Date: 20150420

File: 561-02-602

Citation: 2015 PSLREB 35

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

SHARON-ROSE TAYLOR

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Taylor v. Public Service Alliance of Canada

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

Before: Michael Bendel, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: William S. Gardner, counsel

For the Respondent: Rebecca Thompson, Public Service Alliance of Canada

Heard at Winnipeg, Manitoba,
December 9 and 10, 2014, and February 4 and 5, 2015.
(Written submissions filed on February 18 and 24, 2015.)

I. Complaint before the Board

[1] On February 26, 2013, Sharon-Rose Taylor ("the complainant") filed a complaint alleging that the Public Service Alliance of Canada (PSAC or "the respondent"), through the actions of its component, the Union of National Employees (UNE), had violated its duty of fair representation, as embodied in section 187 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), in its handling of two grievances she had presented.

[2] 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 Board") to replace the former Public Service Labour Relations Board ("the former Board") 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 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 Board.

[3] The complaint named the respondent as "Union of National Employees/Public Service Alliance of Canada." However, since the certified bargaining agent is the PSAC, and not the UNE, the proper respondent is the PSAC, and the complaint has been amended accordingly: see *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52.

[4] The complainant's grievances related to her demotion in November 2009 ("the demotion grievance") and to her allegation that she had been the victim of harassment by management ("the harassment grievance"). The complainant presented both of them after UNE representatives advised her to do so and agreed to provide representation. However, after numerous exchanges spanning three years between the complainant and the UNE relating to her grievances, she concluded in November 2012 that the UNE was refusing to represent her. She then retained counsel to pursue the grievances on her behalf (the demotion grievance being scheduled for adjudication in

April 2015), and she filed this complaint against the respondent, in which the main remedy she seeks is an order that the respondent pay for her legal representation at adjudication. It should be noted that she took early retirement from the public service in March 2013.

[5] Sections 185, 187 and 241 of the *PSLRA* read as follows, and sections 190, 192 and 208 read, in part, as follows:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> …
>
> ***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.*
>
> …
>
> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> …
>
> *(*g*) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> …
>
> ***192.*** *(1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board 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 Board 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 ….*

…

208. *(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*

*(*a*) by the interpretation or application, in respect of the employee, of*

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

*(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

…

Limitation

(4) 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 bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

…

241. *(1) No proceeding under this Act is invalid by reason only of a defect in form or a technical irregularity.*

Grievance process

(2) The failure to present a grievance at all required levels in accordance with the applicable grievance process is not a defect in form or a technical irregularity for the purposes of subsection (1).

II. Request for postponement of the hearing

[6] On the first two days of the hearing, in December 2014, the respondent was represented by Ray Domeij, a grievance and adjudication officer from its Calgary Regional Office. Unfortunately, Mr. Domeij fell seriously ill over the holiday period. A note from his doctor, dated January 12, 2015, indicated that he was undergoing investigations and treatments and that he would be off work until reassessed in three

or four months. The hearing was scheduled to resume on February 4 and 5, 2015. On January 8, the respondent requested an adjournment of the hearing, adding that it was "… uncertain about the timeline for Mr. Domeij's recovery at this point." The complainant objected to an indefinite adjournment.

[7] I then held two telephone conferences on the adjournment request with a representative of the respondent and counsel for the complainant. In the first, held on January 16, the respondent undertook to see if it could make other arrangements for the continuation of the hearing, such as assigning the file to another representative or retaining outside counsel, so as to enable the hearing to resume on a mutually convenient date sometime before the end of March 2015. In the second, held on January 23, the respondent reported that it had nobody available to take over the file at any time before September 2015 and that, in view of the cost, it was not prepared to retain outside counsel. I then requested both parties to file brief written submissions on the adjournment request.

[8] In support of the request for an indefinite adjournment, the respondent argued that it would be a violation of natural justice, specifically of its right to counsel, to deny the request. Parachuting a new representative into a hearing that had already run for two days would adversely affect its ability to present its case. This prejudice to the respondent would be substantial, whereas the complainant would not be prejudiced at all by a delay of a few months. There could be no suspicion that the adjournment request, which resulted from Mr. Domeij's unfortunate illness, had been improperly motivated. The respondent referred to *Witherspoon v. Treasury Board (Department of National Defence)*, 2007 PSLRB 36, *Yarney v. Treasury Board (Department of Health)*, 2013 PSLRB 45, and *Howitt v. Canadian Food Inspection Agency*, 2013 PSLRB 51.

[9] The complainant maintained that the respondent had had an adequate opportunity to make other arrangements for its representation following Mr. Domeij's illness. There was an inherent prejudice to the complainant in the granting of an indefinite adjournment. In addition, since she was having to pay for her own representation on this complaint and on the adjudication of the demotion grievance, the adjournment of the hearing of the complaint would "… delay her chances of obtaining her remedy." A delay would inevitably increase her legal costs. To grant an adjournment until such time as Mr. Domeij returned to work would be unreasonable since there was no guarantee that he would ever be able to do so. In addition, the note

from his doctor had merely stated that, in three or four months' time, he would be reassessed. A delay of a hearing for seven months or more (i.e., until September 2015 at the earliest), as the respondent was requesting, would be unreasonable and would be contrary to the Board's policy, particularly as the request had been made in the middle of the hearing. It was not in the public interest to delay unreasonably the resolution of workplace-related disputes. Moreover, since hardly any of the facts in this case were in dispute, there would be no significant prejudice to the respondent in proceeding with a different representative. This was particularly the case as a senior officer of the UNE (Franco Picciano) had been present throughout the hearing as an advisor to Mr. Domeij. The complainant referred to *Barzotto v. Makuch et al.*, PSSRB File No. 161-02-520 (19881205), and *Chow v. Treasury Board (Statistics Canada)*, 2006 PSLRB 71.

[10] On January 27, 2015, I instructed the Board's Registry to inform the parties that the respondent's request for an adjournment was dismissed. The reasons for that decision follow.

[11] In the first place, I would note that the Board is expressly empowered by section 21 of the *Public Service Labour Relations Regulations*, SOR/2005-79, to "… adjourn a hearing and specify the date, time, place and terms of its continuance." The main consideration for the Board in deciding whether to exercise its power to adjourn a hearing is to assess the prejudice that would likely result from granting or not granting the request.

[12] As there was essentially no dispute about the facts, and as the evidence consisted very largely of e-mail correspondence between the parties, I am satisfied that the prejudice to the respondent arising from a change of representative would be minimal. I also find that it is realistic to expect that Mr. Picciano, a senior officer of the UNE, who was involved in the dispute about the complainant's grievances and who was present as an advisor to Mr. Domeij in the first phase of the hearing, would be able to brief any new representative fully and competently, so as to minimize even further any possible prejudice to the respondent.

[13] As for the prejudice to the complainant, I agree with her that a delay would be inherently prejudicial for her, even though the principal remedy she seeks is financial compensation. She obviously has a substantial emotional investment in the outcome of

these proceedings and the related grievance adjudication. It is natural for an individual litigant to want to bring a dispute such as this to a final resolution as soon as possible and to move on.

[14] However, apart from the prejudice to the parties, a further consideration is the public interest in the efficient and expeditious administration of justice. As the adjudicator stated in *Fletcher v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 39 at para. 36, in rejecting a request for an indefinite adjournment: "I believe that there is also a third interest at play in this matter … It is the general public interest in an efficient administration of justice that avoids undue delays, promotes the final resolution of conflict and is respected by the parties."

[15] In the circumstances of this case, an indefinite adjournment for at least seven months, lasting until September 2015 at the earliest, as requested by the respondent, is clearly unrealistic and unreasonable. The respondent was offered an adjournment for a month or two, until the end of March 2015, in order to arrange other representation, but it rejected that offer on the grounds that it had no one else available to represent it by that date and that it had no wish to retain outside counsel in view of the expense. That position of the respondent, in my view, cannot be reconciled with the public interest and with the legitimate interests of the complainant.

[16] It was for all these reasons that I decided to reject the respondent's request.

[17] I should add that, when the hearing resumed on February 4, 2015, the respondent was represented by Rebecca Thompson, another of its grievance and adjudication officers. I was informed that, when the respondent told me on January 23 that it had nobody available to handle the case before September 2015, Ms. Thompson was scheduled to participate in a different hearing on February 4 and 5, but that the other hearing was adjourned some time before January 28.

