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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

BETWEEN

MARCIA BUFFORD, LORI HALL, ROBYN BENSON, MARLENE ETTEL, VALERIE GRUNDY, DES SCOTT AND PUBLIC SERVICE ALLIANCE OF CANADA

Applicants

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Bufford et al. v. Canada Revenue Agency

In the matter of complaints 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 Applicant Bufford: Simon Renouf, counsel

For the other Applicants*:* Andrew Raven, counsel

For the Respondent*:* Peter Cenne, Canada Revenue Agency

Decided on the basis of written submissions, filed September 18 and October 10, 2013.

I. Applications before the Board

[1] This decision deals with applications made by Marcia Bufford, one of the applicants, and the other applicants — Lori Hall, Robyn Benson, Marlene Ettel, Valerie Grundy, Des Scott and the Public Service Alliance of Canada ("the PSAC") —, for the issuance of consent orders incorporating their agreement to settle two unfair labour practice complaints that Ms. Bufford had filed against the other applicants.

II. Background

[2] Ms. Bufford worked for the Canada Revenue Agency ("the CRA" or "the employer") until August 12, 2009, when the employer deemed her to have resigned from her position.

[3] On April 20, 2007, Ms. Bufford filed a complaint ("complaint No. 1") with the Public Service Labour Relations Board ("the PSLRB") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*") against Ms. Hall, Ms. Benson, Ms. Ettel, Ms. Grundy and Mr. Scott, all representatives of the PSAC. Complaint No. 1 alleged a breach of section 187 of the *PSLRA*, as follows:

1. Between January and April 2004, Ms. Hall failed to file a grievance or follow procedures that resulted in the exhausting of time frames and lost remedies.

2. Between May and July 2006, Ms. Hall misrepresented her authority to act as a union representative.

3. Between August and November 2006, Ms. Ettel failed to file grievances, resulting in the exhausting of time frames and lost remedies.

4. Between November 2006 and January 2007, Ms. Grundy failed to provide adequate representation and timely communication that jeopardized Ms. Bufford's welfare and time frames.

5. In January 2007, Ms. Benson failed to investigate matters such that a resolution to promote representation and protect remedies could occur.

6. Between February and April 2007, Mr. Scott failed to file grievances, resulting in exhausted time frames, and failed to provide complete representation, which affected Ms. Bufford's rights, remedies and best interests.

[4] On June 6, 2007, the PSAC filed a response to complaint No. 1 on behalf of Ms. Hall, Ms. Benson, Ms. Ettel, Ms. Grundy and Mr. Scott, denying any contravention of section 187 of the *PSLRA* and also stating that in part, the complaint was untimely.

[5] Complaint No. 1 was scheduled to be heard by the PSLRB October 27 to 29, 2009, at Edmonton, Alberta. That hearing was postponed at the request of Ms. Bufford on October 22, 2009.

[6] On January 19, 2010, Ms. Bufford sought to amend complaint No. 1 by adding allegations that the PSAC acted in a manner that was arbitrary, discriminatory or in bad faith and breached section 187 of the *PSLRA* based on the following alleged facts:

1. On July 3, 2009, the employer wrote to Ms. Bufford, demanding that she either return to work or resign her position.

2. On July 12, 2009, Ms. Bufford wrote to the employer and advised it that she did not feel safe working at her office for a number of reasons.

3. On July 17, 2009, the employer wrote to Ms. Bufford, insisting that she resign by July 24, 2009, and that in the absence of a resignation, the employer would deem that Ms. Bufford had abandoned her position.

4. On August 8, 2009, Ms. Bufford wrote to the employer, seeking clarification.

5. On August 12, 2009, the employer wrote to Ms. Bufford, indicating that it took her correspondence as an indication to resign and purportedly accepting her resignation.

6. After receipt of the employer's August 12, 2009, correspondence Ms. Bufford sought the assistance of the PSAC and provided the relevant documentation to a representative of the PSAC. Ms. Bufford was advised by the representative of the PSAC that steps had been taken to arrange to meet with representatives of the employer to discuss the matter.

7. The representative of the PSAC advised Ms. Bufford that he had referred her matter to a shop steward to assist her with the filing of a grievance to retract her resignation and that Ms. Bufford was seeking a workplace accommodation from her employer.

8. On September 2, 2009, Ms. Bufford was sent a blank grievance form from the shop steward of the PSAC requesting her to complete and sign it, scan it, and return it to him, which Ms. Bufford did.

9. On September 2, 2009, the shop steward advised Ms. Bufford that he had been directed not to file a grievance on her behalf. On September 8, 2009, Ms. Bufford contacted the first representative she had dealt with at the PSAC and requested assistance. Ms. Bufford attempted on September 13, 2009, to again get in touch with the first representative of the PSAC, requesting assistance.

10. On October 21, 2009, the first representative of the PSAC emailed Ms. Bufford and advised Ms. Bufford that she had been advised in early August 2009 that there was nothing further the PSAC could do for her.

[7] On March 31, 2010, the PSLRB ordered that the new allegations raised by Ms. Bufford formed a new complaint against the PSAC ("complaint No. 2"), which was deemed to have been filed on January 19, 2010.

[8] On August 12, 2010, the PSAC filed its response to complaint No. 2. It denied that it acted in a manner that was arbitrary, discriminatory or in bad faith with respect to its representation of Ms. Bufford's dispute with the employer over the end of her employment and that complaint No. 2 was untimely.

[9] Complaint No. 1, which had been rescheduled to be heard on January 18 to 20, 2011, was postponed at the request of the other applicants.

[10] The PSLRB ordered that both complaints would be scheduled to be heard at the same time; however, it did not consolidate the complaints.

