Date: 20070125

File: 561-34-17

Citation: 2007 PSLRB 13

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

STANLEY BAHNIUK

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Bahniuk v. Public Service Alliance of Canada

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

REASONS FOR DECISION

Before: John Steeves, Board Member

For the Complainant: Himself

For the Respondent: Laurin Mair, Public Service Alliance of Canada

Heard at Calgary, Alberta,
October 18 and 19, 2006.

Complaint before the Board

[1] This is a decision with regards to a complaint made by Stanley Bahniuk ("the complainant") that his bargaining agent, the Public Service Alliance of Canada (PSAC), breached its duty of fair representation.

[2] The complaint, in this case, is dated July 9, 2004, and was filed pursuant to the *Public Service Staff Relations Act (PSSRA)*. 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*.

Summary of the arguments

[3] Mr. Bahniuk alleges that his bargaining agent represented him in a way that was discriminatory, arbitrary and in bad faith. Specifically, the bargaining agent deliberately made it difficult for him to fight the actions of the employer and colluded with the employer to deceive him. The complainant seeks an order that the bargaining agent must pay for independent counsel for all future issues with the employer.

[4] The bargaining agent submits that there was no breach of its duty of fair representation. It never failed to represent Mr. Bahniuk. Some of his grievances were successful and others were not, but every grievance was handled fairly and properly. The bargaining agent seeks the dismissal of the complaint.

Summary of the evidence

[5] The employer is the Canada Revenue Agency ("the employer" or CRA) which, among other things provides revenue services for the Government of Canada. The bargaining agent represents employees of the employer. The bargaining agent includes the Union of Taxation Employees (UTE).

[6] Mr. Bahniuk is an employee of the employer, a member of the bargaining agent and a member of the UTE, having commenced employment in 1986. His current position is as a team leader in Revenue Collection, located in Calgary, Alberta.

[7] Two preliminary comments may assist with the reading of the summary of the evidence in this case. First, many of the communications between the various people involved in this complaint were conducted by means of email and the evidence includes a large number of these messages. Some of these are reproduced below and these have been reproduced as written, unless otherwise indicated.

[8] The second point is that, in his evidence and argument, Mr. Bahniuk had difficulty explaining the grievances he was concerned about and identifying the ones that are the subject of his complainant of unfair representation. At one point, in response to my request for particulars, the complaint entered into evidence an email dated October 10, 2006 (from Ms. Krista Quinn, Senior Staff Relations Advisor to the employer), which listed 14 grievances. However, he also testified that these were "new" grievances and were not the subject of his unfair representation complaint. Further, he had "reached an understanding" with the bargaining agent that he would represent himself on all grievances from a certain date onwards. It was not stated expressly, but the context of the evidence around the grievances listed in the October 10, 2006, email was that these were subject to that understanding.

[9] The bargaining agent entered a list of grievances it believed were at issue in this complaint. They number 10, and the bargaining agent's description of them is as follows:

(a) *March 4, 2003* *Conversion Policy*
Closed, 19/04/05

(b) *March 4, 2003* *Salary Inequity*
Closed, 15/03/04

(c) *March 4, 2003* *Anniversary date*
Closed, 19/04/05

(d) *October 15, 2003* *Performance action plan*
Closed, 23/11/04

(e) *October 15, 2003* *Pay increment*
Granted at final level, closed 23/11/04

(f) *March 7, 2003* *Employee management report*
Closed, 30/01/06

(g) *August 30, 2004* *Management performance leave*
Letters sent to complainant on August 31, 2006 and October 11, 2006 requesting information.

(h) January 6, 2004 Statement of duties
Settlement mediated, June 2006

(i) March 15, 2005 Statement of duties
Settlement mediated, June 2006

(j) Grievances filed in 2004

The last item in the bargaining agent's list (March 15, 2005) also has the following statement:

> *Informed by the Employer that they were transmitted at final, 2005? Letter sent to Regional Vice President requesting files, e-mail sent to Stan Bahniuk requesting file"*

[10] Mr. Bahniuk recognized some of these grievances, but not all. And he was not able to say which ones were at issue with his complaint. As will be seen, the result of this is that the evidence is not always clear about which grievance is being discussed at a particular time.

[11] The events giving rise to this complaint, according to Mr. Bahniuk, started in February 2001, when he was elected as president of the Calgary local of the bargaining agent. The complainant testified that he defeated the then incumbent president, but the rest of the executive stayed the same. The result was that the complainant was seen as an outsider, according to him. His role of president became very difficult, because, among other things, the former president made numerous requests of him and wanted immediate action. The complainant thought this was "sour grapes".