III. The agreed facts

[18] Although there was no formal agreed statement of facts, the following facts, which consist largely of e-mail exchanges, were not contested.

[19] In 2009, the complainant held the position of Manager, Lands and Resources, Land Directorate, in the Manitoba Region of Aboriginal Affairs and Northern Development Canada ("the Department" or AANDC), and was stationed in Winnipeg,

Manitoba. She was classified at the PM-06 group and level and was within a bargaining unit represented by the PSAC. She had started working for the Department, in another position, in 1999.

[20] In February 2009, one of the employees who reported to the complainant alleged that the complainant had harassed her ("the harassment complaint"). After investigating, the Department concluded that the complainant had indeed harassed the employee in question. On November 13, 2009, the Department demoted the complainant to the PM-05 position of Social Development Operational Specialist as a disciplinary measure for the harassment. It was said to be a permanent demotion. Her annual salary was reduced by approximately $19 000 as a result. The complainant was escorted out of her place of work that day and told not to return until summoned to a meeting the Department was planning to convene.

[21] The complainant had been an active member of the UNE, having occupied several positions, including steward and president of her local. Immediately after the November 13 meeting, she contacted Raymond Brossard, the UNE's labour relations officer responsible for employees employed at the Department, to discuss the presentation of a grievance. Mr. Brossard told her that while she should file a grievance, he would not be able to represent or advise her on it since he had been representing the employee who had filed the harassment complaint against her. He would be in a conflict situation, he told her. He said that he would refer the complainant's file to a colleague of his, Jim MacDonald, also a labour relations officer with the UNE. He gave the complainant Mr. MacDonald's contact information.

[22] Mr. MacDonald, who, like Mr. Brossard, was located in Ottawa, spoke to the complainant by telephone and advised her to draft a grievance. This the complainant did, in collaboration with a friend, Grant Rodgers, who had previously been a staff representative with the Manitoba Government and General Employees' Union. The draft grievance was sent by fax to Mr. MacDonald on November 18, 2009. Mr. MacDonald telephoned the complainant a short time later and suggested a minor drafting change. He also suggested that she should present two grievances, one challenging the demotion and one alleging harassment by the employer. He told her that she should write his name and contact information in section 2 of the grievance forms. (Section 2 is headed: "To be completed by representative of bargaining agent where applicable," and the section reads: "Approval for presentation of grievance relating to a collective

agreement or an arbitral award, and agreement to represent employee are hereby given.") Mr. MacDonald told her to leave blank the line in section 2 where the union representative was supposed to sign. Even though the complainant knew that section 2 was not applicable to her grievances, since they did not relate to a collective agreement or arbitral award, she complied with all Mr. MacDonald's directions and suggestions.

[23] The Department convened a meeting for November 30, 2009, to discuss its expectations of the complainant in her new job of Social Development Operational Specialist. Present at the meeting for the Department were Tracy Fleck, Acting Associate Regional Director General, and Diane Bodner and Curtis Connon, both human resources advisors. The complainant attended in the company of Mr. Rodgers. She had the two completed grievance forms with her at the meeting. At some point in the meeting, the complainant passed the two grievances to management, and Mr. Connon took possession of them. Contrary to the established protocol, none of the Department's representatives signed the forms to acknowledge receipt. It was agreed that the complainant would start work in her new position the following Monday.

[24] The complainant returned to work as planned. However, she testified that she found the environment hostile and that she felt humiliated in her new role. As a result, she was under a lot of stress. On January 10, 2010, on her doctor's advice, she went on sick leave.

[25] In June 2011, after about 17 months off work, the complainant was feeling better and was starting to think about returning to work. She sent an e-mail to Mr. MacDonald on June 6, 2011, to request him to move her two grievances forward. Mr. MacDonald e-mailed back on June 24, 2011, that, while he had received a copy of the grievances, the Department did not appear to have acknowledged receipt and had taken no steps to set up a third-level meeting to discuss them. He assured the complainant that he was attempting to get the grievances back on track.

[26] On July 19 and 25, 2011, having received no follow-up from Mr. MacDonald, the complainant again sent e-mails to him enquiring about her grievances.

[27] On August 3, 2011, just back from vacation, Mr. MacDonald replied to the complainant by e-mail, and there followed a flurry of e-mails, with Mr. MacDonald stating that he was still trying to obtain the Department's position and the complainant prodding him to advance the file. (Throughout this exchange and most of

the later correspondence, the complainant was referring to her "grievances" and Mr. MacDonald to her "grievance"). On August 30, he wrote to her that he was due to meet with the Department the following week to "… come to terms with the confusion regarding your grievance." On October 24, having received no follow-up from Mr. MacDonald, the complainant e-mailed him again to ask if any progress was being made. On October 26, he replied to say that Pascal Arcand, the Department's corporate labour relations advisor, with whom he had met, had gone on leave and was expected back in November. Finally, on November 14, Mr. MacDonald reported to the complainant by e-mail that he had just heard back from Mr. Arcand:

> *Based on his comments, it would appear that your grievance has been held in abeyance at the 2nd level of the grievance procedure (the Region), rather than sending it on to the 3rd level. This failure to forward your grievance to the 3rd level immediately has caused the delay that you have encountered thus far. We must now wait to see what the employer's reaction will be to my e-mail. It is my hope that a 3rd level presentation can be arranged within the next few weeks.*

[28] Also on November 14, Mr. MacDonald wrote to Mr. Arcand as follows:

> *With respect to Sharon-Rose Taylor, it is Sharon-Rose's position that her grievance(s) were submitted to the employer in 2009, in the presence of a witness and that they were physically accepted by the employer's representative (although the employer representative failed to endorse them at the time). Both Diane Bodner and Curtis Cannon [sic] (and now yourself) have confirmed that the employer has been in possession of these grievances since 2009.*
>
> *The employer appears to have taken issue with the fact that they "…are not endorsed by the PSAC representative identified on them." I presume AANDC is referring to Section 2 of the grievance form(s), where I am named as the PSAC representative.*
>
> *…*
>
> *We maintain, in any event, there is no need for the Union to endorse this grievance form.*
>
> *In addition, because this grievance involves a demotion, Article 18.24 of the collective agreement provides that it proceed directly to the final level. The grievance was submitted to a delegated employer representative at the Regional level, therefore this grievance should have been forwarded to the delegated management representative for*

> *the 3rd level. I believe this was not done by the employer representative at the Region who accepted the grievance(s). That is why you cannot find a file at the 3rd level.*
>
> *Given the above, I suggest that you obtain the file from the Region so it can be appropriately addressed at the 3rd level. UNE will agree to extend the time limits for a reasonable period of time to allow for you to get the file from the Region. Once you have received it, please contact me so we can discuss next steps.*

[29] In February 2012, the complainant was planning a return to work. (She had been delayed in following up on her grievances by some serious family issues, she testified, including the death of a brother and the illness of her mother.) That month, there was some correspondence with Mr. MacDonald on the subject of her return to work, including some accommodations she might require. On March 5, 2012, Mr. MacDonald e-mailed the complainant about her plans for a return to work. In the same e-mail, he told her that there were problems with her grievances that would need to be addressed:

> *With respect to your grievance(s), there may be substantial delays in having them resolved.*
>
> *We are aware of one (1) grievance related to your being demoted. That is the grievance I have been assigned to assist you with. We have also noted that you have filed a "harassment" grievance at the same time but to date we have not received your "allegations" to support this grievance.*
>
> *In addition, there is some question as to the validity of these grievances. Neither grievance has been signed by management as being received nor have [sic] either been signed by the Union. These matters may have to be resolved before either grievance moves forward.*

[30] On or about June 23, 2012, the complainant returned to work on a part-time basis. Her first few months back at work were very stressful for her, she testified, her father having just passed away and her mother having recently been hospitalized.

[31] On October 29, 2012, the complainant e-mailed Mr. MacDonald to provide him with the allegations which she planned to advance in support of her harassment grievance (and for which he had asked on March 5, 2012). These allegations were contained in several lengthy attachments to her e-mail. On November 25, having received no response from Mr. MacDonald (except an "out-of-office reply," indicating

he would be on vacation until October 30), the complainant re-sent her e-mail and attachments. In reference to her grievances, she added that she was "… very anxious to have these matters resolved as [she was] finding it increasingly difficult to remain in the workplace."

