**Date:** 20240213

**File:** 561-02-47493

**Citation: 2024 FPSLREB 17**

*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**

**IROWA IDAHOSA**

Complainant

and

**TREASURY BOARD**
**(Correctional Service of Canada)**

Respondent

Indexed as
*Idahosa v. Treasury Board (Correctional Service 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:** Barry Reid, Professional Institute of the Public Service of Canada

**For the Respondent:** Calvin Hancock, counsel

Decided on the basis of written submissions, filed July 10 and 14, September 29, October 27, and November 9, 2023.

**REASONS FOR DECISION**

## I. Overview

[1] The complainant alleges that the respondent (also referred to in this decision as the employer) committed an unfair labour practice by retaliating against her for having filed a grievance and, in some cases, for having contemplated filing a grievance. Allegations of this nature are resolved in two phases. First, the complaint must raise an arguable case that the respondent committed an unfair labour practice. Second, if the complaint raises an arguable case, the burden shifts to the respondent to rebut the allegation and prove that it did not commit an unfair labour practice.

[2] This decision is only about the first phase of this inquiry. The sole issue, in other words, is whether the complaint raises an arguable case that the employer committed an unfair labour practice.

[3] I have concluded that one aspect of the complaint raises an arguable case. I have concluded that there is an arguable case that the complainant's supervisor gave her what I call the "silent treatment" after she filed a grievance, and that there is an arguable case that this silent treatment was a form of intimidation or a threat because the complainant filed a grievance. I have concluded that the complainant did not raise an arguable case with respect to the rest of her complaint.

[4] The employer also submitted that the subject of this complaint should be grieved instead of proceeding by way of a complaint. I have concluded that the ongoing grievance does not bar or duplicate this complaint.

## II. Procedural background

[5] The Federal Public Sector Labour Relations and Employment Board ("the Board", which in this case also refers to any of its predecessors) 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).

[6] The complainant made this complaint on May 26, 2023. The employer asked for details of which statutory provisions it was alleged to have violated in committing an

unfair labour practice. The complainant listed six statutory provisions. On July 10, 2023, the employer filed a response, stating that even if the facts alleged in the complaint were true, they did not constitute an unfair labour practice. The complainant replied on July 14, 2023 with more details about the complaint and to explain further why the facts alleged constitute an unfair labour practice.

[7] Having reviewed the complaint, the response, and the reply, I asked the parties for their positions on whether it was appropriate to resolve the "arguable case" phase of this matter based on written submissions. The employer answered in the affirmative; the complainant did not respond. I concluded that the preliminary issue of whether the complainant has an arguable case that the employer committed an unfair labour practice could be resolved in writing. I reached this conclusion because the "arguable case" analysis requires me to take the allegations as proven and assess only whether they meet the legal threshold for an unfair labour practice. Since I do not require any testimony or evidence to prove or disprove the allegations, I am able to determine this pure question of law using written submissions. In this way, I am following previous Board decisions, including *Gabon v. Department of the Environment*, 2022 FPSLREB 6, and *Andruszkiewicz v. Canada Border Services Agency*, 2021 FPSLREB 72, in which the Board addressed the arguable-case phase of an unfair labour practice complaint in writing.

[8] I also decided to proceed in writing because doing so would expedite this complaint. Either the complaint will be dismissed because it does not raise an arguable case or it will continue because the issue of statutory interpretation at the heart of the employer's case has been resolved, and the parties can focus on the evidentiary dispute.

[9] The parties filed written submissions in accordance with a timetable that was modified when necessary and with their consent. I have read those submissions carefully, and I want to thank both representatives for their detailed and thoughtful submissions.

## III. Legal context for assessing an unfair labour practice complaint: the arguable case framework

[10] The complaint alleges a breach of six provisions, namely, ss. 186(2)(a)(ii), 186(2)(a)(iii), 186(2)(a)(iv), 186(2)(c)(i), 186(2)(c)(ii), and 186(2)(c)(iii) of the *Federal Public*

*Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). For ease of reference, those six provisions read as follows:

| | |
|---|---|
| … | […] |
| ***186(2)*** *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall* | ***186(2)*** *Il est interdit à l'employeur, à la personne qui agit pour le compte de celui-ci ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier*, au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada *ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :* |
| ***(a)*** *refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person* | ***a)*** *de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, de la licencier par mesure d'économie ou d'efficacité à la Gendarmerie royale du Canada ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs suivants :* |
| … | […] |
| ***(ii)*** *has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2 or 2.1,* | ***(ii)*** *elle a participé, à titre de témoin ou autrement, à toute procédure prévue par la présente partie ou les parties 2 ou 2.1, ou pourrait le faire,* |
| ***(iii)*** *has made an application or filed a complaint under this Part or Division 1 of Part 2.1 or presented a grievance under Part 2 or Division 2 of Part 2.1, or* | ***(iii)*** *elle a soit présenté une demande ou déposé une plainte sous le régime de la présente partie ou de la section 1 de la partie 2.1, soit déposé un grief sous le régime de la partie 2 ou de la section 2 de la partie 2.1,* |
| ***(iv)*** *has exercised any right under this Part or Part 2 or 2.1;* | ***(iv)*** *elle a exercé tout droit prévu par la présente partie ou les parties 2 ou 2.1;* |

