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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

KELMANY ROSS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Ross v. Public Service Alliance of Canada

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

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Leslie Robertson, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
March 13 to 15 and June 12, 2017.
Written rebuttal submissions received June 13, 2017.

[1] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act*, the *Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board ("PSLREB"), the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* ("*PSLRA*") to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act* and the *Federal Public Sector Labour Relations Act* ("the *FPSLRA*").

I. Complaint before the Board

[2] Kelmany Ross ("the complainant") filed a complaint against her bargaining agent, the Public Service Alliance of Canada ("the bargaining agent" or "respondent"), on April 13, 2015, alleging discrimination in its representation on her behalf, contrary to s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*).

[3] In the original complaint, the complainant named the component of the bargaining agent that she dealt with, the Government Services Union ("GSU"), and Charles Carrière, the shop steward who had represented her in a series of negotiations with her management that had led to the signing of a memorandum of agreement ("MOA") meant to resolve a number of workplace issues.

[4] One month after signing the MOA, the complainant filed her complaint, alleging that the MOA deprived her of her rights and blaming the GSU and Mr. Carrière for not defending her rights sufficiently.

[5] At the hearing, the complainant stated that her complaint was in fact against the whole of the bargaining agent. The bargaining agent made no objection, and at the hearing defended its position of having provided fair representation. For this reason, the style of cause will show simply the bargaining agent as the respondent.

[6] I agreed to the complainant's request to seal documents related to her medical condition and to unproven allegations of poor performance. The bargaining agent did not object. These documents are not essential to understanding this decision, and,

after hearing the complainant's treating psychologist, I was satisfied that their publicity would be harmful to her full recovery.

[7] The MOA and its two draft versions will also be sealed. The MOA was protected by a confidentiality clause. For the purposes of the hearing, it was important to know its terms, which will be discussed in broad strokes in this decision. Its details are to remain confidential, according to the will of the parties to it.

[8] In accordance with the open court principle and following the "Dagenais/Mentuck" test (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76), the sealing of documents will be ordered only when disclosing them would cause harm that would significantly outweigh the benefits of their full disclosure (see *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70). The Supreme Court of Canada reformulated the Dagenais/Mentuck test in the following terms in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41:

…

> *A confidentiality order … should only be granted when:*
>
> *(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

…

[9] In that case, the Supreme Court adopted the stance that a confidentiality order may be necessary to protect the parties' interests. The confidentiality order ensures that documents will be disclosed to the other party and to the decision maker, with the security that they will not be publicized at large. Without that guarantee, they might not be disclosed at all, thus hampering the judicial process.

[10] At the same time, the open court principle must be kept in mind. For that reason, if a confidentiality order is made, its breadth should be kept to a minimum, enough to preserve the interests of a party without preventing the public from

understanding what is being decided. The Supreme Court emphasized that the risk posed by public disclosure must be serious.

[11] In *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, the Supreme Court specifically dealt with the broadcast of an exhibit, which was somewhat analogous to the public being able to view exhibits contained in a proceeding record. That case concerned the Canadian Broadcasting Corporation's request to broadcast a video statement made by an accused. The Supreme Court stressed in that case the vulnerability of the accused when it upheld the lower court's judgment to prohibit the broadcast.

[12] I believe that disclosing the medical documents and unproven performance allegations would cause significant harm to the complainant, given her health and the testimony of her treating psychologist. I also believe that in the interest of labour relations, the confidentiality of settlement agreements should be preserved. Therefore, I ruled at the hearing that the documents related to these matters would be sealed.

II. Summary of the evidence

[13] The complainant presented her evidence and called two witnesses, her treating psychologist, Dr. Rebecca Nemiroff, and Bonnie McNamara, a former work colleague. The bargaining agent called one witness, Mr. Carrière, whose role was described earlier in this decision.

[14] The complainant was first hired at Public Works and Government Services Canada (PWGSC) in September 2011 as a casual employee. Her performance was excellent, according to her and to an informal performance document from PWGSC. In February 2012, she was hired as an indeterminate employee and was subject to a 12-month probation period. From that moment on, conflicts developed with her supervisors and managers. The complainant testified that management created a stressful situation for her, which made it impossible for her to perform her duties and exacerbated a lifelong condition of dyslexia, which she had until then managed satisfactorily with various coping mechanisms.

[15] From October 2012 to February 2013, and again from May 2013 to March 2015, the complainant was on disability leave, for which she received disability benefits from Sun Life Financial, the federal government's workplace insurer. During her leave, she

worked with several professionals to overcome the effects of a workplace that had destroyed her self-confidence.

[16] In the fall of 2014, the complainant, Sun Life, and her treating practitioners seemed to agree that a return to work would be feasible before the two-year mark arrived in March 2015. In her testimony, the complainant spoke at first of the urgency to get back to work before that date, since Sun Life had talked of ceasing the disability payments after two years. At the end of the hearing, when I allowed her to reopen her evidence following the respondent's evidence, the complainant seemed to imply that in fact there had been no urgency and no need to take the measures that were taken to ensure her return to work.

[17] I believe that the first version of her testimony is more realistic, for several reasons. First, that was her initial testimony; second, Mr. Carrière, who was present throughout that return-to-work period, testified to the complainant's eagerness to have the secondment work out; third, there were the email exchanges in late 2014 and early 2015 between the complainant and the bargaining agent, urging it to help her ensure that the employer would agree to a secondment. Finally, the complainant went to considerable lengths to secure a secondment that was to start at the beginning of March 2015.

