Date: 20150204

File: 561-34-653

Citation: 2015 PSLREB 17

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

MARILYN GIBBINS

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Gibbins v. Canada Revenue Agency

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

Before: John G. Jaworski, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Karen Clifford, counsel

Decided on the basis of written submissions, filed October 30 and November 5 and 22, 2013, and January 6, 16 to 20 and 25, 2014.

I. Complaint before the Board

[1] On October 30, 2013, Marilyn Gibbins ("the complainant") filed a complaint against the Canada Revenue Agency ("CRA" or "the employer") under paragraphs 190(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*) and (*g*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*PSLRA*"). The complaint is set out in 28 pages that accompanied the complaint form filed with the then Public Service Labour Relations Board ("PSLRB").

[2] On November 1, 2013, staff of the PSLRB wrote to the complainant, explaining to her that paragraphs 190(1)(*a*) through (*f*) of the *PSLRA* apply to either bargaining agents or employers, and as such, no action shall be taken on her complaint under those paragraphs. Staff of the PSLRB also requested the complainant to provide the particulars of her complaint under section 185 of the *PSLRA* if she believed it applied to the CRA. The complainant was given until November 15, 2013 to provide further particulars.

[3] On November 5, 2013, the complainant forwarded the PSLRB, via email, her particulars, which were handwritten and attached on four 11x17 pages and stated in part as follows:

> 1. ***For my complaint against my employer, CRA,*** *I believe it should be considered under Section 185, particularly Section 186 and 189.*
>
> *CRA:*
>
> *a) has failed in its duty of fair representation;*
>
> *b) has not bargained in good faith and has resorted to trickery and manipulation;*
>
> *c) has defaulted on two settlement agreements that were made;*
>
> *d) has discriminated against me for filing complaints against them and retaliated against me;*
>
> *e) has discriminated against me on the grounds of physical disability by harassing me repeatedly to quit over my foot injuries and in particular, refusing to give up my accommodation to work at home for medical reasons and for not providing me with the tools or support to do my job in order to force me to quit;*

> *f) has retaliated against me for filing the Discrimination and Harassment Complaints and for reporting that a Manager sent WSIB discriminatory and personal information about me and when I made inquiries as to why HR gave out my medical information twice without my knowledge or consent and violated the Privacy Act;*
>
> *g) has intimidated me by the Director telephoning me and raising his voice at me for two hours when Management found out I was about to file the Discrimination Complaint;*

[4] The complainant has also filed a complaint against her bargaining agent, the Professional Institute of the Public Service of Canada ("PIPSC"), which forms a separate complaint, in File No. 561-34-652 ("the PIPSC complaint").

[5] On November 22, 2013, the respondent filed its response to the complaint ("the CRA submission"), denying any contravention of the *PSLRA* and also that the complaint is untimely and frivolous and vexatious.

[6] The complainant filed a reply to the response of the CRA on January 6, 2014.

[7] On January 14, 2014, the PSLRB wrote to the parties and stated as follows:

> *The complainant refers to a series of documents in both the original complaint and in her reply to the respondent's letter.*
>
> *The panel of the Board assigned to this matter has requested that the complainant provide copies of these documents* ***by no later than January 28, 2014****.*
>
> [Emphasis in the original]

[8] The complainant forwarded to the PSLRB a series of emails on January 16, 17, 18, 19 and 25, 2014 in response to the PSLRB's correspondence of January 14, 2014. On January 17, 2014, the employer emailed the PSLRB, in response to emails the complainant forwarded to the PSLRB further to the PSLRB's correspondence of January 14, 2014. The complainant responded to the employer's email of January 17, 2014 on January 20, 2014.

[9] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "*PSLREBA*") was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same

day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the PSLRB seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the Board.

II. Summary of the evidence

[10] The complainant was at all material times an employee of the CRA.

[11] On April 1, 2011, the complainant filed a harassment complaint ("the CRA harassment complaint") with the office of the Assistant Commissioner, Ontario Region of the CRA. Attached to the CRA submission was a copy of a letter dated March 29, 2012 from the Assistant Commissioner of the Ontario Region of the CRA to the complainant dismissing the CRA harassment complaint. According to the March 29, 2012 letter, the complaint had named 18 individuals as respondents and describes events that allegedly occurred over an eight-year period, starting with a workplace injury suffered on June 12, 2003.

[12] In the CRA submission, the employer states that in or about June 2003, the complainant reported an injury to her right foot. The employer further states that the complainant reported an injury to her left foot on December 6, 2006. The complainant states in the complaint that she broke both her feet at work.

