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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

PATRICK CHABBERT

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Chabbert v. Canada Revenue Agency

In the matter of complaints made under section 190(g) of the *Federal Public Sector Labour Relations Act* and section 133 of the *Canada Labour Code*

Before: Patricia Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Chris Hutchison, counsel

Decided on the basis of written submissions,
filed June 27 and July 15 and 19, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] Patrick Chabbert ("the complainant") made unfair-labour-practice and reprisal complaints against the respondent, the Canada Revenue Agency, when, in his capacity as a union representative, he received a written reprimand for contacting a potential witness to harassment. At all relevant times, Mr. Chabbert was the shop steward and later the chief shop steward for Local 50021 of the Union of Taxation Employees (UTE) – a component of the Public Service Alliance of Canada (PSAC). He was representing an employee on a grievance and a work place violence complaint when he was threatened, then disciplined with a written reprimand. He argued that the respondent's actions breached s. 186 (2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") and s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*").

[2] The respondent requested that the complaints be dismissed. The respondent argued that the complainant failed to make out an arguable case that the respondent breached s. 186(2) of the *Act* and that he lacked standing to make the complaint. It also argued that he lacked standing to make a complaint under s. 133 of the *Code* and that he failed to make out an arguable case.

[3] This decision is limited to determining whether the complainant made out an arguable case of an unfair labour practice and of a reprisal and whether he has standing to make these complaints.

[4] The bargaining agent, PSAC, did not make an interference complaint under s. 186(1) of the *Act*. While I will refer to PSAC and the UTE interchangeably, PSAC is the bargaining agent, and the UTE is a component of PSAC that provides direct-level representation to union members.

[5] For the reasons that follow, I must conclude that the complainant made out an arguable case that the respondent breached s. 186(2)(a)(i) of the *Act*. If I take his allegations as true, I find that there is an arguable case that the respondent threatened and disciplined him because he is a representative of an employee organization who at the time was a shop steward representing a member on a harassment grievance and a work place violence complaint.

[6] The complainant made out an arguable case that he was disciplined because of his role as a shop steward securing witness testimony for an employee's grievance process and work place violence complaint.

[7] A shop steward is a key representative of the union at the Local level who provides representation for the union and individual grievors. The complainant alleges that the respondent targeted him because of his role in representing an employee. Further, he alleges that the discipline had a chilling effect because it prevented him from securing further testimony as a shop steward. He alleges that by doing so, the respondent wanted to cover up the harassment.

[8] The whole purpose of s. 186(2) of the *Act* is to prevent the respondent from interfering and targeting employees engaged in legitimate labour relations activities. The complainant made an arguable case that s. 186(2) was breached.

[9] However, the complainant failed to make out an arguable case of a reprisal under the *Code*. Even if I take the allegations as proven, he did not meet the conditions required in *White v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 52. Specifically, his allegations, if taken as true, do not establish that he acted in accordance with Part II of the *Code* when he sought to secure testimony from a potential witness to harassment. Under Part XX of the version of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (*COHS Regulations*) in force at the time, there is no defined role for union representatives in the course of an investigation into work place violence.

[10] There is no provision in the former Part XX of the *COHS Regulations* or Part II of the *Code* that allows union representatives to interview potential witnesses before the competent person conducts the work place violence investigation. Securing witness testimony, as a union representative, for a work place violence complaint is therefore not acting in accordance with Part II of the *Code*.

II. Procedural history

[11] A hearing was scheduled to proceed from July 25 to 27, 2024. Before the hearing, the Board scheduled a pre-hearing conference for June 13. Both parties were asked to comment on whether it was appropriate to proceed by way of written submissions using the arguable-case framework.

[12] The complainant disagreed with proceeding by way of written submissions and alleged that the matter had already been decided three years ago. The respondent disagreed and noted that "the arguable case analysis" had to be determined before any decision was rendered on the merits.

[13] After hearing from the parties, the Board determined that the issue of whether the complaints met the arguable case threshold had not yet been determined and that it was in the interest of the efficient administration of justice to hear their legal arguments on the arguable-case framework. It established a schedule for written submissions, which they followed.

