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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

CLAUDETTE BESNER

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Besner 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: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Mariah Griffin-Angus, Public Service Alliance of Canada

Decided on the basis of written submissions,
filed November 12 and 16 and December 13, 2021.

REASONS FOR DECISION

I. Introduction

[1] On February 18, 2014, Claudette Besner (“the complainant”) made a complaint to the Public Service Labour Relations Board under s. 190(1)(g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) against the Public Service Alliance of Canada (PSAC or “the respondent”). In her complaint, she alleges that a former PSAC grievance and adjudication officer (“the PSAC Officer”) acted in an arbitrary and bad-faith manner, thus breaching his duty of fair representation.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continued under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[3] 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 titles of the *PSLREBA*, the *PSLRA*, 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 and Employment Board Act*, the *Federal Public Sector Labour Relations Act* (“the Act”), and the *Federal Public Sector Labour Relations Regulations* (“the Regulations”).

[4] At all times relevant to this complaint, the complainant was an administrative coordinator (classified AS-02) with the Corporate Management Branch of Human Resources and Skills Development Canada (“the employer”), and the PSAC was her certified bargaining agent.

[5] Although the incident that is at the centre of the complaint occurred in October 2012, the complainant states in her initial complaint that she became aware of the action or circumstances giving rise to her complaint only on February 5, 2014.

[6] The respondent raised a preliminary objection on the basis that the complaint is untimely and asks that it be dismissed. The respondent further argues that the complaint has become moot.

[7] Section 190(2) of the *Act* mandates that a complaint 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.

[8] Therefore, the issue to be determined is **when** the complainant became aware, or ought to have become aware, of the action or circumstances giving rise to her complaint.

[9] This decision deals only with the preliminary objection.

[10] The parties requested that the Board rule on this preliminary matter on the basis of written submissions. Since this decision does not look into the actual merits of the complaint, the name of the PSAC Officer has been withheld in recognition of the inflammatory nature of the allegations.

[11] For the reasons set out in this decision, I have concluded that the preliminary objection should be granted as the complaint is untimely.

II. The particulars of the complaint

[12] On February 10, 2014, the complainant initiated her complaint by completing a Form 16 (used to make a complaint under s. 190 of the *Act*). The form, received by the Board on February 18, 2014, identified February 5, 2014, as the date on which she knew of the act she was complaining of. The complaint is detailed as follows: "On first day of adjudication (Oct. 2012) union lawyer advised me to move grievances directly to CHRC [the Canadian Human Rights Commission] & this is all before adjudication even began. My lawyer declined to go through adjudication."

[13] On March 18, 2014, the complainant submitted a completed “Request for Particulars” form, which asks the complainant to indicate the nature of the complaint against the respondent. She completed the form as follows:

...

2. Please indicate the nature of your complaint against the respondent(s):

Grievance was not submitted through the grievance process

Grievance was settled without your consent or approval

Respondent(s) did not consult you

Grievance was not referred to adjudication

Respondent(s) did not communicate its decision to you

Other (please specify below)

Adjudication was cancelled by my union lawyer, [the PSAC Officer] before it even had a chance to hear my grievance. [The PSAC Officer] said I would have a much better chance of winning if I forwarded grievances directly to CHRC.

3. Is your bargaining agent aware of your concerns or have you attempted to resolve your concern with the bargaining agent? If so, please provide the date of the final decision and the name of the decision maker.

CHR sent a decision dated Jan. 27/14 but not received by myself until Feb 4/14. They have closed the file.

...

[Emphasis in the original]

[14] The complainant attached a document to the form detailing her complaint. It states in part as follows:

...

I maintain I was misrepresented with [the PSAC Officer] as a legal representative. There were many red flags as I worked with [the PSAC Officer] on the said grievances. Over time, in the face of significant time delays in the system itself, [the PSAC Officer] frequently put grievance dates on hold and even temporarily cancelled assigned grievance dates which caused unnecessary harmful delays and anxiety. If it wasn't bad enough that there is already a gross time lag in getting hearing dates then [the PSAC Officer] taking the steps of postponing set hearing dates further indicates that he was not competent to work through said grievances or perhaps, he was afraid too. This would later prove to be true as we got closer to the hearing. He always had an excuse for the cancellations. This was further confirmed to me on day of

hearing where he was unable to move hearing in a complete manner before the adjudicator and consequently, abandoned the grievances.

The day before grievance(s) hearing I met with [the PSAC Officer] at his request, thinking he would be working on last minute important details to move my grievances in a favourable position. He had one sole question for me at this 5 minute meeting and that was a status and review as to my attendance at work which was never an issue to begin with. I was disappointed that he would call me in a last minute meeting to cover seemingly important details for the following day's hearing only to discuss my unremarkable attendance record.

He was not meticulous in handling my file. In fact he was ignorant. On the day of the actual hearing, [the PSAC Officer] was found incapable of presenting his facts and findings before the adjudicator and TB lawyer. I found [the PSAC Officer] highly incompetent.

Minutes prior to adjudication, at the request of [the PSAC Officer], he met with TB lawyer alone and without my presence. He mentioned that the reason why would be to try and settle with TB lawyer before adjudication. [the PSAC Officer] was only able to get TB to fund a telephone for the hearing impaired at \$125. [The PSAC Officer]'s meeting with TB lawyer was obviously, weak and unsuccessful. His only recourse to a TB lawyer that he was afraid off (as he mentioned to me the day before hearing that this TB lawyer had a reputation for being a "hardball") was to abandon the case. TB was inflexible and [the PSAC Officer] was unable to proceed with the grievances especially with the fear that he seemingly had for this TB lawyer.

He then abandoned the case before the adjudicator and before any arguments could be made on said grievance(s).

After [the PSAC Officer]'s one on one meeting with TB lawyer, he came back to the meeting room and faced myself and Denise Camus telling us that **"I don't have a case for the grievances and that the only recourse I would have, would be to have my case heard at the Human Rights level."** He went on to explain how a Human Rights hearing would work .. namely, that we would all be sitting down in a meeting style room to discuss grievances. He encouraged me to go through this route and told me that it would work very well. That my case would be heard properly through CHR.

Human Rights went on to deny our claim as [the PSAC Officer] had abandoned the grievances as per his advice and since [the PSAC Officer] abandoned the case, then we had no Human Rights Case. This is a gross injustice and proves that [the PSAC Officer] was incompetent in dealing with grievances through from beginning to the end. He outright mislead me. A legal representative who should have known better. Does a legal representative not know that CHR would not be going through

hearing my case considering he had abandoned the grievances before it being adjudicated?? Did [the PSAC Officer] not know that the process is such that a full hearing of the grievances must be heard with an adjudicator present before any final recourse with CHR? [The PSAC Officer] gave no reason as to why he was abandoning the case other than he seemed to fear TB lawyer and told me that I would only get what they had offered (\$125 hearing phone). I, therefore, was faced with a failure to proper fair representation (duty to represent) and was misled to believe that what he said was correct and that I would get fair recourse with Canadian Human Rights. More time wasted, more aggravation, more anxieties and an abandoned grievance(s).

[The PSAC Officer] displayed much ignorance and/or was outright fraudulent in the handling of my file including falsifying and relaying his information to me - that I would have recourse with CHR when that wasn't the case.

*[The PSAC Officer] also had a terrible temper. While we were brainstorming a week or so before the hearing he became very angry at me for posing questions. Given that [the PSAC Officer] was aware I have an anxiety disorder one would have expected more consideration and sensitivity. In any case, this is unacceptable behaviour coming from a so called professional hired to legally represent an employee's grievances. [The PSAC Officer] became so angry that it frightened me. [The PSAC Officer]'s response was *I get that way*. Even his physical attire at adjudication hearing was questionable. He was wearing a bold, bright smiling yellow Donald Duck tie with a casual shirt and pants. This is not a professional on all counts. This guy is a joke and a fraud. This is not a person that is able to take his job seriously and conduct himself as he should in a professional manner given his duties to represent. Keep in mind, that I have a witness to all of this (Denise Camus) as I made sure that I would have someone with me who knew my grievances very well.*

I made my complaint with PSAC and shortly thereafter. I was told [the PSAC Officer] had been fired for being incompetent and not fulfilling his duties. This confirmed what I knew all along and he did a great injustice to me and what he was hired for. [The PSAC Officer] is a fraud and I question his credentials. Complete waste of time. Complete waste of resources. Incompetence and a fraud in every count as a legal representative. He deserves what he got coming ... to be fired.

