

**Date:** 20000419

**File:** 161-2-1111

**Citation:** 2000 PSSRB 33

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

**SIU M. LAI**

Complainant

and

**THE PROFESSIONAL INSTITUTE OF THE  
PUBLIC SERVICE OF CANADA**

Respondent

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

***Before:*** Marguerite-Marie Galipeau, Deputy Chairperson

***For the Complainant:*** Himself and Luigi Tucci

***For the Respondent:*** Ainslie Benedict, Counsel

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Heard at Toronto, Ontario,  
February 28 and 29, 2000.

## DECISION

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[1] Siu M. Lai (“the complainant”) is an Income Tax Auditor (AU-03) employed at Canada Customs Revenue Agency. He has referred to the Public Service Staff Relations Board a complaint under section 23 of the *Public Service Staff Relations Act (PSSRA)* in which he alleges that his bargaining agent, The Professional Institute of the Public Service of Canada (PIPSC), denied him representation and that this denial was made in an arbitrary or discriminatory manner or in bad faith.

[2] It is the complainant’s view that his bargaining agent has failed in its duty of fair representation which, under subsection 10(2) of the *PSSRA*, is described as follows:

[...]

(2) *No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit.*

[...]

[3] In summary, the complainant is of the view that his bargaining agent’s refusal to provide him with representation, subsequent to an application for judicial review in Federal Court, constitutes a breach of its duty of fair representation. The complainant is of the view that his bargaining agent should not have relied on a legal opinion which it obtained from Dougald Brown, counsel at the law firm Nelligan/Power. The complainant is of the view that this legal opinion did not consider all the material and relevant evidence applicable to his case. In addition, he is of the opinion that his bargaining agent has failed in its duty of fair representation by refusing to obtain the tapes and the official transcript of the Appeal Board established under the *Public Service Employment Act (PSEA)*, by refusing to file all necessary documents, on his behalf, in Federal Court and finally by refusing to make a motion in Federal Court, on his behalf as well, as to provide him with certain important information or documents.

[4] The facts can be summarized as follows.

### Facts

[5] On May 5, 1999, A.H. Rosenbaum, Chairman of an Appeal Board of the Public Service Commission, rendered a decision pursuant to an appeal lodged by the

complainant under section 21 of the *PSEA* against selections for appointment as a result of a competition.

[6] On May 17, 1999, the complainant asked PIPSC to seek judicial review of the Appeal Board's decision in Federal Court (Exhibit E-1).

[7] On June 9, 1999, a "Notice of Application" was filed in Federal Court by Dougald Brown, counsel (Nelligan/Power).

[8] On July 5, 1999, Dougald Brown sent a five-page legal opinion to PIPSC (Exhibit E-6). It was his professional opinion that this was not a case that would attract the Court's intervention.

[9] As a result, PIPSC advised the complainant that it would not pursue the matter any further but that the complainant was free to pursue the matter at his own risk, cost and expense.

[10] On July 9, 1999, the complainant informed PIPSC (Exhibit E-4) that he would pursue the matter even at his own cost but that before making a final decision he needed from PIPSC a copy of the legal opinion as well as the reasons why his own arguments were considered to be without merit. He also asked which additional documents were required to be filed in Federal Court and what was the deadline. He also asked that the tapes or transcript of the Appeal Board hearing be obtained for him.

[11] On July 12, 1999, Georges Nadeau, Manager, Representational Services, sent to the complainant, on PIPSC's behalf, the legal opinion (Exhibit E-5).

[12] On July 15, 1999, in a letter to PIPSC's representatives (Exhibit E-7), the complainant expressed his concerns and several "significant grounds for judicial review" which he felt the legal opinion did not address. He asked PIPSC to ask Nelligan/Power to reconsider its opinion in light of the arguments which he raised, including his conclusion that the Appeal Board had used the wrong standard of review.

[13] On July 16, 1999, PIPSC acknowledged receipt of the complainant's letter (Exhibit U-3), gave assurances to the complainant that its own lawyer, Claude Leclerc, would review his letter (Exhibit E-7) and subsequently asked Nelligan/Power to review its legal opinion in light of the complainant's submissions.

[14] On July 28, 1999, the firm Nelligan/Power replied that its legal opinion had not changed (Exhibit U-4).