[14] This means that the Board is required to determine whether, if the complainant's allegations are taken as true, the respondent breached ss. 186(2) of the *Act* and 147 of the *Code*.

[15] After the pre-hearing conference, the complainant wrote to the Board, to note that he still disagreed with its decision to proceed by way of written submissions. It responded and explained that it has the authority under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C., 2013, c. 40, s. 365) to decide any matter without holding an oral hearing. It also noted that the decision to proceed by way of written submissions had already been made during the pre-hearing conference which he attended.

III. Background

[16] The parties did not file an agreed statement of facts, but I will summarize the complainant's key allegations.

[17] In September 2019, a member of the bargaining unit whom Mr. Chabbert was representing filed a grievance and made a work place violence complaint alleging that they suffered harassment under Part XX of the *COHS Regulations* in force at the time.

[18] At all relevant times, Mr. Chabbert represented the member in his capacity as the shop steward and then the chief shop steward of UTE Local 50021.

[19] Both the grievance and the work place violence complaint alleged that the member whom Mr. Chabbert was representing had been harassed in the workplace.

[20] Before contacting the potential witness, Mr. Chabbert contacted the respondent representative to inform her that new information from documents retrieved via the access-to-information and privacy process (ATIP) had named a potential witness and to advise that he would contact that individual.

[21] Mr. Chabbert then contacted the potential witness in his capacity as a representative of the union and the employee.

[22] Under the previous version of the *COHS Regulations*, if the respondent became aware of allegations of work place violence, it was required to appoint a competent person if the matter could not be resolved. This person was supposed to be an impartial, knowledgeable and experienced individual who would then proceed to investigate the matter and write a final report with recommendations (See 20.9 (1) to (6) of Part XX of the *COHS Regulations*).

[23] When the complainant contacted the potential witness, the competent person had been appointed, but the work place violence investigation had not begun.

[24] After learning that the complainant had contacted the potential witness, the respondent issued a written reprimand to Mr. Chabbert for interfering in a workplace investigation.

IV. Legal framework for assessing an arguable case under s. 186(2) of the *Act*

[25] Complaints that allege a failure to respect s. 186(2) of the *Act* are subject to a reverse-onus burden provided for by s. 191(3) of the *Act*: "… the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party."

[26] However, before this reverse-onus burden can apply, the complainant must demonstrate that one of the circumstances described at s. 186(2) of the *Act* is met (*Laplante v. Treasury Board (Department of Industry and the Communications Research Centre)*, 2007 PSLRB 95, at para 88; *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37, at paras 31-32; *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2, at paras 103-108).

[27] As such, the arguable-case framework requires the Board to examine whether, if the complainant's allegations are taken as true, there is an arguable case of a breach of s. 186(2) of the *Act*. A complaint that does not show a reasonable link to the prohibitions under s. 186(2) of the *Act* can be dismissed (*Fortier v. Treasury Board (Correctional Service of Canada)*, 2024 FPSLREB 51, at para 101).

[28] In *Gabon v. Department of the Environment*, 2022 FPSLREB 6, and *Idahosa v. Treasury Board (Correctional Service of Canada)*, 2024 FPSLREB 17, the Board adopted the arguable-case framework within the context of an unfair-labour-practice complaint under s. 186(2). Both decisions relied on the framework cited as follows in *Hughes*:

> …
>
> *[86] … The parties were asked to address whether the three complaints before me reveal, on their face, an arguable case of a violation of the* PSLRA. *The parties were asked to specifically address whether, if the Board considered all the facts alleged in the complaints as true, there is an arguable case that the respondent contravened the unfair labour practice legislative provisions of the* PSLRA.
>
> …

[29] Further, when it applied the framework, the Board applied the same rigorous approach to the facts, while being mindful of the following warning in *Hughes*, as follows:

> …
>
> *[105] … if* [there is] *any doubt about what the facts, assumed to be true, reveal, then* [the Board] *must err on the side of finding that there is an arguable case … and … must preserve the complainant's opportunity to have his complaints heard ….*
>
> …

[30] I adopt the same approach.

[31] Also, in *Idahosa*, the Board noted that given the arguable-case framework, it could effectively ignore the respondent's alleged facts at the first step of the analysis.