[13] There is no evidence that the decision of the Assistant Commissioner, Ontario Region of the CRA, as contained in the letter of March 29, 2012 dismissing the CRA harassment complaint, was judicially reviewed by the complainant.

[14] Attached to the complaint is a copy of a grievance form signed by the complainant on May 20, 2011 ("the grievance"). The grievance form also appears to be signed by M. Dolenc of the PIPSC. The grievance form is not signed by a management representative. The grievance states as follows:

> *The grievor grieves that she has been the subject of harassment and discrimination by the employer on the basis of the prohibited grounds of physical disability contrary to Article 43 of the collective agreement, and contrary to section 14 of the Canadian Human Rights Act. In accordance with Article 43 of the collective agreement and section 65 of the CHRA, the Employer is directly and vicariously liable for all of the damages suffered by the grievor resulting from the discrimination and harassment.*
>
> *In failing to maintain a safe workplace for the grievor, the Employer has breached section 124 of Part 11 [*sic*] of the Canada Labour Code and Article 5 of the collective agreement and is directly responsible for damages suffered by the grievor as a result of these breaches.*
>
> *The grievor has suffered undue physical, mental and psychological distress as a result of the above breaches.*
>
> *The grievor request [sic] that this grievance be heard at Level 2 as the first step in the grievance process.*
>
> *Grievance details are attached.*

[15] The grievance stated that the dates on which the act, omission or other matter giving rise to the grievance occurred were April 19 and 20, 2011.

[16] While the grievance form was included in the within complaint filed on October 30, 2013, and it did state on its face that details are attached, there was nothing attached to the grievance form contained in the complaint.

[17] The grievance stated that as corrective action, the complainant wanted to be made whole, and in particular, be paid damages to be compensated for her losses, including damages for mental distress, stress, anxiety, loss of enjoyment of life, trouble, inconvenience and psychological harm. The grievance asked for punitive and aggravated damages and damages pursuant to paragraphs 53(2)(*a*), (*b*), (*c*), (*d*) and (*e*) and subsections 53(3) and (4) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*"). The grievance asked that the employer remedy the poisoned work environment and ensure that the complainant's work environment was healthy and safe and free from discrimination and harassment. The grievance contained a request that the complainant be accommodated by being allowed to continue to work at home.

[18] According to the CRA submission, the grievance was never moved forward as the complainant did not have the support of her bargaining agent. Attached to the CRA

submission is a copy of an email sent from Heather Jeffreys to the complainant on November 18, 2011, which stated as follows:

> . . .
>
> *Per my previous correspondence with you regarding this matter on September 30th, October 4th, October 12th, and November 4th, Article 34.07(4) of the PIPSC Collective Agreement clearly outlines the following* – "An employee **may not present an individual grievance** relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the Institute."
>
> *Therefore you must secure the support of a representative of the PIPSC bargaining unit in order to proceed with this grievance.*
>
> . . .
>
> [Emphasis in the original]

[19] The CRA submission states that the grievance was never advanced or pursued by the complainant. There is no evidence that the grievance was ever delivered to the employer or if it was that it was ever advanced. There is no record of this grievance being referred to adjudication. The complainant does not state that the grievance was ever actually pursued and, if it was, what happened to it.

[20] On November 16, 2011, the complainant filed a complaint with the Canadian Human Rights Commission ("CHRC") ("the HRC complaint"). The HRC complaint appears to be signed by the complainant and has dates of both May 18, 2011 and November 8, 2011.

[21] The HRC complaint makes a number of allegations, some of which appear to be the same as some of the allegations of harassment that were referred to in the CRA harassment complaint and the grievance.

[22] On July 24, 2013, the CHRC dismissed the HRC complaint. The reasons articulated by the CHRC in deciding not to deal with the HRC complaint were as follows:

> *According to the Supreme Court in Figliola, the Commission can only deal with a complaint that has been finally decided*

> *under an alternate process if the complaint to the Commission had human rights issues that were not considered by the alternate decision-maker [sic], or if the complainant did not have the opportunity to address his or her human rights issues through the alternate process. In this case, the alternate process was the internal harassment complaint process available under the CRA Preventing and Resolving Harassment Policy. It is plain and obvious that in his decision the alternate decision-maker [sic], the Assistant Commissioner, Ontario Region, turned his mind to the same human rights issue that were raised in this complaint. The Assistant Commissioner concluded that the complainant's internal harassment complaint was unfounded and/or untimely. The complainant had the opportunity to address her human rights issues through the other process.*

[23] By letter dated August 12, 2013, the CHRC informed the complainant of the decision reached on July 24, 2013 that it had decided not to deal with the HRC complaint under paragraph 41(1)(*d*) of the *CHRA*, and attached a copy of the reasons articulated on July 24, 2013.

