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Citation: 2023 FPSLREB 63

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

JONATHAN ROSS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Ross v. Public Service Alliance of Canada

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Themselves

For the Respondent: Kim Patenaude, counsel

Decided on the basis of written submissions, filed February 2, 11, and 27, March 6, and May 15 and 16, 2023.

REASONS FOR DECISION

I. Objection to the timeliness of the complaint

[1] The Public Service Alliance of Canada ("PSAC" or "the respondent") expelled the complainant from its membership on March 24, 2022. The complainant appealed his expulsion internally no later than April 13, 2022 using the appeal process set out in PSAC's constitution. The internal appeal has not yet been decided. The complainant filed a complaint on January 16, 2023 alleging that their expulsion from PSAC membership was discriminatory, contrary to ss. 188(b) and (c) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). PSAC objects to the complaint because it is untimely.

[2] The complaint is untimely. A complaint that an employee organization has expelled, suspended, or otherwise disciplined a member in a discriminatory manner contrary to ss. 188(b) or (c) of the *Act* must be made within one of two periods: (1) 90 days from the date that a decision has been made in an internal appeal process, or (2) a 90-day window of time commencing 6 months after the complainant files their internal appeal. There has been no appeal decision yet, so the first period has not yet begun to run. The second window of time expired no later than January 12, 2023, shortly before the complaint was filed.

[3] Therefore, I must dismiss the complaint.

II. This case was decided on the basis of written submissions

[4] The Federal Public Sector Labour Relations and Employment Board ("the Board") is empowered to decide a complaint on the basis of written submissions because of its power to decide "… any matter before it without holding an oral hearing" in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365); see also *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 at para. 3; upheld in 2022 FCA 159 at para. 10. This decision is based on the timeliness of the complaint rather than its merits, and I have decided this matter solely on the basis of the parties' written submissions and the documents that they provided to me on that issue.

[5] I invited the parties to provide submissions on the "arguable-case" framework or "arguable-case analysis" of this complaint. This framework or analysis would have

required me to assume that the facts provided by the complainant were true by reviewing both the complaint form and the documents provided by the parties in their exchanges after the complaint was made (see *Corneau v. Association of Justice Counsel*, 2023 FPSLREB 16 at paras. 17, 27, and 29) and then to assess whether the outcome of this complaint is "plain and obvious" (see *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLREB 30 at para. 77). Had I assessed the merits of this complaint, I would have used the arguable-case framework; however, in light of the parties' broad agreement on the facts relevant to the timeliness of the complaint, this approach was unnecessary.

III. Issues

[6] The main issue addressed in this decision is whether the complaint is untimely. This in turn requires assessing four issues:

1) whether the complaint was made outside the time prescribed under the combined effect of ss. 190(3)(b)(ii) and (c) of the *Act*;
2) whether the respondent's dilatory treatment of the complainant's appeal means that it has been "dealt with … in a manner unsatisfactory to the complainant …" for the purposes of s. 190(3)(b)(i);
3) whether the respondent's delay processing the appeal means that the complainant did not receive "ready access" to the appeal process as required under s. 190(3)(a) and 190(4)(b) of the *Act*; and
4) whether I should exercise my discretion under s. 190(4) of the *Act* to hear this case despite the ongoing appeal.

IV. Reasons for concluding the complaint is untimely

[7] The timeliness of this complaint turns on the interpretation of s. 190 of the *Act*. Since the words used in that section are of central importance to this case, I have set out the relevant portions of those provisions in their entirety following this paragraph. The key words are the phrasal verb "dealt with", the term "ready access", and the use of the word "may" to show where the Board has discretion to relieve against time limits; therefore, I have emphasized those words in the following text:

Complaints	***Plaintes à la Commission***
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*	***g)*** *l'employeur, l'organisation syndicale ou toute personne s'est*

committed an unfair labour practice within the meaning of section 185.

Time for making complaint
(2) *Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

Limitation on complaints against employee organizations
(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*

livré à une pratique déloyale au sens de l'article 185.