[32] I agree.

[33] Although I read the respondent's submissions, including its allegations, I will focus solely on the complainant's allegations for the purpose of determining whether

he made out an arguable case. However, if an arguable case is made out under s. 186(2) of the *Act*, the onus will be on the respondent to prove that it did not commit an unfair labour practice. Since this decision is limited to the arguable-case analysis, I will proceed only on that basis.

V. Summary of the complainant's allegations

[34] The complainant made his complaints on May 3, 2021. In the cover letter, he provided the following background information:

> …
>
> *The background of the complaints are that I was disciplined while acting in my capacity as Chief Shop Steward of Local 50021/UTE/PSAC. I was representing an employee that had filed a grievance and a Violence in the workplace complaint under the Canada Occupational Health and Safety Regulations. I was disciplined for contacting a potential witness.*
>
> …

[35] In the Form 26 document, the complainant described as follows the actions that gave rise to the complaint under s. 133 of the *Code*:

> *On October 30, 2020, Karen Morrow … threatened me with disciplinary action. On February 4, 2021, disciplinary action was taken … The threat and the disciplinary action were reprisal for my representation of an employee in a COHSR Part XX violence in the workplace complaint.*

[36] In the box to set out the corrective action that he sought, the complainant requested that "[a]ll record of the disciplinary action be removed from my personnel file …", and "[a] declaration that the respondent has violated section 147 of the *Canada Labour Code*".

[37] In the Form 16 document that the complainant submitted, he wrote the following to explain what gave rise to the complaint under s. 190(g) of the *Act* which alleged a breach of s. 186(2) of the *Act*:

> *On October 30, 2020, Karren Morrow (Director, Winnipeg TSO) threatened me with disciplinary action. On February 4, 2021, disciplinary action was taken (written reprimand). The threat and the disciplinary action were reprisals for my representation of an employee in my role of Chief Shop Steward of Local 50021.*

[38] As corrective action, the complainant requested nearly identical measures, as follows: "All record of the disciplinary action be removed from my personnel file …", and "[a] declaration that the employer has violated subsection 186(2) of the *Federal Public Sector Labour Relations Act*."

[39] The complainant provided additional background to his complaint when the Board required the parties to provide submissions on the arguable-case framework.

[40] The complainant noted that an employee made a harassment complaint on September 26, 2019, and also filed a grievance on the same day, under article 18 of the relevant collective agreement, related to the harassment. The complainant was the representative for that employee at all relevant times in his shop steward and chief shop steward roles.

[41] In early October 2019, the grievance was placed in abeyance, pending the resolution of the harassment complaint.

[42] On December 9, 2019, the respondent's representative advised the employee and the complainant that the respondent would conduct an internal investigation.

[43] The complainant submitted that in January 2020, the employee whom he was representing received documents under an ATIP request that identified an individual as a potential witness to the harassment.

[44] On January 28, 2020, the complainant contacted the respondent representative, to advise her of the additional information found in the records from the ATIP request, including the involvement of a potential witness to the harassment.

[45] On an undisclosed date in October 2020, the employee was advised that the respondent's internal investigation was over.

[46] The complainant alleges that he contacted the potential witness before the competent person had been appointed.

[47] The complainant contacted the potential witness on October 30, 2020, to attempt to secure any testimony related to the harassment. He introduced himself as a union representative for the employee.

[48] On the same day, the respondent threatened the complainant with disciplinary action for contacting a potential witness to the harassment.

[49] On February 4, 2021, the complainant was disciplined for contacting the potential witness.

VI. Analysis

[50] As I stated in the overview, this decision is about whether the complainant established an arguable case that the respondent committed an unfair labour practice and whether there is an arguable case that it engaged in a reprisal. I have divided the analysis into two parts. In Part A, I review whether there is an arguable case that the respondent violated s. 186(2) of the *Act*. In Part B, I review whether there is an arguable case that it engaged in a reprisal, in violation of s. 147 of the *Code*.

A. The arguable case based on s. 186(2) of the *Act*

[51] Section 186(2) of the *Act* bars the respondent or a person occupying a managerial or occupational position, or an officer as defined in the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10), from engaging in unfair labour practices.