| | |
|---|---|
| … | […] |
| ***(c)*** *seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from* | ***c)*** *de chercher, notamment par intimidation, par menace de congédiement ou par l'imposition de sanctions pécuniaires ou autres, à obliger une personne soit à s'abstenir ou à cesser d'adhérer à une organisation syndicale ou d'occuper un poste de dirigeant ou de représentant syndical, soit à s'abstenir :* |
| ***(i)*** *testifying or otherwise participating in a proceeding under this Part or Part 2 or 2.1,* | ***(i)*** *de participer, à titre de témoin ou autrement, à une procédure prévue par la présente partie ou les parties 2 ou 2.1,* |
| ***(ii)*** *making a disclosure that the person may be required to make in a proceeding under this Part or Part 2 or 2.1, or* | ***(ii)*** *de révéler des renseignements qu'elle peut être requise de communiquer dans le cadre d'une procédure prévue par la présente partie ou les parties 2 ou 2.1,* |
| ***(iii)*** *making an application or filing a complaint under this Part or Division 1 of Part 2.1 or presenting a grievance under Part 2 or Division 2 of Part 2.1.* | ***(iii)*** *de présenter une demande ou de déposer une plainte sous le régime de la présente partie ou de la section 1 de la partie 2.1 ou de déposer un grief sous le régime de la partie 2 ou de la section 2 de la partie 2.1.* |

[11] The *Act* defines the term "unfair labour practice" to mean anything prohibited by ss. 186(1), 186(2), 187, 188, or 189(1) of the *Act*. Paragraph 190(1)(g) requires the Board to examine and inquire into any complaint that an employer has committed an unfair labour practice. In practice, these are referred to as "unfair labour practice complaints".

[12] Subsection 191(2) of the *Act* creates an exception to the requirement that the Board examine an unfair labour practice complaint if it involves a matter that could be referred to adjudication under Part 2 of the *Act*. In other words, the Board can decide not to hear the complaint if its subject matter can be grieved and falls within s. 209(1).

[13] Subsection 191(3) of the *Act* states that a complaint that an employer has failed to comply with s. 186(2) is itself evidence that the failure occurred. If a party to the complaint (in practice, the employer or a person acting on its behalf) alleges that the

failure did not occur, the burden of proof falls on that party. This "reverse-onus" rule is common across most Canadian jurisdictions and exists because the employer is the party with the most complete knowledge of why it carried out the actions being complained of; see Adams, *Canadian Labour Law*, 2nd ed. (looseleaf) at chapter 10.2.

[14] However, the reverse-onus rule applies to the facts alleged and not to whether the allegations constitute an unfair labour practice. This means that there is a two-step approach to an unfair labour practice complaint. First, the Board assesses whether the complaint raises an arguable case. In other words, the Board must be satisfied that the alleged facts meet the constituent elements of s. 186(2) of the *Act* at issue. Second, if there is an arguable case, the employer is required to lead evidence to prove that it did not commit one of the acts prohibited in s. 186(2).

[15] The Board described the analytical framework involved in the first step in *Gabon*, at paras. 39 to 41, as follows:

> *[39] In* Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2, the complainant made complaints against his employer alleging several violations of s. 186(2) of the* Act*. The former Board dealt with, among other issues, the respondent's objection that the complainant failed to demonstrate on the face of the complaints that the respondent violated the statutory provisions; in other words, the complaints, on the face, did not disclose an arguable case that the statutory provisions had been violated. Addressing this preliminary objection, the former Board framed the issue as follows at paragraph 86:*
>
> > [86] … The parties were asked to address whether the three complaints before me **reveal, on their face, an arguable case of a violation of the *PSLRA*. The parties were asked to specifically address whether, if the Board considered all the facts alleged in the complaints as true, there is an arguable case that the respondent contravened the unfair labour practice legislative provisions of the *PSLRA***.
> >
> > *[Emphasis added]*
>
> *[40] Using this analytical framework, the former Board found that the complaints revealed an arguable case of a contravention of s. 186(2)(a) of the* Act *(see paragraphs 104 to 108). This approach requires a careful and rigorous analysis of the facts that the parties set out, to assess whether there is an arguable case.*
>
> *[41] The former Board noted as follows in* Hughes*, at para. 105:*
>
> > [105] … if *[there is]* any doubt about what the facts, assumed to be true, reveal, then *[the Board]* must err on the side of finding that there is an arguable case … and … must

> preserve the complainant's opportunity to have his complaints heard ….
>
> [Emphasis in the original]

[16] I have followed that approach in this case. I have taken the facts as summarized by the complainant in her complaint and reply, and I have assumed them all to be true. I will consider them following the arguable-case framework.

[17] The complainant provided some additional facts in her written submissions, in part to provide context to the events that occurred in the 90 days before this complaint was made. The employer submitted that these facts are beyond the scope of what the Board should consider at this time but without providing any authority supporting that objection. I have considered the facts that were alleged to have occurred before the period that was 90 days before the date on which the complaint was made only as context, as requested by the complainant. As for the facts alleged within that 90-day period, they simply expanded upon and clarified for me the facts alleged in the complaint. Those facts were consistent with the details provided in the complainant's written submissions.

**IV. Nature of the complaint**

[18] The complaint in this case is admirably concise, and therefore, I can quote it in its entirety, as follows:

> *Since I have filled my grievances against Meighan* [the complainant's supervisor] *and Brooke* [the manager to whom Meighan reports], *I have seen a change in attitude by them. Specifically, Meighan does* [not] *make eye contact when she speaks with me. Meighan tends not to acknowledge my presence and is dismissive of me when talking to her. Meighan hardly speaks to me. In rare cases that I do communicate with Meighan via e-mail, I get a reply from Brooke instead. I responded to Meighan's e-mail that I would be interested and available to work overtime shifts. I did not get a response back from Meighan in regards to my e-mail. I saw Meighan in her office and I inquired if she did get my e-mail; Meighan said "I did get your e-mail, but we have it filled now." Meighan said "with the assignment you are doing for Brooke, you can't take any overtime shifts." I then said it never said anywhere that I cannot take overtime shifts. She responded, "with the grievance that is going on, you can't be here (health services), you have to stay over there (mental health office)." The mental health office is where Meighan and Brooke have isolated me to without justification and I currently remain isolated from the rest of health*

> *services nurses. With Meighan's response, I view this as a retaliation.*

[19] The employer responded by alleging certain facts and denying several facts alleged in the complaint. The arguable case framework requires me to ignore the employer's alleged facts unless the complainant agrees with them, and therefore, I have not repeated them.