[Sic throughout]

[Emphasis in the original]

[15] Also on March 18, 2014, the complainant provided the following chronological summary of the relevant facts and circumstances in support of her complaint:

...

After 8 years of waiting for an adjudication date to grievances dating 2006 and 2007, [the PSAC Officer], PSAC lawyer was to represent me. Adjudication date was set for October 2012, and all parties were present including my union representative, Denise Camus.

Before the hearing even began, [the PSAC Officer] stated that he wanted to try to settle the grievances with TB lawyers. From 9 a.m. to Noon, he was in a meeting behind closed doors (without my presence or my union rep). By noon, [the PSAC Officer] advised me that it would be best to not hear the grievances through adjudication, but to forward it through CHRC. He said that I would have a better chance of succeeding with CHRC. He said that CHRC court process is less informal and felt it was the best way to go.

I was surprised and I asked Denise Camus if this was true (that we could forego adjudication and go straight to CHRC). She had nothing to say.

TB lawyers failed to settle the grievances outside of court and were only offering to set me up with special hearing telephone system. I don't believe this was a good reason for [the PSAC Officer] to go ahead and cancel adjudication. I felt that adjudication should go on as planned but [the PSAC Officer] felt otherwise.

[The PSAC Officer] also mentioned that he had dealt previously with the presiding judge and TB lawyer and that he found them to be "hardball and difficult". I presume this was another reason why he counselled me to move this to CHRC instead of going ahead with adjudication. [The PSAC Officer] also mentioned that the week that was already booked for adjudication hearings was not enough and he felt as if we would need an extra week.

I was very disappointed at [the PSAC Officer]'s conduct and decision but since he was my lawyer I thought what he said was correct. Also, since Denise Camus, President of my local at PSAC did not give her input into what [the PSAC Officer] was saying, that I was left on my own to decide. We went back to court and [the PSAC Officer] told the presiding judge that we would be closing the case.

Following this the two grievances went back to PSAC whereby another person, Jean Rodrigue [Yaboua] took over my file. Jean was in contact with me several times and asked me why [the PSAC Officer] had chose to cancel the grievances. I kept repeating to Jean that he would be best to get this information directly from [the PSAC Officer] since it was his decision. Despite this, Jean spoke to me several more times and was asking me questions that I thought [the PSAC Officer] should be responding too. I was given the impression by Jean that the process of taking this to CHRC was the right way to go but that Jean had some unanswered questions and I certainly was not the best person to talk to Jean about this. It was not my decision but my lawyer, [the PSAC Officer]. I could not understand why Jean kept asking me questions that I felt only [the PSAC Officer] could answer.

On February 5, 2014 I received a letter from CHRC dated January 27, 2014 and they announced me that the file was now closed according to Section 41.

*This is when I felt that the whole procedures involving PSAC was wrong to begin with. I felt that [the PSAC Officer] ought to have known that all grievances **must** proceed to adjudication before going to CHRC. It occurred to me then that CHRC will take on a grievance case **only after adjudication process** has been dealt with and not successful.*

Key Witness: Denise Camus, President of local at PSAC

...

[Sic throughout]

[Emphasis in the original]

[16] The complainant provided the following description of why she has alleged that the respondent's conduct was arbitrary:

...

I believe that [the PSAC Officer] acted in manner that was arbitrary and in bad faith regarding my rights under the collective agreement because I believe [the PSAC Officer] to be negligent in how he handled my grievances before the adjudication process just prior to the actual hearing. He ought to have known that the correct steps is to go through adjudication process (court) and only when that process has been fulfilled and consequently failed that we push the whole thing to CHRC. Essentially, I feel that [the PSAC Officer] has failed to arrive at a thoughtful judgement and did not have my best interest. Knowing the chain of events and what lead me to this complaint, I feel that perhaps [the PSAC Officer] was lazy and that he also did not want to deal with the presiding judge and TB lawyer whom [the PSAC Officer] stated were "hardball and difficult".

...

[Sic throughout]

[17] The complainant provided the following description of why she has alleged that the respondent's conduct was in bad faith:

...

I believe that [the PSAC Officer], PSAC lawyer acted in deceitful and dishonest conduct.

He was not honest with his decision to cancel adjudication in favour of moving the grievances to CHRC and he deceived me when he counselled that we forego into [sic] moving the grievances to adjudication in favour of moving the grievances in question

directly to CHRC. [The PSAC Officer] is a lawyer and he ought to have known that this was not the correct way to go.

He is my lawyer, and I expect him to know all the rules and regulations of the process. I trusted him and thought he was doing the right thing and following proper procedures. It's very hurtful what he did.

I waited so long for an adjudication date (8 years) only to waste everybody's time in moving this ahead to CHRC before adjudication [sic] had a chance to hear the grievances and make a decision.

[18] On March 25, 2014, the complainant wrote to the Board, indicating that she wished to add the following particulars:

...

The PSLRB complaint against [the PSAC Officer] is related to a 2006 & 2007 grievance hearing that [the PSAC Officer] decided to cancel on the very day of adjudication court hearing dated October 20112.

I also have other grievances dated 2008 that has yet to be heard in a court adjudication.

The Canadian Human Rights Commission letter and report dated January 27, 2014 but received February 4, 2014 states that "the file on this matter has now been closed and that they will not deal with the complaint at this time". It also states "either party to a complaint can ask the Federal Court to review a Commission's decision under subsection 18.1(1) of the Federal Courts Act".

Also, under CHRC Record of Decision Under Sections 40/41 which was attached to their letter of January 27, 2014, it states under Section 41(1): "The Commission decided, for the reasons identified below, not to deal with the complaint at this time under paragraph 41(1)(a) of the Canadian Human Rights Act, as the complainant ought to exhaust grievance or review procedures otherwise reasonably available."

Under Reasons for Decision it states: "The Commission adopts the following conclusion set out in the Section 40/41 Report: Although the grievance process is no longer available for the allegations from 2006 to 2007 as the grievance appears to have been concluded, the ongoing grievances appear to cover the same issues that the complainant has been grieving since 2006 and therefore she should first exhaust the grievance procedure. If her human rights concerns are not dealt with under the PSLRA, then the complainant may reactivate her complaint with the Commission".

Here are my thoughts on the situation. I had a right to have grievances for 2006-2007 to be heard at the October 2012 adjudication hearing but [the PSAC Officer], PSAC lawyer

suggested that I go through CHRC instead. Also it took 6 full years before an adjudication date was set for the above grievances and that is only after many previously scheduled hearing dates that were cancelled at the last minute. I had to write to the Chairperson of PSLRB in order to expedite an adjudication date without any cancellation. I was tired of waiting. Then [the PSAC Officer] decides to cancel the adjudication hearing for the reasons stipulated in my previous letter to you.

If we wait until grievances dated 2008 is heard which is already 6 years delinquent and with an expected another 6 years of wait for an adjudication date, there is no guarantee that I will be able to recover a possible decision on 2006 and 2007 grievances that could have been made at the original adjudication date hearing. This means that it will delay my 2006 and 2007 case even further with many other arguments along the way.

The point is I had a right to have 2006 and 2007 grievance heard on the day that adjudication was scheduled. I lost that right. Not only that, but I also lost a possible case that could have been substantiated.

I am currently on medical retirement and if you take that into consideration with my age, I don't have it in me to go through another possible argument about 2006 - 2007 hearing. Further, the 2006 and 2007 grievances are before the 2008 grievance. If 2008 grievance is substantiated when it is heard before the courts, there is no guarantee that 2006 and 2007 can be combined. I am sure the employer will argue their point. Plus I would have lost my costs and recoveries that I was looking for in 2006 and 2007.

I hope you can see my concerns to this. Again, the point is that I had a right to have 2006 and 2007 heard at the adjudication date and that was taken away from me.

...

[Sic throughout]

[19] Finally, on March 31, 2014, the complainant wrote to the Board and included the following statement regarding her complaint:

...

[The PSAC Officer], did not follow proper regulations to an adjudication process. I have a right to have the grievances heard. I was told that CHRC is the proper process to go through. This was false and unfair representation as the statement is not true. I was falsely represented. [The PSAC Officer] is a fraud.

