original]

[92] While Mr. Gray established that the application of the policy in question to his leaves for union business was new, he led no evidence concerning the reason for which it was now applied, to prove that it was motivated by anti-union animus, which he was required to do in order to found a successful complaint. Indeed, the evidence presented by the respondent, and not contradicted by Mr. Gray, revealed that the issues in this case came to light when a CCSC agent worked on his pay file. The reason for which the change occurred was purely circumstantial and administrative.

[93] Having considered all the evidence, I conclude that the CRA has proven, on a balance of probabilities, that by applying its LWOP policy to Mr. Gray, it did not discriminate against him or treat him differently on the basis of his union membership, participation in its activities or status as a union officer. Accordingly, I find that the respondent did not commit an unfair labour practice within the meaning of section 185 of the *Act*.

2. <u>Grievance (PSLRB File No. 566-34-5754)</u>

[94] In his grievance, Mr. Gray alleged that, by temporarily striking him off strength, the CRA violated the no-discrimination clause of the collective agreement on the basis of his membership or activities in the union. The details of the grievance, cited earlier in this decision, are reproduced here for convenience:

> *On 19 March 2010, I discovered that, once again, I had been temporarily struck off strength as a result of having taken more than 6 consecutive days of union leave without pay, with the result that I was not credited with that service for purposes of calculation of my superannuation and my T4 has been erroneously amended. I take union leave in order to cover my absence from the workplace while I perform the duties that I am required to perform as a Vice-President of the Professional Institute of the Public Service of Canada, which is the duly-certified bargaining agent for my bargaining group, among others. The CRA's actions have prejudiced my pension and constitute discrimination and retaliation against me for my lawful activities as an official of my union.*
>
> *The CRA's actions against me have been taken in contravention of my rights as defined by my Collective Agreement in general, and specifically in contravention of my rights as defined by Article 43, clause 43.01.*

[95] For ease of reference, clause 43.01 of the collective agreement reads as follows:

> ***43.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted, or membership or activity in the Institute.*

[96] In *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, the adjudicator reviewed the evidentiary burden to be met by the person alleging discrimination as follows:

. . .

> ***131*** *. . . It is well established in the jurisprudence that a person who alleges that he or she has been the victim of discrimination must present* prima facie *evidence of his or her allegations. When that person meets his or her burden, it is then up to the respondent to provide an explanation to show that it did not act in a discriminatory manner or that its conduct was otherwise justified. The Federal Court of Appeal commented as follows in* Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, about the concept of* prima facie *evidence:*
>
> . . .
>
> [18] The decisions in *Etobicoke, supra*, and *O'Malley, supra,* provide the basic guidance for what is required of

> a complainant to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act*. As McIntyre J. put it in *Etobicoke*, at page 208, "Once a complainant has established before a board of inquiry a *prima facie* case of discrimination,..., he is entitled to relief in the absence of justification by the employer". McIntyre J. reiterated the test for establishing a *prima facie* case of discrimination in *O'Malley, supra*, at page 558:
>
> The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.
>
> . . .
>
> ***133*** *Finally, it is recognized that the burden of proof applicable in matters of discrimination is that of the balance of probabilities.*
>
> . . .

[97] In the context of clause 43.01 of the collective agreement, Mr. Gray had to demonstrate that he had a characteristic protected from discrimination under that clause, that he experienced an adverse impact with respect to a term or condition of employment under the collective agreement, and that the protected characteristic was a factor in the adverse impact.

[98] Mr. Gray's characteristic that is protected from discrimination by clause 43.01 of the collective agreement is his membership or activity in the union. As for an adverse impact, although Mr. Gray experienced difficulties with the pay system, the evidence did not disclose that the application of the employer's pay policy to him was any different than the application of that policy to any other employee on a LWOP for more than six consecutive days. The employer's evidence to the effect that the policy applied to all employers on LWOP for a period in excess of six days was not contradicted by the grievor. While it may have been his LWOP status that triggered the application of the policy to him, there was no evidence that it was the fact that he was on LWOP for union business that triggered its application. Even if I accepted that Mr. Gray experienced an adverse impact as a result of the application of the employer's pay policy, there was no evidence that his participation in the union's activities was a factor in the employer's actions.

[99] In my view, the employer fully justified its application of its pay policy. Although Mr. Gray was affected by its application, based on the evidence, there is no doubt that the employer did not discriminate against him.

[100] In view of my conclusion, I need not address the corrective measures sought by the grievance. Nonetheless, I note that while those requested measures included correction of his superannuation account, Mr. Gray did not contradict the employer's evidence that his pension was unaffected by the events in issue.

[101] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[102] The complaint in PSLRB File No. 561-34-464 is dismissed.

[103] The grievance in PSLRB File No. 566-34-5754 is dismissed.

February 6, 2013.

Steven B. Katkin,
adjudicator and a panel of the
Public Service Labour Relations Board