Date: 20031028

File: 161-2-1245

Citation: 2003 PSSRB 98

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

KEITH NOWEN, LINDA TRUEMAN, DANIEL BOYD, HAROLD CARSON, MARY ANN CLAYTON, GREG HARSCH, DENNIS NERIUOKA, KELLY TURNER, ROBERT WINTERS, WILLIAM CRIST AND LEAH WILE

Complainants

and

UCCO-SACC-CSN

Respondent

RE: Complaint under Section 23 of the Public Service Staff Relations Act

Before: Ian R. Mackenzie, Board Member

For the Complainants: Keith Nowen, Complainant

For the Respondent: John Mancini, UCCO-SACC-CSN

Heard at Calgary, Alberta
July 23, 2003.

[1] Keith Nowen and others filed a complaint under subsection 23(1)(a) of the *Public Service Staff Relations Act* (*PSSRA*) against UCCO-SACC-CSN, and in particular John Beauchamp, Prairies Regional Representative for UCCO-SACC-CSN, and Robert Clarke, the Health and Safety Representative for the local union at Bowden Institution. The complaint relates to grievances that were filed early in February 1999, and referred to adjudication on May 3, 2000 by the predecessor union, the Union of Solicitor General Employees (USGE), Public Service Alliance of Canada (PSAC). On October 25, 2002, the Public Service Staff Relations Board (the Board) was advised by UCCO-SACC (CSN Prairies) that a settlement was reached with the employer and that the hearing scheduled for the following week should be cancelled. The complainants allege that both the way that the settlement was reached and the settlement itself were contrary to the bargaining agent's duty of fair representation under subsection 10(2) of the *PSSRA*.

[2] The complainants request that the Board issue the following orders:

1. *That Mr. John Beauchamp was in a conflict of interest when he entered into financial negotiations to resolve the hours of work grievance, at Prairie Regional Headquarters on October 24, 2002.*

2. *That Mr. Robert Clarke is not recognized or authorized as a bargaining agent and had no legal right to represent the group of grievors or enter into a financial agreement.*

3. *That the $611.52 financial settlement agreed by the parties at the meeting at Prairie Regional Headquarters on October 24, 2002 be null and void.*

4. *That the behavior of both Mr. John Beauchamp and Mr. Robert Clarke were arbitrary, discriminatory or in bad faith in the representation of the employees of Bowden Institution.*

5. *That the attached list of staff names (those who claim to have submitted grievances in 1999) be included with the current 24 grievors.*

6. *That an adjudication hearing be convened within 30 days of the receipt of this complaint.*

7. *That all Correctional Officers (CX 01; CX 02; and CX 03) employed at Bowden Institution prior to 1999 benefit from any financial settlements reached regarding the hours of work grievance.*

[3] The Board received the complaint on November 19, 2002. The employer was provided with a copy of the complaint and by e-mail dated January 28, 2003, declined to make any submissions. The respondent provided its reply on January 31, 2003:

> […]
>
> *Mr. Beauchamp was acting as the CSN Prairies union advisor. In this capacity he represents UCCO-SACC-CSN members at the final level of the grievance procedure and when the grievance is referred to adjudication.*
>
> *Based on the jurisprudence and evidence he concluded that the employer's offer was acceptable.*
>
> *Mr. Beauchamp acted in good faith. He was neither arbitrary nor discriminatory in his representation of Bowden institution employees in the settlement concerning the group grievance.*
>
> […]

[4] The complainants called one witness, and the respondent called one witness. The complainants recalled one witness in reply.

Preliminary Matters

[5] John Mancini, the representative for the respondent, raised a number of preliminary matters relating to the jurisdiction of the Board and Mr. Nowen's standing or authority to represent the complainants. I ruled on some of the issues at the hearing and reserved on others.

[6] It was Mr. Mancini's submission that the Board had no jurisdiction to hear the complaint because the complainants had accepted and cashed the settlement cheques issued by the employer and were therefore estopped from pursuing a complaint. I ruled that estoppel did not apply to this complaint, as this was not a dispute with the employer but with the bargaining agent. Acceptance of a settlement with the employer does not preclude the filing of a complaint against the bargaining agent.

[7] Mr. Mancini submitted that Mr. Nowen did not have the authority to represent anyone other than himself and the two other complainants who were present at the hearing (Daniel Boyd and Linda Trueman). It was Mr. Mancini's submission that this complaint was Mr. Nowen's personal vendetta, and there was no more support for the

complaint within the bargaining unit other than the three complainants present at the hearing.

