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XR: 561-02-41772

Citation: 2024 FPSLREB 32

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

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

BETWEEN

RUPINDER PANESAR

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Panesar v. Canada Revenue Agency

In the matter of a complaint made under section 133 of the *Canada Labour Code*

Before: Caroline E. Engmann, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Elizabeth Matheson, counsel

Heard via videoconference,
June 21 to 23, 2022.
(Written submissions filed July 7, 8, 14, and 18, 2022.)

REASONS FOR DECISION

I. Complaint before the Board

[1] On May 20, 2020, Miss Rupinder Panesar ("the complainant") made a complaint under s. 133 of the *Canada Labour Code* (R.S.C. 1985, c. L-2; "the *Code*") with the Federal Public Sector Labour Relations and Employment Board ("the Board") that her employer, the Canada Revenue Agency ("the CRA" or "the respondent"), had terminated her employment in retaliation for her making a workplace violence complaint, which was contrary to s. 147 of the *Code*.

[2] At the time of her complaint, she was an employee of the CRA occupying a quality assurance advisor position in the Quality Assurance Section of the Goods and Services Tax/Harmonized Sales Tax Directorate ("the GST/HST Directorate") in the CRA's Compliance Branch. Her position was classified at the AU-04 group and level and formed part of the bargaining unit represented by the Professional Institute of the Public Service of Canada ("the PIPSC").

[3] The respondent objected to the Board's jurisdiction to hear the complaint because it is untimely. Additionally, the respondent denied that it took action against the complainant that was prohibited under s. 147 of the *Code*; therefore, the Board should dismiss the complaint.

[4] When the complainant made this complaint, she also made a complaint against the PIPSC, alleging that it had breached its duty of fair representation. The Board dismissed that complaint on October 27, 2021, in *Panesar v. Professional Institute of the Public Service of Canada*, 2021 FPSLREB 119.

II. Summary and disposition

[5] The essential facts underlying the complaint are relatively simple and straightforward. The complainant had been absent from the workplace for over two years, initially on paid sick leave and then on sick leave without pay. Between January 3, 2019, and February 24, 2020, the respondent sent her a total of four letters outlining options to resolve her leave and employment status (these letters are commonly known as "options letters"). The respondent issued the letters under the auspices of the CRA's *Directive on Leave and Special Working Arrangements* ("the Directive").

[6] On June 14, 2019, the complainant made a complaint under the *Code* provisions on violence in the workplace ("the workplace-violence complaint"). The Labour Program of the Department of Employment and Social Development (ESDC) was in the process of handling the workplace-violence complaint when this reprisal complaint was made.

[7] On February 24, 2020, the respondent sent the complainant a third options letter, in which it asked her to choose one of four options outlined in the letter to resolve her leave-without-pay and employment status. She was given a deadline of March 6, 2020, to respond, failing which management would recommend that her employment be terminated for reasons other than a breach of discipline or misconduct. The complainant did not respond to this or any of the other options letters; rather, she made this complaint.

[8] There is evidence that the complainant contacted the Board in February 2020 to make this complaint. There was some administrative confusion as to the specific recourse that she sought; therefore, her complaint was not registered by the Board until May 20, 2020. Based on the evidence, I find that the complaint is timely, and the respondent's jurisdictional objection is dismissed.

[9] On its merits, I dismiss the complaint as I find that by issuing the options letters dated January 30, 2020, and February 24, 2020, the respondent did not contravene s. 147 of the *Code*. I arrive at this disposition for two reasons. First, the options letter per se was not an activity proscribed by s. 147. Second, even if I am wrong, the complaint still fails as the complainant failed to establish any nexus between the issuance of that options letter and the exercise of her right to make the workplace-violence complaint.

III. Rulings

[10] During and before the hearing, I made several procedural, interlocutory, and evidentiary rulings. I believe that I must formally address a few of them in this decision for the parties' benefit and to provide the proper context for this decision. Three are set out in this section.

A. The denial of the complainant's postponement request

[11] This matter was scheduled to proceed by way of videoconference on the specified dates, in accordance with the Board's videoconference guidelines. The complainant requested an in-person hearing in Ottawa, Ontario, which was granted.

[12] The complainant then requested that the in-person hearing be rescheduled. When I received her request, I scheduled a pre-hearing conference call on June 10, 2022, to receive the parties' submissions. I ruled as follows after the call, denying the request:

> *On June 10, 2022, a pre-hearing conference call was held to provide the complainant the opportunity to provide* [the Board with] *a detailed explanation for her request for a postponement of the in-person hearing which has been granted further to her request.*
>
> *Based on the explanations provided by the complainant, the Board is not convinced that it would be in the interest of justice and fairness to grant the request for a postponement. The preamble to the* Federal Public Sector Labour Relations Act *recognizes the "efficient" resolution of workplace disputes. Granting the complainant's request will not further the efficient resolution of her complaint. The request for a postponement is hereby denied.*
>
> *…*

B. Recusal ruling

[13] After I made that ruling, on June 13, 2022, the complainant wrote to the Board. She stated that she objected to the Board member assigned to her file and requested that a Board member be assigned "… who is not a previous counsel/lawyer and represented the respondent, who is not a previous government employee (federal, provincial/territorial and/or municipal), who is not a career civil servant." As the panel of the Board seized with this matter, I treated this request as a motion for recusal and informed the parties that I would render my ruling shortly. I delivered my ruling on the recusal motion on June 17, 2022. For the reasons outlined in the recusal ruling, I denied the recusal request. That ruling is attached to this decision as Appendix A.

C. Evidentiary Ruling 1 - request to call witnesses

[14] At the outset of the hearing, the complainant made a request to call four witnesses, as follows:

…

> *Request to the Board for appearance of the respondent's* [four] *witnesses, namely,* [names redacted] *who made allegations (falsehoods as these did not occur) against me and upon whose false statements the respondent [sic] coercive demands of "fit to work" and "medical assessment" are based. In addition, based on these witnesses' allegations the employer denied me access to the workplace as of 12:00 p.m. on June 21, 2017.*

…

[15] My ruling denying her request is as follows:

> *The complainant has requested the attendance of four individuals* - [names redacted]– *to provide evidence / testimony and to allow her to question them regarding certain statements or assertions made about her in or about 2016 and 2017. I gather from the complainant's testimony that these individuals made statements which formed the basis of a request from the employer for the complainant to undergo a fitness to work evaluation (FTWE) – an issue which continues to be a bone of contention between the complainant and her employer. The appropriateness of the employer's request for a FTWE is not an issue that is before me in this complaint, nor am I required to assess the validity or legitimacy of the employer's request in order to make my determination under sections 133 and 147 of the Canada labour [sic] Code. The issue as to whether the employer had any justification to demand or request a FTWE is a matter for another process and it would be ultra vires and beyond my jurisdiction to make any findings or evaluative determinations on that issue. As creatures of statute, administrative decision-makers [sic] must deal with matters that fall squarely within their statutory mandate.*
>
> *Based on my assessment, nothing that these four individuals will potentially say in their testimony will be of any assistance to me in this matter. I therefore deny the complainant's request to have these individuals attend the hearing in order to be questioned by the complainant.*
>
> *To be clear, this ruling does not prevent the complainant from compelling the testimony of these four individuals in any parallel, ongoing or future proceedings where the legitimacy of the employer's request that the complainant undergo a FTWE is at issue. The complainant may be disappointed with this ruling but I believe that this is the fairest and legally sound interlocutory decision to make so as to protect the complainant's interests in her ongoing matters with her employer.*

IV. Summary of the evidence

A. For the complainant

[16] The complainant testified on her own behalf. I allowed her to testify about events that occurred beyond the immediate 90 days preceding May 2020, when she made her complaint, over the respondent's objection. I ruled that she could testify about those events only as background and contextual information and that I would not make any factual findings related to matters that were not squarely before me in this complaint, specifically, her discrimination-and-harassment complaint and the workplace-violence complaint.

[17] Until February 2021, the complainant was employed by the CRA in the Quality Assurance Section for small and medium businesses. She started working for the CRA as a PM-02 in the Greater Toronto Area in Ontario, and she studied and worked her way up to an AU-04 position. Her residence is in Brampton, Ontario, which has never changed. When she accepted the AU-04 position at CRA's headquarters in 2004, she remained resident in Brampton and commuted weekly to Ottawa for her work.

[18] On December 1, 2015, she started working in the Quality Assurance Section after a permanent lateral transfer was made. She approached the director of her section and requested family status accommodation. She understood that she was to train under the manager of the section for one year and was told that after that, she could work remotely. She was supposed to start working remotely on December 1, 2016. The respondent never honoured her request for family status accommodation.

[19] She was not allowed to work in her substantive AU-04 capacity and was unable to apply for higher positions, due to a lack of experience. As a result, she wanted to change sections, so she approached another director to ask about working in her section. She met with her director to discuss her concern that she was not being assigned work at her substantive level. At that meeting, her director threatened that he would put her on an action plan. She was very surprised that the director threatened her, which she wanted to report to the CRA's assistant commissioner.

[20] She was raised with love and compassion. Her parents never shouted at her. As a child, she suffered no abuse of any kind. Therefore, when someone shouts at her, it is hurtful to her. She did not want to meet with her manager behind closed doors unless for constructive criticism. Her manager questioned her about her leave and her

work hours. She explained that she had to leave work early on Fridays to drive home to Brampton, so she did not understand why she was being questioned. The conversation took place in July 2016. She felt that she was being monitored, and everything she did became an issue.

