Date: 20150612

File: 561-02-622

Citation: 2015 PSLREB 55

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

MAXINE HOLLOWAY

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Holloway v. Professional Institute of the Public Service of Canada

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

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Linelle Mogado, counsel

Heard at Ottawa, Ontario,
July 2 and 3 and August 18 and 19, 2014.

I. Complaint before the Board

[1] The complainant, Maxine Holloway, alleged that the respondent, the Professional Institute of the Public Service of Canada (PIPSC), committed an unfair labour practice within the meaning of section 185 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), in violation of paragraph 190(1)(*g*), when Allison Tomka, a PIPSC employee, arbitrarily decided, on January 28, 2013, to not pursue a harassment complaint on behalf of the complainant. This refusal was an act of bad faith, according to the complainant.

[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 new 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 *Act* before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board.

II. Summary of the evidence

[3] The complainant stated that she filed an unfair labour practice complaint against the PIPSC when Allison Tomka, an employment relations officer (ERO) with the PIPSC, refused to pursue a grievance on her behalf alleging discriminatory actions by her employer. Ms. Tomka's actions constituted a breach of sections 185 and 187 of the *Act*. The complainant sought Ms. Tomka's assistance to ensure that she was properly accommodated when her employer attempted to remove her from her workplace rather than maintain accommodations, which were required and had been put in place.

[4] The parties submitted as Exhibit 1 an agreed statement of facts, which reads as follows, and as Exhibit 2 an agreed book of documents to which Exhibit 1 refers:

1. The Respondent, the Professional Institute of the Public Service of Canada (the "Institute", "Union", or "PIPSC") has been the certified bargaining agent for Maxine Holloway (the "Complainant" or "Ms. Holloway") at all times relevant to this complaint.

2. The Union is party to a Collective Agreement with the Treasury Board Secretariat of Canada ("Treasury Board" or "TB") for the bargaining unit comprised of the Audit, Commerce and Purchasing ("AV") Group. The AV Group Collective Agreement expires on June 21, 2014.

3. Ms. Holloway is employed by Public Works and Government Services Canada ("PWGSC"). She is at the PG-02 Group and Classification and is a member of PIPSC's AV Group bargaining unit.

4. In the period covered by the complaint, Ms. Holloway was represented by the Institute's Employment Relations Officer ("ERO"), Allison Tomka.

5. Ms. Holloway first contacted Ms. Tomka in November 2011. At that time, Ms. Holloway was a Union Steward, and consulted Ms. Tomka by phone regarding a member's issue.

6. John Courtney was a Union Steward in PWGSC during the times relevant to this complaint.

7. Ms. Holloway next contacted Ms. Tomka on June 15, 2012, when Ms. Holloway left Ms. Tomka a voicemail message. Ms. Tomka returned Ms. Holloway's voicemail on June 18, 2012 and they spoke on the phone.

8. On June 18, 2012, that same day, Ms. Tomka emailed Ms. Holloway to provide a link to the Treasury Board's "Policy on Prevention and Resolution of Harassment in the Workplace" ("TB Harassment Policy"). A true and correct copy of Ms. Tomka's email is attached as Exhibit 2 Appendix A.

9. The link that Ms. Tomka sent was to the Treasury Board's "Policy on Prevention and Resolution of Harassment in the Workplace", in effect until September 30, 2012. A true and correct copy of this document is attached as Exhibit 2 Appendix B.

10. On October 18, 2012, to prepare for Ms. Holloway's return to work, Ms. Tomka was invited by Ms. Holloway to attend a meeting with the employer with Mr. Courtney and Ms. Holloway. Ms. Holloway confirmed Ms. Tomka's attendance by email. A true and correct copy of Ms. Holloway's email is attached as Exhibit 2 Appendix C.

11. After this meeting on October 18, 2012, Ms. Tomka, Ms. Holloway, and Mr. Courtney had a discussion regarding the meeting and discussed some questions that Ms. Holloway had.

12. Ms. Tomka memorialized this conversation in an email exchange with Ms. Holloway, dated November 14 and 15, 2012. A true and correct copy of this email exchange between Ms. Tomka and Ms. Holloway is attached as Exhibit 2 Appendix D.