[52] While s. 186(1) of the *Act* prohibits the respondent from engaging in specific actions against a union, s. 186(2) prohibits unfair labour practices against persons exercising their lawful rights of association, including their rights to testify and to file grievances and what is broadly framed in the legislation as "any right under this Part", Part 2 or Part 2.1. Those parts deal with grievances and specific provisions unique to the Royal Canadian Mounted Police.

[53] As previous Board decisions have noted, only a bargaining agent may make a complaint alleging a breach of s. 186(1). Complaints made under s. 186(2), like this one, can be made by individuals who allege that their respondents made reprisals against them because of their prescribed union or grievance activities.

[54] The relevant provision, s. 186(2) of the *Act*, reads in part as follows:

186(2) *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or*	***186(2)*** *Il est interdit à l'employeur, à la personne qui agit pour le compte de celui-ci ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier*, au sens*

confidential position and no person who is an officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*	*du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada *ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :*
(a)** refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, **or intimidate, threaten or otherwise discipline** any person, **because the person	***a)** de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, de la licencier par mesure d'économie ou d'efficacité à la Gendarmerie royale du Canada ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs suivants :*
***(i) is** or proposes to become, or seeks to induce any other person to become, **a member, officer or representative of an employee organization**, or participates in the promotion, formation or administration of an employee organization,*	***(i)** elle adhère à une organisation syndicale ou en est un dirigeant ou représentant — ou se propose de le faire ou de le devenir, ou incite une autre personne à le faire ou à le devenir —, ou contribue à la formation, la promotion ou l'administration d'une telle organisation,*
***(ii)** has testified **or otherwise participated**, or may testify or otherwise participate, in a proceeding under this Part or Part 2 or 2.1,*	***(ii)** elle a participé, à titre de témoin ou autrement, à toute procédure prévue par la présente partie ou les parties 2 ou 2.1, ou pourrait le faire,*
***(iii)** has made an application or filed a complaint under this Part or Division 1 of Part 2.1 or presented a grievance under Part 2 or Division 2 of Part 2.1, or*	***(iii)** elle a soit présenté une demande ou déposé une plainte sous le régime de la présente partie ou de la section 1 de la partie 2.1, soit déposé un grief sous le régime de la partie 2 ou de la section 2 de la partie 2.1,*
***(iv)** has **exercised any right under this Part or Part 2 or 2.1** ….*	***(iv)** elle a exercé tout droit prévu par la présente partie ou les parties 2 ou 2.1;*
…	[…]

[55] These provisions are quite standard in labour relations statutes across the country. Their purpose is to ensure that a respondent does not interfere in lawful union activities or make reprisals against employees for exercising certain collective and representational rights.

[56] In addition, s. 5 of the *Act* concerns employee freedoms. Contrary to the respondent's argument, I believe that it is relevant to this case. It is a guarantee of the freedom of all employees, as applicable, to join the employee organizations of their choice and to participate in their lawful activities, which certainly includes representing employees on grievances and complaints.

[57] The complainant's allegations initially mention a general breach of s. 186(2), but his reply submissions are more specific. They pointedly allege a breach of s. 186(2)(a)(i).

[58] The complainant argues that by contacting a potential witness to harassment, he was acting in his capacity as a shop steward and a representative of the employee for both the harassment grievance and the work place violence complaint.

1. There is no arguable case that the grievor was disciplined for participating in the administration of an employee organization

[59] The complainant argues that by threatening to discipline him and by eventually disciplining him, the respondent committed an unfair labour practice because he was disciplined for participating in the administration of an employee organization.

[60] I agree with the respondent that based on a reading of s. 186(1), in conjunction with s. 186(2), the administration of an employee organization concerns the internal affairs of that organization. It does not pertain to representation.

[61] Section 186(1) refers to prohibiting the respondent from interfering in the "… formation or administration of an employee organization or the representation of employees by an employee organization …", while s. 186(2)(a)(i) prohibits it from committing a series of actions because the person "… **is** or proposes to become, or seeks to induce any other person to become, **a member, officer or representative of an employee organization**, or **participates in** the promotion, formation or **administration of an employee organization** …" [emphasis added].