[21] She met with the Director of the Computer Audit Specialist Division, who later misrepresented what occurred during their meeting. She had become teary-eyed and upset when she thought about her father's passing. The respondent had refused to allow her to work from Toronto, and she was unable to be with her father when he passed away. Even to this day, she becomes emotional at the thought that she was not present for her father's passing. Things were deteriorating in her workplace; she was being called into impromptu meetings and was being interrogated behind closed doors. The work situation was quite stressful.

[22] She approached the acting director general and explained that she did not feel safe in her workplace and that she needed a "safe haven".

[23] The work stress caused her to collapse at work one day. The respondent called an ambulance to take her to the hospital. She showed up for work the next day and found that a co-worker was putting shoes on her desk, where she eats. The next day, the same co-worker came in and began to loudly slam briefcases and close cabinet doors. She left the area because she did not feel safe.

[24] Because she had collapsed at the workplace, she became concerned about her physical health; so, she took some time off work. She left at the end of August 2016 on sick leave. On October 4, 2016, the respondent sent her a package requesting a fitness-to-work evaluation. She never responded to the letter; nor did she provide the package to her doctor.

[25] Instead, she provided the respondent with this note from her physician:

> *This is to certify that the above patient, seen in our medical office n [sic] 08-Oct-2016, was unable to work and/or attend school due to medical reasons on the dates specified below.*
>
> *From: 5- September – 2016 To: 6- October- 2016*
>
> *Comments:*
>
> *May return to work October 11, 2016.*

[26] She testified that when she returned to work, she provided her doctor's note to management. Management then informed her that an access to information request ("ATIP request") required her attention. She believed that management was seeking information on her and that someone from the CRA had made that ATIP request. She asked the Board to order that the respondent disclose the originator of the ATIP request. I explained to her that the information was not relevant to my determination; however, I ordered the respondent to provide her with the information if it was available.

[27] The complainant testified that when she went to her original desk, she discovered that her effects had been moved to another cubicle. Her desk had been chipped in the corner, her ruler was tapered, and her keyboard was covered with meat. She spoke to an administrative assistant about the meat on her keyboard, and the assistant said that she would clean it. However, according to the complainant, cleaning it would not have removed the embedded meat. She required a new one, which she was eventually able to obtain from the CRA's Information Technology Section.

[28] She found that when she returned to work, things did not improve; rather, things became worse. Her performance evaluation was entirely negative. She was being told that she could no longer do her job, and her evaluation changed to include her behaviour. Her manager carried out an untrue mid-year review, and she was assigned a level two. The respondent could let an employee go if they received a second level two.

[29] She made a discrimination-and-harassment complaint against several individuals under the CRA's internal *Directive on Discrimination and Harassment Free Workplace*. The respondent did not investigate her complaint because it said that the allegations did not meet the criteria for acceptance under its directive.

[30] The respondent asked her to voluntarily comply with a medical assessment. Her PIPSC labour relations officer asked her to phone her doctor and fix a date for it. She went to her doctor and asked for an appointment. She did not agree to the medical assessment; she never changed her mind about going through with it. She did not agree with the basis for it, and in her view, once she agreed to it, it would mean that she also agreed with the false narrative that formed the basis of the request to take the assessment.

[31] CRA's human resources officers also told her to comply with the medical assessment.

[32] She wrote to her branch's assistant commissioner. She wanted to be moved to a different branch and into a different reporting relationship.

[33] She was told that as of June 21, 2017, she was not allowed in the workplace. She was put on sick leave. The respondent contacted Sun Life, which called her and informed her that a referral had been sent for disability benefits for her and that it required a medical assessment. She received a letter that stated that she would not receive Employment Insurance benefits. Later, she received a letter from the respondent stating that it had put her on sick leave and then on leave without pay. The respondent then sent her the options letters by regular and registered mail. None of the options outlined in the options-letter package were good choices for her, given that she had worked 20 years with the CRA.

[34] She has been away from the workplace since June 21, 2017. She has not responded to any of the respondent's demands for a fitness-to-work evaluation. On July 27, 2017, the CRA's assistant commissioner for her directorate wrote to her and told her to contact the Labour Program at ESDC.

[35] She contacted ESDC in 2019 and made a complaint with its Labour Program on June 14, 2019 (note that June 14, 2019, is the date on the complaint registration form; however, in a letter dated September 24, 2019, from ESDC, the date of the complaint is stated to be June 17, 2019). Under the section of the complaint registration form titled "Nature of Complaint", she stated as follows:

> *VIOLENCE IN THE WORK PLACE. Steps 1 and 2 were not conducted. I complained about the situation of violence in the workplace to the Assistant Commissioner, there was no attempt at trying to resolve the situation and that no competent person was appointed to investigate my allegations of harassment.*

[36] Initially, ESDC closed her file. She received a letter dated September 24, 2019, which stated as follows:

> …
>
> *Having investigated your complaint, in my opinion, the employer has complied with the requirements of the Act. As you did not provide any information to me indicating that you wished to*

> *pursue the matter, it was deemed that your complaint was withdrawn on September 13, 2019.*
>
> *The Labour Program of Employment and Social Development Canada can, therefore, take no further action on your behalf.*
>
> …

[37] Upon receiving this letter, she contacted ESDC, and the complaint was revived. She then provided it with the discrimination-and-harassment complaint that she had previously made with the respondent.

[38] According to the complainant, the respondent acknowledged her workplace-violence complaint and informed her that it would begin the investigation process. It took the respondent months to select the person it wanted as a competent person [a competent person is an independent and objective and competent person selected to investigate the workplace violence complaint]. She received four names from the respondent, but she did not find those people impartial, and she informed the respondent of her position. It asked her to explain why she did not find them impartial. According to her, under ESDC's *Interpretations, Policies and Guidelines No. 943-1-IPG-081* ("IPG"), she was not required to provide any explanation to the respondent, so she refused to provide one.

[39] She referred to a letter that she received from Mr. Melançon, Manager, Quality Assurance Section, dated February 24, 2020, outlining options to resolve her leave-without-pay situation. She stated that the letter constituted the reprisal, in particular its final paragraph, which states as follows:

> *If you do not choose your option by this date, management will recommend the termination of your employment "for reason other than breaches of discipline or misconduct" pursuant to Section 51(1)(g) of the* Canada Revenue Agency Act.

[40] On the timeliness issue, the complainant testified that she made her complaint in February 2020. She initially contacted the Canada Industrial Relations Board ("CIRB") on February 6, 2020, to determine her options for redress after she received the second options letter, dated January 30, 2020. The CIRB informed her that the Board was the appropriate forum for her redress options. On February 14, 2020, she telephoned the Board's 1-800 number and left two messages with her return phone

number. She did not receive any response, so on February 24, 2020, she contacted the CIRB again and explained that she had not received any response from the Board.

[41] Eventually, she spoke to a member of the Board's Registry team. She explained to the registry officer that she found the forms on the Board's website confusing and that she had identified Form 16 and Form 26 as relevant to her situation. Following her telephone conversation with the registry officer, she received an email from the Board, informing her that she had used the incorrect forms to make a complaint against her employer.

[42] She provided complaint forms to show that she contacted the Board in February 2020.

[43] On cross-examination, she confirmed that she received the letter dated January 30, 2017, from the CRA's assistant commissioner informing her of the reasons that her discrimination-and-harassment complaint would not be investigated.

[44] She also confirmed that she has been absent from the workplace since June 21, 2017.

1. Correspondence from Nathalie Brisson

[45] On cross-examination, the complainant confirmed that she received a letter dated January 3, 2019, from Nathalie Brisson, the acting director of her work unit. This letter contained the following enclosures: 1) a letter to a doctor; 2) medical assessment consent forms, one for the complainant's doctor, and the other for a medical clinic; and 3) an occupational fitness assessment form ("OFAF"). The letter referred to two previous letters that were sent to the complainant on September 22, 2017, and January 18, 2018, respectively. Ms. Brisson confirmed that the complainant had been temporarily struck-off strength as she had exhausted all her leave credits. Ms. Brisson then outlined the options for resolving the complainant's leave-without-pay status as follows:

> …
>
> *… Around the 18-month mark, where an employee has been on Leave Without Pay (LWOP), a letter called the 'Option letter' is sent to the employee. This letter gives four options:*
>
> *1. Return to work (with an OFAF confirming the employee's fitness to work)*

> *2. Medical retirement*
>
> *3. Retirement*
>
> *4. Resignation*
>
> …

[46] Ms. Brisson further informed the complainant that if she wished to return to the workplace, she would have to follow through with the fitness-to-work evaluation. The steps to follow were also outlined in the letter.

[47] In cross-examination, the complainant confirmed that she also received a letter dated May 16, 2019, from Ms. Brisson, which outlined all the previous letters that the CRA had sent about her leave status that noted that the complainant had not responded.

[48] Ms. Brisson noted that management had tried to contact the complainant several times, without success, with a view to discussing her leave-without-pay situation. She outlined four options for resolving the complainant's leave situation and asked that the complainant provide a written response by June 16, 2019. A preaddressed envelope was provided for that purpose.

[49] The complainant testified that she received Ms. Brisson's second letter, but she did not respond to it.