[15] On July 29, 1999, Claude Leclerc, in-house counsel for PIPSC, advised the complainant that Nelligan/Power's opinion had not changed (Exhibit E-8) and that the complainant would have to make his own inquiries to obtain the tapes or transcript. Once more, the complainant was advised that PIPSC would not be pursuing the matter. Claude Leclerc, on behalf of PIPSC, asked him to provide his new address where the federal matter could be transferred.

[16] On August 9, 1999, the complainant informed PIPSC that he would represent himself, asked PIPSC for certain documents and also asked that PIPSC seek an extension of time on his behalf to file and serve the Application Record (Exhibit E-9).

[17] On the same day, PIPSC reiterated it would not be pursuing the matter any further and would not be filing or serving documents on his behalf (Exhibit E-10). However, on August 12, 1999, the law firm Nelligan/Power, hired by PIPSC, wrote to the complainant, included a copy of a "Notice of Intention to Act in Person" and informed the complainant it would serve and file it for him upon receipt of a signed copy (Exhibit U-6).

[18] On the same day the complainant informed PIPSC that, if the Executive Committee had not taken the decision to deny him representation, he wished to appeal the decision not to represent him to the Executive Committee in accordance with the "Conflict Resolution Procedures-Internal Labour Relations Matters" of PIPSC's policy manual. Once more, he insisted that the tapes and the official transcript be obtained.

[19] On August 16, 1999, the law firm Nelligan/Power sent to the complainant documents relevant to the judicial review application in the Federal Court and instructed him on the next steps to follow.

[20] On August 26, 1999, the president of PIPSC, Steve Hindle, informed the complainant that, after reviewing the documentation and after having had discussions with legal counsel on the implications of previous cases (*Au et al.* (PSC Appeal Board Decision; File 97-NAR-01383; and *Ewing vs. AG Canada* ([1999] F.C.J. No. 1038; Court File No.: T-2401-98), the Executive Committee had concluded that it would not pursue the matter further (Exhibit U-2).

[21] On September 18, 1999, the complainant filed a motion before the Federal Court for an order extending the time for serving and filing the Application Record in order to allow him to obtain the tapes and exhibits before the Public Service Commission Appeal Board (Exhibit E-18).

[22] The motion was granted by the Federal Court (Exhibit E-19).

[23] The complainant spent 15 consecutive days transcribing the portions of 33 tapes which, in his view, were relevant to his argument (Exhibit E-20).

[24] In response, the Attorney General filed a motion for an extension of time in order to obtain a complete transcript (Exhibit E-21).

[25] The complainant testified that he is of the opinion that the original legal opinion obtained by PIPSC from Nelligan/Power is arbitrary in that counsel in advising PIPSC did not have the benefit of the tapes or transcript of the Appeal Board hearing. The complainant is of the view that PIPSC should have obtained and remitted to the author of the legal opinion a copy of the tapes or transcript. He is further of the view that PIPSC's usual policy not to obtain transcripts is wrong. Transcripts should be obtained if circumstances require it and in his case they were necessary since the standard of review applied by the Appeal Board was at issue. If the Federal Court granted an extension of time to the complainant in order to prepare the transcript, then PIPSC should have obtained the tapes or transcript. The complainant is of the view that the Attorney General's subsequent request for an extension of time in order to check the transcripts in Federal Court is evidence that they were necessary.

[26] As a shop steward, the complainant is aware of PIPSC's policy in matters of judicial review but disagrees with the "conservative stand" it takes. In his particular case, he is of the view that PIPSC did not act with "due diligence" and was wrong to rely on a legal opinion which did not consider all the facts.

[27] This concludes the complainant's evidence.

[28] The respondent's evidence comprised the testimony of Claude Leclerc, General Counsel employed by PIPSC, as well as that of the President of PIPSC, Steve Hindle.

[29] Both persons related the different steps taken on the complainant's behalf. I have already enumerated them chronologically and therefore will not repeat their testimony. I will simply relate the following additional and relevant evidence given by both witnesses.

[30] Claude Leclerc is the person who asked Nelligan/Power to give PIPSC the initial legal opinion. He sent the law firm the entire package of information which had been transmitted to him by the complainant. He instructed counsel to file the necessary application in Federal Court to protect the time limits. Upon receiving the legal opinion (Exhibit E-6), he decided that the bargaining agent would not pursue the matter.

[31] In 15 years of employment at PIPSC, Claude Leclerc cannot recall that the transcription of tapes has been useful, nor can he recall ever having made a request to obtain them. Usually, an affidavit suffices if the Chairperson of the Appeal Board has omitted information and the written decision of the Appeal Board Chairperson stands on its own.

