Date: 20070316

File: 561-02-42

Citation: 2007 PSLRB 29

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

LEWIS S. EISEN

Complainant

and

UNION OF SOLICITOR GENERAL EMPLOYEES

Respondent

Indexed as
Eisen v. Union of Solicitor General Employees

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Georges Nadeau, Vice-Chairperson

For the Complainant: Walter T. Langley, counsel

For the Respondent: Chantal Homier-Nehmé, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
May 30 and 31, 2006.

I. Complaint before the Board

[1] On February 25, 2005, Lewis S. Eisen ("the complainant") filed a complaint against the Union of Solicitor General Employees ("the respondent"), a component of the Public Service Alliance of Canada ("the Alliance"), under section 23 of the *Public Service Staff Relations Act* ("the former *Act*"), R.S.C., 1985, c. P-35, alleging a failure to observe the prohibitions set out in subsection 10(2), by acting in a manner that was arbitrary, discriminatory and in bad faith in the representation provided to him.

[2] The complainant is claiming lost income of $34 203 on the assumption that his position would have been classified at the ED-EDS-03 subgroup and level. He is also seeking an order of payment of cost and interest on the above.

[3] On April 1, 2005, the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 39 of the *Public Service Modernization Act*, the Public Service Labour Relations Board ("the Board") continues to be seized with this complaint, which must be disposed of in accordance with the new *Act*.

II. Position of the parties

[4] At the onset of the hearing, the complainant indicated that his complaint was limited to the allegation that the respondent acted in a manner that was arbitrary and that he was abandoning is allegation that the respondent had acted in bad faith or in a discriminatory fashion.

[5] The complainant qualified his complaint by saying that the respondent had failed to deal with his request for assistance in a reasonable and timely fashion, that he had been provided with inaccurate advice and that the respondent had failed to take any reasonable steps to attempt to obtain the relief that he was seeking, which was to be paid at the appropriate level for the work that he was doing. The respondent also failed to advise the complainant of the steps that he could take on his own to redress the situation.

[6] The respondent maintained that it had advised the complainant of his rights and had provided appropriate advice and guidance. The complainant never requested that a grievance be filed on his behalf. The respondent maintained that no violation of subsection 10(2) of the former *Act* occurred.

III. Summary of the evidence

[7] The complainant testified first, on his own behalf. In July 2002, the complainant, a lawyer by training, who had been doing consulting work training federally appointed judges, was offered a term appointment for the period from July 29, 2002, until March 31, 2003. The position offered was that of Senior Trainer, JUDICOM with the Office of the Commissioner for Federal Judicial Affairs ("the Office") in Ottawa, and the letter of offer specified that the position was classified at the AS-04 group and level. The complainant accepted the offer. JUDICOM is:

> *. . . an electronic information and communication infrastructure that ensures that the body of judicial knowledge shared by judges is available to all judges, wherever they are located, and which provides for a secure vehicle for electronic communication and conferencing amongst these judges.*

[8] The process that led to the above-mentioned job offer had been ongoing for some time. While doing the consulting work, the complainant had been approached by the Office in May 2002 to review and sign a job description for the Senior Trainer, JUDICOM position. On May 29, 2002, the complainant, his supervisor and the manager signed a draft work description for position OOC-094, Senior Trainer, JUDICOM, Policy and Corporate Services, Communications and Information System Division at the Office (Exhibit C-1). On the document there is no mention with regard to classification or effective date of classification. The complainant's understanding was that this was a description of the work that he was doing and that it would become the "employed position" that he would be offered. A year later, the complainant was asked to review the job description and started to note on the document changes that he would have liked to see.

[9] The complainant testified that he was offered the position of Senior Trainer, JUDICOM in July 2002 and that at the time he raised the concern to his supervisor, Layla Michaud, that the AS-04 classification was not the appropriate one for this type of work. He understood that Ms. Michaud agreed and that people above her, including Suzanne Labbé, Deputy Commissioner for Federal Judicial Affairs, also agreed. He indicated that the Office's representatives were apologetic and anxious that he accept the position. The complainant contends that the Office offered to place him at the top of the pay scale and promised that, if he took the position, it would classify it properly and remunerate him retroactively to the date when he was appointed.

[10] The complainant indicated that he accepted the position on the basis that it would be reclassified. The complainant added that the Office was not able to promise him what the exact classification of the position would be, as it could have been AS-05, AS-06 or even in the LS group or ED-EDS subgroup. As time went by, the complainant raised the classification issue again and was given various reasons why the classification was being delayed. Either a new human resources (HR) employee was coming in or a new structure was being put in place. There was always some reason for the delay. When Deputy Commissioner Labbé introduced the new HR director, she again apologized for the delay in classifying and indicated that, since they had a new HR director, this problem would be straightened out. In March 2003, at the end of his initial term appointment, the complainant received a job offer extending his appointment for another year, at the same group and level.

