Date: 20171002

File: 561-34-797

Citation: 2017 FPSLREB 30

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

JENNIFER MYLES

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, DEBI DAVIAU, SHANNON BITTMAN, PETER GILKINSON, AND HEATHER KOHLI

Respondents

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

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

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Raymond Lazzara

For the Respondents: Steven Welchner, counsel

Heard at Toronto, Ontario,
May 30 to June 1, 2017.

I. Complaint before the Board

[1] Jennifer Myles ("the complainant") is employed by the Canada Revenue Agency (CRA) and is a member of the Audit, Financial, and Scientific (AFS) bargaining unit, which is represented by the Professional Institute of the Public Service of Canada ("the Institute", or "PIPSC" in the quotations). The complainant is also a member of the Institute.

[2] On November 3, 2015, the Public Service Labour Relations and Employment Board (PSLREB) received a complaint from the complainant under s. 190(1)(g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) against the respondents. On June 6, 2016, the respondents filed their response to the complaint. On July 12, 2016, the complainant filed a reply to that response.

[3] The matter was scheduled to be heard between May 30 and June 1, 2017, in Toronto, Ontario, at the same time as another complaint (Board File No. 561-34-823) filed by the complainant.

[4] 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 name of the PSLREB and the title of the *PSLRA*, the *Public Service Labour Relations and Employment Board Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations Act* ("the *Act*"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

II. Summary of the evidence

A. Preliminary issue

[5] At the outset of the hearing into both this matter and file 561-34-823, I heard submissions with respect to preliminary issues. The one with respect to this complaint was an objection by the respondents to my jurisdiction to hear it on the basis that the preconditions to filing the complaint under s. 188(c) did not exist. I heard the parties' arguments and determined that I could partially uphold the objection, however, the record before me was insufficient to allow me to uphold the objection in its entirety, and I ordered that the hearing proceed, but on a limited basis. As is

set out later in this decision, the respondent later withdrew their objection.

B. <u>The complaint</u>

[6] I received three briefs of documents, one from the complainant and two from the respondents, as well as some loose documents. The briefs were marked as exhibits with the proviso that the documents they contained would be proved in the ordinary course or entered into evidence on consent.

[7] Section 57 of the *Regulations* provides that complaints made under s. 190 of the *Act* are to be filed using a particular form, Form 16, which requires completing 8 or 10 (as the case may be) sections and allows for additional pages to be attached if need be. The 10 sections require the following information:

1. The complainant's identity and contact information.

2. The identity of the organization or the persons being complained about and its or their contact information.

3. The part of the *Act* under which the complaint is being made.

4. A concise statement of each act, omission, or other matter complained of, including dates and the names of the persons involved.

5. The date that the complainant knew of the act, omission, or other matter giving rise to the complaint.

6. If a complainant is alleging an unfair labour practice prohibited by s. 188(b) or (c) of the *Act*, and if the employee organization has established a grievance or appeal procedure, the complainant is to provide the date on which the grievance or appeal was presented in accordance with any procedure established by the employee organization.

7. If a complainant is alleging an unfair labour practice prohibited by s. 188(b) or (c) of the *Act*, and if the employee organization has established a grievance or appeal procedure, the complainant is to provide the date on which the employee organization provided him or her with a copy of the decision made in that

grievance or appeal procedure.

8. The steps taken by or on behalf of the complainant to resolve the action, omission, or other matter giving rise to the complaint.

9. The corrective action being sought by the complainant under s. 192(1) of the *Act.*

10. Other matters that the complainant may feel are relevant to the complaint.

[8] Form 16 ends with a place for the complainant to sign and date the complaint.

[9] At section 4 of the complaint, the complainant set out the concise statement of each act, omission, or other matter complained of as follows: "PIPSC, President Daviau, VP Bitman, Director Peter Gilkinson and Heather Kholi continuously harassed, Bullied and discriminated against me due to my race and Ethnic origin. 190 Act [*sic* throughout]."

[10] At section 5 of the complaint, the date identified as the date on which the complainant knew of the act, omission, or other matter giving rise to the complaint was indicated as August 4, 2015.

[11] At section 6 of the complaint, the date identified as the date on which a grievance or appeal was presented in accordance with any procedure that has been established by the employee organization was also indicated as August 4, 2015.

[12] At section 7 of the complaint, the date identified as the date on which the employee organization provided the complainant with a copy of the decision in accordance with any procedure that has been established by the employee organization was also indicated as August 4, 2015.

[13] At section 9 of the complaint, the corrective action the complainant seeks under s. 192(1) of the *Act* is as follows: "Reinstate my Stewardship. Written apology and a New Policy on Discrimination due to Race. Pain & suffering and any other remedy deemed appropriate [*sic* throughout]."

