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**File:** 561-02-710

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*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

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BETWEEN

**DHIMUTH ABEYSURIYA**

Complainant

and

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA**

Respondent

Indexed as

*Abeyesuriya v. Professional Institute of the Public Service of Canada*

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

**Before:** Catherine Ebbs, a panel of the Public Service Labour Relations and Employment Board

**For the Complainant:** Himself

**For the Respondent:** Martin Ranger, counsel

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Decided on the basis of written submissions,  
filed October 28, November 21 and December 1, 2014.

### **I. Complaint before the Board**

[1] On August 21, 2014, Dhimuth Abeysuriya (“the complainant”) filed a complaint under paragraph 190(1)(g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), claiming that the respondent bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC), had engaged in an unfair labour practice within the meaning of section 185 of the *PSLRA*.

[2] Public Works and Government Services Canada (PWGSC) hired the complainant in 2009 as a PG-01 supply officer trainee under the EE-VM (Visible Minority) category. According to the complainant, he was denied a PG-02 supply officer staffing promotion, which should have gone to him rather than to another employee, Mr. “L”.

[3] The complainant contacted the PIPSC for assistance. He claims that the PIPSC contravened section 187 of the *PSLRA* (unfair representation by a bargaining agent), when it failed to properly consider his requests to assist him in this matter. The complainant also alleges that he has been discriminated against on the basis of colour, race, age, sex and religion with respect to this and other staffing actions.

[4] The corrective action the complainant seeks is to obtain a PG-02 supply officer position at PWGSC Bedford Row, Halifax, Nova Scotia.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the new Board”) to replace the former Public Service Labour Relations Board (“the former Board”) as well as the former Public Service Staffing Tribunal. In other words, the new Board is now performing the functions that were exercised separately by the former Board and the PSST. 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 *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* 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 former

Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board.

[6] For the reasons that follow, I conclude that the staffing matters at issue in this complaint do not fall under either the *PSLRA* or the applicable collective agreement, which is between the Treasury Board and the PIPSC for the Audit, Commerce and Purchasing Group (all employees); expiry date, June 21, 2014 (“the collective agreement”). Therefore, the new Board does not have jurisdiction to examine the complaint on its merits.

## **II. Background**

[7] Following a request by the former Board, the complainant provided further particulars about his complaint on September 4, 2014. When asked to provide a concise statement of each act or omission complained of, the complainant stated: “I believe PIPSC union has not represented me fairly. I strongly believe that I have been denied a PG-02 staffing promotion when someone else was given the job. I have not received satisfactory responses from my Union Rep.”

[8] In his supporting documentation, the complainant attached a series of email correspondence concerning this matter. The salient portions of this email exchange are noted as follows. On April 3, 2014, the complainant wrote to the PIPSC President, stating that it was up to the PIPSC to take action on his behalf concerning the following two matters:

...

*(2) About the attached PG-04 processes and creating pools when it was not listed in the attached PDF poster,*

*(3) The two PG-02 positions at 5th floor PWGSC Halifax office was not given to me (as Manager . . . has told . . . and me, Manager . . . is ready to testify at any hearing regarding the two PG-02 positions and about [Mr. L] who was terminated by Manager . . . but taken to a PG-02 position at the Halifax office by Manager . . . and Team Lead . . . which has taken my Bedford Row Halifax position.*

...

[Emphasis in the original]

[Sic throughout]

[9] The President of the PIPSC responded that the complainant's concerns had been forwarded to the PIPSC's Chief of Representational Services for review. On April 14, 2014, a PIPSC employee emailed the Chief of Representational Services and the complainant confirming that the PIPSC would review the two issues referenced earlier in this decision and would advise the complainant in writing. The PIPSC decided not to pursue a grievance or complaint on the complainant's behalf with respect to this matter. It then denied his subsequent request for reconsideration.

[10] On October 8, 2014, the former Board directed the parties to provide written submissions on a preliminary issue of its jurisdiction. Specifically, the parties were directed to address the following question: "Does the right to fair representation provided for in the *PSLRA* apply on to matters or disputes covered by the *PSLRA* or by an applicable collective agreement (i.e., staffing recourse issues are not covered by the *Act*)?"

[11] The parties were asked to consider the former Board's decision in *Brown v. Union of Solicitor General Employees and Edmunds*, 2013 PSLRB 48, in their respective submissions.

[12] On October 28, 2014, the former Board received the complainant's written submissions. On November 21, 2014, the new Board received the respondent's written reply submissions. On December 1, 2014, the new Board received the complainant's written rebuttal submissions.