[11] The employer is not a party to the complaints.

[12] Ms. Bufford and the other applicants, but not the employer, were canvassed with respect to their availability for the hearing of the complaints, and on June 25, 2012, they advised the PSLRB that they were available for a hearing in Edmonton, Alberta, from January 28 to 31, 2013.

[13] PSLRB Member Howes was appointed under section 44 of the *PSLRA* to hear and determine both complaints.

[14] On December 11, 2012, a Notice of Hearing was sent to Ms. Bufford and the other applicants with regard to the complaints.

[15] On December 11, 2012, the PSLRB corresponded, via email, with Ms. Bufford and the other applicants, with a copy to the employer, which correspondence stated as follows:

. . .

> *As the parties might be aware, earlier in the above-noted proceedings the employer was being copied under section 7 of the Regulations, as a "person who might be affected by the outcome of the proceedings". The* [PSLRB] *was copying the employer by cc of its material to Mr. H.A. Newman-Treasury Board Legal Services. At the time, the parties were directed to do the same.*
>
> *Somewhere along in the process – around the time that the 2nd complaint file was opened – it appears that the* [PSLRB]*'s correspondence ceased being copied to Mr. Newman due to an administrative error.*
>
> *The* [PSLRB] *will resume copying Treasury Board Legal Services on its correspondence in these matters and requests that the parties do the same pursuant to section 7 of the Regulations. Unless the* [PSLRB] *and parties are advised otherwise, correspondence should be copied to Richard Fader (email address above).*

. . .

[16] On December 13, 2012, an amended Notice of Hearing was sent with regard to the complaints, the difference in the Notice being that it was copied to counsel for the employer.

[17] On December 13, 2012, counsel for Ms. Bufford wrote to counsel for the other applicants in reply to correspondence sent on December 7, 2012, from counsel for the other applicants. The December 13, 2012, letter answered questions counsel for the other applicants had asked, as follows:

1. the witnesses Ms. Bufford intended on calling;

2. documentary disclosure with respect to Ms. Bufford's 2007 complaint under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6);

3. the event within 90 days of the filing of each complaint, which addresses the timeliness issues;

4. a precise statement of the remedies Ms. Bufford is seeking; and

5. disclosure of documents upon which Ms. Bufford intended to rely upon at the hearing.

[18] Counsel for Ms. Bufford's correspondence of December 13, 2012, was copied to counsel for the employer at Treasury Board Legal Services.

[19] With respect to the remedies Ms. Bufford stated she was seeking, as referenced in her counsel's correspondence of December 13, 2012, Ms. Bufford stated that:

> 1. *An order pursuant to section 192(1)(D)* [*sic*] *of the* Public Service Labour Relations Act *extending the time for advancing a grievance in the matter to arbitration notwithstanding the expiration of any time limit pursuant to a collective agreement, subject to any conditions that the* [PSLRB] *may prescribe.*
>
> 2. *An order that Ms. Bufford may be represented by legal counsel of her choice, at the Union's expense, in any such arbitration.*
>
> 3. *Or, in the alternative, damages and costs to make Ms. Bufford whole in all respects with respect to the loss of employment and breach of the Duty of fair representation in this case, and*
>
> 4. *Any other remedy that counsel may advise and the Public Service Labour Relations Board may award following the hearing of the matters.*

[20] Between December 12, 2012, and December 17, 2012, 10 emails were exchanged between the PSLRB and the offices of counsel for Ms. Bufford and counsel for the other applicants, of which the last four were copied to counsel for the employer. The subject matter of these emails was the scheduling of a pre-hearing teleconference with regard to the complaints. Counsel for the employer did not respond to any of the email correspondence, despite a specific reference to him in the penultimate email sent by

counsel for the other applicants on December 17, 2012, at 11:41 a.m. (EST) and responded to at the PSLRB that same day at 11:48 a.m. (EST) as follows:

> . . .
>
> *December 17, 2013 11:41 AM*
>
> *I have other available dates after January 7th but perhaps we shd* [*sic*] *hear from Richard Fader before we review everyone's availability. In the meantime, I am holding Jan. 7 at 10am Eastern time.*
>
> . . .
>
> *December 17, 2012 11:48 AM*
>
> *. . . However, the employer's availability is not normally solicited for pre-hearing conferences or hearings unless they've requested – and been granted - intervenor status. I do not believe that there have been many instances in all the DFR complaints currently before the* [PSLRB] *where such a request has been made; the employer is more usually just copied on correspondence as a "person who might be affected by the proceedings" in accordance with section 7 of the Regs* [*sic*].

[21] On January 7, 2013, counsel for the other applicants wrote to counsel for Ms. Bufford and copied both the PSLRB and counsel for the employer, as follows:

> *Further to the Case Management Conference Call conducted this morning we hereby set out the basis of* [the other applicants'] *position that the* [PSLRB] *does not have jurisdiction to hear these complaints on the basis of timeliness.*
>
> *On September 2, 2009, Jerad Cooper, then Union of Taxation Employees Shop Steward, informed Ms. Bufford that she was not in a position to file a grievance in the matter regarding the Employer's August 12, 2009 acceptance of Ms. Bufford's resignation. Mr. Cooper also advised that Ms. Bufford was not able to file a "duty to accommodate" grievance as that issue had already been grieved and responded to by the Employer.*
>
> [The PSAC] *submits that* [Ms. Bufford] *knew of the events giving rise to* [complaint No. 2] *on September 2, 2009 when* [the PSAC]*'s final position was communicated to her. As* [complaint No. 2] *is deemed to have been filed on January 19, 2010, the complaint was filed 139 days after communication by* [the PSAC]. *Under section 190(2) of the* PSLRA, *a complaint must be made not later than 90 days*