13. Ms. Holloway commenced a gradual return to work in October 2012. By December 2012, she had returned to working full-time.

14. A meeting was set for January 11, 2013. A true and correct copy of an email exchange between Ms. Tomka and Ms. Holloway reflecting the setting of the meeting, with the subject line, "RE: FW: Perfume Refresh" is attached as Exhibit 2 Appendix E. A true and correct copy of an email from Paul Rolland to Ms. Holloway, Ms. Beaulieu, and Ms. Tomka reflecting the setting of the meeting, with the subject line, "Follow-up – M. Holloway RTW" is attached as Exhibit 2 Appendix F.

15. The meeting occurred on January 11, 2013. In attendance were Ms. Holloway, her Manager, Mr. Paul Rolland, and a Senior Labour Relations Advisor, Micha Beaulieu. The topic of discussion was the perfume refresh issue.

16. At the January 11, 2013 meeting, Ms. Holloway shared with Ms. Tomka for the first time a document showing her email correspondence to the office of David McGuinty, M.P., dated August 20, 2012, and further emails to his office in October 2012. A true and correct copy of this email exchange between Mr. McGuinty's office and Ms. Holloway, with the subject line, "Re: Office Harassment" is attached as Exhibit 2 Appendix G.

17. Also at this January 11, 2013 meeting, Ms. Holloway shared with Ms. Tomka a December 17, 2012 letter from the Assistant Deputy Minister, Human Resources Branch, PWGSC addressed to Ms. Holloway. A true and correct copy of this document is attached as Exhibit 2 Appendix H.

18. On January 28, 2013, Ms. Tomka sent a detailed email to Ms. Holloway providing a response on the email exchange that Ms. Holloway had with the office of Mr. McGuinty. A true and correct copy of Ms. Tomka's email is attached as Exhibit 2 Appendix I.

19. On January 29, 2013, Ms. Holloway responded to

> *Ms. Tomka by email. A true and correct copy of this email is attached as Exhibit 2 Appendix J.*
>
> *20. On January 29, 2013, Ms. Tomka responded to Ms. Holloway by email. A true and correct copy of this email is attached as Exhibit 2 Appendix K.*
>
> *21. Ms. Holloway did not contact Ms. Tomka following this email.*
>
> *22. Ms. Holloway filed the instant complaint with the PSLRB on April 26, 2013. She submitted her completed "Request for Particulars" form to the PSLRB on June 6, 2013.*
>
> *23. In early June 2013, after Ms. Holloway had filed the instant complaint, she called Ms. Tomka, seeking the Union's assistance because the employer again took her off work, and insisted upon a Health Canada assessment in order to return her to work.*
>
> *24. Institute ERO, Dejan Toncic, currently represents Ms. Holloway in her labour relations issues, described in paragraph 23, with the employer.*
>
> *25. Since then, Mr. Toncic has assisted Ms. Holloway on three matters: (1) her return to work, (2) a grievance on forced sick leave, and (3) a complaint of workplace harassment against her immediate supervisor.*
>
> *26. Ms. Holloway has since been returned to work with no restrictions.*
>
> *27. At this time, Ms. Holloway's harassment complaint has been put into abeyance, as the parties have agreed that the working relationship has improved between Ms. Holloway and her immediate supervisor.*

[5] The complainant has suffered from severe allergies, which have been aggravated by the workplace since 2009. In May 2011, a meeting was held with her manager and her director to discuss what needed to be done and to determine what the employer was prepared to do. She was accompanied by John Courtney, her union representative. At that meeting, the employer representatives alluded to the complainant being "crazy" and "loonie toons," according to her. At Mr. Courtney's suggestion, the complainant was referred to Health Canada, which referred her to a mental health specialist, who determined that, based on an interview and written tests, the complainant was, in her own words, ". . . mentally challenged and needed to be off work immediately." The complainant was put off work on December 9, 2011.