[62] When different words are used in statutes, different meanings must be ascribed. Therefore, even though representatives of employee organizations do participate in its administration, I agree with the respondent that Parliament did not intend for the "administration of an employee organization" to be synonymous with being a representative of an employee organization".

[63] The "administration of an employee organization" includes lawful activities that range from providing regular information and updates to the membership to updating membership lists and internal union websites. On the other hand, being a representative of an employee organization or union includes activities associated with representation, like representing the union or individuals on grievances and complaints, at joint union-management meetings or on health and safety policy committee. The complainant's allegations are solely focused on the respondent's alleged response to the complainant's representation of an employee. Thus, in reviewing the complainant's allegations, I find that are simply no allegations that the respondent threatened or disciplined the complainant because he participated in the administration of an employee organization.

2. There is an arguable case that the complainant was targeted for being a union representative

[64] I find that the complainant alleged that he was targeted because he is a "representative of an employee organization". The complainant's submissions may lack the precision of a seasoned legal advocate. However, I find the entire context of the complaint is that the complainant was targeted while representing an employee on a grievance and a work place violence complaint in his role as a shop steward and later a chief shop steward.

[65] The respondent argues that the complainant must allege that he was targeted *merely* because he is a representative of an employee organization.

[66] I disagree.

[67] What is necessary to meet the arguable case threshold is an allegation of a causal relationship between the respondent's discipline and the complainant's action, or in this case, his status as a union representative. The respondent provides no authority for its argument that, to make an arguable case of a breach of section 186(2),

the complainant must allege he was targeted merely because he is a representative of an employee organization.

[68] In addition, the respondent's discipline must take place after the complainant's action, for example, after the complainant becomes a representative of the union. (See *Idahosa v. Treasury Board*, 2024 FPSLREB 17 at para 26). I find that this allegation of a causal relationship is present. The timing is less of a factor as the complainant alleges the respondent's impugned actions are with respect to his ongoing status as a union representative throughout the period that he was representing an employee and particularly after he interviewed a potential witness to the alleged harassment.

[69] The complainant repeats throughout his submissions that he was acting in his capacity as a union representative at all times when:

1. he contacted the employer representative to inform her of a potential witness
2. he contacted the potential witness and
3. he was disciplined.

[70] These are not incidental allegations but at the very heart of the complaint. Moreover, the complainant makes allegations regarding the respondent's alleged reprisal that are directly linked to his status and activities as a representative of the union.

[71] Here are some examples: "… At all relevant times, I was representing the Victim as part of my role as shop steward and then chief shop steward of PSAC/UTE Local 50021."

[72] The complainant alleges that on October 30, 2020, he contacted the potential witness in an attempt to secure any witness testimony in relation to the alleged harassment. He notes that "… I introduced myself as a union representative for the Victim."

[73] The complainant alleges that on October 30, 2020, the employer threatened him with disciplinary action for contacting the potential witness.

[74] The respondent's submissions seem to ignore that the complainant alleges that he was targeted not just **while** he was representing an employee but **because** he was doing so in his capacity as a shop steward of the Local.

[75] The complainant alleges that the letter of reprimand that he received on February 4, 2021, was an act of punishment. He claims that it had a chilling effect that prevented him from contacting other potential witnesses in his capacity as a shop steward. I cite these additional relevant allegations from the complaint:

> …
>
> *In this case, not only did the Employer violate my right to freely participate in lawful union activity by punishing me for contacting a potential witness, but it created a chilling effect that prevented me from contacting other potential witnesses.*
>
> *Through its violations, the Employer created the circumstances where I was damned if I did, damned if I didn't. If I would have contacted potential witnesses, I would be subjected to threats and disciplinary action. And if I didn't contact potential witnesses, I would lose my freedom to fully participate in the representation of the Victim.*
>
> …

[76] The complainant's allegations that the respondent was trying to punish him and stop him from doing his job directly link the alleged reprisal to his role as a representative of the union.

[77] Therefore, reading the allegations closely, I find that the complainant in fact alleges that the respondent targeted him with threats on October 30, 2020, and eventual discipline on February 4, 2021, because he was a representative of an employee organization and was trying to do his job.