[24] There is no evidence that the complainant sought judicial review of the CHRC decision not to deal with the HRC complaint, and the CRA submission states that in fact no judicial review was sought.

[25] After the complainant had filed the HRC complaint, but prior to the July 24, 2013 decision of the CHRC not to deal with it, there appear to have been mediation sessions, which took place involving the complainant and the employer. It appears from the material filed that the PIPSC was representing the complainant during a portion of this period and had also retained legal counsel to represent the complainant during the process.

[26] It was not evident from the material what the dates of the mediation sessions were, if a mediator was involved and, if so, who that mediator was. It is evident from the material that at some point after the mediation sessions, the complainant started to communicate directly with the employer; however, it is not clear if her relationship with PIPSC had been severed. It is clear, though, that the complainant did have discussions, primarily via email, directly with the CRA or through its legal counsel and, sometimes, with both at the same time.

[27] It appears that during the course of these post-mediation discussions that the complainant had with the CRA and its legal counsel, various offers and counter-offers

of settlement were made. The complainant alleges that the CRA made unconditional offers of settlement to her and that she accepted these offers of settlement. The complainant provided as evidence of the settlement copies of emails exchanged between herself and Gillian Patterson (counsel to the CRA), and Roxanne Descoteaux and Laura McKerron (both of the CRA).

[28] It would appear that the exchange between the complainant and Ms. Patterson starts on February 19, 2013, by way of an email from the complainant to Ms. Patterson, Ms. Descoteaux and Ms. McKerron. Ms. Patterson responds to the complainant on February 21, 2013. Ms. Patterson's email of February 21, 2013, requests that the complainant respond by February 26, 2013.

[29] There does not appear to be a response to the email of Ms. Patterson by the requested February 26, 2013 deadline, and on March 1, 2013, Ms. Patterson emails the complainant, stating that the CRA is prepared to provide the complainant with an extension of time to respond to its latest proposal.

[30] On March 6, 2013, the complainant emails Ms. Patterson at 19:52 and again at 23:10. In these emails, the complainant reiterates her position that she had accepted the CRA offer of settlement that was made prior to February 19, 2013.

[31] On March 10, 2013, the complainant emailed Pascale Lagace, Acting Director of Resolution Services at the CHRC, stating that the ". . . offer to settle forwarded to CRA on February 19, 2013 is not acceptable to CRA as it did not contain the clause that I agree to quit should I not be approved for Medical Retirement. Therefore the offer to settle that I am making now is what CRA wants . . . ." The complainant then outlines for Ms. Lagace her offer of settlement to the CRA.

[32] On March 11, 2013, the complainant emailed Ms. Lagace, putting forward another offer of settlement to be sent to the CRA and authorizing Ms. Lagace to present the offer to the CRA.

[33] On March 13, 2013 at 13:12, Ms. Lagace wrote to the complainant about the emails the complainant had exchanged with the CRA regarding settlement. Ms. Lagace stated as follows:

. . .

> *I am writing further to recent e-mail exchanges received from you and CRA concerning offers to settle exchanged between the parties. As you know, the Commission attempted to assist the parties to resolve the issues raised by the complaint through its mediation process on two occasions but this process did not lead to a settlement. Following that process, the respondent raised preliminary objections that were subject of a section 41 analysis report which has now been disclosed to the parties. Given those circumstances, this matter will not be returned to mediation at this stage and the parties are invited to provide their submissions to the section 41 report disclosed on February 12, 2013 by the March 28th deadline.*
>
> *I note the CRA has indicated that it is willing to continue negotiations with the complainant, provided that she obtains representation from her union or some other representative.*

. . .

[34] On March 13, 2013 at 15:41, the complainant emailed Ms. Lagace and asked her if the CRA was considering her last offer of settlement.

[35] On March 13, 2013 at 17:29, the complainant emailed Ms. Patterson, Ms. Descoteaux, Ms. McKerron and Ms. Lagace. In this email, the complainant states that she is accepting the offer of the CRA but in the same breath states that the CRA had already accepted her offer. Later that same day at 19:24, the complainant again emails Ms. Patterson, Ms. Descoteaux, Ms. McKerron and Ms. Lagace as well as Isabelle Roy, also legal counsel at PIPSC. In this email, the complainant reiterates her position that the CRA had accepted her earlier offer of settlement and also states that she has agreed to all of the CRA's terms of settlement.