[18] In a note dated November 28, 2014, and again in a note dated March 10, 2015, Dr. Nemiroff insisted on the importance for the complainant not to return to the same workplace, as doing so would put her at great risk of relapse. The March 2015 note specifies other measures of accommodation, but the most important one, and the only one in the November 2014 note, is clearly for the complainant not to return to the same workplace.

[19] The complainant testified that because of this recommendation, she actively sought in the fall of 2014 a secondment or deployment elsewhere in the public service. She also testified that she received no help with it from the bargaining agent and that she had to take care of all the details and formalities by herself. She did secure a secondment at Shared Services Canada (SSC) that was scheduled to start in early March 2015. However, she was still on disability leave, and she needed PWGSC's approval both for the return to work and the secondment.

[20] Mr. Carrière is a shop steward for GSU Local 70055 at the complainant's PWGSC workplace. He testified that her case was referred to him sometime in September 2014. The issue, as he saw it, was helping the complainant return to work.

[21] According to his testimony, doing so involved mainly dealing with the employer's labour relations officer. Mr. Carrière said that he often dealt with labour relations officers since that was the most effective way to deal with issues that arose in the workplace; dealing with those officers often had more impact than dealing with managers.

[22] On November 2, 2014, the complainant made a complaint under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *CLC* complaint"), pursuant to s. 20.9 of the *Occupational Health and Safety Regulations*, (SOR/86-304). She had reported incidents of harassment to her employer, which, after an investigation, had dismissed the allegations. In her *CLC* complaint, she detailed all the events, starting in November 2011, which had led to her disability leave because of the employer's alleged harassment.

[23] Mr. Carrière testified that he was aware of the *CLC* complaint and that he had received three calls from the investigating officer. He explained that new management at PWGSC was taking the violence and harassment provisions of the *CLC* very seriously and that it was in the process of implementing several related measures. As to the *CLC* complaint, Mr. Carrière recalled only that the officer had educated him about the provisions, but he added that this did not particularly help his case, which was simply returning the complainant to work. He was content to let the separate process continue under the Labour Canada officer's direction.

[24] The *CLC* complaint led to an "Assurance of Voluntary Compliance" (AVC), which is a document by which the federal Minister of Labour recognized the need for the employer to investigate further the complainant's harassment allegations. Subsection 20.9(2) of the *Occupational Health and Safety Regulations* provides as follows: "If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible."

[25] The employer was advised of the AVC on February 5, 2015. It had a work plan attached that provided for the following actions (with target dates for completion ("TDC")):

> *The employer will request that the employee provide detailed allegations, including for example, dates, names, facts, witnesses, etc.* [TDC]: *February 20, 2015*.
>
> *Management to prepare fact-finding questions to obtain relevant details and to communicate with employee to discuss concerns and determine what resolution options can be agreed upon.* [TDC]: *March 6, 2015*.
>
> *If the matter is unresolved, the employer shall appoint a competent person to investigate, as per the Canada Occupational Health and Safety Regulations 20.9(3).* [TDC]: *March 20, 2015*.

[26] In the end, the work plan was not carried out, as the process of negotiating the complainant's return to work took over and eventually superseded the *CLC* complaint, as will be explained later.

[27] The complainant also filed a complaint on October 16, 2013, with the Canadian Human Rights Commission (CHRC), alleging that the employer had discriminated against her. The CHRC dismissed the complaint following an investigation that concluded on December 5, 2014, on the grounds that the employer had met its accommodation obligations.

[28] Mr. Carrière testified that a mediation process was set up, with the agreement of both the complainant and the employer, to facilitate her return to work. Sun Life was pushing for a return to work, and so was the employer. However, the employer did not see the need for additional accommodation, which for Mr. Carrière consisted of returning the complainant to work in another workplace. Mr. Carrière repeated several times that not only did he think it was advisable to follow the psychologist's advice, he was also convinced that if the complainant returned to her initial workplace, she would be terminated within the remaining probation period. He insisted on the fact that probationary employees have no protection against the employer deciding to terminate them.

[29] The complainant's probation period, which started when she commenced permanent employment in February 2012, had been paused because of her need for accommodation, revealed to the employer in October 2012, and because of her leaves of absence. Under Treasury Board rules, the employer has the obligation to ensure a proper accommodation is in place before commencing or continuing the probation period, depending on when it is informed of accommodation needs. According to

PWGSC's calculation, the complainant had still 20 weeks left in her probation period. The complainant maintains that PWGSC knew, or should have known, of her accommodation needs as soon as she started her permanent employment.

[30] Before the first mediation session on February 26, 2015, the complainant indicated to Mr. Carrière that she disagreed with the choice of mediator, since he had already been involved in a prior informal conflict resolution process between the complainant and PWGSC. She said she no longer trusted this mediator. Mr. Carrière responded that since time was of the essence to ensure the secondment, and since this mediator had an excellent reputation, he was willing to trust him to get the best possible deal for the complainant. The signatures of the complainant, Mr. Carrière, and the mediator all appear on a document entitled, "Agreement to participate in mediation", and I take it to mean that the complainant accepted the mediator, despite her misgivings.

[31] At this first mediation session, the employer proposed two options to the complainant: returning to work in her previous PWGSC workplace, or resigning from PWGSC after completing a secondment or a deployment.

[32] In an email sent the day after the mediation session, the complainant accepted option 2 — secondment or deployment with resignation if the secondment were not renewed or a deployment did not occur. She sought to have her performance assessments and probationary period excluded from any agreement, leaving it to the host department (whether secondment or deployment) to deal with her performance assessment. She also sought to be notified of the resignation six weeks in advance. Finally, she asked for the employer to sign the secondment agreement immediately.