Délai de presentation
(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.*

Restriction relative aux plaintes contre une organisation syndicale
(3) *Sous réserve du paragraphe (4), la plainte reprochant à l'organisation syndicale ou à toute personne agissant pour son compte d'avoir contrevenu aux alinéas 188b) ou c) ne peut être présentée que si les conditions suivantes ont été remplies :*

a) *le plaignant a suivi la procédure en matière de présentation de grief ou d'appel établie par l'organisation syndicale et à laquelle il a pu* ***facilement recourir****;*

b) *l'organisation syndicale a :*

(i) *soit* ***statué*** *sur le grief ou l'appel, selon le cas, d'une manière que le plaignant estime inacceptable,*

(ii) *soit omis de* ***statuer*** *sur le grief ou l'appel, selon le cas, dans les six mois qui suivent la date de première présentation de celui-ci;*

c) *la plainte est adressée à la Commission dans les quatre-vingt-dix jours suivant la date à partir de laquelle le plaignant était habilité à*

with paragraphs (a) and (b), make the complaint.	*le faire aux termes des alinéas a) et b).*
Exception	***Exception***
(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*	***(4)*** *La Commission* ***peut****, sur demande, statuer sur la plainte visée au paragraphe (3) bien que celle-ci n'ait pas fait l'objet d'un grief ou d'un appel si elle est convaincue :*
(a) *the action or circumstance giving rise to the complaint is such that the complaint should be* ***dealt with*** *without delay; or*	***a)*** *soit que les faits donnant lieu à la plainte sont tels qu'il devrait être* ***statué*** *sans délai sur celle-ci;*
(b) *the employee organization has not given the complainant* ***ready access*** *to a grievance or appeal procedure.*	***b)*** *soit que l'organisation syndicale n'a pas donné au plaignant la possibilité de* ***recourir facilement*** *à une procédure de grief ou d'appel.*

[Emphasis added]

A. Was the complaint made outside the time limit prescribed in s. 190(3)(c) of the *Act*? Answer: yes.

[8] The complainant alleges that the respondent committed an unfair labour practice as that term is defined in s. 185 of the *Act*.

[9] The complainant was a member of PSAC. Along with four other members, they were alleged to have violated PSAC's Oath of Office. PSAC investigated that allegation. Ultimately, on March 24, 2022, its National Board of Directors expelled the complainant and the other four members from membership. The expulsion was to be reviewed every five years.

[10] PSAC's constitution ("the Constitution") provides that a member may appeal disciplinary action to a tribunal. The regulations state that the tribunal shall be established within two months of an appeal being commenced unless the two-month period is extended by the mutual agreement of the parties or a decision of the Alliance Executive Committee ("AEC") that "… extenuating circumstances prohibit the establishment of the Tribunal …" in a timely fashion.

[11] The complainant (and the other expelled members) filed their appeal under the Constitution. The complainant emailed their appeal on April 10, 2022, and then sent a copy of it by registered mail on April 11, 2022, which was delivered on April 13, 2022. The AEC granted a series of extension of time for the appeal, and it is currently scheduled to be heard on June 27, 2023.

[12] The time limits set out in s. 190 of the *Act* are mandatory because of Parliament's use of the phrase "… must be made to the Board not later than 90 days …" and the absence of any other provision in the *Act* giving the Board broad jurisdiction to extend the time limits set out in the *Act* (see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55, and *Corneau* at para 14).

[13] The 90-day time limit in s. 190(2) is "[s]ubject to" ss. 190(3) and (4) of the *Act*. Those sections apply only to complaints alleging a breach of ss. 188(b) or (c). Section 190(3) provides that no complaint of a breach of ss. 188(b) or (c) may be made unless these three conditions have been met:

1) the complainant has filed a grievance or appeal in accordance with a procedure established by the employee organization;
2) the employee organization either
    i) has "dealt with" the grievance or appeal, or
    ii) has not "dealt with" the grievance or appeal within 6 months of the complainant filing their grievance or appeal to the employee organization; and
3) the complaint must be filed with the Board within 90 days after either of those 2 events occurs.