[12] While Mr. Bahniuk was the local president, the bargaining agent was involved in national collective bargaining with the employer. Bargaining was not going well, and the bargaining agent was discussing various job actions across the country. In Calgary, the local discussed picketing the home of a member of the Board of Directors of the employer. According to the evidence of the complainant, he questioned taking that action, especially on a weekday, because he was concerned that members of the bargaining agent would be subject to discipline. In his evidence, he said he was also concerned about being "underhanded", because ". . . that kind of one-up-man-ship creates barriers to negotiations". The complainant went further than questioning this action within the local; in cross-examination, he agreed that he had disclosed the picketing tactics of the bargaining agent to the employer. He was challenged about this

within the executive of the bargaining agent at the time and, in an email dated May 15, 2001, to the National President of UTE, the complainant stated:

. . .

> *As far as my discussing issues with management, I have no regrets as it was simply for the specific purpose of trying to get the two parties together to enable them to express their concerns and view points of the impact on employees and CRA's productivity that the stall in negotiations is having on the organization.*

. . .

[13] In the end, the picketing took place outside the home of the Calgary director on a Saturday, not during normal working hours. The employer reprimanded the employees who took part in the picketing for harassment, and the reprimands were grieved. In a decision dated October 19, 2001, the Public Service Staff Relations Board directed that the employer rescind and destroy the letters of reprimand on the basis that the employees were conducting a peaceful demonstration on public property and on their own time (*Public Service Alliance of Canada and Barnowski v. Canada Customs and Revenue Agency, et al,* 2001 PSSRB 105).

[14] There was dissatisfaction among the executive and members of the local about Mr. Bahniuk's actions as president of the local. This came to a head at an executive meeting when he agreed to resign if he lost a vote of confidence at a membership meeting. The vote took place in July 2001; it was against the complainant and he resigned. He testified, ". . . I felt my focus as president would be against management but it turned out that I was fighting the local . . . ." He also testified that this event ". . . established the basis for the actions that followed . . ." because it ". . . turned out that I was fighting the local . . .", as well as the employer. After this, the complainant testified: ". . . I chose to fight my fight alone, without the union. . . ."

[15] From January 14, 2003, to February 17, 2003, Mr. Bahniuk was off work while he participated in a fitness-to-work evaluation. The conclusion of this evaluation was that he was fit to work. There was a disagreement about the status of the complainant while he was off for this evaluation. Eventually, the employer accepted that the time

was sick time. The complainant testified that the bargaining agent "helped me with that".

[16] Mr. Bahniuk testified early in 2003, was when he began to have a "strained" relationship with management and ". . . the few people who control management did not like the facts that I brought up unpleasant things. . . ." Further, ". . . according to the employer, I should not even be on this planet. . . ." And by August 2003, according to the complainant, he was being "bombarded" and "harassed". He estimated that he had three to five grievances about this time. One related to a decision by the employer to put him on action plans, another related to a performance appraisal and another related to a selection panel; these are discussed below. There were others (". . . maybe another one or two. . .") but he was unable to provide any further information about them in his evidence. The overall objective in his mind was ". . . to get the union to help establish that the employer was being malicious. . . ."

[17] As an employee, Mr. Bahniuk was subject to periodic performance appraisals and, as a manager, he could receive the benefit of a 10-day "performance leave", if he met a number of requirements. One of these was that he had to receive a rating of "meets" or "exceeds" in the category of ongoing performance assessment. The complainant received a performance appraisal dated September 10, 2003. It stated that he had not met or exceeded his ongoing performance assessment. Because of this deficiency (he met all the other requirements), he was not entitled to performance leave. The complainant grieved this appraisal; he described it as "punitive" in his evidence.

[18] The grievance proceeded through the grievance procedure with the assistance of the bargaining agent. It came before an adjudicator of the Board, and a hearing was held on July 26 and 27, 2005. Mr. Bahniuk was represented by bargaining agent. In a decision dated December 20, 2005, Adjudicator MacKenzie denied the grievance (*Bahniuk v. Canada Revenue Agency,* 2005 PSLRB 177). As he pointed out, there are very narrow grounds for an adjudicator to review a performance appraisal; generally, a grievance must establish bad faith on the part of an employer.

[19] With regards to the action plans, the first one was for the period from February 18, 2003, to March 31, 2004, and it arose because the employer was concerned about how Mr. Bahniuk related to his co-workers and management. Some of

the measurement criteria set out in a document dated February 18, 2003, were as follows:

. . .

> *Your conduct must demonstrate cooperation with your peers and superiors. You are expected to think through the possible impact and/or consequences of your actions. Your conduct must not belittle, cause personal humiliation, or cause embarrassment to your peers or superiors. …*
>
> *You will demonstrate sensitivity to the rights of individuals.*
>
> . . .
>
> *Where you disagree with Management's position, discussions with Management will be held privately. Once Management has made a decision, you are expected to stop challenging management and to support the decision.*
>
> . . .