2. Correspondence from Jean-Marc Mélançon

[50] The complainant received a letter dated January 30, 2020, from Jean-Marc Melançon, Manager, Quality Assurance Section, outlining the four options for resolving her leave-without-pay status. The letter concluded as follows:

> …
>
> *… a written response indicating your decision and the effective date is required; please make your selection on the attached LWOP Option Selection form, and return it to me by* ***February 21, 2020****. If you do not choose your option by this date, management may begin the process to terminate your employment "for reason other than breaches of discipline or misconduct" pursuant to Section 51(1)(g) of the* Canada Revenue Agency Act*.*
>
> *You can contact me at* [telephone number redacted] *if you have any questions or need support in this process.*
>
> …

[Emphasis in the original]

[51] The complainant testified that she did not respond to the letter. She considered it a reprisal, and she concluded that management was already taking steps to terminate her employment.

[52] She received the options letter dated February 24, 2020, from Mr. Melançon, which was a follow-up to the January 30, 2020, options letter. In addition to outlining the four options for resolving the leave-without-pay situation, the letter stated that if she did not respond by the deadline of March 6, 2020, management would recommend the termination of her employment.

[53] Upon further cross-examination, the complainant confirmed that her employment had not yet been terminated as of the date on which she made her complaint. She confirmed that the actual date of the termination of her employment was February 22, 2021.

[54] The complainant acknowledged that she received a letter dated May 6, 2020, from ESDC, which states in part as follows:

> …
>
> *Having investigated your complaint, in my opinion, the matter will be better resolved between the parties without my further intervention. Therefore, in accordance with the provisions of the* Canada Labour Code*, Part II, paragraph 127.1(10)*(b)*, it is my recommendation that you and your employer resolve the matter between yourselves.*
>
> *The Labour Program of Employment and Social Development Canada will, therefore, take no further action on your behalf.*
>
> …

3. The complainant's reply

[55] In reply, the complainant stated that she objected to the options letters presented to her during her cross-examination because they were based on hearsay allegations of incidents that did not occur. She testified that the respondent did not respect the provisions of the *Code*, and she sought to introduce into evidence ESDC's IPG.

[56] She then read from the portions of the IPG that set out the definitions of harassment and factors that contribute to workplace violence (sections 3.1, 3.2, 3.3, 11.1, and 11.2). She testified that the respondent failed to comply with the IPG. According to her, ESDC informed her that the respondent had to appoint a competent person, which still had not been done. Therefore, her workplace-violence complaint was still ongoing.

B. Evidentiary ruling 2 - the IPG

[57] The complainant asked that the IPG be marked as an exhibit. The respondent objected to its admissibility on grounds of relevance. I accepted the IPG and marked it as an exhibit but ruled that its relevance to the complaint was doubtful. Given the complainant's apparent confusion about the relevance of the IPG to this complaint, I find it necessary to reproduce my ruling, as follows:

> …
>
> *I am not convinced of the relevance of this document to any issue that I must determine in this complaint. Having heard the parties' submissions, I remain doubtful of its relevance. Given that the complainant's acknowledgement that her workplace violence complaint which falls under the auspices of this IPG remains open and ongoing, I remain cautious of not making any determinations about a process that is not squarely within my jurisdiction.*
>
> …

C. For the respondent

[58] Two witnesses testified on the respondent's behalf, Ms. Brisson and Mr. Melançon. They each signed and sent options letters to the complainant while they occupied the position of the manager of the Quality Assurance Section.

[59] Ms. Brisson is currently the manager of the Business Intelligence Section of the GST/HST Directorate in the Compliance Programs Branch. Earlier, she was the manager of the Quality Assurance Section for about a year. Between February 26, 2018, and September 30, 2019, she was the acting director of the Computer Audit Specialist Division, and in that capacity, she had delegated authority for human resources for three sections, including the Quality Assurance Section, where the complainant worked.

[60] At all relevant times when she was in her role, the complainant was on leave without pay.

[61] Ms. Brisson sent a letter dated January 3, 2019, to the complainant as a heads-up that the 18-month mark of her leave without pay was approaching and informing her that an options letter would soon arrive. Ms. Brisson referred to the previous letters sent to the complainant that had gone unanswered. Ms. Brisson's letter addressed the four options available to the complainant to regularize her leave-without-pay situation and highlighted that a fitness-to-work evaluation would be required if she chose to return to work.

[62] Ms. Brisson referred to the Directive, which requires managers to address and to "… regularly re-examine all cases of LWOP [leave without pay] due to illness or injury in the workplace to ensure that continuation of LWOP is supported by current medical evidence." The Directive also provides that such leave-without-pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated based on its circumstances.

[63] She sent the January 3, 2019, letter to the complainant under the Directive.

[64] She also sent the complainant the options letter dated May 16, 2019, which set out all the steps that the respondent had taken since 2017 to deal with its request for a fitness-to-work evaluation and her leave-without-pay situation. The same four options were outlined in the letter, and she was given a deadline of June 14, 2019, to respond.

[65] Ms. Brisson did not receive any response from the complainant.

[66] On cross-examination, she was asked how she became aware of the contents of her letters. She responded that she was briefed by previous managers as she came into the role.

[67] At the end of Ms. Brisson's cross-examination, the complainant raised an objection to the admissibility of the options letter dated May 16, 2019, on the basis that it contained hearsay information and that it should not be admitted. My ruling on this objection follows.

D. Evidentiary ruling 3 - the May 16, 2019, options letter

[68] The respondent tendered into evidence the options letter dated May 16, 2019, from Ms. Brisson to the complainant, who objected to it on the basis that it contains hearsay. Ms. Brisson authenticated the options letter, which she signed in her capacity as the acting director for the section in which the complainant worked. She wrote it in accordance with her delegated authority for human resources matters. She received advice, guidance, and support from labour relations advisors when drafting the options letter, which she then signed and mailed or caused to be mailed to the complainant, who testified and acknowledged that indeed, she received the options letter.

[69] My understanding is that that document was adduced to establish the following facts, which are relevant to my determination of whether a reprisal occurred, contrary to s. 147 of the *Code*:

a) The communication to the complainant of the respondent's required options to regularize her status of being on leave without pay or temporarily struck-off strength in accordance with the provisions of the Directive.
b) The complainant's receipt of that information.
c) The complainant's receipt of the information from the respondent at the relevant time.

[70] In my view, a), b), and c) constitute the most salient factual determinations underpinning any reprisal allegation. As I have already determined and ruled, it is not within my jurisdiction to assess or evaluate the justification or legitimacy of the respondent's requirement that the complainant undergo a fitness-to-work evaluation. As noted in my ruling about calling four individuals as witnesses, I am not required to determine those matters in this complaint.

[71] As I understand this objection, the complainant questions the veracity of the events narrated in the May 16, 2019, options letter. It was her prerogative to question the respondent's version of certain occurrences and the gloss it chose to put on them; however, I note that the complainant testified that she never did respond to the options letters. In my view, if one questions the accuracy or veracity of a statement, it is incumbent upon that person to present a contrary position.

[72] In any event, it is not my role in the context of this complaint to sort through all of that; therefore, I refrain from making any evaluative comments on this aspect.

[73] I will dismiss the objection to the admissibility of the May 16, 2019, options letter on the basis that the facts for which it was adduced, as outlined in items a), b), and c), are relevant to my determination of the complaint, and it does not offend the hearsay rule.

[74] Next, Mr. Melançon testified. He is currently a manager with the CRA within its GST/HST Directorate. At all times relevant to this complaint, he was the manager of the Quality Assurance Section, where the complainant worked. When he was in that role, she was on leave without pay, and in his capacity as the manager, he had the delegated authority to deal with her leave-without-pay status.

[75] Mr. Melançon sent the options letter dated January 30, 2020, to the complainant, setting out the four options available to her and asking her to respond by February 21, 2020. In it, he informed her that a separate process was underway to investigate the workplace-violence complaint. He explained that he had to clarify that the workplace-violence-complaint process was ongoing and that separate letters had been sent.

[76] His letter also referenced previous letters sent to the complainant, including the May 16, 2019, options letter, which, he noted, was the first one. He noted that the respondent received no response to that letter from the complainant and that given the lapse of time, it was necessary to provide her with the options again. He testified that to extend the leave without pay, the respondent required updated medical evidence.

[77] He did not receive a response to his January 30, 2020, options letter by the deadline of February 21, 2020; therefore, he sent another one on February 24, 2020, with a response deadline of March 6, 2020. He did not receive any response from the complainant.

[78] Mr. Melançon testified with respect to the processing of the workplace-violence complaint and the selection of a competent person. There appeared to have been some initial difficulty communicating with the complainant as emails sent to her bounced back as undeliverable. He was advised to communicate with her by regular mail as opposed to email.

[79] On January 31, 2020, he received an email from the complainant, requesting that she be provided with "… the full contact information for the competent person regarding the Violence in the Workplace investigation." He sent her a package with the names of four individuals proposed as competent persons and requested that she provide a response by March 9, 2020.

[80] Mr. Melançon subsequently received a copy of ESDC's May 6, 2020, letter to the complainant, informing her that it had closed its file. According to him, the letter meant that there was no longer any role for him to play and that the matter was closed.

[81] On cross-examination, he explained that he had to consider factors such as geographic location and language in his selection of names for the competent person. He did not recall providing the complainant with any additional information on the competent persons whom he had proposed. The complainant suggested to him that the respondent violated the IPG by failing to appoint a competent person.

V. Summary of the arguments

[82] Following the evidentiary portion of the hearing, I directed the parties to provide their final arguments in writing, and I established a schedule for the delivery of the parties' written submissions.