[14] At section 10 of the complaint, which is for other matters relevant to the complaint, the complainant set out the following: "Continueos [*sic*] attempt to demean and exclude me from PIPSC events."

[15] Attached to the complaint are two pages of additional information, the relevant portions of which read as follows:

> *The President of the Professional Institute of the Public Service of Canada (Debi Daviau) has abused her authority, bullied, harassed and discriminated against me due to my race (Black, African Canadian), by refusing to renew my stewardship as well as continuous harassment activities since.*
>
> *Debbie Daviau, Shannon Bittman, Peter Gilkinson, and Heather Kholi have continued to harass me purely due to my race. This is a deliberate violation of the Canadian Charter of Rights and Freedom.*
>
> *In so doing, she has violated PIPSC bylaws, which clearly states that unless there has been discipline against a steward pursuant to the Discipline Policy, the renewal of a steward is usually the responsibility of the AFS Group (Auditing, Financial, Scientific). The AFS Group and the Toronto West Branch approved my renewal.*
>
> *On August 04, 2015 I received a letter from the President, stating that my steward renewal was denied. In that same letter she made unsupported allegations against me without verifying the fact or discussion the allegations with me. She also made reference to a letter I sent to her earlier complaining that her very close Vice President Bitman and her partner, Peter Gilkinsen were treating me differently and targeting me due to my race. PIPSC have yet to address my concerns. I am not aware of any behaviour that would result in such discipline.*
>
> *Her decision has adversely affected my position as the Vice President of AFS Group in the Toronto West TSO, because it required me to resign. Debbie Daviau, Shannon Bitman, Peter Gilkinson and Heather Kholi continued their harassment via emails telling me I could not attend the Ontario Steward Council held September 24, 2015. This deliberate attempt to exclude, me from attending an event that was previously planned is further proof of their harassment.*
>
> *The President and The Ontario Director through their staff proceeded to send me harassing emails in an effort to intimidate, harass, and exclude me from attending PIPSC events.*

The President, her Executive Committee and Board of Directors are all Caucasians and there are very few Black employees involved in the union, which is evident at PIPSC functions. This group have gone out of their way to demeaned, humiliate, and excluded me from various PIPS events over the past two years.

. . .

As a result of the stress and duress caused by the blatant differential treatment, bullying and harassment I have had many sleepless nights and the feeling of being excluded.

Remedies sought:

1. I be made whole and reinstated my stewardship and my position as the AFS Toronto West Vice President immediately.

2. PIPSC and the President, Debi Daviau, Vice-President Bitman, Peter Gilkinson and Heather Kholi be found to have harassed, bullied and discriminated against me based on my race by removing me from office and as such she has abused her authority contrary to the PIPSC Discipline Policy.

3. Debi Daviau, Vice-President Bitman, Peter Gilkinson and Heather Kholi be sanctioned including having financial penalties imposed and be removed from office.

4. PIPSC, Debi Daviau, Vice-President Bitman, Peter Gilkinson and Heather Kholi be subject to punitive and aggravated damages awarded to me for the humiliation I have suffered as a result of PIPSC' actions and the guilty parties egregious behaviour and abuse of authority, along with their efforts to tarnish my reputation and embarrass me.

5. Apologies in writing from Debi Daviau, Vice-President Bitman, Peter Gilkinson and Heather Kholi. PIPSC should be ordered to publish these apologies so that all members are made aware of them.

. . .

[Emphasis in the original]

[*Sic* throughout]

[16] The complainant called two witnesses, who gave testimony on May 30, 2017. On May 31, 2017, the complainant began her evidence, testifying in chief in the morning. Upon their return from the lunch break, the parties met and reached an agreement with respect to the continuation of the proceeding, and the complainant did not return to the witness box to continue her evidence.

[17] The parties agreed that the matter would proceed by an agreed statement of facts (ASF), which they presented to me both orally and later in writing. The ASF were as follows:

1. The complainant applied to renew her stewardship.
2. President Daviau declined to renew her stewardship.
3. At the time the Institute did not have a policy which allows for recourse for all individuals whose stewardship has been denied.
4. The complainant will argue that her complaint, 561-34-797 should be allowed based on the failure of the Institute to provide a recourse policy for individuals whose stewardship has been denied.
5. The complainant will not make any other arguments in support of complaint 561-34-797.
6. The PSLREB is not permitted to consider any facts other than those set out above.

[18] I confirmed with the parties that the paragraph that states that the PSLREB is not permitted to consider any facts other than those set out in the ASF meant that I was to disregard any documents put forward in evidence in any documents proffered by the parties to that point and that I was to disregard all the oral evidence that I had heard from the witnesses.