[78] Moreover, contrary to the respondent's argument, an allegation or suggestion that the respondent refused to recognize the employee's right to be represented by the bargaining agent is not required to meet the threshold of an arguable case under s. 186(2)(a)(i). All that is required are allegations that establish a causal link between the employee's status as a representative of an employee organization and the respondent's prohibited actions under s. 186(2). The tenor of the entire complaint is that the complainant was targeted by the respondent because he was acting in his shop steward role on a grievance and a harassment complaint.

[79] To that end, I find that the matter before me can be easily distinguished from *Baun v. Statistics Survey Operations*, 2018 FPSLREB 54, in which there were no such allegations of a causal link between the employee's status and the respondent's

impugned actions. The complainant in *Baun* made allegations that s. 186(2) had been breached, but this is where the similarity to this case ends. Ms. Baun was not a union representative at any time, nor did she make any allegations that she was targeted because of any involvement in lawful union activities, like representing a member. In fact, Ms. Baun was originally represented by her union and it later withdrew its support for her termination grievance.

[80] Further, the fact that the grievance was in abeyance has no bearing on whether the complainant continued to represent on it. The respondent suggested in its arguments that he was no longer representing on the grievance since it was in abeyance. However, the complainant could have been called upon at any time by the employee to take it out of abeyance, and he could have continued to gather information and evidence that might have been useful to resolving or advancing it. In any event, the complainant alleges that he was still the union representative on the grievance when he was disciplined, and these are the allegations which I have considered.

[81] Therefore, not only did the complainant have standing to make a complaint under s. 186(2) as an individual who "is a representative of an employee organization" but also, I find that he made out an arguable case under s. 186(2) that he was threatened and disciplined because of his union role.

[82] In *Joe v. Marshall*, 2021 FPSLREB 27, at para 120, the Board emphasized the significant role and responsibilities of elected union officials who must enjoy protections for lawful union activity.

> *Being an elected union official carries with it a set of heightened obligations and responsibilities. This is why there is legislation that protects lawful union activity. Among other things, the Board must ensure that the union freedoms set out in the* Act *can be exercised with impunity. As the former Board determined in* Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37, it is fundamental to the integrity of the labour relations system that persons who exercise rights accorded to them under those laws do so, and can continue to, without fear of reprisal. Were it otherwise, given the possibility of the misuse of authority in the relationship between individual persons and employers, "… the chilling effect of reprisal action on the exercise of vested statutory rights could undermine the effective force of those rights" (see* Quadrini*, at para. 45). Union officials must be able to exercise their lawful activities without fear of reprimand, interference, or intimidation from the employer.*

[83] In that matter, the former Board determined that a local union president had established an arguable case of a violation of s. 186(2) when the respondent initiated a disciplinary investigation against the local president for allegedly instigating a plot to discredit members of management. Once the onus shifted to the respondent to establish that it had not committed an unfair labour practice, it failed to meet its burden. The former Board found that the respondent had initiated the investigation to intimidate the local president, interfere in the administration of the union, and prevent the president from carrying out lawful union activities, including the representation of union members (*Joe* v. *Marshall* at para 109).

[84] In *Fortier v. Treasury Board (Correctional Service of Canada)*, 2024 FPSLREB 51, part of the complaint alleged a breach of s. 186(2) of the *Act*. The complainant in that case alleged that the respondent's administrative investigation into her representation of a member, as the Local's president, constituted discrimination and an unfair labour practice. She also alleged that the respondent's actions prevented her from representing a member in the course of an investigation and that they damaged labour-management relations. The Board found that the allegations, if believed to be true, presented an arguable case of a violation of that provision. Moreover, the Board had the benefit of a full hearing and eventually determined that the respondent intimidated and threatened the complainant because of her union representative role in representing the member.

[85] While the facts in *Joe* and *Fortier* are not identical to those in the case before me, there are some striking similarities. First, a local union official alleged that the respondent took steps to shut down representation by engaging in actions of a disciplinary nature. Second, allegations were made that the respondent's actions had a detrimental effect on the representation of members. These kinds of allegations are similar to those in the matter before me, in which the complainant alleges that the disciplinary measure was motivated by a desire to cover up harassment and that it had a chilling effect on his ability, as a union representative, to represent an employee.