I have a right to my fair hearing and compensation for losses, cost and recoveries....

...

[20] In terms of corrective action, the complainant requests that the respondent “go through [the] proper process” and seeks an order under s. 192(1)(d) of the *Act* to that effect.

III. The timeline of events relevant to the preliminary objection

[21] The complaint received by the Board on February 18, 2014, was initially placed in abeyance, pending the resolution of other grievance files involving the complainant. On August 30, 2021, after the other matters were settled, the complaint was scheduled for a hearing from November 30 to December 2, 2021.

[22] The parties requested that the Board render a decision based on written submissions, without holding an oral hearing. The respondent provided written submissions on November 12, 2021, and the complainant on November 16 and December 13, 2021. Both parties included numerous documents in support of their submissions.

[23] The following is a chronological review of the events as described in those documents that are relevant to the preliminary objection. Of note, the complainant was either the author or the recipient or was copied on each document.

[24] On November 6, 2012, the complainant wrote to the CHRC to request that her human rights complaint be reopened (complainant’s Exhibit 6A).

[25] On November 22, 2012, the CHRC responded to the complainant, requesting that she complete a complaint form by December 31, 2012 (complainant’s Exhibit 6).

[26] On December 3, 2012, a new PSAC representative, Jean-Rodrigue Yoboua, took over the complainant’s file and wrote to the CHRC. He explained that the withdrawal of the complainant’s grievance was not attributable to her (complainant’s Exhibit 5):

...

The following letter is a follow-up to our phone conversation of November 20, 2012 asking the Complainant to explain the circumstances surrounding the withdrawal of her discrimination grievance.

On October 22, 2012, the Complainant was advised by the union that she should withdraw her grievance and that it was the union’s intention to do so if she did not agree to withdraw.

Article 42 of the Canadian Human Rights Act states the following

42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.

(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that **the failure to exhaust the procedure was attributable to the complainant and not to another.**

As stated in article 42(2), the withdrawal of Ms Besner's grievance does not bar an investigation of her complaint because the failure to exhaust the grievance procedure was not attributable to her.

...

[Emphasis in the original]

[27] On January 31, 2013, the CHRC wrote to the employer to inform it of the complaint (complainant's Exhibit 16) and that the CHRC intended to deal with it. It informed the employer of its right to contest the complaint under s. 41(1) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "the CHRA"). Under that section, the CHRC may refuse to deal with a complaint if, among other grounds, another process could be used instead, such as a grievance or review process (see s. 41(1)(a)).

[28] On March 14, 2013, the employer wrote to the CHRC to voice its objection to the complaint under s. 41(1)(a). It submitted that the CHRC should refuse to deal with the complaint as there was another complaint or review process that could be used, specifically the grievance procedure under the relevant collective agreement (complainant's Exhibit 13):

...

It is our opinion that the appropriate process to deal with this complaint falls under the Public Service Labour Relations Act (PSLRA) as set forth under sections 208-214. As written, individual employees may present grievances about matters affecting the terms and conditions of employment, including human rights concerns, such as adverse differential treatment, failure to accommodate, harassment related to a prohibited ground, or any other case where there is an alleged breach of a provision of the Act.

The grievance procedure is available to the complainant as prescribed in article 18.15 of the Program and Administrative Services (PA) collective agreement. The employee has availed herself of this recourse mechanism.

As indicated in the summary of complaint, the alleged discrimination suffered from Ms. Besner occurred between September 2005 and 2008. The complainant had filed four different grievances related to these similar allegations:

- First grievance was filed on December 7, 2006, and the second on May 14, 2007. After having exhausted the grievance procedure within the Department, Ms. Besner and the Public Service Alliance of Canada referred the grievances to adjudication in accordance with the provisions of the PSLRA. The adjudication was scheduled to take place from October 22 to October 26, 2012. However, these grievances were withdrawn before the Public Service Labour Relation Board on the first day of adjudication hearing.*
- The third grievance was filed on June 20, 2008, and the fourth grievance July 9, 2008. They are both still following the grievance procedure outlined in the PA collective agreement.*

In conclusion, the Department recommends that the Commission should not deal with the complaint pursuant to subsection 41(1)(a) of the Act because the grievance procedure is available to the complainant to address her allegations of discrimination.

...

[Sic throughout]

[29] On April 9, 2013, the CHRC wrote to the complainant in response to her March 31, 2013, letter (no copy of it was provided to the Board). It advised that the complaint would be submitted to the Commission, which would decide whether it should refuse to deal with it on the grounds that she had not exhausted all available grievance and review procedures. It also invited her to provide her position on the issue (complainant's Exhibit 7):

...

Under sections 40 and 41 of the Canadian Human Rights Act (the Act), the Commission may refuse to deal with complaints under certain circumstances. The above complaint raises issues under section 41(1)(a) of the Act. The complaint will therefore be submitted to the Commission. The Commission will decide whether to deal with the complaint. Specifically, the Commission will decide whether it should refuse to deal with the complaint for the following reason:

- the complainant has not exhausted all available grievance and other review procedures;*

Before submitting the complaint to the Commission, I am inviting you to provide your position on the issues for decision....

...

[30] On May 31, 2013, Mr. Yoboua responded to that letter on the complainant's behalf (complainant's Exhibit 1A). He explained that, with respect to the complainant's 2006 and 2007 grievances, there were no other review processes available, as those grievances had been withdrawn. As such, the only option available to her was the complaint to the CHRC:

...

The present letter is in response to your section 40/41 letter dated April 9, 2013 inquiring into whether another complaint process was available to Ms Besner. Ms Besner has filed several grievances against Human Resources Development Canada (Hereinafter referred to as the "Respondent")

In 2006 and 2007 Ms Besner filed two grievances both grievances were filed under article 19 of the Program and Administrative Service Collective Agreement which states the following:

There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.

On October 22, 2012, PSAC withdrew representation with respect to the 2006 and 2007 grievances. Because these grievances dealt with the interpretation of a collective agreement issue, she was not able to deal with these grievances on her own. After the withdrawal of the grievance, Ms Besner decided to pursue her human rights complaint on her own and filed a complaint before the Canadian Human Rights Commission.

In 2008, Ms Besner filed additional grievances related to article 19 of the collective agreement. These grievances are still going through the various levels and no decision has taken place as to whether or not they will go through the adjudication process.

In 2012, Ms Besner filed three more grievances. Although these three grievances pertain to a violation of article 19, they are based on a set of facts that differ from the preceding grievances. They pertain to facts that have taken place in 2012, well after the filing of her grievances in 2008. They primarily allege discrimination in the "Selection of Employee Retention and Lay Off process" and a failure to accommodate Ms Besner with respect to being provided with a work computer a printer and a working voicemail account. One grievance also alleges discrimination with respect to not being paid acting pay. The grievances are still going through the various levels and no decision has taken place as to whether or not they

will go through the adjudication process. Ms Besner intends on filing a human rights complaint with respect to these allegations.

a) Is there another Complaint or review process available to the Complainant? Does the Complainant have full access to the process?

There is currently, no other review process available to Ms Besner with respect to the 2006-2007 violations of the Act because 2006-2007 grievances have been withdrawn. As such, the only option available to her is the present complaint. It is also important to note that the grievances which were filed in 2012 are not presently before the Commission and will be the subject of an upcoming human rights complaint.

Further, none of the grievances which are in the grievance process can provide remedies retroactively to the 2006-2007 violations of the Act. As such, her only recourse to address those issues is the present complaint.

b) If another complaint or review process is available, has it resulted in a final decision? If a final decision has not been made, has the complainant caused the delay?

The grievance process which was slated to go to arbitration in October of 2012 has been withdrawn. As such, the grievance is completed and no other process is available to Ms Besner with respect to the 2006-2007 violations of the Act. Further, the withdrawal of the grievance was not attributable to Ms Besner.

c) Should the complainant be asked to go through another review process?

No other complaint or review process is available to Ms Besner. She has waited over 6 years to have her complaint heard and has no other recourses available to her with respect to the 2006-2007 violations of the Act.

...

[Emphasis in the original]

[31] On October 1, 2013, the CHRC wrote to the complainant to provide her with a copy of a Section 41 report (“the s. 41 report”), which the Commission would consider when deciding whether it should refuse to deal with her complaint (respondent’s Exhibit 4). The letter provides as follows:

...