[19] On the basis of the ASF the respondent's withdrew their objection to jurisdiction.

III. Summary of the arguments

A. For the complainant

[20] The employer here is an employee organization. Employee organization's fight for employee rights. Part of this is natural justice. Natural justice means that whenever a decision is made it is in an objective manner.

[21] A person should be able to know what complaint is made and address those facts. A decision should be made by a panel without bias and should be held to a very high standard.

[22] The complainant was a steward, who could hold the position for up to a three year term. The position could be renewed. The process involved the filling out of a form which included the listing of activities. The process assumes that if you have done something as a steward that you will be renewed.

[23] The complainant filed a renewal form and was denied a renewal of her steward position.

[24] The complainant submits that the Institute should have indicated to all stewards what the process was; when the terms started and when they ended. The complainant's contract was extended automatically.

[25] The complainant referred me to Article 20.90 of the *Quebec* Civil Code which stands for the proposition that a contract is renewed because it was extended and there was no objection from the employer.

[26] It is offensive that Ms. Daviau waited until the term of the contract ended to fire the complainant.

[27] Ms. Daviau should have gone through a process of telling the complainant about concerns she may have had about disrespectful communication and other conduct. Ms. Daviau effectively terminated the complainant for cause; but took the position that the term was over, therefore she need not renew the complainant's contract.

[28] The actions of the respondents was very humiliating.

[29] The *Employment Standards Act* (which specific legislation was not brought to my attention) provides protection for contracts greater than a year. The PIPSC as an employer has the obligation to treat the complainant with dignity and respect and explain why she was not renewed.

[30] While the steward position is not a paying position the complainant submits is it is a paying position. There is a barter system in place; stewards get training to help them in their career as stewards and the quid pro quo is that they help members of the bargaining units when necessary.

[31] The complainant continued to work as a steward even after her term was deemed to have come to an end; therefore the contract is deemed to be continued and the contract can only be terminated in the ordinary course. She was dismissed because her fixed term was not renewed. The employer (the Institute) has to give a valid reason to justify fair reason for dismissal.

[32] The employer (the Institute) needs to investigate fully if it is dismissing the complainant and cannot do so on conjecture or rumour. "I heard. . ." is not a valid reason to dismiss someone. This is an unfair dismissal. It is a breach of natural justice to not follow a procedure. The Institute should have had an impartial person; there should have been recourse.

[33] The complainant was wrongfully dismissed. If there was gross misconduct there may be a basis to dismiss but there is no evidence of that.

[34] Sections 190, 185 and 188 all refer to discriminatory manner. Discrimination is very broad. If it was to mean 'race' it should have referred to the *Canadian Human Rights Act* ("the *CHRA*").

[35] Discriminatory means arbitrary and bad faith.

[36] The action by the Institute is discrimination because they fired the complainant with no investigation. The Institute says there is no recourse. The President decides something; this is not natural justice. It doesn't matter how the President makes the decision since it was not based on facts and there was no investigation; the complainant has no chance to defend herself.

[37] There is a suggestion that there are cultural issues; but was the complainant given any training or progressive discipline. This is what an employer should be held to.

[38] The Institute acted in bad faith because it didn't follow their own procedure. What is acceptable and not should be etched in stone; what is harassment? If you don't say good morning; that could be considered harassment.

[39] Was the complainant given a chance to be trained? Were things explained to her? She acted the way she did because of her culture; because of the way she grew up; perhaps she was expressing her point of view. She could have been able to explain her side of the story. That is the whole purpose of discipline; trying to correct behaviour.

[40] This is why we don't fire people right away. Do they need technical training? Perhaps training in interpersonal skills. The complainant gave of her own fee time; to gain insight; insight into labour law; this is why she did it; it is a contract.

[41] It is the position of the complainant that she was renewed by the Institute as a steward because her stewardship was not terminated on January 1, 2015; therefore she continued to be a steward. If her stewardship was denied, she was terminated. It is natural justice. You have to have an investigation. There was no investigation. Facts have to be disputed and a conclusion should be unbiased or perceived to be unbiased. The complainant was not provided an opportunity.

[42] The grievor was damaged, hurt and humiliated; she should get damages.

[43] The Institute should defend employees.

[44] The Institute should treat people in a dignified manner.

[45] The complainant also requests costs.