[33] The employer refused those terms, and a second mediation session was organized. This time, it led to the MOA, the terms of which led to the present complaint.

[34] The second mediation session was held on March 12, 2015, again with the same reluctance-inducing mediator. Between the first and second mediation sessions, the complainant and PWGSC exchanged a great deal of correspondence.

[35] The first mediation session was held on Thursday, February 26, 2015. The complainant sent her offer on February 27. Mr. Carrière, who was leaving for a week-long vacation on February 28, nevertheless took the time to answer the complainant and advised her to avoid communicating with PWGSC in his absence. She claims that she never knew he was on holidays until PWGSC informed her on March 10 that his first available date for mediation would be March 12 (he took a week of vacation followed by three days of training from March 9 to 11).

[36] While Mr. Carrière was away, the complainant confirmed her gradual return to work in her secondment position with the manager at Shared Services Canada. The manager at PWGSC did not agree that the secondment was all arranged, and stated that this would be discussed at the second mediation session. The exchange of email between Mr. Carrière and the complainant just before the second mediation session was as follows:

> [March 9: the complainant to Mr. Carrière:]
>
> *Charles, you told me my secondement* [*sic*] *was being approved?*
>
> [March 10: Mr. Carrière to the complainant:]
>
> *Hi Kelmany,*
>
> *We are going to meet on Thursday, as soon as I get more info I will let you know.*
>
> *I would like to meet at least a half hour prior to meeting with the employer.*
>
> [March 10: the complainant to Mr. Carrière:]
>
> *Fine. Thank you. There is zero discussion about resigning. If they can't deal with this situation in a mature manner than please let me know and I will not be attending. Thanks Charles.*

[37] Before Mr. Carrière's return, the complainant wrote to the bargaining agent as follows on March 3, stating that she would wait for him to continue negotiating with the employer:

> *… I have decided to contact the hiring manager and delay the secondement* [*sic*] *and await Charles* [*sic*] *return since I enjoy working with him. I hoped someone else who knew what is happening in my case was on "call" in his absence*

> *but it appears I was mistaken.*

[38] Mr. Carrière testified that the complainant appeared alert and energetic for the second mediation session and keen to get the matters settled so that the secondment agreement would be signed (it was signed on that day). She testified on the contrary that she was in a detached state, as she was so traumatized by having to negotiate with managers who had caused her problems, with the help of a mediator that she did not trust.

[39] Between the two mediation sessions, on March 10, 2015, Dr. Nemiroff wrote a note detailing the necessary accommodations for the complainant. No mention is made of her ability or inability to participate in mediation.

[40] On April 14, 2015, after the complainant filed this complaint against the bargaining agent, Dr. Nemiroff penned another note, advising against mediation and stating as follows:

> *… At this time, it is recommended that Ms. Ross refrain from participating in voluntary mediation or facilitation connected with her harassment case due to her medical condition and its associated limitations (as per the medical document provided to the employer on March 12, 2015)* [dated March 10, 2015].

[41] The note adds that the stress incurred would be harmful to the complainant. In cross-examination, Dr. Nemiroff was asked why the recommendation had not come earlier, in the March 10 note. She answered that she could not foresee then the distress that the mediation would cause. Again in cross-examination, she stated that it would not have been apparent in March that the complainant was unwilling to participate.

[42] Mr. Carrière testified that the mediation took a full day, with a lot of back and forth. He was alone with the complainant for long periods and tried his best to explain to her the different clauses of the MOA and their meaning. Throughout the mediation, the complainant appeared to understand, although some things were upsetting to her. She testified that in fact she had little recollection of that day and that she had been in a fog. Dr. Nemiroff spoke of “dissociation”. Mr. Carrière did not note anything unusual in her behaviour or reactions.

[43] At the end of the day, the parties finally agreed that all was settled. According to Mr. Carrière, there was a spontaneous sigh of relief, accompanied by the beginning of a "high-five" gesture. However, the complainant piped up that the secondment agreement had still not been signed. This was then done, and that was the end of the session.

[44] The complainant started her secondment the following Monday. Mr. Carrière sent her an email wishing her a happy return to work. The complainant responded at the end of the day with the following: "Thank you. It was a good day. Question: can we get our union component to read the document they got me to sign to make sure it was all legal?"

[45] The complainant was profoundly unhappy with the MOA. The main points of dissatisfaction were the provisions on the following topics: renouncing any grievance or complaint against PWGSC related to her employment with it, withdrawing the *CLC* complaint, not pursuing the CHRC complaint, and agreeing to resign from PWGSC in the event the secondment was not renewed and no deployment occurred. The other sticking point was the 100 probationary days that remained. The MOA provided that they would be confirmed in writing to the new organization in the event of a deployment.

[46] Mr. Carrière testified that he had explained to the complainant during the mediation that these were normal conditions in the context of probationary employment to obtain a secondment.

[47] At the hearing, the complainant testified that she understood these conditions to mean that she would never again be able to grieve any action of a public service employer, to complain under the *CLC*, or to complain to the CHRC. Mr. Carrière testified that he had explained to her that the MOA concerned only the actions (whether grievance or complaint under the *CLC* or to the CHRC) related to her employment with PWGSC.

[48] The secondment started on March 16. On March 27, Mr. Carrière emailed the complainant a reminder that she needed to retract all complaints against PWGSC by the end of the day, as the MOA stated that it would be done within 10 days of the start of the secondment. Mr. Carrière added the following: "Let me remind you that if the agreement is not followed the employer will be in a position to void the agreement

based on breach of contract."