[36] By June 17, 2013, there appeared to have been some further discussions between the parties, and the PIPSC was once again involved. An email was sent by Linelle Mogado, legal counsel at the PIPSC, to the complainant, advising her that the CRA had declined the complainant's demand regarding her offer and stated that the offer the CRA had made was still open.

[37] On July 4, 2013, Ms. Mogado emailed the complainant, Ms. Patterson and Ms. Roy and stated as follows:

. . .

> *I write to confirm that Ms. Gibbins rejected the CRA's most recent counter-offer of $25,000 and its cooperation in her application for medical retirement, in her below email of June 28, 2013.*
>
> *Please be advised that the Institute's representation of Ms. Gibbins in her CHRC matter has ceased.*

. . .

[38] The email of June 28, 2013 (from the complainant) that Ms. Mogado referred to in her July 4, 2013 email in paragraph 37 of this decision was sent to Ms. Patterson at 16:33 and stated as follows:

> *It has come to my attention, that for whatever reason, PIPSC has not related to you the fact that I am rejecting CRA's last offer to settle, despite me continually informing them of that fact, for some time now.*
>
> . . .
>
> *Although CRA has insisted I use PIPSC or a lawyer, to negotiate or finalize an agreement, it would appear that their involvement is only serving to thwart all efforts to come to an agreement in a timely manner, if atoll.*
>
> *I have just now received an email that Ms. Mogado has left you a message to speak with you, but I believe it is necessary for me to indicate my rejection of the offer to you directly, given the failure of PIPSC to do so.*
>
> [*Sic* throughout]

[39] As set out in paragraphs 22 and 23 of this decision, on July 24, 2013, the CHRC dismissed the HRC complaint, and that decision was communicated to the complainant by letter from the CHRC on August 12, 2013.

[40] On October 16, 2013, Ms. Patterson wrote to the complainant and stated as follows:

. . .

> *I write further to your email dated October 15, 2013 regarding the settlement discussions that took place between you, your various counsel, and the Canada Revenue Agency in the context of your human rights complaint at the Canadian Human Rights Commission.*

> *As you know my client entered into these discussions on a without prejudice basis, and unfortunately, the parties were unable to come to any resolution. The complaint proceeded at the Commission, and on July 24, 2013, the Commission dismissed your complaint. That process has now been completed, and that matter is now closed.*
>
> *As regards to your complaint before the Ontario Labour Relations Board, in correspondence dated September 30, 2013, to which you were copied, the Agency has advised the OLRB that it will not be participating in that process.*
>
> *I trust the above explains your query, and the status of the various proceedings commenced by you.*
>
> . . .

[41] A copy of the October 15, 2013 email referred to in the October 16, 2013 letter referred to in paragraph 40 of this decision was not provided.

[42] I am not aware of the details of the Ontario Labour Relations Board ("OLRB") complaint.

[43] On October 24, 2013 at 16:08, the complainant emailed Ms. Patterson, Ms. Roy and Gary Corbett of PIPSC and Ted Hsu, M.P. In this email, the complainant states that she is accepting the CRA's offer of settlement. The complainant also refers to not hearing from the CRA since August 2013. While the complainant states she is accepting the CRA's offer, she also points out that the amount of the offer is different from the previous amount that was offered. In addition, the email states that the specific terms of the offer regarding the medical retirement issue were not made.

[44] Ms. Patterson responded to the complainant's October 24, 2013 16:08 email on that same day, at 20:42. Ms. Patterson advised the complainant that she understood the OLRB had dismissed her complaint and referred the complainant to the October 16, 2013 letter and advised her that the CRA was closing its files with respect to her complaints. The complainant immediately emailed Ms. Patterson back at 20:54, stating that Ms. Patterson could not dismiss her complaints or close her file. She repeats her position that she has an agreement of settlement with the CRA, which is legally binding.

[45] On October 30, 2013, the within complaint was filed with the PSLRB.