[32] Mr. MacDonald replied by e-mail on November 26, 2012. It reads, in part, as follows:

…

> *However, based on comments made in your most recent e-mail, I am concerned that there may be a misunderstanding about the representation that I have been assigned to provide to you. I have not been asked to advocate on your behalf with respect to the merits of grievances or any harassment complaint. Brother Raymond Brossard continues to be the Labour Relations Officer (LRO) responsible for such matters on behalf of UNE members employed by AANDC.*
>
> *For my involvement, I am advised that there was a successful harassment complaint filed against you by another UNE member and that your employer levied a disciplinary response as a result. Therefore, pursuant to PSAC Policy 23, I have been assigned to represent you solely on the "quantum" of the disciplinary penalty that was imposed. My role is to review this file to determine if a permanent demotion was an appropriate response given the circumstances and if not, to make a representation to your employer in an attempt to reduce this penalty.*
>
> *In this respect, I agree largely with you. A demotion is seen as a very severe penalty and in the circumstance I do not believe it should have been applied on a permanent basis. As you say, a disciplinary penalty should be remedial in nature and not punitive. So I am preparing to meet with your employer solely for the purpose of attempting to have the demotion commuted and have you reinstated back to the group and level of your former position as Manager.*
>
> *Once I have reviewed all the information that you have provided, I will contact you with any questions that I may have. After that, I will schedule a meeting with your employer in order to plead your case in an effort to have the quantum of discipline reduced.*
>
> *Hopefully we will be successful. However, if we are not, I will forward your file to the Grievance & Adjudication Section of the PSAC to determine if any further action will be taken by the Union on your behalf.*

> *For all other labour relations matters related to your job, Raymond Brossard continues to be the LRO assigned to AANDC …*

[33] PSAC Policy 23, referred to in this e-mail, stated that harassment was "… totally inconsistent with the principles of union solidarity, dignity and respect," and that the PSAC did not "… condone any form of harassment or discrimination." It stated that the role that the PSAC could play where a workplace harassment complaint was filed was based on three principles:

> *1.* [T]*he Union's role in providing representation to employees in the context of workplace harassment should be consistent with its condemnation of harassment;*
>
> *2.* [Y]*ou can request and obtain Union representation unless it is clear that the allegations – on their face – do not meet [sic] the definition of harassment that applies to your workplace. Depending on where you work, the definition of harassment can be found either in your collective agreement or in an employer policy; and*
>
> *3.* [I]*f an allegation of harassment has been made against you, the Union can help provide you with information about the process you can expect. If a finding has been made that you did harass someone, and you are subject to corrective measures such as discipline or a deployment to another position, the Union may provide you with representation where it reasonably believes that the measures taken are too severe or unwarranted in the circumstances.*

[34] The Policy went on to declare that since the employer was responsible for providing a workplace free from harassment, the employer "… must assess the validity of a complaint, decide whether to investigate it, and, if so, render a decision ...." In a list of Q & As circulated with the Policy (whether by the PSAC or the UNE was not clear), the following appeared:

> …
>
> *If the Respondent receives discipline as a result of the grievance/complaint, then he or she can approach the Union with a request for representation. The Union will consider whether any resulting discipline was warranted or was excessive, or whether any other corrective measures were reasonable in deciding whether it will provide representation.*
>
> …

[35] The complainant replied to Mr. MacDonald's e-mail of November 26, 2012, on the same day. She wondered why the UNE was separating her two grievances from each other since they were "significantly inter-related," but she did not object, as such, to anything in Mr. MacDonald's e-mail.

[36] The same day, the complainant e-mailed Mr. Brossard to ask him, in accordance with Mr. MacDonald's e-mail earlier that day, to move her harassment grievance forward to the final (third) level.

[37] On November 28, Mr. Brossard replied to the complainant. He confirmed that he was the labour relations officer assigned to the UNE members at the AANDC. He then added the following:

> *I have perused all the documents … you provided to Jim* [MacDonald] *(via your e-mail of Nov. 26th) as it related to him representing you on the quantum of the discipline which has been issued. His objective will be to argue that the discipline may have been excessive. I can only assume at this juncture that you misinterpreted his comments in his e-mail to you.*
>
> *Please note that all of these documents may or will be used by Jim in his presentation on the matter. I can assure you that the UNE does not have any grievances currently active in our database; whether on harassment or other. The ones that we had are referenced above, which Jim will take into account for his presentation. In the event there are new issues that warrant the involvement of UNE, then I would suggest that you communicate with the Local representatives.*
>
> *I trust that I was able to shed clarification on the matter.*

[38] The complainant e-mailed back to Mr. Brossard on November 28, with a copy to Mr. MacDonald. The e-mail read, in part, as follows:

> …
>
> *I ask for your patience, but I am still unclear. At the time of the demotion and walkout I filed two grievances: one grieving harassment by management; the other grieving demotion. These ought to be presented together/treated as part and parcel of a pattern of misconduct against me, the demotion being one, albeit significant example.*

> *Please confirm that these two grievances will be presented simultaneously.*

[39] On November 29, 2012, Mr. MacDonald sent the complainant the culminating e-mail in this protracted correspondence that had started with her demotion three years before. It was the e-mail that triggered the present complaint. It reads as follows:

> *Hi Sharon-Rose:*
>
> *Based on the most recent correspondence between yourself and me and between yourself and Raymond, I have reviewed everything that I have on file related to your "grievance(s)".*
>
> *The UNE continues to have significant "technical" concerns related to your grievance(s) that will need to be addressed and corrected before we can proceed with providing further representation for your grievance(s). The most troublesome technical concern relates to the fact that, despite the numerous exchange of e-mails between us, you have yet to provide the Union with a fully endorsed copy of your grievance(s).*
>
> *Earlier today, I met with Raymond and my supervisor, Franco Picciano, to discuss your situation. Raymond has confirmed that you have not provided him with a properly endorsed copy of your grievance(s) either. Even though your employer has acknowledged receiving grievance forms from you in 2009, they too have expressed concerns that the grievance forms they received were not properly completed nor submitted.*
>
> *Based on the foregoing, from a technical point of view, we do not have a "grievance". Neither your "demotion" grievance nor your "harassment" grievance have [sic] ever been officially received or registered by either the Union or the employer. In other words, your employer can make a very convincing and legitimate legal argument that your grievance(s) simply do not exist.*
>
> *Therefore, in order for the Union to continue to provide representation, before going further, the Union will require validation that your grievance(s) have been duly signed and properly filed with your employer and that [sic] were filed in a timely fashion.*
>
> *In addition, upon initial review of the documentation provided to the Union on October 29, 2012, and since most, if not all, of the documentation appears to related [sic] to events leading up to and during a previous harassment complaint process initiated by another UNE member wherein*

> *you were named as "Respondent" and accused of being the "Harasser". [sic] This harassment process has since been concluded and it was determined that allegations against you were "founded". You had ample opportunity to voice any concerns/opinions that you had during the processing of that complaint. The resulting residual matters to this complaint have only just been finalized. The Union will not be party to re-opening this matter. Therefore we will not provide representation in this regard.*
>
> *In any case, in the event that you are unable to provide the required validation of your grievance(s), you are still free to process your grievance(s) on your own, at your own expense. However, should you elect to do so, you will be faced with having to overcome the same technical obstacles mentioned above.*
>
> *Should you have any questions or concerns regarding the above, please feel free to contact me.*

[40] On December 5, 2012, the complainant sent a three-word e-mail to Messrs. MacDonald, Brossard and Picciano: "Shame on you." She had no further contact with them.