[6] The complainant informed Mr. Courtney that she wanted to file a grievance about being put off work. He advised her that she should wait until she returned to the workplace. She was off work for 11 months, during which time she spoke to Mr. Courtney on various occasions. He was then replaced by Ms. Tomka. In June 2012, the complainant contacted Ms. Tomka, who sent her a copy of the Treasury Board harassment policy. In July 2012, the complainant again contacted Ms. Tomka and asked her to resend a copy of the policy as the original had been deleted. Ms. Tomka was advised that the complainant would be returning to work in September 2012 and that the complainant wanted to set the wheels in motion on her grievance.

[7] The complainant was able to return to work in September 2012 but did not actually return to work until October 16, 2012. At a return-to-work meeting held on October 16, 2012, the employer requested another Health Canada assessment, to which the complainant objected. On October 18, 2012, she met with Mr. Courtney and Ms. Tomka to discuss what could be done about the length of time she had been off. She was advised that there was nothing the PIPSC could do. Management had followed the correct procedure, and there was no basis on which to file a grievance.

[8] One particular co-worker continued to ignore the requirement to be scent-free in the workplace. The complainant sent him emails asking him to please refrain from wearing cologne in the workplace. In December 2012, she again complained to her manager about this co-worker's use of cologne in the workplace, and a meeting was scheduled for January 11, 2013. The complainant's co-worker was aware of her chemical sensitivities and that his continued use of colognes constituted harassment in her opinion.

[9] On January 2, 2013, Ms. Tomka sent an email (Exhibit 5) to Micha Beaulieu, Senior Labour Relations Advisor, at Public Works and Government Services Canada (PWGSC), where the complainant was employed, stating that she "… would really like to avoid a grievance on this one …." The complainant stated in her testimony that Ms. Tomka wanted to avoid a grievance and that she did.

[10] At the January 11, 2013, meeting, the employer representatives in attendance brought up a letter that the complainant had sent to her member of Parliament, David McGuinty. Mr. McGuinty forwarded it to the PWGSC's assistant deputy minister (ADM), Human Resources, for a response. The ADM's response was that the

complainant should work with her union to resolve workplace issues. Ms. Tomka's response to this suggestion, according to the complainant, was that there was nothing much she could do for her. It was too late to file a complaint concerning the accommodation issues the complainant faced, and there was no point filing a harassment grievance as it was out of time as well. The complainant stated that she was never advised of any other forum available for her to challenge Ms. Tomka's decision.

[11] Prior to December 21, 2011, the complainant was a PIPSC shop steward. She was aware that there were timelines within which a grievance had to be filed, but since she was not representing herself, she was not thinking about them. She did not discuss timelines with Ms. Tomka; nor did Ms. Tomka mention them in her emails to the complainant. When Ms. Tomka refused to pursue her grievance, the complainant did not follow up with her as it was pointless if the PIPSC could not do anything anyway.

[12] In June 2013, the complainant was advised that Dejan Toncic, another PIPSC ERO, was to replace Ms. Tomka as the ERO representing her. He filed grievances related to the complainant's absence from work and harassment (Exhibits 16 and 17). They met with her team leader and manager and had various other discussions concerning the direction in which her accommodation requests were heading. Mr. Toncic took over representing her for her return to work.

[13] Ms. Tomka testified that the complainant contacted her in November 2011 concerning another PIPSC member. During this discussion, she advised Ms. Tomka that she had personal workplace concerns related to harassment. Ms. Tomka asked her to send her a list of the allegations to review via email and opened a file for the complainant on December 6, 2011. The complainant did not follow up on this request.

[14] The next contact Ms. Tomka had with the complainant was in June 2012 when the complainant phoned to advise Ms. Tomka of the current situation with her long-term disability leave. Again, Ms. Tomka requested that the complainant provide her with the information to establish a harassment complaint. Ms. Tomka sent the complainant a link to the Treasury Board harassment policy. She did not summarize their discussions in an email as she felt that everything was sufficiently discussed on the phone. Ms. Tomka had no doubt that the complainant understood everything that was said to her on the phone.