[11] Michael Walker, the new manager of Information Technology, arrived in May 2003. According to the complainant, Mr. Walker had very different ideas about the role of government with respect to services to judges. Mr. Walker started to cut courses from the curriculum, as he believed that the government should not be in the training business. The complainant indicated that the work of training judges represented between 5 and 10 percent of his duties and the pinnacle course of that training was legal research on the Internet. This work really called on his expertise while the remaining 90 percent of his duties could have been done by others. By fall 2003, Mr. Walker had decided that the position of Senior Trainer, JUDICOM did not need a lawyer, as the duties no longer included teaching legal research online. Mr. Walker proceeded to put a job description together that reflected his views.

[12] The complainant was dissatisfied with this development. He felt that the position was being diminished and, because of that, expected it to be classified as an AS-04. He told Mr. Walker that that was not the position for which he had come on board, although the complainant acknowledged that management had the right to redefine his work and could downgrade the importance of the position. The complainant further indicated that, as a result of these developments, he did not expect to stay in the position and that, if Mr. Walker chose to go ahead, he should not expect the complainant to remain in the position.

[13] The complainant did not raise the issue of his classification with Mr. Walker, as he believed that Mr. Walker was not interested, since he was proceeding with the

redefinition of the position. A new draft work description was prepared for a Chief Trainer, JUDICOM, at the end of October 2003. This draft was sent to two consultants to obtain an opinion as to an appropriate classification. The complainant was told that they assessed that it would probably be classified as an AS-04. The complainant indicated that Mr. Walker and an HR representative told him that he could ask for the position to be formally reclassified. The result could have been that the position would be reclassified as an AS-04 or an AS-03 or even perhaps an AS-05, but this last possibility was unlikely. The complainant testified that he was asked if he wanted the position reclassified, to which he replied: "I don't care what you do with the job description, I need you to classify the job description I was hired on." The complainant contended that the previous job description reflected the work that he had done for the last two years until Mr. Walker arrived. He added that, if the position had been properly classified from the beginning (i.e. July 29, 2002) as an LS-1, he would have been renewed as an LS-1 and, if the position as it is now described was reclassified as an AS-03, he would benefit from the protection afforded to reclassified employees and would have retained his LS-1 classification. If this had been the case, he would have sought a deployment at a higher level more commensurate with his skills.

[14] The complainant indicated that it had taken until some time in November 2003 to get the opinion of the consultants and that it was in December 2003 that Mr. Walker told him that the complainant had to decide whether he wanted to ask for a classification review or not. The complainant said that it became apparent at that point in time that he was not making any headway and decided to contact the respondent.

[15] The complainant contacted Janson LaBond, a representative of the respondent, who came to see him at his office late in December 2003. After some preliminary discussion on membership, the complainant explained his case and Mr. LaBond referred him to the respondent's website. Mr. LaBond suggested that the complainant research the website and indicated that it contained information on the grievance process. The complainant indicated that he read through it.

[16] What the complainant wanted at that time was to have the original work description that he signed properly classified and to be remunerated accordingly retroactive to July 29, 2002. The complainant explained to Mr. LaBond why he felt that the AS-04 classification was not correct for the job. He testified that he was told by Mr. LaBond to look at the respondent's website and that he would be contacted in a

few days. The complainant found that the website contained good basic information. This was the first time that he contemplated getting involved in the grievance process. The complainant is of the view that Mr. LaBond knew that this would have been his first grievance, as he asked him to sign a membership card with the respondent.

[17] The complainant testified that, after consulting the respondent's website, he thought that the information was not applicable to his situation; it was helpful general information. The follow-up meeting with Mr. LaBond occurred a few days later. The complainant acknowledged that they played telephone tag. During this meeting, Mr. LaBond indicated to the complainant that he understood that the complainant was contemplating filing a classification grievance and that there was a 25-day time limit from the date of the last classification decision. The complainant was dissatisfied with this advice and told Mr. LaBond that this was a more complicated case than usual and that he needed to talk to an expert. The complainant explained to Mr. LaBond that he needed to grieve his original job description, not the new one. Mr. LaBond, although reluctantly, referred him to Doug Marshall, who, at the time, was the respondent's Regional Vice-President, Ottawa. The complainant indicated that Mr. LaBond seemed to resent the fact that the complainant wanted more information. Mr. LaBond provided the complainant with Mr. Marshall's phone number.