IV. <u>Other evidence</u>

[41] The complainant testified that, on reading Mr. MacDonald's e-mail of November 29, 2012, she felt she had been "kicked" by her union. Mr. MacDonald, she stated, "pulled the plug" on representing her with this e-mail. Apart from the refusal to represent her, Mr. MacDonald had wrongly characterized her allegations in support of the harassment grievance as relating primarily to the harassment complaint that had been filed against her. She testified that it was obvious from the documentation she had sent to Mr. MacDonald on October 29, 2012, that she was alleging that management had harassed her, and her allegations had nothing to do with her relationship with the employee who had filed the harassment complaint against her. Moreover, she had no way of providing the documents Mr. MacDonald insisted on obtaining, namely, receipts for the grievances signed by management, since no such documents existed, as Mr. MacDonald must have known from their e-mail exchanges. After receiving Mr. MacDonald's e-mail of November 29, 2012, she personally contacted labour relations officials of the Department in Ottawa to set up a third-level grievance meeting, without informing the UNE. (She added that Mr. Rodgers represented her at the third-level grievance meeting held on March 4, 2013, and that

her grievances were rejected on their merits, without the Department raising any "technical" objections to them.)

[42] In cross-examination, the complainant acknowledged that she had received steward training from the UNE, in 2001 or 2002, and had represented a few members on disciplinary matters, at least two of which led to grievances being filed. She therefore had some familiarity with the grievance procedure. The practice when she started representing members was that management provided the grievor with a receipt upon the grievance being filed, but this practice was not followed consistently. She raised the issue with management. At one point, the stewards would personally deliver grievances to Human Resources after obtaining signed receipts from the appropriate managers. In about 2007, however, when Ms. Bodner became Human Resources Advisor, the complainant stopped asking for signed receipts, believing they were not necessary. She was aware that her grievances should have been filed at the third level, i.e., in Ottawa, but she assumed that, if she gave them to a human resources officer in Winnipeg, they would be directed to the right person. Mr. Brossard, moreover, had told her to file them in Winnipeg.

[43] The complainant testified that she had received no representation from the UNE in connection with the harassment complaint since the employee who had filed that complaint was represented by the UNE. For that reason, she decided to refrain from asking for UNE representation at the meeting on November 13, 2009, when she was demoted, or at the follow-up meeting on November 30, 2009. All the UNE representatives in Winnipeg, she testified, had been involved, in some way or another, in representing the other employee. She had spoken to Mr. Brossard, however, in the period between the two meetings. Mr. Brossard advised her that it was more important to submit the grievances promptly than to have the grievance forms signed by Mr. MacDonald. Although she knew that she did not need Mr. MacDonald's signature in section 2 of the grievance forms, she followed Mr. MacDonald's advice and wrote his name on the forms.

[44] When the complainant gave the grievance forms to the Department on November 30, 2009, she knew that management had a deadline for replying to the grievances. She did not follow up with management, however, when the deadline was not met. Not only was she experiencing health problems at the time, but she also assumed she could leave it to Mr. MacDonald to do so.

[45] The complainant testified that she understood that no action would be taken on her grievances while she was on extended sick leave since grievances were "held in abeyance" in such circumstances. She had been told this by Mr. MacDonald, and it made sense to her. (In his testimony, Mr. Connon confirmed this was the practice).

[46] The complainant testified that she had no complaints about the assistance Mr. MacDonald gave her regarding her return to work.

[47] In his testimony, Mr. Connon was asked whether he had informed anyone from the UNE that the Department would not deal with the grievances by reason of them not having been receipted at the time of their presentation. He denied ever saying anything to that effect. He could not remember Mr. Arcand informing him of any technical problems with the grievances. Normally, a grievance would be signed, for the purpose of acknowledging receipt, by the management representative to whom it was submitted. It was not the practice for a human resources officer to provide the signed receipt.

[48] Mr. Picciano testified about PSAC Policy 23. It was adopted by the PSAC membership at a convention in April 2009, following extensive consultation with the PSAC components, and it was also adopted by the UNE. It was designed to enable the PSAC to manage the issue of complaints in which one employee was accusing another employee of harassment. Under this Policy, if an employee presented a complaint which, on its face, alleged harassment by another employee, the PSAC and its components would not represent the respondent, except to explain the process to that employee or to challenge the quantum of discipline imposed on that employee for the harassment. The respondent, according to Mr. Picciano, could not be arguing, on behalf of the complaining employee, that there had been harassment, at the same time as it was arguing, on behalf of the accused employee, that there had been no harassment. He denied that this Policy, having been decided on democratically by the members, was arbitrary. It was part of "the union's governance code," he stated.

[49] Mr. Picciano reviewed the steps taken by the UNE in deciding whether to represent employees (on matters other than allegations of harassment). The standards used by the UNE were based on the decisions of this Board on the duty of fair representation and constituted "due diligence" by the UNE, he stated. The employee was fully involved. If the UNE decided that it would not go forward with the

representation of an employee, it sent a "closing letter" to the employee to confirm and explain its decision. The closing letter process was generally known to employees. The complainant had personal knowledge of closing letters since she had received one from the PSAC in 2002 on an unrelated matter. She would therefore have known, according to Mr. Picciano, that Mr. MacDonald's e-mail of November 29, 2012, was not a denial of continued representation.

[50] Mr. Picciano added that the UNE has lawyers on staff to advise and represent employees.

[51] In his view, the complainant had simply been asked for information by Mr. MacDonald in the e-mail of November 29, 2012, and, rather than provide the information, she chose to break off communicating with the UNE.

[52] Mr. Picciano initially testified that there were at least two technical defects in the complainant's grievances that could have prevented them from being addressed on their merits, namely, the absence of a signed transmittal form and the absence of evidence as to the date on which the grievances were first presented. He described this as "shoddy paperwork" by both the complainant and the Department. However, when pressed, he conceded that he was aware of no case where a grievance had been dismissed because of defects of this kind.

[53] Mr. MacDonald testified that he started working for the UNE in 2009, after over 30 years in the labour relations field, much of it as an employer representative. When he was first assigned the complainant's file, he felt that her permanent demotion for harassment was inappropriate. The quantum of discipline imposed on an employee for harassment was a subject on which the UNE could represent the employee under Policy 23. Until the complainant returned to work from her lengthy sick leave, there was not a lot he could do in support of her grievance against her demotion. He knew that she also wanted to pursue a harassment grievance which she had filed, but he did not have any details about her allegations in support of that grievance until the fall of 2012.

[54] When the complainant's return to work was imminent, Mr. MacDonald testified, he helped her with her request for certain accommodations. In particular, her doctor had stated that she should not go back to the same office where she had been working previously. To find another job for the complainant turned out to be a lengthy process.

He understood that the return to work was successful, but later he heard that she had decided to take early retirement.

[55] When the complainant first spoke to Mr. MacDonald about her demotion grievance in November 2009, he asked her for a copy of the grievance form. The complainant, he stated, had difficulty locating it. In addition, the demotion grievance, pursuant to the collective agreement, should have gone straight to the third level, and he asked the complainant to provide him with a copy of the grievance transmittal form directing the grievance to the third level. He spoke or sent e-mails to Mr. Arcand, the Department's corporate labour relations advisor, about six times, to try to locate these documents. Mr. Arcand could not find them, but, eventually, Mr. MacDonald received a copy of the grievance from Mr. Connon, although it was barely legible. The complainant never in fact supplied him with a copy. Apart from the borderline legibility of the form he received from Mr. Connon, he noted that management had not dated or signed it to acknowledge receipt. Despite several requests, the complainant never provided him with a receipted copy of the grievance or with a grievance transmittal form.

[56] In his e-mail to the complainant of November 29, 2012, Mr. MacDonald testified, he told her that he could not proceed with representing her on the demotion grievance without a properly endorsed grievance. This was not, he insisted, a refusal to represent her, merely a request that she provide him with the document he needed.

[57] As regards the complainant's harassment grievance, Mr. MacDonald initially testified that the documents she sent him on October 29, 2012, contained nothing new. They were merely a "rehash," he stated, of the position she had put forward during the harassment complaint against her in 2009. All her harassment allegations, he claimed, had been examined by the harassment investigator, who had given her an opportunity to respond to the case against her. However, in cross-examination, after being specifically asked to take the time during a break in the hearing to review the complainant's harassment allegations, he conceded that some of them were completely unrelated to the issues raised in the harassment complaint against her.

[58] Mr. MacDonald added that he had not been informed of a third-level meeting on the complainant's grievances, and he was surprised to learn that the complainant had

pursued them to that level herself. Nor had he been informed of the rejection of the demotion grievance at the third level and of its referral to adjudication.