[49] On March 28, the complainant replied to the email and stated that the letters of retraction were ready to be sent but that in fact, by not implementing the secondment agreement properly, the employer risked being in breach of contract. Pay had still not been instituted, as of March 27, and the accommodation equipment from PWGSC had still not been transferred to the complainant's workstation at SSC. She wrote as follows:

> *I patiently await their compliance since I am fit to work and I cannot do so if I am sitting at a cubicle at SSC with no computer, no phone and no email address. They have not implemented my secondement [sic] so do not threaten me about breaching anything since they have not done their part.*
>
> [Emphasis in the original]

[50] Mr. Carrière answered as follows on March 30:

> *Hi Kelmany,*
>
> *For all administrative questions … please contact Pascal* [manager at PWGSC and signatory of the MOA]. *As for question 2 you must speak with Micheline from disability management.*
>
> *As for the complaints that must be retracted they are due 10 days after you sign the agreement which was on the 12 of March.*
>
> *This will be my last email to you since you are with SSC now you must deal with the local there.*
>
> …

[51] The complainant immediately sought further help from the bargaining agent. The same day, she received a response from Stephanie Ehler from the bargaining agent, who assured her that she would find out who could support her at SSC.

[52] On March 31, Craig Spencer, another GSU representative, wrote to the complainant to confirm that she was still with the GSU but that she was with a different local. He also stated that all local officers had sworn an oath of confidentiality, implying that she could discuss concerns about the MOA with her new local representative. The same day, Ms. Ehler emailed the complainant again with the

number and contact information of her new local as well as the names of the local president and the regional vice-president responsible for the local.

[53] The complainant called Ms. McNamara as a witness. She is a long-time public service employee, and she testified that she had worked in the same office as the complainant. According to her testimony, the atmosphere was rather toxic. She had had a health problem that had led to discipline. Thanks to the bargaining agent's intervention, specifically that of Mr. Carrière, the problem had been resolved.

[54] The complainant wanted to stress that no MOA had been necessary to resolve Ms. McNamara's health-related problem. I explained to the complainant at the hearing that unfortunately I could give little weight to Ms. McNamara's testimony. In fact, I give it no weight at all. I am certain that she testified in good faith and that she told me the truth as she perceived it. However, I have no idea what the employer's version would be; nor do I have a complete picture of the context. For those reasons, I can draw no conclusions from the facts described by Ms. McNamara.

[55] This complaint is against the bargaining agent. If anything, Ms. McNamara's testimony about the bargaining agent was rather favourable. However, I cannot compare how the bargaining agent acted for Ms. McNamara to the way it dealt with the complainant, as their employment situations were entirely different.

[56] On April 13, 2015, one month after signing the MOA, the complainant filed her complaint with the Board. The complaint was essentially that the MOA had deprived her of her rights as an employee and that she had felt coerced into signing it.

III. Summary of the arguments

A. For the complainant

[57] The complainant opened her argument with the principles enshrined in the *Canadian Charter of Rights and Freedoms* (*The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11) and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), which are that there is a fundamental right to the dignity of the person and that it includes the right to make decisions.

[58] The complainant argued that at the time the MOA was signed, she was not fit to consent to or to sign it. The respondent failed her by not listening to her and instead forging ahead with the MOA. Despite medical reports from the treating specialist, the

respondent simply did not hear the complainant say "No" to the mediation and the MOA process.

[59] The complainant argued at length that despite Mr. Carrière's opinion that she risked termination on probation if she stayed with PWGSC, there was no evidence of it. Had she been terminated, she would have had the right to grieve it, either as a rejection on probation or as a termination since according to her, her probation period was finished. I asked her a question directly on the evidence, as I had understood that the probation had been stopped on October 2012, when she had disclosed her dyslexia to the employer. She replied that she had returned to work from February 2013 to May 2013, at which time she had completed her probationary period. Had she grieved her termination, the Board could have found discrimination.

[60] Even if her probationary period was not complete, had she been rejected on probation, the Board could still have found in her favour. She cited to that effect a document on the website of the Professional Institute of the Public Service of Canada that mentioned the Public Service Staff Relations Board's decision in *Dhaliwal v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 109. In that decision, the adjudicator found that the rejection on probation was solely attributable to the employee's use of sick leave and family related leave. The adjudicator ordered his reinstatement.

[61] The complainant referred to the AVC process to show that an independent third party had found evidence of harassment in the workplace and evidence that the employer had not done enough to respond to the harassment complaint. By signing the MOA, the respondent deprived her of protection and did nothing to solve the harassing workplace situation.

[62] The complainant invoked contract law to argue that the MOA was not enforceable. What she received from the MOA was insufficient consideration, given all the rights she had been forced to renounce. Her consent was deficient, as she had not agreed to the mediator and had clearly said so to Mr. Carrière. The MOA had given rise to her complaint denouncing it as unconscionable. Therefore, it should be struck down.

[63] The complainant emphasized the Board's jurisdiction to hear and decide cases under the *CHRA* and to award damages. She referred in particular to s. 226 of the *FPSLRA*.

[64] According to the complainant, the respondent made her sign the MOA, thus negotiating with PWGSC to deprive her of her rights under the *FPSLRA*. Under that legislation, she could have grieved PWGSC's actions. Through the MOA, the respondent also deprived her of her rights under the *CLC* and the *CHRA*.

[65] The respondent acted in bad faith by contracting the complainant out of the collective agreement.

[66] In sum, the MOA became a barrier to accommodation, as it deprived her of her rights and recourses. By its nature, it is a confidential document, allowing employers and bargaining agents to circumvent the protections of human right legislation and collective agreements. The Board should denounce the MOA and annul it.

