Date: 20250710

File: 561-02-39674

Citation: 2025 FPSLREB 84

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

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

Between

CYNTHIA LANGLOIS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Langlois v. Public Service Alliance of Canada

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

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

For the Complainant: Herself

For the Respondent: Daria Strachan, counsel

Heard at Ottawa, Ontario,
September 17 to 20, 2024,
and by videoconference,
December 13, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] On January 17, 2019, Cynthia Langlois ("the complainant") made this complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against the Public Service Alliance of Canada ("the respondent" or "the PSAC") under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). She alleged that the respondent breached its duty of fair representation under s. 187 when it decided not to refer her grievance to adjudication.

[2] The respondent denied the allegation and asked that the complaint be dismissed.

[3] In this decision, "the Board" refers to the Board in its present iteration and to all its predecessors.

II. Summary of the complaint, and its disposition

[4] At all relevant times, the complainant worked as a management executive assistant in the Material and Assets Management Division of Health Canada ("the employer"). She went on sick leave in December 2014 and returned to work in May 2015. She went on sick leave again in September 2015 and never returned to the workplace. She applied and was approved for medical retirement by a letter dated June 19, 2017, from the occupational health medical officer ("the medical retirement letter"), which stated that "… retirement on the grounds of permanent disability is recommended effective February 27, 2016 with no further review."

[5] The administrative paperwork required to process her medical retirement included a resignation notice with a prospective resignation date. On December 11, 2017, she signed a resignation notice with an effective date of February 27, 2016. The employer rejected the notice and asked her to provide one with a resignation date in the future. The complainant claimed that by virtue of the medical retirement letter, her effective resignation date was February 27, 2016, and that she was entitled to an immediate annuity as of that date.

[6] The effective resignation date became a bone of contention between her and the employer. Eventually, she provided the appropriate resignation notice on February 20, 2018, with an effective resignation date of September 12, 2017, which was the date on which she first notified the employer that her medical retirement had been approved.

[7] On February 20, 2018, the respondent filed a grievance on the complainant's behalf against this: "… the denial of management to accept my medical retirement to be effective on February 27, 2016, as stated on [*sic*] the Public Service Occupational Health Program medical approval letter." That grievance is the subject matter of this complaint.

[8] The employer denied the grievance on grounds of timeliness as well as on the merits. In the final-level grievance response dated September 21, 2018, the employer explained that a request to retire must be dated in the future and that under the applicable legislation, management had no discretion to grant a retroactive effective retirement date.

[9] By letter dated October 10, 2018 ("the non-referral decision"), the respondent informed the complainant that it would not refer her grievance to adjudication because the Board had no jurisdiction to hear the grievance, given that the federal public service pension plan was not part of the relevant collective agreement, and the Board has no jurisdiction to interpret the provisions of the *Public Service Superannuation Act* (R.S.C., 1985, c. P-36; "the *PSSA*").

[10] The complainant disagreed with the non-referral decision and appealed it. On November 8, 2018, the respondent dismissed her appeal and upheld the non-referral decision.

[11] Despite the several tangents that the complainant brought to bear on this complaint, the basic underlying facts are simple and straightforward. I am to assess whether the respondent made the non-referral decision arbitrarily, discriminatorily, or in bad faith, contrary to s. 187 of the *Act*. The complainant did not meet her burden of proving that the respondent failed its duty of fair representation.

[12] For the reasons outlined in this decision, the complaint is dismissed.

III. Procedural history

[13] A note about the procedural history is necessary.

[14] The complainant named both the employer and the PSAC as respondents to her complaint, alleging that they each separately violated s. 190 of the *Act* when they dealt with her medical retirement application.

[15] The employer requested that the complaint be dismissed without a hearing because the facts do not disclose an arguable case that it committed an unfair labour practice against the complainant.

[16] By way of a letter decision dated June 20, 2019, a panel of the Board dismissed the portion of the complaint against the employer.

[17] An application for judicial review of that decision was dismissed by order dated May 20, 2020, for reasons of delay. It is important to mention this because in her final argument, the complainant invited the Board to reconsider the June 2019 decision. She argued that she abandoned the application because she was under psychological stress. She did not provide any submissions on the Board's reconsideration power under s. 43 of the *Act*.

[18] The Board rejects the complainant's request.

[19] In November 2019, the complainant inquired about when her complaint against the PSAC would be scheduled for a hearing. She was informed that it was in the scheduling queue.

[20] I was assigned as a panel of the Board to hear the complaint against the PSAC in spring 2022.

[21] On August 17, 2022, the Board's registry informed the parties that the Board proposed to hear the matter on October 4 to 7 or 11 to 14, 2022, by videoconference.

[22] On August 22, 2022, the complainant informed the Board that she wanted an in-person hearing and that she was not available for one until the new year.

[23] On December 21, 2022, the Board notified the parties that the matter had been scheduled for an in-person hearing from April 18 to 21, 2023. On the same date, the complainant informed the Board that she did not anticipate being ready for the hearing until June or July 2023 at the earliest.

[24] The Board postponed the April dates to June 20 to 23, 2023.

[25] On February 15, 2023, the complainant requested that the June hearing dates be postponed to November 2023 because she was unable to prepare for and participate in a hearing, due to health issues.

[26] The Board held a case management conference call with the parties on November 28, 2023. They agreed that the complaint could be set down for a hearing in mid-September 2024.

[27] On January 19, 2024, the Board informed the parties that matter was set down for a hearing from September 17 to 20, 2024.

[28] The hearing proceeded in person on the scheduled dates. December 13, 2024, was added as an additional day, to receive the parties' final submissions via videoconference.

IV. Witnesses

[29] The complainant testified on her own behalf.

[30] Before the hearing, the complainant listed several witnesses whom she intended to call. They were Anthony Tilley (former president of the Union of Health and Environment Workers (UHEW), a PSAC component); James Infantino, Disability Insurance and Pensions Officer, PSAC; Kimberley (Kim) Coles, Service Officer, UHEW; Amarkai Laryea, Coordinator, Representation Section, PSAC; Marie-Anne Bradford, Director, Health Canada; Sylvain Amyotte (former acting director, Health Canada); Todd Mitton (former director general, Health Canada); and James Cameron, lawyer. She initially requested summonses for all the proposed witnesses.

[31] The complainant also requested a summons for Lisa Woodstock, the registrar in charge of the Administrative Tribunals Support Service of Canada's ("the ATSSC") secretariat for the Board. She alleged that the registrar would provide evidence on her allegation that the Board's registry had destroyed certain documents that she sent to it in her January 9, 2018, letter, which was an alleged action that amounted to spoliation. That legal term will be explained later in this decision.

[32] With respect to Mr. Cameron, the Board explained that it would not issue a summons because of the existing solicitor-client privilege, and it encouraged her to discuss her request with him. With respect to Ms. Coles and Mr. Laryea, the Board explained that since they were being called as the respondent's witnesses, there was no need to issue summonses because the complainant would have the opportunity to cross-examine them.

[33] The Board's interlocutory ruling on the summonses request is retained on its file.

[34] Following the interlocutory ruling, the complainant amended her list of witnesses, and the Board issued summonses for Mr. Tilley, Mr. Infantino, Ms. Bradford, and Ms. Woodstock.

[35] On the first hearing day, the ATSSC's legal counsel attended and made a motion to quash the summons issued to Ms. Woodstock because under s. 31(2) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), ATSSC employees are neither competent nor compellable to appear as witnesses in any proceeding respecting information obtained in the exercise of their powers or the performance of their duties or functions providing services to the Board. The Board granted the motion and quashed the summons for Ms. Woodstock.

[36] On the hearing's first day, the complainant advised that she would not call any of the witnesses whom she had summonsed. The Board notes this because the respondent asked that it draw an adverse inference from her failure to call those witnesses, particularly Mr. Infantino.

[37] The respondent called the following witnesses: Ms. Coles; Kayla Minor, Grievance and Adjudication Analyst, PSAC; and Mr. Laryea.

V. The documentary evidence

[38] The complainant filed a digital book of documents containing 801 pages spanning 2012 to 2024, arranged under 45 numerical tabs and alphabetical tabs A to Z. Although the emails were organized chronologically, several email threads were incomplete, there were several handwritten notations on the documents (presumably in her hand), and it appeared that certain documents were cut and pasted into each other. The 13-page table of contents contained her editorial comments on the documents. The Board directed that the 13-page table of contents was inadmissible and that it should be removed.

[39] The Board marked the complainant's book, minus the 13-page table of contents, as an exhibit, subject to the respondent's blanket objection to most of the documents on several grounds.

[40] The Board directed the respondent to prepare a table of its objections, which is retained on its file.

[41] The respondent raised four broad objections: relevance, timeliness, authenticity and incompleteness. On many documents, it raised multiple objections. I will treat the objections for relevance first, and if a document is ruled inadmissible because it is not relevant, I will inquire no further.