[46] On November 4, 2013, the complainant emailed Samantha McBride, a labour relations ("LR") advisor at the CRA. The subject line of the email was "HR Contact Question", and the complainant indicated in her email that she was contacting Ms. McBride as Ms. Patterson had instructed her to do so. The last paragraph of the email was as follows:

> *Given that Ms. Patterson instructed me to contact you, could you please contact me at your earliest convenience to discuss my on-going [sic] issue with CRA and my Harassment and Discrimination Complaints and the fact that I have accepted two offers to settle from CRA yet CRA is not upholding our agreements.*

[47] On November 14, 2013, Ms. McBride wrote back to the complainant and advised her that her role as LR advisor was to provide advice to management and she should contact her local union president or the acting audit manager. That same day, the complainant responded back to Ms. McBride, setting out in some detail the complaints and the process that she had been engaged in. Ms. McBride responded back to the complainant via email on November 19, 2013, stating as follows:

> *My understanding is that management and yourself entered into negotiations however an agreement was never finalized. If you would like to discuss further, I recommend you contact Ms. Roxanne Descoteaux at 613-541-3621.*

III. Summary of the arguments

A. For the complainant

[48] The complainant has filed two complaints, one against her bargaining agent, and one against the respondent; both appear to arise out of the same facts.

[49] The complainant's argument is centred on the fact that she believes that she had reached a settlement agreement with the respondent with respect to the HRC complaint, and the respondent has failed to effectuate or honour the agreement.

[50] The complainant has submitted many pages of materials; however, the material and the argument that accompanies the material reiterates the same submission in a variety of iterations, which is that she has a valid and binding settlement agreement with the respondent with respect to her HRC complaint that the respondent is failing to honour.

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

[51] It is the position of the CRA that there has been no contravention of subsection 190(1) of the *PSLRA* nor of any section of the *PSLRA* to which the complainant refers in her submissions, and it asks this panel to exercise its jurisdiction under what is now section 21 of the *PSLREBA* and dismiss the complaint as frivolous and vexatious.

[52] In addition, the CRA submits that the complaint should be dismissed in accordance with subsection 190(2) of the *PSLRA* as it is untimely.

[53] The CRA submission states that the complaint makes allegations that fall under the following five categories:

1. Allegations of bad faith, unreasonableness and wrongdoing in the negotiations and conduct by the CRA at the mediations of the HRC complaint;

2. Allegations with respect to the CRA's interactions with the Workplace Safety and Insurance Board and the disability insurer (Sun Life);

3. Allegations that the CRA has failed to comply with an alleged settlement reached in furtherance of the mediation(s) of the HRC complaint;

4. Complaints of harassment and discrimination; and

5. Allegations of retaliation in 2011 following the submission of the CRA harassment complaint.

[54] The CRA submits that the allegations being made by the complainant, which are set out at paragraph 53(1), 53(2) and 53(3) of this decision, all arise out of matters involving other organizations and other administrative tribunals and cannot form the basis of a complaint under section 190 of the *PSLRA*.

[55] The CRA submits that the allegations contained at paragraphs 53(4) and 53(5) are outside of the jurisdiction of this panel and are untimely and in any event are *res judicata* as they have been reviewed in detail by both the CRA internal harassment process and the CHRC and have been determined.

[56] The CRA submits that there is no basis for a complaint under section 186 or subsection 189(1) of the *PSLRA*. The complainant has not submitted any prior Part 1 applications under the *PSLRA* (as referenced in paragraphs 186(2)(*a*) and (*b*) and 189(1)(*b*)), and as such, the provisions are not engaged in reference to any Part 1 matters.

[57] The CRA submits that consideration then arises as to whether the complainant has exercised rights under Part 2 of the *PSLRA* for which she was then the subject of retaliation or any prohibited acts as set out in the *PSLRA*. The complainant filed a harassment complaint with the CRA, which was addressed under the provisions of the CRA's harassment policy. There is no nexus to the provisions of section 186 or subsection 189(1) of the *PSLRA*.

[58] The CRA submits that while a grievance form was attached to the complaint, and a plain reading of the grievance indicates that the complainant is seeking to grieve purported violations of the relevant collective agreement and the *Canada Labour Code,* Part II (R.S.C., 1985, c. L-2), the complainant was barred from pursuing the grievance unless she had the support of her bargaining agent. The CRA also submits that the grievance was never referred to any level in the grievance process. Neither the fact that the grievance was never "presented" within the meaning of section 186 of the *PSLRA* nor that the complainant was not able to pursue the grievance and exercise any rights thereunder were not in any way due to any action or inaction of the CRA.

[59] The CRA submits that in any event, with respect to the grievance, the matters raised therein were raised in both her CRA harassment complaint and HRC harassment complaint.

[60] The CRA submits that in her response for particulars, the complainant makes reference to retaliation for having filed a complaint. The filing of a harassment complaint either pursuant to the internal CRA policy or at the CHRC is not the same as filing a complaint under the *PSLRA* and as such does not engage section 186 or subsection 189(1) of the *PSLRA*.