[15] In October 2012, Ms. Tomka heard from the complainant about an upcoming return to work. There had been no communication with the complainant between June and October of 2012. In preparation for the return to work, updated medical information was required. According to Ms. Tomka, Mr. Courtney was to deal with securing the updated information, which was confirmed by an email from him (Exhibit 24). Ms. Tomka attended the meeting on October 18, 2012, and took notes (Exhibit 25). The meeting was convened by the PWGSC Disability Management Coordinator to discuss the complainant's sensitivities to scents and to develop a progressive return-to-work plan for her. There were no roadblocks identified to a successful return to work; nor did any additional things need doing as a result of the meeting.

[16] Ms. Tomka met with the complainant and Mr. Courtney following the return-to-work meeting. The complainant expressed concerns about the effect of being away from the workplace for 11 months and her frustration with Health Canada.

[17] A few weeks later, the complainant emailed Ms. Tomka (Exhibit 2, tab D) in a follow-up to her question about whether anything could be done about the fact that she was ". . . taken off work for extended periods of time for no founded reason, just an opinion that was not supported anywhere."

[18] In her response dated November 15, 2012, Ms. Tomka reminded the complainant that she and Mr. Courtney told her following the October 18 meeting that challenging the doctor's opinion was not a labour relations issue and therefore was not a matter that the PIPSC could help with.

[19] On December 17, 2012, the complainant reported, by email to her manager, an incident in which a colleague applied cologne in his office, which irritated her sensitivities to scent. Mr. Courtney and not Ms. Tomka was copied on this email. A copy of it was forwarded to Ms. Tomka by Mr. Courtney (Exhibit 12), following which Ms. Tomka emailed the complainant to see how the PIPSC could be of assistance (Exhibit 13).

[20] A call between Ms. Tomka and the complainant was scheduled for December 20, 2012, but did not actually occur until January 2, 2013. On the call, the complainant indicated that she wished to file a harassment grievance, which Ms. Tomka indicated would be premature. She needed to check with the PWGSC to

determine what the complainant's managers had done in response to her complaint. The complainant did not object to this type of resolution. Ms. Tomka was unaware at the time of the letter to Mr. McGuinty and the response to it by the PWGSC's ADM, Human Resources.

[21] On January 2 and 3, 2013, Ms. Tomka and Ms. Beaulieu had an email exchange (Exhibit 5) in which Ms. Tomka raised the complainant's concerns with the violation of the no scents policy in her workplace by her coworkers. Ms. Tomka indicated that she preferred to settle the matter rather than proceed with a grievance as requested by the complainant. Ms. Beaulieu in her reply mentions the letter to Mr. McGuinty and asks if it could be discussed at the same meeting to be scheduled to discuss the scents policy issue.

[22] Following this email exchange, another began concerning setting up a meeting to discuss the cologne issue on January 11, 2013. At the meeting on January 11, the employer, the PWGSC, indicated that the employee in question had been spoken to about his use of cologne and that he had apologized. The employer reiterated to the employee the importance of respecting the no-scents policy. The issue appeared to be resolved.

[23] At the same meeting, the complainant's manager, Paul Rolland, referred to other concerns she had raised in her email of December 17, 2012, including allegations that the employee had sprayed chemicals around her to irritate her and had pretended he had not done so. According to the complainant, the employee would come by her office, spray the chemicals and then leave. She also alleged that the employee would laugh at her on the street and would pretend that he did not know her. Her email was intended to be a formal complaint to Mr. Rolland that she considered the employee's actions harassment and that she wanted them stopped.

[24] Mr. Rolland raised these allegations with the employee, who denied them and stated that he was unaware of what would have given rise to them. Mr. Rolland asked the complainant to go back to Health Canada to follow up on the original assessment, which she refused to do since her physician had said she was fit to be at work. Mr. Rolland did not insist further, and the matter was left on the table.

[25] Following this, the discussions at the meeting moved on to the email sent to Mr. McGuinty by the complainant (Exhibit 2, tab G), which had been forwarded to the

PWGSC's ADM, Human Resources, for a follow-up. The ADM directed (Exhibit 2, tab H) Mr. Rolland to meet with the complainant and the PIPSC to reach a resolution concerning the issues identified in the McGuinty letter. Up to this point, Ms. Tomka was unaware that the complainant had taken her issues to her member of Parliament. The group adjourned so that Ms. Tomka could review the email, meet with the complainant and determine what the next steps should be. The group agreed to reconvene if necessary.