A. For the complainant

[83] The Board received the complainant's written submissions on July 7, 2022. On July 8, 2022, the complainant resubmitted her written submissions with several attachments. The two-page document primarily addressed a request for documents from the respondent and the 2019 workplace-violence complaint. She also attached the forms that she had filed with the Board in February 2020 to initiate her complaint.

[84] Following a review of her submissions, the Board issued the following direction:

> *The Board has received the complainant's closing argument on her complaint made under section 133 of the* Canada Labour Code. *The Board notes that the complainant's argument largely deals with a request for documents relating to the workplace violence complaint which she filed on June 14, 2019. As the Board repeatedly informed the parties during the course of the hearing, this is not a matter that is within the Board's jurisdiction.*

> *Given the absence of an oral hearing where the Board would have had an opportunity to seek clarification on the parties' submissions, the Board invites the complainant to address the following issues raised by the Board during the course of the hearing:*
>
> 1. *What right did she exercise under the* Canada Labour Code*?*
> 2. *What action or inaction of the respondent does she allege is prohibited by section 147 of the* Canada Labour Code*? As explained during the course of the hearing, this action or inaction must have occurred in the 90-day period preceding the complaint.*
> 3. *Is there a direct link between the exercise of the right described in item (1) and the respondent's action or inaction in item (2)? Explain why.*
>
> *The complainant can amend and/or resubmit her closing argument to address the questions listed above. She must do so by* ***July 12, 2022*** *or advise the Board that she intends to rely on the closing argument previously submitted by her.*
>
> [Emphasis in the original]

[85] The Board did not receive a response from the complainant by the July 12, 2022, deadline. However, after the respondent's submissions were delivered on July 14, 2022, the complainant made additional written submissions on July 18, 2022, ostensibly in reply to the respondent's submissions.

[86] To better understand the complainant's submissions, I have reproduced extensive excerpts. She commenced her submissions as follows:

> *I am thankful to the Board, Board Member and the respondent's counsel for their guidance, patience, generosity.*
>
> *The respondent/employer did not present its witnesses who made the original allegations and false statements (not under oath and not testified in presence of the Board) against me, namely* [names redacted]*. It's these individuals whom the employer claimed and based its coercive demand for the medical assessment, suspension, options package, and termination as these actions are all continuously linked, incremental, and consequential and not any one of these employer actions stands alone or is solitary. All the employer's actions started with Mr.* [name redacted]*'s (aka* [name redacted]*) threat, retaliation and reprisal as sham/camouflage disguised discipline.*
>
> *The employer's two witnessed misrepresented their positions (Ms. Nathalie Brisson as Director and Mr. Jean-Marc Malencon as*

> *Manager) in their written communications yet their direct testimony to the Board they both stated that they were acting in their positions. Neither witness explained that they were aware and/or knew facts or the origin of the issues of abuse of authority of authority, untruths, misrepresentation, misinformation, false statements, falsehoods, discrimination and harassment, workplace violence, suspension, and termination. They did not state or provide evidence as to that they took the actions that they did upon their own accord. They are neither the owners nor the heads of the CRA. They did not state that they appointed themselves to the positions they occupied during the time they took the actions. Mr. Malencon acknowledged that he was not familiar with the 943-1-IPG-081 and did not provide the required and requested information about the competent persons. Accordingly, Mr. Malencon did not follow procedural fairness nor adhere to the rule of law as per 943-1-IPG-081. Ms. Brisson and Mr. Malencon both represented the employer and accordingly are obligated in their duty to follow procedural fairness and the rule of law. Occupying the important positions as "director" and "manager" in representing the employer and not doing their due diligence as to their knowledge of CRA, TBS, and GOC policies and processes, procedural fairness and rule of law is wilful blindness as it is incumbent upon them to know bases their actions at the behest of and on behalf of the employer and the employer's ultimate decisions and actions of reprisal resulting in termination of employment. This not just a process, it is about an employee's life and livelihood and that of the employee's family and everything that is so wholly connected.*
>
> …
>
> [*Sic* throughout]

[87] She devoted most of her submissions to the legitimacy of the respondent's request for a fitness-to-work evaluation and her workplace-violence complaint. She argued that that request was the following:

> …
>
> *… the ongoing abuse of authority, discrimination and harassment, retaliation and reprisal, suspension and termination which are all based upon a foundation of absolute and deliberate untruths, blatant and outright false statements and falsehoods, misrepresentation and misinformation, sham and camouflage disciplinary action leading* [to the] *termination of employment.*
>
> …

[88] With respect to the workplace-violence complaint, she argued that the respondent failed to comply with the IPG's requirements and to follow "the rule of law" and "procedural fairness".

[89] As for the reprisal complaint, she argued that her "… suspension and options package [were] tantamount to a disciplinary action resulting in termination which gives the Board jurisdiction over the matter."

[90] She further argued that the respondent misrepresented facts when it stated that she had been away from the workplace since June 2017. She stated this: "I did not leave the workplace. It is the employer who suspended my access to the workplace as of June 21, 2017, at 12:00 p.m."

[91] She continued with this:

> …
>
> *It is my understanding that the Board may consider/refer/review the history or background information which is beyond the "ninety (90) days" timeframe in order to determine the genesis of the complaint and in its search for the truth upon which to base its decision.*
>
> *The respondent/employer's [sic] stated the termination of employment is based on its evidence of the original 2019 options package which it states is a result of being away from the workplace for two years. The respondent/employer misrepresented the facts stating that it is I who had not been at the workplace for two years and according to its policies and process and the resultant 2019 options package and termination. As stated above the employer's foundational premise is faulty and erroneous. This is beyond the "ninety (90) days" timeframe. This opens the door to look, review, consider any information beyond the ninety (90) days timeframe.*
>
> …

[92] The complainant argued further that "[q]uestions regarding the employer's decision to terminate [her] employment are important as are the related linkages and background information." She then outlined the questions as follows:

> …
>
> *Question 1: Why did the employer decide to terminate my employment? The employer states that it offered/provided to me an "options package" (2019 to 2020) to which it did not receive a response from me. It should be notes that options packages were identical and not different in any respect.*
>
> *Question 2: Why did the employer decide to offered/provided the "options package" to me? The employer states that it offered/provided "options package" according to its process when*

> *an employee has been away on from the workplace due to sick leave or leave without pay and states this applied to my situation.*
>
> *Question 3: Why had it been two years+ since I was not at the workplace? The employer states that I had left the workplace and not returned. As stated in my testimony, documentation and related information the employer's assertions/statements/ allegations are false, untrue, and misrepresentations. It is the employer who suspended my access to the workplace, arbitrarily put me on sick leave and then leave without pay despite my opposition and disagreement to the employer's decisions and actions.*
>
> *Question 4: Why did the employer decide to suspend my access to the workplace? This was direct result of* [the director's] *threat, retaliation and reprisal as sham/camouflage disguised discipline based on untruths, falsehoods, false statements, misrepresentation, and misinformation (confirmed by Assistance Commissioner's* [name redacted] *letter dated July 2017). As stated in my testimony, documentation and related information the employer's assertions/statements/allegations are false, untrue, and misrepresentations. It is the employer who suspended my access to the workplace, despite my opposition and disagreement to the employer's decisions and actions.*
>
> *Question 5: Why did the employer decide to demand a "medical assessment"? This was direct result of the director's* [name redacted] *threat, retaliation and reprisal as sham/camouflage disguised discipline based on untruths, falsehoods, false statements, misrepresentation, and misinformation, which I reported and filed a related Discrimination and Harassment Complaint with the employer's Discrimination and Harassment Centre of Expertise upon advice and guidance from the employer's Human Resources Branch. As stated in my testimony, documentation and related information the employer's assertions/statements/allegations are false, untrue, and misrepresentations.*
>
> *I believe my complaint to the Board should be allowed for all the reasons outlined above, and that the termination is sham/camouflage, and disguised disciplined in violation of Section 133 and the related Section 147 of the Canada Labour Code.*
>
> …
>
> [*Sic* throughout]

[93] She argued that her complaint was timely because she contacted the Board in February and spoke to one of its registry officers about making a complaint.

B. For the respondent

[94] The Board received the respondent's closing submissions on July 14, 2022. It referred to the following cases: *Babb v. Canada Revenue Agency*, 2012 PSLRB 47; *Canada (Attorney General) v. Frazee*, 2007 FC 1176; *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96; *Lapointe v. Canada Revenue Agency*, 2020 FPSLREB 19; *Larivière v. Treasury Board (Department of Employment and Social Development)*, 2019 FPSLREB 73; *Leary v. Treasury Board (Department of National Defence)*, 2005 PSLRB 35; *Lueck v. Department of Foreign Affairs, Trade and Development*, 2021 FPSLREB 87; *Pacquet v. Air Canada*, 2013 CIRB 691; *Pezze v. Treasury Board (Department of Natural Resources)*, 2020 FPSLREB 37; *Tanguay v. Statistical Survey Operations*, 2005 PSLRB 43; *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52; *Vanegas v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 60; *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLREB 78; *Walker v. Canada (Attorney General)*, 2020 FCA 44; and *White v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 52.

[95] The respondent argued that the complaint ought to be dismissed because it is untimely as it was not made within the 90-day statutory limitation period. Alternatively, it argued that the complainant did not demonstrate that she suffered any reprisal within the meaning of the *Code*.