[20] The complainant filed a reply that denied many of the facts set out in the employer's response. Importantly, she also provided some additional facts to support her complaint, as follows:

> …
>
> *6. From April 26, 2023 until June 29, 2023, the Complainant was forced to perform Administrative Duties that were not consistent with her work description, did not require nursing training or licensing, and were not consistent with the nursing duties she had been performing for the Employer since 2018. Further, during the approximately two months that the Complainant was forced to perform Administrative Duties, she lost considerable income because the Employer denied her requests to pick up overtime shifts as a nurse.*
>
> *7. The Complainant does not dispute that she filed Grievance No. 68745, but states that she did so on May 5, 2023, not May 6, 2023 as set out in Paragraph 19. Nor does the Complainant dispute that her grievance alleges discrimination and disguised discipline, but would like to add that she also alleged that she was being disciplined without just cause contrary to s.12(3) of the Financial Administration Act.*
>
> *8. Twelve days after the Complainant filed her grievance, on May 17, 2023, she received an email from her supervisor to all Health Services staff indicating that there were overtime shifts available for the upcoming weekend. The next day, on May 18, 2023, the Complainant responded to her supervisor by email indicating that she would be willing to pick up some of those shifts. Her supervisor did not reply and, on May 19, 2023, the Complainant went to speak with her supervisor. Her supervisor said "…with the assignment you are doing…, you can't take any overtime shifts." Her supervisor then went on to say that "…with the grievance that is going on, you can't be here (Health Services). You have to stay over there (Mental Health Office)." The Union submits that the Complainant's May 19, 2023 conversation with her supervisor is clear evidence that management was retaliating against the Complainant for presenting a grievance.*
>
> *9. On May 22, 2023, the Complainant also filed a Notice of Occurrence under the* Work Place Harassment and Violence

> Prevention Regulations *on May 22, 2023 alleging that she had been harassed by management from May 30, 2022 until the date of filing.*
>
> *10. After the Complainant filed Grievance No. 68745, the Employer required her to continue with Administrative Duties for another six weeks, until June 29, 2023. During those six weeks, the Employer continued to deny her overtime shifts in which she would have been able to practice nursing. The union alleges that those six weeks and the financial penalty imposed upon the Complainant during those six weeks were retaliation for filing Grievance No. 68745. The Union alleges that the Employer discriminated against the Complainant because she had "…presented a grievance under Part 2…" of the* Federal Public Sector Labour Relations Act.
>
> *11. But even before the grievance was filed, the Employer knew or ought to have known that the Complainant was planning on exercising her grievance rights under s. 208 of the* Federal Public Sector Labour Relations Act *as early as mid-April 2023. On April 12, 2023, a PIPSC steward met with the Complainant's supervisor and the Chief of Health Services to express the Union's concerns about how management was treating the Complainant.*
>
> *12. The Union alleges that, as a result of the April 12, 2023 meeting with the Union, the Employer knew or ought to have known that the Complainant "…may testify or otherwise participate, in a proceeding under…" Part 1 of Part 2 of the* Federal Public Sector Labour Relations Act. *The Union alleges that the Employer placed the Complainant on Administrative Duties on April 26, 2023 to "…intimidate, threaten or otherwise discipline…" her into not filing a grievance or taking other actions to protect her rights.*
>
> *…*
>
> *14. Finally, the Union asserts that not making eye contact with the Complainant, not responding to the Complainant's emails, and not acknowledging the Complainant's presence became an issue after the Complainant filed Grievance No. 68745. Her supervisor's behaviour after she presented her grievance effectively deprived the Complainant of the ability to informally discuss the Employer's perception of her and her performance at work, necessitating this complaint and the Board's intervention. The Union asserts that this kind of behaviour by the Complainant's supervisor is not only consistent with, but also evidence of management's retaliation against the Complainant for filing a grievance.*
>
> *…*

[21] The complainant's submissions expanded upon the background to these events. They describe a conflict between her and her supervisor dating back to November 9, 2022. At the risk of oversimplifying a complex and evolving situation, her supervisor accused her of having fallen asleep during a meeting, being late for work or missing

from her nursing station, making errors about medication, and generally looking unwell. The supervisor stated that as a result, the employer would no longer support a flexible work schedule that the complainant had been working since July 17, 2022 to allow her to care for a family member. Finally, the supervisor suggested that the complainant take some time off and required a medical note attesting to her fitness to work before she would be permitted to return. The complainant went on sick leave until January 17, 2023 when she returned to work.