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

[46] The ASF put only the following three facts before me,:

1. The complainant applied to be renewed in her steward position.

2. Ms. Daviau, the Institute's president, denied it.

3. The Institute has no policy providing recourse to anyone whose stewardship has been denied.

[47] The parties agreed that the Board cannot look at any facts other than those articulated in the ASF, yet the complainant has not abided by that agreement. She suggested that other facts exist with respect to the renewal process, why her stewardship was not renewed, a quid pro quo process by both sides, correspondence, and the Institute's by-laws.

[48] The complainant referred to facts that were not agreed to and that were not adduced in evidence. The Board is not permitted to consider any facts other than those agreed to by the parties.

[49] The parties agreed to the three facts already set out. The complainant agreed to argue only that her complaint should be allowed based on the Institute's failure to provide a recourse policy for anyone whose stewardship has been denied. As part of the ASF, she agreed to not make any other arguments. She not only breached the ASF by making other arguments but also referred to facts that have not been proven.

[50] The respondents submit that the complainant breached the agreement reached in the ASF and as such has acted in bad faith.

[51] The respondents did not make submissions on every one of the different submissions that did not comply with the ASF, except those that appear to suggest that somehow, the complainant was employed by the Institute, which they submit she was not. The institute was not her employer; it was and is her bargaining agent, of which she was a member. She has no employment contract with the Institute. Also in this vein, no *Employment Standards Act* would apply.

[52] Based on the limited facts set out in the ASF, there is no evidence linking the one allegation it contains, namely, the Institute failed to have a recourse procedure for persons whose stewardship was denied, to any of the respondents; as such, the complaint should be dismissed.

[53] The complainant alleges that the failure to have such a recourse procedure in place breaches s. 188(c) of the *Act*. That paragraph prohibits an employee organization from taking disciplinary action against or imposing any form of penalty

on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner.

[54] To be successful in an allegation that s. 188(c) of the *Act* was breached, a complainant must demonstrate that the employee organization imposed discipline or a penalty on him or her. Based on the ASF, there is no evidence that the complainant was disciplined. On its face, not renewing a stewardship is not discipline. In addition, without additional facts, not renewing a stewardship cannot be considered a penalty. Instead, it is akin to not renewing term employment. Without additional facts, it is not reasonable to conclude that the complainant was penalized.

[55] *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 64 at para. 32, adopted the following definition of "penalty": "[translation] a sanction established or imposed by a statute or authority to suppress a prohibited act." The ASF does not establish that any sanction was imposed on the complainant. There is no evidence that she was disciplined or otherwise penalized, and as such, her complaint should be dismissed.

[56] Paragraph 188(c) of the *Act* prohibits an employee organization from applying "standards of discipline" in a discriminatory manner. Based on the ASF, there is no suggestion that any standards of discipline were applied to the complainant, let alone in a discriminatory manner. Since this is a condition to finding that s. 188(c) of the *Act* was breached, the complaint should be dismissed.

[57] A breach of s. 188(c) of the *Act* requires that the standards of discipline be applied to the complainant in a discriminatory manner. The ASF does not disclose any discrimination. Based on the ASF, no Institute member whose stewardship was not renewed had appeal rights at the same time as the complainant's stewardship was not renewed. Accordingly, the complainant was not discriminated against.

[58] Even if discrimination were interpreted to mean arbitrariness or unreasonableness (an interpretation that is not consistent with the language used), there is no evidence that the lack of appeal rights is on its face arbitrary or unreasonable.

[59] An employee organization does not have an obligation to afford its members appeal rights, even with respect to discipline. When no appeal rights are in place,

in certain circumstances, a member may bring a complaint to the Board under s. 188(c) of the *Act* alleging discriminatory discipline. The fact that there are no appeal rights is not in and of itself a breach of the *Act*.

[60] *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, made a finding that the scope of discrimination includes arbitrary and unreasonable conduct. This finding is inconsistent with the ordinary understanding of the word "discrimination", both in common parlance and the common law.

[61] The *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*) has materially identical provisions to s. 188(c) of the *Act.* In *Abbott v. International Longshoremen's Association, Local 1953* (1977), 26 di 543, the Canada Labour Relations Board (CLRB) set out that in assessing whether a union has discriminated, the individual should not be singled out for treatment in either a decision to charge, the procedural format, or the penalty. The CLRB confirmed the very limited role that it played in reviewing internal union discipline. Absent evidence of discrimination, the Board has no jurisdiction to intervene.

[62] There is no evidence in the ASF that the Institute discriminated against the complainant, even if discrimination is defined as broadly as in *Bremsak*. The ASF is clear that at the relevant time, no members had appeal rights. Like all the members who did not have their stewardships renewed, the complainant had no appeal rights, which was not discriminatory, arbitrary, or unreasonable.