[96] On the issue of timeliness, the respondent argued as follows:

> …
>
> *12. The Complainant confirmed that the options letter dated January 30, 2020 has a postmark on that same day. She also confirmed she had received a copy of it and her receipt was within two weeks of January 30, 2020. She later clarified that she received it no more than 15 days after it was dated. If the options letter from January 30, 2020 and February 24, 2020 are the reprisal, then the complainant knew about it or ought to have known about the January 30, 2020 letter prior to the February 20, 2020 deadline ….*
>
> …
>
> *14. Although the January 30 letter says the employer "may" begin the process of terminating employment is a response was not received by the deadline and the February 24 letter says "will recommend" termination if a response is not received by the deadline, this is not a meaningful distinction. In both instances, termination is not a certainty, but rather a possible outcome if the*

> *employer did not receive a response. The Complainant would have known about this contingency when she received the first letter, which at the latest would have been February 14, 2020. In the absence of an argument pertaining to a difference in content between the January 30, 2020 and February 2, 2020 letters, there is no reason to suggest the Complainant did not know about this potential outcome on February 14, 2020.*
>
> …

[97] The respondent asked that the complaint be dismissed as untimely.

[98] With respect to the merits of the complaint, the respondent adopted the four-part test in *Vallée* and argued that while s. 133 of the *Code* was engaged by the complainant's June 14, 2019, workplace-violence complaint, she failed to meet the balance of that test.

VI. Issues

[99] I must determine these two issues:

1) Was the complaint timely?
2) If so, did the options letters dated January 30 and February 24, 2020, constitute an act by the respondent that was prohibited under s. 147 of the *Code*?

VII. Reasons

A. Statutory framework

[100] The provisions of Part II of the *Code* are important and relate to occupational health and safety. There are provisions on employer and employee obligations, the establishment and functioning of workplace committees to address health-and-safety issues, recourses, and sanctions for health-and-safety violations.

[101] One of the important employee protections in Part II is the freedom from reprisals for exercising any right under that part. It is codified in s. 147 as follows:

147 *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's*	***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu*

rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee	*des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*
***(a)** has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*	***a)** soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*
***(b)** has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*	***b)** soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*
***(c)** has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*	***c)** soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*

[102] An employee who believes that their employer violated s. 147 has the right to make a complaint under s. 133, as follows:

***133 (1)** An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*	***133 (1)** L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.*
***(2)** The complaint shall be made to the Board not later than ninety 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.*	***(2)** La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.*
…	[…]

[103] The CIRB is the main statutory body responsible for dealing with the recourses under Parts I and II of the *Code*. However, Parliament carved a specific role for the

Board and its predecessors to adjudicate complaints made under s. 133 in respect of the public service and persons employed in it (see s. 240 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*).

B. Issue I - the complaint was timely

[104] Section 133(2) of the *Code* specifies that "[t]he complaint shall be made to the Board not later than ninety 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." In *Larivière*, at para. 71, the Board held that the time limit in s. 133(2) is mandatory and that the Board has no authority to extend it. It referred to the 2010 decision in *Laroque v. Treasury Board (Department of Health)*, 2010 PSLRB 94.

[105] I note that the analysis in *Laroque* on the Board's authority to extend timelines hinged on the clear legislative provision in s. 240(b) of the *FPSLRA*, which precluded applying s. 156(1) of the *Code*. Section 240(b) was repealed, effective 2019. The implication of that repeal for the Board's authority, if any, to extend timelines under s. 240 is yet to be determined. I note that in *Wood v. Canada Revenue Agency*, 2020 FPSLREB 57, this Board reflected on the effect of the repeal on a complaint that predated the repeal and concluded that the repeal did not have retroactive effect to deprive a party of substantive legal rights. Based on my findings in this case, I need not engage in that analysis.

[106] Section 133(2) requires the Board to embark upon a factual inquiry to establish whether a complaint is timely. To conduct this inquiry, I adopt the analysis of the Board's predecessor in *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100 at para. 23 (upheld in 2011 FCA 98, at paras. 49 and 51). Although *Boshra* dealt with a duty-of-fair-representation complaint under Part I of the *Public Service Labour Relations Act*, as the *FPSLRA* was named then, the Board has adopted this approach in the context of a complaint made under s. 133 in Part III of the *FPSLRA* (see *Larivière*; and *Bhasin v. National Research Council of Canada*, 2023 FPSLREB 11 at para. 20).

[107] The first question I must address is the essential nature of the complaint (per *Bhasin* at para. 24 and *Boshra* at paras. 20 and 23). Next, I must determine whether that complaint was made in the "… ninety 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."

1. The essential nature of the complaint

[108] The respondent placed the complainant on medical leave starting on June 22, 2017. It was paid leave until approximately October 2017, when her sick leave bank was exhausted. The respondent's reason for placing her on medical leave was twofold, 1) concern for her fitness to remain in the workplace, and 2) the parties' inability to obtain a fitness-to-work evaluation for her. It communicated its decision to her by letter dated July 19, 2017.

[109] The complainant has been absent from the workplace since June 21, 2017.

[110] Between July 19, 2017, and February 24, 2020, the respondent sent three options letters to the complainant, outlining the options for her to resolve her leave-without-pay status. On January 3, 2019, it sent her the letter that provided her advance notice that she would receive one such options letter. The first options letter was dated May 16, 2019, and it outlined the four options that the complainant could exercise, which were 1) medical retirement, 2) non-medical retirement, 3) resignation, and 4) returning to work with an up-to-date medical assessment. The letter set a deadline of June 14, 2019, for her to respond and indicate her choice.

[111] On June 14, 2019, the complainant made the workplace-violence complaint under Part II of the *Code*. She did not respond to the first options letter, of May 16, 2019.

[112] On January 30, 2020, the respondent sent the second options letter as a follow-up to the first one. In addition to the four options outlined in the first letter, this second letter included the following:

> …
>
> *… a written response indicating your decision and the effective date is required …by* ***February 21, 2020****. If you do not choose your option by this date, management may begin the process to terminate your employment "for reason other than breaches of discipline or misconduct" pursuant to Section 51(1)(g) of the* Canada Revenue Agency Act.
>
> [Emphasis in the original]

[113] The respondent sent the third options letter on February 24, 2020. It was essentially identical to the previous one of January 30, except that the concluding paragraph stated this:

> …
>
> *… a written response indicating your decision and the effective date is required; please make your selection on the attached LWOP Option Selection form, and* ***return it to me by March 6, 2020****.*
>
> *If you do not choose your option by this date****, management will recommend the termination of your employment "for reason other than breaches of discipline or misconduct"*** *pursuant to Section 51(l)(g) of the* Canada Revenue Agency Act*.*
>
> [Emphasis in the original and added]

[114] The complainant testified that she did not respond to the letters. She received the second one on or about February 3, 2020. On February 6, 2020, she phoned the CIRB about making a complaint and was advised to contact the Board, which she did. I have quoted her written closing arguments as follows:

> …
>
> *On February 6, 2020, I telephoned the CIRB and I was advised that the CIRB does not deal with government employees. I was advised to contact the FPSLREB. I was given the FPSLREB's telephone number 1-866-931-3454. I explained that I called this number and I got a voicemail asking me to leave my contact information and someone will get back to me.*
>
> *I contacted the FPSLREB on February 14, 2020 and left my name and telephone number* [redacted]*. I did not receive a response. I believe altogether I left two messages on the FPSLREB voicemail.*
>
> *On February 24, 2020, I contacted the CIRB and I spoke with* [a representative]*. We had spoken before. We discussed that the CRA terminated my employment and that it was a reprisal complaint 147 under the CLC and 133. He asked me if I had telephoned the FPSLREB. I explained that I had been calling them but the FPSLREB does not answer the telephone, instead asked one to leave their contact info. He said that FPSLREB is the department I need to contact for CRA under part 2, and 147. Again he said I need to call the FPSLREB. He added that when the union is not representing me I need to contact the FPSLREB, the same department for the duty of representation complaint. He advised me that if I have trouble, contact*[ing] *the FPSLREB to call him again. He provided me with his telephone number* [redacted]*. He said that if I cannot get hold of them by the next day that I should call him back. I said that when I had spoken to him earlier that since then I had been trying to contact the FPSLREB for the last two weeks and they don't*

answer; and that I had been trying longer than that and that they do not answer but for the last two weeks I have been leaving my name and number. He asked me for my name and number. He said that he was going to send the FPSLREB an email and also try to telephone the FPSLREB to give me a call back. He advised that that is the right department for me to talk to. He also said that there are forms online. I said that there are but the forms are very complicated; I wasn't sure that I was allowed to fill them out by myself. He said that yes I can. I said that if they can tell me which exact form to fill as there are a lot. He said that there was a 90 day limit. I said that more than two weeks ago the CRA told me that they will be terminating me. He said to let him try and if I don't hear back in two days to call him back.

On February 26, 2020, I again telephoned [the CIRB representative] *since I had not heard from him or the Board. He was not available so I left him a voicemail.* [One of the Board's registry officers] *(FPSLREB) had initially telephoned me on February 26, 2020 at 3:38 p.m. I had missed* [her] *call as I was not near the telephone. Shortly thereafter, I returned* [her] *call. I asked her to call me back as this was a long distance call for me. She telephoned me back immediately at 3:46 p.m. I explained to her that I had been trying to reach the FPSLREB and had left two messages and perhaps they were busy as I had not heard back. I explained that* [the CIRB representative] *was the one who had referred me to the FPSLREB. I explained my employment situation to her and she advised that what she can do is to send me the information that I need and the forms by email. I explained that I looked at all the forms on the FPSLREB's website and that they are quite confusing and I found two; one is 26 and the other is 16 or 21. I said that they ask you for information which I am not sure that I understand clearly. I said that I don't know which forms to use. She said that she can send the forms and the related information to me by email but could not provide me with legal advice. I explained to her that because I filed my initial complaint for discrimination and harassment with the employer and then for violence in the workplace with the Labour Program, that this is not only retaliation, it's like termination just because they can. So, I don't know which one form is it just one form for retaliation or is there another one for discrimination. She said that for discrimination I can file a complaint with the CHRC. I gave her my email address* [redacted]*. She said that she will send this to me right away.*

After the above conversation ended, [the registry officer] *sent an email to me (Wed, Feb 26, 2020, 4:13 p.m.) with some information.*

On February 26, 2020, I file the completed Forms 16 and 26 dated 26/02/2020 filed with FPSLREB.