The action plan also stated that ". . . failure to meet these expectations will result in consideration" of ". . . administrative action, which may include termination of employment."

[20] Also in 2003, Mr. Bahniuk was a member of a selection panel and he believed the employer had acted unethically and illegally with regards to the panel's work. He filed a grievance about this, but the grievance procedure was not the right forum for the complainant's concerns; there was a question as to whether he had standing to challenge a board of which he was a member. Nonetheless, the grievance went to the third level, apparently with the support of the bargaining agent. In his evidence, the complainant stated, ". . . I disagree with the employer. They say there was an alternative dispute mechanism but it was not for me. The issue was the integrity of the board and I believe that is grievable. . . ."

[21] The February 2003 action plan required regular meetings every two weeks to discuss ". . . work performance . . . including deficiencies and observed improvements. . . " and written feedback to Mr. Bahniuk was to be provided every month. At first, a representative from the bargaining agent, Gwen Jackson, attended the regular meetings with the complainant.

[22] On July 28, 2003, Betty Oates, a representative of the employer, emailed Mr. Bahniuk to advise him that the employer wanted to have a level-two meeting with him about one of his grievances. Some dates were proposed. The complainant replied by email on the same day and stated, ". . . as you know, there are several grievances in question and I expect review of them and at each level will take several days . . . ." He asked for "assurances", including an assurance that the Acting Director would have the authority to ". . . overrule decisions made, not only by her boss, but the Assistant Commissioner Prairie region and the Assistant Commissioner for human resources. . . ." This was because, ". . . I believe that direction could only come from the Commissioner or Minister. . . . [but]. . . Even then, I am not sure there isn't a significant conflict of interest situation that a court or the public service integrity office would approve. . . ."

[23] The next day, July 29, 2003 (by this time Mr. Bahniuk was copying the local president of the bargaining agent, Bob Carpenter, with his emails), Ms. Oates advised the complainant, among other things, that she could not give the assurances he sought, " . . . because, without a hearing, management is not yet aware of the details of your specific grievances. . . ." A long series of emails followed in which, for example, the complainant asked whether Ms. Oates was ". . . indicating the Agency will not provide an impartial assessment. . . ." To this, Ms. Oates replied, ". . . I am not saying anything. I am simply wishing to schedule Level II consultation. . . ." The final email in this series is one from Mr. Carpenter, who simply said that, in response to inquiries by the complainant, he would be contacted by the Vice-President of the bargaining agent to address the issue of ". . . consultation at each level of the grievance procedure. . . ." He testified that this exchange was significant because it ". . . does not give me comfort that the union will carry these on and represent me. . . ."

[24] On September 4, 2003, Ms. Oates emailed Mr. Bahniuk to confirm a meeting on September 8, 2003. The subject was a level-one consultation on grievance 60731. The complainant testified that this was a grievance about his performance appraisal. He requested, by email, "assistance" from Michael Ell, a representative of the bargaining agent. In his evidence, the complainant explained that he wanted ". . . someone to take notes because I don't trust what is going on. . . ." Mr. Ell replied by email, ". . . What kind of assistance are you looking for. . . ?" and the complainant stated, ". . . I am requesting that someone attend the consultation to confirm what was said. . . ." The reply from Mr. Ell was:

. . .

> *If that's what you are looking for, then you can bring anyone else in the meeting with you to take notes for you. If you wish it to be more confidential than that I would recommend that you attempt to have the day of the meeting changed as I don't believe any of our executive will be available on Monday. Tuesday, Wednesday or Thursday are all fine with me. I will be away Monday.*

. . .

[25] According to Mr. Bahniuk's evidence, he was being told to "wait", and this was the ". . . first inkling that I was going to be attacked by the union as well as the employer. . . . "

[26] On September 24, 2003, Mr. Bahniuk was advised by Terry Dupuis, Regional Vice-President of UTE, that ". . . all Union matters on your behalf, will now be handled by Ian Daykin/Alternate Regional Vice President of the Union of Taxation Employees. . . ." Further, ". . . at no time, are you to contact the Local Officers or Stewards in Calgary with any Union matters. Ian will be more than happy to handle any of these requests that you may have." To this the complainant replied on the same day stating:

. . .

> *First question, who will assist me with any meetings with local management? Second question, I have verbally requested copy of notes from the local but yet to receive them. Thirdly in the past Ian supposedly has represented me on several issues however has never initiated contact with me and what I view deliberately went against my wishes in granting an extension. I question Ian's desire to wanting to help me.*

. . .

This resulted in a series of emails in which Mr. Dupuis stated that Mr. Daykin was the right person to represent Mr. Bahniuk and the complainant disagreed.