[63] The complainant argued that her complaint should succeed if she can demonstrate that the Institute acted in a manner that was arbitrary, discriminatory, or in bad faith. This language it used in s. 187 of the *Act*. Had Parliament intended to allow bargaining agent members to argue before the Board that internal discipline or a penalty should be set aside if it was imposed in a manner that was arbitrary or in bad faith, it would have added those words to s. 188(c), as it did to s. 187 of the *Act*.

[64] For the complainant to succeed, she had to prove one or more of the allegations set out in her complaint, which, in essence, is a racial discrimination complaint. The ASF makes no suggestion that race played any role in the fact that the Institute did not have an appeal mechanism for members who did not have their stewardships

renewed; nor does the ASF suggest that the complainant was singled out because of her race. The ASF is silent on this issue.

[65] Section 4 of Form 16 asks for a concise statement of each act, omission, or other matter being complained of. The complainant filled in this section as follows: "PIPSC, President Daviau, VP Bitman [*sic*], Director Peter Gilkenson [*sic*] and Heather Kholi continuously harassed, bullied and discriminated against me due to my race and ethnic origin." It is apparent that the complainant's view is that her complaint is one of harassment and discrimination due to her race.

[66] The complainant attached to her complaint additional details of her racial harassment and discrimination allegations. The first two paragraphs make it clear what the complaint is about. The allegation of ". . . continuous harassment activities on the basis of [her] race and the denial of stewardship", is but one example listed. She lists other examples of racial harassment, such as being excluded from attending events and receiving harassing emails.

[67] In the remedy section of the Form 16 filled in by the complainant, it is also apparent that it is in essence a harassment complaint based on race. At paragraph 2 of her requested remedies, she asks for a declaration that the Institute, President Daviau, Vice-President Bittman, Director Gilkinson, and Ms. Kholi harassed her and discriminated against her.

[68] In her complaint, the complainant alleges that the failure to renew her stewardship amounted to harassment on the basis of race, which is the primary basis of her complaint. There is no mention in the complaint of the fact that she did not have appeal rights; nor do the remedies sought mention that appeal rights should be afforded her.

[69] Given that the complaint does not refer to the fact that the complainant did not have appeal rights, and given that she did not allege that the failure to provide appeal rights breached the *Act*, she could not make that allegation at the hearing. She was limited to the allegations set out in her complaint. As the ASF makes it clear that the only allegation before the Board is with respect to the lack of appeal rights, and since the complainant did not make this allegation in her complaint, it ought to be dismissed.

[70] It is not the Board's role under s. 188(c) of the *Act* to comment on whether it believes the employee organization's practices are fair or unfair. In this case, the Board's role is not to comment on whether it is fair for the Institute to provide no formal recourse for those who do not have their stewardships renewed. The Board's role is limited to assessing if each element of s. 188(c) of the *Act* has been satisfied. Paragraphs 73 and 77 of *Bremsak* confirm that under a s. 188(c) challenge, the Board is not to be concerned with whether an employee organization's policies are deficient; there must be evidence that supports each element in s. 188(c).

[71] *Saunders v. Canadian Union of Postal Workers, Calgary local* (1988), 74 di 165, deals with s. 185 of the *CLC*, which is similar to s. 188 of the *Act*. The CLRB commented on its limited jurisdiction, stating that a union's internal affairs are quite specific, restricted, and specialized. In *Horsley v. Canadian Union of Postal Workers* (1991), 84 di 201, the CLRB made it clear that its mandate, with respect to bargaining agents' internal discipline processes, was not to sit in appeal of those decisions. It stated: ". . . the mischief sought to be caught by these sections is discriminatory abuse of internal disciplinary powers." It upheld that view in *Beaven v. Telecommunications Workers Union* (1996), 100 di 96, and *Mangatal v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada)* (1997), 105 di 1.

[72] The complainant is incorrect in suggesting that the lack of an internal appeal mechanism breaches the principles of natural justice, which does not include the right to an appeal. Even with respect to discipline, employee organizations have unfettered discretion to decide whether to provide an internal appeal procedure.

[73] Subsection 190(3) of the *Act* provides that if an appeal process exists, it must be followed before bringing a complaint under s. 188(c) of the *Act*. However, it does not require that an appeal procedure exist in the first place.

[74] Section 188 of the *Act* sets up a limited right of review to the Board for those matters set out in s. 188. If the matter is not referred to in s. 188 and there is no internal appeal mechanism within the employee organization, then the member may have political recourse or in some cases recourse to the courts by way of court action or judicial review.