[42] I have determined that the documents contained in alphabetical tabs A to Y are relevant for context. Tab Z is not relevant. The respondent has also objected to these documents on grounds of timeliness, authenticity and incompleteness. In essence, these objections deal with the probative value and weight to be given to the documents. Given the purpose for which the documents have been admitted, and the overall disposition of the complaint, I will inquire no further into the other grounds of objection.

[43] I have upheld the objection on a few of the numerical tabs on ground of relevance and have overruled the objection on most of those tabs as I find that they provide relevant historical and contextual information. The result of my determination is summarized in the table below:

Objection upheld on ground of relevance	Objection overruled on ground that documents contain relevant historical and contextual information
Tabs 1, 4, 5, 8, 10, 11, 21, 22, and 27.	Tabs 2, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40

[44] The respondent filed a digital book of documents of 16 tabs and 236 pages.

VI. Preliminary objection

[45] The respondent objected that the complaint was untimely because it appeared to be based on events and documents that fell outside the 90-day limitation period. I received the parties' written and oral submissions on it. Based on those submissions, I determined that the essential core of the complaint was timely, namely, the non-referral decision. I dismiss the timeliness objection.

VII. Summary of the evidence

A. For the complainant

[46] The complainant's testimony and documents covered times outside the 90-day limitation period within which to make a complaint under s. 190(2) of the *Act*. Most of the events that she described during her testimony were irrelevant to my determination of the core question in this complaint, and I have outlined most of them as historical background information.

[47] The complainant was employed as a management executive assistant classified at the AS-04 group and level at the employer. She left on a five-month sick leave in late 2014 and returned to work in May 2015. According to her, the employer failed to properly accommodate her when she returned. It changed her job and put her in one for which she was unqualified. It placed her in an AS-04 position, to deal with finance and human resources matters. She had no training in that area, and she refused to perform those duties. She insisted on being provided with duties that matched her training and experience as an executive administrative assistant. Those were the barriers that she faced when she returned to work. She was asked to perform duties that she could not perform.

[48] Her doctor provided a medical note outlining concerns about the return-to-work plan that the employer put in place for the complainant. At that time, she wrote to Mr. Tilley, then the UHEW's president, with details of her welcome back to the office and provided him with a chronology of events. He did not respond to her.

[49] She felt compelled to take the position that the employer offered because the respondent did not support her; rather, it allowed the employer to do whatever it wanted to.

[50] When she received a letter from Sun Life Financial, the employer's disability insurer, denying her disability benefits claim, she contacted Mr. Tilley again but received no help from him. He told her to contact Mr. Infantino, who was the PSAC's disability and pensions expert.

[51] On October 22, 2015, her doctor put her off work for at least eight weeks. That was her last day at work.

[52] She retained a lawyer on her own to sue Sun Life Financial for denying her claim for disability benefits. On December 19, 2016, she reached a settlement, with her lawyer's help.

[53] In January 2017, she contacted the federal government's pension pay centre about the paperwork for medical retirement and was told that it would send her a package of forms for her family doctor to complete.

[54] She was deemed medically retired by Dr. L'Ecuyer of the NCR Occupational Health Clinic for the Public Service Occupational Health Program, Health Canada, effective February 27, 2016. His letter, the medical retirement letter, stated as follows:

> …
>
> *We have received additional medical information in support of Cynthia Langlois' application for retirement on medical grounds. Based on the information currently at hand, we now wish to advise you that retirement on the grounds of permanent disability is recommended effective February 27, 2016 with no further review.*
>
> …

[55] The complainant included a portion of a letter dated September 6, 2017, from the Pension Centre as part of her book of documents. When asked about the complete package, she indicated that she no longer had it. According to the two pages that she provided, it appeared that she contacted the Pension Centre on that date and that the package was sent to her in response. The two pages outlined the steps that she had to take to start processing her medical retirement. Notably, she had to provide the Pension Centre with her employer's confirmation of her resignation and its effective date. The letter also included the following caution:

> …
>
> *As you are currently on Leave Without Pay (LWOP) and you have not yet terminated your employment, you may choose not to count your period of LWOP in excess of the first three months as pensionable service.…*
>
> *NOTE:* ***If you will not be returning to work prior to leaving the public service and your employer provides us with advance notification of your termination, the future termination date will be accepted as the effective date of your cessation of employment. However, if your employer does not notify us of your termination in advance, the effective date of your cessation of employment will be the day following the date on***

> ***which your employer notifies the Pension Centre of your termination****.…*
>
> …
>
> [Emphasis added]

[56] According to her, the employer forced her to provide a resignation date of February 20, 2018, which was contrary to Dr. L'Ecuyer's letter. She alleged that the respondent allowed the employer to provide a resignation date of 2018 even though she medically retired in February 2016. At a meeting in January 2018, the employer agreed to September 12, 2017, as her retirement date, but the respondent ignored that agreement.

[57] She received a letter dated September 12, 2017, from the employer for an update on her absence from the workplace that noted that the doctor's note covering her absence had expired on July 13, 2017. The employer asked her to confirm her intentions as to her employment by returning to duty, resigning, or providing a leave request to cover her continued absence.

[58] On November 7, 2017, she emailed the employer as follows: "As requested by the Pension Centre, can you please confirm my date of retirement. Retirement is recommended effective February 27, 2016 as per letter dated June 19, 2017 from M. L'Ecuyer [*sic*], MD, CCFP."

[59] On November 20, 2017, the employer emailed her the following:

> *… Seems to me you were advised what was required … on 9 Nov 2017, namely, you will need to complete a resignation form and choose your last day as an employee (noting that compensation should have the attached form three months prior to your retirement date). I would then review and accept the proposed date.*
>
> …

[60] She and the employer exchanged a flurry of emails about her termination date. In a nutshell, she insisted that her retirement or resignation date was February 27, 2016, and the employer insisted that that date could not be retroactive but rather had to be in the future.

[61] Those emails eventually culminated in a conference call between her, her lawyer, the employer, and someone from the Pension Centre on January 15, 2018. A summary

of the points discussed at the meeting was captured in an email exchange dated January 15 and 16, 2018, between the complainant and the employer. The employer responded to three questions that she posed.

[62] The employer confirmed that without an employee's consent, Dr. L'Ecuyer's office would never share the medical retirement letter with it and that it was up to the employee to provide the letter to his or her employer. It then confirmed that it would accept September 12, 2017, as her retirement date because that was the date on which she formally notified it of her medical retirement. Finally, it confirmed that the retirement could not be backdated to February 27, 2016, as she had requested, based on the *PSSA*'s provisions.

[63] On January 19, 2018, Dr. L'Ecuyer emailed the complainant as follows:

> …
>
> *I am writing you today in response to your email dated Wed, Jan 17, 2018 at 1:32 PM. I have reviewed your file here at the NCR Clinic.*
>
> *Our mandate at the clinic is, among other duties, to review requests for early retirement on medical grounds. Medical Officers make a determination regarding eligibility based on medical information contained in the file.*
>
> ***As previously noted, your request for early retirement on medical grounds was approved, from a medical point of view, as of 2016-02-27 and I signed the letter to advise you of this on 2017-06-19.***
>
> ***Medical Officers do not have a mandate to influence any further decisions regarding your application that are of a non-medical (administrative?) nature.***
>
> ***Hence, I recommend that you seek advice regarding further handling of the administrative aspects of your request from the appropriate individuals who are trained for this kind of situation (i.e. your H.R. representative, your employer, your union representative, a pay center representative or other qualified person of your choosing?).***
>
> …
>
> [Emphasis added]

[64] On January 19, 2018, she forwarded Dr. L'Ecuyer's correspondence to the PSAC and asked for its position.

[65] On January 23, 2018, she received the following email from Cory Beauregard of the PSAC:

> …
>
> *I spoke to the LR rep for your case, she has provided me with some of the documentation and the policies a to applying for Medical Retirement. From what I can see the responsibility is on the employee to advise the employer as to when medical retirement is to commence.*
>
> *If you have any documentation that shows you provided this information prior to September we can push to have that date as the official date.*
>
> *If you prefer to proceed with have your actual retirement date as 2016-02-27, we can file a grievance. My belief is that it will not be accepted, on the grounds of time frame (25 days to file a grievance), as well as Management and LR will hold to the policies place. Many time pay policies can not be over ridden.*
>
> *Please advise as to how you would like to proceed, as well as if you have documentation regarding notifying management prior to your request for retirement in September.*
>
> …
>
> [*Sic* throughout]

[66] She responded on January 23, 2018, as follows: "You have GOT to be kidding me." And she added this: "Too funny. Okay, can you please file a grievance on my behalf? Thanks. Cynthia". She then asked for a meeting with the respondent to file a grievance, although she stated that filing one seemed "ludicrous".