### **III. Issues**

[13] Do the staffing matters at issue in this complaint fall under either the *PSLRA* or the applicable collective agreement?

[14] If the answer to that question is "No," does the new Board have jurisdiction to examine the complaint on its merits?

### **IV. Summary of the arguments**

#### **A. The complainant's submissions**

[15] The complainant does not address the preliminary jurisdictional issue raised by the former Board. He does not refer to *Brown*. Moreover, he cites no jurisprudence in support of his position. The complainant's submissions are, for the most part, a

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reproduction of the information that he previously provided in response to the former Board's request for further particulars.

[16] The crux of the complaint against the respondent is found at page 9 of the complainant's written submissions, as follows:

*... the PIPSC Union representative . . . has failed to represent or conduct a thorough detail investigation regarding the unfair, unethical, incorrect, discriminatory (due to my color, race, age, sex, and religion) staffing procedures by filing Grievances, OR by filing a Complaint with Public Service Staffing Tribunal (PSST), OR by filing a Complaint or Grievances with PSLRB (for example under Section 208(2)), OR right to arbitration before coming to a decision.*

[Sic throughout]

[17] The complainant provided copies of his performance reviews from 2010 to 2011, which he claims state that he would be receiving a PG-02 (supply officer) position. Instead, Mr. L, who he claims is unqualified, received a PG-02 position. The complainant further states that he was informed that there were two PG-02 supply officer positions at PWGSC Bedford Row, Halifax, but that he did not receive one of them.

#### **B. Respondent's reply submissions**

[18] The respondent argues that the new Board has no jurisdiction to consider the complaint since it pertains to staffing matters. According to the respondent, complaints brought under section 187 of the *PSLRA* are limited exclusively to matters set out in the *PSLRA* or the collective agreement. Section 187 reads as follows:

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

[19] The respondent takes the position that all the allegations raised by the complainant pertain to the staffing procedure used and the staffing of a PG-02 (supply officer) position at the PWGSC.

[20] The respondent relies on *Brown* (at para 55 to 84; specifically, para 72) as well as a previous Board decision, *Elliot v. Canadian Merchant Service Guild et al.*, 2008 PSLRB 3, at para 188 and 189, in support of its position. The respondent argues that *Brown* confirms that the new Board does not have jurisdiction over the duty of fair representation when faced with an employee who is complaining about representation related to a staffing matter. In addition, the respondent submits that the former Board followed *Brown* in *Tran v. Professional Institute of the Public Service of Canada*, 2014 PSLRB 71. According to the respondent, the former Board has confirmed that staffing matters are to be excluded from its review in duty-of-fair-representation cases.

[21] Thus, the respondent submits that, based on this jurisprudence, any representation action by a bargaining agent that does not fall, within the parameters of the *PSLRA* or a relevant collective agreement is beyond the new Board's jurisdiction to review. The respondent seeks the summary dismissal of the complaint without an oral hearing.

### **C. Complainant's rebuttal submissions**

[22] The complainant again expresses his belief that the new Board has jurisdiction to "investigate" his complaint. He argues that most of his allegations "are not staffing." He reiterates his position that the PIPSC's failure to thoroughly investigate or to take any other action with respect to his complaint that he was treated unfairly concerning the PG-02 position was arbitrary, discriminatory and in bad faith.

[23] According to the complainant, the reason that the PIPSC provided to him for its decision not to pursue the matter was that the PG-02 position at issue was posted on *Publiservice* (the Government of Canada's jobs site, where job advertisements and notifications subject to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) are posted) and he did not apply. However, the complainant claims that there was no *Publiservice* poster notifying employees that someone had been appointed to the position. The complainant states that a manager told him that a deployment took place in this case. He further states that he made this clear to the PIPSC several times but that the respondent did nothing.

[24] The complainant did not provide any further jurisprudence in support of his position.

## **V. Analysis**

[25] To assist me in determining whether I have jurisdiction to consider the complaint, I will begin by reviewing the applicable former Board jurisprudence. A number of former Board (and its predecessor) decisions that predate *Brown* are germane to the analysis.