[8] Mr. Nowen stated that he would have liked to have all 24 grievors present at the hearing, but that management would not grant leave for many of those employees who wished to come.

[9] I ruled that the complaint had signatures attached and that unless there was evidence presented to the contrary, the assumption remained that those who had signed as supporting the complaint remained as complainants. I indicated, as well, that a determination on who is an appropriate complainant could be addressed further in final arguments, as a final determination was not necessary in order to proceed with the hearing. Mr. Mancini did not introduce any evidence during the hearing that any of those who had signed the complaint had withdrawn their support for the complaint or had withdrawn their support for Mr. Nowen to represent them. Accordingly, all of the individuals who signed the original complaint are to be considered complainants.

[10] The complaint contained a second list of names and signatures of grievors who had signed grievances in 1999, but whose grievances were not referred to the final level. It is not clear from the document whether these individuals supported the complaint or not. Although it is a reasonable assumption that the signatures were included in the complaint to indicate support for the complaint, direct (and explicit) evidence of support for a complaint under the *PSSRA* is required. Consequently, those individuals who signed their names on the second list are not to be included as complainants.

[11] Mr. Mancini submitted that it was not clear what the complainants wanted from this complaint. Mr. Mancini suggested that Mr. Nowen was seeking a settlement of the grievances that went back further than the 25 days allowed by the collective agreement, which was clearly wrong. Mr. Nowen stated that the complainants realized that I could not rule on the merits of the grievances, and what was being sought was a re-opening of the grievance process. I told the parties that the interpretation of the 25-day limitation period and the reasonableness of the settlement of these grievances are at the heart of the complaint and required evidence. Consequently, I could not deal with it in a preliminary ruling.

[12] Mr. Mancini submitted that the Board does not issue declaratory orders and that I could not issue a declaratory order that Mr. Beauchamp had a conflict of interest. He stated that I could, however, come to a factual conclusion that Mr. Beauchamp acted in a conflict of interest. Mr. Mancini stated that there were policy reasons for not making such a finding. He made the same argument regarding the complainants' request relating to Mr. Clarke's role. Mr. Nowen did not dispute that the Board could not issue declaratory orders of this nature. I indicated that it was open to me to assess these matters in the context of my overall conclusion on the merits of the complaint. I also indicated that policy reasons for not coming to such conclusions of facts should be left for final argument.

[13] Mr. Nowen agreed that the request for the convening of an adjudication hearing was moot, as the hearing of the complaint was now underway.

[14] Mr. Mancini indicated that the bargaining agent would be seeking damages from the complainants present at the hearing because the complaint was frivolous. I advised Mr. Mancini that the jurisdiction of the Board to award damages or costs was, in my view, limited. I also advised the parties that the issue of damages should be left to final argument.

[15] Mr. Mancini also submitted that UCCO-SACC-CSN was not the bargaining agent when the grievances were filed. I ruled that matters that arose before UCCO-SACC-CSN became the bargaining agent could be introduced as evidence solely for the purpose of providing the necessary context for the settlement of the grievances. The PSAC is not a respondent and the representation provided by the PSAC is not at issue in this complaint.

Evidence

[16] According to Jean Beauchamp, the CSN Advisor in the Prairies Region, and a former union official at Bowden Institution, the grievances at issue first arose in January 1999, when new managers at Bowden Institution changed a long-standing policy on hours of work. This change in policy led to the filing of grievances by most CX officers at Bowden. According to Daniel Boyd, one of the complainants and also one of the grievors, the hours of work issue went back to June 25, 1998.

[17] The grievance of Keith Nowen (Exhibit C-1) contained language similar to all of the filed grievances:

> *I grieve mgmt. policy that exists at Bowden Institution where CX1's and CX2's have been scheduled to work an 8 ½ hour day shift. The extra hours accumulated as a result of this policy far exceeds the requirement laid down in the collective agreement under hours of work. Articles of the collective agreement (Master Agreement and CX collective agreement) being contravened are listed as follows: Article 21.02(a)(i): shiftworkers are required to work an average of 37 ½ hours per week. Article 21.02(a)(ii): shiftworkers are required to be on duty for 8 hours per shift. Article 21.07 states that shiftworkers are to be allowed a reasonable amount of time away from post to consume a meal on any shift. Article 21.13 states that overtime will be paid for all hours worked in excess of 8 hours per shift. Article 21.15 states that overtime will be compensated for, at applicable rate, for each 15 minutes of overtime worked.*
>
> ***CORRECTIVE ACTION REQUESTED***
>
> *That this policy of a scheduled 8 ½ hour day shift be rescinded immediately. That all scheduled overtime accumulated since the implementation of this policy (98 Jun 25) be paid at the applicable rate.*