[67] The complainant had a telephone call with Mr. Infantino on January 23, 2018, after which he wrote to her as follows:

> …
>
> *Thank-you very much for your e-mail correspondence and the clarifications provided during our subsequent telephone conversation. It was pleasant speaking with you today!*
>
> *As discussed, this is to confirm that you are not in receipt of regular monthly federal disability benefits and that you are aware that a retirement date of September 12th, 2017 would provide you with a greater lifetime pension benefit as opposed to a retirement date of February 27th, 2016.*
>
> *As further discussed, there is no provision in the Public Service Superannuation Act which would prevent you from receiving monthly federal medical retirement pension benefits as of*

> *February 27th, 2016 as designated by the Health Canada Medical Officer.*
>
> *Consequently, my only suggestion to you would be to file a formal notice of resignation to your employer designating February 27th, 2016 as your date of termination of employment. Should you encounter difficulties from the employer with the foregoing, appropriate redress should be pursued by your PSAC and Union of Health and Environment Workers (UNEW) representatives.*
>
> *I trust the foregoing is of assistance. Should you have any related questions or concerns, please do not hesitate to contact my office at any of the coordinates indicated below.*
>
> …

[68] Mr. Infantino told her that the employer misinterpreted the *PSSA*'s provisions and that there were no reasons she could not receive her medical retirement benefits as of February 27, 2016.

[69] In cross-examination, she was asked about an email from Mr. Infantino dated February 1, 2018, informing her of the response that he had received from the Pension Centre, which stated as follows: "The member has to be advised that it is not possible to have the termination date in 2016, even though Health Canada accepted her medical retirement from that date."

[70] She responded that the Pension Centre's information was wrong and that she preferred Mr. Infantino's interpretation. Furthermore, she noted that he never went back on his interpretation of the *PSSA*'s provisions and the opinion that her resignation could be backdated.

[71] She filed a grievance on January 31, 2018. Annie Noel of the UHEW assisted her. She could not explain what happened to that grievance.

[72] When Ms. Coles took over from Ms. Noel, the complainant filed the grievance dated February 20, 2018, and submitted her retirement notice to the employer. It denied the grievance at both the second and final levels of the internal grievance process.

[73] Ms. Coles sent the grievance to the PSAC's Representation Section, for it to be referred to adjudication. She received the letter dated October 10, 2018, from Ms. Minor, informing her that the PSAC would not refer the grievance to adjudication. She disagreed with the decision and asked that it be reconsidered.

[74] She received Mr. Laryea's decision dated November 8, 2018, denying her appeal of the non-referral decision. She disagreed with his decision.

[75] She testified that the respondent did not thoroughly review her file. She disagreed with it that the Board does not have jurisdiction over pension matters. She provided it with Board decisions in which, according to her, the Board had assumed jurisdiction over *PSSA* matters. The decisions were *Vidlak v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLREB 91; *Wercberger v. Canada Revenue Agency*, 2016 PSLREB 41; and *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90 at para. 93.

[76] The Board asked the complainant to confirm the basis for her position that the respondent's conclusion that the Board had no jurisdiction over *PSSA* matters was wrong. She provided these four reasons:

1) the three cases cited in the last paragraph, in which she claimed that the Board assumed jurisdiction over pension matters;
2) a section of the employer's policy on disability management that deals with when an employee is unable to return to work;
3) an excerpt from the PSAC's website that reproduces the employer's policy on disability management; and
4) the opinion that she received from Mr. Infantino.

[77] On the issue of spoliation, the complainant identified certain documents that she did not receive from the Board when she made her open court request for copies of all the documents that she had submitted previously in relation to her complaint. She stated that 27 exhibits were attached to her January 9, 2019, letter that were not included in the copies that she received. She testified that the employer and the respondent colluded to destroy these documents, so they were not placed before the panel of the Board that rendered the June 20, 2019, decision.

[78] The complainant resubmitted these documents to the Board on March 4, 2024.

[79] The complainant went through everything in her 800-page book of documents.

B. For the respondent

1. Ms. Coles

[80] As of the hearing, Ms. Coles was retired, for medical reasons. She had 22 years' experience working with different unions. She worked as a service officer with the

UHEW from 2015 to 2019. She provided advice and guidance to UHEW executives and members on labour relations issues, harassment, and sexual harassment complaints at the local, regional, and national levels. She also represented members at the second and third levels of the internal grievance process. At that time, the UHEW had 9000 members.

[81] In 2019, she obtained her certification in non-profit management and was hired as an executive director with the Professional Association of Foreign Service Officers, where she remained for four years until her medical retirement.

[82] She and the complainant prepared the grievance dated February 20, 2018, which stated as follows as follows: "I grieve the denial of management to accept my medical retirement to be effective on February 27, 2016, as stated on [*sic*] the Public Service Occupational Health Program medical approval letter." The requested corrective action stated was as follows:

> *I demand that my medical retirement be retroactive to February 27, 2016 as per medical professional with the Health Canada, PSOCHP* [*sic*]*. I demand to receive pension benefits and all other related compensation and benefits back to this date and be made whole.*

[83] The complainant submitted her retirement letter to the employer at the same time she submitted the grievance.

[84] When the grievance was first filed, Ms. Coles informed the complainant that it was untimely.

[85] She understood that the retirement letter had to be provided to the employer as soon as possible, so that the pension could be processed speedily. She did not understand why the complainant did not provide the retirement letter as soon as she received the medical retirement letter.

[86] She represented the complainant at all levels of the internal grievance process. She found it unusual that the complainant sought to go back to 2016 instead of seeking to extend her pensionable time, because there was a 2% pension increase for each additional year of service.

[87] She and the complainant discussed the grievance, and she explained to the complainant that what she sought to accomplish was very challenging. The complainant was adamant about the February 27, 2016, date and was unwilling to provide a retirement date in the future, as the employer requested. During their discussions, she explained to the complainant that the employer did not have the jurisdiction or discretion to change the *PSSA*'s requirements.

[88] At both levels, the employer denied the grievance on the ground of timeliness. It also reviewed the grievance's merits and denied it on the basis that selecting the retirement date was not discretionary.

[89] Ms. Coles testified that once the employer received the complainant's retirement letter in February 2018, it did not delay processing her retirement.

[90] In its second-level reply, dated May 3, 2018, the employer stated this:

> …
>
> *I have taken into consideration the Information provided by the Public Service Pension Centre, regarding their interpretation and application of the* Public Service Superannuation Act *and its* Regulations*, as it relates to the determination of retirement dates. I have also considered arguments put forward by you and Ms. Coles at the second level grievance hearing. In light of the information available to me, the decision to not back date* [*sic*] *your medical retirement to the recommended date in the Health Canada medical professional's letter is not discretionary. The legislation does not allow for flexibility or discretion, and as such, is not within my delegated authority. Furthermore, the recommended date of your medical retirement, being February 27, 2016, is nothing but a* recommendation*. As indicated in the letter from Dr. L'Ecuyer, the date in question is when it was deemed you were permanently disabled. The letter in question is not the authority that dictates your retirement date based on medical grounds. I also do not find that the delays encountered in receiving your benefits are the result of management's inaction; rather, management provided you with clear instructions along the way to have you provide the missing documentation to finalize this process which you provided on February 21, 2018. Following receipt of this documentation, management accepted your resignation and submitted the paperwork to the Public Service Pension Centre for processing.…*
>
> …

[91] The employer issued the third- and final-level reply on September 21, 2018. Again, it denied the grievance as untimely and reiterated its position on the grievance's merits as follows:

> …
>
> *I have considered the letter from the PSOHP, however I note the date in question is when it was deemed that you were permanently disabled and therefore eligible to medically retire, not the effective date of your retirement. The PSOHP does not have the delegated authority to dictate the retirement date. Instead, they are the medical opinion the Pension Centre relies upon to release pensions for medical retirements.*
>
> *Regarding the interpretation and application of the PSSR, subparagraph 27(2)(b)(i) indicates that retirement is only effective once it has been accepted by the* [*sic*] *management and communicated in writing to the Pension Centre. Neither the Pension Centre nor the PSOHP have the delegated authority to accept a request to retire; only someone in your management hierarchy could do so. This was communicated to you on September 13, 2017, November 9, 2017, November 21, 2017, and December 22, 2017.*
>
> *Furthermore, the request to retire must be future-dated* [*sic*]*. There is no flexibility in the PSSR to grant a retroactive effective date. This is unlike other Human Resources processes which have provisions for retroactivity built into their policies and procedures.*
>
> *Regarding your arguments related to the delays in the process and the lack of management support, I note that you informed management six months after the PSOHP had recommended your medical retirement, and that it took a further seven months for you to provide an appropriate effective date of retirement, despite management providing you with clear instructions and guidance.*
>
> …

[92] When Ms. Coles received the third-level reply, she discussed other possible recourses that would be available to the complainant, including a referral to adjudication and a possible human rights complaint. She also informed her that the grievance was not strong on its merits.

[93] She completed the referral to adjudication request for the PSAC's Representation Section's consideration. She noted that the deadline for a referral to adjudication was October 31, 2018.