[32] Claude Leclerc pointed out that his decision not to pursue the matter in Federal Court was reviewed by the Executive Committee (comprising the President and the four Vice-presidents of PIPSC). Claude Leclerc attended the meeting of the Executive Committee and discussed with the Committee members the two legal opinions given by Nelligan/Power as well as the *Ewing (supra)* decision. The Appeal Board decision itself comprised approximately 47 pages. According to the President of PIPSC, the Executive Committee was of the opinion that no additional information needed to be excerpted from the tapes.

### Arguments

#### For the Complainant

[33] The argument of the complainant can be summarized as follows.

[34] The bargaining agent's decision not to pursue the application for judicial review was based on the recommendation of the legal opinion it obtained. That legal opinion was rendered without considering all the material and relevant evidence applicable to the case, including the relevant portions of the transcript of the Appeal Board's hearing in order to determine what standard of review was consistently and repeatedly

applied by the Appeal Board in reviewing the selection board's decision and the arguments of the appellants that the expected answers to certain income tax questions of the selection board were in fact wrong.

[35] Despite repeated requests made by the complainant to review his concerns, the bargaining agent, according to the complainant, failed to take the necessary steps to rectify the concerns. These concerns turned out to be valid as is evident from the fact that the respondent to the application for judicial review, the Attorney General of Canada, has now filed a motion in Federal Court for an extension of time to allow her to prepare her respondent's record in order to have a complete transcript of the hearing prepared.

[36] In summary, the complainant believes that he has demonstrated clearly that his bargaining agent has failed to fulfil its duty of due diligence owed to him as a member of the bargaining unit with respect to his application for judicial review.

#### For the Respondent

[37] The argument of counsel for the respondent can be summarized as follows.

[38] The complainant bears the onus of demonstrating that PIPSC acted arbitrarily, discriminatorily or in bad faith.

[39] The bargaining agent is of the view that the evidence does not establish a breach of said duty. The proceeding under section 23 of the *PSSRA* is not an inquiry into the Appeal Board's decision or the merit of the application for judicial review. Similarly, it is not the role of this Board to examine the correctness of either the legal opinion provided or of PIPSC's decision not to support the application for judicial review. Rather, the sole question for this Board is whether the bargaining agent acted reasonably and not in an arbitrary fashion or in a discriminatory fashion or in bad faith.

[40] The bargaining agent submits it handled the complainant's request with care and with due consideration of the merits of the Federal Court proceedings. There is no evidence whatsoever of bad faith towards the complainant. No doubt the complainant was very disappointed. On his own analysis of the Appeal Board's decision, he was confident the Federal Court would refer it to another appeal board. The legal opinion

obtained by PIPSC was different. According to this legal opinion, the application for judicial review was unlikely to succeed.

[41] It is a fair conclusion that, if the complainant spent days and days listening to tapes as he did, PIPSC is justified in having the policy in general not to obtain tapes. It was not unreasonable in the present context for PIPSC to take that position. Additionally, what actually went on at the hearing is not relevant unless a bias at the hearing is alleged. Judicial review can be dealt with through an affidavit. A single reading of the Appeal Board's decision leads one to conclude that in the end the Appeal Board applied the right standard of review despite its alternating use of the words "unreasonable" and "patently unreasonable".

[42] In a perfect world, a stable of law students could transcribe and analyse tapes, but the bargaining agent, after having made a cost/benefit analysis, has decided against doing that in every member's case. Even if, as the complainant suggests, the Attorney General wants to see the entire transcript, and therefore this would give validity to the argument that transcripts were relevant, this Board's role is not to decide if the legal opinion is correct but rather whether the bargaining agent acted in bad faith.

[43] There was no immediate deadline at the time the bargaining agent told the complainant it would not represent him. Therefore, regarding PIPSC's alleged refusal to file the necessary documents to protect the complainant's rights and PIPSC's failure to make a motion to extend the deadline, it should be noted that there was no imminent deadline at the time PIPSC told the complainant it would not represent him. Having made this decision, PIPSC did not have to seek an extension if the complainant did file an application. From July 6, 1999 on, the complainant was on notice that PIPSC was not inclined to pursue the matter.

[44] Claude Leclerc gave instructions that the complainant was to be given all relevant material but, in view of the decision not to proceed, the bargaining agent did not have the duty to give the complainant legal precedents.