[14] As the Board put it as follows in *Myles*, at para. 91:

> ***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.*

[15] I will address shortly the meaning of "dealt with"; however, in summary, "dealt with" means "decided". Therefore, this complaint falls under the second of the two categories in the second condition set out earlier in this decision because the

respondent has not yet "dealt with" the complainant's appeal. This in turn means that the deadline to make this complaint was 6 months plus 90 days from the date on which the complainant presented their appeal to the respondent.

[16] The complainant presented their appeal by email on April 10, 2022, but also sent it by registered mail that arrived on April 13, 2022. I have chosen to treat the appeal as having been presented on April 13, 2022 because that is the most beneficial date for the complainant, but the result of this complaint is the same regardless of which date I use. Section 190(3)(b)(ii) of the *Act* uses the phrase "within six months **after** the date" [emphasis added] of the appeal, which means that the period does not include April 13, 2022 (see the *Interpretation Act* (R.S.C., 1985, c. I-21), at s. 27(5)). Therefore, six months after the date on which the complainant presented their appeal was October 14, 2022. Ninety days after October 14, 2022 was January 12, 2023.

[17] This complaint was made on January 16, 2023, which therefore was outside the period prescribed in s. 190(3)(c) of the *Act*. I must dismiss the complaint.

B. Was the appeal "dealt with … in a manner unsatisfactory to the complainant …" because of the respondent's delay deciding it or its other actions in processing it? Answer: no.

[18] Section 190(3)(b)(i) of the *Act*, together with s. 190(3)(c), permit an employee to make a complaint not later than 90 days after the employee organization has "dealt with" their appeal. In this case, the respondent has not decided the appeal. It has begun to process the appeal but has done so in a dilatory fashion, and the complainant complains about the slow pace of their appeal.

[19] This requires me to determine whether the phrase "dealt with" is synonymous with "decided" or, alternatively, synonymous with "processed". If "dealt with" means "decided", then s. 190(3)(b)(i) cannot apply, as there has been no decision. Alternatively, if "dealt with" means "processed", then s. 190(3)(b)(i) could apply, because the delay processing the appeal means that it has been processed in a manner unsatisfactory to the complainant. Such a failure to process the appeal in a timely fashion would be a continuing breach of an employee organization's obligations and would effectively restart the 90-day period whenever the delay becomes "unsatisfactory to the complainant".

[20] In *Myles*, at para. 91, the Board equated the term "dealt with" with "decided" and stated that the 90-day period set out in s. 190(3)(b)(i) runs "… from the date of the decision in the grievance or appeal process that the complainant finds unsatisfactory." Neither party in that case made submissions about the timeliness of the complaint. Therefore, while I reach the same conclusion as did the Board in *Myles*, I will provide lengthier reasons for that conclusion.

[21] The meaning of s. 190(3)(b) of the *Act* must be determined by considering the trinity of statutory interpretation: the text, context, and purpose of that provision (see *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236 at para. 7).

[22] When the words of a provision are precise and unequivocal, their ordinary meaning predominates. However, if they can support more than one reasonable meaning, the context and purpose have a greater impact on their interpretation (see *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10).

[23] In this case, the phrasal verb "deal with" is capable of meaning either "decided" or "processed". For example, the *Collins English Dictionary*, 13th ed., defines "deal with" in a way that has both of those meanings, stating, "When you deal with something or someone that needs attention, **you give your attention to them**, and often solve a problem **or make a decision** concerning them" [emphasis added].

[24] This dual meaning is also demonstrated in the *Veterans Review and Appeal Board Act* (S.C. 1995, c. 18), which contains two uses of that term as follows:

…	[…]
27 (1) *An appeal shall be heard, determined and dealt with by an appeal panel consisting of not fewer than three members designated by the Chairperson.*	***27 (1)*** *L'appel est entendu par un comité composé d'au moins trois membres désignés par le président.*
…	[…]
29 (1) *An appeal panel may* … ***(c)*** *refer any matter not dealt with in the decision back to that person or review panel for a decision.*	***29 (1)*** *Le comité d'appel peut … soit encore déférer à cette personne ou à ce comité toute question non examinée par eux.*

… […]

[25] The term "dealt with" in s. 27 of that *Act* must mean something other than "decided" (otherwise, it would be redundant with the previous word "determined"), but the same term in s. 29 means "decided" (as the matter must be "in the decision"). That statute helps demonstrate how the term "dealt with" can mean different things and thus shows why a purely textual interpretation is unhelpful in this case.