This is a follow-up on our letter of April 9, 2013 about your complaint against Human Resources and Skills Development Canada.

Here is a copy of the section 41 report that has been prepared for this complaint. The Commission will consider this report when it reviews your complaint and makes its decision.

Please read this report carefully. If you disagree with information it contains, it is important that you make a submission to the report.

...

[32] The attached report concluded that, although the grievance process was no longer available for the 2006 to 2007 allegations, there were ongoing grievances that appeared to cover the same issues. As a result, it recommended that the CHRC not deal with the complaint **at that time**, and the complainant ought to exhaust the other grievance or review procedures available to her. If, however, those procedures were terminated or they were not reasonably available, the CHRC advised that it retained the discretion to deal with the complaint at the complainant's request:

...

The issue for the Commission to decide is whether it should refuse to deal with the complaint under section 41(1)(a) of the Act.

The Commission can decide:

- a) To deal with the complaint under section 41(1) of the Canadian Human Rights Act, or*
- b) Not to deal with the complaint at this time under section 41(1)(a) of the Canadian Human Rights Act, as the complainant ought to exhaust grievance or review procedures otherwise reasonably available. At the end of the grievance or review procedure, the complainant may ask the Commission to reactivate the complaint.*

...

Factors relevant to a decision under section 41(1)(a)

...

This means that the Commission can decide not to deal with a complaint under section 41(1)(a) of the Act if it finds that the complainant chose not to finish another process that was reasonably available to him or her. Therefore, it is important that complainants use any complaint or grievance process available to them and try to get a final decision in that process. Otherwise, the Commission could refuse to deal with their complaint.

...

Analysis

...

24. Although two of the complainant's grievances have been withdrawn by the union, it appears that there are four outstanding grievances on which a final decision has not been made. As such, it appears that the complainant has not exhausted alternate redress.

25. *The outstanding grievances appear to pertain to the same ongoing allegations of harassment. The grievance process appears to still be readily available to the complainant, and the complainant has not demonstrated any reason as to why this process should not be first exhausted. The complainant's grievances could be dealt with under the PSLRA and ultimately by the PSLRB. The remedies that the Commission could offer would be similar to the remedies provided under the PSLRB.*

Conclusion

26. *Although the grievance process is no longer available for the allegations from 2006 to 2007 as the grievance appears to have been concluded, the ongoing grievances appear to cover the same issues that the complainant has been grieving since 2006 and therefore she should first exhaust this grievance procedure. If her human rights concerns are not dealt with under the PSLRA, then the complainant may reactivate her complaint with the Commission.*

Recommendation

27. *It is recommended, pursuant to paragraph 41(1)(a) of the Canadian Human Rights Act, that the Commission not deal with the complaint at this time because:*

- *The complainant ought to exhaust grievance or review procedures otherwise available. At the termination of these procedures, or if they prove not to be reasonably available, the Commission may exercise its discretion to deal with the complainant's request.*

[Emphasis in the original]

[33] On November 4, 2013, Mr. Yoboua wrote to the CHRC on the complainant's behalf to object to the conclusion and recommendation in the s. 41 report (complainant's Exhibit 9). The letter states as follows:

...

The present letter is in response to the Section 40/41 Report dated October 1, 2013. We respectfully disagree with the Report's conclusions that Ms Besner should go through the grievance process with respect to her 2006 -2007 grievance/allegations. The report correctly finds that there is no recourse available for Ms Besner with respect to her 2006 and 2007 grievances/allegations, however, it finds that those allegations should await the outcome of her 2008 grievances prior to being investigated.

In paragraph 2 of the Report, the investigator states that Ms Besner returned to the Commission despite the fact that the grievance process had not been completed. This finding is not entirely accurate as Ms Besner no longer has recourse by way of a grievance with respect to the 2006 and 2007

grievances/allegations and the facts that surround them. As such, returning to the Commission was an appropriate step to take in the present circumstances.

The 2006-2007 allegations cannot be remedied before the Public Service Labour Relations Board. Even if Ms Besner obtains certain remedies for the 2008 grievances, an adjudicator would not have the power to grant remedies related to the 2006 and 2007 grievances. As such, deferring the investigation into these proceedings will only delay Ms Besner's chance to have this portion of her complaint investigated by the Commission. Ms Besner has been waiting since 2006 to seek a remedy and referring the complaint back to the grievance process would mean that it would take several more years before Ms Besner's grievances could be heard.

Further, Section 41(1) a) of the Canadian Human Rights Act states that a deferral can only take place when a grievance process is reasonably available. Given that no grievance process is available with respect to the 2006 and 2007 allegations/grievances, we respectfully submit that the 2006 and 2007 allegations should be investigated.

...

[34] On November 4, 2013, the employer also wrote to the CHRC in response to the s. 41 report, expressing its agreement with its recommendation (complainant's Exhibit 15A):

...

This is in response to your letter dated October 1, 2013 regarding the section 41 report prepared for Ms. Besner's Canadian Human Rights Complaint (CHRC) against Employment and Social Development Canada (ESDC) [previously named Human Resources and Skills Development Canada (HRSDC)].

Given Ms. Besner continues to have four (4) pending grievances from 2008, ESDC is in agreement with the Commission's recommendation, pursuant to paragraph 41(1)(a) of the Canadian Human rights [sic] Act, to not deal with this CHRC at this present time. Ms. Besner's allegations of discrimination can be addressed through the grievance procedure as outlined in the PA collective agreement.

...

[35] On January 27, 2014, the CHRC wrote to the complainant to inform her that it had decided not to deal with her complaint **at that time** (complainant's Exhibit 7C). It further advised that she could return to the CHRC following the completion of the other process available to her if she believed it did not adequately address her human

rights issues and wanted to reactivate her complaint. Its communication reads as follows:

...

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in your complaint (20080756) against Human Resources and Skills Development Canada.

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 41(1)(a) of the Canadian Human Rights Act, not to deal with the complaint at this time.

The decision of the Commission is attached.

Accordingly, the file on this matter has now been closed.

You can return to the Commission within 30 days following the completion of the other process if you believe that the human rights issues were not adequately addressed and would like the Commission to reactivate your complaint. The Commission will then verify whether the other process adequately dealt with the human rights issues in order to decide whether or not to deal with the complaint.

...

IV. Summary of the arguments

A. The respondent's preliminary objection

[36] The respondent argues that the complaint is untimely as it was not 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" as required under s. 190(2) of the Act.

[37] It argues that the determination of **when** the 90 days started requires assessing the "essential nature" of the complaint. It relies on *Tyler v. Public Service Alliance of Canada*, 2021 FPSLRB 107 at para. 158, where the Board stated this:

[158] As the Federal Court of Appeal stated in Boshra, I must determine the essential nature of the complaint. In other words, what did the union do or fail to do that is the basis of what Ms. Tyler submitted as causing the alleged violation of the duty of fair representation?

[38] It argues that a survey of the complainant's submissions reveals that the essential nature of her complaint is her dissatisfaction with the PSAC Officer in 2012. It provides these examples:

- a. *"Adjudication was cancelled by my union lawyer, [the PSAC Officer], before it even had a chance to hear my grievance."...*
- b. *"TB lawyers failed to settle the grievances outside of court and were only offering to set me up with a special hearing telephone system. I don't believe this was a good reason for [the PSAC Officer] to go ahead and cancel adjudication. I felt that adjudication should go on as planned..."*
- c. *"I was very disappointed in [the PSAC Officer]'s conduct and decision..."*
- d. *"I felt that perhaps [the PSAC Officer] was lazy..."*
- e. *"[the PSAC Officer] **abandoned** the case in what was supposed to be grievance hearings... Before even facing the hearing judge, he told me and Denis Camus (my witness) that I did not have a case... Why did he abandon my case?"...*
- f. *"I maintain that [the PSAC Officer] conducted himself in a dishonest manner... was incompetent in the handling of my grievances leading up to what was supposed to be an adjudication hearing..."*

[Emphasis in the original]

[39] The respondent argues that these examples clearly indicate that the essential nature of this complaint relates to the events in 2012 involving the hearing and withdrawal of the complainant's grievances. It submits that she should have made her complaint within 90 days of that time and not 16 months later.

[40] The respondent relies on *Nemish v. King*, 2020 FPSLRB 76, and *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90, in support of its argument that the clock started in 2012, not 2014.