[94] On October 10, 2018, she received a letter from Ms. Minor that stated that the PSAC would not refer the grievance to adjudication. The letter explained that the Board

would have no jurisdiction to hear the grievance since it dealt with pension matters, which were not part of the relevant collective agreement.

[95] Despite that decision, she continued to support the complainant by seeking answers and explanations for her. On December 7, 2018, she obtained a chronology of events from the employer, which she emailed to the complainant. In her email, she noted that on January 26, 2018, the Pension Centre confirmed that the September 2017 date could not be accepted because it was retroactive and that her pension benefits were to be effective as of the date on which she submitted her formal resignation.

[96] On cross-examination, Ms. Coles could not recall whether she spoke with Ms. Noel, the local representative of the respondent who had dealt with the complainant before she took over the complainant's file.

[97] Ms. Coles was recalled to specifically address the contents of an email that she sent to Louise Allen, Human Rights Analyst, Canadian Human Rights Commission, about a possible human rights complaint. In the email, Ms. Coles stated as follows:

> …
>
> *We received senior management's reply to Cynthia Langlois' 3rd level grievance on Sept 21, 2018. Unfortunately, the grievance was denied. While I will be sending the grievance to the PSAC's representation section to review for possible referral to the FPSLREB, I would be surprised if they decide to refer. As such, I am providing you with background to Cynthia's situation.*
>
> *In late 2014, Cynthia went on extended sick leave from her position as Management Executive Assistant, AS-04 with the Chief Financial Officer Branch of Health Canada. Cynthia stated that she was not accommodated and felt she was not supported by management.*
>
> *She then applied for long term disability benefits from Sunlife in March, 2015. She received notice that her claim was denied in April, 2015. In May she returned to work and was told that she was required to perform different duties rather than the responsibilities of her substantive position. She requested training for these new duties and was not satisfied with management's response to her request and was feeling very stressed and unsupported. Her doctor then put her on modified hours in the meantime her appeal to Sunlife was denied.*
>
> *She went off on unpaid sick leave in September, 2015. She then obtained legal counsel and was able to receive a settlement from Sunlife in 2016. She then filed for medical retirement, was denied*

> *the first time, then finally received notification in June, 2017 from Health Canada doctor, that her medical retirement was approved effective February 27, 2016.*
>
> *She assumed that this medical approval notification was also sent to her employer and would start the process for pension payments. This was not the case. When she was contacted by her employer in September, 2017 regarding her return to work, she told them she was approved for medical retirement. The employer then informed her that the letter from the Health Canada doctor does not activate her pension, that they require her signed and dated resignation first. Cynthia felt that management was just using this as a stalling tactic and that her pension benefits should be processed with the effective date provided by the doctor*
>
> *Cynthia and her lawyer met with Health Canada labour relations officer and the Pension Centre representative to discuss the situation via a teleconference in January, 2018. At that meeting the employer stated they would accept her effective retirement date as September 12, 2017 when she first informed management of her retirement approval. Cynthia did not agree and contacted UHEW local representative to file a grievance in February, 2018.*
>
> *The local reached out to the UHEW national office for advice and guidance, I was the service officer assigned to take over Cynthia's case. As the 25 day timeframe to file the grievance was missed, it was a very challenging situation. I ended up providing representation at the 2nd and 3 level hearings highlighting the employer did not provide her the support and guidance to Cynthia. That in fact they had set her up to fail and had installed barriers as opposed to removing them on her return to work, but it was no surprise when management denied both levels.*
>
> *As you can see this a long and complicated situation. If have any questions or require any further information, please let me know.*
>
> …
>
> [*Sic* throughout]

[98] Ms. Coles explained that she obtained the information in that email from the complainant because she was not present during the events recounted in it.

2. Ms. Minor

[99] Ms. Minor was hired by the PSAC in June 2014.

[100] She worked in several positions with PSAC until June 2018, when she became a grievance and adjudication analyst. As such, she was required to assess grievances from the PSAC's components and decide whether the PSAC would support referring them to adjudication. She also provided advice to its components on interpreting

collective agreements and relevant legislation or workplace policies relating to grievances.

[101] When a file is assigned to her for review and analysis, she thoroughly reviews the documents in it, the relevant collective agreement provisions, and the caselaw and any legislation that may apply to the grievance. She took the same approach with the complainant's file.

[102] After her thorough review of the grievance, she concluded that there was no chance of success because the Board had no jurisdiction over its subject matter. She made the non-referral decision, which she communicated in her October 10, 2018, letter to Ms. Coles. She explained that the federal public service pension plan was not part of the relevant collective agreement and that s. 113 of the *Act* specifically bars a collective agreement from directly or indirectly altering a term or condition of employment established by the *PSSA*.

[103] After her decision, she had several email communications with the complainant, who disagreed with her analysis and decision. She responded to the complainant's questions and provided supporting information.

[104] On October 15, 2018, she informed the complainant that if she wished to appeal the non-referral decision, she could contact the Representation Section's acting coordinator. She also reiterated her earlier advice that the complainant contact Mr. Infantino.

[105] On cross-examination, she confirmed that the grievance was about the complainant's medical retirement date. She confirmed that she was probably aware that the employer had agreed to a termination or resignation date of September 12, 2017.

[106] She was also asked about the 40-day deadline to refer a grievance to adjudication and whether that deadline was extended by continued discussions about the case beyond it. She explained that she sought an extension of the deadline so that the PSAC would reconsider the non-referral decision. In the end, a further review did not change the initial decision.

3. Mr. Laryea

[107] Mr. Laryea was the Representation Section's coordinator. In that capacity, he had overall responsibility for the section, including general staffing, internal labour relations, and human resources. He was also responsible for the PSAC's overall budget and strategic direction in general when it came to representing its members.

[108] Ms. Minor was one of his direct reports. In his coordinator role, he saw the non-referral decision letter of October 10, 2017. If a non-referral decision is made, and the concerned member wants it reviewed or reconsidered, an analyst would escalate the issue to him in his capacity as the coordinator.

[109] He reviewed Ms. Minor's non-referral decision and confirmed it. A non-referral decision relinquished the member's right; therefore, the review was rigorous and comprehensive. In this case, he agreed with the analysis that the Board has no jurisdiction over pension issues and that therefore, the grievance would not succeed at adjudication.

[110] On December 7 and 17, 2018, he informed the complainant that her file was closed at the Representation Section and that she could contact Ms. Coles at the local level and Mr. Infantino for clarification on pension issues.

[111] On cross-examination, he was asked whether he was aware of the September 12, 2017, termination or resignation date that had been agreed upon when he conducted his review. He explained that he was aware of it but that he did not consider it new information that would influence the non-referral decision. According to him, even if it was new information, it would not have changed the decision, because the Board does not have jurisdiction over pension issues.

VIII. Summary of the arguments

A. For the complainant

[112] The complainant referred to the following cases: *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699; *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10; *Elliot v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 4; *Wercberger*; *Canada*

(Attorney General) v. Frazee, 2007 FC 1176; *Nadeau v. Attorney General of Canada*, 2018 FCA 203; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18; and *Nash v. Public Service Alliance of Canada*, 2023 FPSLREB 64.

[113] It was clear that when Mr. Laryea examined the complaint form, he realized that he had made an error and that the complainant's issue was her medical retirement date. Medical retirement usually triggers an immediate annuity; in her case, she did not receive one. Her medical retirement date was February 27, 2016, but her employer and her bargaining agent disregarded it and failed to process her medical retirement accordingly. Mr. Laryea's reaction while under cross-examination was telling when he realized his error that her file was about her termination type and date.

[114] Public servants' rights on dismissal are governed by the *Financial Administration Act* (R.S.C., 1985, c. F-11), the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"), and the *Act*. Section 63 of the *PSEA* states that an employee may resign from the public service by giving the deputy head notice in writing of his or her intention to resign, and the employee ceases to be an employee on the date specified by the deputy head in writing on accepting the resignation, regardless of the date of acceptance.

[115] In *Wercberger*, the Board stated that retirement is a *de facto* voluntary termination of employment. All types of terminations of employment can be grieved before the Board.

[116] The Treasury Board's directive on leave without pay because of injury or illness specifies a two-year time frame, after which an employee can medically retire, based on a Health Canada decision. That happened for the complainant. Health Canada approved her medical retirement with an effective date of February 27, 2016, with no further review.

[117] An employee qualifies for medical retirement if Health Canada certifies that they meet the definition of "disability", namely, a physical or mental impairment that prevents them from engaging in any employment for which they are reasonably suited by virtue of their education, training, or experience and that can reasonably be expected to last for the rest of their life. If they must retire because of disability before age 60, they will receive an immediate annuity, unless they have less than two years of

pensionable service. The complainant qualified for an immediate annuity because she had more than those two years.

[118] The employer treated the termination of her employment as a termination for medical incapacity as opposed to a medical retirement, and as such, she was denied the benefits to which she was entitled. Since she did not receive an immediate annuity, and she was forced to provide a two-year resignation date in advance.