[22] On or about February 8, 2023, the complainant was late for work because of a snowstorm. As a result of that or some other issues that are not before me, she was ordered to return home and to permit someone else to drive her car for her. A union steward wrote to a senior employer official to complain about the treatment of the complainant. The complainant quoted from that email as follows:

> …
>
> *… "…very unsensitive, disrespectful and, frankly irresponsible…for the Health Services manager of all people to leave Irowa to the indignity of the situation without reasonable cause or explanation…." The steward went on to state "I am reminded of the two workplace violence complaints brought to bear in 2018/19 that tore the social-political fabric of this place apart that made much of the staff sick during those years…. Many of the reasons for the workplace violence issues raised were ultimately tied to working conditions like the few raised above and are once again a force to be reckoned with."*
>
> …

[23] The complainant states that on April 14, 2023, she forgot her prescription glasses at home and therefore had to strain to read medication orders. She states that she was then ordered to go home despite not making any errors that day. She missed three shifts and obtained a note from her physician on April 20, 2023, stating that she was fit to work. Nevertheless, the employer assigned her to a special project away from her nursing duties effective April 26, 2023. During the special project, she worked 7.5 hours per day, Monday to Friday, instead of her previous 12-hour shifts. This meant that she lost overtime pay.

[24] On May 5, 2023, the complainant filed a grievance against this assignment. She also filed a notice of occurrence alleging workplace harassment and violence under Part II of the *Canada Labour Code* (R.S.C., 1985, c. L-2) on May 22, 2023.

## V. Framework for decision

[25] As I stated earlier, this decision is about whether the complaint discloses an arguable case that the employer committed an unfair labour practice. I have divided these reasons into two broad parts: whether there is an arguable case that the employer violated s. 186(2)(a) of the *Act*, and then whether there is an arguable case that the employer violated s. 186(2)(c). I will conclude by discussing the employer's defence based on s. 191(2).

## VI. The arguable case based on s. 186(2)(a) of the *Act*

### A. The complainant must provide an arguable case showing a causal relationship and between the employer's actions and having filed a grievance

[26] Paragraph 186(2)(a) of the *Act* prohibits the employer or a person occupying a managerial or confidential position from engaging in a series of actions "because" the complainant has carried out any of the actions set out in ss. 186(2)(a)(i) through (iv). The use of the word "because" means that there must be a causal relationship between the employer or manager's impugned activity and the complainant's action. This in turn means that the impugned activity must take place after the complainant takes one of the steps set out in ss. 186(2)(a)(i) through (iv).

[27] Subparagraph 186(2)(a)(iii) lists "… has … presented a grievance under Part 2 …". Subparagraph 186(2)(a)(iii) is obvious in its meaning: the complainant must provide an arguable case that the impugned actions took place because she filed a grievance. This requires that the impugned actions must have taken place after she filed her grievance.

[28] Subparagraph 186(2)(a)(ii) also lists as one of those steps that the complainant "… has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2 or 2.1 …". The complainant argues that since she will inevitably be a witness in her grievance, her circumstances are captured by s. 186(2)(ii) as well. Additionally, she argues that the phrase "**may** … otherwise participate" [emphasis added] in s. 186(2)(ii) applies to the impugned conduct predating her May 5, 2023 grievance. She argues that as early as February 8, 2023, her managers should have known that a grievance was a "very real possibility."

[29] I have concluded that the prospect of participating in or testifying in one's own grievance does not fall within the scope of s. 186(2)(a)(ii) of the *Act* because that would

render s. 186(2)(a)(iii) redundant. Such an interpretation would violate the presumption against tautology in legislation. As Ruth Sullivan states at page 211 of *The Construction of Statutes*, 7th ed.:

> *It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.*

[30] If s. 186(2)(a)(ii) of the *Act* included a complainant participating in their own proceeding, then there would be nothing left to be included in s. 186(2)(a)(iii) because filing an application, making a complaint, or filing a grievance includes participating in that proceeding. In other words, if s. 186(2)(a)(ii) included testifying or participating in one's own proceeding, everything included in s. 186(2)(a)(iii) would also be included in s. 186(2)(a)(ii). For this reason, s. 186(2)(a)(ii) covers participating in someone else's proceeding, not filing one's own proceeding. Since the complaint is about alleged retaliation relating to the complainant's own grievance, s. 186(2)(a)(ii) does not apply to this complaint. There is no arguable case that the employer breached s. 186(2)(a)(ii) of the *Act*.

[31] As for s. 186(2)(a)(iv) of the *Act*, the complaint does not disclose what "right under this Part or Part 2 or 2.1" the complainant has exercised other than presenting a grievance, which is covered under s. 186(2)(a)(iii) of the *Act* instead. The complaint does refer to a workplace harassment and violence complaint. However, s. 186(2)(a)(iv) of the *Act* only prohibits conduct designed to seek to have an employee refrain from participating in a proceeding under Part 1, 2, or 2.1 of the *Act*. A workplace harassment and violence complaint is made under the *Canada Labour Code*. The only powers that the Board has under the *Canada Labour Code* are found in Part 3 of the *Act* and so fall outside the scope of a complaint made under s. 186(2).

[32] I can now turn to the two things that the complainant alleges violated s. 186(2)(a)(iii) of the *Act* — the denial of overtime and her manager's attitude. As I stated earlier, this in turn means that the complainant must provide an arguable case that the impugned conduct happened after and because she filed her grievance.

**B. There is no arguable case that the denial of overtime was causally linked to having filed a grievance**

[33] I have concluded that there is no arguable case that the denial of overtime was causally linked to the complainant having filed a grievance.

[34] As set out earlier, the complainant was transferred to an administrative position on April 26, 2023, which she grieved on May 5, 2023. One of the consequences of working in that administrative position was that as of April 26, 2023 she was no longer working regular overtime and — to quote from her submissions — she "… would not be able to earn any overtime."