[26] For that reason, the statutory context is particularly important. Four elements of this context lead me to conclude that "dealt with" means "decided" and not "processed".

[27] First, interpreting the phrasal verb "dealt with" to mean "processed" in a way such that a delay processing the appeal triggers s. 190(3)(b)(i) would render s. 190(3)(b)(ii) meaningless. The same word must be given the same meaning throughout a statute; see *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378 at 1387. If "dealt with" means "processed" in s. 190(3)(b)(ii), then that subparagraph would never be applied. Replacing the term "dealt with" with "processed" in those two sections serves to demonstrate this point, as follows:

> ***190 (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*
>
> …
>
> ***(b)*** *the employee organization*
> **(i)** *has* **[processed]** *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),* **[processed]** *the grievance or appeal ….*
>
> …
>
> [Emphasis added]

[28] If an employee could complain about the delay processing an appeal under s. 190(3)(b)(i), then there would be no need for s. 190(3)(b)(ii). At the risk of abusing a metaphor, in s. 190(3)(b)(ii) Parliament built a window that opens 6 months after an appeal has been filed and closes 90 days later. Having built that window, Parliament

cannot have intended s. 190(3)(b)(i) to mean that there was no wall in which to install it.

[29] Second, this meaning of "dealt with" is also consistent with how the Board has treated the same term in s. 209(1) of the *Act*. That section provides that an employee may refer a grievance to adjudication when it has been presented up to the final level of the grievance process and "… has not been **dealt with** to the employee's satisfaction …"[emphasis added]. The Board has found that it has no jurisdiction to hear a claim that the employer breached the rules of procedural fairness during the grievance process (see *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57; upheld in *Price v. Treasury Board (Canada)*, unreported, court file no. T-1074-13). If the phrasal verb "dealt with" in s. 209(1) means "processed", then the Board would have the jurisdiction to consider the process followed during the grievance process; however, it does not have that jurisdiction. Therefore, the term "dealt with" is more consistent with "decided" in s. 209(1). As stated earlier, the "same words, same meaning" principle means that the term "dealt with" should be interpreted the same in s. 209(1) as in s. 190(3)(b)(i) — i.e., it means "decided" and not "processed".

[30] Third, the French version of s. 190(3)(b) uses the verb *statuer*, which means « Prendre une décision » (*Le Petit Robert de la langue française*, (Paris: Dictionnaires Le Robert, 2022) sub verbo "statuer"). When one version of a statute is textually ambiguous and the other is plain, "… we must look for the meaning that is common to both versions … The common meaning is the version that is plain and not ambiguous …"; from *R. v. Daoust*, 2004 SCC 6 at para. 28. In this case, the French is plain, and the English is ambiguous. Therefore, I prefer an interpretation of the English version that is consistent with the plain meaning of the French version, namely that "dealt with" means decided.

[31] Fourth and finally, this interpretation is more consistent with two broader principles that apply to reviewing internal union affairs. The first principle is that union members must exhaust a union's internal appeal recourses before challenging their discipline before a labour board or court. As the leading text in this field puts it, "[b]oth the common law and several labour relations statutes prescribe the requirement of exhausting internal recourses" (from MacNeil, Lynk & Engelmann, *Trade Union Law in Canada* at paragraph 9.41; see also *Kuzych v. White (No. 3)*, 1951

CanLII 373 (UK JCPC), and, more recently, *Brown v. Hanley*, 2018 ONSC 1112 at para. 59).

[32] This principle is consistent with the broader rule that a reviewing court will not consider a challenge to the process followed by a tribunal until after the tribunal has rendered its final decision (see *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61). Permitting an immediate challenge to the process followed by a union's appeal body before deciding the appeal by interpreting "dealt with" to mean "processed" would run contrary to this principle.