[119] When she called the Pension Centre to follow up on her medical retirement benefits, she was told that all that was required was an email from her immediate supervisor accepting her medical retirement and that her pension benefits would kick in shortly after that. She emailed her supervisor on November 10, 2017, and gave him that information. She informed him that her retirement date was effective February 27, 2016. He did not accept her resignation date, and she was asked to provide a resignation date in the future, preferably three months in advance.

[120] A conference call was held on January 15, 2018, which included the complainant's private lawyer. She pointed out that she informed her direct supervisor on September 12, 2017, and that the employer agreed to that date as her effective resignation date.

[121] On October 10, 2018, she was advised that the PSAC would not refer her grievance to adjudication because it dealt with a pension matter, over which the Board has no jurisdiction.

[122] Her grievance was denied on grounds of timeliness. The respondent was negligent when it filed her grievance late.

[123] The complainant spent a considerable amount of time on the grievance's timeliness. She argued that the respondent was negligent when it filed the grievance late. The Board pointed out to her that that was not an issue before it and that she had to address the 90-day limitation period under s. 190(2) of the *Act* and whether she made her complaint on time.

[124] The complainant referred to s. 12 of the *PSSA* and argued that on January 23, 2018, the respondent's pension expert, Mr. Infantino, advised her that there was no *PSSA* provision that prevented her from receiving monthly pension benefits effective February 27, 2016, as designated in the medical retirement letter.

[125] Mr. Infantino advised her that the employer had misinterpreted the *PSSA*'s provisions. He never expressed any support for the Pension Centre's decision that the retirement date had to be in the future. Her private lawyer informed her that he had never seen anything so bizarre. The respondent condoned the employer's misinterpretation and disregarded its pension expert's opinion.

[126] The employer's reason for denying her grievance was incorrect, and the respondent condoned it. Nothing in the *PSSA* required her medical retirement date to be in the future. She was medically retired effective February 27, 2016. Her manager's responsibility was to accept the date stipulated in the medical retirement letter.

[127] She disagreed with the respondent's position that the complaint was out of time. Ms. Minor testified that she sought an extension of time until the end of November 2018 to refer the grievance to adjudication, which meant that PSAC represented the complainant until November 30, 2018. It also meant that the 90-day limitation period was from December 1, 2018, to March 1, 2019.

[128] During that period, the complainant corresponded with Ms. Minor, who told her to contact Mr. Infantino. On December 17, 2018, Mr. Laryea confirmed that her file was closed in the Representation Section. She urged the Board to consider December 1 or 17, 2018, as the start date for the 90-day limitation period.

[129] The complainant made submissions on constructive dismissal. I have not outlined those submissions because they are not relevant to the complaint before the Board. In essence, the gist of them was that the employer's action or inactions documented in the 27 exhibits attached to her January 9, 2019, letter amounted to constructive dismissal.

[130] The complainant made submissions about the events that transpired upon her return to work in 2015. They are outside the limitation period and are not part of the complaint before the Board; therefore, I see no reason to outline them.

[131] On spoliation, she stated that she requested all the documents related to this hearing on January 10, 2024, and that she received a reply on February 19, 2024. She emailed the Board and the respondent's counsel, inquiring about the Board's Form 21 and the 27 attachments to her January 9, 2019, letter to the Board.

[132] The Board has acknowledged the open court principle and maintains an open-justice policy, to foster transparency in its processes and accountability. Spoliation occurs when a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation and when a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Destroying relevant documents interferes with the legal system's goal and the quest for the truth. The destruction of evidence was deliberate with the clear intention of gaining an advantage in the litigation. The prejudice to the complainant was so profound that it prevented her from showing that the employer's actions caused her significant economic loss and continued psychological harm.

[133] As remedy for the alleged spoliation, she asked the Board to accept all her exhibits transmitted on March 4, 2024. She also asked for an investigation into the destruction of the 27 exhibits, and damages.

[134] On the complaint itself, she argued that the respondent acted in bad faith and with ill will toward her from when she returned to work in May 2015 until she left the workplace. She reached out to the respondent for assistance, but she received none. She had to retain a private lawyer to help her with her disability benefits.

[135] The respondent's failure to represent her led to substantial economic losses and psychological harm. She sought damages in the amount of $1.2 million. She explained that that amount was based on the deficit of two years of pensionable benefits and the loss of income to 2029, which is when she would have retired. Included in that amount was also a claim for aggravated and punitive damages and the loss of her disability pension benefits under the Canada Pension Plan.

B. For the respondent

[136] The respondent referred to the following cases: *Stratton v. Public Service Alliance of Canada*, 2024 FPSLREB 53; *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90; *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78; *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20; *Nemish v. King*, 2020 FPSLREB 76; *Marcil v. Public Service Alliance of Canada*, 2022 FPSLREB 65; *Tremblay v. Canadian Association of Professional Employees*, 2023 FPSLREB 69; *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; *Ouellet v. St-Georges*, 2009 PSLRB 107; *Canadian Merchant Service Guild*;

Cousineau v. Walker, 2013 PSLRB 68; *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95; *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52; *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44; *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128; *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13; *Barbot v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2016 PSLREB 113; *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20; *Dodd v. Canada Revenue Agency*, 2015 PSLREB 8, *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509; and *Trillium Power Wind Corporation v. Ontario*, 2023 ONCA 412. The respondent also referred to Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at paragraph 3:86.

[137] At all relevant times, the respondent and its representatives fulfilled their duty of fair representation to the complainant in an honest, thorough, and forthright manner. It acted in good faith, objectively and competently, throughout the internal grievance process. It did not engage in any conduct that could be considered arbitrary, discriminatory, or in bad faith as defined under s. 187 of the *Act*.

[138] The respondent asked the Board to dismiss the complaint. The complainant brought up a whole host of issues that are not properly before the Board. The only issue before it is whether the respondent met its duty of fair representation with respect to the non-referral decision. Based on the evidence, not only did the respondent meet its duty, but also, it also exceeded its duty, given all its efforts to help her.

[139] The fact that the complainant did not like the decision does not mean that the duty of fair representation was breached.

[140] Most of the complainant's arguments pertained to the employer's alleged actions and inactions, not those of the respondent.

[141] The statutory 90-day limitation period eliminated all the issues that the complainant raised in her evidence and submissions except the non-referral decision.

[142] Counsel for the respondent outlined the evidence of Ms. Coles, Ms. Minor, and Mr. Laryea.

[143] When the complainant first approached the UHEW in or around January 2018, she had already missed the 25-day time limit for filing a grievance against the

employer's decision on her effective retirement date. In September 2017, it had informed her that it would not accept February 2016 as her effective retirement date. She should have filed her grievance 25 days after that. She did not approach the respondent until months later.

[144] Ms. Coles explained that she prepared and made grievance presentations at both levels of the internal grievance process. When the employer denied the grievance at both levels, the complainant was disappointed, so Ms. Coles referred the grievance to the PSAC's Representation Section for its consideration.

[145] Ms. Minor became involved at that level in her analyst capacity. She reviewed the grievance's merits and determined that the Board does not have jurisdiction over pension issues. Therefore, she recommended that it not be referred to adjudication in the non-referral decision. The complainant disagreed with Ms. Minor's decision and applied for a reconsideration. Mr. Laryea then became involved. He reviewed the file and approved and upheld the non-referral decision.

[146] The respondent provided the complainant with committed and confident representation from the initial filing of the grievance in February 2018 to and even beyond its non-referral decision in October 2018.

[147] Ms. Coles was the service officer who helped to draft the grievance and made representations at the second and final levels of the internal grievance process.

[148] The employer denied the grievance based on timeliness but also considered its merits. The employer highlighted the complainant's failure to complete the required documentation to finalize her medical retirement, despite that she was provided with clear instructions. It explained that the PSSA did not allow for a discretionary backdating of her effective retirement date. She disagreed with that interpretation.

[149] Counsel for the respondent addressed the complainant's apparent confusion with the applicable limitation period. Counsel clarified that the timeliness issue pertained to the complaint under s. 190(2) of the *Act*, not the grievance.

[150] Despite the respondent's non-referral decision, made due to jurisdictional constraints, it continued to explore possible avenues of recourse for the complainant. In terms of the non-referral decision, it reviewed the merits in full and explained its

decision based on the *PSSA*'s imposed jurisdictional limits. It explained to her that pension-related issues fall outside the Board's jurisdiction.

[151] As of October 10, 2018, the non-referral decision was final, and it did not change, regardless of the communications that continued. The respondent's decision was based on a reasonable and informed assessment of the Board's jurisdiction and the grievance's likelihood of success. Ms. Minor provided a clearly detailed rationale for the decision dated October 10, 2018.