> *after the day on which* [Ms. Bufford] *knew or ought to have known of the actions or circumstances giving rise to the complaint. The time period prescribed by the* PSLRA *is mandatory and the* [PSLRB] *has no jurisdiction to extend it.*
>
> *Regarding the first complaint, on December 8, 2010, John Haunholter responded to the* [PSLRB]*'s request for particulars arising out of the November 29, 2010 pre-hearing teleconference. This response maintained the timeliness objection as to* [Ms.] *Ettel and* [Ms.] *Hall.*
>
> *The first complaint alleges specific representation failures by* [Ms. Ettel and Ms. Hall]. *The complaint further sets out specific timeframes for those alleged failures. For* [Ms.] *Hall, the time frames for the alleged representation failures are January to April 2004 and May to July 2006. For* [Ms.] *Ettel, the time frame given in the complaint is August to November 2006. The complaint is dated April 20, 2007. The date for the purpose of timeliness is therefore January 20, 2007.* [The other applicants submit] *that the* [PSLRB] *is without jurisdiction for the purpose of* [complaint No. 1] *against* [Ms.] *Hall and* [Ms.] *Ettel as the alleged representation failures are identified as having occurred wholly outside of the 90 day time frame.*
>
> . . .

[22] The hearing with regard to the complaints before PSLRB member Howes started from January 28 to 31, 2013; however, it was not completed. It was scheduled to continue on May 3, 2013. On April 23, 2013, the applicants requested a postponement of the continuation of the hearing, as they were engaged in settlement discussions. On April 24, 2013, the hearing scheduled for May 3, 2013, at Edmonton, Alberta, was postponed.

[23] On August 1, 2013, counsel for the other applicants confirmed that the applicants had reached a settlement between them with regard to the complaints and filed applications for consent orders.

[24] The consent order sought by the applicants that addresses complaint No. 1 is as follows:

1. The complaint respecting Ms. Hall, Ms. Benson, Ms. Ettel, Ms. Grundy and Mr. Scott is dismissed.

2. The complaint respecting the PSAC is allowed.

3. The time limits for referring Grievances No. 70042929 and No. 70042930 to adjudication are extended to 45 days from the date the order is issued and received by the parties.

4. Upon receipt of the employer's decision to the aforesaid grievances at the final level of the grievance process, the grievances shall be referred to adjudication in the normal course and within the governing time limits. At adjudication, any and all applicable time limits for the presentation of the grievances shall be considered met.

5. The grievances are deemed to have been advanced in a timely fashion.

6. Grievances No. 70042929 and No. 70042930 are deemed to have been presented in a timely manner such that the merits of the grievances are to be addressed at adjudication upon referral of the aforesaid grievances to adjudication.

7. The PSAC shall appoint a grievance and adjudication officer who has had no prior involvement with Ms. Bufford's grievances or complaints to represent Ms. Bufford at the adjudication of the aforesaid grievance. At the said adjudication of the aforesaid grievance, the PSAC shall utilize its best efforts to seek full compensation for all losses arising out of the subject matter of the grievance, including compensation for legal expenses incurred by Ms. Bufford.

[25] The consent order sought by the applicants that addresses complaint No. 2 is as follows:

1. The complaint is allowed.

2. The PSAC shall within 45 days from the date the order is issued and received by Ms. Bufford and the PSAC present a grievance on behalf of Ms. Bufford to the employer with respect to the circumstances surrounding the termination of Ms. Bufford's employment in or about August and September 2009, which termination Ms. Bufford maintains was an unjust dismissal or involuntary forced resignation without cause.

3. The aforesaid grievance shall be presented at the final level of the grievance process and shall be considered timely in all respects, notwithstanding that the subject circumstances occurred in August and September 2009.

4. Upon receipt of the employer's reply to the aforesaid grievance at the final level of the grievance process, the grievance shall be referred to adjudication in the normal course and within the governing time limits. At adjudication, any and all applicable time limits for the presentation of the grievance shall be considered met.

5. The PSAC shall appoint a grievance and adjudication officer who has had no prior involvement with Ms. Bufford's grievances or complaints to represent Ms. Bufford at the adjudication of the aforesaid grievance. At the said adjudication of the aforesaid grievance, the PSAC shall utilize its best efforts to seek full compensation for all losses arising out of the subject matter of the grievance, including compensation for legal expenses incurred by Ms. Bufford.

[26] On August 13, 2013, the PSLRB wrote to the employer as it did not appear to have been involved in the preparation of the requested consent orders and requested the employer provide any submissions it may have.

[27] On September 18, 2013, the employer wrote to the PSLRB in response to the correspondence of August 13, 2013. On October 10, 2013, the applicants responded to the employer's correspondence of September 18, 2013.

[28] Under section 44 of the *PSLRA*, these applications for consent orders were assigned to me by the chairperson of the PSLRB.

[29] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *PSLREBA*") was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the PSLREB") 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 PSLREB. On November 3, 2014, the PLSREB amended the *Public Service Labour Relations Board Regulations* (SOR/2005-79), which became the *Public Service Labour Relations Regulations* ("the *Regulations*").

[30] This decision relates to the applications by the applicants for the issuance of consent orders pursuant to their settlement agreement with regard to the complaints.

[31] At the time of this decision, neither the PSLRB nor the PSLREB was in receipt of any application brought by Ms. Bufford or on her behalf by anyone to extend the time to either file grievances or refer grievances to adjudication.

III. Summary of the arguments

A. For the employer

[32] The CRA takes the position that I have no jurisdiction under subsection 192(1) of the *PSLRA* to issue the consent orders sought. The parties to the complaints are Ms. Bufford and the other applicants. The effect of the requested consent orders would have a direct impact on the employer, which is not a party to the complaints.