[26] Ms. Tomka reviewed the McGuinty letter and provided the complainant her assessment and comments on January 28, 2013 (Exhibit 2, tab I). In her assessment, allegations of harassment outside the workplace were not within the PIPSC's mandate. Other allegations of harassment inside the workplace were beyond the 12-month period identified in the Treasury Board harassment prevention policy or beyond its scope. Consequently, the PIPSC could not help her resolve these matters or file a grievance on her behalf. The complainant was not pleased with Ms. Tomka's response and indicated by email that she intended to file a complaint against the PIPSC (Exhibit 2, tab J). In response, Ms. Tomka clarified that the PIPSC was willing to help her with any issue within the scope of its mandate and asked her to provide any documents she might have that were related to the workplace issues (Exhibit 2, tab K).

[27] The complainant did not send any further documents as requested and did not contact Ms. Tomka again until June 2013 following an incident in the workplace on June 10. The complainant alleged that she had been poisoned in the workplace, and she had called an ambulance to assist her. According to her, someone in the workplace had sprayed chemicals into the air purifier in her office. Following this incident, Mr. Rolland advised her that she was to stay off work until she was assessed by Health Canada.

[28] Ms. Tomka returned the complainant's call (see the notes, in Exhibit 31). She offered to help the complainant with two concerns that were identified: how quickly the Health Canada assessment could be completed, and confirming the status of her leave. The complainant continued to question when her harassment grievance would be filed. Knowing that this unfair labour practice complaint was filed, the complainant's request was assigned to another ERO, Mr. Toncic (Exhibit 15). Ms. Tomka had no further dealings with the complainant and did not receive anything further from the complainant.

[29] On cross-examination, Ms. Tomka indicated that she did not remember being asked by the complainant to file a grievance concerning the competency of the physician assigned by Health Canada. In fact, the complainant was advised that it was not something with which the PIPSC could help. Ms. Tomka also did not recall having a discussion concerning filing a grievance about the PWGSC's actions of insisting that the complainant be examined by Health Canada and insisting on her absence from the workplace for 11 months as a result. Again, there was nothing with which the PIPSC could have helped as the PWGSC had followed all the rules. Ms. Tomka remembered that the grievor had expressed her frustration with this and that she had been advised that a grievance was not appropriate in the circumstances. It was Ms. Tomka's opinion that the complainant had accepted this response.

[30] Furthermore, despite the complainant's suggestion that the PIPSC should have sent her for an independent medical examination rather than relying on Health Canada's opinion, it is not a common practice as it is very costly. Cost is not the only deciding factor, but it is relevant to the ERO's recommendation. Other relevant information considered is the fact situation and whether additional medical information is required to support the member's claim. The PIPSC would obtain an independent medical evaluation at its own expense only in the context of a workers' compensation claim.

[31] Mr. Toncic assumed carriage of the complainant's file in June 2013 when it was assigned to him by his supervisor. Following a telephone conversation with the complainant, he set up a meeting to discuss her return to work, filed a grievance concerning an involuntary leave without pay, filed a harassment grievance related to issues with her manager in July 2013 and assisted her with filing a workers' compensation claim.

[32] The complainant returned to the workplace on July 26, 2013, without the need for a Health Canada assessment, to which she had refused to give her consent. The harassment grievance filed on her behalf is being held in abeyance as the situation had improved since the grievance was filed and the parties had met.

[33] Mr. Toncic explained the PIPSC's internal review procedure (Exhibit 29), which can be used by a member who disagrees with a decision made related to him or her by an ERO. The member is to be referred to the manager, Representational Services, who

supervises the EROs. If the member is still dissatisfied, mechanisms exist for escalating it beyond this level. When there is a clear impasse between the member and the ERO, a copy of the internal review procedure policy is reviewed with the member.