B. <u>For the bargaining agent</u>

[67] The bargaining agent representative started her arguments by responding to some comments the complainant had made in her arguments.

[68] The bargaining agent very much disagreed with the complainant's position that she had not been involved in the decision-making process that led to the MOA. In fact, the evidence pointed in the opposite direction. She made several suggestions to the draft, some of which were accepted (such as not using the word "settlement").

[69] The MOA did not bargain the complainant's rights away. There was no issue of grieving the rejection on probation, which had not occurred. There was no renouncing of employee rights forever. In other words, the complainant had greatly exaggerated the MOA's negative impact and harm.

[70] The bargaining agent also took issue with the fact that the complainant repeated a number of times that there was no evidence that her employment would have been terminated had the MOA not been negotiated. Mr. Carrière testified that she had been concerned about rejection on probation, as had he. He had studied the jurisprudence and had concluded that it was very rare that the PSLREB or the predecessor Public Service Labour Relations Board ("PSLRB") overturned a rejection on

probation. Of course, had she been rejected, the respondent would have helped with a grievance, but that was really not the preferred solution.

[71] The issue was not whether the harassment complaints had been resolved but rather the role Mr. Carrière had played in the MOA.

[72] Striking down the MOA would place the complainant back in her job, where nobody, including her, wanted her to be.

[73] The complainant argued that her treating specialist had said she was not fit to participate in the mediation sessions and that the respondent did not listen to that argument. That was not quite accurate. Dr. Nemiroff had written the letter stating that the complainant should not participate in mediation after the MOA was concluded, based on the complainant's recall of the mediation session.

[74] The achievement of the MOA had been to remove the complainant from a work environment she considered toxic, in keeping with Dr. Nemiroff's recommendation. Mr. Carrière stated that he was proud that he had helped the complainant reach her goal, which had been to negotiate a return to work in a secondment position.

[75] The complainant stated a number of times that "No means no". However, in the end, she did not say "No"; she signed the MOA and had participated in its drafting. Mr. Carrière testified that he saw her as fully engaged in both mediations. There had been time to discuss the content of every clause of the MOA.

[76] The issue that the Board has to decide is whether Mr. Carrière's representation was done in bad faith, was discriminatory, or was arbitrary; it is not to decide whether the MOA was good or bad. Mr. Carrière honestly thought he had achieved the best possible result for the complainant and believed that she thought so too.

[77] The respondent's representative then reviewed the case law the respondent considered applicable to this case, which I shall review in my reasons. To conclude on the respondent's arguments, it provided compassionate representation and represented the complainant diligently. She failed to show how the representation provided by the respondent, and Mr. Carrière specifically, was in bad faith, discriminatory, or arbitrary. For these reasons, the complaint should be dismissed.

C. Rebuttal

[78] I allowed the complainant to provide her rebuttal in writing. It was received the day after the final day of the hearing. In it, she disputes the respondent's interpretation of the evidence presented at the hearing.

[79] The complainant disputes the fact that Mr. Carrière did not know that she was not fit to attend the mediation. I accept Mr. Carrière's testimony. This is not to deny the stress that the complainant was going through but is simply to say that I accept that her participation in both mediations, her exchanges with PWGSC between the mediation sessions, and her signing of the agreement to mediate and then the MOA all were taken at face value: she was participating.

[80] In her rebuttal, the complainant adds a medical note dated January 24, 2015, to show that she was unfit. The note is inadmissible, as evidence is closed. However, I will say that had I found the evidence of this note admissible, it would not have changed my decision. The note, addressed to Mr. Carrière, speaks of a medical recommendation to avoid high stress, and consequently, states that the work accommodation should take this into account. It would appear that Mr. Carrière did not see it as a barrier to mediation, and neither would I. The complainant was extremely eager to have the secondment agreement signed, and not signing it might have also caused her considerable stress.

[81] The complainant wants to correct the impression that Mr. Carrière and the respondent helped with the secondment arrangement. I agree with her that they did not. From the evidence I heard at the hearing, it was clear in my mind that the complainant had done all the work to arrange the secondment. Mr. Carrière's contribution was negotiating the MOA, which was an essential condition for PWGSC to sign the secondment agreement.

[82] The complainant states that she does not recall all the phone calls Mr. Carrière supposedly held with her. Obviously, I have no evidence of the phone calls, except Mr. Carrière's testimony. I believe him, not because he stated he made many phone calls, but because he was well aware of the case, was well aware of all the negotiations that occurred, and was well aware of the complainant's needs and concerns, despite her opinion. As a matter of fact, as I reproduced earlier in this decision, she asked to continue to be represented by Mr. Carrière in the negotiations, as she enjoyed working

with him. That comment, being contemporaneous with the events at issue, seems to me rather convincing as to Mr. Carrière's engagement.

[83] Finally, the complainant stresses how the MOA deprived her of her rights. As I will explain further on, I do not come to the same conclusion.

IV. Reasons

[84] Before considering the arguments of the parties to decide this matter, I must make a comment about erroneous statements that both parties made at the hearing. Mr. Carrière repeated a number of times that probation is the only circumstance in which the employer can terminate an employee for cause. I believe he meant the contrary, as stated in the *FPSLRA* and the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), which is that probation is a situation in which the employer can end an employee's employment, without cause, as long as there is a reasonable justification, such as poor performance or simply unsuitability. Discrimination is not a reasonable justification.

[85] For her part, the complainant misunderstood several aspects of the MOA. Mr. Carrière testified that they had all been explained in the course of the mediation process. I find that the bargaining agent did not fail to explain to the complainant what the MOA meant. The misunderstanding could have stemmed from many different sources, as it probably did, including the complainant's nervousness about losing her job, her fragility on returning to work after a medical leave due in large part to the stress she had endured in her employment, her way of processing information, and any number of other factors.