[33] The applicants cannot agree to remedy the complaints in a manner that impacts the employer, which is not the party complained of. At all relevant times, subsection 192(1) of the *PSLRA* stated as follows:

> ***192.*** *(1) If the* [PSLRB or PSLREB] *determines that a complaint referred to in subsection 190(1) is well founded, the* [PSLRB or PSLREB] *may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> . . .

[34] My remedial authority is further prescribed in paragraph 192(1)(*d*) of the *PSLRA*, which clearly does not contemplate an order against the employer. At all relevant times, paragraph 192(1)(*d*) of the *PSLRA* stated as follows:

> ***192.*** *(1)(d) If an employee organization has failed to comply with section 187, an order requiring the employee*

> *organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the* [PSLRB or PSLREB] *considers that the employee organization ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on . . . .*

[35] The object of the applications for consent orders go much further than what is set out in paragraph 192(1)(*d*) of the *PSLRA* and could more appropriately be dealt with on an application to extend time where the employer is a party.

[36] My accepting the applications and issuing the requested consent orders would have the effect of imposing on the employer a remedy to address complaints filed against the other applicants. The employer would be faced with defending cases for which the employer is not aware of an intention by Ms. Bufford to proceed with grievances in which some of the supporting facts are 10 years old. The passage of time has created a prejudice for the employer to defend its position.

[37] The employer further submitted that in any complaint to which it may be an affected person, it has the right to be informed and provided with sufficient notice to attend and participate in the hearings.

[38] The PSLRB's email correspondence of December 11, 2012, to the applicants and to the Treasury Board's employer representation division acknowledged that the PSLRB had inadvertently omitted to copy the employer on the correspondence between the applicants between May 2010 and December 2012. In the same correspondence, the PSLRB provided notice that the error would be corrected on a "go forward" basis, and since December 2012, the employer has been sent and received all correspondence from May 2010 to December 2012.

[39] Although the employer did receive notice of the January 2013 hearing before PSLRB member Howes with regard to the complaints through the Treasury Board's employer representation division on December 12, 2012, the PSLRB did not notify the employer of Ms. Bufford's ongoing intent to proceed with her grievances and did not provide sufficient advance notice of the January 2013 hearing. While the employer recognizes that the error with respect to notices was administrative, the result remains that the CRA did not receive proper notice of the hearing; nor was it able to provide its position at the hearing. The statement made by the applicants in their applications that the employer was provided notice and chose not to participate is incorrect.

B. <u>For Ms. Bufford</u>

[40] Ms. Bufford submits that the employer was provided with proper notice and the right to provide its position at the January 2013 hearing before PSLRB member Howes with regard to the complaints. Ms. Bufford specifically refers to an email sent on January 21, 2013, by counsel for Ms. Bufford to the PSLRB and copied to counsel for the employer, which stated as follows:

> *Hi Lisa, We are having our books of exhibits copied this week. I propose to make copies as follows: 1 for Mr. Raven, 1 for the witnesses to refer to, 1 for myself, and 1 for* [PSLRB] *Member Howes. I understand that no one will be appearing for the Treasury Board or the Government of Canada.*

[41] Ms. Bufford states that the email of January 21, 2013, referred to above in paragraph 40 was not responded to by counsel for the employer; nor did counsel for the employer respond to an earlier email sent by counsel for the other applicants on January 7, 2013, which attached a letter from counsel for the other applicants to counsel for Ms. Bufford also dated January 7, 2013.

[42] Despite being aware that two complaints had been filed, and despite knowing that a hearing had been scheduled for January 2013 before PSLRB member Howes and that the applicants were preparing for the hearing, the CRA did not at any time request intervenor status with regard to the complaints pursuant to section 14 of the *Regulations.* The CRA had been copied on all correspondence as a "person who might be affected by the proceedings." It was incumbent on the CRA to apply for intervenor status, and they chose not to do so. The CRA having been given notice, as a "person who might be affected by the proceedings", PSLRB member Howes was entitled to proceed in their absence when the CRA chose not to appear. In support of this proposition, Ms. Bufford relies on *Canadian Parks and Wilderness Society v. Canada (Minister of the Environment),* [1992] F.C.J No. 553 (T.D.) (QL); *Hoyne v. Aerospace, Transportation and General Workers Union of Canada (CAW Canada Local 222),* [2002] OLRB Rep. November/December 1062; and *International Union of Painters and Allied Trades, Local Union 1891 v. AB & C Renovations Inc.,* [2011] O.L.R.D. No. 3679 (QL).

[43] Finally, the CRA has not provided any reasons for its failure to respond or apply for intervenor status with regard to the complaints.

C. <u>For the other applicants</u>

[44] It is the position of the other applicants that I have jurisdiction under subsection 192(1) of the *PSLRA* to grant the consent orders requested by the applicants as a remedy with regard to the complaints. I have the power to make any order I consider necessary in order to address a failure to comply with section 187 of the *PSLRA*, including extending time limits to submit grievances.