[75] Unlike the *Act*, the labour legislation in British Columbia, the *Labour Relations Code* (R.S.B.C. 1996, c. 244, s. 10), expressly requires that the employee organization's disciplinary process be carried out in accordance with the natural justice requirements of common law. The respondents also referred me to the Alberta *Labour Relations Code* (R.S.A. 2000, c. L-1, s. 26). The *Act* does not contain these provisions. The omission from the *Act* of any rights and obligations relating to natural justice in the conduct of internal employee organization affairs speaks strongly to Parliament's intent that the Board not regulate these matters independently of allegations of discriminatory treatment. Members of employee organizations retain their right to bring court proceedings alleging a violation of an employee organization's constitution and by-laws, including an alleged violation of an express or implied obligation on an employee organization to impose discipline or a penalty.

[76] *Sullivan and Driedger on the Construction of Statutes*, 5th Edition, states that when interpreting legislation, the courts often find it helpful to look at the enactments of other jurisdictions. When statutes that otherwise are similar use different words or adopt a different approach, this suggests that a different meaning or purpose was intended.

[77] Even if a breach of natural justice occurred, it would not be sufficient to make a finding under s. 188 of the *Act*; there must be a breach of natural justice that resulted in discrimination. On that point, the respondents referred me to *Ernst v. Federal Government Dockyard Trades and Labour Council East*, 2007 NSSC 82.

[78] The respondents also referred me to *Berry v. Pulley*, 2002 SCC 40.

C. The complainant's reply

[79] The complainant stated that perhaps her contract with the Institute was not an employment contract but was just a contract.

IV. Reasons

[80] For the reasons that follow, the complaint is dismissed.

[81] The complaint was filed under s. 190(1)(g) of the *Act* and alleges that the Institute and the individual respondents committed an unfair labour practice within the meaning of s. 185 in the form of a breach of s. 188(c), which states as follows:

> ***188*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> . . .
>
> ***(c)*** *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner. . . .*

A. <u>Timeliness</u>

[82] Subsections 190(2), (3), and (4) of the *Act* state as follows:

> ***(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.*
>
> ***(3)*** *Subject to subsection (4), no complaint may be made to the Board under subsection (1) on the ground that an employee organization or any person acting on behalf of one has failed to comply with paragraph 188(b) or (c) unless*
>
> ***(a)*** *the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the employee organization and to which the complainant has been given ready access;*
>
> ***(b)*** *the employee organization*
>
> ***(i)*** *has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or*
>
> ***(ii)*** *has not, within six months after the date on which the complainant first presented their grievance or appeal under paragraph (a), dealt with the grievance or appeal; and*
>
> ***(c)*** *the complaint is made to the Board not later than 90 days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.*
>
> ***(4)*** *The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by an employee organization to comply with paragraph 188(b) or (c) that has not been presented as a grievance or appeal to the employee organization, if the Board is satisfied that*

> ***(a)*** *the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or*
>
> ***(b)*** *the employee organization has not given the complainant ready access to a grievance or appeal procedure.*

[83] While s. 190(1) of the *Act* sets out for complainants the basis on which a complaint may be made, ss. 190(2) and (3) set out a 90-day time limit within which a complaint may be filed under s. 190. The basis for the complaint determines when the time limit begins. The Board cannot extend it.

[84] Subsection 190(2) of the *Act* states that a complaint made under s. 190 must be made within 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; however, s. 190(2) is fettered by stating that it is subject to ss. 190(3) and (4).

[85] Subsection 190(3) states that it is subject to s. 190(4).

[86] Both ss. 190(3) and (4) refer to ss. 188(b) and (c). Section 188 addresses unfair labour practices by employee organizations, their officers or representatives, or persons acting on their behalf.

[87] This complaint names as respondents the Institute and its officers or representatives Ms. Daviau, Ms. Bittman, Mr. Gilkinson and Ms. Kholi. As such, for timeliness, the complaint must be looked at while taking into account what is set out in ss. 188 and 190(3) and (4).

[88] Subsection 190(3) of the *Act* provides that the period in which to file a complaint related to ss. 188(b) or (c) of the *Act* is not later than 90 days after the first day on which the complainant could have filed a complaint depending on the steps taken by the complainant and the employee organization (in this case the Institute) under ss. 190(3)(a) and (b).

[89] Paragraphs 190(3)(a) and (b) provide for the potential grievance and appeal in accordance with any procedure that has been established by the employee organization and to which the complainant has been given access. Paragraph 190(3)(b) is broken down into two subparagraphs. When read together, they

state that the 90-day time limit to file a complaint begins to run from the earlier of two dates, depending on the action of the employee organization.

[90] The first potential date is if the employee organization deals with the grievance or appeal within six months of the date on which the complainant first presents his or her grievance or appeal in accordance with the procedure established by the employee organization. The second potential date is if the employee organization does not deal with the grievance or complaint within those first six months.