[18] The grievances were denied at all levels. The employer issued the final level response on April 20, 2000. Mr. Nowen's reply was entered into evidence (Exhibit C-1) and concludes as follows:

> […]
>
> *After careful study, I have concluded that you are called upon to work an eight-hour day shift. Your eight-hour shift is performed over a period of eight and one half (8 1/2) hours, of which, one half (1/2) hour constitutes a meal break during which time you are not required to work. That being the case you are not entitled to remuneration for the half hour meal break.*
>
> *The collective agreement provisions have also been examined carefully and it was determined that the Institution is not in contravention of any of its relevant provisions.*

[19] On April 4, 2000, Michel Charbonneau, on behalf of the bargaining agent for the CX group at that time (USGE, PSAC), wrote to Mr. Beauchamp in anticipation of the possible referral of these grievances to adjudication (Exhibit C-1). Although no decision had yet been made on whether to refer the grievances to adjudication, Mr. Charbonneau raised one concern about the grievances:

[…]

These grievances in my humble opinion have merit. Meanwhile, it is very possible that following my representation, the local management may want to discuss the matter further with you. It was mentioned during the hearing that the practice of providing a free meal to employees during the lunch hour was to make sure that the employees will remain at the institution during the lunch hour in case of emergency. This long practice has been supported by the USGE's membership across the country and we have even used that practice to oppose the CSC's intention to do away with the noon "free meal" with success. The actual grievances are in fact a direct threat to the practice of providing a "free" meal to employees should the employees decide to go outside for their half hour lunch if authorized by the employer. Should the employees not be authorized to leave the institution, then the employer retaining them "captive" will have to pay them for the time as time spent at work. Meanwhile the employer may decide to not provide "free meal" to employees anymore or to charge the employees the cost of their meal, and because the provision of "free meal" is not a guarantee of the collective agreement then the employer may advise the employees that the employer considers to put an end to the practice. This letter is not in anyway an indication of no support to the grievances as presented but a practice has a similar meaning of a collective agreement up to the time the parties to a practice indicate the intention to put an end to that practice.

Before the 23 grievors are sending back their forms 14 to the National Office, I will suggest that the situation be reassessed within the membership of the Bowden Local because of the possible threat to a practice that profit to the majority of employees.

[…]

[20] Mr. Beauchamp testified that the concerns raised in the letter were still relevant at the time that the grievances were settled.

[21] The references to adjudication were completed by the grievors on or about May 3, 2000 (Exhibit C-1), and the PSAC consented to the referral to adjudication.

[22] A mediation session took place on October 4, 2000, and resolved the hours of work policy issue (Exhibit C-4). Compensation for the grievors for the accumulated overtime was left unresolved.

[23] On March 31, 2001, UCCO-SACC-CSN was certified as the bargaining agent for CX officers.

[24] On June 26, 2002, the local president at Bowden Institution sent an e-mail to the grievors regarding a possible settlement of the grievances:

> *Hello all,*
>
> *Your grievance re the hours of work has gone to the fourth level. At the fourth level it was decided that they would pay out $750.00 to everyone who took the grievance to that level. They estimated that this lasted for a period of approximately four months during which time you have worked approximately thirty extra hours. I am requested to find out from everyone if they will accept this or not. It is not a joint decision. If you decide to take the $750.00 my understanding is that you will be paid it. If you decide not to take the $750.00 it will no longer be on the table.*
>
> *Please get back to me as soon as possible with your individual decisions.*

[25] Mr. Boyd testified that the offer was not accepted by the grievors and it is alleged in the complaint that a majority of the grievors declined the offer.

[26] The grievances were scheduled for adjudication by the Board for October 29 and 30, 2002, in Calgary. Mr. Beauchamp testified that prior to the hearing, Treasury Board officials suggested settlement discussions. Before the settlement meeting, a document outlining the basic principles for settlement was prepared (Exhibit R-2), which reads as follows:

> 1. *Establish and agree on the names of employees*
>
> 2. *Establish and agree on the time period*
>
> 3. *Review the information provided respecting how many officers could have been allowed to leave for lunch had they asked, come up with an average, and then a percentage*
>
> 4. *Do we want to calculate on an individual basis, or on an average basis per employee.*

[27] Mr. Clarke, a local union representative at Bowden Institution, was selected by the local to participate in the settlement discussions, according to Mr. Beauchamp.