[18] The complainant contacted Mr. Marshall early in 2004. After explaining the situation briefly, the complainant was told that Mr. LaBond was the appropriate person to deal with the issue and to give the complainant direction. The complainant testified that he told Mr. Marshall that he believed that his situation was beyond Mr. LaBond's expertise and that the complainant wanted to speak with someone who knew the area well and could advise him. Mr. Marshall responded by telling the complainant that no such person was available. Mr. LaBond was the complainant's representative and the complainant had to deal with him.

[19] The complainant testified that he then contacted Mr. LaBond, who told him that he should file a classification grievance and asked him when the classification decision had been made. At that point, the complainant undertook to find out and contacted an HR officer of the Office. He informed the HR officer that he wanted to file a classification grievance and needed to know the date of the classification decision for his position. The HR officer indicated that the position had not been classified. The complainant informed Mr. LaBond of this. Mr. LaBond told the complainant that there

needed to be a classification date and added something about point rating. The complainant went back to the HR officer, who eventually showed him a document that predated the original job description. The complainant went back to Mr. LaBond and told him that the only available document was more than two years old. Mr. LaBond advised the complainant that the 25 days to file a classification grievance were up; the complainant could not grieve, because he needed a classification decision less than 25 days old. The complainant could not recall if Mr. LaBond mentioned anything else that the complainant could do to assist in resolving the matter.

[20] The complainant indicated that Mr. Walker left in February 2004 and that, from that point on, he reported directly to Deputy Commissioner Labbé. The complainant testified that he took over some of Mr. Walker's responsibilities. He took this opportunity to raise the issue of his classification with Deputy Commissioner Labbé. She promised that it would be rectified as soon as possible. However, by March 2004 he had had enough and made arrangements to be deployed outside of the Office to a PM-04 position. He informed Mr. LaBond of his decision to leave the Office. He was not told by Mr. LaBond that the fact of leaving the Office would mean that the complainant was losing any right to grieve the lack of classification of the original position. The complainant testified that, had he known that this was the case, he would have given the decision more thought. He mentioned to his new supervisor that he was in the midst of a classification dispute and was hoping to rectify the situation soon.

[21] Following his deployment, the complainant contacted the Canadian Employment and Immigration Union, the Alliance's component responsible for his new department. He was referred to Suzanne Gauthier, a Labour Relations Officer with the respondent, who provided assistance. She seemed to understand the complainant's situation and the recourses available to employees. Although Ms. Gauthier indicated to the complainant that he had no legal recourse available to him, she undertook to contact the Office to try resolving the situation. By November or December 2004, her efforts proved fruitless, as the Office refused to amend the classification. In February 2005, after seeking legal advice, the complainant filed this complaint. On May 29, 2005, he moved from a PM-04 to a PM-05 indeterminate position.

[22] In cross-examination, the complainant recognized that he had attempted to negotiate a higher salary with the Office, but had accepted work at the AS-04 group and level in the hope that the position would be classified at a higher level. He also

recognized that he had no experience in classification but was relying in good faith that the Office would abide by its commitment. Asked if he had considered filing a grievance under the collective agreement, he replied that he did not recall. At that time, he believed that he had an accurate statement of duties.

[23] The first witness that testified for the respondent was Mr. LaBond. Mr. LaBond has been a public service employee for 11 years.

[24] Mr. LaBond is an active member of his bargaining agent. He is currently a local representative and the alternate occupational health and safety representative with the Canadian Association of Professional Employees ("the Association"). Prior to becoming a member of the Association, he was active with the respondent, of which he was a local representative, and had been elected recording secretary and vice-president of local 70125, National Courts of Canada, which catered to employees working at the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court and the Office. Mr. LaBond also held a number of positions within the Alliance. Prior to joining the public service, Mr. LaBond was active in local 503 of the Canadian Union of Public Employees.

[25] Throughout his involvement with bargaining agents, Mr. LaBond had taken a number of training courses directed at local representatives. He noted that not all matters are adjudicable under the former *Act*.

[26] Mr. LaBond gave an outline of the Alliance's structure and the responsibilities of the official at each level of the grievance process. Grievances are first dealt with by local representatives who sign them as representatives of the bargaining agent. The local representatives present the grievance at levels one and two. A labour relations officer from the Alliance's component then ensures representation at the third level and it is the Alliance that ensures representation at adjudication, if necessary.