[35] The complainant argues that the refusal to permit her to work overtime on or after May 18, 2023 was because she had filed a grievance. But her description of her discussion with her supervisor was this:

> …
>
> *… Her supervisor said "… with the assignment you are doing …, you can't take any overtime shifts." Her supervisor then went on to say that "… with the grievance that is going on, you can't be here (Health Services). You have to stay over there (Mental Health Office)."*
>
> …

[36] In her written submissions, the complainant confirms that version of events, stating as follows:

> …
>
> *29. Some of the incidents that formed the basis for this complaint occurred on May 17, 18, and 19, 2023 and are set out in the Complainant's original complaint document. Those incidents include a statement from Ms. Jones "with the assignment you are doing for Brooke, you can't take any overtime shifts." And when the Complainant challenged Ms. Jones about that rule not being in the collective agreement, Ms. Jones responded "with this grievance that is going on, you can't be here (health services), you have to stay over there (mental health office)."*
>
> …

[37] The complainant's own words confirm that she was denied overtime because of her assignment to administrative duties. Her complaint does not disclose an arguable case of any causal link between filing a grievance and being denied overtime. She was

denied overtime before she filed a grievance; she continued to be denied overtime after she filed a grievance for the same reasons as before.

### C. There is an arguable case that the supervisor's attitude change after the grievance was filed could constitute an unfair labour practice

#### 1. There is an arguable case that the change in attitude came after the complainant filed a grievance

[38] For the change in attitude, the complainant summarizes the basis of the complaint as being that her supervisor did the following: "… not making eye contact, not acknowledging her presence, being dismissive, rarely speaking to her, and not responding to her emails …". She goes on to argue that this was "**more** workplace harassment and violence" [emphasis in the original].

[39] The employer argues that on the complainant's version of events, this so-called change in attitude was not a change at all but rather part of a pattern of behaviour that predated the filing of the grievance. Therefore, there is no connection between the impugned behaviour and the complainant having filed a grievance.

[40] However, the complainant does more than allege a continuation of the same pattern of behaviour that occurred before May 5, 2023. To be clear, the complainant argues that she was harassed both before and after May 5, 2023. However, she also alleges that there was a change in her supervisor's behaviour after she filed her grievance, stating that "… not making eye contact with the Complainant, not responding to the Complainant's emails, and not acknowledging the Complainant's presence became an issue after the Complainant filed …" her grievance.

[41] Specifically with respect to the allegation about not responding to emails, the complainant provided only one example of it — her supervisor did not respond to her email asking for overtime shifts on May 17, 2023 (but instead on May 18, 2023, told her verbally that she would not receive any overtime). Further, the complainant does not allege that her emails are going unanswered; she alleges that her supervisor does not respond directly to her emails and her supervisor's manager responds instead. As not responding to emails post-dated the grievance, there is an arguable case that this behaviour occurred because the complainant filed her grievance.

**2. The silent treatment is serious enough to fall within the activities prohibited in s. 182(2)(a) of the *Act***

[42] The issue then becomes whether a supervisor "… not making eye contact with the Complainant, not responding to the Complainant's emails, and not acknowledging the Complainant's presence …" is activity barred by s. 186(2)(a) of the *Act*.

[43] At the risk of oversimplifying the situation, the complainant alleges that her supervisor is giving her the "silent treatment". The employer argues that these actions are not serious enough to constitute a breach of s. 186(2)(a) of the *Act*. The complainant argues that they are.

[44] Paragraph 186(2)(a) of the *Act* prohibits the following actions:

- refuse to employ or to continue to employ;
- suspend;
- lay off;
- discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police;
- otherwise discriminate against any person with respect to employment, pay, or any other term or condition of employment;
- intimidate;
- threaten; or
- otherwise discipline any person.

[45] In soliciting written submissions in this matter, I asked the parties specifically to provide submissions about which, if any, of these actions the change in attitude could fall within. The complainant submits that the attitude and behaviour discussed earlier (i.e., the refusal to make eye contact, not acknowledging her presence, rarely speaking to her, and not responding to emails) fall within the bullet points "intimidate" or "threaten". The employer, by contrast, submits that the alleged attitude and behaviour would not fit within any of those categories; specifically, it submits that this conduct cannot be reasonably seen as seeking to intimidate or threaten the complainant.

[46] The issue in dispute between the parties is this: how serious does the impugned conduct have to be to constitute "intimidate, threaten or otherwise discipline" and fit within s. 186(2)(a) of the *Act*? The complainant states that the conduct would meet the definition of "harassment" in the *Canada Labour Code*, as further described in a document entitled "Requirements for employers to prevent harassment and violence in federally regulated workplaces" and published by Employment and Social Development

Canada, to describe what could, and could not, constitute harassment under the *Canada Labour Code*. The complainant submits that workplace harassment must fall within the meaning of "intimidate, threaten, or otherwise discipline". The complainant quotes from *Joe v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 10, in which, interpreting s. 186(2)(c), the Board stated this at para. 46:

> …
>
> *… Paragraph 186(2)(c) includes the phrase, "by any other means". The rules of statutory interpretation require that this phrase is interpreted as meaning, "by any other means* ***of a similar kind****"* (Manella *at para. 24, emphasis in original). In my view, "a similar kind" would include but not limited to:* ***ill-will*** *[sic], deceit, fraud and an unreasonable exercise of management authority.*
>
> …
>
> [Emphasis added and in the original]

[47] While not saying so explicitly, the complainant submits that this alleged harassment would demonstrate "ill will" and that ill will falls within the scope of s. 186(2)(a) of the *Act* as well as s. 186(2)(c).