[41] Relying on *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, it argues that the complainant cannot argue that she was waiting for the CHRC's decision before making her complaint. It notes that she has not identified any specific action that the PSAC took **after** October 2012 that she is unhappy with.

[42] The respondent also takes the position that the complaint is moot because of a settlement agreement that the complainant and her former employer reached in 2017.

It states that that agreement resolved all outstanding grievances and CHRC complaints. The Board was not provided with a copy of it.

B. The complainant's response to the preliminary objection

[43] The complainant is self-represented. In a 35-page written submission, she addressed each statement in the respondent's submissions. As a result, her submissions are extremely repetitive, which she readily acknowledged.

[44] In an attempt to ensure that the complainant's arguments are accurately captured, I have decided to reproduce excerpts of her submissions that, in my opinion, reflect the main relevant points of her arguments against the preliminary objection. They read as follows:

...

*Adjudication was scheduled for October 22, 2012 for grievances 2006-07. [the PSAC Officer], PSAC was my representative. On the day of the grievance, [the PSAC Officer] wanted to speak to the TB lawyer **prior** to adjudication. He said he wanted to settle the case with TB through this meeting. I was not present for this meeting. After he met with TB lawyer, and not knowing what they talked about [the PSAC Officer] spoke to me and Denise Camus, PSAC President of local **assured** Ms. Camus and I **"that the outcome would be the same if not better than adjudication" (Exhibit 10 [dated December 31, 2019]) - by going through CHRC to hear the 2006-07 grievances combining 2008 onward grievances which had yet to be adjudicated. He said that I would have recourse with CHRC and that they would mediate in an informal way. He encouraged me to go through this route and told me that it would work very well. He then proceeded to abandon the 2006-07 case and closed adjudication on the above grievance. I believed [the PSAC Officer] when he told me to go through CHRC for best outcome and that they would hear 2006-07 grievances along with the later ones plus as he said "there would be recourse with CHRC". [The PSAC Officer] never gave me any reasons why he was abandoning the case and since I was not at the meeting with him and TB, I had no idea. It seemed as if moving things through CHRC was an alternative to adjudication.***

... And so, I went with his advice. At no time on the day of adjudication did I think that what [the PSAC Officer] was telling me about going through CHRC was wrong.

...

A few days after [the PSAC Officer] closed the above adjudication, I spoke to someone at PSAC and was told that [the PSAC Officer] had been fired. This person said that the firing of [the PSAC Officer] was as a result of being incompetent and not fulfilling his

duties. Shortly afterwards, (about 2 weeks) another Grievance Adjudication Officer from PSAC took over my file. His name was Jean-Rodrigue Yoboua.

...

... I still stand by the Duty to Fair Representation made in February 2014 on the basis of being given false and ill advice from [the PSAC Officer] in moving everything to CHRC. There was a process with CHRC and I had to wait it out. I did reopen my complaint within 30 days of [the PSAC Officer] giving me the information about moving things through CHRC and so I was clearly following his legal advice, believing what he had said to me. The fact that it took more than a year after reopening my complaint for CHRC to provide a final report, I cannot be blamed for this. And if I felt at the time of [the PSAC Officer]'s advice of moving things through CHRC was arbitrary then I may have made a Duty to Fair Representation complaint at that time but I didn't know any better as what he told me sounded credible.

...

... PSAC is responsible for the fallout of the October 22, 2012 grievances and the decisions [the PSAC Officer] counselled me on especially, when the counsel was not correct, proper and in fact, it was arbitrary.

The Duty to Fair Representation is legitimate and filed on time based on [the PSAC Officer] advising me to go through CHRC where he **“assured me that the outcome would be the same, if not better than going through adjudication”**. As such, any points given by [the PSAC Officer] on the grievances can be used as a single point to file a Duty to Fair Representation Complaint. I decided to use [the PSAC Officer]'s CHRC counsel as the point as I had no reason to file a Duty to Fair Representation prior to knowing that what [the PSAC Officer] counselled me on was arbitrary....

...

The Duty to Fair Representation is not on the withdrawal of the grievances **as I was not aware of why the withdrawal happened plus I have just begun to piece everything together based on this exercise and reviewing all documentation**. I was just in an accident, unable to comprehend everything except for what [the PSAC Officer] told me with to go through CHRC with my complaint with an **assurance “that the outcome would be the same if not better than adjudication”**. It still goes to show that the Duty to Fair Representation based on [the PSAC Officer]'s advice to go through CHRC **is also arbitrary**. PSAC was wrong to withdraw those grievances but they were also wrong in providing false legal advice as too CHRC. And since, Mr. Yoboua was trying to support me in the CHRC process following [the PSAC Officer]'s ill advice to me, it still goes to show that Mr. Yoboua, PSAC was trying to “smooth” the issue that [the PSAC Officer] had withdrawn the grievances and perhaps, they shouldn't have been withdrawn based on the

evidence that I just came about now through putting all the paperwork together.

And if as Mr. Yoboua states “the withdrawal of the grievances was not attributable to her” then I cannot be held responsible for not making a Duty to Fair Representation on the withdrawal of the grievances as [the PSAC Officer] is guilty on both counts.

In hindsight, if the 2006-07 grievances cover the same issues of the later grievances, and as these were the first grievances of many, then [the PSAC Officer] **was wrong and negligent in withdrawing the said grievances**. I had everything that met the requirements of having a grievance in the first place. I had the documents stating I had medical letters (both psychological and medical) stating my functional limitations dating back to 2003 (**Exhibit 17 & 20**).

Having said that, I cannot be blamed for not filing a Duty to Fair Representation Complaint against [the PSAC Officer] on the basis of his withdrawing of the said grievances because:

- 1) [the PSAC Officer] did not tell me why he was withdrawing the grievances.
- 2) He gave me alternative that seemed even better than adjudication - by advising me to go through CHRC with an **assurance** of a same if not better outcome than adjudication.
- 3) **I only became aware of the reasons for the withdrawal of grievances while preparing myself for this exercise and through the exercise became aware of the collective agreement reason as to why [the PSAC Officer] withdrew the grievances when all along I met the collective agreement issue of having medical letters stating my limitations beginning 2003.**
- 4) Mr. Yoboua, PSAC seemingly was taking over the CHRC file which now supports what [the PSAC Officer] was telling me to do.

...

... And so the Duty to Fair Representation complaint is **valid** and filed on time, based on what [the PSAC Officer] assured me. There was no reason for me to file a complaint against [the PSAC Officer] at the time of the hearing as he had assured me of a better outcome with his counsel of going through CHRC....

Having faith in what [the PSAC Officer] “**assured me that the outcome would be the same, if not better than going through adjudication and that I would have recourse**” CHRC’s final report came to me in February 2014. It became evident, that this was the time to file a Duty to Fair Representation complaint against [the PSAC Officer]. I was within the 90 day period to do this. The 90 day period to file a complaint was within the means of CHRC’s process that I had to wait out for a final response. And [the PSAC Officer] acted arbitrarily in giving me false advice to go

*through CHRC and as a result he wasted my time. **Having said that, I had no idea that it was wrong at the time of [the PSAC Officer] withdrawing the said grievances as his counsel to follow through with CRHC with an assurance of a “better outcome if not better than adjudication and that I would have recourse” seemed to be an honest advice. I had placed my faith in [the PSAC Officer] at the time. [The PSAC Officer] is a certified grievance and adjudication officer and one would think that whatever he counsels is correct.***

...

*[The PSAC Officer] is responsible for the the legal counsel about going through CHRC. It was after CHRC’s final report from the Acting Chief Commissioner on January 15, 2014 including another letter dated January 27, 2014 from David Langtry, Acting Chief Commissioner (**Exhibit 7C & 7D**) and it occurred to me I was **mislead and misrepresented by [the PSAC Officer].** I still had to go through the CHRC process to know whether or not [the PSAC Officer]’s legal advice was sound. **Since it was [the PSAC Officer] that initiated advising me to go through CHRC to mediate all grievances then it stands to say that [the PSAC Officer] is responsible for his ill advice and that I still had to hear out the final report from CHRC as I was following [the PSAC Officer]’s legal advice and one has to give the benefit of the doubt especially when one doesn’t know any better. It is not my fault that the process takes so much time as it seems with every other avenues (PSAC, PSLRB ..) ... The 16 months of filing a complaint is in line with my belief in what [the PSAC Officer] assured me, therefore, it met the time limits.***

*Before the rendering of the final report from the Commissioner made in January 24, 2014, letters were sent to various officials such as Labour Relations, and Jean-Rodrigues, PSAC (**Exhibit 7A & 7B**). This letter stated that “the Commission will review the Complaint form, the report, the submissions, and the comments to those submissions at its next available meeting. When the Commission as finished its review, it will make a decision. We will then write to let you know what the Commission has decided.” Again, I am bound by time of filing due to the process. The final report is the final word. Therefore, the filing of the Duty to Fair Representation is not untimely and is within the 90 days of knowing the action of [the PSAC Officer] of giving false advice that is arbitrary. I had to ensure myself that [the PSAC Officer] misrepresented me and this came about in the final report of the Commissioner....*

...