[91] If there is an employee organization process allowing for a grievance or appeal, and a decision is rendered within 6 months of the date on which the complainant presented the grievance or appeal, then the 90-day time limit to file a complaint under s. 190 of the *Act* runs from the date of the decision in the grievance or appeal process that the complainant finds unsatisfactory. If there is no decision within those first 6 months, the 90-day time limit runs from the first day outside the first 6 months. Those six months begin on the date the complainant files his or her grievance or complaint.

[92] An example of calculating the time is as follows. If a complainant filed a grievance or appeal pursuant to an employee organization procedure on March 31 (that day being any business day not a Saturday or holiday), then the six-month period would encompass April through the end of September. If no decision is rendered on the complainant's grievance or appeal by September 30 (again, assuming that day is not a Saturday or holiday), then the 90-day period starts running on October 1 (again assuming that it is not a Saturday or holiday). If a decision was rendered within the April 1 to September 30 time frame, then the 90-day period runs from the date of the unsatisfactory decision.

[93] A simple reading of the section as a whole (s. 190(3)) clearly indicates that the 90 days would start after the date determined in s. 190(b)(i) has occurred. It is hardly likely that a complainant would know that the time limitation was running if he or she was not communicated the decision that he or she found unsatisfactory. Therefore, when a decision is made within the first 6 months, for the calculation of the 90-day time limit, a complainant has to have been communicated the decision with which he or she takes issue. If not, then by default, the 90-day limit would start running on the day after the 6 months have run out.

[94] Neither party made any submissions on the timeliness of the complaint.

[95] The complaint itself sets out the same date, August 4th 2015, as the date the complainant knew of the act or omission giving rise to the complaint; the date on which the complainant filed a grievance or appeal regarding those facts, pursuant to a procedure established by the employee organization; and, the date on which the complainant received a decision to the grievance or appeal pursuant to the procedure established by the employee. Therefore, the date from which the ninety day time frame must run, would be August 4, 2015. Ninety days from August 4, 2015 is November 2, 2015. The complaint was received via fax on November 3, 2015. As it is one day out of time, it must fail.

B. <u>The merits of the complaint</u>

[96] Even if the complaint were timely, it would fail on the merits.

[97] The complainant alleges the following in the complaint:

- by refusing to renew the complainant as a steward, Ms. Daviau abused her authority and bullied, harassed, and discriminated against the complainant due to her race;
- Ms. Daviau and the other named respondents, Ms. Bittman, Mr. Gilkinson, and Ms. Kohli, harassed the complainant due to her race;
- the discrimination against the complainant and the harassment breached the Institute's by-laws, which state that unless a steward has been disciplined, his or her renewal is usually the responsibility of the AFS Group, which the Toronto West Branch had approved for her;
- the complainant received a letter from Ms. Daviau on August 4, 2015, stating that her steward renewal had been denied;
- in the August 4, 2015 letter, Ms. Daviau made unsupported allegations against the complainant without verifying facts or discussing the allegations with her;

- Ms. Daviau referred to a letter that the complainant had sent to her in which she had complained that Ms. Bittman and Mr. Gilkinson were treating her differently and were targeting her due to her race;

- Ms. Daviau, Ms. Bittman, Mr. Gilkinson, and Ms. Kholi harassed the complainant by sending her emails stating that she could not attend the Ontario Steward Council held on September 24, 2015;

- through their staff, Ms. Daviau and Mr. Gilkinson sent the complainant harassing emails in an effort to intimidate, harass, and exclude her from attending Institute events;

- Ms. Daviau, her executive committee, and the Institute's board of directors are all Caucasians, and there are very few Black employees involved in the Institute, which is evident at its functions; and

- Ms. Daviau, Ms. Bittman, Mr. Gilkinson, and Ms. Kholi demeaned and humiliated the complainant and excluded her from many Institute events in the two years preceding the filing of the complaint.

[98] The complainant's allegations make it abundantly clear that her position is that the respondents' actions were discriminatory and harassing and were made against her due to her race.