[26] First, in *Lai v. The Professional Institute of the Public Service of Canada*, 2000 PSSRB 33, the Public Service Staff Relations Board dealt with a complaint that the bargaining agent had failed to provide representation on a judicial review application before the Federal Court. While the bargaining agent, the PIPSC, chose not to question its obligation to represent members in matters arising outside of the *Public Service Staff Relations Act* (R.S.C. 1985, c. P-35; PSSRA) in that case, the following comments of the Deputy Chairperson, at para 49, are noteworthy:

*[49] I should start out by saying that I have reservations with regard to the proposition that a bargaining agent's duty of fair representation extends to matters which are outside the scope of the PSSRA and which, as in the present case, arise out of matters coming under the PSEA. Rather, I am inclined to think that the duty is limited to rights arising out of the PSSRA.*

[27] More importantly, in another duty-of-fair-representation complaint, *Ouellet v. Union of Canadian Correctional Officers - Syndicat des agent correctionnels du Canada - CSN*, 2007 PSLRB 112, which involved the decision of the bargaining agent in that case to refuse to represent the complainant in a judicial review of a Public Service Commission (PSC) decision concerning an investigation by the PSC Recourse Branch, the following passages are important to this decision:

...

**30** ... However, some aspects of the labour relationship, including staffing, are excluded from the scope of the new Act and are instead governed by the Public Service Employment Act....

...

***34 Moreover, staffing is not negotiable under the new Act. Staffing is governed by the Public Service Employment Act, which provides its own recourse mechanisms. This was not a matter of ensuring the application of a collective agreement provision or even the exercise of recourse under the new Act. A priori, barring a specific commitment by a union to provide representation outside of those areas, it cannot have the duty of representation. The complainant asked the respondent to act on his behalf. It refused to in an area where it can choose to refuse to provide representation. Equally for that reason, I dismiss the complaint.***

...

[Emphasis added]

[28] *Lai* was mentioned at para 19 of *Ouellet* as follows: “It should be noted that the Board Member leans toward the view that the duty of representation is limited to the rights under the former *Act*” (i.e., the *PSSRA*).

[29] In *Elliott*, the Board Member was also dealing with a preliminary issue of jurisdiction on the basis of written submissions from the parties. The former Board was faced with a complaint that the bargaining agent had breached its duty of fair representation in the manner in which it handled the complainant’s claim before the Workers’ Compensation Board (WCB). As the Board Member explained, the issue before him was whether the duty of fair representation set out in the *PSLRA* applied to matters before the WCB. He held as follows at para 188:

*[188]... I am of the view that the duty of fair representation as set out in section 187 of the PSLRA relates to rights, obligations and matters set out in the PSLRA, that are related to the relationship between employees and their employer. In other words, the “representation” to which that section refers to [sic] is representation of employees in matters related to the collective agreement relationship or the PSLRA, such are [sic] representation in collective bargaining and the presentation of grievances under that Act.*

[30] The Board Member in *Elliott* pointed out that he did not need to decide whether the duty of fair representation applies to proceedings and processes pertaining to the *PSEA*. However, he did note that he found the general reasoning of the preliminary comments in *Lai* referenced earlier in this decision the sound and right approach. The Board Member emphasized that if Parliament had intended to give the former Board

the broad mandate to supervise representational services offered voluntarily by a bargaining agent, it would have given an indication to this effect. As follows, the Board Member's reasoning, at para 195 of *Elliott*, is insightful:

*[195] The services that a union decides to offer to its members that are not linked to the PSLRA or the collective agreement relationship are matters between the union and its members. If the union fails to properly represent its members in those matters ... that matter is not within the jurisdiction of this Board.*

[31] In *Brown*, the complaint before the former Board concerned the decision of the Union of Solicitor General Employees (USGE) President to instruct the PSST that, before the hearing of a PSST complaint, it would not require the PSST to issue a subpoena for the attendance of the Commissioner of the Correctional Service of Canada at the hearing. The complainant alleged that the USGE President's decision was made arbitrarily and discriminatorily and in bad faith.

[32] Accepting the reasoning in *Elliott*, the panel of the former Board in *Brown* found as follows at para 54:

*[54] ... the Board's jurisdiction to review an alleged complaint falling under section 187 of the Act must have its genesis either under the Act or the relevant collective agreement that the bargaining organization or bargaining agent had negotiated for the member that made the complaint.*

[33] In *Tran*, the complainant alleged that the bargaining agent had failed in its duty of fair representation by refusing to pursue a judicial review application following the complainant's unsuccessful candidacy in a Canada Revenue Agency (CRA) staffing process. *Tran* involved a staffing matter that was covered under the CRA's staffing recourse mechanisms, and section 54 of the *Canada Revenue Agency Act* (S.C. 1999, c. 17) specifically precludes the applicable collective agreement from dealing with matters governed by the CRA's staffing program. The former Board noted that *Elliott* (which refers *Lai*) was followed in *Brown*.