[59] Mr. MacDonald testified that both he and Mr. Arcand had felt that the demotion grievance would not withstand scrutiny at adjudication, although Mr. Arcand had not stated explicitly the Department's position on the procedural validity of the grievance. The first problem with the grievance, according to Mr. MacDonald, was that there was nothing on the grievance form to indicate whether the Department had accepted the grievance, although Mr. Connon and Ms. Bodner had confirmed to him that they had possession of the grievance. Moreover, he testified, the grievance had not been assigned a reference number by either party. It had not been signed or dated by the Department either. In addition, there was a problem with the absence of a transmittal form. Treasury Board lawyers, according to Mr. MacDonald, were very strict on the question of compliance with technical requirements, including time limits. He conceded in cross-examination, however, that the complainant had told him the date she had presented the grievance to the Department, and he had no reason to doubt her word on this. If the grievance was, in fact, received by the Department on November 30, 2009, as the complainant claimed, it was timely.

V. Parties' submissions

[60] The complainant argued that the respondent's preoccupation with the procedural or technical aspects of her grievances demonstrated its arbitrary and bad faith approach to representing her. All these alleged technical issues were raised by UNE representatives, mainly Mr. MacDonald. None of them was raised by the Department. There was no evidence that any of the technical issues had any substance to them. The way the complainant had been treated by her own union was "shocking" and "arrogant." She had given the respondent all the documents she had, yet the UNE was still asking her for more documents, without which it would not proceed with its representation. This was the very essence of arbitrary and bad faith conduct by a bargaining agent.

[61] It was clear from the harassment allegations the complainant sent to the UNE on October 29, 2012, that her harassment grievance went well beyond the scope of the harassment complaint that had been made against her, as Mr. MacDonald acknowledged in his cross-examination. Yet Mr. MacDonald refused, on behalf of the

UNE, to represent her on the harassment grievance on the false ground that she was attempting to reopen the harassment complaint.

[62] As for PSAC Policy 23, the complainant argued that it was an "… institutionalized breach of the duty of fair representation." Under this Policy, the respondent was to make no determination of its own as to the merits of an employee's case when the employee was accused of harassment. This was arbitrariness, since the decision whether to represent the employee took no account of the facts of the case. This was also discrimination, since the respondent chose sides and left one employee out in the cold. The fact that this Policy had been democratically adopted by the respondent did not save it. All of the UNE's decisions on the complainant's case were tainted by Policy 23.

[63] The complainant sought the following remedies:

> (a) a declaration that the respondent had violated the duty of fair representation;
>
> (b) a declaration that PSAC Policy 23 was not valid and that it violated the respondent's duty of fair representation;
>
> (c) an order that the respondent assist the complainant by paying her reasonable legal costs for the adjudication of the demotion grievance; and
>
> (d) an order that the respondent contribute to the costs incurred by the complainant in relation to this complaint.

[64] In the course of the complainant's submissions, reference was made to *Re Vogel*, [2006] M.L.B.D. No. 12 (QL); *Faryna v. Chorny*, [1952] 2 D.L.R. 354; *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509; *Central Park Lodges*, [1998] O.L.R.D. No. 3606 (QL); *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207; *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79; *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103; *Lavoie*, 2012 CIRB 636; *Benoit v. Trimble et al.*, 2014 PSLRB 46; *Riley*, 2008 CIRB 419; *Bristol Aerospace Ltd.*, [2013] M.L.B.D. No. 48 (QL); *Scott*, 2014 CIRB 710; and *E.P. v. CUPE 500*, 2014 CanLII 81077 (MB LB).

[65] The respondent argued that the onus was on the complainant to prove a violation of the duty of fair representation. The Board should not attempt to dictate to

the respondent how to conduct its affairs. Nor was it the role of the Board to be an appeal mechanism to which an employee denied representation by a union could turn for relief.

[66] The respondent maintained that when one employee accused another of harassment, it could not be put into the position of representing both of them. PSAC Policy 23 was approved and adopted by the members to address the conundrum. A similar situation arose where two employees were in competition for the same job, and in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada*, [1990] 1 S.C.R. 1298, the Supreme Court of Canada had expressly stated, at page 1329, that in such a situation it was not objectionable for a union to choose to support one claim over another. Policy 23 complied fully with the statements of the Court in *Gendron*. The Policy had, moreover, been democratically adopted by the membership. The respondent had not acted arbitrarily or in bad faith in following the Policy in this case.

[67] The respondent also contended that, by signing her PSAC membership card, the complainant had agreed to be bound by all PSAC policies, including Policy 23. In these circumstances, she could scarcely ask the respondent to violate Policy 23 in her case.

[68] The respondent argued that the complainant had failed to bring certain relevant facts to its attention. If the UNE had had full disclosure from the complainant, its approach to her continued representation could have been different. "The complainant was not cooperative in providing the information requested by Mr. MacDonald," the respondent asserted. Employees could scarcely allege a violation of the duty of fair representation where they had failed to make an honest effort to bring all pertinent information to the union's attention. "The union had done everything in its power to represent the complainant," the respondent claimed.

[69] In any event, the respondent argued, the UNE did not refuse to continue to represent the complainant. The Department told the UNE of its technical objections to the grievances, and the UNE made a reasonable decision, based on its experience, not to proceed as long as the objections were outstanding. The complainant then chose to proceed on her own. "Her choices are not the responsibility of the union," the respondent maintained. Having failed to invite the respondent to represent her at the

third-level meeting or at adjudication, it would be extraordinary, the respondent continued, if it were to be ordered to pay counsel to represent her at adjudication.

[70] As regards the complainant's request for her costs of this complaint, it had been held that costs could not be awarded under the *PSLRA*: *Canada (Attorney General) v. Robitaille*, 2011 FC 1218 (appeal dismissed on other issues: 2012 FCA 270).

[71] The respondent argued that, if the Board were to decide that there had been a violation of the duty of fair representation, the only possible remedy would be to refer the file back to the respondent so that its Grievance and Adjudication Section could consider whether it would support the grievance at adjudication.

[72] The respondent referred to the following additional cases: *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28; *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32; and *Gagnon*.

VI. Supplemental submissions

[73] At the close of the parties' arguments, I requested them to make submissions on a further matter, which had not been fully addressed. I explained that the duty of fair representation had originally been developed by the courts to ensure that a bargaining agent would not abuse its exclusive powers to represent employees in bargaining and in grievance arbitration. It seemed likely from the early cases that, if employees had had the power to take grievances to arbitration without the support of their bargaining agents, the courts would not have felt the need to develop this aspect of the duty of fair representation. Under section 208 of the *PSLRA*, however, employees have the right to refer grievances to adjudication (except where they relate to a collective agreement or arbitral award). I drew the parties' attention to section 187 of the *PSLRA*, where there is no express limitation on the parameters of the duty of fair representation. I also drew their attention to paragraph 192(1)(*d*) of the *PSLRA*, dealing with remedies for violations of the duty of fair representation, from which it was apparent that the Board could grant remedies even where the employee was authorized to take action without union support. In these circumstances, I asked for submissions on the questions (a) whether, in its decisions, the Board (or the former Board) had given any guidance on the statutory obligation of employee organizations to represent grievors on matters for which the support of the employee organizations

was not required, and (b) if no such guidance had been given, what position the Board should take on the issue.

[74] According to the respondent, the Board had not yet committed itself to any position on the subject under discussion. It argued that the Board should find that, where a grievor had disagreed with the union about the carriage of a grievance and had carried it forward without union representation, there was no room for imposing a duty of fair representation on the union. The Board should "… proportionately remove the duty imposed on unions" in situations where the employee had the power to pursue a grievance without union representation. In the alternative, the respondent argued,

…

> *[a]t a minimum, in situations where bargaining agents are not required as part of their legislated mandate to represent employees, and where the employees have the choice to represent themselves, the duty of fair representation should be commensurately reduced.*

…

Bargaining agents should have no liability where employees have chosen to represent themselves. The respondent cited the following cases: *Lopez v. CUPE*, [1989] OLRB Rep. May 464; *Elliott v. Canadian Merchant Service Guild et al.*, 2008 PSLRB 3; *Kraniauskas v. Public Service Alliance of Canada et al.*, 2008 PSLRB 27; *Brown v. Union of Solicitor General Employees and Edmunds*, 2013 PSLRB 48; *Sahota et al. v. The Professional Institute of the Public Service of Canada et al.*, 2012 PSLRB 114; *Bracciale v. Public Service Alliance of Canada (Union of Taxation Employees, Local 00048)*, 2000 PSSRB 88; and *Shutiak et al. v. Union of Taxation Employees — Bannon*, 2008 PSLRB 103.