**a. The actions do not need to include some force or threatened force**

[48] The employer, by contrast, submits that s. 186(2)(a) requires something more serious. It relies upon decisions from the Ontario Labour Relations Board (OLRB) stating that an unfair labour practice requires "… some force or threatened force, whether of a physical or non-physical nature"; see *C.A.W. v. Atlas Specialty Steels*, [1991] O.L.R.B. Rep. June 728 at para. 12. The OLRB has also characterized the required level of activity to constitute an unfair labour practice as "… force has been threatened (physical or non-physical) …"; see *Labourers' International Union of North America, Local 183 v. Turnkey Site Solutions Ltd.* (2019), 36 C.L.R.B.R. (3d) 306 at para. 22.

[49] The difficulty with the employer's reliance on Ontario cases is that the Ontario statute is worded differently from the *Act*. Those two cases interpret ss. 70 and 76 of the Ontario *Labour Relations Act* (S.O. 1995, c. 1, Sched. A). Section 70 prohibits employer interference with union activity unless the employer is merely exercising "freedom to express views" so long as it "… does not use coercion, intimidation, threats, promises or undue influence." Section 70 of the Ontario *Labour Relations Act* is the functional equivalent to ss. 186(1) and (5) of the *Act* — not s. 186(2). Section 76 of the Ontario *Labour Relations Act* is the functional equivalent of s. 186(2) of the *Act*;

however, it is worded very differently than the *Act*. Section 76 of the Ontario *Labour Relations Act* prohibits interference with exercising any rights under that statute "by intimidation or coercion". The *Act*, by contrast, does not use the term "coercion". Therefore, I have not followed these Ontario decisions.

[50] The employer also relies upon British Columbia Labour Relations Board decisions that have come to the same conclusion as the Ontario cases and require the use of force, threats, fear, or compulsion. The employer argues that British Columbia's *Labour Relations Code* (RSBC 1996, c. 244) is virtually identical to the *Act*, making that labour board's decisions on this point more persuasive. It is true that s. 6(3) of the British Columbia *Labour Relations Code* is virtually identical to s. 186(2) of the *Act*. However, the cases relied upon by the employer (namely, *Certain Employees of RJ Healthlink Ltd v. RJ Healthlink Ltd*, 2011 CanLII 47715 (BC LRB) at paras. 30 to 35 and the cases cited in it) interpret s. 9 of that Code, which states, "A person must not use **coercion** or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union" [emphasis added]. As I said earlier, the *Act* does not use the term "coercion". Therefore, I have not followed these British Columbia decisions either.

[51] The employer also relied upon the decision in *Walenius v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2020 FPSLREB 48, in which the Board dismissed a complaint made under s. 186(1) of the *Act* because the complainant was not represented by a bargaining agent and therefore did not have standing to make that complaint. The Board also commented in passing that the underlying dispute (which was about a building pass) was tied to other conflicts and not the fact that the complainant wanted to attend a breakfast event hosted by her union. The employer argues that this case shows that a subjective, personal conflict does not fall within the scope of s. 186(2)(a) of the *Act*. However, *Walenius* was about s. 186(1) of the *Act*, which is designed to protect bargaining agents' rights. All the Board states in *Walenius* is that the personal conflict between an employee and the employer in that case did not implicate the bargaining agent simply because one incident involved a union breakfast. That decision has no bearing on the meaning or application of s. 186(2) of the *Act*.

[52] The employer relied upon *Laplante v. Treasury Board (Department of Industry and the Communications Research Centre)*, 2007 PSLRB 95, in which the Board dismissed a complaint made under s. 186(2) of the *Act* because the complainant did not allege that her employer's allegedly harassing conduct was motivated by punishing her for filing a grievance — in large part because she made her complaint and filed her grievance at the same time. In this case, the complainant clearly states that what I have called the "silent treatment" was punishment for having filed a grievance.

**b. The words "intimidate, threaten, or otherwise discipline" cannot be interpreted in context with the other items listed in s. 186(2)(a) of the *Act* because there is no common denominator in the other items**

[53] Finally, the employer argues that the phrases "… otherwise discriminate … with respect to employment, pay or any other term or condition of employment …" and "intimidate, threaten or otherwise discipline" should be read in context with the other actions prohibited by s. 186(2)(a) of the *Act*, namely, refusing to employ or continue to employ, suspend, or lay off an employee. The terms "otherwise discriminate" and "intimidate, threaten or otherwise discipline" should be read to mean actions that are similar to the other actions prohibited in that paragraph.

[54] The employer's argument is that a term or expression should be interpreted by taking surrounding terms into account. The meaning of a statutory term can be revealed by its association with other terms. The Latin term for this approach is *noscitur a sociis*. One aspect of the associated-meaning approach is that in an enumeration, a general word or term should be constrained to things of the same class as those specifically mentioned. The Latin term for this rule is *ejusdem generis*, which is what the employer urges me to follow.

[55] However, one of the requirements of the *ejusdem generis* rule is that there must be some common element in the list of specific items. For example, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the Supreme Court of Canada had to interpret what was then s. 61.5(9) (currently s. 242(4)) of the *Canada Labour Code*, which stated that an adjudicator finding that an employee was unjustly dismissed may require the employer to "pay the person compensation", "reinstate the person", and "… do any other like thing that it is equitable to require the employer to do …". The adjudicator in that case ordered the employer to provide a letter of recommendation for an employee. The employer argued that the adjudicator did not

have the power to make such an order because the power to do "any other like thing" should be limited to remedies similar to the payment of compensation and reinstatement. The Supreme Court of Canada disagreed because there was no "common denominator" (at page 1072) in the first two elements of the list with which to constrain the third element. I note that while the Justice writing this part of the decision dissented on part of the result, the entire Court agreed with his disposition of this statutory interpretation.