[99] There is very little evidence before me upon which to consider the complainant's allegations. The only evidence I have that is remotely linked to the allegations in the complaint is the admission in the ASF that the complainant was a steward and that she was not renewed as one. Beyond that, there is no evidence at all relating to any of the allegations in the complaint. I do not have any evidence of any of the following:

- the process to become an Institute steward or to be renewed as one;

- the duties and responsibilities of an Institute steward;

- how long an Institute steward serves (the term);

- what, if anything, happens when a steward's term ends;

- the Institute's discipline policy, standards, or process;
- what steps the respondents took to apply the discipline policy or standards to the complainant, if any;
- the August 4, 2015, letter;
- correspondence between the complainant and Ms. Daviau;
- emails that the complainant and any of the respondents exchanged;
- emails any of the respondents or their staff sent to the complainant;
- the racial or ethnic make-up of the Institute's Executive Council;
- the racial or ethnic make-up of the Institute's membership;
- what the respondents did to the complainant that amounted to harassment;
- what the respondents did to the complainant that amounted to bullying;
- what the respondents did to the complainant that amounted to discrimination;
- what the respondents did to exclude the complainant from Institute events including the Ontario Steward Council held on September 24, 2015;
- what emails the respondents sent to the complainant either excluding her or attempting to exclude her from that Ontario Steward Council ; and
- how the respondents treated the complainant differently due to her race.

[100] The only evidence before me is that the complainant was not renewed in her Institute steward position and that there was no procedure for redress if a steward who wished to be renewed was not.

[101] A condition to being able to establish the basis for a complaint under s. 190(1)(g) of the *Act* against an employee organization or its officers or representatives under s. 188(c) is that the organization or its officers or representatives took disciplinary action against or imposed a penalty on a member. There is no evidence that that took place. Since there is no evidence of disciplinary action or any form of a penalty, the complaint cannot succeed.

[102] The only evidence I have is that the complainant was an Institute steward, that she was not renewed in that position, and that the Institute does not have a recourse process if a member is not renewed as a steward. Setting aside for the moment that on the face of it, those facts do not establish discipline or a penalty, even if they did, s. 188(c) of the *Act* requires that the discipline or penalty imposed must be based on the discriminatory application of the Institute's discipline standards.

[103] I have no evidence of the Institute's discipline standards; nor do I have any evidence of any disciplinary process that might or might not have taken place. I also have no evidence of any discrimination.

[104] Therefore, if the complainant could have established the Institute's failure to establish a recourse process for the non-renewal of Institute stewards, her complaint fails because there is no evidence of any application of the discipline standards, nor any evidence of an application of the discipline standards, in a discriminatory manner.

[105] The complainant alleged that the discrimination against her was based on her race. There is no evidence of discrimination let alone racial discrimination.

[106] Finally, at no place in her complaint did the complainant make the allegation that the failure to have a recourse process or procedure with respect to the renewal or non-renewal of Institute stewards was the basis for her complaint. While evidence established that there was no recourse process or procedure, that fact was never the basis for the complaint. This is clearly a breach of the principle established in *Burchill v. Canada (Attorney General)* [1980] F.C.J. No. 97.

[107] The Board obtains its jurisdiction from the *Act*. The complainant made submissions suggesting that her relationship with the Institute had been a contract, perhaps an employment contract. She is employed by the CRA; she is a member of

a bargaining unit represented by the Institute. There is no evidence that she is employed by the Institute. If she were, as an employee, she would not have recourse for an employment dispute with the Institute under the *Act*. That recourse lies elsewhere.

[108] The complainant also made submissions suggesting that the actions amounted to bad faith or arbitrariness, which are included in discrimination. Section 187 of the *Act*, which deals with the actions of an employee organization in its representation of its members, specifically states that an employee organization and its officers and representatives shall not act in a manner that is arbitrary, discriminatory, or in bad faith. Paragraph 188(c) does not use the phrase "bad faith" or the word "arbitrary". The very fact that Parliament saw fit to use the word "arbitrary" and the phrase "bad faith" together with the word "discriminatory" in s. 187 and that in the very next section it did not use the word "arbitrary" and the phrase "bad faith" is a clear indication of Parliament's intent that they are not a basis for a complaint under s. 188(c).

[109] This does not mean that an arbitrary action or bad faith by the employee organization cannot amount to discrimination. It means that arbitrary action or bad faith, in and of themselves, cannot support a complaint against an employee organization under s. 188(c) of the *Act.* It is arguable that arbitrary actions or bad faith could be evidence of discrimination; however, that being said, there is no evidence that the Institute acted in a manner that was arbitrary or in bad faith, let alone that the arbitrary action or bad faith amounted to discrimination.

[110] The majority of the complainant's submissions have no factual or legal underpinning whatsoever. It is unclear what, if any, relevance her submissions with respect to the *Civil Code of Quebec*, the (unidentified) *Employment Standards Act*, and natural justice have with respect to her complaint or to the limited facts that she agreed to that are before me. Much if not all her submissions were premised on allegations for which no facts were adduced. She referred to documents and events for which no evidence was proffered.

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

(The Order appears on the next page)

V. Order

[112] The complaint is dismissed.

October 2, 2017.

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