[45] In *Ménard v. Public Service Alliance of Canada,* 2010 PSLRB 124, the PSLRB found that its jurisdiction was not limited to the remedies provided in paragraph 192(1)(*d*) of the *PSLRA*. At paragraphs 28 and 29 of *Ménard*, the PSLRB stated as follows:

> *[28] Paragraphs 192(1)(*a*) to (*f*) of the* [*PSLRA*] *refer to specific orders about the different breaches of the* [*PSLRA*] *for which a complaint may be filed under subsection 190(1). A cursory analysis of paragraphs 192(1)(*a*) to (*f*) shows that the legislator's intent was to set out specific orders for the different breaches of the* [*PSLRA*]*. In general, each order aims to return to the complainant what was lost or not received because of the breach of the* [*PSLRA*]*. Specifically with respect to the duty of representation, paragraph 192(1)(*d*) states that the* [PSLRB] *may require the employee organization to take and carry on on behalf of the complainant or to assist the complainant to take and carry on any proceeding that the* [PSLRB] *considers that the employee organization ought to have taken and carried on on the complainant's behalf or ought to have assisted the complainant to take and carry on. Clearly, the remedy directly addresses the breach committed.*
>
> *[29] Under that legal framework, the work "including" in subsection 192(1) of the* [*PSLRA*] *serves to introduce or "include" specific measures adapted to different breaches of the* [*PSLRA*]*. However, it should not be understood as limiting the power of the* [PSLRB] *to order other measures as long as they are logically connected to the breach committed.*

[46] The other applicants submit that *Ménard* is consistent with the "fair, large and liberal interpretation" an adjudicator has previously stated must be given to provisions of the *PSLRA* in *Amos v. Deputy Head (Department of Public Works and Government Services),* 2008 PSLRB 74 (upheld in 2011 FCA 38).

[47] I must have the power to grant an extension of time to file a grievance; otherwise, ordering an employee organization to take or carry on a grievance that is

out of time would be an ineffective remedy. The CRA's submission that the object of the applications for consent orders could more appropriately be dealt with through an application to extend the time limits is futile and was soundly rejected by the PSLRB in *Ménard* at paragraph 39, where it stated as follows:

> *The respondent indicated that the appropriate remedy would be for it to help the complainant file an application with the Chairperson of the* [PSLRB]*, so that he would consent to extend the time for filing a grievance, allowing her to file a new one. Even though that remedy is connected to the respondent's error, I believe that it is useless and not necessarily helpful to providing the complainant with an opportunity to assert her rights with her previous employer. In fact, as the complainant pointed out, there is no guarantee that the Chairperson will grant an extension of time. If the Chairperson were to deny the application, the complainant would have no further recourse.*

[48] I would be providing a remedy under subsection 192(2) of the *PSLRA* by putting Ms. Bufford in the same position she would have been had the violation of the *PSLRA* not occurred. I must have the power to order measures that are logically connected to the breach. *Ménard* rescinded the bargaining agent's withdrawal of the complainant's grievance, which effectively meant that the grievance had to be treated by the employer as if it had never been withdrawn. My jurisdiction, therefore, must include the power to extend time limits in order to allow Ms. Bufford's grievances to be heard on their merits.

[49] The consent orders sought do not constitute an order against the employer but are an order against the parties complained of as contemplated in subsection 191(1) of the *PSLRA*, as the proposed language directs the PSAC to take steps in the presentation and pursuit of Ms. Bufford's grievances. To facilitate these actions, the requested consent orders direct that the time limits otherwise applicable be extended. It is clear that the requested consent orders call for remedial action to be taken by the PSAC, and no action is ordered against or directed toward the employer.

[50] Labour boards in other jurisdictions with provisions similar to subsection 192(1) of the *PSLRA* have ordered time limits extended in circumstances where an exercise of such power is warranted. Such a similar provision is section 99 of the *Canada Labour Code* (R.S.C., 1985, c. L-2) , which states as follows:

> ***99.*** *(1) Where, under section 98, the* [Canada Industrial Relations Board] *determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95, or 96, the* [Canada Industrial Relations Board] *may, by order, require the party to comply with or cease contravening that subsection or section and may*
>
> . . .
>
> *(*b*) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the* [Canada Industrial Relations Board] *considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;*
>
> . . .
>
> *(2) For the purpose of ensuring the fulfillment of the objectives of this Part, the* [Canada Industrial Relations Board] *may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the* [Canada Industrial Relations Board] *is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfillment of those objectives.*

[51] The Canada Industrial Relations Board has waived time limits in directing a union to take on a grievance or refer a grievance to arbitration.

[52] The Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, provides as follows:

> . . .
>
> *96. (4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the* [Ontario Labour Relations Board] *in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the* [Ontario Labour Relations Board] *may inquire into the complaint of a contravention of* [the Ontario *Labour Relations Act*] *and where the* [Ontario Labour Relations Board] *is satisfied that an employer, employers' organization,*

> *trade union, council of trade unions, person or employee has acted contrary to* [the Ontario *Labour Relations Act*] *it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,*
>
> . . .
>
> *(b) an order directing the employer, employers' organization, trade union, council of trade unions, person or employee or other person to rectify the act or acts complained of . . . .*
>
> . . .

[53] The British Columbia *Labour Relations Code*, R.S.B.C., 1996, c. 244, states as follows:

> . . .
>
> ***14** (4) If, on inquiry, the* [Labour Relations Board of British Columbia] *is satisfied that any person is doing, or has done, an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, it may*
>
> > *(a) make an order directing the person to cease doing the act;*
> >
> > *(b) in the same or a subsequent order, direct any person to rectify the act . . . .*
>
> . . .

[54] I, like the Ontario and British Columbia labour relations boards and the Canada Industrial Relations Board, have broad remedial powers that allow me to put Ms. Bufford back in the position she would have been in had there been no violation of the *PSLRA*.

[55] If I determine that subsection 192(1) of the *PSLRA* contains gaps, which would not allow the consent orders requested to be made, section 36 of the *PSLRA*, as it existed at the time these applications for consent orders were filed, provided me with remedial authority to exercise any powers that are incidental to the attainment of the objects of the *PSLRA*. Section 36 stated as follows:

> ***36.** The* [PSLRB] *administers* [the *PSLRA*] *and it may exercise the powers and perform the functions that are*

> *conferred or imposed on it by* [the *PSLRA*], *or as are incidental to the attainment of the objects of* [the *PSLRA*], *including the making of orders requiring compliance with* [the *PSLRA*], *regulations made under it or decisions made in respect of a matter coming before the* [PSLRB].