***There is no going back to CHRC to exhaust the other process.** The process happened when in 2017 other grievances were mediated **without the 2006-07 grievances** that were similar to other grievances. Those 2006-07 are closed files and no matter what cannot be revived as I have exhausted what CHRC was asking. Retroactively remedies for those closed grievances cannot*

be revived not even with CHRC as the human rights concerns have been considered in the 2017 mediation and settlement with the later grievances. That is clear. Therefore, I have exhausted all other grievances and there is no going back to CHRC as the other grievances have been exhausted and the 2006-07 closed grievances stays closed as they are similar to the ones that were mediated which is what CHRC was basing their decision to exhaust all grievances which were similar. This would satisfy CHRC. There is nothing more that CHRC can do for me and I knew that back when I made my decision to file the Duty to Fair Representation and [the PSAC Officer] ill advised me and ought to have applied his knowledge on the CHRC process before assuring me otherwise. [The PSAC Officer] failed to look at the risk that CHRC may pose over the fact that I had similar grievances that still had to be heard. He acted in an arbitrary conduct. He deserves the Duty to Fair Representation Complaint.

...

Should PSLRB legal team wish to see the MOU, I can provide this to you. CHRC would be satisfied to hear that 2008-onward grievances were heard, settled and mediated as the grievances were similar to the 2006-07 ones and it would settle the fact that I exhausted the adjudication process for 2008 onward grievances.. They would also be satisfied with the human right issues being covered as they are issues that would have covered 2006-07 grievances since they are similar as the later grievances. The 2006-07 grievances remain closed grievances no matter what and no retroactively remedies can be had. There is no recourse for the lost 2006-07 grievances.

...

[Sic throughout]

[Emphasis in the original]

[45] The complainant also argues that the timelines should not apply to her, due to medical reasons. She states:

...

A few days before or after adjudication of October 22, 2012, I was rear-ended in a car accident hitting my head on the steering wheel and whiplashed backwards. I soon was not able to work or concentrate much as I suffered a mild concussion. Multiple rehabilitation appointments began on October 26, 2012. Rehabilitation was for both physical and psychological issues including a concussion and concussion syndrome with major migraines. I also fell in a deep depression and soon developed Fibromyalgia. I exhausted my sick days then went on Long Term Disability. I could not work on anything - not even my housework. I had an attendant care assistant for my daily living activities. My thoughts were so muddled as a result of the concussion, that

*months later, I had contacted Denise Camus **to remind me of the details of the adjudication hearing and [the PSAC Officer]’s advice given to me.** Following that I **medically retired** in December 31, 2013.*

...

... I filed within 90 days of when I knew of the action giving rise to the complaint. Also, to consider the fact that I had just had a car accident and suffering many injuries including a concussion which rendered me off work taking my sick days to recuperate and bedridden most of time, if not, daily rehabilitation.

...

Given the confusion I had over the 2006-07 grievances that were withdrawn, the process and it’s repercussion - as you can see to my confusion under Exhibit 18 & 18A, & 19, I ask that the Duty to Fair Representation Complaint go through as being valid. The car accident with injuries to myself in and around the time of the adjudication did not help things.

...

[Sic throughout]

[Emphasis in the original]

[46] The complainant did not provide the Board with any documentation to substantiate those statements. However, she did offer as follows: “For a fee that has to be paid upfront, I can provide you with clinical notes to substantiate the car accident and my injuries (concussion and others) that happened just days within the October 22, 2012 adjudication timeframe.”

V. Reasons

A. The applicable timeline

[47] The complaint made under s. 190(1)(g) of the *Act* claims that the PSAC Officer committed an unfair labour practice and that he breached his duty of fair representation on the basis of arbitrary and bad-faith conduct.

[48] Section 190(1)(g) of the *Act* reads as follows:

190 (1) *The Board must examine and inquire into any complaint made to it that*

...

190 (1) *La Commission instruit toute plainte dont elle est saisie et selon laquelle :*

[...]

(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.

g) l'employeur, l'organisation syndicale ou toute personne s'est livré à une pratique déloyale au sens de l'article 185.

[49] Section 185 of the *Act* defines an unfair labour practice as anything prohibited by ss. 186(1) or (2), 187, 188, or 189(1).

[50] The provision of the *Act* referenced under s. 185 that applies to this complaint is s. 187, which provides as follows:

187 *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

187 *Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.*

[51] Section 190(2) of the *Act* provides as follows the time frame to make a complaint when a complainant alleges a violation of s. 187:

190 (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.*

190 (2) *Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.*

[52] The Board and its predecessors have repeatedly affirmed the mandatory nature of subsection 190(2) of the *Act*. The time limit prescribed for filing a complaint must be respected, and the Board has no jurisdiction to extend it (see, for example, *Boshra, Nemish, Esam, and Éthier v. Correctional Service of Canada*, 2010 PSLRB 7).

[53] The extent of this Board's jurisdiction is to determine, based on the evidence, the date on which the 90-day period started, or in other words, 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 her complaint. This is purely a question of fact (see *Mohid v. Brossard*, 2012 PSLRB 36 at paras. 35 and 36).

[54] The respondent argues that the complaint should be dismissed as the complainant knew or ought to have known of the action or circumstances giving rise to the complaint on October 22, 2012, which was more than 90 days before the date on which she made her complaint.

[55] The complainant, on the other hand, argues that she did not realize that the PSAC Officer's conduct was arbitrary and in bad faith until February 5, 2014, which is the date on which she received the CHRC's decision not to proceed with her complaint at that time.

[56] The complainant made her complaint to the Board on February 18, 2014. As a result, for the preliminary objection to succeed, it must be established that she knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to her complaint before November 16, 2013, which was 90 days before the date on which she made her complaint.

B. The essential nature of the complaint

[57] As the Federal Court of Appeal held in *Boshra*, when making a timeliness determination under s. 190(2) of the *Act*, the Board must first determine the essential nature of the complaint. In *Tyler*, this was explained as determining what the union did or failed to do that is the basis of what the complainant is submitting as causing the alleged violation of the duty of fair representation (at para. 158).

[58] The complaint, received by the Board on February 18, 2014, explains the basis for the complaint as follows: "On first day of adjudication (Oct. 2012) union lawyer advised me to move grievances directly to CHRC & this is all before adjudication even began. My lawyer declined to go through adjudication."

[59] The complainant provided extensive detailed particulars in March 2014 as to why she believes that that was inappropriate.

[60] The respondent argues that the essential nature of the complaint is the complainant's dissatisfaction with the PSAC Officer in 2012. In support, it refers to several statements in the complainant's submissions that show her dissatisfaction with

him. It argues that those examples clearly indicate that the essential nature of her complaint relates to events in 2012 involving the hearing and withdrawal of her grievances.

[61] A careful review of the initial complaint received by the Board on February 18, 2014, and the detailed particulars provided to the Board in March 2014 support that the essential nature of the complaint relates to the PSAC Officer's actions in October 2012. The following are some relevant excerpts from the particulars of the complaint:

...

... I believe [the PSAC Officer] to be negligent in how he handled my grievances before the adjudication process just prior to the actual hearing. He ought to have known that the correct steps is to go through adjudication process (court) and only when that process has been fulfilled and consequently failed that we push the whole thing to CHRC... I feel that perhaps [the PSAC Officer] was lazy and that he also did not want to deal with the presiding judge and TB lawyer whom [the PSAC Officer] stated were "hardball and difficult".

...

He was not honest with his decision to cancel adjudication in favour of moving the grievances to CHRC ... he deceived me when he counselled that we forego into moving the grievances to adjudication in favour of moving the grievances in question directly to CHRC....