[34] Both *Brown* and *Tran* are consistent in holding that staffing is an area that falls outside the *PSLRA*. While *Tran* dealt with a staffing matter under the CRA's staffing recourse and *Brown* with staffing under the *PSEA*, the cases are consistent in their approach. In *Brown*, the reasoning is found as follows at para 72:

[72] A review of the relevant sections of the PSEA, the FAA and the Act suggests that Parliament was seeking to keep separate and distinct the processes of evaluating, choosing and appointing suitable candidates for positions within the federal public service on the one hand and of negotiating and regulating terms and conditions of employment on the other.

[35] Similarly, in *Tran*, the panel of the former Board states as follows at para 100:

[100] As the FAA, the CRA and the PSLRA show, the statutory scheme has clearly established two separate and mutually exclusive spheres, namely labour relations and staffing. Given that the complaints come under the area of staffing, I find that the Board does not have jurisdiction to deal with them and that therefore they must be dismissed.

[36] However, it is important to emphasize how the former Board characterized the issue that it had to decide in *Tran*, namely, as follows (at para 95): “Since the instant case involves a staffing matter, it must be determined whether staffing falls under the *PSLRA* or the applicable collective agreement.”

[37] This is the key point. Unlike the respondent’s blanket position before me that the new Board does not have jurisdiction over the duty of fair representation when faced with an employee who is complaining about representation related to a staffing matter, the new Board must ask itself whether the staffing at issue in this case falls under the *PSLRA* or the applicable collective agreement.

[38] If the complainant is complaining about the appointment of Mr. L, then this is a staffing matter that falls exclusively under the *PSEA*. However, the complainant claims that Mr. L was deployed into the position. If Mr. L was in fact deployed, then the complainant would not have had a right to complain to the then PSST. (See, e.g., *Smith v. President of the Canada Border Services Agency et al.*, 2007 PSST 0029.) Pursuant to subsection 53(1) of the *PSEA*, a deployment is not an appointment within the meaning of the *PSEA*.

**A. Would the complainant have a right to grieve the purported deployment of Mr. L under the *PSLRA*?**

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[39] The short answer is “No.” While under subparagraph 209(1)(c)(ii) of the *PSLRA*, an employee may refer to adjudication an individual grievance related to his or her

deployment, there is no right to bring a grievance under the *PSLRA* related to the deployment of another employee. While the former may relate to “... rights, obligations and matters set out in the *PSLRA* ...” (see *Elliott*, at para 188), there is no corresponding right or obligation under the *PSLRA* with respect to the latter situation (i.e., the situation that, in the complainant’s version, is the one before the new Board in this case). Thus, I conclude that the staffing matters complained of in the present case do not fall under the *PSLRA*.

**B. Do these matters fall under the applicable collective agreement?**

[40] The collective agreement was not included in any of the parties’ submissions. (I am prepared to take judicial notice of the applicable collective agreement.)

[41] At page 7 of his submissions, the complainant alleges that the respondent acted in a manner that was arbitrary, discriminatory or in bad faith with respect to his rights under the collective agreement. No provisions of the collective agreement were referenced.

[42] If the subject matter of the complaint relates to staffing, then there is no basis for an allegation that the complaint falls under the applicable collective agreement. Since staffing continues to be a non-negotiable matter in collective bargaining, the complainant’s contention that the matter is covered by his collective agreement is unsupportable.

**VI. Conclusion**

[43] The former Board’s jurisprudence is consistent (*Lai, Ouellet, Elliott, Brown and Tran*) that complaints to the new Board that the bargaining organization or agent breached the duty of fair representation set out in section 187 of the *PSLRA* applies only to matters or disputes covered by either the *PSLRA* or an applicable collective agreement. The present case involves staffing matters.

[44] As explained in the analysis, since the staffing matters raised in this complaint do not fall under either the *PSLRA* or the applicable collective agreement, I conclude that the new Board lacks the jurisdiction to examine the complaint on its merits. Since a grievance could not be brought with respect to the subject matter of this complaint, the complainant had no right to representation, and accordingly, the new Board lacks

jurisdiction to determine whether the respondent contravened section 187 of the *PSLRA*.

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

*(The Order appears on the next page)*

**VII. Order**

[46] The complaint is dismissed.

March 19, 2015.

**Catherine Ebbs,  
a panel of the Public Service Labour  
Relations and Employment Board**