[33] The second principle is that courts — not labour boards — retain the jurisdiction to determine whether a union violated the rules of natural justice in disciplining one of its members in the absence of specific statutory language granting this jurisdiction to a labour board. As the Nova Scotia Supreme Court held in *Ernst v. Federal Government Dockyard Trades and Labour Council (East)*, 2007 NSSC 82 at para. 15, "[n]atural justice issues which are the manifestation of the discriminatory application of standards of discipline are captured by the legislation …", but other breaches of natural justice in internal union decisions are not captured by the *Act*.

[34] This principle that labour boards have no inherent jurisdiction to review the process of a union's internal appeal mechanism is also aptly demonstrated by the provisions in labour relations legislation in other jurisdictions expressly granting labour boards the jurisdiction to hear complaints about union discipline that violates the rules of procedural fairness and natural justice. As Ruth Sullivan points out, "… when statutes [in other jurisdictions] that **otherwise are similar use different words** or adopt a different approach, this suggests that a different meaning or purpose was intended" [emphasis in the original] (*The Construction of Statutes*, 7th ed., at 13.06[2]).

[35] Most noteworthy is legislation in Alberta that expressly grants the Alberta labour board jurisdiction over claims that a union violated the rules of procedural fairness in an internal appeal (see the Alberta *Labour Relations Code*, RSA 2000, c L-1; s. 26, and *Public Service Employee Relations Act*, RSA 2000, c P-43; ss. 7 and 47). Had Parliament intended the Board to have jurisdiction to hear a complaint over the process followed in an internal appeal during that ongoing appeal, it would have said so explicitly as is the case in Alberta.

[36] For these reasons, the phrasal verb "dealt with" in s. 190(3)(b) of the *Act* means "decided", not "processed". This interpretation fits better within the context of s. 190(3)(b) itself, the use of the same term in s. 209, the French version of the *Act*, and the broader principles of reviewing internal union affairs that require members to exhaust internal remedies and reserve procedural concerns to the courts in the absence of express statutory language granting jurisdiction over those issues to a labour board. This means that the delay processing the complainant's appeal does not fall within the meaning of "dealt with" in s. 190(3)(b)(i). Instead, the time limit in s. 190(3)(b)(ii) applies, and as already described that time limit expired before the complainant made this complaint.

C. Did the respondent's delay processing the appeal mean that the complainant did not receive "ready access" to the appeal process as required under s. 190(3)(a) of the *Act*? Answer: no

[37] The complainant expressed concern about the delay processing their appeal. The complainant argues that the respondent has not met its "requirement" under s. 190(3)(b)(ii) of the *Act*. They further argue that the respondent acted in bad faith by ignoring their communications about their appeal and ignoring the timeframes set out in the Constitution. They state that the respondent's inactions had a negative impact on them, but the respondent still failed to act.

[38] There is no question that the complainant's appeal has been delayed. They filed their appeal no later than April 13, 2022. PSAC's national President acknowledged receiving the appeal on June 22, 2022, provided information about the appeal process, and requested the name of the complainant's representative. On September 15, 2022, PSAC appointed a tribunal chairperson, who was one of its past presidents. The complainant objected the next day. Therefore, the President spoke to and corresponded with the Canadian Labour Congress about providing a chairperson for the tribunal. In the meantime, the AEC passed motions to extend the time frame for the appeal on July 18, 2022, November 14, 2022, and then sometime in February 2023. On February 28, 2023, the Canadian Labour Congress appointed a chairperson for the tribunal. That appeal is, finally, scheduled to be heard on June 27, 2023.

[39] This delay raises a threshold question of whether a delay means that the complainant has been deprived of "ready access" to the appeal process. I have

concluded that a delay processing the appeal does not fall into the category of malfeasance that deprives a member of "ready access" to an internal appeal process.