[56] The PSLRB and the Federal Courts have affirmed remedial authority to take such action as is necessary to ensure the *PSLRA* is administered in a manner consistent with its objects and with its broader scheme.

[57] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2010 PSLRB 88, the PSLRB stated, at paragraph 166, as follows:

> *. . . Furthermore, as a question of law, I believe that the* [PSLRB] *may use section 36 as necessary to resolve that dispute because doing so is rationally linked to, and thus incidental to, the objects of the* [*PSLRA*] *to resolve disputes efficiently and to maintain effective labour-management relations.*

[58] The passage of time, as alleged by the employer, of potentially up to 10 years, cannot be a bar to the exercise of my discretion to fashion a proper remedy. The employer has not provided any evidence of any prejudice. The employer is fully aware of the complaints and the facts leading up to them as they were filed back in 2007 and 2010, respectively.

[59] The employer was aware of the January 2013 hearing before PSLRB member Howes with regard to the complaints as it was given notice of the hearing and was provided with the opportunity to attend and seek standing if it wished to do so. It cannot take the position that it was not provided with proper and sufficient notice.

IV. Reasons

[60] There are two separate complaints filed by Ms. Bufford as against the other applicants. The essence of the complaints is that the other applicants failed to present and pursue, on her behalf, grievances against her employer.

[61] Ms. Bufford and the other applicants have argued that the employer has no right to object to the applications for consent orders as the employer was aware of the complaints, was copied on correspondence, did not seek intervenor status and has

chosen not to participate in the January 2013 hearing before PSLRB member Howes with regard to the complaints. These arguments are without merit.

[62] The parties to the complaints are Ms. Bufford and the other applicants. The complaints do not name the employer; nor is the employer a party to them.

[63] The hearing of the complaints before PSLRB member Howes started; however, it was never completed. The PSLRB was advised that the applicants entered into settlement discussions and was eventually forwarded two applications for consent orders.

[64] There is no evidence that the employer, who is not a party to the complaints, was invited to participate in the settlement discussions or was even aware of the settlement discussions.

[65] With respect to complaint No. 1, the requested consent order states at paragraph 3 that the time limits for referring two separate grievances, Grievance No. 70042929 and Grievance No. 70042930, are extended to 45 days from the date the order is issued and received by the applicants. Paragraphs 5 and 6 of that same requested consent order state that the grievances are deemed to have been advanced in a timely fashion or timely manner. The extension of time and the ordering that the grievances are deemed to be advanced in a timely fashion is relief that is not as against any of the other applicants but is clearly as against the interests of the employer.

[66] With respect to complaint No. 2, the requested consent order states at paragraph 2 that within 45 days from the date the order is issued and received by the applicants, the PSAC shall present a grievance on behalf of Ms. Bufford to the employer, which grievance, according to paragraph 3 of that same requested consent order, shall be considered timely in all respects, notwithstanding that the subject circumstances occurred in August and September of 2009. Paragraph 4 of that same requested consent order states that any and all applicable time limits for the presentation of the grievance shall be considered met. The ordering that the time limits have been met is relief, which is not as against the other applicants but is made directly as against the interests of the employer.

A. Subsection 192(1) of the *PSLRA*

[67] At all relevant times, subsection 192(1) of the *PSLRA* stated as follows:

> ***192.*** *(1) If the* [PSLRB or PSLREB] *determines that a complaint referred to in subsection 190(1) is well founded, the* [PSLRB or PSLREB] *may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> . . .
>
> *(*d*) if an employee organization has failed to comply with section 187, an order requiring the employee organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the . . . employee organization ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on . . . .*

[68] The power in subsection 192(1) of the *PSLRA* is discretionary. There is no requirement to make any order. In addition, the making of the order is predicated on actually making a determination that the complaint is well founded. Although the hearing of the complaints started before PSLRB member Howes, it was never completed, and the parties to the complaints — Ms. Bufford and the other applicants — entered into a settlement agreement. Neither, I nor the PSLRB have made any determination on the merits of the complaints.

[69] Subsection 192(1) of the *PSLRA* is also very specific as against whom an order may be made. It gives the discretion, if a complaint is founded, to make any order against the party complained of. The parties complained of are the other applicants. So while there is discretion to make orders and jurisdiction to make an order after determining that a complaint was well founded, those orders, under subsection 192(1) of the *PSLRA*, cannot be as against the employer, because the employer is not one of the parties against whom the complaints are made.

[70] As the conditions as set out in subsection 192(1) of the *PSLRA* have not been met, I cannot grant the applications for consent orders under this subsection.

B. Timeliness of the grievances/Application to extend timelines

[71] Complaint No. 1 refers to the failure by Ms. Hall, Ms. Benson, Ms. Ettel, Ms. Grundy and Mr. Scott to file grievances on behalf of Ms. Bufford between January 2004 and April 2007. It is clear given the facts that grievances relating to those events would be, as of the date of the applications for consent orders, potentially as much as nine and a half years out of time. Complaint No. 2 refers to the failure by the PSAC to file a grievance in relation to the termination of Ms. Bufford's employment, which occurred in August 2009, just shy of four years before the date of the applications for consent orders and therefore clearly well outside the time limit within which to file a grievance with her employer against this action. It is therefore abundantly clear that the substantive part of the relief that both Ms. Bufford and the other applicants are agreeing should be ordered by me is as against the employer.