[86] These misunderstandings are a large part of her complaint before the Board, and so I believe it is important to correct them before deciding whether the bargaining agent failed in its duty of fair representation.

[87] The complainant argued that the MOA closed the door for her with respect to several recourses that should have been available but were not, because of the MOA, including the AVC process under the *CLC*, addressing a complaint to the CHRC, and the grievance procedure.

[88] It is true that the MOA specifically states that the complainant is renouncing any recourse under those three mechanisms, but this is specifically tied to employment at PWGSC. The AVC could not be implemented if she was no longer in the workplace; the human rights complaint had already been dismissed. As to the grievance, it is unclear what it was supposed to deal with beyond harassment (AVC) or discrimination (the human rights complaint). If it was the forced resignation, there would have been little to decide, since it never came to pass.

[89] The issue in this case can be stated as follows: Did the bargaining agent breach its duty of fair representation as defined in s. 187 of the *FPSLRA*? That is, did it act in a manner that was arbitrary, discriminatory, or in bad faith in the representation of the complainant? From the evidence I heard, it did not.

[90] The test to determine whether the bargaining agent breached its duty of fair representation was first stated by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. The parties agreed that this was the starting point of the analysis. The test is formulated as follows at 527:

> *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.*

[91] Although *Gagnon* is a case in which grievances could be brought only by a union, which is not the case under the *FPSLRA*, subsequent decisions of the PSLRB and of the PSLREB have found that bargaining agents are obligated to consider requests for representation and to decide whether to represent employees and to what extent, after a serious and diligent study of each matter.

[92] In this case, there is no question that the respondent took an active role in helping the complainant return to work. Her complaint is that her concerns were largely ignored and that Mr. Carrière's behaviour manifested discrimination, bad faith, and arbitrariness. Before considering these three points, I wish to briefly consider the case law presented by the parties that I find relevant to the issues to be decided.

[93] The complainant cited *Jutras Otto v. Brossard*, 2012 PSLRB 15. In that decision, the member of the PSLRB simply decided the remedy following an earlier decision (2011 PSLRB 107), in which he had found that the bargaining agent had failed its duty of fair representation. The facts in the earlier decision established that two bargaining agent representatives had mishandled a harassment grievance as well as a grievance dealing with rejection on probation. The PSLRB found that the two representatives' actions amounted to such negligence that it could be considered arbitrary.

[94] The facts in *Jutras Otto* are quite different from the present case. In that case, the bargaining agent did not do any follow up. Although the complainant in this case had made a harassment complaint, Mr. Carrière was not charged with it. He understood that the harassment was being dealt with through the *CLC* process. His mission, as he understood it, was to help the complainant return to work. He worked diligently with her and with PWGSC representatives to achieve that goal. I heard no evidence of any negligence on his part, and from the documentary evidence, there were several exchanges from September 2014 to March 2015.

[95] The complainant argued that the decision in *Taylor v. Public Service Alliance of Canada*, 2015 PSLREB 35, supported her argument that the respondent had failed to support her against PWGSC. The complainant in *Taylor* had been demoted following an investigation that had found that she had harassed another employee. The PSAC at the time had a policy that it would not represent an employee to dispute a harassment finding; it would represent that employee only with respect to the quantum of the ensuing penalty. The PSLREB member in *Taylor* concluded that this policy was

arbitrary and that it left the complainant in that case without bargaining agent support if the harassment charges were in fact unfounded. Therefore, he concluded s. 187 of the *PSLRA* had been breached.

[96] In the present case, the complainant was not left in a lurch because of a failure by the respondent to act on her behalf to secure her return to work. Mr. Carrière actively sought an agreement with PWGSC to allow her to return to work. According to both the complainant's and Mr. Carrière's testimonies, that was her primary goal. It is therefore not a case, as in *Taylor*, of deliberately ignoring the complainant's needs.

[97] The complainant cited *Dhaliwal* and *Leonarduzzi v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-27886 (19990628), [1999] C.P.S.S.R.B. No. 97 (QL) (application for judicial review dismissed in 2001 FCT 529), as instances in which the Board could take jurisdiction in cases of rejection on probation. I agree that the Board may consider the underpinnings of a rejection on probation; nevertheless, in general, rejection on probation is covered by the *PSEA*, and the Board has no jurisdiction, save in exceptional circumstances. Whether the complainant's case would have been one of those is a matter of conjecture. Mr. Carrière can hardly be faulted for his prudent assessment that it is better to avoid rejection on probation altogether because the case law tends to confirm the employer's decision.

[98] The respondent included in its authorities *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44, which is in certain regards very similar to the case before me. In that case, Mr. Sayeed disagreed with an MOA that the employer and the bargaining agent in that case had negotiated to resolve his outstanding dispute with his employer.

[99] Mr. Sayeed had filed five grievances against the employer, three about performance appraisals, one about a disciplinary letter, and one about a one-day suspension. The MOA would have restored the pay and benefits for the one-day suspension, in exchange for Mr. Sayeed withdrawing all grievances. Mr. Sayeed was profoundly dissatisfied, as he considered that his complaints against the employer were not being addressed. He truly believed the bargaining agent was depriving him of his rights under the legislation and the collective agreement.

[100] For its part, the bargaining agent had done its best to negotiate the best deal, taking into account the various grievances and the workplace situation. When Mr. Sayeed refused to sign the MOA, many exchanges ensued between him and the bargaining agent, which finally ceased its representation of him.