[56] Similarly in this case, there is no "common denominator" in the other terms in the list in s. 186(2)(a). The entire list, for ease of reference, reads as follows:

| | |
|---|---|
| ***186(2)(a)*** *refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person ….* | ***186(2)a)*** *de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, de la licencier par mesure d'économie ou d'efficacité à la Gendarmerie royale du Canada ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs* […] |

[57] The employer's submission would ask me to carve out the terms "or otherwise discriminate", "intimidate", and "threaten" and interpret those terms consistently with the remaining terms in that list. The most common way to apply *ejusdem generis* is when there is a list of specific terms followed by a single general term — not when some of the terms are specific and some are more general. I am aware of one case in which a court used *ejusdem generis* to interpret two terms out of four in a list (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at paras. 195 to 197, and even in that case the judge was in the minority). However, I am not aware of any case in which three items in a list were interpreted by referring to four other items.

[58] Even if I were to accept that *ejusdem generis* can apply to limit the meaning of three general terms in a list of seven, the difficulty is that there is no common denominator for the four remaining terms. The terms "… refuse to employ or continue

to employ …", "lay off", and "discharge" all involve the cessation of employment — but "suspend" does not. The terms "refuse to … continue to employ" and "suspend" could be read by referring to the final term "otherwise discipline" to mean that the common denominator is some form of disciplinary sanction, but a "lay off" and a "… discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police …" are non-disciplinary.

[59] In conclusion, s. 186(2)(a) of the *Act* — unlike the provisions in Ontario's and British Columbia's legislation discussed earlier — does not require that an employer or manager use force or physical threats to achieve their ends. As the Board recently put it in *Coupal v. Canadian Food Inspection Agency*, 2021 FPSLREB 124 at para. 233 (in a passage cited by the employer), "Section 186(2)(a) … prohibits the employer from taking punitive actions against employees seeking to enforce their rights." The Board also described s. 186(2)(a) as prohibiting "reprisals" against anyone for having exercised the rights enumerated in that provision; see *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37 at paras. 45 to 47.

[60] Harassment can certainly be punitive. It can also be a reprisal. Giving someone the silent treatment can be harassment, depending on the circumstances; see, for example, *Lemay v. Canada (Attorney General)*, 2019 FC 608 at paras. 32 to 35, *Loyer v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 16 at paras. 21 to 32, *Hertz Canada Limited v. Canadian Office and Professional Employees' Union, Local 378*, [2011] B.C.W.L.D. 6915 at para. 20, and *United Nurses of Alberta v. Alberta Health Services*, 2019 CanLII 4278 (AB GAA) at para. 20. Therefore, the silent treatment can be punitive or a reprisal and can constitute a threat or intimidation.

[61] Therefore, I have concluded that the complainant has made an arguable case that giving her the silent treatment after filing a grievance violated s. 186(2)(a)(iii) of the *Act*.

[62] I want to emphasize that this does not mean that the complaint will necessarily succeed. The employer may be able to meet its burden to prove that there was no silent treatment, that its actions and those of its managerial employees were appropriate, or that the silent treatment was not serious enough to warrant relief under s. 186(2)(a)(iii) of the *Act*. However, those questions will require a hearing before the Board to determine. The complainant has an arguable case.

## VII. There is no arguable case of a violation of s. 186(2)(c) of the *Act*

[63] As stated earlier, s. 186(2)(a) is about prohibiting an employer or its managers from punishing or reprising against employees for enforcing their rights. Paragraph 186(2)(c), by contrast, "… prohibits any action that would prevent … recourse under the *Act*. That action need not be punitive; the very prevention is prohibited"; see *Coupal*, at para. 233.

[64] However, s. 186(2)(c) of the *Act* states that no employer or manager "… shall … seek … to compel a person to refrain from …" filing a grievance or participating in a proceeding under the *Act*. In soliciting written submissions from the parties, I asked them specifically to identify what the complainant was being sought to "refrain from" doing. Her submission on this point is as follows:

> …
>
> *53. The union submits that this case falls squarely within the meaning of s. 186(2)(c) of the Act. Again, the union submits that, taking the Complainant's allegations as true, the nexus between the Complainant's grievance and the penalty of not being allowed to work overtime as long as the grievance was ongoing is clear, direct, and obvious.*
>
> *54. The union submits that, by making a public example of the Complainant, isolating her from her coworkers and insisting that she work in a different department, and preventing her from discharging her normal duties as a nurse, the employer sent a clear message to the Complainant and potentially other members of the staff that pursuing her rights under the collective agreement or pursuant to statute would result in further penalties from management. In the Complainant's case, these additional penalties included not being allowed to pick up overtime shifts as long as the Complainant pursued her grievance. The union submits that the employer attempted to intimidate, threaten, and penalize the Complainant into not (i) testifying in, or otherwise participating in a grievance or other proceeding, (ii) making a disclosure that the employee might need to make in a grievance or other proceeding, and (iii) presenting a grievance or making a complaint.*
>
> …

[65] As I understand the complainant's submission, she argues that the employer sought to compel her to refrain from filing a grievance and participating in that grievance. She also submits that the impugned action that sought to compel her to refrain from filing her grievance was assigning her to the administrative position (i.e., "… isolating her from her coworkers and insisting that she work in a different

department, and preventing her from discharging her normal duties as a nurse …"). That assignment occurred on April 26, 2023. The complainant is vaguer about what grievance she was allegedly pressured not to file.