[61] It is the position of the employer that any complaint made under subsection 190(1) of the *PSLRA* must be made not later than 90 days after the date on which the complainant knew, or in the opinion of this panel ought to have known, of

the action or circumstance giving rise to the complaint. In the complainant's materials, she states that

> *I filed a discrimination complaint and was physically ambushed in my cubicle and sent home and forced out of my job and the reason given by George Deszpoth in April 2011 was that 'you filed a complaint against us' which clearly was retaliation.*

[62] It is the CRA's position that the only action that the complainant attempts to link to the wording found in section 186 and subsection 189(1) of the *PSLRA* relates to an event that took place in April 2011, and as such, her complaint is well outside of the 90-day period stipulated in subsection 190(2) of the *PSLRA*.

[63] The CRA submits that the issues raised by the complainant in this complaint regarding allegations of harassment, discrimination and retaliation are identical to those raised by her and disposed of in both the internal CRA complaint and the HRC complaint. The complainant did not seek judicial review of either the CRA complaint or the HRC complaint. It is the position of the CRA that the facts relating to this matter have been dealt with fully in other fora and as such are *res judicata*. The CRA states that it would be an abuse of process and vexatious to permit the complainant to, in the guise of a section 190 complaint, indirectly bring these matters before this panel, when she has failed to fully deal with them directly in the proper forums following the proper process.

C. <u>The complainant's reply</u>

[64] Much of the complainant's 29-page reply is a reiteration of her main point, which is that she believes that she had reached a settlement agreement with the respondent with respect to the HRC complaint, and the respondent has failed to effectuate or honour that agreement.

[65] The complainant states that the refusal of the CRA to address the settlement or provide an explanation for their refusal to honour the settlement is sufficient for this panel to accept her complaint.

[66] The complainant states that the CRA's focus on the CHRC is irrelevant to the main issue at hand, which is that the CRA will not pay her the settlement funds that

were agreed to, and that the CRA continues to act in an arbitrary and discriminatory manner.

[67] The complainant states that the CRA is delaying the complaint process by not providing facts, details or evidence in their submissions, and they have provided vague generalizations and unsubstantiated accusations.

[68] The complainant goes through the documentation submitted, pointing out that a settlement agreement was reached with respect to the HRC complaint.

[69] The complainant states that this panel should accept her complaint as against the CRA because the CRA did not adequately address the CRA harassment complaint or the HRC complaint.

[70] The complainant states that the CRA has violated the *PSLRA* as well as rules and policies according to the collective agreement as well as the CRA's own staffing and conflict resolution policies.

[71] The complainant states that she filed her complaint in a timely manner as soon as the respondent would not respond to her request to pay the settlement monies.

[72] The complainant states that the complaint is not frivolous or vexatious.

IV. Reasons

[73] For the reasons that follow, the complaint against the respondent must fail.

[74] From the evidence filed and arguments made by the complainant, it appears that the complainant is suggesting that the employer has not, in the course of her HRC complaint, negotiated fairly and in good faith with her. She has stated that she had reached an agreement with the employer with respect to the HRC complaint and that the employer has reneged on that agreement.

[75] This panel is not a court with inherent jurisdiction. This panel's jurisdiction flows from the *PSLRA* and from decisions rendered by its reviewing courts. The complainant was, at all material times, an employee of the CRA. Disputes between employees and their employer, under the *PSLRA*, are usually dealt with under "Part 2, Grievances". Without getting into too much detail, section 208 of the *PSLRA* permits employees to grieve almost any action of the employer. That being said, the

jurisdiction of an adjudicator to hear and determine grievances by way of adjudication is limited by section 209 of the *PSLRA*.