…

[115] The Form 26 that she said she filed on February 26, 2020, contained the following pertinent information:

> …
>
> *3. Concise statement of each act, omission or other matter complained of, including dates and names of persons involved:*
> *TERMINATION OF EMPLOYMENT*
>
> *4. Steps that have been taken by or on behalf of the complainant for the resolution of the act, omission or other matter giving rise to the complaint:*
>
> *FILED COMPLAINT WITH ESDC'S LABOUR PROGRAM UNDER CLC PART II COHS REGULATION XX SECTION 20.*
>
> *5. Corrective action sought under section 134 of the* Canada Labour Code*:*
>
> *YES*
>
> …

[116] According to her uncontradicted testimony at the hearing, on February 27, 2020, the Board confirmed that it had received the forms that she had submitted. She waited for the Board's formal response and acknowledgement. After hearing nothing, she contacted it again on May 20, 2020 (ostensibly after she received the May 6, 2020, letter from ESDC's Labour Program), at which point the Board advised her to file the forms again, which she did. The Board acknowledged its acceptance of the new forms on May 26, 2020.

[117] On examination of the second Form 26 that she filed with the Board on May 20, 2020, I find that sections 3, 4, and 5 contain more information than the one filed in February 2020. What follows is a side-by-side comparison of the two forms:

…	[…]
3. Concise statement of each act, omission or other matter complained of, including dates and names of persons involved:	*3. Concise statement of each act, omission or other matter complained of, including dates and names of persons involved:*
TERMINATION OF EMPLOYMENT	*DISCRIMINATION, HARASSMENT, VIOLENCE, RETLIATION, ABUSE OF AUTHORITY, BAD FAITH, FALSE ALLEGATIONS, FALSEHOODS, MISREPRESENTATION, FALSE PERFORMACE REVIEW, NOT ALLOWED AT PLACE OF WORK,*

	ARBITRARY PLACEMENT ON ADMINISTRATIVE MEDICAL LEAVE, LEAVE WITHOUT PAY, ***TERMINATION OF EMPLOYMENT****, DIRECTORS, DIRECTORS GENERAL, MANAGERS, ASSISTANT COMMISSIONERS, DEPUTY COMMISSIONER, COMMISSIONER, MINISTER OF NATIONAL REVENUE …*
4. Steps that have been taken by or on behalf of the complainant for the resolution of the act, omission or other matter giving rise to the complaint:	*4. Steps that have been taken by or on behalf of the complainant for the resolution of the act, omission or other matter giving rise to the complaint:*
FILED COMPLAINT …	*REPORT TO ALL LEVELS OF MANAGEMENT NO RESOLUTION PROVIDED,* ***FILED*** *DISCRIMINATION & HARASSMENT* ***COMPLAINT*** *INTERNALLY, FACED RETALIATION & REPRISAL, COMPLAINT TO ESDC LABOUR PROGRAM, NO RESOLUTION PROVIDED,* ***TERMINATION,*** *NO PROCEDURAL FAIRNESS, NATURAL JUSTICE*
5. Corrective action sought under section 134 of the Canada Labour Code*:*	*5. Corrective action sought under section 134 of the* Canada Labour Code*:*
YES	***REINSTATEMENT OF EMPLOYMENT*** *WITH ALL PAY, BENEFITS, LEAVE WITH INTEREST, LAWYER FEES WITH COSTS, AWARD FOR DISCRIMINATION, HARASSMENT, VIOLENCE, DAMAGE TO REPUTATION, STRESS … VIOLENCE, PROMOTIONS DENIED, REQUEST FOR A SAFE WORKING ENVIRONMENT*

[Emphasis added]

[118] I find no intrinsic difference between the Form 26s filed in February and May. Both refer to the termination of the complainant's employment. She testified that she took the references to termination of her employment in the options letters as reprisals. The concluding portion of the January 30, 2020 options letter stated: "[i]f you do not choose your option by [February 21, 2020], management may begin the

process to terminate your employment 'for reason other than breaches of discipline or misconduct' pursuant to Section 51(1)(g) of the *Canada Revenue Agency Act*."

[119] The third options letter dated February 24, 2020, contained a similar caution except that the word "will" replaced "may" in the previous letter. This options letter concluded with the following caution: "[i]f you do not choose your option by [March 6, 2020], management will recommend the termination of your employment …".

[120] She believed that the respondent had effectively terminated her employment when she received the letters, and her response was to reach out to the CIRB, to make a complaint.

[121] It must be noted that the first options letter, dated May 16, 2019, did not contain this cautionary language.

[122] I find that the essential nature of her complaint was that the respondent had terminated her employment because she made a workplace violence complaint.

2. The complaint was made within the 90-day time limit

[123] For the reasons that follow, I find that the complainant did "… make a complaint in writing to the Board of the alleged contravention" within the meaning of s. 133(1) of the *Code* on February 26, 2020, when she filed the first Form 26 with the Board.

[124] The *Code* does not specify any method that an employee is to use to make a complaint under s. 133.

[125] Section 57.1 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79) specifies as follows:

> ***57.1*** *A complaint under section 133 of the* Canada Labour Code *that is made to the Board must be signed by the complainant or their authorized representative and must contain the following information:*
>
> ***(a)*** *the names and contact information of the complainant and their authorized representative, if any;*
>
> ***(b)*** *the name and contact information of the employer;*
>
> ***(c)*** *a concise statement of each act, omission or other matter giving rise to the complaint;*

> ***(d)*** *the steps that have been taken by or on behalf of the complainant for the resolution of the act, omission or other matter giving rise to the complaint;*
>
> ***(e)*** *the corrective action sought under section 134 of the* Canada Labour Code*; and*
>
> ***(f)*** *the date of the complaint.*

[126] The Board developed its Form 26 as a tool for making a complaint under s. 133. The form includes the items in ss. 57.1(a) to (f) just quoted, as required.

[127] As noted, the two Form 26s that the complainant submitted in February and May 2020 are intrinsically the same as to the "… statement of each act, omission or other matter giving rise to this complaint". In both forms, she alleges that the respondent terminated her employment because she made a (workplace-violence) complaint. Coupled with her testimony about her understanding of what the concluding paragraphs of the two options letters meant to her, I conclude that she made her complaint within the 90 days of the options letters dated January 30 and February 24, 2020.

[128] In my view, any administrative confusion about the appropriate forms to complete must not be held against the complainant. Doing so would be contrary the stated purpose and objectives of Part II of the *Code*.

C. Issue II - the complaint is unfounded

[129] The prohibitions and recourses in ss. 133 and 147 of the *Code* provide a protective scheme that seeks to promote health and safety in the workplace and to provide recourse for employees who choose to exercise their rights or engage processes under Part II of the *Code*.

[130] Subject to s. 133(6), which reverses the burden of proof, a complainant must establish that on a balance of probabilities, the respondent breached s. 147 of the *Code* by engaging in prohibited conduct. The reverse onus is not applicable in this instance; therefore, the complainant had the burden of establishing that the respondent took action against her that was prohibited by s. 147 of the *Code*.

[131] Since I have determined that the complaint is timely, I must now assess its merit. I adopt the applicable legal test as that set out by the Board in *White* as follows:

…

> *[73] In the circumstances before me, and in light of the wording of s. 147 of the* Code*, I find it more useful to reformulate and simplify the principles in* Vallée *and* Chaves *as follows:*
>
> 1. *Has the complainant acted in accordance with Part II of the* Code *or sought the enforcement of any of the provisions of that Part (section 147)?*
> 2. *Has the respondent taken against the complainant an action prohibited by section 147 of the* Code *(sections 133 and 147)? and*
> 3. *Is there a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the* Code *or seeking the enforcement of any of the provisions of that Part?*

…

1. The complainant exercised her rights under Part II of the *Code*

[132] The respondent conceded that the workplace-violence complaint met the first requirement that there must be the exercise of a right or some other activity under Part II of the *Code*. Without determining the validity of the workplace-violence complaint, I agree that the first requirement is met.

2. The respondent did not act contrary to s. 147 of the *Code*

[133] I find that the respondent did not take any action against the complainant that is prohibited by s. 147 of the *Code*.

[134] The second step of the test in *White* requires that I determine whether the contents of the respondent's January 30 and February 24, 2020, options letters breached the prohibitions in s. 147 of the *Code*.

[135] The catalogue of prohibited actions in s. 147 is comprehensive and comprises the following employer actions: dismissal, suspension, layoff, demotion, the imposition of a financial penalty, the imposition of a non-financial penalty, a refusal to pay remuneration, and any disciplinary action or the threat of any disciplinary action.