[28] Mr. Beauchamp testified that employees with active grievances were advised of the upcoming settlement discussions. Mr. Beauchamp testified that Mr. Clarke advised him that 14 of the 24 grievors did have prior knowledge of the discussions (Exhibit R-3). In addition, he testified that employees who were at the workplace on October 14, 2002, were also advised of the way that the matter would be settled, based on the principles set out in Exhibit R-2.

[29] On October 23, 2002, Messrs. Beauchamp and Clarke met with Bonnie Davenport, the Acting Regional Chief of Staff Relations, Prairies Region, and Dianne Bird, another management representative. The parties reached an agreement that stated that the grievors agreed to withdraw their grievances in return for payment of $611.52 to each grievor (Exhibit R-7). The parties also agreed that the settlement was made "without publicity". The agreement was signed by Ms. Davenport and Ms. Bird, on behalf of the Department, and Messrs. Beauchamp and Clarke, on behalf of UCCO-SACC-CSN.

[30] Mr. Beauchamp testified that the amount of the settlement was calculated by using the date of the first grievance filed and counting back 25 days from that date. The highest salary was then used as the basis for calculating the average payment based on the total number of day shifts worked during the period January 18 to May 31, 1999 (Exhibit R-6). Mr. Boyd testified that he did not understand why the end date of May 31, 1999 was chosen, and it has never been made clear to him why this date was chosen. Mr. Boyd also testified that there was a general expectation among the grievors that they would have received a higher amount through adjudication. In cross-examination, Mr. Boyd said that he had never worked out the amount that he thought he was owed, but estimated it as between $1,000 and $1,500. He also testified that there was never anything in writing from the bargaining agent as to why or how the settlement amount was reached. Mr. Boyd said that when he received his cheque, he told Mr. Clarke a lot of people would be unhappy with the settlement.

[31] Mr. Beauchamp testified that since the settlement was agreed to on a "without publicity" basis, the bargaining agent could not post anything on the bulletin board with regard to the settlement. He testified that, to his knowledge, Mr. Clarke informed all the grievors of the settlement.

[32] On October 25, 2002, the Board received a letter from the CSN Prairies Office stating that a settlement had been reached with the employer and that the scheduled hearing could therefore be cancelled.

Arguments

For the Complainants

[33] In addition to oral argument at the hearing, Mr. Nowen relied on arguments contained in his complaint document, which is on file with the Board. This summary of the complainants' arguments includes points raised in the written complaint, as well as points raised in oral argument.

[34] Mr. Nowen submitted that the actions of Messrs. Beauchamp and Clarke in reaching the settlement were under-handed and in bad faith. There was no notice of intention shared with the grievors and there was no opportunity for the grievors to ratify the settlement or vote to continue with the adjudication hearing.

[35] Mr. Nowen also submitted that Mr. Beauchamp was in a conflict of interest when he went to Prairies Regional Headquarters to negotiate a settlement of the 24 grievances. Mr. Beauchamp was a grievor and therefore should have removed himself from the position of negotiator. It was the complainants' position that Mr. Beauchamp had a personal agenda to resolve the hours of work grievances at a financial settlement that favoured management. Mr. Nowen also submitted that Mr. Clarke should not have participated in the negotiations, as he did not have the necessary status to attend or authority to enter into any financial agreements.

[36] Mr. Beauchamp should have been aware of the expectations of the grievors, which was that they were entitled to compensation for the extra hours worked, as stated in the corrective action in the grievances (from June 25, 1998). Mr. Beauchamp should have known that the final settlement of $611.53 was far below the expected level of compensation.

[37] Mr. Nowen questioned the agreement signed by the bargaining agent and management on October 23, noting that Mr. Clarke was not certified as a bargaining agent. He also questioned why the Deputy Commissioner's signature was not on the document.

[38] Mr. Nowen submitted that Mr. Beauchamp circumvented the grievance process by returning to, and entering into, negotiations at the third level after the grievances had been presented and dealt with at the fourth and final level.

[39] Mr. Nowen also submitted that the e-mail from Mr. Clarke (Exhibit R-3) was unreliable because it was hearsay and was also written in January 2003, long after the events in question. He questioned the statement in the e-mail that some of the grievors were informed of the settlement discussions. He stated that the reference in the document to a discussion between Mr. Winkler and him was totally inaccurate.