[40] Other labour boards have interpreted the term "ready access" to mean that a union must provide its members with the meaningful ability to **commence** an appeal. The Nova Scotia Labour Board ("NSLB"), for example, interpreted the term "ready access" in legislation virtually identical to s. 190(4)(b) of the *Act* in *MA v. Union*, 2019 NSLB 89 at para. 11, as follows:

> *[11] This case also raises the question as to what is meant by the phrase "ready access" as contained in subsection 55 (3) of the* Act… [W]*here a union has established appeal processes and these are not used, an employee must show the Board* [the NSLB] *that they have been denied ready access to those appeal processes in order to avoid the requirement of engaging with them… It is simply not enough to say, "I did not know about these processes." Employees have a duty to enquire and educate themselves about any available appeal processes just as they do about the Board's* [the NSLB's] *processes. If they can show, for example, that the Union frustrated their access to these processes or refused to accept their appeal, the Board* [the NSLB] *may not consider that such an employee had been given "ready access."…*

[41] Thus, the NSLB was concerned with an employee's ability to commence an appeal and interpreted "ready access" to mean that the employee must have the ability to commence one.

[42] The Canada Industrial Relations Board ("CIRB") has addressed the delay processing an appeal by applying s. 97(5)(a) of the *Canada Labour Code* (the equivalent to s. 190(4)(a) of the *Act*), not s. 97(4)(a) or 97(5)(b) (the equivalent to s. 190(3)(a) or 190(4)(b) of the *Act*). For example, in *Teamsters, Local Union 847 v. Canadian Merchant Service Guild*, 2011 CIRB 605 (upheld in 2012 FCA 210), the CIRB exercised its discretion under s. 97(5)(a) of the *Canada Labour Code* in part because "… there was no evidence before the Board [the CIRB] that the appeals would be dealt with in a timely manner." This is an indication that a delay hearing an appeal is relevant under s. 190(4)(a) of the *Act* but not s. 190(3) or s. 190(4)(b) – i.e. a delay is not about denying "ready access" to the appeal process.

[43] In *Clark v. Air Line Pilots Association*, 2022 FCA 217, the Federal Court of Appeal affirmed a CIRB decision that rejected a complainant's request under the *Canada Labour Code* to have their complaint heard while their internal appeal was still

pending. Clark argued that the CIRB should hear the case under s. 97(5) of the *Canada Labour Code* (the equivalent to s. 190(4) of the *Act*) because of harassment by his union and delay in processing the appeal. The Federal Court of Appeal rejected that argument, stating that the CIRB only has the ability to intervene despite an ongoing internal appeal in two circumstances: "in urgent cases and in cases where the union is obstructing access to the appeal process" (para 45). The complainant in *Clark* raised the issue of delay, but both the CIRB (in a letter decision cited as 2020 CIRB LD 4421) and the Federal Court of Appeal considered that the delay did not amount to obstructing access to the appeal process (particularly because the delay was at Clark's request).

[44] The CIRB adopted a similar approach to the meaning of "ready access" in *Thibeault v. Canadian Union of Postal Workers*, 2014 CIRB 711. In that case, a union member was suspended for six months. The member filed an internal appeal against that suspension, but the union simply ignored the appeal. Therefore, the member made a complaint with the CIRB. The union in that case argued that the member's internal appeal was untimely. The CIRB disagreed. However, the CIRB went on to state that even if the internal appeal was untimely, the union had denied "ready access" to the appeal process, triggering the exception in s. 97(5) of the *Canada Labour Code* (R.S.C., 1985, c. L-2) (the equivalent to s. 190(4) of the *Act*). At paragraph 47, the CIRB stated, "While CUPW did not explicitly deny Mr. Thibeault ready access to the appeal process, in the Board's [the CIRB's] view, its silence and failure to act upon receipt of his appeal letter had the same effect."

[45] To put this more plainly, *Thibeault* was not about delay – it was about a complete refusal to hear an appeal. That complete refusal meant that there was no ready access to the appeal process. Similarly, *Clark* was also about whether the delay had the effect of obstructing access to the appeal process.

[46] For these reasons, the delay processing the complainant's appeal cannot mean that the respondent denied the complainant "ready access" to the appeal process. The delay in this case does not amount to obstructing access to the appeal process.