[75] According to the complainant, the former Board had declared in *Elliott* that the duty of fair representation applied to grievances which an employee could carry without the support of the bargaining agent if the grievances related to an aspect of the employment relationship regulated by the *PSLRA*. In particular, the former Board stated in that case that grievances relating to disciplinary matters came within that category. In *Brown*, the former Board followed the opinion stated in *Elliott*. The complainant contended that there were cogent policy reasons for this conclusion, which was also consistent with the language of the *PSLRA*. In addition, if the duty of

fair representation did not apply to representation on grievances which employees could pursue without union support, the bargaining agent would be free from the standard of representation embodied in section 187 of the *PSLRA* if it chose to represent them, which would be an illogical result that could scarcely have been intended by Parliament.

VII. Reasons for decision

A. Scope of the duty of fair representation

[76] The first matter I wish to address is the scope of the duty of fair representation under the *PSLRA*, in particular whether it applies to grievances which an employee is authorized to pursue, under section 208, without bargaining agent support.

[77] In *Elliott,* the employee complained about the representation he had received from his bargaining agent in relation to a compensation claim under provincial workers' compensation legislation. The employee organization contended that the duty of fair representation had no application to claims of that kind. The former Board, after examining the origins of the duty of fair representation, concluded that the duty under the *PSLRA* did not extend to any aspects of the employment relationship that were not regulated by the *PSLRA*, such as the workers' compensation claim in issue there. However, although the case did not relate to grievances, the former Board expressed the opinion that the duty applied to grievances even when employees did not require the support of their bargaining agents. This is what the former Board wrote (at paragraphs 184 to 187):

> *184 As in the private sector, the* PSLRA *gives unions important representation powers. For example, a bargaining agent certified under the* PSLRA *has the exclusive right to bargain for members in its unit (paragraph 67(*a*)). An employee cannot present an individual grievance relating to the interpretation or application of a provision of a collective agreement unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit (subsection 208(4)). In my view, the duty of fair representation applies to those matters since they are set out in the* PSLRA *and they concern the relationship of employees vis-à-vis their employer. Also, in light of the genesis of the duty of fair representation, the fact that the union has exclusive representation rights in the negotiation of a collective agreement and has exclusive approval rights for those grievances gives greater support to the conclusion that the duty of fair representation applies to those matters.*

> *185 However, the duty of fair representation in the federal public service is not entirely based, as in the private sector, on the exclusive character of union representation. For example, in my view (and this is an* obiter *since I do not have to decide that matter) that duty would apply to grievances related to disciplinary action resulting in termination, demotion, suspension or financial penalty under paragraph 209(1)(*b*) of the* Act, *even though the bargaining agent does not have veto powers over those grievances. The employee does not need union approval to present his or her grievance to the employer, and he or she may represent himself or herself or chose whomever he or she wishes as a representative. Again, in my view, the duty of fair representation covers those types of grievances because, as explained above, they relate to an aspect of the employee/employer relationship regulated by the* PSLRA. *In these matters, the union must, in my view, act in a manner that conforms to section 187 of the* PSLRA.
>
> *186 Even though I know of no cases that have discussed the issue of whether the duty of fair representation applies to disciplinary matters, this Board has in fact in the past applied the duty of fair representation to such matters. For example, the decisions* Pavlic v. Professional Institute of the Public Service of Canada, *PSSRB File No. 161-02-792 (19970324) and* Ruda v. Public Service Alliance of Canada, *PSSRB File No. 161-02-821 (19971007) both dealt with disciplinary discharge, and in both cases the PSSRB examined whether the duty of fair representation had been breached by the union in the manner they represented the grievor at adjudication.*
>
> *187 It cannot be said that the ambit of the duty of fair representation as set out in the* PSLRA *is limited to collective agreement matters as in the private sector. As explained above, the duty of fair representation applies, in my view, to the adjudication of disciplinary matters under paragraph 209(1)(*b*) of the* Act, *even though those matters are not usually dealt with in collective agreements in the federal public service because they are dealt with in the* PSLRA *itself. That is why, in my view, section 187 does not refer to the collective agreement. To do so would have prevented the duty of fair representation from operating in disciplinary matters.*

[78] In *Brown*, the former Board accepted the reasoning in *Elliott* to support its conclusion that the duty of fair representation did not extend to the representation of employees on complaints before the Public Service Staffing Tribunal under the *Public Service Employment Act,* S.C. 2003, c. 22, ss. 12, 13. See also *Lai v. The Professional Institute of the Public Service of Canada*, 2000 PSSRB 33, *Ouellet v. Union of Canadian*

Correctional Officers – Syndicat des agent correctionnels du Canada – CSN, 2007 PSLRB 112, and *Tran v. Professional Institute of the Public Service of Canada*, 2014 PSLRB 71. (The Board has recently applied this line of cases in *Abeysuriya v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 26).

[79] As the former Board noted in paragraph 186 of *Elliott,* in the past, it has examined the possible breach of the duty of fair representation in relation to discharge grievances without ruling in the first place whether the duty could, in principle, apply to such grievances.

[80] While the former Board held in *Elliott* that it could not have been intended that section 187 of the *PSLRA* apply to matters not regulated by the *PSLRA*, the comments made in that case about disciplinary grievances were clearly unnecessary to the decision (as the former Board itself stated) since that case did not relate to grievances at all. Moreover, the decisions cited by the former Board in *Elliott,* at paragraph 186, did not rule on the application of section 187 of the *PSLRA* to disciplinary grievances but merely assumed it applied. In these circumstances, I approach this issue in the present case on the basis that it is one where the former Board did not rule and where the Board has not yet ruled.

[81] On my reading of paragraph 192(1)(*d*) of the *PSLRA*, quoted earlier in this decision, it appears that Parliament intended that the duty of fair representation could extend to some matters which employees could pursue without the approval of their bargaining agent. That provision authorizes the Board, in the event of a breach of section 187, to require an employee organization "… to assist any such employee to take and carry on any proceeding that the Board 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 …." According to this provision, there therefore existed proceedings which an employee was authorized to take and carry on without the assistance of the employee organization but which "… 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 …."

[82] The more difficult question is to identify the proceedings referred to in paragraph 192(1)(*d*) which the employee organization "… ought to have taken and carried on …" or "… ought to have assisted the employee to take and carry on …." I

doubt that Parliament intended the Board to declare prospectively that certain categories of proceedings were ones where employee organizations had a duty under section 187 to represent employees. Rather, in my view, it likely expected the Board to examine the facts underlying any complaint to see whether, in retrospect, it was reasonable to hold the employee organization to the standards in section 187. I base this conclusion on the inferences arising from the language of the provision. In particular, if Parliament had intended that the duty of fair representation should apply to certain categories of proceedings, I would have expected to find a listing of those categories in the *PSLRA*. In my view, the Board therefore has to consider each complaint on its own merits in deciding whether the employee organization "ought to have" acted in support of the employee.

[83] I must therefore turn to the complainant's two grievances, which it would be appropriate to examine separately.

B. Demotion grievance

[84] As regards the demotion grievance, I note the following facts:

- The demotion constituted a major financial penalty for the complainant, of approximately $19 000 per year, in addition to being a serious career setback and leading to humiliation and stress, causing her to go off work for almost two and one-half years.

- The complainant followed the advice of UNE officers in the drafting of the grievance, including adding the name of Mr. MacDonald as her representative.

- The grievance was submitted to the Department on November 30, 2009. According to the normal practice, the complainant should have obtained a copy of the grievance form bearing the signature of management and bearing the date of receipt. Officials of the Department, however, did not sign a copy of the grievance form or date it.

- Although there was some discussion between Mr. MacDonald and the Department about the processing of the grievance, in particular about whether the grievance was procedurally defective and whether it had been

effectively transmitted to the third level, the Department never took the position that it was in any way defective.