[76] A prerequisite to having an individual grievance referred to adjudication under section 209 of the *PSLRA* is the actual filing of a grievance by the employee, either with or without the assistance of their bargaining agent, with the employer. While there is a one-page document in the material that appears to be a completed grievance form, executed by the complainant on May 20, 2011, there is no evidence that the grievance was ever advanced. In any event, the matter before me is not a grievance but a complaint. The complainant does not appear to have availed herself of the grievance process under "Part 2, Grievances"; instead, she has chosen to file a complaint under section 190 of the *PSLRA*, which is under "Part 1, Labour Relations", which states as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> *(*a*) the employer has failed to comply with section 56 (duty to observe terms and conditions);*
>
> *(*b*) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> *(*c*) the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions);*
>
> *(*d*) the employer, a bargaining agent or a deputy head has failed to comply with subsection 110(3) (duty to bargain in good faith);*
>
> *(*e*) the employer or an employee organization has failed to comply with section 117 (duty to implement provisions of the collective agreement) or 157 (duty to implement provisions of the arbitral award);*
>
> *(*f*) the employer, a bargaining agent or an employee has failed to comply with* [what was then section 132] *(duty to observe terms and conditions); or*
>
> *(*g*) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[77] Paragraph 190(1)(*a*) allows for the filing of a complaint where the allegation is made that an employer has failed to comply with section 56 of the *PSLRA*. Section 56 of the *PSLRA* is found in Part 1, Labour Relations, Division 5, Bargaining Rights, Certification of Bargaining Agents, Application for Certification. Section 56 of the *PSLRA* freezes the terms and conditions of employment pending an application for certification of a bargaining agent under the *PSLRA*. There is no evidence whatsoever that this has anything to do with an application for certification or that the CRA altered the terms and conditions of employment pending the certification of the bargaining agent. As such, this paragraph is not available to the complainant upon which to base her complaint.

[78] Paragraph 190(1)(*b*) allows for the filing of a complaint where the allegation is made that an employer or bargaining agent has failed to comply with section 106 of the *PSLRA*. Section 106 of the *PSLRA* is found in Part 1, Labour Relations, Division 7, Collective Bargaining and Collective Agreements, Negotiation of Collective Agreements. Section 105 provides direction to the employer and the bargaining agent about the process involved in giving notice to bargain collectively after an employee organization has been certified as a bargaining agent for a bargaining unit. The complainant is neither a bargaining agent nor an employer, and the facts set out in the complaint have nothing to do with bargaining collectively between a bargaining agent and employer. As such, this paragraph is not available to the complainant upon which to base her complaint.

[79] Paragraph 190(1)(*c*) allows for the filing of a complaint where the allegation is made that an employer, a bargaining agent or an employee has failed to comply with section 107 of the *PSLRA*. Section 107 of the *PSLRA* is found in Part 1, Labour Relations, Division 7, Collective Bargaining and Collective Agreements, Negotiation of Collective Agreements, Effect of Notice. Section 107 provides that the terms and conditions of employment applicable to employees in the bargaining unit in existence at the time the notice to bargain has been given and to which the notice to bargain relates remain in place until a new collective agreement is reached, an arbitral award is rendered or a strike could be authorized legally. The complainant has based her complaint on the negotiations arising between her and the employer due to the HRC complaint. There is no evidence that the complaint relates to the employer changing the terms and conditions of employment applicable to the employees in the bargaining unit after notice to bargain has been given and before a collective agreement has been

entered into, an arbitral award is made or a strike is authorized legally. This paragraph is therefore not available to the complainant upon which to base her complaint.

[80] Paragraph 190(1)(*d*) allows for the filing of a complaint where the allegation is made that an employer, a bargaining agent or a deputy head has failed to comply with subsection 110(3) of the *PSLRA*. Subsection 110(3) of the *PSLRA* is found in Part 1, Labour Relations, Division 7, Collective Bargaining and Collective Agreements, Negotiation of Collective Agreements, Two-tier Bargaining. Subsection 110(3) is another iteration of section 106 that provides that the employer, bargaining agent and deputy head for the department or the portion of the Public Service must bargain with each other in good faith when they are bargaining towards an agreement for a bargaining unit for employees in a specific department. As the within complaint has nothing to do with collective bargaining for a collective agreement, this paragraph is not available to the complainant upon which to base her complaint.

[81] Paragraph 190(1)(*e*) allows for the filing of a complaint where the allegation is made that an employer or employee organization has failed to comply with section 117 or 157 of the *PSLRA*. Section 117 of the *PSLRA* is also found in Part 1, Labour Relations, Division 7, Collective Bargaining and Collective Agreements, Negotiation of Collective Agreements, Duration and Effect. This section requires the parties to the collective agreement to implement the collective agreement within specific timelines. For its part, section 157 of the *PSLRA* is found in Part 1, Labour Relations, Division 9, Arbitration, Implementation. This section requires the parties to implement the arbitral award within specific timelines. Again, since this complaint has nothing to do with collective bargaining for a collective agreement or the implementation of a collective agreement or arbitral award by either the employer or the bargaining agent, it is not available to the complainant upon which to base her complaint.