D. Are the circumstances that gave rise to the complaint such that it should be dealt with without delay under s. 190(4)(a) of the *Act*? Answer: no

[47] Section 190(4) of the *Act* contains two exceptions to the limitation periods set out in s. 190(3): first, when the employee has not been given "ready access" to the appeal process (s. 190(4)(b)); and second, when there are circumstances that mean that the Board should deal with the complaint without delay, irrespective of the appeal process (s. 190(4)(a)). I have already addressed the question of "ready access", and therefore will limit my reasons in this part to s. 190(4)(a) of the *Act*.

[48] Section 190(4) of the *Act* states that the Board has the ability to hear a complaint "that has not been presented as a grievance or appeal to the employee organization." On its face, this appears to mean that filing a grievance or appeal ousts the Board's jurisdiction under s. 190(4). The CIRB, though, applied the equivalent provision in the *Canada Labour Code* in *Thibeault* and *Clark* despite the fact that the complainant filed an appeal. As neither party in this case addressed whether the fact that the complainant filed an appeal means that s. 190(4) of the *Act* cannot apply, I have considered that provision despite my concerns about whether it can apply in this case.

[49] Section 190(4) is a discretionary provision because it states that the Board "**may**" hear a complaint if either of the two exceptions are made out. Section 190(4)(a) is also discretionary: it grants the Board the discretion to hear a complaint under s. 188(b) or (c) of the *Act* despite an employee organization's internal appeal process if the complaint "**should** be dealt with without delay" [emphasis added].

[50] I have concluded that, in this case, the delay processing this appeal does not justify the exercise of discretion for three reasons.

[51] First, the complainant was expelled from PSAC membership on March 24, 2022, and filed their appeal no later than April 13, 2022. They then waited over 9 months before making this complaint. A party that complains about a delay must do so in a timely fashion; this is particularly important in light of s. 190(3)(b)(ii) of the *Act*, which opens a 90-day window 6 months after an appeal has been filed, during which an employee may make a complaint to the Board. An employee relying upon s. 190(4)(a) should — in all but the rarest of cases — make their complaint before the window available in s. 190(3)(b)(ii) opens.

[52] Second, the complainant was one of five PSAC members disciplined by the respondent. All five (including the complainant) have appealed, but only the complainant has proceeded to the Board. In these circumstances, the complainant has not explained why their complaint should jump the queue over the appeals proceeding for the other four members.

[53] Third, the complainant is partially responsible for the delay by objecting to the first appeal tribunal chairperson selected by the respondent. While they had every right to object, they must accept the delay that was the inevitable consequence of insisting that the appeal tribunal be chaired by someone from another employee organization.

[54] For these reasons, I conclude that the circumstances of this case are not such that the complaint should be dealt with without delay. I decline to exercise my discretion to hear this complaint.

[55] In summary, neither of the preconditions to the exercise of discretion under s. 190(4) of the *Act* exists in this case. The respondent provided "ready access" to its appeal process, and the circumstances of this complaint are not such that it should be dealt with without delay. Even if those preconditions existed, I would still have exercised my discretion not to determine this complaint in light of the complainant's delay making this complaint, the implications of hearing it on the companion appeals, and the complainant's actions delaying their appeal.

V. Limits of this decision

[56] Nothing in these reasons should be understood to condone the dilatory fashion in which the respondent has proceeded with the complainant's appeal. The respondent suggested in its written submission that having "taken steps" in the appeal within six months of its filing was sufficient. As set out earlier, an employee organization is expected to decide an appeal within six months, not just take steps towards that decision. Had the complainant made their complaint four days earlier, the Board would have heard it. Parliament built a window during which an employee may make this type of complaint that opens six months after the employee has filed their internal union appeal. Employee organizations should ensure that such appeals are decided by the time that six-month window opens.

[57] Finally, the parties made submissions about whether the complaint raises an arguable case that the respondent violated ss. 188(b) or (c) of the *Act*. In light of my decision about its timeliness, I have not addressed those submissions in any way. I do not want to comment on the merits of the complainant's appeal or prejudge any complaint that may be made within the 90-day period after the complainant's appeal has been decided.

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

(The Order appears on the next page)

VI. Order

[59] The complaint is dismissed.

June 20, 2023.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board