[72] The other applicants argued that if subsection 192(1) is deficient, section 36 of the *PSLRA*, as it existed at the time these applications for consent orders were filed, provided me with the power to take the step of making the order to extend the time frames with respect to the filing of the grievances and referring of grievances to adjudication. Section 36 stated as follows:

> ***36.*** *The* [PSLRB] *administers* [the *PSLRA*] *and it may exercise the powers and perform the functions that are conferred or imposed on it by* [the *PSLRA*]*, or as are incidental to the attainment of the objects of* [the *PSLRA*]*, including the making of orders requiring compliance with* [the *PSLRA*]*, regulations made under it or decisions made in respect of a matter coming before the* [PSLRB].

[73] On November 1, 2014, section 36 of the *PSLRA* has been renumbered as section 12 of the *PSLRA*. Section 12 of the *PSLRA* reads as follows:

> ***12.*** *The* [PSLREB] *administers* [the *PSLRA*] *and it may exercise the powers and perform the duties and functions that are conferred or imposed on it by* [the *PSLRA*]*, or as are incidental to the attainment of the objects of* [the *PSLRA*]*, including the making of orders requiring compliance with* [the *PSLRA*]*, with regulations made under it or with decisions made in respect of a matter coming before the* [PSLREB].

[74] Also on November 1, 2014, section 19 of the *PSLREBA* came into force Section 19 of the *PSLREBA* reads as follows:

> ***19.*** *The* [PSLREB] *is to exercise the powers and perform the duties and functions that are conferred or imposed on it by* [the *PSLREBA*] *or any other Act of Parliament.*

[75] The *PSLRA* is divided into four different parts. Duty of fair representation complaints (complaints under paragraph 190(1)(*g*) of the *PSLRA*) fall under Part 1 of the *PSLRA*, which is entitled "Labour Relations." Section 36 of the *PSLRA* was found there at the time these applications for consent orders were filed. Section 12 of the *PSLRA* is also now found there

[76] Individual grievances against the employer, which Ms. Bufford states that the other applicants have failed to present on her behalf, fall under Part 2 of the *PSLRA*, which is entitled "Grievances." At all relevant times, subsection 237(1) of the *PSLRA* (which is found in Part 2 of the *PSLRA*) stated as follows:

> ***237.*** *(1) The* [PSLRB or PSLREB] *may make regulations respecting the processes for dealing with grievances, including regulations concerning*
>
> . . .
>
> *(*d*) the time within which a grievance may be presented at any level in a grievance process;*
>
> . . .
>
> *(*f*) the manner in which and the time within which a grievance may be referred to adjudication after it has been presented up to and including the final level in the grievance process . . . .*

[77] Under sections 237 and 238 of the *PSLRA* the PSLRB made the *Regulations* and the PSLREB amended them.

[78] At all relevant times, Part 2 of the *Regulations* was entitled "Grievances" and encompassed sections 61 through 106.

[79] At the time these applications for consent orders were filed, section 61 of the *Regulations* stated as follows*:*

> ***61.*** *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the*

> *providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*
>
> *(*a*) by agreement between the parties; or*
>
> *(*b*) in the interest of fairness, on the application of a party, by the Chairperson.*

[80] The *Regulations* clearly codified, under section 61, the power to extend time limits with respect to the presentation of grievances and the referring of grievances to adjudication.

[81] At the time these applications for consent orders were filed, section 45 of the *PSLRA* stated that the Chairperson of the PLSRB may authorize a Vice-Chairperson to exercise any of the Chairperson's powers or perform any of the Chairperson's functions, including powers or functions delegated to the Chairperson by the PSLRB. Section 45 of the *PSLRA* read as follows:

> ***45.*** *The Chairperson may authorize a Vice-Chairperson to exercise any of the Chairperson's powers or perform any of the Chairperson's functions, including powers or functions delegated to the Chairperson by the* [PSLRB].

[82] At the time these applications for consent orders were filed, the power to extend time limits with respect to the presentation of grievances and the referring of grievances to adjudication was vested in the Chairperson of the PSLRB, and only the Chairperson, or a Vice-Chairperson of the PSLRB, as delegated by the Chairperson under section 45 of the *PSLRA*, could exercise that power. It is trite law that the applicants in this case cannot contract out of the *Regulations*, which require the approval of the employer or that of the Chairperson of the PSLRB or of her delegate, to extend the time prescribed for the filing of a grievance or the reference of a grievance to adjudication.

[83] On November 3, 2014, section 61 of the *Regulations* was amended to state as follows*:*

> ***61.*** *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*

> *(*a*) by agreement between the parties; or*
>
> *(*b*) in the interest of fairness, on the application of a party, by the* [PSLREB] *or an adjudicator, as the case may be.*

[84] Since November 3, 2014, the power to extend time limits with respect to the presentation of grievances and the referring of grievances to adjudication in circumstances similar to those in this case is vested in the PSLREB.

[85] While timelines to present individual grievances are set out in collective agreements, they were also set out at all relevant times under section 68 of the *Regulations*. At all relevant times, the timeline to refer individual grievances to adjudication are set out under section 90 of the *Regulations*. It is clear that both of the applications for consent orders provide for substantive relief as against the employer in relation to grievances that Ms. Bufford alleged the other applicants never filed on her behalf. This relief as set out in the applications for consent orders is specifically as against the employer and is relief that should be sought by a grievor, or on behalf of a grievor, by way of an agreement with the employer to extend the timelines under paragraph 61(*a*) of the *Regulations*. Failing such an agreement, an application to extend time under paragraph 61(*b*) of the *Regulations* could have been filed before November 3, 2014, with the Chairperson of the PSLRB or as of November 3, 2014, with the PSLREB.