[27] Mr. LaBond testified that in the course of his role as local representative, he had signed off on about 15 classification grievances. There are generally three grievances filed for each classification issue: the first is designed to obtain a formal job description, the second requests acting pay and, finally, the third grievance deals with classification.

[28] Mr. LaBond indicated that, in challenging a job classification, the first step is to obtain a complete and current job description, a point rating and organizational chart for the job description, as provided for under most collective agreements. This is necessary, particularly when a job description has not been updated for a period of time. Mr. LaBond indicated that he also advised employees to file acting pay and classification grievances to establish a retroactive date if the process was successful. Once a new job description is completed, the employer will send it for classification. If the classification decision is not satisfactory, the classification grievance may be supported by the Alliance, if one of its classification specialists believe that the case has merit. An employee can pursue a classification grievance on his own without the assistance or support of his bargaining agent. In all classification cases, it is an employer's board that determines the fate of the grievance and the matter is not adjudicable before an independent third party.

[29] Mr. LaBond recalls meeting with the complainant around December 2003 and again in January 2004. The complainant had a job description and classification related issue. He was unhappy with his classification. He had been verbally promised an upwards reclassification by a manager, but this had not occurred. There were no written documents in support of his claim. Mr. LaBond commented that it was not the first time that he had heard this type of story.

[30] Mr. LaBond testified that he explained to the complainant his options and indicated to him that the first thing to do was to get a current and up-to-date job description. He referred the complainant to the tool box on the respondent's website, which explained how to request a job description, which grievances to file and how those grievances are linked. Mr. LaBond added that he advised the complainant to file all three grievances. The complainant was non-committal and did not seem to be overjoyed by the prospect. The complainant commented that his term appointment was up in March 2004, that he was not sure whether it would be renewed, and that he might be out the door before the grievance process ran its course. Mr. LaBond indicated to the complainant that the first step was to file the three grievances and get started on the job description to clarify the classification of the position. Mr. LaBond indicated that the employee is responsible for getting a current and updated job description, a current classification, the point rating by factor and the organizational chart. At the end of the meeting, the complainant indicated that he would take the information under advisement and that he would initiate a request for a job

description. Mr. LaBond noted that often term employees facing clear violations of the collective agreement are reluctant to file grievances as their term appointment may not be renewed.

[31] When the complainant asked to speak to a more experienced representative of the respondent, Mr. LaBond referred him to Mr. Marshall. Mr. LaBond indicated that he felt comfortable with the assistance that he provided to the complainant and that he would not have done things differently.

[32] In cross-examination, Mr. LaBond recognized that he had not opened a file regarding the complainant. He indicated that he normally opens file only once a grievance was filed. The complainant had not filed a grievance. Mr. LaBond confirmed that the complainant had made him aware of the promise that had been made to reclassify the position and that the complainant was seeking retroactive pay at a higher level. Mr. LaBond maintained that the job description that the complainant had provided was a draft and had not been classified. This was not an official job description and the first task, in order to address the situation, was to get an official job description, point rating and organizational chart.

[33] In re-examination, Mr. LaBond noted that to file a classification grievance, an employee needs a classification decision and added that classification grievances were not adjudicable.

[34] The respondent called on Ms. Gauthier to testify next. She indicated that information about the respondent's functioning and structure is on its website. Her role was to provide representation to members at the final level of the grievance process and to consultation committees. She was also involved with training and various meetings and conferences for the respondent.

[35] Ms. Gauthier testified that classification grievances are filed with the employer at the local level and are forwarded to the final level of the classification grievance process. The respondent's role is to ensure that the classification grievance file is complete and contains an official job description, the classification and point rating of the job, and an organizational chart provided by the employer. Without these documents, a classification officer cannot perform a proper evaluation of the case. A job content grievance is carried by the respondent at all levels of the grievance process. The respondent's local representative has responsibility to present the

grievance at the first three levels, while the respondent ensures representation at the final level of the grievance process.

[36] Ms. Gauthier testified that it was not her role to provide advice to individual employees. The respondent represents 12 000 employees grouped into 120 locals. It would not be feasible to provide advice to individual employees. That responsibility resides with the respondent's local representatives.

[37] Ms. Gauthier described the process undertaken when an employee expresses dissatisfaction with the classification of his or her position. She first indicated that an employee can grieve the classification if he or she has received a classification decision within the previous 25 days. If no such decision exists, the way to kick-start the process is to have changes made to the job description. The employee is advised to carefully read the document containing the job description and request that additional duties, if any, be incorporated into the job description. If that happens, then there is a need for the employer to review the classification and obtain a new classification decision. If the employer refuses to amend the job description, then the employee is advised to file a job content grievance, an acting pay grievance and a classification grievance, all at the same time. The acting pay grievance and the classification grievance are put in abeyance until the job content grievance is resolved. The respondent's local representative is aware of the procedure and it is contained in the tool box on the respondent's website.