[136] The facts of this case are very similar to those in *Lueck*. It was decided prior to the reformulation of the *Vallée* test in *White* but is nevertheless instructive. In *Lueck*, the Board was also required to determine whether the contents of an options letter breached the prohibitions in s. 147 of the *Code*. In that case, the Board ruled that the

non-termination options outlined in the Directive and cited in the options letter, namely, return to work, medical retirement, retirement, or resignation, did not involve "… a loss or disadvantage that could be considered a financial or other penalty under s. 147 of the *Code*" (para. 277).

[137] Those options are outlined in the Directive, as follows:

> …
>
> *Persons with the delegated authority are to regularly re-examine all cases of LWOP due to illness or injury in the workplace to ensure that continuation of LWOP is supported by current medical evidence. Such LWOP situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances.*
>
> *All LWOP due to illness or injury will be terminated by the employee's:*
> - *return to duty;*
> - *resignation or retirement (on medical or non-medical grounds); or*
> - *termination of employment pursuant to paragraph 51(1)(g) of the Canada Revenue Agency Act.*
>
> …

[138] In the context of this complaint, I deduce that the complainant's quarrel is not with the non-termination options identified in the options letters. I must note in parenthesis that she contested the basis for the respondent's demand for a fitness-to-work evaluation; however, I need not decide that issue in this complaint.

[139] According to the complainant, the respondent's action that is the basis for her complaint, as she identified on the Form 26, is "termination of employment" or, in the language of s. 147, a dismissal. I must therefore determine whether identifying the option of non-disciplinary dismissal in the options letters brought the respondent's action within the prohibited parameters of s. 147.

[140] The evidence in this case is clear that the complainant remained an employee of the respondent when she made her complaint; therefore, it must necessarily have alluded to a dismissal threat. As in *Babb*, the complainant's belief that her employment would be terminated or was effectively terminated, however sincerely she held that belief, could not be the basis for a complaint under s. 133 because at the moment she made the complaint, she was still employed. Perhaps she was being prophetic since she

was staunch in her position that she would not undergo a fitness-to-work evaluation. Once she took that position, she could not then fault the respondent for simply providing her with options to regularize her status.

[141] I find that providing an options letter to an employee to regularize or resolve a protracted absence from the workplace due to illness is not an employer action that fall within the catalogue of prohibitions in s. 147 of the *Code*. The options letter is informational, setting out the various ways in which such a protracted absence can be resolved. For instance, the option of returning to work with or with accommodation can hardly be prohibited by s. 147 of the *Code* nor could the option of a medical retirement.

[142] I find that the reference to termination of employment or dismissal for incapacity as one of the options is not disciplinary; it is an administrative option that the respondent can exercise to address the protracted absence of an employee on account of illness.

[143] The *Canada Revenue Agency Act* (S.C. 1999, c 17) specifies that the respondent, in the exercise of its responsibilities in relation to human resources management, may provide for two categories of termination of employment:

a) termination of employment for breaches of disciplinary standards and misconduct (s. 51(1)(f), disciplinary termination or dismissal); and
b) termination of employment for reasons other than breaches of discipline or misconduct (s. 51(1)(g), non-disciplinary termination or dismissal).

[144] The respondent's Directive specifically refers to non-disciplinary termination of employment under s. 51(1)(g) as one of the listed options.

[145] I conclude that the respondent did not engage in any prohibited action in the 90 days before the complaint was made.

3. The options letters were not directly linked to the workplace-violence complaint

[146] Although I need not consider the balance of the test given my conclusion that the respondent did not engage in any prohibited action under s. 147, I will proceed and complete the analysis in the event that I have erred, as well as out of an abundance of caution.

[147] Relying on *Pezze*, the respondent argued that there is no direct link between the complainant's exercise of her rights under Part II of the *Code* (the workplace-violence complaint made in July 2019) and the options letters. The temporal proximity of the two events is not sufficient to support a reprisal under s. 133; a complainant must provide evidence that clearly establishes a link between the two events or actions.

[148] The respondent also referred to Mr. Melançon's evidence. He sent both 2020 options letters and testified that he did not know what the workplace-violence complaint was about; he was aware only of its existence. In the January 30, 2020, options letter, he stated as follows:

> …
>
> *Management is aware that you contacted the Minister of National Revenue and CRA's Deputy Commissioner via email in July 2019, citing that you were a victim of workplace violence. A separate process is currently underway to investigate your claim, to ensure that the workplace is safe and secure for all employees.*
>
> …

[149] I note that there is no such reference in the second options letter. I do not find that Mr. Melançon's statement that there is a "separate process" for the workplace-violence complaint advances or supports the respondent's position that there was no link between the two events.

[150] The test in *White*, contemplates a direct link between the two events. In *White*, the Board described the inquiry or the question to be answered as follows:

> …
>
> *[114] …whether, on a balance of probabilities, the disciplinary reprimand* [impugned action] *was given* ***because*** *the complainant refused to work or otherwise acted in accordance with Part II of the* Code *or has sought the enforcement of any of the provisions of that Part. To reiterate, the last step in* Vallée*, as reformulated and simplified … requires that "… there is a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the Code or seeking the enforcement of any of the provisions of that Part." In the case at hand, that requirement relates to the causality between the reprimand of April 30, 2019, and his actions of April 24, 2019.*
>
> …
>
> *[127] … the issue that I must determine is whether the disciplinary reprimand was* ***because*** *Mr. White had refused to work or was*

> *otherwise acting in accordance with, or in furtherance of, Part II of the* Code.
>
> …
>
> [Emphasis in the original]

[151] The *Canadian Oxford Dictionary* defines "because" as "for the reason that", "since", "on account of", or "by reason of". The two actions or events must be directly linked.

[152] I must examine the evidence to ascertain whether there is a direct link between the workplace-violence complaint, made in July 2019, and the options letters that the complainant received in January and February 2020.

[153] The relevant evidence in this case clearly and unequivocally leads me to conclude that there was no link between the workplace-violence complaint and the options letters that the complainant received in January and February 2020.

[154] The complainant made the workplace-violence complaint in July 2019, and as previously noted, she did so ostensibly in response to the first options letter, which she received in May 2019. Since January 2019, the respondent has been resolute and singularly focused on its request that she regularize her leave-without-pay status by exercising the options available to her under the Directive.

[155] I note that the May 2019 options letter did not include the notification found in the 2020 letters that in the absence of a selection, the respondent would recommend the termination of the complainant's employment for non-disciplinary reasons. I must consider whether including that information changed the nature of the options letter, to bring it within the parameters of s. 147 of the *Code*. The option of a termination of employment for non-disciplinary reasons is specified in the Directive and is the only option that falls within the respondent's authority. The Directive provides as follows:

> …
>
> *Persons with the delegated authority are to regularly re-examine all cases of LWOP due to illness or injury in the workplace to ensure that continuation of LWOP is supported by current medical evidence. Such LWOP situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances.*
>
> *All LWOP due to illness or injury will be terminated by the employee's:*

> - *return to duty;*
> - *resignation or retirement (on medical or non-medical grounds); or*
> - *termination of employment pursuant to paragraph 51(1)(g) of the Canada Revenue Agency Act.*
>
> …

[156] I find that the essential nature of the options letter of May 16, 2019, was purely informational and administrative. It laid out all the possible scenarios for addressing an employee's status after a lengthy absence from the workplace. I do not find that including that option in the two 2020 options letters was done **because** of the workplace-violence complaint that the complainant made in July 2019. Rather, the respondent's option was included simply to inform her of all the options, including the only one that was at its discretion.

VIII. Conclusion

[157] The complainant had to establish on a balance of probabilities that the options letters that she received in January and February 2020 constituted actions proscribed by s. 147 of the *Code*. She failed to.

[158] I was not convinced that the statement in the options letters to the effect that the manager would recommend that the complainant's employment be terminated for non-disciplinary reasons was retaliatory. I find that this statement was a notification to the complainant that should she not exercise an option, the respondent would exercise the only option open to it. Providing an employee with options to resolve a workplace-absence situation, without more, is not punitive, disciplinary, or retaliatory.

[159] The complainant believed that the options letters were tantamount to a termination. Her belief alone is not sufficient for the Board to conclude that the letters were tantamount to a termination of employment.

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

(The Order appears on the next page)

IX. Order

[161] The complaint is dismissed.

March 7, 2024.

Caroline E. Engmann,
a panel of the Federal Public Sector
Labour Relations and Employment Board

Appendix A - Letter decision on recusal motion

June 17, 2022

Rupinder Panesar (Filing Party) ***BY E-MAIL***

[email address redacted]

Elizabeth Matheson (Representative for the Employer) ***BY E-MAIL***

[email address redacted]

Re: Letter Decision

Federal Public Sector Labour Relations and Employment Board File 560-34-41773 Rupinder Panesar & Canada Revenue Agency Motion for recusal

A panel of the Federal Public Sector Labour Relations and Employment Board, ("the Board"), comprised of Caroline E. Engmann, has requested that I provide you with the following decision regarding a request for recusal of the Board member.

Procedural History

On May 20, 2020, the complainant filed a complaint with the Board under section 133 of the Canada Labour Code (CLC) *alleging that the Canada Revenue Agency (respondent) committed acts of reprisal against her contrary to section 147 of the* CLC *(file number 560-34-41773).*

On December 20, 2021, the parties were informed that the complaint had been set down for a hearing on June 21 to 23, 2022 by way of a videoconference.

Board Member Caroline E. Engmann was assigned as a panel of the Board to hear the complaint.