- Mr. MacDonald stated the following in his e-mail of November 29, 2012:

> *Therefore, in order for the Union to continue to provide representation, before going further, the Union will require validation that your grievance(s) have been duly signed and properly filed with your employer and that [sic] were filed in a timely fashion.*

- This was the first time he specifically asked her for this validation, although he had previously mentioned possible problems arising from the absence of a properly acknowledged grievance form.

- The respondent had informed the complainant on November 26, 2012, that while it would represent her on the question of the "quantum" of discipline, it could not do so on the question of whether there was just cause for some discipline. This position resulted from PSAC Policy 23 on the representation of employees accused of harassment. This was the first time it had drawn her attention to Policy 23 or told her that representation would be limited to "quantum."

- The complainant interpreted the e-mail of November 29 as a refusal to continue to represent her. She stopped communicating with the respondent, except for an e-mail of her own on December 5 saying, "Shame on you."

[85] As was eventually acknowledged in the testimony of the respondent's witnesses and in the respondent's submissions, none of the alleged technical or procedural defects mentioned by Mr. MacDonald would have prevented the grievance from being addressed on its merits at adjudication (or at the third level). As should be well known to everyone involved in the processing of grievances, the courts have held on many occasions that grievance arbitrators (and adjudicators) should endeavour to resolve grievances on their merits and should avoid giving priority to technical or procedural issues: see, e.g., *Galloway Lumber Co. Ltd. v. Labour Relations Board of British Columbia*, [1965] S.C.R. 222; *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199 (Ont. C.A.); and *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157. Furthermore, in section 241 of the *PSLRA,* Parliament has

specifically limited the impact of technical irregularities (see, e.g., *Martel and Carroll v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 35; *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78; *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20; *Public Service Alliance of Canada v. Staff of the Non-Public Funds, Canadian Forces*, 2009 PSLRB 123; and *Perron v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 109). I also note that Mr. Picciano testified that the UNE had lawyers on staff to advise on the representation of employees. In these circumstances, it is difficult to know from the evidence whether Mr. MacDonald honestly believed, in November 2012, that the defects were potentially fatal to the grievances or whether he was simply being bureaucratic in insisting that all the "i"s be dotted and all the "t"s be crossed before seeking a third-level meeting on the grievance.

[86] However, despite Mr. MacDonald's zeal to resolve all possible technical deficiencies even if they could have had no conceivable impact on the jurisdiction of an adjudicator, the request he made in his e-mail of November 29, 2012, while irrelevant, was modest. All he sought was "… validation that your grievance(s) have been duly signed and properly filed with your employer and that [*sic*] were filed in a timely fashion." Contrary to the suggestions in the complainant's submissions, the e-mail, in my view, cannot bear the interpretation that the respondent was insisting on obtaining documents the complainant did not have. His request for "validation" was not an insistence on obtaining specific documents from the complainant. "Validation" could have taken many forms. While I can fully understand that the complainant might well have been exasperated by the pessimistic, adversarial and bureaucratic tone adopted by Mr. MacDonald in this e-mail, after he had ostensibly been her representative for three years, I am satisfied not only that he had no intention of denying continued representation on the demotion grievance but also that the e-mail cannot reasonably be interpreted as a refusal to continue to represent her.

[87] Both parties approached this complaint on the basis that the complainant broke off communication with the respondent for two reasons, namely, Mr. MacDonald's hypothetical procedural objections to the grievances and the respondent's Policy 23, even though the raising of this latter issue in his e-mail of November 26, 2012, did not elicit any immediate objection from the complainant. In his e-mail of November 26, 2012, Mr. MacDonald had told her for the first time that, in view of PSAC Policy 23, his mandate would have to be limited to seeking a reduction in the quantum

of the discipline imposed on her. In other words, as the complainant's representative, he would be prevented from challenging the Department's conclusion that she had been guilty of harassing the other employee, but he would argue that an indefinite demotion, causing a $19 000 salary reduction, was excessive.

[88] Mr. MacDonald (in keeping with the Policy) thus drew a distinction between, on the one hand, the Department's determination that the complainant had harassed the other employee and, on the other hand, its decision to demote her, with the respondent only prepared to represent her on the latter issue. I have doubts whether this distinction is viable. The obvious and natural strategy for any union representative seeking the reduction of a disciplinary penalty is to attempt to minimize the gravity of the offence for which the employee was disciplined. I do not understand how a union could do a conscientious job of persuading an adjudicator that an indefinite demotion was excessive without scrutinizing the alleged harassment and, almost certainly, challenging the account of the person making the complaint. However, since I heard no submissions on this specific question, I do not intend to examine it any further.

[89] PSAC Policy 23 was designed to define the respondent's approach to representing employees in relation to harassment, particularly in situations where one employee has accused another of harassment. The PSAC's main concern, according to the witnesses called on its behalf and according to its submissions, was to avoid having to represent both the accuser and the accused where a harassment complaint was made. The other concern implicit in the Policy was that defending an employee accused of harassment could be perceived as condoning workplace harassment.

[90] Although neither party referred to this in their submissions, I note that, according to the Q & As accompanying the Policy, the respondent, in representing an employee disciplined after a harassment complaint, was supposed to "… consider whether any resulting discipline was warranted …." Mr. MacDonald and the UNE, however, took the position that, since the complainant had been accused of harassment, the Policy prevented them from representing her on any matter other than the quantum of discipline. That position was endorsed in the respondent's submissions. The statement from the Q & As appears to contradict other parts of the Policy. In these circumstances and in the absence of submissions on the point, I will attach no significance to the statement in question.

[91] In its submissions, the respondent argued, among other things, that, in *Gendron,* the Supreme Court of Canada had accepted that the duty of fair representation allowed a bargaining agent to favour the interests of one employee over those of another, which is what Policy 23 did in denying representation to an employee accused of harassment while guaranteeing representation for the employee claiming to have been harassed.

[92] *Gendron* was a case of a job competition, where the successful candidate objected to the bargaining agent representing three unsuccessful candidates. At pages 1328-9, the Court stated the following:

> *… As is illustrated by the situation here a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.*

[93] The *Gendron* decision, in my view, offers no support for the legitimacy of PSAC Policy 23. According to the Court, a bargaining agent could choose to represent the interests of one employee over those of another only if "… it turns its mind to all the relevant considerations." In the present context, the most relevant consideration is whether harassment has occurred. Yet Policy 23 simply states that representation is denied (except on the question of quantum) to an employee against whom an allegation is made without requiring any assessment of the validity or veracity of the harassment allegation.

[94] I agree with the complainant that this Policy is arbitrary in that the decision as to whether the respondent will represent an employee's interests hinges on an irrelevant factor, namely, whether a harassment complaint has been made against that employee. In my view, to deny representation to an employee falsely accused of harassment while representing the accuser, a result that might easily flow from Policy 23, would serve no conceivably legitimate union purpose and would not be

saved by the reasoning in *Gendron*. Contrary to what is suggested in the Policy, representing an employee accused of harassment is no more a condonation of harassment than representing an employee accused of assault or theft is a condonation of those offences. No attempt was made by the respondent to explain or justify its belief that representing an employee accused of harassment would detract, or would be seen as detracting, from its commitment to a harassment-free workplace.

[95] The respondent also argued that PSAC Policy 23, having been democratically adopted to regulate how it conducted its business, should not be questioned by the Board. In *Bremsak*, the former Board rejected the argument that it should defer to union policies in deciding whether the *PSLRA* had been violated. The union policy examined there by the former Board provided that a member who made an application to an outside body about an internal union issue would be suspended from any elected position until the outside application was resolved. The employee in that case, having filed a complaint with the former Board against her union, was suspended from her elected position pursuant to the union policy. She then made a second complaint to the former Board, alleging that her suspension violated subparagraph 188(*e*)(ii) of the *PSLRA*, which prohibits discrimination against an employee for having filed a complaint under the *PSLRA*. The former Board concluded that, while the situation was not simple, the union policy lacked "balance" and was "overreaching." The union was held to have committed an unfair labour practice by applying its policy. This is what the former Board wrote (at paragraph 117):

> *While acknowledging this complexity, I am nonetheless unable to accept that all situations involving an application to an outside body require a suspension from elected office or that all duties of such a position are properly the subject of a suspension. In my view, some proportionality is required to balance the various factors at play so that the legitimate interests of the bargaining agent are protected and harmful actions of an elected person do not threaten those interests. Unfortunately, I cannot find any such balance in the policy in dispute, and I find [sic] to be overreaching in scope.…*

[96] As for the respondent's argument that the complainant, by signing her membership card, was bound to respect Policy 23 and could not ask the Board to violate it, I would simply observe that, as a general rule, parties are not free to contract out of their obligations under the *PSLRA*.