[38] Ms. Gauthier indicated that the complainant had contacted one of her colleagues, Don Reid, and that Mr. Reid had referred the complainant's inquiry to her. Ms. Gauthier contacted the complainant and, after being made aware of his situation, she informed him that he could no longer file a job content grievance because, at that time, he was no longer in the position. Ms. Gauthier noted that without a job content grievance there would be no new classification decision. However, she would attempt to intervene with the Office and see what could be done. Unfortunately, the Office was not helpful and she reported back to the complainant that no more could be done.

IV. Summary of the arguments

A. For the complainant

[39] The complainant argued that he considered that the respondent had acted in an arbitrary and capricious manner. The respondent had failed to determine, after a

reasonable and comprehensive review, what recourse was available to the complainant to redress his situation. The complainant wanted his position to be reclassified and retroactive pay for the period during which he performed the duties.

[40] The complainant added that the respondent had failed to adequately consider the problem in a way that could lead to a reclassification and retroactive pay. It is the complainant's submission that the respondent failed to consider or provide him with options that may have been available to resolve his problem.

[41] After reviewing the evidence, the complainant indicated that, although he had a legal background, he was a neophyte when it came to the process of dispute resolution with his employer. It was the first time that he needed the assistance of his bargaining agent to resolve a problem.

[42] The complainant noted that he sought out the respondent and provided details of his situation to Mr. LaBond. From Mr. LaBond's testimony, it is fair to say that Mr. LaBond understood the problem. This was a reclassification and a retroactive pay issue. The problem was not to have the complainant's then current duties classified. The complainant was satisfied that his then current duties set out in exhibit C-3, were properly classified and that he would not get higher pay for performing them. The complainant had learned from discussing with an HR representative of the Office that there was a risk that the classification likely would either remain the same or could come back lower. The complainant had no interest in having the modified position reclassified with regard to the duties that he was performing just before leaving the Office.

[43] The complainant argued that although Mr. LaBond had experience in grievance-related matters, he did not have experience in a problem similar to the complainant's. Mr. LaBond's experience was with job descriptions that did not reflect the duties performed. The complainant's problem was the opposite.

[44] The complainant argued that Mr. LaBond took no notes during their meeting, that he did not review the work descriptions for the position and that he did not speak with anyone at the Office, despite the fact that he had said that, on some occasions, he would try to resolve the problem informally with the employer. Mr. LaBond did not speak to any representative of the respondent or the Alliance, as he considered the complainant's situation to be a routine problem. Despite the fact that there are

classification officers at the Alliance, Mr. LaBond made no effort to speak to or to get advice from them, nor did he suggest to the complainant that it might be prudent for him to speak to a classification officer.

[45] The complainant was clearly looking for someone with specific expertise, and asked Mr. LaBond to talk with such a person on two occasions, to which Mr. LaBond responded by saying: "These persons are not available and besides you have me."

[46] At the first meeting, Mr. LaBond suggested that the complainant do research on his own and referred him to the tool box on the respondent's website. The complainant argued that it was clear from their meeting that Mr. LaBond was of the point of view that the respondent could not help with the classification and retroactive pay issues. Mr. LaBond had reached this conclusion after a brief interview with the complainant and without taking any appropriate steps.

[47] The complainant added that he asked to speak to an expert. Mr. LaBond referred him to Mr. Marshall, who referred the complainant back to Mr. LaBond. When speaking with Mr. LaBond, the complainant was told that he needed to get his job reclassified. Mr. LaBond did not tell the complainant that if he did what Mr. LaBond suggested, there may have been a possibility of resolving the problem. There appeared to be no hope of getting the position reclassified retroactively because the complainant had not filed a grievance within the required 25 days of a reclassification decision. The only possible conclusion would have been that the complainant's then current duties would have received a formal classification and that he would have been paid in accordance with that classification. The complainant concluded that that would not help him. He had received that last advice from an HR representative and two consultants.

[48] The complainant testified that he told Mr. LaBond about leaving the Office. Mr. LaBond said that the subject came up because the complainant's term appointment was coming to an end on March 31, 2004. In either case, Mr. LaBond made no comment about the impact of leaving the Office on the complaint's ability to do anything about his classification issue. As it turns out, leaving the Office was fatal to any opportunity for the complainant to find a satisfactory resolution to his problem through the grievance process. Had he been made aware of the issue, he would have thought very carefully about leaving the Office.