[152] At the complainant's request, Mr. Laryea reviewed and confirmed the non-referral decision. On November 8, 2018, he wrote to her as follows:

> …
>
> *This is in regards to your appeal of the non-referral letter of October 10, 2018. I have looked over your file and I have had discussions with Kayla Minor. I have taken into consideration the email you wrote on October 26, 2018 as well as the documentation you have provided in the file. I have also considered the non-referral letter of October 10, 2018 letter* [*sic*] *as well as Ms. Minor's email correspondence of October 11 and October 15, 2018. After* [*sic*] *review of this information,* ***I concur with the decision not to refer this matter to adjudication for the reasons expressed in the letter of October 10, 2018.***
>
> ***However, please do not take this as PSAC not being sympathetic to the issues you have raised in your grievance. What has been communicated to you is that we do not believe we would be successful before the Federal Public Sector Labour Relations and Employment Board. I would reiterate and encourage you to get in contact with James Infantino to discuss what other avenues may be possible to address this issue and how the PSAC may be able to assist. I thank you for taking the time to write.***
>
> …
>
> [Emphasis added]

[153] None of the respondent's representatives who dealt with the complainant acted in an arbitrary, a discriminatory, or in a bad-faith manner during their representation of her. Even when she sent them vulgar and abusive correspondence, they remained professional and polite.

[154] The three witnesses who were directly involved in representing the complainant were credible, and their evidence was not shaken in cross-examination.

[155] Ms. Woodstock was not a compellable witness under the statute. She had no connection with the respondent.

[156] On the issue of spoliation, there was no plausible advantage for the registrar to destroy or suppress documents in these proceedings. Not only did the proposition or allegation not make any sense, but also, the complainant always possessed the documents.

[157] The complainant failed to prove that documents were destroyed, which is an essential element in establishing spoliation. Adopting the principles of spoliation neatly summarized in *Trillium Power Wind Corporation*, the spoliation allegations did not apply to the respondent; nor did spoliation have any impact on its representation of her.

[158] On the issue of the witnesses, initially, the respondent understood that the complainant would call six witnesses; however, when the hearing opened, she decided not to call any witness other than herself.

[159] During her testimony, the complainant referred to many statements that her proposed witnesses allegedly made and their meanings. Counsel for the respondent argued that the Board must reject the complainant's hypothetical and speculative interpretations of those alleged statements. Relying on the *Ma* decision, she further urged the Board to draw an adverse inference from the complainant's choice to not call those summonsed witnesses.

[160] In her submissions, the complainant repeatedly referred to Mr. Tilley, who retired from the PSAC many years ago. A summons was issued for him, but she chose not to call him to testify. To the extent that the Board is inclined to consider any information attributed to him (given that his alleged involvement dated to 2015), an adverse inference must be drawn that had Mr. Tilley been called, he would not have provided testimony favourable to the complainant's case.

[161] The complainant also mentioned Mr. Cameron at length, in particular his alleged comments that the employer's processing of her medical retirement was "bizarre". She could have but chose not to call her former lawyer, who was present with her at the January 2018 meeting and therefore would have had clear and direct knowledge as to

whether the medical retirement date could have been made retroactive to February 27, 2016.

[162] The complainant also repeatedly referred to Mr. Infantino. The Board issued a summons to compel his attendance, but she chose not to call him. The significance of her failure to call him is that her entire disagreement with the respondent's decision hinged on her interpretation of the information that she received from him. Even when she was shown his final email to her about the unfavourable response that he had received from the Pension Centre, she still clung to his earlier statement. A negative inference must be drawn from her deliberate choice not to call him as a witness.

[163] Referring to *Canadian Merchant Service Guild*, counsel for the respondent argued that the respondent has considerable discretion when deciding whether to refer a grievance to adjudication. A decision not to refer one would pass muster under s. 187 of the *Act* if it is based on a thorough review of the facts and the applicable case law and it is made without arbitrariness or discrimination and not in bad faith. The non-referral decision was based on solid legal grounds. All the respondent's representatives carried out their responsibilities professionally and courteously, despite the complainant's unprofessional, discourteous, and abusive communications.

[164] On the timeliness issue, counsel for the respondent argued that the cutoff date to start the 90-day clock should be October 10, 2018, the date on which the non-referral decision was made. According to counsel, the complainant's and respondent's back-and-forth communications after October 10, 2018, did not change the decision date. Alternatively, counsel argued that November 8, 2018, should be the cutoff date, since that was the date on which Mr. Laryea made his decision on the appeal of the non-referral decision.

[165] On the merits of the complaint, counsel for the respondent argued that the complainant failed to meet her burden of establishing that the respondent breached its duty of fair representation.

C. The complainant's reply

[166] On the issue of timeliness, the complainant argued that until late November 2018, she was still communicating with Mr. Laryea about her retirement date and

providing him with new information; consequently, the 90-day limitation period should have started running from the beginning of December 2018.

[167] On the issue of the adverse inference, she spoke to Mr. Infantino and had every intention of calling him as a witness, but her lawyer advised her that the documentary evidence outweighed the testimonial evidence. It was also open to the respondent to call Mr. Infantino, as he was its pension expert, and Mr. Laryea continuously told her to speak to him, to assess her options.

[168] The complainant argued that she was medically retired effective February 27, 2016, but the employer forced her to resign in February 2018; the respondent condoned the employer's illegal act, even though its pension expert stated that the employer's interpretation was incorrect.

[169] On the issue of spoliation, the complainant argued that she referred to the Crown as the entity, her employer, which had every reason to get rid of the documents, the Board's Form 21, and the 27 exhibits that dealt with her grievance under s. 209(1)(b) of the *Act*.

IX. Analysis and reasons

A. The statutory framework

[170] Section 187 of the *Act* provides for a bargaining agent's duty of fair representation as follows:

187 *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*	***187*** *Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.*

[171] That provision codifies a fundamental principle of labour relations found in most labour relations statutes across Canada, and it is the corollary to the exclusive right granted to a bargaining agent to represent or act as the agent for all employees in an identified bargaining unit in dealings with the employer. The Supreme Court of

Canada described the legal landscape of a union's representational obligations in *Bernard v. Canada (Attorney General)*, 2014 SCC 13, as follows:

> …
>
> *[21] It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise.* ***A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union has the*** **exclusive** ***right to bargain on behalf of*** **all** ***employees in a given bargaining unit****, including Rand employees.* ***The union is the exclusive agent for those employees with respect to their rights under the collective agreement****. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee,* ***he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees****.*
>
> *[22]* ***The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith****. The* **Public Service Labour Relations Act** *imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in strike votes and to be notified of the results of such votes* ***(s. 184)****. According to the Board, similar obligations apply to the conduct of final-offer votes under s. 183 of the* Act*.*
>
> …
>
> [Emphasis added]

[172] In *Canadian Merchant Service Guild*, the Supreme Court of Canada explained a bargaining agent's obligation in the following terms:

> …
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*
>
> …

[173] Bargaining agents have substantial latitude when representing their members, and the threshold or bar for establishing arbitrary, discriminatory, or bad-faith conduct is high. The Board's role is not to determine the reasonableness or correctness of a bargaining agent's decision but to assess the integrity of the decision-making process that led to the impugned decision (see *Sayeed*, at para. 59; and *Bahniuk*, at paras. 49 to 51).

[174] In *Cousineau*, the Board neatly summarized its jurisprudence relating to the concepts of arbitrariness, discrimination, and bad faith with the context of s. 187 of the *Act* as follows:

> …
>
> *30 What is required to sustain an allegation of bad faith or of arbitrary or discriminatory action has been the subject of a considerable number of Board decisions. In* Ménard v. Public Service Alliance of Canada, *2010 PSLRB 95, the Board refers to some of the leading cases in the following manner:*
>
> …
>
> **22** With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:
>
> *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible…*
>
> …
>
> **23** In *International Longshore and Wharehouse* [*sic*] *Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the

> arbitrary nature of a decision, to prove a breach of the duty of fair representation, "… a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."
>
> …
>
> *31 A bargaining agent's determination as to whether it should provide representation was also examined by the Board in* Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, which offered the following guidance and useful concepts:*
>
> …
>
> **44** … It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):
>
> …
>
> *42. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of [the duty of fair representation].*
>
> …

[175] In *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at para. 77, the Board stated that a "… complaint cannot be merely about disagreements on strategy or dissatisfaction with communication between a complainant and the union; a complaint must be about the violation of the duty of fair representation set out in s. 187 of the *Act*."

[176] Again, in *Burns*, the Board stated this:

…

> *[79] In all duty-of-fair-representation complaints, the issue before the Board is expressed in these questions:* ***Has the union violated the*** **Act***? **Has the union performed its statutory representation role in a way that is arbitrary, discriminatory, or in bad faith? Is there, for example, a proceeding that the union did not carry out, and that it ought to have carried out, in the representation of an employee in the bargaining unit?***
>
> *[80] In* McRaeJackson *at paragraph 54, the CIRB provides this conclusion as to why most duty-of-fair-representation cases are not founded:*
>
> > [54] **Ultimately, if the union has directed its mind to the employee's complaint, gathered the information relevant to making a decision, attempted to resolve the situation and reasonably exercised its discretion not to pursue a grievance or refer it to arbitration according to the criteria stated earlier, and informed the employee of its reasons for doing so, an employee will have little cause for complaint**.
>
> …
>
> [Emphasis added]

[177] The employer's actions are not at issue in a duty-of-fair-representation complaint (see *Burns*, at para. 81).