[40] With regard to the interpretation of clause 20.10 of the collective agreement, Mr. Nowen submitted that the bargaining agent's interpretation was wrong. He submitted that it merely stated that an employee has 25 days from the date that the employee becomes knowledgeable about an issue to file a grievance, and it does not mean that one can only go back 25 days for a remedy.

[41] The complainants submitted that the proposed settlement should have come back to the workplace for a review by the members, as had been done with the earlier offer from the employer.

[42] In conclusion, Mr. Nowen requested that I uphold the requests listed in the complaint, including nullifying the settlement and rescheduling the grievances for a hearing.

For the Respondent

[43] Mr. Mancini submitted that in a complaint under subsection 10(2) of the *PSSRA*, the complainants are under a heavy burden of proof. The complainants must prove that Messrs. Beauchamp and Clarke and the bargaining agent acted in bad faith, arbitrarily or in a discriminatory fashion. He submitted that the complainants have not met this burden.

[44] Mr. Mancini stated that whatever the merits of the interpretation of the collective agreement and the grievances, it must be shown that the bargaining agent acted in bad faith – there is simply no evidence of bad faith. Taken all together, the allegations in the complaint either are wrong legally or show a lack of understanding of the negotiation and labour relations processes.

[45] Mr. Mancini submitted that Mr. Beauchamp was not in a conflict of interest. Everyone at Bowden Institution knew that he was the Union advisor. There was no evidence that anyone at Bowden Institution raised any concerns about his representation. Even if concerns had been raised, there was a decision at the local level to have him involved in the grievances. Mr. Beauchamp did not benefit unduly because he was an employee; he received the same settlement as everyone else. There was no evidence that he attempted to benefit from his position.

[46] Mr. Mancini submitted that the complaint rests on a gross misunderstanding of the grievance process and the limits of the grievances. The complainants want the grievances to go back to at least 1998; their interpretation simply does not hold together.

[47] With regard to the authority of Mr. Clarke to attend the negotiations, Mr. Mancini submitted that Mr. Clarke is an elected officer and was entitled to be there. In fact, his attendance was an essential safeguard used by the UCCO-SACC-CSN. When a Union official brokers any deal, an elected officer of the local must accompany him. Why would we question his presence? What did he do that constitutes bad faith? His presence is contemplated by the UCCO-SACC-CSN constitution and rules. When a Union official goes to the table without the presence of the grassroots, the Union does not have the transparency it likes. His presence at the negotiations was part of his role.

[48] The allegation that Mr. Beauchamp should have been aware of what the grievors wanted is also unfounded. The way a grievance is written does not matter. The Union advisor must look at the collective agreement and go to the table to negotiate a settlement from a credible position. The Union advisor knows that Mr. Nowen's position that the grievances should go back further than 25 days is impossible and the employer knows it as well. Mr. Nowen and the other complainants do not understand what is generally accepted in the jurisprudence about the effect of limitation periods in collective agreements.

[49] Mr. Mancini also submitted that the complainants misunderstood the nature of the grievances. The collective agreement provides for an eight-and-one-half hour shift. The reality, prior to January 1999, was that CXs were only working eight hours. The lunch break was part of this practical arrangement. In January 1999, three new keepers decided to "play by the book" and force the officers to stay for the full eight

and one-half hours. This new application of the collective agreement lasted from January to May of 1999. As of May 1999, the prior arrangement was reintroduced. Just because the original grievances contained a statement of the grievance and corrective action does not mean that the grievors are entitled to everything requested. For years, the reality was that employees were working eight hours when the collective agreement said they should be working eight and one-half. The only argument open to the bargaining agent would have been to argue that the practice of the employer overrode the clear text in the collective agreement. Mr. Mancini submitted that he had not yet won a case on this basis.

[50] On October 23, 2002, the bargaining agent brokered a deal that was quite advantageous to the grievors. It was, in fact, more advantageous than expected. The hours that the deal was based on were inflated, because not all grievors would have been required to work that half hour on every shift. The deal was also based on the highest average salary. The bargaining agent could not have seriously sat down at the table to get the employer to pay past May (when the prior practice was reinstated) or prior to January (25 days prior to the earliest grievance). The deal was better than any resolution that could have been obtained at adjudication.