[49] The complainant added that when Mr. LaBond first learned of the complainant's two-fold problem, his only advice was to obtain a job description for his current duties. Mr. LaBond gave the complainant advice and direction without taking steps to evaluate and analyze the problem or taking steps to seek counsel from any representative of the respondent.

[50] The complainant believes that he was trying to resolve a pre-contractual promise and that Mr. LaBond took no steps whatsoever to verify that that was the case. On various occasions, the complainant's superiors had renewed their commitment to classify the Senior Trainer, JUDICOM position. At no time did the respondent take any steps to determine if these commitments were grievable. The complainant decided to leave based on information provided to him. This information was provided without any rationale or reasonable analysis of his problem. The fact that he deployed to another position without knowing that, by doing so, he could no longer grieve was extremely prejudicial to his position. He could no longer pursue the resolution of his problem.

[51] In these circumstances, the complainant argued that the only remedy available was one of damages. From the evidence, the Board should conclude that the damages claimed are reasonable and that they are the only remedy reasonable and available to the complainant at this point.

[52] The complainant referred me to *Savoury v. Canadian Merchant Service Guild,* 2001 PSSRB 79, ¶126, which describes how a bargaining agent's discretion must be exercised and what should be expected of its representatives. He also brought *Griffiths v. United Steelworkers of America and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 101,* [2002] CIRB no. 208, to my attention. That case relied on *Canadian Merchant Service Guild v. Gagnon,* [1984] 1 S.C.R. 509, which enunciated five principles that should govern the duty of fair representation. The complainant also noted that actions or omissions that exceed simple negligence may constitute arbitrariness and that, flagrant errors, consistent with a non-caring attitude, may also be arbitrary. He also referred me to *Jakutavicius v. Public Service Alliance of Canada,* 2005 PSLRB 70, where the bargaining agent had failed to inform the complainant of her right to pursue her case without the support of the bargaining agent, despite repeated requests for such information.

[53] For those reasons, the complainant is urging the Board to find that the respondent has acted in such an arbitrary manner that it has failed in its duty to fairly represent him. He requested that the Board order monetary compensation.

B. <u>For the respondent</u>

[54] The respondent indicated that it did not act in an arbitrary manner. It submits that the complainant has not established on a balance of probabilities that the respondent acted in such a manner.

[55] In his complaint, the complainant alleged that the respondent acted arbitrarily by failing to deal with a request for assistance in a reasonable and timely manner. He further alleged that the respondent provided inaccurate advice and generally failed to carry out its responsibilities. However, to the contrary, as established through testimony, Mr. LaBond took immediate steps to meet the complainant upon being contacted by him. Mr. LaBond, as a volunteer and local representative of the respondent, met with the complainant during their lunch break. Mr. LaBond did a full assessment of the issue raised by the complainant with respect to the promise made by the Office. Mr. LaBond advised the complainant of available options and the steps that needed to be taken to get a reclassification. Mr. LaBond clearly advised the complainant of the documents needed to start the process. The respondent never refused to file a grievance on the complainant's behalf and never provided him with inaccurate advice. Mr. LaBond responded to each of the complainant's requests in a timely manner, with accurate advice and information. As stated in his testimony, Mr. LaBond never insisted on having a classification decision before a grievance could be filed.

[56] In cross-examination, the complainant confirmed that he was aware of the collective agreement and the work description signed in May 2002 (Exhibit C-1). The document was not classified and is in a draft form. If the complainant wanted a final job description, he could have resorted to article 55 of his collective agreement and made such a request to the Office. The complainant chose not to do so. Instead, he sat on his rights and waited for the Office to act on its promise. When asked in cross-examination why he did not grieve in 2002, the complainant could not provide an explanation.

[57] The complainant did not contact the respondent until late in 2003, when he received a new job description from Mr. Walker (Exhibit C-3). At that point in time, it was already too late. Management had taken the decision that he would no longer train judges to do legal research on the Internet. The Office had provided a new job description, still in a draft form.

[58] When the complainant met with Mr. LaBond, Mr. LaBond understood the issue, had experience in these matters and advised the complainant as to the only option available, which was to request an up-to-date position description under article 55 of the collective agreement. The complainant decided to take this advice under consideration and requested to speak to someone else. He was referred to Mr. Marshall, who gave the complainant essentially the same advice and referred him back to Mr. LaBond.