...

I waited so long for an adjudication date (8 years) only to waste everybody's time in moving this ahead to CHRC before adjudication had a chance to hear the grievances and make a decision.

...

The point is I had a right to have 2006 and 2007 grievance heard on the day that adjudication was scheduled. I lost that right....

...

... Again, the point is that I had a right to have 2006 and 2007 heard at the adjudication date and that was taken away from me.

...

[The PSAC Officer], did not follow proper regulations to an adjudication process. I have a right to have the grievances heard. I was told that CHRC is the proper process to go through. This was false and unfair representation as the statement is not true. I was falsely represented. [The PSAC Officer] is a fraud.

I have a right to my fair hearing and compensation for losses, cost and recoveries....

...

[Sic throughout]

[62] Those statements lead me to conclude that the essential nature of the complaint is the complainant's dissatisfaction with the PSAC Officer's advice to withdraw her 2006 and 2007 grievances and instead to pursue her complaint directly with the CHRC. It is that action by the PSAC Officer that gave "rise" to the complaint as referred to in s. 190(2) of the *Act*.

C. The timeliness of the complainant

[63] There is no disputing that on October 22, 2012, the complainant was aware of the advice that she withdraw her grievances and instead pursue her complaint before the CHRC.

[64] The respondent argues that since the essential nature of the complaint relates to the events that took place on October 22, 2012, the clock for making the complaint started then and not in 2014.

[65] The complainant, however, argues that her complaint is timely as she only became aware on February 4, 2014, that the PSAC Officer's advice was, as she alleges, a misrepresentation. She argues that she did not make a complaint in 2012 as she believed that the advice that she received was sound legal advice. She states that it is only when she received the CHRC decision on February 4, 2014, that she realized that she had not been given proper advice.

[66] Turning to the case law for guidance, in *Nemish*, the complainant made a duty-of-fair representation complaint which sought to challenge her bargaining agent's decision not to pursue a grievance. Ms. Nemish argued that the 90-day timeline should have started only on the date on which she received a final response from her bargaining unit's president that upheld a lower-level decision made within the bargaining unit not to file a grievance. She argued that until she received this final decision, she did not know all the circumstances giving rise to her complaint. In dismissing her complaint as untimely, the Board stated as follows:

...

[32] The statutory limit is mandatory, which is made clear by the language in the Act that states that a complaint "... must be made to the Board not later than 90 days after the date ...". Given that mandatory language and the absence of any other statutory provision providing the Board with discretion, the Board has consistently held that it has no discretion under the Act to extend the 90-day limit in s. 190(2) (see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55, *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20 at para. 36, *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, and many other cases).

...

[35] However, having said that, s. 190(2) does give the Board discretion to determine when a complainant knew, or ought to have known, of the action or circumstances giving rise to the complaint.

...

[37] I do not accept the complainant's argument that she knew only of the UNE's action (Ms. Sanderson's letter) but not the totality of the circumstances (that Mr. Aylward would not change the UNE's decision). Firstly, **the wording in s. 190(2) of the Act is disjunctive — the clock starts ticking when a complainant knows of the action or circumstances giving rise to his or her complaint. Furthermore, the timeline does not continue to evolve depending on what actions or circumstances occur after a decision is made and communicated.**

...

[Emphasis in the original and added]

[67] Similarly, in *Esam*, the complainant made an unfair-labour-practice complaint against her bargaining agent, alleging a breach of its duty of fair representation for failing to file a grievance on her behalf and for failing to properly advise her of the implications of not pursuing a grievance both before and after a harassment investigation. In dismissing her complaint as untimely, the former Board concluded as follows:

...

35 The essence of the complaint before me is that the union breached its duty of fair representation under section 187 of the PSLRA by failing to submit a grievance on behalf of the complainant both before and after a harassment investigation that took place between 2010 and 2012. **The complainant argued that her complaint is timely because she was not aware that the union breached its duty of fair representation until August 3,**

2013, when she learned of the implications of the failure to file a grievance.

36 In my opinion, the time limit for filing a complaint did not begin when the complainant first understood the consequences of the failure to file a grievance between 2010 and 2012; it began when she knew or ought to have known that no grievance was filed, because that is the essential nature of the complaint.

...

40 However, even if I accept that the time limit did not begin to run until the complainant learned of the implications of not filing a grievance, by her own admission, she learned of those implications at the latest on August 3, 2013, which was outside the time to make a complaint...

...

[Emphasis added]

[68] The *Nemish* decision refers to *Éthier*, which I also find relevant to this case. In *Éthier*, the complainant was dissatisfied with his bargaining agent after it reached an agreement with his employer that changed the interpretation of the collective agreement in a manner that negatively impacted him. Mr. *Éthier* expressed his dissatisfaction to his union representatives and decided to pursue the grievance process on his own since his bargaining agent would not support him. He made a duty-of-fair representation complaint after he received confirmation from the employer at the final level of the grievance process that he would not obtain the redress that he sought. In dismissing the complaint as untimely, the former Board stated this:

...

20 The fact that the complainant pursued his grievance at all levels does not in any way change the fact that the union refused to support the dispute, which is the subject of this complaint, and that the complainant was so advised by the end of June 2006.

21 In general, the circumstances that give rise to a complaint cannot be extended by invoking other circumstances that go beyond the first refusal to proceed with the grievance or dispute at issue. In this case, the 90-day period to make a complaint with the Board began on the date of that refusal, at the end of June 2006, and not on the date on which the complainant deemed that he had sufficient evidence to make the complaint, which was December 13, 2006. The period for filing a complaint cannot be extended by a complainant's attempts to convince a union to change its decision. To the extent that there is a violation of the PSLRA, there is no minimum or maximum standard for the

degree of knowledge that a complainant must have before filing his or her complaint.

*22 The essence of the complaint was the union's refusal to exercise the representation rights and recourses to which the complainant claims he was entitled. Accordingly, the complainant's knowledge of the union's refusal to support his dispute is the triggering event of a violation of section 190 of the PSLRA and the 90-day period for filing the complaint. Therefore, the period began when the complainant realized that the union would not help him settle his disagreement. **The PSLRA does not contain any provision that a complainant must exhaust all alternate recourse before filing a complaint.***

...

[Emphasis added]

[69] Applying the principles enunciated in *Nemish*, *Esam* and *Éthier*, I likewise conclude that the present complaint is untimely. The essential nature of the present complaint is the complainant's dissatisfaction with the PSAC officer's advice that she withdraw her grievances and instead pursue her complaint before the CHRC. There is no disputing that on October 22, 2012, she was aware of that advice. As stated in *Nemish*, the timeline does not continue to evolve depending on what actions or circumstances occur after the action or circumstances giving rise to the complaint.

[70] The complainant's argument for not making a complaint in 2012 is based on her claim that, at that time, she believed that the advice provided to her was sound legal advice. This is not supported by the detailed particulars. Indeed, contrary to what is claimed in her submissions dated December 13, 2021, it is clear from the particulars provided in March 2014 that the complainant was dissatisfied and disagreed with the PSAC Officer's advice from the moment it was provided on October 22, 2012.

[71] In her particulars of March 18, 2014, she states this:

... There were many red flags as I worked with [the PSAC Officer] on the said grievances... [The PSAC Officer] taking the steps of postponing set hearing dates further indicates that he was not competent to work through said grievances or perhaps, he was afraid too. This would later prove to be true as we got closer to the hearing. He always had an excuse for the cancellations. This was further confirmed to me on day of hearing where he was unable to move hearing in a complete manner before the adjudicator and consequently, abandoned the grievances.

The day before grievance(s) hearing ... I was disappointed that he would call me in a last minute meeting to cover seemingly

important details for the following day's hearing only to discuss my unremarkable attendance record...

He was not meticulous in handling my file. In fact he was ignorant. On the day of the actual hearing, [the PSAC Officer] was found incapable of presenting his facts and findings before the adjudicator and TB lawyer. I found [the PSAC Officer] highly incompetent.

... [The PSAC Officer]'s meeting with TB lawyer was obviously, weak and unsuccessful. His only recourse to a TB lawyer that he was afraid off (as he mentioned to me the day before hearing that this TB lawyer had a reputation for being a "hardball") was to abandon the case. TB was inflexible and [the PSAC Officer] was unable to proceed with the grievances especially with the fear that he seemingly had for this TB lawyer.