[86] The parties to an agreement to extend time, under paragraph 61(*a*) of the *Regulations*, would be the grievor and the employer. There is no evidence that there is any agreement between Ms. Bufford and the employer under paragraph 61(*a*) of the *Regulations* to extend the timelines to either present grievances or refer grievances to adjudication, and as such, the appropriate action to be taken to extend the time to file grievances or refer a grievance to adjudication now is by bringing an application to do so under the *Regulations.*

[87] In the cases of extending the time limits for presentation of grievances and extending the time limits for referring grievances to adjudication, the party against whose interest relief is sought is the employer. There is no evidence that there had been any application filed by Ms. Bufford or on behalf of Ms. Buford before November 3, 2014, with the Chairperson of the PSLRB or as of November 3, 2014, with

the PSLREB to extend time under paragraph 61(*b*) of the *Regulations* with respect to presenting grievances or to referring grievances to adjudication.

[88] Decision makers under the PSLRA, and its predecessor *Public Service Staff Relations Act* (R.S.C., 1985, c. P–35), have established a significant body of jurisprudence with respect to applications to extend the time for filing grievances and referring grievances to adjudication. The PSAC is well aware of this jurisprudence given that on many occasions they have represented applicants seeking to extend time frames for both grievances and referring grievances to adjudication.

[89] It is troubling that notwithstanding the complaints filed, no one, not Ms. Bufford, not her counsel or the PSAC, brought an application to extend the time limits for the filing of grievances. There is nothing, notwithstanding the filing of the two complaints, that prevented any of them from bringing an application under paragraph 61(*b*) of the *Regulations* to extend the time limits to file grievances and, if necessary, refer those grievances to adjudication. Complaint No. 1 was filed six years prior to, and complaint No. 2 was filed three years prior to, the filing of these applications for consent orders.

C. Application to be an intervenor

[90] Intervenor is defined by *Black's Law Dictionary* as "one who voluntarily enters a pending lawsuit because of a personal stake in it."

[91] At the time these applications for consent orders were filed, section 14 of the *Regulations* provided that anyone with a substantial interest in a proceeding before the PSLRB may apply to the PSLRB to be added as a party or an intervenor and that the PSLRB may, after giving the parties the opportunity to make representations in respect of the application, add the person as a party or an intervenor.

[92] At all relevant times, section 1 of the *Regulations* set out various definitions for terms found throughout the *Regulations*. "Initiating document" means many different things, depending on the purpose of the document. Under paragraph 1(v) of the *Regulations*, it means a complaint made under section 190 of the *PSLRA*.

[93] At all relevant times, section 4 of the *Regulations* provided, upon receipt of an initiating document for the provision of copies to the other party and to any person who may be affected by the proceeding. At all relevant times, subsection 7(2) of the

Regulations provided that any person who filed a document subsequent to an initiating document had to provide a copy of that document to the person who filed the initiating document and any other person who received an initiating document by virtue of section 4 of the *Regulations*.

[94] It appears from the position of both Ms. Bufford and the other applicants that the one at fault would be the employer. Ms. Bufford has argued that the employer had notice of the January 2013 hearing before PSLRB member Howes with regard to the complaints, had the right to participate in the hearing, had been copied on correspondence and could have applied for intervenor status.

[95] The fact that at all relevant times section 4 and subsection 7(2) of the *Regulations* required the provision of copies of documents filed with regard to the complaints to other people or organizations did not somehow morph those people or organizations into parties to the complaints against whom relief could be ordered without due process. It was incumbent on Ms. Bufford, if she was seeking relief as against someone, to bring a proceeding as against that party. If the employer was a proper party, the employer should have been named by Ms. Bufford as a party. The employer is not required to apply for intervenor status. It is not incumbent upon a non-party to seek intervenor status in any proceeding commenced by parties just because it may have some interest in the matter.

[96] In *Ménard*, the complainant complained that her bargaining agent had failed to comply with section 187 of the *PSLRA* by withdrawing a grievance she had filed. The PSLRB ordered that the withdrawal of the complainant's grievance be rescinded and that the complainant's bargaining agent provide her with full and complete representation. *Ménard* does not grant the substantive relief that Ms. Bufford and the other applicants herein are seeking. While the decision in *Ménard*, on its face, appears to grant substantive relief as against the employer, there was nothing in that decision that prevented the employer from availing itself of all defences available in responding to the grievance, including a timeliness argument. Here, the requested relief would specifically abrogate that defence.

[97] The submissions of Ms. Bufford focus on the fact that the employer chose not to participate in the January 2013 hearing before PSLRB member Howes with regard to the complaints and as such should suffer the consequences of not attending. As set

out earlier in these reasons, the hearing was not completed, and PSLRB Member Howes made no findings. Ms. Bufford and the other applicants entered into settlement discussions. There is nothing that precluded them from inviting the employer to participate in those discussions and entering into a three-way settlement agreement, whereby the employer consented to the timelines as being extended. It is clear from the evidence and the submissions that the employer, at the very least, did not agree to the relief as set out in the applications for consent orders, and given all of the evidence before me, it appears highly unlikely that the employer was engaged in the settlement discussions.

[98] If I am wrong in my reasoning either with respect to the interpretation of subsection 192(1) of the *PSLRA* or my interpretation of the law with respect to the application of extending time for the filing of grievances, for all of the reasons previously set out herein, I decline to exercise the discretion provided to me under the *PSLRA* and shall not issue the consent orders requested by the applicants with respect to complaint No. 1 and complaint No. 2.

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

(The Order appears on the next page)

V. Order

[100] The applications for consent orders are denied.

February 20, 2015.

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