[59] The respondent argued that the evidence showed that the complainant was not happy, since he wanted a quick resolution, as his term appointment was ending in March. The evidence also revealed that Mr. LaBond and the complainant spoke of the end of the term appointment, and the fact that if the complainant pursued the matter, it might jeopardize the renewal of his term.

[60] The respondent added that the complainant never asked Mr. LaBond, or anyone else, how his rights would be affected if he left the Office. Mr. LaBond stated that if the complainant had communicated his intention to file a grievance, Mr. LaBond would have filed one on his behalf. Mr. LaBond would have assembled the documentation and opened a file. However, Mr. LaBond required that the complainant obtain the specific documents from the Office in order to initiate the process.

[61] In response to the complainant's claim that he was a neophyte in labour relations, the respondent argued that the complainant had legal training and is trained in the area of performing legal research on the Internet. Had he been truly interested in pursuing this matter, he would have been able to find the name and the telephone number of one of the respondent's representatives. The complainant chose not to do so until he was deployed outside the Office. Furthermore, although the complainant was deployed outside the Office, Ms. Gauthier communicated with him on a regular basis and took steps to advance the complainant's concerns to the Office, even though she knew that he had lost the opportunity to grieve.

[62] The respondent noted that the fundamental issue was that the Office had failed to act on its promise. This was not a case of a breach of the collective agreement. The promise had been made in 2002 and the complainant contacted the respondent in late 2003. The complainant contacted the respondent to pursue a claim on a failure to fulfill a promise to which the respondent was not a party. The respondent's main role is to enforce the collective agreement, not matters or agreements outside of it.

[63] The respondent argued that, nonetheless, it provided advice and guidance to the complainant, who chose not to accept it and not to file a grievance. The complainant did not act on the advice that he received from Messrs. LaBond and Marshall. The complainant did not lose an opportunity to grieve because of the respondent's failure to provide him with advice or guidance.

[64] The evidence revealed that the complainant accepted the position mentioned in the letter of offer (Exhibit C-2) at the AS-04 classification level. He should have known the consequences of not including in the letter the promise made by the employer.

[65] The respondent never refused to file a grievance on the complainant's behalf and never provided him with inaccurate advice. The respondent replied to each of his request with accurate advice and assistance.

[66] The respondent added, in the alternative, that should the Board find that the advice provided was inaccurate, it did not amount to arbitrariness on the respondent's part. That the complainant believes that the information that he received from Mr. LaBond was not helpful, does not meet the standard for arbitrariness. Promises made by the Office are not covered by the collective agreement. They are not adjudicable and not enforceable in a court of law unless they meet specific legal criteria. Despite the fact that this was an arrangement outside the collective agreement, the respondent provided representation and fully assessed the complainant's situation.

[67] Although the respondent recognizes that it has a duty of fair representation, it submitted that the standard for scrutiny should be lower with respect to the enforcement of a personal contract and issues related to classification, as such matters are outside the collective agreement.

[68] The respondent reviewed the jurisprudence and submitted *Lipscomb v. Public Service Alliance of Canada et al.,* 2000 PSSRB 66, *Sophocleous v. Pascucci and Richey*, PSSRB File No. 161-02-861 (19980121) and *Charron v. Lafrance et al.,* PSSRB File No. 448-H-4 (19900208). It argued that *Savoury* was distinguishable on the facts. That decision stands for the proposition that the bargaining agent has an obligation to inform employees of their rights and options. That is what the respondent provided to the complaining in this case. With regard to *Jakutavicius*, the respondent noted that it did not refuse to file or pursue a grievance on the complainant's behalf. Contrary to the situation in *Jakutavicius*, the respondent provided the complainant with advice on the steps necessary to pursue his case.

[69] The respondent noted that the claim for $34 203 in damages was speculative, as there was no way to determine if the Office, in any event, would have reclassified the position to the level that the complainant wanted. The assignment of duties is an employer's prerogative and an area where an employer has wide discretion. It is an area where the respondent constantly struggles on behalf of its members. The complainant has not proven that he suffered any damages as a result of the Office's promise not being kept nor should the respondent be held liable for such speculative damages.

[70] The respondent requested that the complainant's request for damages be dismissed for lack of merit and requested that his request to be afforded legal costs also be dismissed.

C. <u>Complainant's rebuttal</u>

[71] In reply, the complainant noted that *Lipscomb*, *Sophocleous* and *Charron* dealt with situations outside the collective agreement. He further noted that this was the first time that the respondent took the position that the complainant's situation was outside the collective agreement. He added that this case was not a matter of a pre-contract arrangement but rather a commitment verbally given during the employment period and it is wrong to say that it is outside the collective agreement.