[51] Mr. Mancini submitted that, in the agreement entered into with the employer (Exhibit R-7), the bargaining agent knew that the grievances had not been withdrawn on the day that the agreement was signed. Settlement of grievances always involves the withdrawal of the grievances. The membership can say that they will not accept this. The bargaining agent is accountable to the membership, both internally and through the Board.

[52] Mr. Mancini also stated that Mr. Nowen's submission that the Deputy Commissioner's signature should have been on the agreement was not relevant. Mr. Mancini submitted that the authority to enter into agreements can be delegated, and whether it was appropriately delegated is not the complainants' concern but the employer's concern.

[53] Mr. Mancini submitted that the allegation in the complaint that no one was informed that the grievances were going to be discussed with management is shown by Exhibit R-3 to be inaccurate. The allegation raises a further issue about how far a bargaining agent has to go vis-à-vis its members when it sits down to negotiate. The complainants seem to think that there should have been a vote on the settlement. This

form of "ultra-democracy" is not practical. The bargaining agent has a duty to represent fairly and has to explain any settlement to its members. The bargaining agent is accountable to its members if it acted in bad faith. The duty to represent fairly does not require a vote every time. There are situations where a vote may be conducted, but these circumstances are internal Union affairs.

[54] Mr. Mancini submitted that damages should be awarded against the three complainants who attended the hearing. Mr. Mancini stated that he could not particularize the costs associated with the representation and the costs of Messrs. Beauchamp and Clarke at the hearing, but that those costs could be quantified. He submitted that damages were appropriate because the bargaining agent attempted to mediate the dispute. There was also no attempt by Mr. Nowen to contact the bargaining agent to try to understand what the settlement was. There was no attempt to go to bargaining agent officials to discuss the settlement. Mr. Mancini also speculated that Mr. Nowen did not consult with a lawyer or labour relations professional, who would have told him that his interpretation was wrong. Mr. Nowen has had his "day in court" and this should not be at the expense of the bargaining agent. This is why the bargaining agent is seeking damages.

Complainants' Reply Argument

[55] Mr. Nowen submitted that both sides had refused mediation; therefore, this should not be a factor in this case.

[56] Mr. Nowen disputed Mr. Mancini's claim that only one-third of the hours were eligible for payment, as leaving an officer alone at a post would be contrary to the security policy of Bowden Institution.

[57] Mr. Nowen submitted that clerks were able to get retroactive payment for pay equity beyond 25 days and questioned why this would not apply to this situation.

[58] With regard to costs, Mr. Nowen submitted that the bargaining agent was the one with all the resources and that the complainants had none.

[59] Mr. Nowen submitted that the 44 officers who filed grievances, but did not end up on the final list of grievors, were not advised about the grievance transmittal process. Mr. Beauchamp was the local president during the period that the grievances were submitted. Mr. Beauchamp should have advised them of their obligations under

the collective agreement and provided them with transmittal forms. Mr. Nowen requested that these 44 individuals be included in the final number of grievors.

Respondent Reply Argument

[60] In light of the fact that Mr. Nowen raised new issues in his reply argument, I allowed Mr. Mancini to reply to these new points.

[61] Mr. Mancini submitted that there was no evidence presented about the grievors who did not proceed to the final level, and no evidence that Mr. Beauchamp bore any responsibility for the failure of those grievances to go to the final level of the grievance procedure.

Reasons for Decision

[62] This complaint is the result of a failure to communicate, which, in my view, is a shared failure between the bargaining agent and the complainants. There was also a fundamental misunderstanding of the grievance and settlement process by the complainants, and the bargaining agent did not make much of an effort to explain either the process or its actions in settling the grievances. The complainants did not make sufficient efforts to raise their concerns internally, either. However, the evidence falls short of demonstrating bad faith by the bargaining agent or its representatives.

[63] The duty of fair representation (set out in subsection 10(2) of the *PSSRA*) requires bargaining agents and their representatives to represent employees in the bargaining unit in a manner that is not "arbitrary, discriminatory or in bad faith".