III. Summary of the arguments

A. For the complainant

[34] Ms. Tomka has admitted that she arbitrarily refused to file any grievance for the complainant. In her email on January 2, 2013 (Exhibit 5), Ms. Tomka stated that she wanted to avoid filing a grievance. She arbitrarily withheld medical help available to the complainant from the PIPSC. It is apparent from Mr. Toncic's evidence that Ms. Tomka misled the complainant into believing that a grievance could be filed only once she returned to the workplace. At the hearing of this matter in July 2014, Ms. Tomka claimed she was still waiting for more information from the complainant to support filing a grievance. This information was provided on October 18, 2012, and on November 18, 2012, the complainant was advised via email that there was nothing the PIPSC could do to assist her.

[35] These proven arbitrary actions by Ms. Tomka in dealing with the complainant's file establish a breach of paragraph 190(1)(*g*) and section 187 of the *Act*. Further proof of the breach is that Mr. Toncic was successful filing a grievance on her behalf as well as dealing with a multitude of related issues, none of which Ms. Tomka was willing to pursue. It was clear that when the complainant was put off work, she wanted to file a grievance. Mr. Courtney informed her that a grievance could not be filed unless she was in the workplace.

[36] In contacting Ms. Tomka, the complainant sought her representation for the grievance. Ms. Tomka informed her that it was premature to take formal action against the PWGSC (Exhibit 26). When the complainant returned to the workplace in October 2012, it was clear that she required a perfume-free workplace. When it was reported to Ms. Tomka that the complainant had ongoing concerns with the PWGSC's intention to provide such a workplace, Ms. Tomka advised her to give management time to deal with her concerns rather than file a grievance or complaint. Following the perfume incident in December 2012, the complainant made it clear that she wanted the matter dealt with. In Ms. Tomka's email of January 2, 2013 (Exhibit 5), she clearly

indicates her preference was not to file a grievance. The complainant could not force her to, so she backed off.

[37] No particular thing triggered this complaint; it was the cumulative effect of many things. It was Ms. Tomka's correspondence of January 28, 2013 (Exhibit 2, tab I), filled with a host of what she could not do that triggered it. She could not leave the door open to filing a grievance and then tell a PIPSC member that it was too late and that nothing could be done. The complainant should have been told what the timelines were before being told it was too late.

[38] Ms. Tomka at no time mentioned that the PIPSC could obtain an independent medical evaluation. She was aware of the challenges that the complainant was facing with her return to the workplace. She was aware that there was difficulty finding a specialist to evaluate the complainant, yet she never offered the use of the PIPSC's doctor to assist the complainant to return to work.

[39] Ms. Tomka was the PIPSC ERO assigned to the PWGSC portfolio. The complainant contacted her seeking her help, and she did nothing to assist the complainant. She has met her burden of proof. Despite the information provided and the discussions held, Ms. Tomka made an arbitrary decision not to file a grievance on her behalf.

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

[40] The allegations made by the complainant relate to the PIPSC's failure to intervene when she was put off work in October 2011. The complaint does not mention Ms. Tomka, but it is her actions that are challenged. December 2011 was well beyond the 90-day time limit established by the *Act* for filing an unfair labour practice complaint. Anything before January 28, 2013, is outside the jurisdiction of the new Board. The witness testimony only provides the background. Based on the evidence, there was no breach of the duty of fair representation by the PIPSC.

[41] The complainant alleged discrimination based on race yet provided no facts or evidence in support of this allegation. Merely because she is a black woman did not support an allegation of discrimination. If disability is the basis of the alleged discrimination, the complainant spoke to Mr. Courtney concerning the Health Canada medical report, not Ms. Tomka. There is no evidence of what Mr. Courtney did or did

not do. Simply put, there is no evidence of discrimination against the complainant in the manner in which she was represented by the PIPSC.

[42] The new Board's role in a duty-of-fair representation complaint is to examine the bargaining agent's decision-making process; it is not to determine whether the decision was correct. The new Board is to scrutinize the bargaining agent's conduct. Considerable latitude is to be afforded the bargaining agent in making decisions on the representation of its members (see *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, and *Mohid v. Brossard*, 2012 PSLRB 36).