[72] The complainant objected to the assertion that, because he was a lawyer and had knowledge on how to conduct legal research, he could have done his case by himself. He put the matter in the respondent's hands and requested assistance but did not get it. What he did get was advice to the effect that he should request a job

description. He did make the request and was advised by the Office that it was prepared to comply and get the position reclassified, while warning him that the result may not be favorable in the circumstances at the time. The complainant argued that he was relying on the Office's commitment when he approached the respondent. The complainant could have shown that there had been an ongoing commitment and the fact that the duties of the position had recently changed did not alter his claim.

V. Reasons

[73] The complainant claimed that a commitment was made at the time that he accepted the first one-year term appointment to the Office. That commitment was that the classification of the position that he was accepting as an AS-04 was to be reviewed. The Office did not act on that promise and when he was offered a second term at the same level, the complainant again accepted it with his understanding that the classification of the position would be reviewed. This again did not occur. During the course of his second term appointment, a new manager was appointed, who modified his duties. It was only some months after this change occurred that the complainant approached the respondent to request assistance.

[74] The respondent noticed that the complainant had a draft job description and advised him to seek a current and complete job description from the Office, in accordance with his collective agreement. That is in most cases the first step that the respondent recommends to take in attempting to support a case to obtain the reclassification of a position when no official job description is available. When the complainant approached the Office and was told that the position would not likely be reclassified at the level that he was seeking, he did not pursue the matter. The complainant contended that the respondent failed to provide him with the advice and assistance that would have allowed him to successfully pursue his claim and, thus, failed in its duty of fair representation. I disagree.

[75] A change in work assignment took place during the course of the summer 2003. This change was reflected in the revised draft job description provided to the complainant in October 2003 and it was late in December 2003 before he contacted Mr. LaBond. Mr. LaBond reviewed the case and provided him with what he believed was the appropriate advice in the circumstances.

[76] The complainant waited until after the work assignment had changed to contact the respondent and seek advice on how to proceed to redress the situation. In doing so, he jeopardized his rights to make that claim. He did not act within the 25-day timeframe provided in the collective agreement to file a grievance, he accepted a reappointment at the same group and level and allowed the situation to evolve to a point where his claim would become difficult, if not impossible, to address. Even when he was suggested a course of action by Mr. LaBond to attempt to deal with the issue, he did not pursue it.

[77] The complainant was aware of his rate of pay since his first appointment and chose to rely on a verbal promise that his classification would be reviewed. Although this failure to abide by a promise could have been grieved, the Office's failure to live by it was not in itself a subject matter that would have allowed the grievance to be referred to adjudication under the former *Act.* At best he would have been able to bring the matter to the attention of his superiors responsible to reply to the grievance in the grievance procedure. Such was done in an informal manner by Ms. Gauthier. The Office's reply was in the negative.

[78] The evidence revealed that the respondent provided the complainant with what it believed was the appropriate advice to attempt to stake a claim in his particular circumstances. There is absolutely no evidence to support a claim that the respondent acted in an arbitrary fashion. I have no reason to conclude otherwise. The complainant has not established, on a balance of probabilities, that the complainant provided him with flagrantly erroneous advice, and certainly not with advice that would suggest negligence or carelessness on the respondent's part. To the contrary, the evidence suggests that the respondent's representatives were trying to help the complainant, especially Ms. Gauthier, who went out of her way to help him.

[79] I am also of the opinion that the damages sought are speculative at best. Even if I had accepted that the respondent failed in its duty of fair representation towards the complainant, there was no guarantee whatsoever that his claim that the position warranted a higher classification had any basis and would have succeeded to the extent that he expected. The complainant readily admitted having no experience in classification of positions.

[80] I feel compelled to comment on a bargaining agent's duty to represent all employees in the bargaining unit. In response to the complainant's argument that he

was a neophyte in face of the grievance process, the respondent replied at the hearing that the complainant had the ability to conduct his own research in pursuit of his reclassification claim. Although I am convinced that such an attitude had nothing to do with the way that Messrs. LaBond, Marshall and Reid or Ms. Gauthier dealt with the complainant's request for help, I am perplexed by the fact that this argument was made at the hearing. I remind the respondent that a bargaining agent's duty of fair representation is owed to all employees in the bargaining unit, regardless of their education or sophistication level.

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

(The Order appears on the next page)

VI. Order

[82] The complaint is dismissed.

March 16, 2007.

Georges Nadeau,
Vice-Chairperson