[64] The Supreme Court of Canada has succinctly set out the general principles applicable to bargaining agents in meeting their duty of fair representation:

> 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.*
>
> [*Canadian Merchant Service Guild v. Gagnon,* [1984] 1 S.CR. 509]

[65] The grievances at issue in this complaint involved the interpretation of the collective agreement. Under the *PSSRA*, collective agreement grievances require the approval of the bargaining agent for the referral to adjudication, as well as an expression by the bargaining agent of its willingness to represent the grievor(s) (subsection 92(2)). The former bargaining agent for the grievors did refer the grievances to adjudication in May 2000, and resolved the underlying policy issues. However, the successor bargaining agent came to an agreement on the monetary compensation, settled the grievances and advised the Board that it would not be proceeding with the adjudication hearing. By its letter, the bargaining agent effectively withdrew its approval for referral to adjudication, as it is permitted to do under subsection 91(2) of the PSSRA.

[66] The complainants stated that they had wanted their grievances to proceed to adjudication. As I have indicated, the *PSSRA* does not provide such an unfettered access to adjudication for employees with collective agreement grievances. The British Columbia Labour Relations Board has recently canvassed the main reasons for this gatekeeper role of bargaining agents:

> *Unions* [have] *this exclusive control because it is necessary in order for a union to be effective in representing the employees as a whole. The power of a union comes from the fact that it represents all the employees as a single entity. A union must speak with one voice in order to negotiate effectively with the employer A union must be able to make commitments that the employer can rely upon if the union expects to receive anything in return. It would be unable to*

> *make such commitments if, in the future, it was required to act in whatever manner it was directed to by various, individual employees.*
>
> *A union must also be able to direct its resources so that they achieve maximum effect. Union resources are limited. If, for example, an employee could insist that his or her dismissal grievance go to arbitration even where on a reasonable assessment there is no case, this could waste tens of thousands of dollars of the union's resources, which come from employees' dues.*
>
> *Through the control of its resources, a union can leverage them to achieve maximum results for minimum expenditure. An employer knows that the union could take any given case to arbitration if it wished. It also knows that the union is likely to accept a reasonable settlement if one is offered. With that type of relationship, the employer may be motivated to make reasonable offers to settle some matters by agreement, without litigating every issue. In that way, employees achieve the greatest gain with the least expenditure. By contrast, if individual employees could take every grievance to arbitration whenever they wished, the amount of litigation in the workplace would multiply and employees would very quickly find their collective resources depleted. This type of situation would be detrimental to the workplace and, for employees and the union, unaffordable. It may also place an excessive demand on the employer, affecting the business as a whole.*
>
> *As well, a union must be in charge of making decisions given the reality that what is good for one employee in the bargaining unit may be bad for others….. It must be free to argue the interpretation it feels is in the best interests of the bargaining unit as a whole.*
>
> *For these reasons, among others, unions must act as a single entity in order to represent the employees effectively. They must be able to make decisions even where individual employees in the bargaining unit may disagree. In fact, unions are able to exercise collective power because employees cannot simply do whatever they wish individually. It is that characteristic which gives unions their bargaining power on behalf of the employees.*
>
> [*Judd and C.E.P. Local 2000*, 91 C.L.R.B.R. (2d) 33 (para. 36-39)]

[67] The complainants' representative raised the issue that the grievances were not settled with the permission of the grievors and that the grievors never withdrew their grievances in writing. It is true that it is an employee who refers a collective agreement

grievance to adjudication under the *PSSRA*. However, an overriding principle in the *PSSRA* is that the matter cannot be referred to adjudication (or proceed to adjudication after referral) if the bargaining agent does not provide both its consent and support. In practical terms, the settlement of a collective agreement grievance by a bargaining agent ends the grievance process, including the adjudication process. The failure of the bargaining agent to obtain the formal withdrawal from each grievor does not constitute a breach of the duty of fair representation.

[68] Bargaining agents and their representatives are given fairly wide latitude in the settlement of grievances (*Richard and Public Service Alliance of Canada*, 2000 PSSRB 61 and *Lipscomb and. Public Service Alliance of Canada*, 2000 PSSRB 66. In *Trade Union Law in Canada* (MacNeil, Lynk and Engelmann), the principle is summarized as follows:

> *A union which fully turns its mind to the grievance, after having made a thorough investigation, and concludes that it should not be arbitrated because it believes there is little likelihood of success will have fulfilled its obligations, even if a board might have reached a different conclusion.* [para. 7.480]