[101] The Vice-Chairperson who heard that matter ruled that the bargaining agent had not breached its duty of fair representation. It was clear that the employee and the bargaining agent had very different views on the manner of pursuing his rights. The bargaining agent worked diligently and in good faith to ensure the best representation as it saw it, in the interest of the employee, who saw it otherwise. That in itself was not sufficient to find a breach of s. 187 of the *PSLRA*.

[102] In *Nowen v. UCCO-SACC-CSN*, 2003 PSSRB 98, correctional officers had filed individual grievances about changes to their work schedules that related to the interpretation and application of their collective agreement and therefore required the support of the bargaining agent for both the grievance procedure and the referral to adjudication. Just before the adjudication hearing, the bargaining agent settled with the employer. Some of the grievors were unhappy with the terms of settlement, about which they had not been consulted. They therefore filed a complaint against their bargaining agent for a breach of the duty of fair representation.

[103] The Public Service Staff Relations Board ("PSSRB") found that there had been no breach. The bargaining agent had not acted in bad faith or in a discriminatory or arbitrary way. It had sought the best solution to a problem involving the grievors. The PSSRB member stated that it was not for him to decide whether proceeding to adjudication would have given the grievors a more a favourable outcome. His only task was to determine if the bargaining agent had fulfilled its duty of fair representation. According to his assessment, it had.

[104] *Bialy v. Gordon*, 2016 PSLREB 87, is a more recent case where the bargaining agent again chose to settle a number of grievances on behalf of many grievors. As in *Nowen*, the examination of the bargaining agent's action is not about results but rather whether the bargaining agent acted in a serious and thoughtful manner and took into account its members' interests.

[105] In that case, the grievors were kept informed of the settlement negotiations. Ms. Bialy was unhappy with the settlement and with the fact that it put an end to any further recourse with respect to her work description and classification. It was not a curtailment of her rights but a reasoned solution to a problem, which offered her certain benefits. In the end, the analysis centred on the bargaining agent's decision-making process, which was found to be solid. Therefore, there was no breach of s. 187 of the *PSLRA*.

[106] Essentially, the complainant's argument is that Mr. Carrière, as an agent for the bargaining agent, negotiated a bad deal with the MOA. The respondent's defence is that Mr. Carrière did the best he could in the circumstances and that he certainly carried out his duty of fair representation.

[107] Was there discrimination? There seemed to be two aspects to the discrimination argument. One was that the complainant had not been protected against harassment. In fact, Mr. Carrière was aware that she perceived her work environment as toxic, and he took to heart Dr. Nemiroff's main recommendation, which was that the complainant should not return to her initial workplace. That main accommodation was certainly front and centre in Mr. Carrière's strategy.

[108] The other component of the discrimination was the fact that her stress level and psychological state prevented her from truly participating in negotiating the MOA. The respondent should have seen it and refused to engage with PWGSC, despite the fact that the complainant was pushing to have her secondment agreement approved.

[109] Mr. Carrière testified that he saw someone who was fully engaged in the negotiation process. I have the evidence of the emails from the complainant to PWGSC following the first mediation session. I also have evidence of her exchanges with Mr. Carrière about the secondment and about the urgency of coming to an agreement with PWGSC.

[110] Dr. Nemiroff stated only after the fact that the complainant should not engage in mediation. She said nothing to that effect in March 2015, when negotiations were underway. She admitted in cross-examination that it would have been impossible to see that the complainant was unfit for mediation or incapable of signing an agreement.

[111] If the treating specialist did not see the problem before the mediation sessions and the signing of the MOA, one can hardly blame Mr. Carrière, a layperson with no training in psychology, for not seeing it.

[112] Therefore, I cannot find that there was discrimination.

[113] Did Mr. Carrière act in bad faith? I find that he acted diligently and that he followed through in his representation of the complainant to achieve her goal of securing PWGSC's signature on the secondment agreement. I also find that he was honest and open about the process and the MOA and that he sought to explain the compromises that are necessarily part of any negotiation.

[114] The complainant seems to believe now that another solution would have been preferable and that there should not have been a clause in the MOA on resigning from PWGSC. Again, I believe that Mr. Carrière made the best of a difficult situation. I also think he was convinced that rejection on probation should be avoided at all costs. As I stated earlier, this was a prudent assessment and certainly was not done in bad faith.

[115] The complainant's situation was not similar to *Dhaliwal*, despite her argument that she was forced to sign the resignation letter because of her use of sick leave, for which there was no evidence. There was evidence of PWGSC's dissatisfaction with her work performance (I stress that I am not pronouncing on whether this was justified or not; I am not seized of that matter).

[116] Were Mr. Carrière's or the respondent's actions arbitrary? A great deal of effort went into negotiating with PWGSC's labour relations officer, organizing and participating in the mediation, drawing up the MOA, and ensuring that a follow-up took place after the MOA was signed. I cannot see any negligence or arbitrariness in the way the respondent represented the complainant.

[117] In her arguments, the complainant raised the issue that the probationary period had not been calculated properly, that she had in fact completed her probationary period by March 2015, and that it was completely unfair to include a period of 100 days of probation in the settlement agreement, thus depriving her of the rights of an indeterminate employee.

[118] I did not hear any evidence from PWGSC on this matter, and therefore, it is difficult to determine if the calculation of 100 days of probation was accurate. However, I note that the complainant worked full-time from February 2012 to October 2012 and then went on disability leave until mid-February 2013, when she began a gradual return to work. She resumed a full-time schedule on March 25, 2013, and started extended sick leave on May 25, 2013. While accommodation was being instituted on her return to work in February 2013, there is no information at the hearing on whether the probation period continued to be paused during this time.