[66] In her written submissions, the complainant submits that as early as February 8, 2023, the employer knew that her bargaining agent believed that the employer had conducted itself in a way that was "unrespectful, insensitive, and irresponsible" and that its conduct was similar to that which gave rise to workplace harassment and violence complaints in 2018 and 2019. The complainant further submits that "… the employer knew or ought to have known as early as February 8, 2023 that there was a very real possibility that the Complaint [*sic*] would file a grievance or grievances in response to the way she had been treated."

[67] I have read the complainant's submissions carefully, particularly her summary of the context behind this complaint. Those submissions disclose three grievable events: the November 9, 2022, meeting with management, being sent home on February 8, 2023, and then the transfer on April 26, 2023.

[68] The complainant does not allege that the employer should have known that a grievance was possible because of the November 9, 2022, meeting. Further, the transfer on April 26, 2023, is the action that she states constitutes the breach of s. 186(2)(c) of the *Act*, so she cannot be alleging that the employer assigned her to prevent her from grieving the assignment. I am left with an allegation that the employer reassigned her on April 26, 2023, to intimidate or threaten her into not grieving the fact that she was sent home for a week on February 8, 2023.

[69] The complainant submits that since the employer knew that her union considered her treatment on February 8, 2023 "unrespectful, insensitive, and irresponsible", it should have known that a grievance was coming about those events. However, as the employer points out, the "mere possibility" of a grievance or complaint does not trigger the application of s. 186(2)(c) of the *Act*; see *Construction Labour Relations Assn. of British Columbia) v. I.U.P.A.T., District Council 38*, [2004] B.C.L.R.B.D. No. 361 (QL) at para. 17, applying the similarly worded provision in s. 5 of the British Columbia *Labour Relations Code*. Saying that an event is "unrespectful, insensitive, and irresponsible" is not enough to put an employer on notice that a

grievance is coming. An employee may feel upset and may say that they have been disrespected without ever filing a grievance.

[70] The complainant also does not explain the additional problem of the time that elapsed between the February 8, 2023 treatment and the transfer on April 26, 2023. Her collective agreement, which was between the Treasury Board and the Professional Institute of the Public Service of Canada for the Health Services group that expired on September 30, 2022, sets out the standard 25-working-day limitation period in which to file a grievance in clause 34.12. The transfer on April 26, 2023 occurred well after the expiry of that limitation period. The complainant, in essence, argues that the employer assigned her to administrative duties to intimidate her into not filing a grievance that she did not warn was possible and that would be over a month late. I have concluded that there is no arguable case that the employer knew about the possibility that the complainant would grieve the events of February 8, 2023, given that she never said that she was considering grieving them and that any grievance would have been out of time.

[71] I have also read the complainant's written response to the employer's initial objection, in which she stated, "On April 12, 2023, a PIPSC steward met with the Complainant's supervisor and the Chief of Health Services to express the Union's concerns about how management was treating the Complainant." Without more information about that meeting, I cannot conclude that there is even an arguable case that this meeting could have alerted the employer that a grievance was coming. I also note that the complainant's more complete and specific written submissions did not mention this meeting.

[72] The complainant also suggests that her union's message to her employer was also sufficient to forewarn it about a workplace harassment and violence complaint. However, as I said earlier in this decision, workplace violence and harassment complaints do not fall under Parts 1, 2, and 2.1 of the *Act*. Therefore, they cannot trigger s. 186(2)(c) of the *Act*.

[73] Therefore, I have concluded that the complaint does not disclose an arguable case of a violation of s. 186(2)(c) of the *Act*, as there is no arguable case that the assignment on April 26, 2023, was designed to intimidate or threaten the complainant into not grieving the events of February 8, 2023.

## VIII. The complaint should not be dismissed because of the grievance

[74] Subsection 191(2) of the *Act* states that the Board **may** refuse to determine this complaint if it is in respect of a matter that could be referred to adjudication under Part 2 of the *Act*. This power is discretionary on the part of the Board.

[75] The employer submits that I should apply that provision "[t]o the extent the allegations in [the] complaint relate to the denial of overtime opportunities …" because "[t]he Board would **arguably** have the authority to adjudicate this matter" [emphasis added]. It does not argue that what I have called the "silent treatment" allegations must be addressed through the grievance procedure — and in fact, it states that the Board would not have the authority to adjudicate this matter (at paragraph 74 of its written submissions). Therefore, I cannot exercise the power in s. 191(2) of the *Act* to dismiss this complaint.

[76] Additionally, the employer does not unequivocally agree that the Board has jurisdiction to hear this grievance at adjudication — only that it "arguably" does so. This is not sufficient to trigger s. 191(2) of the *Act*. I must be convinced that the grievance could be referred to adjudication — not just that it "arguably" could be. Even if I believed that the matter could be referred to adjudication, I would exercise my discretion under s. 191(2) not to refuse to determine the complaint in the absence of an unequivocal statement by the employer that it would not contest the Board's jurisdiction to adjudicate this grievance.

[77] The employer argues that any findings in the harassment investigation may render this complaint an abuse of process. This issue is not before me at this arguable case stage, and anything I say about it would be merely speculation at this time. Therefore, I will not address the abuse-of-process argument raised by the employer.

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

*(The Order appears on the next page)*

## IX. Order

[79] The employer's preliminary objection is allowed in part.

[80] There is no arguable case of a violation of s. 186(2)(a)(ii), 186(2)(a)(iv), or 186(2)(c) of the *Act*. There is an arguable case of a violation of s. 186(2)(a)(iii) of the *Act*.

[81] The complaint will be returned to the Board's Registry for scheduling in the normal course.

February 13, 2024.

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