[178] I agree with and adopt the Board's statements in *Burns*.

B. Timeliness

[179] Section 190(2) of the *Act* reads as follows:

190(2) *Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*	***190(2)*** *Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.*

[180] In *Castonguay*, referencing s. 190(2) of the *Act*, the Board explained that the wording is mandatory and that there is no discretion to extend the timeline. Since then, the Board's jurisprudence has evolved to the point that in *Beaulieu v. Public*

Service Alliance of Canada, 2023 FPSLREB 100, it stated that the time limit could be extended, in very limited and exceptional circumstances. I find that there are no exceptional circumstances in this case that would warrant taking the approach in *Beaulieu*.

[181] The complaint was made on January 21, 2019; therefore, only the respondent's actions or omissions in the preceding 90 days must be considered. That is the period from October 23, 2018, to January 21, 2019.

[182] In its submissions, the respondent admitted that Mr. Laryea's decision from his review of the non-referral decision was made within that time frame.

[183] I agree. I find that the complaint, as it pertains to the non-referral decision, was timely.

C. The merits of the complaint

[184] In much of her presentation, the complainant consistently tied the employer's decision about her effective termination date to the respondent; however, she was unable to explain how the respondent was implicated in processing her medical retirement. She did not point out any document or guideline that requires a bargaining agent to play a role in processing an employee's medical retirement, which is a matter exclusively within the employer's authority. It is true that the respondent often posted the employer's policies and guidelines on its websites and bulletin boards, but as Mr. Laryea explained in his testimony, it is done for educational and informational purposes.

[185] The complainant had the burden of proof to present sufficient evidence to establish that the respondent failed to represent her fairly, in accordance with s. 187 of the *Act* (see *Ouellet*, at para. 31). I find that she failed to meet her burden.

1. The respondent did not discriminate against the complainant

[186] In *Gilkinson v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 62, in the context of an unfair-labour-practice compliant, the Board explained the meaning of "discrimination" as follows:

…

> ***17*** *Discrimination is not defined in the* Act*. However, the French version of the* Act *speaks of "*distinctions illicites*", or illegitimate distinctions, to translate discrimination. Black's Law Dictionary defines discrimination as "differential treatment"; the Concise Oxford Dictionary defines the verb discriminate as "to make an unjust distinction in the treatment of different people".*
>
> …
>
> ***19 Discrimination, then, involves an illegitimate distinction based on irrelevant grounds****. In this case, the complainant has not shed any light on the nature of the distinction he alleges. No grounds are invoked. Rather, a conflictual situation has arisen.*
>
> …
>
> [Emphasis added]

[187] Neither side presented any evidence or arguments regarding discrimination. The complainant has failed to meet her burden that the respondent's conduct was discriminatory. On the contrary, I find that the respondent's representation of the complainant in relation to her grievance about the effective date of her medical retirement was not discriminatory.

2. The respondent did not act in bad faith

[188] Bad faith cannot be presumed; the complainant must establish bad faith on sufficient facts, to demonstrate the elements of bad faith by the respondent (see *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLREB 30 at para. 97).

[189] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 48, the Supreme Court of Canada explained that prohibiting bad faith in the context of the duty of fair representation means the absence of an "… intent to harm or malicious, fraudulent, spiteful or hostile conduct …" on the part of a bargaining agent.

[190] There was no evidence that the respondent's representatives who represented the complainant from beginning to end demonstrated anything but respect, courtesy, honesty, and forthrightness.

[191] I do not find that the respondent acted in bad faith in representing the complainant.

3. The non-referral decision was not arbitrary

[192] In *Noël*, the Supreme Court of Canada described the notion of arbitrariness in the context of the duty of fair representation as follows:

> …
>
> *50 The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation.* ***The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible.*** *The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.…*
>
> …
>
> [Emphasis added]

[193] "Arbitrariness", in this context, connotes conduct or actions that are perfunctory and capricious and that lack any deliberate review or thoughtfulness (see *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70 at para. 133).

[194] In *D'Alessandro v. Public Service Alliance of Canada*, 2018 FPSLREB 90 at para. 50, the Board acknowledged that while bargaining agents should be accorded substantial latitude in their representational decisions, they must establish the steps they took to reach their decisions. The absence of evidence demonstrating the steps taken to arrive at a representational decision may lead to a conclusion that the decision was made in an arbitrary manner; in other words, the decision was made on a whim.

[195] Based on both the testimonial and documentary evidence, I am satisfied that the respondent reached the non-referral decision after a thoughtful, detailed, and reasoned consideration of the grievance's merits. Nothing about its process was arbitrary, from filing the grievance to ultimately, making the non-referral decision.

[196] There was no doubt that the crafting and wording of the grievance reflected what the complainant wanted. She tendered into evidence the grievance presentation, which ostensibly she and Ms. Noel wrote on January 31, 2017, as follows:

> *I grieve that management has acted in bad faith and is misinterpreting PSSA regulations including but not limited to 27.2 (b)(i) to obstruct the receipt of my medical retirement benefits, which were deemed to be effective February 27, 2016, by a medical professional. This delay in receiving my benefits and to resolve this issue is causing me undue stress and financial hardship.*

[197] The grievance that the complainant and Ms. Coles crafted on February 20, 2018, states this: "I grieve the denial of management to accept my medical retirement to be effective on February 27, 2016, as stated on [*sic*] the Public Service Occupational Health Program medical approval letter."

[198] The corrective action requested was the same in both versions of the grievance, which was that her medical retirement benefits be retroactive to February 27, 2016.

[199] I find that the respondent was neither negligent nor arbitrary when it crafted the grievance that underlies this complaint.

[200] Ms. Coles represented the complainant at both levels of the internal grievance process. After the employer denied the grievance at the final level, she continued to represent and advocate for the complainant by 1) forwarding the grievance and the relevant documentation to the PSAC's Representation Section for its consideration of a potential reference to adjudication, and 2) reaching out to the Canadian Human Rights Commission about filing a human rights complaint.

[201] No evidence was adduced that the complainant was dissatisfied with the quality of the representation that she received from Ms. Coles. Indeed, it was quite the contrary; on November 28, 2018, the complainant emailed Ms. Coles as follows:

> *Thanks for looking into this for me. If memory serves me correctly I re-submitted my retirement date in late February 2018 and received my first disability payment in March 2018.*
>
> *I would like my disability benefits backdated to the date I advised my employer I was medically retired, which was September 12, 2017, as per the non-existent regulation that HC is talking about and which I expect the Alliance will advocate on my behalf.*
>
> *I appreciate YOUR efforts.*
>
> …

[202] Ms. Minor was the next respondent representative to work on the complainant's file. A review of the documentary and testimonial evidence did not disclose any arbitrariness on Ms. Minor's part. I am satisfied that she conducted a thorough review of the grievance and the issues raised and that she considered the relevant jurisprudence when she made the non-referral decision because the Board lacks jurisdiction over pension matters.

[203] What resulted was a difference of opinion between the complainant and Ms. Minor. The complainant believed that the Board has jurisdiction, based on Mr. Infantino's opinion and the Board's jurisprudence. She also referred to her private lawyer's alleged statement that he found the whole situation "bizarre", without elaborating on what he meant.

[204] As previously noted, the Board's role is not to assess the correctness of the respondent's decision, and I do not intend to. However, I find it appropriate and transparent to outline the jurisprudence that each side relied on for their respective positions.

[205] The complainant referred to the following cases to support her view that the Board has jurisdiction over pension matters: *Wercberger*, *Vidlak*, and *Mutart*.

[206] In *Wercberger*, the grievor alleged that his employer failed to accommodate him to the point of undue hardship and thus forced him to take medical retirement. He alleged discrimination and disguised discipline. The grievor was not represented by his bargaining agent.

[207] The Board upheld the employer's objections to its jurisdiction and concluded that it had no jurisdiction over the grievance

[208] Nothing in that case dealt with the *PSSA*'s provisions. The only factual similarities to the complainant's case are that that grievor received disability benefits from Sun Life and then went on medical retirement.

[209] In *Mutart*, the grievor was on sick leave without pay for 10 years, and the employer notified him that his employment would be terminated for incapacity. He opted for medical retirement and resigned. He subsequently sought to rescind his resignation.

[210] The Board explained that once the deputy head accepted his resignation, he ceased to be an employee. It ruled that "[a]ccepting the grievor's resignation and application for medical retirement was a function of the deputy head's authority under section 63 of the *PSEA*, which [was not subject to the Board's jurisdiction]."

[211] I note that other than medical retirement, nothing in that case dealt with an issue under the *PSSA*.