On April 13, 2022, in response to the Board's request for a prehearing conference, the complainant requested that the hearing be held "in-person in Ottawa" as opposed to "via Zoom". This request was discussed at a pre-hearing conference held on May 30, 2022. Parties were informed that the request would be discussed with the Chairperson and a response would be provided. A summary of matters discussed at that prehearing conference was shared with the parties via email.

On June 2, 2022, the complainant's request for an "in-person hearing in Ottawa" was granted and the parties were informed that the hearing scheduled for June 21 to 23, 2022 would be held in-person in Ottawa.

On June 3, 2022, the complainant requested that the in-person hearing be rescheduled.

A teleconference was held on June 10, 2022, to address the complainant's request for a postponement of the hearing. After

hearing the submissions of the parties, they were informed that a decision would be rendered on the postponement request on June 13, 2022.

On June 13, 2022, the Board denied the complainant's request for a postponement.

Request for recusal

Following the communication of the decision on the request for a postponement to the parties, on June 13, 2022, the complainant made a request as follows:

…

> I object to the Board's assignment to the Board Member assigned to this file. I request that the Board assign a Board Member:
>
> - who is not a previous counsel/lawyer and represented the respondent,
>
> - who is not a previous government employee (federal, provincial/territorial, and/or municipal),
>
> - who is not a career civil servant.

In her subsequent written representations, the complainant added another restriction as follows:

> - whose family member(s) are employees of the respondent, the Board, the DOJ, and/or TBS

In her submissions, the complainant argued that the Board Member made certain rulings favouring the respondent whereas she denied or ignored her requests. The complainant relied on the following cases: Marques v Dylex Ltd. *(1977) 81 DLR (4th) 554 (Ont. Div. Ct.);* Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon, *[1968] 3 All E.R. 304 (C.A.),* Commonwealth Coatings Corp v Continental Casualty Co et al*, 393 US 145 (1968) 337 at 339;* R v Lippé*, [1991] 2 SCR 114 at 144, 128 NR 1;* Ghirardosi v. British Columbia (Minister of Highways)*; [1966] SCR 367, 56 DLR (2d) 469;* Bank of Montreal v. Brown*, 2006 FC 503, [2006] FCJ No 623;* Energy Probe v. Atomic Energy Control Board*, 1984 CanLII 3039 (FCA), [1985] 1 FC 563. She also cited the following article: Joshua Tayar,* "Safeguarding the Institutional Impartiality of Arbitration in the face of Double-Hatting"*, McGill Journal of Dispute Resolution, Volume 5 (2018-2019), Number 5.*

*The respondent asked that the motion be denied. The respondent argued that the fact that the Board Member was formerly employed as a counsel for the respondent, is not sufficient to demonstrate a reasonable apprehension of bias (*Shura v. Chairperson of the Parole Board of Canada*, 2020 FPSLREB 26). Suspicion is not enough, allegations must be supported by sufficient evidence that there is a sound basis for the apprehension of bias (*Shura *at para 157, citing* Adams v. British Columbia (Worker's Compensation Board)*, [1989] B.C.J. No. 478).*

Analysis and Reasons

The Board (and its predecessors) were established by Parliament to, among other responsibilities, administer the collective bargaining and grievance adjudication systems in the federal public service and in Parliament. It addresses labour relations grievances and complaints between the federal government as employer and its employees.

Before being appointed to the Board in 2021, the Board member was legal counsel with Treasury Board Secretariat, Legal Services. The Federal Public Sector Labour and Employment Board Act, *S.C. 2013, c. 40, s. 365, provides that board members must be appointed from a list of eligible persons prepared by the Chairperson in consultation with the employer and the bargaining agents (section 6). While the employer and bargaining agents recommend eligible appointees, section 6(4) enshrines the presumption of impartiality by providing as follows:*

> **(4)** Despite being recommended by the employer or the bargaining agents, **a member does not represent either the employer or the employees and must act**
>
> **impartially in the exercise of their powers and the performance of their duties and functions.**

The Federal Court of Appeal in Oberlander v. Canada (Attorney General), *2019 FCA 64 at para. 8, succinctly explained the importance of the presumption of impartiality as follows, citing Supreme Court of Canada decision* Wewaykum Indian Band v. Canada, *2003 SCC 45:*

> *… "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council,* Ethical Principles for Judges *(1998), at p. 30). It is the key to our judicial process and must be presumed. […] the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.*

The Federal Court of Appeal went on to note that the onus is on the appellant to establish "a real likelihood or probability of bias" and that allegations of bias must also be "tenable" or "credible".

The type of motion brought by the complainant is not novel as this Board and its predecessors have dealt with this issue in the past. In the following two decisions, the Board addressed requests for recusal on grounds similar to those relied upon by the complainant, namely, the Board member's previous employment at the Department of Justice and as counsel for the Treasury Board. In Bialy et al. v. Public Service Alliance of Canada, *2012 PSLRB 125, the Board denied a request for recusal as it concluded*

that although the Board Member assigned had previously acted as counsel for the employer, he was able to render a decision in an independent, fair, objective, impartial and unbiased manner. Similarly, in Veillette v. Chouinard, St-Amand and Canada Revenue Agency*, 2013 PSLRB 61, the Board articulated the appropriate test to determine whether there is a reasonable cause for the apprehension of bias as follows:*

> 7. The test for determining whether there is reasonable cause for the apprehension of bias or reasonable likelihood of bias was established by the Supreme Court of Canada as follows in Committee for Justice and Liberty v. National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at 394, and in R. v. S. (R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484:
>
> > The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude…"
>
> 8. Additionally, the question of the nature of the evidence required to demonstrate the existence of an apprehension of bias was raised as follows by the British Columbia Court of Appeal in Adams v. British Columbia (Workers' Compensation Board) (1989), 42 B.C.L.R. (2d) 228:
>
> …
>
> … An accusation of that nature … ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound
>
> basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. … suspicion is not enough…
>
> …

In dismissing the motion for recusal, the Board in Veillette *relied on earlier Board decisions and noted that:*

> 11 It is common knowledge that other Board members have also worked within the federal public service or for bargaining agents during their careers. The Board often considers expertise acquired via specializing in labour relations in the federal government, with bargaining agents or in the private sector as an asset. That is also why section 19 of the Act provides that the Board must be representative, and that section deals specifically with the impartiality of Board members, no matter the source of the

recommendation for their appointment to the Board. Subsection 19(4) of the Act states specifically as follows:

> (4) Despite being recommended by the employer or the bargaining agents, a member does not represent either the employer or the employees and must act impartially in respect of all powers and functions under this Act.

In her submissions, the complainant argued that there is a "pecuniary bias" on the basis that the Board member has a "reasonable expectation of pecuniary gain." As noted by the Board in Herbert v. Deputy Head (Parole Board of Canada) *2020 FPSLREB 28, at para 34: "Board members are not employees of the Treasury Board or any other arm of the federal government," including the Canada Revenue Agency. Rather, they are appointed by the Governor in Council (GIC) and hold a public office pursuant to an order-in-council. Furthermore, they are under the supervisory oversight of the Conflict of Interest and Ethics Commissioner of Canada as public office holders under the* Conflict of Interest Act, *SC 2006, c. 9, s. 2.*

In Energy Probe v. Atomic Energy Control Board, *1984 CanLII 3039 (FCA), one of the cases cited by the complainant, the Federal Court of Appeal held that the test for pecuniary bias is the existence of a "direct pecuniary interest" in the matter. There is no evidence of "direct pecuniary interest" on the part of the Board member in this case.*

In Hamilton Health Sciences Corporation v. Canadian Union of Public Employees, Local 4800, *2004 CanLII 54977 (ON LA) an arbitrator dismissed the employer's motion for his recusal on the basis, among others, that the arbitrator had previous dealings with the union counsel. He concluded that the test for a reasonable apprehension of bias has not been met. In the course of his reasoning, the arbitrator pointed to the distinction between "bias" and impartiality" as follows:*

> [6] Mr. Justice Cory's decision in *R. v. R.D.S.*, supra, elaborated on the test for apprehension of bias. He observed that the test is not to be related to the "very sensitive or scrupulous conscience." **He stated that the threshold for a finding of real or perceived bias is high. He cautioned that such a finding must be carefully considered, because an allegation of reasonable apprehension of bias calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice.** (¶¶112-113) **He reiterated that the grounds for an allegation of this sort must be substantial, and that the onus is on the party seeking to disqualify the adjudicator to bring forward evidence that satisfies the test.** (¶114)
>
> [7] Mr. Justice Cory also addressed the meaning of the term "bias." He observed that "bias" must be contrasted with impartiality. Impartiality, he said, is "a state of mind in

> which the adjudicator is disinterested in the outcome, and is open to
>
> persuasion by the evidence and submissions" whereas "bias denotes a state of mind that is in some way predisposed to a particular result." (¶¶104-105) **He stated that it is not enough to show that a decision maker has certain beliefs, opinions or even biases; "It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence."** (¶107) *[emphasis added]*

The Board concurs with the observations in the Hamilton Health Sciences Award. *None of the assertions by the complainant meets the high threshold of establishing "bias" in any form or a reasonable apprehension of bias. The mere fact that the Board member was formerly employed as legal counsel for the Treasury Board does not in and of itself give rise to a reasonable apprehension of bias.*

There is no basis to conclude that the assigned Board Member would not carry out her duties in an independent, fair and impartial manner.

For these reasons, the Board denies the complainant's request for recusal.

[name redacted]

Acting Case Management Officer

Email : [email address redacted]

for the Federal Public Sector Labour Relations and Employment Board

c.c.

Treasury Board Secretariat Legal Services

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