[119] What I do have as evidence is that PWGSC had determined that there were still 20 weeks to go in her probation and that the complainant signed the MOA that included that information. The MOA also stated that the probationary period was suspended during the secondment and that in the event of a deployment, it would be communicated to the department offering the deployment.

[120] The uncertainty surrounding the remaining probation period prevents me from deciding whether it was fair or unfair. It seems to me that objectively, given the considerable leaves of absence when the complainant was still on probation (whatever the amount left), she benefitted from generous employment conditions.

[121] In any event, in this complaint, I am not deciding the employer's actions but rather the respondent's. As concerns the probationary period, Mr. Carrière accepted the numbers PWGSC advanced. I heard no evidence that the complainant had provided him with facts to show that the calculation was wrong.

[122] From all of the above, I cannot find that the respondent breached its duty of fair representation.

V. Conclusion

[123] In the course of her arguments, the complainant denounced the secretive nature of settlement agreements, which allow the employer and bargaining agents to circumvent the lawful protections afforded to employees by human rights legislation and collective agreements.

[124] Settlement agreements are not unlawful. They are compromise solutions that result from parties agreeing to the give-and-take of negotiations. In this MOA, the complainant, contrary to what she believes, did not lose her rights as an employee. She

simply agreed that in return for an 18-month reprieve in the probation period that seemed to be leading to a rejection on probation, she would not seek any further recourse against PWGSC, which she was leaving in any event. She would be allowed to go on secondment, and her employment in the public service would be maintained if she found another indeterminate position with another department. It seems that feelings were mutual; she considered her work environment toxic, and PWGSC no longer wished to have her as an employee.

[125] In fact, the MOA preserved the complainant's employment throughout the secondment and allowed the deployment to happen during this time. Mr. Carrière testified that Pascal Girard, the PWGSC manager who participated in the negotiation of the MOA, suggested extending the secondment period from 12 to 18 months to create a better possibility of a deployment. This was not a plan to extend the probationary period; this was a guarantee of employment pending the deployment.

[126] The MOA served to preserve the complainant's employment by allowing a secondment. The employer has no obligation to agree to a secondment, especially for a probationary employee. However, in this context, the secondment was seen as part of the accommodation and resolution of the workplace harassment complaint, by offering the complainant the opportunity to work in another workplace, away from the managers who had caused her distress. In addition, as recommended by the treating specialist, the secondment was the preferred accommodation. Because the MOA largely settled the harassment and accommodation issues, I cannot see that it deprived the complainant of her rights.

[127] The complainant had serious misgivings about the resignation that was imposed on her, but it was clear that secondment and eventually a deployment to another department offered the best solution. Several sources confirmed it: the treating psychologist, Mr. Carrière, and the complainant in her testimony and in email exchanges at the time the MOA was being negotiated.

[128] Again, the MOA served to protect the complainant's employment by removing her from her toxic workplace. (I am not pronouncing on the objective toxicity of the workplace, as I had no evidence from the employer; however, it was clear that she considered the workplace toxic and that her treating psychologist strongly recommended that she not return to it). In return for that protection, she had to cease

all proceedings against PWGSC that were related to her employment there. That is the nature of negotiation — to gain something, it may be necessary to relinquish something else. The complainant's misunderstanding of the extent to which she had renounced her rights was not the bargaining agent's doing.

[129] From the evidence I heard, I have concluded that the bargaining agent acted in good faith, without discrimination and without arbitrariness, in seeking the best solution for the difficulties the complainant had encountered at work. She had to renounce pursuing her complaints under the *CHRA* (although it is unclear what remained of her complaint, since the CHRC had dismissed it, and the deadline for a judicial review had passed) and the AVC under the *CLC*. These complaints were no longer live since she had left PWGSC. She also was committed to resigning if no further secondments or deployments arose. However, the resignation was not immediate — it was designed specifically to give her the opportunity to continue working for the federal public service, which is what occurred. The duration of the probation period was a direct result of her status, but it had not been extended. It had been suspended and was to be restarted with accommodation, as the rules provided.

[130] I want to emphasize that contrary to a comment the complainant made at the hearing, which was that standing up for one's rights only causes trouble, the opposite happened in this case, in large part due to her initiative and strength. Both the human rights complaint and the workplace harassment complaint under the *CLC* brought home to PWGSC the need to pay attention to and to find a solution to a difficult workplace situation.

[131] The complainant gained bargaining tools that were used to negotiate a solution that usually would not be open to a probationary employee. She obtained from the MOA that her employment status be maintained as long as she was successful with secondments or deployments. In other words, although she had signed a resignation letter, it would become effective only if she failed elsewhere.

[132] Probationary employees, by definition, are not generally given a second chance to prove themselves. The complainant was given that opportunity. That is the value of what the respondent negotiated for her.

[133] Although I dismiss her complaint, I do acknowledge that the negotiations and the MOA were extremely stressful for the complainant. But in the end, she overcame the obstacles and found another permanent position in the federal public service. I do believe her bargaining agent helped her achieve this, by extricating her from a workplace she could not thrive in.

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

(The Order appears on the next page)

VI. Order

[135] The complaint is dismissed.

[136] Exhibits C-2, C-8, C-9, C-10, C-33, C-34, C-35, C-36 and C-37 have been ordered sealed.

[137] Copies of documents admitted as evidence and now sealed (C-34, C-35, C-36 and C-10) appear in the Board file as part of submissions from the complainant (respectively tabs E, P, S and T to her submissions dated June 9, 2015) and will be sealed.

July 25, 2017.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board