[43] The complainant's burden was to show sufficient evidence at the hearing that on the balance of probabilities, the PIPSC failed to meet its duty of fair representation. According to the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, a complainant does not have an absolute right to arbitration, and a union enjoys considerable discretion as to what it will pursue on behalf of a member. According to that case, this discretion must be as follows (at page 527):

. . .

> *… exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other….*

. . .

[44] The number of interactions between the complainant and Ms. Tomka demonstrate that Ms. Tomka provided assistance to her when she requested it. Ms. Tomka listened to the complainant, attempted to investigate the case and requested additional information from her, which was not provided. The respondent conceded that Ms. Tomka's email (Exhibit 2, tab I) raises questions concerning Ms. Tomka's diligence in representing the complainant. However, a union member is not entitled to perfect representation. The bargaining agent or union has wide latitude and discretion in the way its assists its members.

[45] Ms. Tomka did not shut the door on the complainant in her January 28, 2013, email; the complainant decided that the matter was final. Ms. Tomka asked for more information, which the complainant did not provide. The door was left open

concerning a grievance on harassment in the workplace. According to *Canadian Merchant Service Guild*, a union member must cooperate with the union to investigate the allegations that were raised. The complainant in this case did not. When additional information was requested, she failed to provide it to Ms. Tomka.

[46] The issue related to filing a grievance in 2011 did not involve Ms. Tomka; Mr. Courtney represented the complainant at that time. There is no evidence of what he did or did not do before the new Board other than the complainant's memory of the events, which was not supported by the exhibits and Ms. Tomka's recollections. Ms. Tomka did not receive a request from her to file a grievance related to being put off work.

[47] The respondent provided the complainant with reasonable representation throughout the period in question. It did not behave in a manner that was arbitrary, unreasonable or in bad faith. In order to determine that the respondent acted in a manner that was arbitrary, unreasonable or in bad faith, the bargaining agent's conduct as a whole must be assessed (see *Re Judd*, [2003] B.C.L.R.B.D. No. 63 (QL)), but the complainant's behaviour must also be examined as a whole. It is not sufficient to look at isolated acts that might fit the description.

[48] The bar for establishing arbitrary conduct is purposefully set high (*Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128). The complainant had a responsibility to inform the respondent of her desire to file a grievance (*Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44) and to cooperate with the respondent's investigation of the grievance. She did not; she did not provide a copy of her email to her member of Parliament to Ms. Tomka, and in five other situations for which the complainant required assistance, Ms. Tomka requested additional information from her, which was not provided. Ms. Tomka was unable to investigate her allegations without her cooperation.

[49] This complaint should be dismissed based on the timelines being exceeded. If not, the respondent has established that the complainant provided insufficient evidence to discharge her burden of proof.

IV. Reasons

[50] The *Act* provides for filing a complaint for a violation of section 187 against a bargaining agent under section 190 as follows:

> *Complaints*
>
> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> *(*a*) the employer has failed to comply with section 56 (duty to observe terms and conditions);*
>
> *(*b*) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> *(*c*) the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions);*
>
> *(*d*) the employer, a bargaining agent or a deputy head has failed to comply with subsection 110(3) (duty to bargain in good faith);*
>
> *(*e*) the employer or an employee organization has failed to comply with section 117 (duty to implement provisions of the collective agreement) or 157 (duty to implement provisions of the arbitral award);*
>
> *(*f*) the employer, a bargaining agent or an employee has failed to comply with subsection 125(1) (duty to observe terms and conditions); or*
>
> *(*g*) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> *Time for making complaint*
>
> *(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board* ***not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.***
>
> . . .
>
> [Emphasis added]

[51] Counsel for the respondent argued that the new Board is without jurisdiction to hear the matters alleging a violation of the duty of fair representation earlier than

90 days before the date that the complainant filed her complaint. She is correct; however, the letter of January 28, 2013, provides a lengthy summary and comment on all the issues that arose between October 2011 and January 11, 2013. It is Ms. Tomka's assessment of these issues that gave rise to the complaint, according to the complainant. Consequently, both parties agreed that my inquiries under this complaint are to be fixed on the email of January 28, 2013 (Exhibit 2, tab I), which is identified in the Form 16 filed by the complainant (Exhibit 3) on April 26, 2013, which was within the 90-day time limit for filing complaints. The email conveys the respondent's stand on pursuing grievances by the complainant. It is the message conveyed and the proposed plan of action that offended the complainant and that forms the basis of the complaint. She interpreted the response as a refusal on the part of her bargaining agent, in the guise of Ms. Tomka, to assist her in pursuing grievances against the PWGSC.