[82] Paragraph 190(1)(*f*) allows for the filing of a complaint where the allegation is made that an employer, a bargaining agent or an employee has failed to comply with what was section 132 of the *PSLRA* at the time the complaint was filed. Then section 132 of the *PSLRA* was found in Part 1, Labour Relations, Division 8, Essential Services. Again, this section dealt with collective bargaining and the terms and conditions of those employees whose positions are deemed essential, pending the reaching of a new collective agreement. Again, since this complaint has nothing to do

with the employer changing the terms and conditions of employment of employees who occupy positions deemed essential in the bargaining unit after notice to bargain has been given and before a collective agreement has been entered into, it is not available to the complainant upon which to base her complaint.

[83] This leaves only paragraph 190(1)(*g*), which refers to committing an unfair labour practice within the meaning of section 185 of the *PSLRA*. Section 185 states that "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1) of the *PSLRA*.

[84] Sections 187 and 188 of the *PSLRA* refer to the actions of employee organizations and their officers and representatives. As this complaint names the employer, sections 187 and 188 of the *PSLRA* are not applicable and are not available to the complainant upon which to base her complaint under paragraph 190(1)(*g*) of the *PSLRA*.

[85] This leaves only subsections 186(1) and (2) and subsection 189(1) of the *PSLRA* under which she could base her complaint.

[86] Subsection 189(1) of the *PSLRA* states as follows:

> ***189.*** *(1) Subject to subsection (2), no person shall seek by intimidation or coercion to compel an employee*
>
> *(*a*) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be, a member of an employee organization; or*
>
> *(*b*) to refrain from exercising any other right under this Part or Part 2.*

[87] Paragraph 189(1)(*a*) is not applicable and is not available to the complainant upon which to base her complaint under paragraph 190(1)(*g*) of the *PSLRA*, as the complaint has nothing to do with joining, refraining from joining, ceasing to be or continuing to be a member of an employee organization.

[88] Paragraph 189(1)(*b*) is not applicable and is not available to the complainant upon which to base her complaint under paragraph 190(1)(*g*) of the *PSLRA*, as the complaint has nothing to do with exercising any right under Part 1 or Part 2 of the *PSLRA*.

[89] Subsection 186(1) states that neither the employer or a person acting on behalf of the employer shall

> (a) participate in or interfere in the formation or administration of an employee organization;
>
> (b) participate or interfere in the representation of employees by an employee organization; and
>
> (c) discriminate against an employee organization.

[90] As set out in paragraph 89 of this decision, as this complaint has nothing to do with the formation or administration of an employee organization, the representation of employees by an employee organization or discrimination against an employee organization, as such, subsection 186(1) is not available to the complainant upon which to base her complaint under paragraph 190(1)(*g*) of the *PSLRA.*

[91] Like subsection 186(1) of the *PSLRA*, subsection 186(2) prohibits the employer, and any person who is acting on behalf of the employer or any person in a managerial or confidential position, from acting against a person with respect to participating in or with an employee organization or testifying or exercising rights under Part 1 or Part 2 of the *PSLRA*. There is no evidence that the employer or any person who occupied a managerial or confidential position acted in a manner with respect to the complainant because she was involved in any manner with an employee organization or was testifying or exercising rights under Part 1 or Part 2 of the *PSLRA*.

[92] Subsection 190(2) of the *PSLRA* states as follows:

> ***190.*** *(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[93] The 90-day period stipulated in subsection 190(2) is statutory and cannot be extended as there is no authority under the *PSLRA* regime. The complaint was filed on October 30, 2013, and as such, 90 days preceding that date would be Thursday, August 1, 2013. For the complainant's complaint to be timely, the actions against which she is complaining would have had to occur on or after

Thursday, August 1, 2013, unless those acts upon which she is basing her complaint could not have been known to her.

[94] As set out in the complainant's particulars, the complainant referenced discrimination and harassment due to a disability arising out of the foot injuries and in particular refusing to accommodate her. The particulars further disclose that the complainant is relying on facts relating to sending to the WSIB (Workplace Safety and Insurance Board) information that she states was discriminatory and personal and a violation of the *Privacy Act* (R.S.C. 1985, c. P-21). Finally, the particulars as filed by the complainant also state that a director telephoned her and raised his voice with her when management found out she was going to file the discrimination complaint. All of these incidents took place long before Thursday, August 1, 2013 and as such are outside of the 90-day time frame as set out in subsection 190(2) of the *PSLRA* and as such are untimely.

[95] As the complaint, submissions and documentation do not disclose any facts which would permit this complaint to proceed, it shall be dismissed.

[96] For all of the above reasons, this panel makes the following order:

(The Order appears on the next page)

V. Order

[97] The complaint is dismissed.

February 4, 2015.

John G. Jaworski,
a panel of the Public Service Labour Relations and Employment Board