[69] The question for me to decide is not whether I agree with the bargaining agent's assessment that the grievance settlement was better than what it could achieve at adjudication, but whether it acted in bad faith, discriminatorily or arbitrarily in coming to that assessment. The bargaining agent and the complainants put forth alternate views on the implication of the 25-day limitation period for the filing of grievances contained in the collective agreement. The bargaining agent introduced evidence on the calculations it used in coming to the settlement, based on its interpretation that the compensation could not go back beyond 25 days prior to the filing of the grievance. The complainants disputed this method of calculation, as well as the restriction to the 25 days prior to the filing of the grievances. It was also Mr. Beauchamp's testimony that it was his opinion, at that time, that the settlement was the best that could be achieved in the circumstances. Mr. Mancini did not provide any jurisprudence to support this interpretation, but the decision of the Federal Court of Appeal in *Coallier v. Attorney General*, [1983] F.C.J. No. 813 provides a reasonable basis for coming to such a conclusion. I conclude that the bargaining agent's interpretation of the collective agreement and its assessment of the settlement were reasonable and were not arbitrary, in bad faith or discriminatory.

[70] There was direct testimony from Mr. Beauchamp that some grievors (but not all) were advised that settlement discussions were to take place and were also advised of the basic parameters of those settlement discussions. I accept this testimony as reliable. The e-mail from Mr. Clarke (Exhibit R-3) is not reliable, however, both because the author did not testify and because the e-mail was prepared long after the events at issue. I have given this exhibit no weight. There was evidence that the grievors were advised of the settlement after it had been signed, and after the bargaining agent representatives had agreed to withdraw the grievances. The failure to communicate with all of the grievors prior to the settlement of these grievances does not constitute a breach of the duty of fair representation, in these circumstances. The failure to communicate can result in a finding of a breach of the duty if a grievor has relevant information that the bargaining agent failed to consider. In this case, the grievors could not have provided any information that was not already in the bargaining agent's possession (see *Brideau and BRAC* (1986), 12 CLRBR (N.S.) 245 (CLRB)). It may be good practice and common sense to consult with all grievors in advance of finalizing a settlement of a collective agreement grievance, but the failure to do so in this case does not constitute a breach of subsection 10(2) of the *PSSRA*.

[71] The complainants allege that it was improper for a grievance that had been heard at the final level to be settled at a lower level. There are no rules on where a grievance can be settled. In fact, it is often more effective to discuss settlement at the level where the parties are familiar with the work unit and the issues. I find nothing improper in the fact that the matter was settled at a lower level.

[72] The complainants allege that Mr. Beauchamp was in a conflict of interest in that he was a grievor and also participated in the settlement discussions. Mr. Beauchamp received no preferential treatment in the settlement, and there is no evidence of any conflict in his role as both a grievor and a representative of the bargaining agent.

[73] The complainants also allege that Mr. Clarke was not recognized or certified as a bargaining agent. The implication is that Mr. Clarke did not have the requisite authority to participate in the settlement discussions. Mr. Clarke had the approval of the bargaining agent to participate in the settlement discussions. It is the organization, not the individual, which is certified as a bargaining agent. The certified bargaining agent is free to delegate responsibilities as it sees fit.

[74] In the complaint and in oral arguments, Mr. Nowen raised issues relating to those grievors whose grievances did not reach the final level. In the complaint, the complainants request that an attached list of employees, who claim to have submitted grievances in 1999, be included on the list of 24 grievors whose grievances were referred to adjudication. It is also alleged that Mr. Beauchamp was responsible for the failure to transmit these grievances to subsequent levels. There was no evidence introduced as to why the grievances were not transmitted to subsequent levels and no evidence that Mr. Beauchamp was in any way responsible. The failure to transmit grievances can occur for a variety of reasons, and there is no evidence that Mr. Beauchamp acted in bad faith, discriminatorily or arbitrarily in his handling of the grievances.

[75] The claim for damages raised by Mr. Mancini at the commencement of the hearing is without merit. Mr. Mancini submitted no authority for the Board to award damages. In any event, his claim is more appropriately considered as a claim for costs. Although he did not set out in particular the losses suffered by the bargaining agent, he referred to the costs of attending the hearing. There is no authority in the *PSSRA* for the awarding of costs against complainants. Accordingly, the claim for damages or costs is dismissed.

[76] Mr. Mancini's reference to the refusal of mediation by the complainants as support for the claim for damages was unfortunate. Mediation is a voluntary process and the decision of either party to participate or not participate in mediation is an internal decision that should never be a factor in any subsequent hearing.

[77] In conclusion, the complaint against UCCO-SACC-CSN and its representatives, Jean Beauchamp and Robert Clarke, is dismissed. The claim for damages against the complainants is also dismissed.

Ian R. Mackenzie,
Board Member

OTTAWA, October 28, 2003.