[97] For these reasons, I therefore conclude that the respondent acted arbitrarily in refusing to represent the complainant on her demotion grievance on anything other than the quantum of the discipline.

C. <u>Harassment grievance</u>

[98] The harassment grievance was drafted and presented to the employer at the same time as the demotion grievance. In his e-mail of November 29, 2012, Mr. MacDonald stated that the respondent would not represent the complainant on the harassment grievance:

> *In addition, upon initial review of the documentation provided to the Union on October 29, 2012, and since most, if not all, of the documentation appears to related [sic] to events leading up to and during a previous harassment complaint process initiated by another UNE member wherein you were named as "Respondent" and accused of being the "Harasser" [sic]. This harassment process has since been concluded and it was determined that allegations against you were "founded". You had ample opportunity to voice any concerns/opinions that you had during the processing of that complaint. The resulting residual matters to this complaint have only just been finalized. The Union will not be party to re-opening this matter. Therefore we will not provide representation in this regard.*

[99] Mr. MacDonald acknowledged during cross-examination that he had been mistaken in asserting that the harassment grievance was just a "rehash" of the position the complainant had taken when she had been the target of the harassment complaint in February 2009. It would therefore appear that, when he wrote his e-mail of November 29, 2012, he had failed to read, or perhaps to understand fully, the allegations which the complainant had forwarded to him on October 29, 2012. The reality, as he conceded in his cross-examination, was that these allegations went well beyond the issues that had been dealt with in the harassment complaint and dealt primarily with harassment of the complainant by management.

[100] Accordingly, while PSAC Policy 23 was the reason the respondent gave for refusing to represent the complainant on her harassment grievance, the Policy had little or nothing to do with the harassment grievance. The real reason for the refusal was Mr. MacDonald's mistaken belief about the nature of the grievance.

[101] It has been held many times that the duty of fair representation does not impose on employee organizations a particularly stringent standard of competence in the representation of employees on grievances. They are to be allowed a wide margin of error. However, I am aware of no case where an employee organization's failure to read or understand simple documents in its possession, resulting in its refusal to represent an employee, was held to be within that margin of error.

[102] I am therefore satisfied that the respondent acted in an arbitrary manner when it informed the complainant three years after the matter was brought to its attention that it would not represent the complainant on her harassment grievance.

D. Conclusions and remedy

[103] Having found that the respondent acted arbitrarily in limiting the scope of its representation of the complainant on the demotion grievance and in refusing to represent her on the harassment grievance, I must decide whether any remedy is available to the complainant, beyond a declaration that the respondent violated section 187 of the *PSLRA*, inasmuch as she was not statutorily dependent on the respondent's representation and was free to pursue both grievances without the respondent's support.

[104] As regards the demotion grievance, I am satisfied that the complainant is entitled to a compensatory remedy. Without ruling on the need for such considerations to be present as a condition for the granting of such a remedy, I find that there are three elements in this case which militate in favour of this result.

[105] Firstly, the complainant originally consulted the respondent on this grievance in November 2009, immediately after the sanction was imposed on her. The respondent advised her about the filing of a grievance and agreed to represent her. There was no mention by the respondent that it would represent her only on the "quantum" of the discipline until November 26, 2012, three years later, despite numerous communications in the interim between the complainant and Mr. MacDonald. If the complainant had been informed in November 2009 of the limited parameters of the representation she would receive from the respondent, she could have pursued other options. She could, for example, have retained counsel promptly in November 2009, which would undoubtedly have enabled her to have an adjudication hearing scheduled for well before April 2015. The respondent allowed her to believe for three years that it

would provide full representation of her interests. The expectation it thereby created for her is entitled to some protection. In my view, this feature of the case strongly suggests that the Board's discretion should be exercised in favour of granting a remedy to the complainant.

[106] Secondly, the indefinite demotion of the grievor, giving rise to a $19 000 salary reduction, was obviously a very severe penalty. In my view, this too suggests that the adjudication of the complainant's grievance is something the respondent "… ought to have taken and carried on on the employee's behalf …" (to quote from paragraph 192(1)(*d*) of the *PSLRA*).

[107] Thirdly, I note that disciplinary demotions were only introduced into this sector in 2003, with the passage of the *PSLRA*. Before then, demotion in the public service was possible only for incompetence or incapacity (under the *Public Service Employment Act,* R.S.C. 1985, c. P-33). There have been relatively few adjudication decisions under the *PSLRA* examining this form of disciplinary sanction. In these circumstances, the decision on the adjudication of the complainant's demotion grievance might well have significant value as a precedent, with implications going far beyond her individual case. This also suggests, in my view, that the respondent, with its responsibility for representing so many employees in this sector, should have acted on the complainant's behalf.

[108] The respondent argued that, if I found a violation of section 187 of the *PSLRA*, the only remedy I should consider granting was a referral of the grievance to the PSAC's Grievance and Adjudication Section for a consideration whether the PSAC should support the complainant at adjudication. In my view, such an order, while possibly the appropriate one in certain cases of violation of section 187, would be quite inadequate in the circumstances of this case. It can be assumed that the PSAC's Grievance and Adjudication Section, being constitutionally bound to comply with Policy 23, would, at most, agree to represent the complainant on the penalty imposed on her for the alleged harassment. The broader question whether she in fact harassed the other employee would almost certainly be beyond what the respondent would pursue at adjudication, in view of Policy 23. However, as I have found, the Policy lies at the very heart of the respondent's breach of section 187. The remedy suggested by the respondent in this case would therefore be an illusory and inadequate one.

[109] In my view, the appropriate remedy (in addition to a declaration that the respondent violated section 187) would be an order that the respondent pay the complainant her reasonable legal fees and expenses for the adjudication of the grievance, as agreed between the parties. If no agreement is reached, the parties may file written submissions in this regard with the Board, and the Board will issue its decision. Although no objection was taken to the Board's jurisdiction to make such an award, I should state that I am satisfied that the Board's authority, under subsection 192(1) of the *PSLRA*, to make "… any order that it considers necessary in the circumstances against the party complained of …" is broad enough to cover this remedy: see *Menard v. Public Service Alliance of Canada*, 2010 PSLRB 124, at para. 29:

> *… the word 'including' in subsection 192(1) of the* Act *serves to introduce or 'include' specific measures adapted to different breaches of the* Act*. However, it should not be understood as limiting the power of the Board to order other measures as long as they are logically connected to the breach committed.*

This compensation order is logically connected to the breach committed in this case. In *Riley*, 2008 CIRB 419 (application for judicial review dismissed sub nom. *Amalgamated Transit Union, Local 1374 v. Greyhound Canada Transportation Corp.*, 2010 FCA 11), referred to in the complainant's submissions, the Canadian Industrial Relations Board determined that its remedial powers on a complaint of this nature extended to ordering a bargaining agent to pay the reasonable legal fees and expenses of complainants who engaged counsel to represent them in the arbitration process.

[110] As regards the harassment grievance, I have recorded my view that the respondent acted arbitrarily in refusing to represent her. The harassment grievance, however, cannot be referred to adjudication, and the complainant has asked for no specific remedy in respect of the respondent's refusal beyond a declaration that the refusal was a violation of section 187. A declaration to that effect will be issued.

[111] The complainant has also asked for her costs of this complaint. I am satisfied, on the basis of *Robitaille,* that I have no authority to award costs of this complaint.

[112] I should add that it would not be appropriate in the context of this section 187 complaint for the Board to declare PSAC Policy 23 to be invalid, as the complainant requested.

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

(*The Order appears on the next page)*

VIII. Order

[114] The complaint is allowed. I declare that the respondent violated section 187 of the *PSLRA*. I order the respondent to compensate the complainant by paying her reasonable legal fees and expenses for the adjudication of the demotion grievance, as agreed between the parties. If no agreement is reached, the parties may file written submissions in this regard with the Board, and the Board will issue its decision.

April 20, 2015.

Michael Bendel,
a panel of the Public Service Labour Relations and Employment Board