[86] Therefore, I find that in light of my analysis of the allegations that the complainant advanced, he made out an arguable case of a breach of s. 186(2)(a)(i).

[87] Given that I have found an arguable case under s. 186(2)(a)(i), there is no need to analyse whether the complainant has made an arguable case of a breach of s. 186(2)(a)

(ii) to (iv) of the *Act*. Moreover, as I previously stated, the complainant narrowed his focus to address s. 186(2)(a)(i). His allegations do not examine the extent to which there is an arguable case of a breach of s. 186(2)(a)(ii) to 186(2)(a)(iv).

[88] My conclusion that the complainant made out an arguable case of a breach of s. 186(2)(a)(i) is not a determination that any breach of it occurred. Should this matter proceed, the respondent will bear the onus of establishing on a balance of probabilities that it did not commit an unfair labour practice under s. 186(2).

B. The arguable-case framework under s. 133 of the *Code*

[89] The complainant also argues that the respondent breached s. 133 of the *Code*. He alleges that its threat and written reprimand constituted a reprisal for him representing an employee in a work place violence complaint under Part XX of the former *COHS Regulations*.

[90] The relevant provisions of the *Code* are 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.*

[91] Section 147 of the *Code* reads 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 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*
>
> ***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 des droits prévus par la présente partie, ou de prendre — ou menacer 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.*

[92] In *Brassard v. Treasury Board (Immigration, Refugees and Citizenship Canada)*, 2021 FPSLREB 130, the Board applied the arguable-case framework to a matter involving allegations of a breach of s. 133.

[93] The Board, at para 30, described the framework as follows: "By considering the alleged facts as true, I must decide whether the complainant shown that there is an arguable case that the respondent contravened s. 147 of the *Code*." I am faced with the same task in this case.

[94] Further, although the complainant alleges that the four-part test in *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52, to determine whether s. 147 was contravened, is obsolete, I disagree. *Vallée* still provides a useful guide when analyzing whether the respondent engaged in prohibited actions that were linked to the complainant exercising rights or actions that accorded with Part II of the *Code*.

[95] However, the reformulation of the test in *White* is helpful, and the language in its first and fourth parts certainly aligns more with the language of s. 147. Therefore, I will use the formulation of the test in *White* to determine whether the complainant's allegations, if taken as true, establish an arguable case of a breach of s. 147. I have reproduced the test 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?*
>
> …

[96] The complainant alleges that he acted in accordance with Part II of the *Code* by trying to secure witness testimony about the harassment faced by the employee whom he was representing. He alleges that the testimony was required to help the competent person in the individual's eventual investigation.

[97] The complainant also alleges that the employee whom he was representing had rights to procedural equity and that by securing witness testimony, he acted in accordance with the occupational health-and-safety provisions of Part II by ensuring that those rights were upheld. However, the complainant does not specify in his submissions which provisions of Part II he acted in accordance with or sought to enforce.

[98] I agree with the Board's comments in *White* that the phrase "… has acted in accordance with Part II …" of the *Code* is broader than just exercising rights under Part II. However, I struggle to see how the complainant made an arguable case that he acted in accordance with Part II or that he sought the enforcement of any of its provisions.

[99] Acting in accordance with Part II would be akin to doing what is in line with it or what fulfils it. That part of the *Code* is dedicated to safeguarding workplace occupational health and safety. It sets out measures to prevent accidents, occurrences of harassment and violence, and physical or psychological injuries or illnesses that are linked with or that may occur in the workplace. Part II also lays out the duties of employers and employees. It describes the important role of policy health-and-safety committees, which are a critical mechanism for raising, discussing, and resolving workplace health-and-safety issues.

[100] As I already mentioned in Part A, the complainant alleges that he was a shop steward when he faced the reprisal, but there are no allegations that he was doing

anything that could be interpreted as having "acted in accordance with Part II". For example, he does not allege that he was a health and safety representative carrying out any of the duties prescribed under Part II.