[212] In *Vidlak*, the grievor alleged that the employer violated the leave provisions of the collective agreement when it refused to delay his retirement date, to allow him to exhaust his accumulated sick leave bank.

[213] The Board dismissed the grievance on the basis that there was no collective agreement violation. It also commented that it has no jurisdiction over a valid resignation.

[214] I note that other than the fact that that grievor went on medical retirement, nothing in that case dealt with interpreting the *PSSA*.

[215] For its part, in addition to the relevant statutory provisions, the respondent referred to the following cases to support its decision that the Board has no jurisdiction to interpret the *PSSA*'s provisions: *Barbot*, *Association of Justice Counsel*, and *Dodd*.

[216] In *Barbot*, the grievor was concerned about her obligation to make payments to settle her contributions to her pension and supplementary death benefits under the *PSSA*. The Board held that it had no jurisdiction over the grievance because its pith and substance was about her obligation to make those payments under the *PSSA*. No collective agreement may alter the *PSSA* or its regulations. (see paragraphs 50, 58 and 60 to 62).

[217] In the *Association of Justice Counsel* case, the Board held that portions of bargaining proposals that related to the pensionable service or benefits could not form part of the arbitration board's terms of reference because terms and conditions that were established under the *PSSA* are precluded from the Board's jurisdiction (see paragraph 36).

[218] In *Dodd*, the Board ruled that the grievance was about pension obligations under the *PSSA*; therefore, it had no jurisdiction (see paragraphs 8 to 11 and 21).

D. Spoliation

[219] The complainant alleged that the ATSSC committed spoliation because when she made her open court request in January 2024 for all the documents in her file, the Board's registry did not provide her with the 27 attachments that she sent along with her January 9, 2019, letter. Those documents are found at Tab T of the complainant's book of documents (marked as Exhibit C1), at pages 557 to 690.

[220] According to the complainant, the 27 exhibits that she attached to her January 9, 2019, letter to the Board supported the Board's Form 21 and the referral of her grievance to adjudication. The essence of her spoliation claim is captured in her April 10, 2024, email as follows:

> …
>
> *Can the person who is acting on behalf of Lisa Woodstock please acknowledge this email? Also, can the FPSLREB please advise how it intends to proceed regarding this matter.*
>
> *Given the gravity of the situation, please note I intend to summon the registrar as a witness for my hearing in September 2024.*
>
> *Spoliation has clearly taken place by the FPSLREB and, I believe, at someone's request within PSAC & Treasury Board or Health Canada.*
>
> *Spoliation occurs when a party has intentionally destroyed evidence relevant to current or contemplated litigation and a reasonable inference can be drawn that the evidence was destroyed in order to affect the litigation.*
>
> ***This is a serious offence - especially since one of the parties is the "unbiased, independent quasi-judicial tribunal". It's unprecedented.***
>
> ***The 27 exhibits that mysteriously disappeared from the registry cement my DFR case against PSAC and prove my allegations of constructive dismissal.***
>
> ***Daria*** [PSAC counsel]***, have you determined who within PSAC, Treasury Board and/or Health Canada counselled the FPSLREB to destroy the exhibits?****…*
>
> …
>
> [Emphasis added]

[221] The Board's registry, as the complainant acknowledged, is an outside, "unbiased, independent" entity. It is not a party to the litigation, which is a prerequisite to establish spoliation. There is no evidence that documents disappeared or were destroyed. As a matter of fact, the documents exist, as the complainant resent them to the registry. She had to provide clear and cogent evidence to support her serious accusation of wrongdoing; she failed to.

[222] She never provided any clear evidence as to how she submitted the documents to the Board in January 2019, whether it was by mail or email. She never explained why she had the documents or copies of them in her possession if she maintained that they were destroyed or that they disappeared.

[223] The alleged collusion between the employer, the PSAC, and the Board's registry, to suppress or destroy documents, was highly speculative, and the complainant provided no evidence or logical explanation as to motives.

[224] Spoliation occurs when one party to the litigation intentionally destroys evidence, with the objective of gaining an advantage in the litigation. Described as either a tort of a rule of evidence, the concept requires a court or a decision maker to draw an adverse inference that the destroyed evidence would have been unfavourable to the party that destroyed it.

[225] In *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, the plaintiffs lost their house in a fire. The source of the fire was unclear, and the fire department concluded that the fire could have been caused by the improper disposal of smoking material or a malfunction of a cordless electric drill, which was manufactured by the defendant.

[226] When the plaintiffs sued the defendant, the remains of the house had been razed, to facilitate reconstruction. And the remains of the alleged defective drill were missing, too. The Court granted the defendant's motion to dismiss the lawsuit because of the absence of relevant and crucial evidence. The Alberta Court of Appeal allowed the plaintiffs' appeal, holding as follows:

…

> *[4] … As a general rule, determining whether spoliation has occurred, and what relief should follow, if any, is a matter best left to the trial judge who can consider all of the surrounding facts.*

> *While the court always has the inherent jurisdiction to strike an action to prevent an abuse of process, it should not do so where a plaintiff has lost or destroyed evidence, unless it is beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in litigation, and the prejudice is so obviously profound that it prevents the innocent party from mounting a defence. These conditions are not close to being met in this case.*
>
> …
>
> *[18] … Spoliation in law does not occur merely because evidence has been destroyed.* ***Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.***
>
> …
>
> [Emphasis added]

[227] The Court summarized the Canadian law of spoliation as follows:

> …
>
> *[29] … I would summarize the Canadian law of spoliation in the following way:*
>
> 1. *Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.*
> 2. *The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.*
> 3. *Outside this general framework other remedies may be available — even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.*
> 4. *The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of*

> *negligence, although these issues, in most jurisdictions, remain open.*
>
> 5. *Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.*
> 6. *Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.*
>
> …

[228] Applying those principles to the facts of this case, the complainant failed to establish her claim.

[229] I have concluded that spoliation did not occur in this case.

E. The reconsideration of the June 2019 decision

[230] I dismiss the complainant's request that the Board reconsider the June 2019 decision, for three reasons. First, as I understood her submissions on this point, because of the alleged spoliation, the Board Member did not have all the evidence before him when he rendered his decision. And she abandoned her judicial review application, for health reasons.

[231] Since her claim of alleged spoliation has failed, there is no basis for a reconsideration on this ground.

[232] Second, the Board's June 2019 decision was final. It was within the complainant's right to seek judicial review of it, and she exercised that right. Regardless of how she chose to describe her motive for not perfecting her judicial review application, the fact is that the Federal Court of Appeal rendered a decision on her application. That decision was also final. Therefore, this matter is exhausted.

[233] Third, on August 23, 2024, the complainant made a request for reconsideration of the June 20, 2019, decision on the same basis as she argued before me. In a letter decision dated August 27, 2024, the chair of the Board dismissed her request.

[234] On a final note, on this point, the complainant did not serve any notice to the employer of her intention to seek a reconsideration of the June 2019 decision. The PSAC is not the proper party to her reconsideration request.

F. Adverse inference

[235] I am prepared to draw an adverse inference from the complainant's decision not to call Mr. Infantino to testify on the information that he gave her on the *PSSA* interpretation.

[236] Although Mr. Infantino was described as the PSAC's expert on disability and pension issues, I do not find that he is the authority on the *PSSA* or its interpretation and application. Ultimately, he accepted the Pension Centre's interpretation that the termination date could not be backdated to 2016, despite the statement in the medical retirement letter. Despite this, the complainant buried her head in the sand and insisted that Mr. Infantino's opinion prevailed over the Pension Centre's interpretation.

[237] The complainant argued that the respondent could also have called Mr. Infantino as a witness. That is true because there is no property in witnesses; but that is not the point. The respondent based the non-referral decision on the Board's jurisdiction to interpret the *PSSA*'s provisions. That is a legal question that Mr. Infantino could not have opined on; therefore, the respondent had no need to call him.

G. Conclusion

[238] Both parties referred to several cases. The Board read and reviewed them all in the context of the parties' respective submissions. In this decision, it referred to only those cases that it deemed relevant to its analysis and decision.

[239] In a duty-of-fair-representation complaint, the Board's role is not to sit in judgment of the bargaining agent's representation decision. Rather, its role is to determine whether the respondent acted in an arbitrary or a discriminatory manner or in bad faith in its decision-making process. The Board's role is not to assess the legitimacy or correctness of the respondent's decision.

[240] A bargaining agent is not obliged to follow one of its members' instructions or directions when it makes decisions about moving grievances forward or the approach to adopt in any grievance. It exercises considerable discretion in how it allocates its resources to fulfil its representational obligations.

[241] In this case, I find that the respondent did not breach its duty of fair representation. Ultimately, the complainant disagreed with the non-referral decision and clung blindly to an untenable legal position. She was, in Shakesperean terms, hoisted with her own petard.

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

(The Order appears on the next page)

X. Order

[243] The complaint is dismissed.

July 10, 2025.

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