[45] Another point which should be made is that the complainant's true complaint is with the legal opinion itself which is not grounded in the tapes. Therefore, if someone behaved arbitrarily, it was not the bargaining agent.



[46] The following jurisprudence was quoted: *Forsen* (Board file 161-2-733); *Aditya N. Varma* (15 CLRB (2d) 307); *Professor Uday Singh* ([1990] OLRB Rep. May 621); *Ford* (Board file 161-2-775); *International Union, United Plant Guard Workers of America Local 1962* ([1991] O.L.R.D. No. 313); *Metropolitan Toronto Civic Employee's Union Local 43* ([1995] O.L.R.D. No. 4954); *Robert McIntyre* ([1990] OLRB Rep. February 175).

### Reply

[47] In reply, the complainant stated that his bargaining agent acted in a manner that is arbitrary with respect to his application for judicial review by relying on the legal opinion that was rendered without considering all the material and relevant evidence and by not taking into consideration the repeated concerns he raised in his various letters. According to the complainant, the question is not whether the legal opinion is right or wrong. The question is whether it has been rendered based on all of the evidence that can be made available. According to the complainant, the answer is clearly in the negative. Therefore, as such, the legal opinion has been rendered in an arbitrary or capricious manner.

### Reasons for Decision

[48] This complaint is dismissed for the reasons that follow.

[49] I should start out by saying that I have reservations with regard to the proposition that a bargaining agent's duty of fair representation extends to matters which are outside the scope of the *PSSRA* and which, as in the present case, arise out of matters coming under the *PSEA*. Rather, I am inclined to think that the duty is limited to rights arising out of the *PSSRA*.

[50] However, since the bargaining agent indicated to me at the hearing that it was choosing not to question its obligation to represent members in matters arising outside of the *PSSRA*, I will explain why, assuming it had the legal obligation in the first place, I am of the view that it did not fail in the discharge of this duty in the terms it is couched under the *PSSRA* at subsection 10(2).

[51] In one word, the bargaining agent relied in good faith on a legal opinion.

[52] Not only did the bargaining agent turn its mind to the rights of the complainant, it sought legal advice from an expert independent from the bargaining agent, that is, Dougald Brown.

[53] Even if I were to accept the complainant's argument that Dougald Brown should have listened to the tapes or considered a transcript thereof before giving a legal opinion, then the fault, if any, would lie more with the author of the legal opinion than with the bargaining agent. I want to make it clear that I do not view it as a fault for Dougald Brown to have relied on the Appeal Board's reasons and decision to reach his legal opinion.

[54] Many administrative tribunals do not normally tape or transcribe their hearings and the Federal Court itself usually bases its decisions in judicial review on the written decision of the administrative tribunal and not on tapes or transcripts. Therefore, Dougald Brown did not form his opinion on anything less than what courts usually rely on. This is equally true of the bargaining agent.

[55] Therefore, I am of the view that neither the bargaining agent nor the author of the legal opinion, Dougald Brown, acted unreasonably.

[56] Even less do I think that either acted in bad faith, arbitrarily or in a discriminatory fashion. In fact, the evidence points to the opposite conclusion.

[57] The time limits in Federal Court were protected as Dougald Brown was drafting his legal opinion. The bargaining agent considered the complainant's concerns with the legal opinion and sought a second legal opinion (Exhibit U-4) from the law firm Nelligan/Power. It acknowledged the complainant's letters (Exhibits E-5, E-8, U-3) and kept him informed (Exhibit E-8) of its decisions. (Even the firm Nelligan/Power was helpful (Exhibits U-6 and U-8) to the complainant.) Finally, the complainant's situation was considered not only by the bargaining agent's in-house counsel, Claude Leclerc, but also by its Executive Committee.

[58] It is clear that the complainant has a difference of opinion with both counsel who gave the two legal opinions. In the end, his own opinion on the likelihood of success of his application in Federal Court may prevail, but that in and of itself would not mean that he did not receive fair representation from his bargaining agent.

[59] I am satisfied that the bargaining agent's decision not to represent him in Federal Court was arrived at after careful consideration of his arguments, including the necessity of hearing the tapes.

[60] As for the other points raised by the complainant, I am of the view that they do not, based on the evidence before me, support a finding that the bargaining agent acted in bad faith, arbitrarily or in a discriminatory fashion.

**Marguerite-Marie Galipeau,  
Deputy Chairperson**

OTTAWA, April 19, 2000.