[101] Nothing in Part II of the *Code* or in Part XX of the former *COHS Regulations* refers to a union representative's right to secure witness testimony for a work place violence complaint. As the Board noted in *Archer v. Public Service Alliance of Canada*, 2023 FPSLREB 105 at para 49, there is nothing in the former Part XX of *the COHS Regulations* that refers to the representation of an employee or that obliges the union to represent an employee in the course of an investigation by a competent person.

[102] Therefore, securing witness testimony, as a union representative, for an investigation by the competent person cannot be interpreted as acting in accordance with Part II or of seeking to enforce this part since it is the role of the competent person, not the union representative, to secure testimony for an investigation and to produce a written report with conclusions and recommendations (see s. 20.9(4) of Part XX of the *COHS Regulations*). In fact, the respondent cannot even reveal the identity of any persons involved in the work place violence complaint to the competent person without the person's consent (see s. 20.9 *COHS Regulations*).

[103] Further, contrary to the complainant's argument, there is nothing in section 240 of the *Act* that can be read as providing union representatives with the right to contact potential witnesses for a work place violence investigation, Section 240 is an application provision that explains how Part II of the *Code* applies to the public service and its employees. It also explains how certain terms in this Part should be read within the context of the *Act*. It provides no substantive rights to union representatives to interview witnesses for the investigation of appointed competent persons.

[104] While the employee whom the complainant was representing certainly had the right to procedural fairness in the course of any work place violence investigation under Part II, this does not include the right for the complainant, as a union representative, to secure the testimony **for** the competent person conducting the investigation. The complainant provides no authority in the *Act* or the Board's case law to support this argument.

[105] Therefore, I find that attempting to secure witness testimony for a competent person's investigation, as a representative of the union, cannot be equated with having acted in accordance with Part II or seeking to enforce any of the provisions of this part.

[106] This conclusion should not be read as in any way diminishing the important role that union representatives play in helping to prevent and address work place violence, including harassment. However, the *Code* and the former *COHS Regulations* prescribe that, in the context of a complaint under Part XX of the *COHS Regulations*, conducting workplace investigations, including interviewing potential witnesses, was neither the right nor the responsibility of union representatives.

[107] I will now briefly address the two cases on which the complainant relies.

[108] The application before the Federal Court in *Pronovost v. Canada Revenue Agency*, 2017 FC 1077, which was allowed, did not contemplate the question before me. Instead, it was a judicial review application of an employer's decision to dismiss a work place violence complaint in which the applicant was provided no opportunity to provide any feedback on the competent person's report. The Court found the competent person's investigation "seriously deficient", and a new workplace investigation was ordered to be carried out by another competent person.

[109] In *Anderson v. Canada (Customs and Revenue Agency)*, 2003 FCT 667, the applicant sought the judicial review of a staffing recourse decision made by the Canada Revenue Agency. Citing the Supreme Court of Canada's landmark decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Court confirmed that procedural fairness, in the context of the Canada Revenue Agency's staffing recourse procedures, includes the right to meaningfully present "… relevant facts and to have one's position fully and fairly considered by the decision-maker [*sic*]." Ultimately, the Court determined that the applicant had been provided an adequate opportunity to be heard. In the case before me, if I take the complainant's allegations as true, the competent person had been selected when the complainant contacted the witness, but no investigation had begun, and no final report had been issued. Therefore, the *Anderson* case is not helpful, as the facts and context are so very different.

[110] Neither of those cases provides any support for the complainant's position that contacting a potential witness for a work place violence complaint is acting in

accordance with Part II of the *Code* or seeking the enforcement of any of the provisions of this Part.

[111] Given that the complainant failed to make an arguable case that he meets the first component of the *White* test, it is unnecessary to proceed to the other parts of the test. Therefore, I find that he failed to make out an arguable case of a breach of s. 133 of the *Code*.

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

(The Order appears on the next page)

VII. Order

[113] The motion to dismiss is allowed in part.

[114] The complaint 561-34-42967 alleging a breach of s. 186(2) of the *Act* will be scheduled to be heard on the merits in due course.

[115] The complaint 560-34-42968 alleging a breach of s. 133 of the *Code* is dismissed.

November 26, 2024.

Patricia Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board