[52] The *Canadian Merchant Service Guild* case is the seminal case concerning the duty of fair representation. The Supreme Court, relying on its decision in *Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206, which stated that by virtue of the union's certification as the exclusive representative of the bargaining unit's members, it is obligated to represent its members with respect to grievances, set out the following principles (at page 527):

. . .

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*
>
> . . .

[53] Applying the Supreme Court's reasoning, to be successful in this complaint, the complainant had to establish that she has been treated in a manner that was arbitrary, discriminatory, or in bad faith, not merely that she did not agree with Ms. Tomka. Barring this, the respondent should be shown substantial latitude in making its decisions as to what grievances it would support (see *Manella*, at para. 38).

[54] The complainant in this case has provided no evidence that would support that any of the PIPSC's actions were arbitrary, capricious, discriminatory or wrongful. She might not have agreed with them. The respondent established a decision review for situations in which its members did not agree with the EROs' decisions. The complainant could have challenged Ms. Tomka's decisions using this avenue but did not.

[55] If the complainant felt that the service she was being provided by Ms. Tomka was substandard or that Ms. Tomka was acting in a manner that was arbitrary, or discriminating against her, or that was in bad faith, she should have raised her concerns with the respondent so that they could have been addressed. Ultimately, she did so by filing this complaint, which is why Mr. Toncic became her representative. The fact that Mr. Toncic was able to resolve certain issues that Ms. Tomka could not does not establish that the complainant was not properly represented by the respondent. Different EROs have different skills and approaches to resolving issues that arise between members and their employers.

[56] The burden of proof under section 187 of the *Act* rests with the complainant. It requires her to present sufficient evidence to establish on the balance of probabilities that the respondent failed to meet its obligations under the duty of fair representation (see *Ouellet*, at para. 31). It is not sufficient to discharge this onus for the complainant to state that Ms. Tomka did not file a grievance; *ergo*, she failed in her duty of fair representation. There is no absolute right to have a grievance referred to adjudication;

the respondent has the right to refuse to represent the member (*Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28). The new Board's role is to determine whether that decision was made in an arbitrary or discriminatory manner, without proper consideration, or made in bad faith.

[57] The evidence proffered by the complainant did not establish that Ms. Tomka acted either discriminatorily or in an arbitrary fashion. Moreover, there is no evidence of bad faith. In fact, her assessment of the situation as set out in her email of January 28, 2013, provides an in-depth analysis of the fact situation. Furthermore, as argued by counsel for the respondent, Ms. Tomka did not refuse to represent the complainant; rather, she asked for more information, which the complainant did not provide. The evidence showed that the complainant was non-cooperative with the respondent and that she did not provide the additional information requested. No reason was provided for this failure, and the length of time between communications with Ms. Tomka did not indicate that the complainant actively pursued her cause.

[58] Ultimately, ". . . if a union has directed its mind to the relevant information, based its decision on relevant facts, and there is no evidence of discrimination or bad faith, then regardless of the degree of skill or strategy that goes into making the complaint …," an unfair labour practice complaint must be dismissed because the union as respondent has not breached the *Act* (see *Judd*, at para. 88). Similarly, unless the complainant establishes that the quality of the union representation was seriously negligent, in the sense of dealing with the employee's concerns in a superficial or careless manner, the complaint cannot succeed on the basis that the respondent acted arbitrarily (*Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, at para. 22), thus , I conclude that the complainant has failed to prove on a balance of probabilities that Ms. Tomka and the PIPSC acted in a manner that was either arbitrary, discriminatory, or in bad faith in her representation.

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

(The Order appears on the next page)

V. Order

[60] The complaint is dismissed.

June 12, 2015.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations and Employment Board