... [The PSAC Officer] was incompetent in dealing with grievances through from beginning to the end... [The PSAC Officer] gave no reason as to why he was abandoning the case other than he seemed to fear TB lawyer ... I, therefore, was faced with a failure to proper fair representation (duty to represent)

[The PSAC Officer] displayed much ignorance

... Even his physical attire at adjudication hearing was questionable. He was wearing a bold, bright smiling yellow Donald Duck tie with a casual shirt and pants. This is not a professional on all counts. This guy is a joke and a fraud. This is not a person that is able to take his job seriously and conduct himself as he should in a professional manner given his duties to represent...

I made my complaint with PSAC and shortly thereafter, I was told [the PSAC Officer] had been fired for being incompetent and not fulfilling his duties. This confirmed what I knew all along and he did a great injustice to me and what he was hired for. [The PSAC Officer] is a fraud and I question his credentials...

... I don't believe this was a good reason for [the PSAC Officer] to go ahead and cancel adjudication. I felt that adjudication should go on as planned but [the PSAC Officer] felt otherwise.

... Also it took 6 full years before an adjudication date was set for the above grievances and that is only after many previously scheduled hearing dates that were cancelled at the last minute. I had to write to the Chairperson of PSLRB in order to expedite an adjudication date without any cancellation. I was tired of waiting. Then [the PSAC Officer] decides to cancel the adjudication hearing for the reasons stipulated in my previous letter to you.

[Sic throughout]

[72] All those statements support a factual finding that the complainant had serious concerns with the PSAC Officer's advice from the moment it was provided. As stated in *Éthier*, to the extent that the Act was violated, there is no minimum or maximum

standard for the degree of knowledge that a complainant must have before making a complaint. Furthermore, there is no requirement in the *Act* that a complainant must exhaust all alternate recourse before making a complaint. In this case, the complainant was aware of the advice and was dissatisfied with it from the moment it was provided. As such, she had 90 days from that moment (October 22, 2012) to make a duty-of-fair-representation complaint. However, the complaint was made well after that timeline.

[73] Even were I to accept the complainant's argument that the clock should only have begun to run when the PSAC Officer's alleged misrepresentation became apparent to her, I would still not be able to rule in her favour. This is because I do not believe it is possible in this case to establish whether or not a misrepresentation occurred.

[74] In her submissions dated December 13, 2021, the complainant argues that she had no reason to make a complaint against the PSAC Officer at the time of the hearing since he had provided her an "assurance" that her CHRC complaint would provide her with the "... same if not better outcome than adjudication." She argues that she did not make the complaint against him earlier since she first had to assure herself that what he had told her had been a misrepresentation. She states that for that to take place, she had to wait for the CHRC to render its decision on whether to hear her complaint. She argues that she should not be penalized by the fact that that process took over a year to finalize.

[75] In other words, the complainant argues that the clock should only start to run on the date when the representation became, in her mind, a misrepresentation.

[76] The representation, or alleged misrepresentation, in question is described in the "Request for Particulars" form submitted on March 18, 2014, as follows: "Adjudication was cancelled by my union lawyer, [the PSAC Officer] before it even had a chance to hear my grievance. [The PSAC Officer] said I would have **a much better chance of winning** if I forwarded grievances directly to CHRC" [emphasis added].

[77] Further, in the additional particulars provided on March 18, 2014, the complainant refers to the PSAC Officer's representation as follows: "He said that I would have **a better chance of succeeding** with CHRC" [emphasis added].

[78] Based on the evidence presented, the complainant followed the respondent's advice, and initially, it appeared to be fruitful as the CHRC wrote to her and her

employer on January 31, 2013, informing them that mediation could be arranged to resolve the dispute. However, on March 14, 2013, the employer raised an objection on the basis that there was another process available and that, as such, she should be required to wait until all her other grievances were resolved before her complaint could be allowed to be heard before the CHRC.

[79] This led to the CHRC's decision issued on January 27, 2014. Importantly, this decision did not close the complainant's file. Rather, it provided her with the ability to return to the CHRC were she not satisfied with the outcome of her other grievances. Therefore, after she exhausted her other grievances, she still had the opportunity to return to the CHRC to obtain redress. As a result, a determination as to whether the PSAC Officer's advice was sound (i.e., the representation that she had "a better chance of succeeding" or "a much better chance of winning") would be known only were she to return to the CHRC after exhausting the process for her other grievances.

[80] I am cognisant that a large part of the complainant's disappointment following the CHRC's decision was that this represented a further delay in addressing her ongoing disputes with her employer. However, she did not include in her allegations anything to the effect that the PSAC Officer had made representations that the CHRC process would be more expeditious. Rather, the only allegations are that the PSAC Officer made representations regarding her chances of succeeding.

[81] In her written submissions dated December 13, 2021, the complainant states that the CHRC avenue is no longer available to her as all her human rights issues were addressed in a settlement reached with her employer in 2017. As a result, the true and final conclusion as to the soundness of the PSAC Officer's advice will never be known because **she** chose to settle her complaints rather than avail herself of her right to return to the CHRC.

[82] For all these reasons, and applying the principles enunciated in *Boshra, Nemish, Esam*, and *Éthier*, I find that the complaint is untimely.

D. Should the timeline be adjusted due to the complainant's health issues?

[83] The complainant states that in the period either before or after the October 22, 2012, hearing, she was involved in a car accident and suffered a mild concussion. In the closing arguments of her written submissions provided in December 2021, she

states that her complaint should be accepted as valid as a result of her confusion about her 2006 and 2007 grievances and adds this: “The car accident with injuries to myself in and around the time of the adjudication did not help things.”

[84] The Board considered a similar situation in *Tyler*, in which the complainant claimed that she was unable to comply with the 90-day limitation due to illness. At paragraph 209, the Board concluded as follows:

[209] Sadly for Ms. Tyler, Parliament has not given the Board the discretion to vary the application of the time limit under s. 190(2) to make complaints. I am therefore unable to accept her request for an accommodation due to her illness to allow her complaint to be upheld despite being untimely.

[85] Similarly, in *Nemish*, the Board stated as follows:

...
[39] I also do not accept that the complainant’s ability to file a timely complaint was compromised by the concussion she unfortunately sustained on September 5, 2018. No medical evidence was proffered to the effect that her knowledge of the action or circumstances giving rise to her complaint was compromised by this injury, and her testimony made it clear that it was not.

...
[86] I find myself necessarily reaching the same conclusion as did the Board in *Tyler* and *Nemish*.

[87] The complainant did not provide medical documentation to the effect that her injuries rendered her incapable of appreciating the action or circumstances giving rise to her complaint; nor does she claim as much.

[88] I find that on October 22, 2012, the complainant was aware of the fact that her grievances were withdrawn and that she was being given advice to instead pursue the matter with the CHRC. The fact that she acted on the advice and took steps to revive her CHRC complaint on November 11, 2012, is evidence of this understanding.

[89] Furthermore, her detailed statements on the events of October 22, 2012, and after clearly show that she had the necessary ability to comprehend the events of the day as well as her interactions with Mr. Yoboua in the subsequent weeks.

[90] Finally, I note that in the year that followed the withdrawal of her grievances in October 2012, she actively pursued her CHRC complaint. Therefore, she should similarly have been able to make a complaint against the respondent.

[91] As noted in *Esam*, it is well established that the Board does not have the ability to extend the 90-day time limit under the *Act*. The only discretion it is provided is to determine when “in the Board’s opinion” the complainant ought to have known of the action or circumstances giving rise to the complaint (see *Nemish*). I find that the complainant had the necessary knowledge on October 22, 2012, of the essential nature of the complaint as well as the events that followed.

E. Has the complaint become moot?

[92] The respondent argues that, in addition to being out of time, the complaint has also become moot. They rely on a settlement agreement that the complainant and her former employer reached in 2017. They claim that this settlement agreement resolved all outstanding grievances and CHRC complaints.

[93] Both parties offered to provide the Board with a copy of the settlement agreement if requested.

[94] As it has been determined that the complaint is untimely, it is not necessary to look further into whether or not the matter has also become moot.

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

(The Order appears on the next page)

VI. Order

[96] The complaint is dismissed due to it being untimely.

May 31, 2023.

**Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board**