[27] Mr. Daykin then emailed Mr. Bahniuk on September 26, 2003, as follows:

> *I will begin by answering the two queries you raised on the afternoon of Sept 24.*
>
> *1] I will assist you when I am available.*

> *2] I will endeavour to get "copies of notes" when you advise me what specific notes and where I will find them. I have no intention of trying to guess what it is that you are specifically wanting or needing, or going through the numerous documentation that has been generated on your behalf.*
>
> *3] I take exception to the comments you are making and will not be replying in this regard.*
>
> *Now I wish to advise you of the administrative process that you are to follow so that I may provide you with any and all "help" that you may require of me.*
>
> *I am bound by the PSAC Constitution and the Bylaws of the UTE in the area of representation. I wish to assure you that I will assist you where valid concerns are brought forward by you, and in the manner in which I assist the 650 members here in Edmonton and the 850 members within our Region.*
>
> *What this means is you are not to expect immediate, individualized service as it will not happen. You are welcome to suggest how you wish your concerns to be handled, but I will make the ultimate determination on almost all matters. My preference is to deal in all matters via email so that we both have a written record of all things.*
>
> *I will be sharing all details of your correspondence, concerns, grievances, complaints, whatever, with my Regional Vice President (Terry Dupuis) and our National President (Betty Bannon). As well, they will refer all matters that you bring to their attention to me for resolution. This is being done to ensure that one person, me, is aware of all things pertaining to you.*
>
> *I hope this clarifies matters, and I look forward to working with you.*

[28] To this, Mr. Bahniuk replied on September 29, 2003, that he did not believe that Mr. Daykin had answered all of his questions. He provided copies of some emails and stated, ". . . Ian's statement that 'I will assist you when I am available' does not give me a great deal of comfort that I will get timely or willing assistance. . . ." In his testimony, the complainant described this as a significant exchange because, ". . . [I] feel like I am harassed and no one cares . . . This is the start of the relationship with the union and they will assist you when they are available. . . ."

[29] Another series of emails commenced, including one dated September 29, 2003, from Mr. Daykin to the complainant, stating as follows:

. . .

> *Until I am advised of a **specific date, time and reason** for any meeting where you request my presence, I cannot answer this question [whether Daykin would attend a meeting with management "this week"].*
>
> . . .
>
> *I will make every effort to get these notes [taken by Gwen Jackson] for you. As they now are housed in our National Office, I will instruct them to action your request as soon as possible. Where would you like them sent?*
>
> . . .
>
> *In closing, our Region (UTE Rocky Mountains) has recently unanimously decided that there will be absolutely no referrals of any grievance to third level until such time as a new Assistant Commissioner is appointed. You should be aware of this, as there will be no exceptions. And, as far as your wanting to "hear all consultation hearings", unless you are willing to pay all costs associated with travel to/from Ottawa, I doubt that your request will be considered. If this is your wish, please advise further.*

. . .

[30] Mr. Bahniuk replied with four more questions in an email dated the same date. He also testified "I did not ask to be represented from someone in Edmonton or Ottawa". Mr. Daykin answered, in another email dated September 29, 2003, that he ". . . will advise you accordingly. . ." about attending a meeting ". . . once supplied with date, time and reason. . . . " He also said:

. . .

> *Let me make it perfectly clear to you that your collective agreement allows you representation. It does not give you the right to pick and choose who or where, nor does it enable you to have a representative at your beck and call. You are one of many I represent on any given day, Mr. Bahniuk.*

. . .

[31] Mr. Bahniuk replied on October 6, 2003, "I am requesting assistance at all meetings I have with management and this is one". Mr. Daykin then repeated that he needed "specific details" of the meeting to determine if he should be there in person, via teleconference or "at all". He also stated that all employees must ". . . meet with management at one time or another, and to request that a union representative assist

at each and every meeting that you have with them is something that merely cannot be entertained. . . . " The complainant's answer to this was that the meeting was ". . . a regular meeting about work plan issues. I don't get an agenda. . . ." He also stated that, ". . . In the past management notes have not been accurate and I need someone to take notes so I have a third party to confirm what was said. I believe it is my right to receive assistance from the Union". Then Mr. Daykin said, "As you point out, it is your right to receive assistance. . . but it is not your right to dictate the type of assistance that you receive. I don't know how much clearer I can make this. . . . "

[32] Mr. Bahniuk persisted and said, "I have given you as much as I know, please tell me if you are going to assist me or not". Mr. Daykin replied that the "limited information" provided to him indicated that it was a regular meeting on work plan issues and the complainant's "only concern" was that management's notes have not been accurate. On this basis, he was ". . . prepared to assist as follows: You keep notes, they keep notes, and at the end of the discussion you both agree to one another's notes by signing them an [*sic*] dating them. Glad I could be of assistance. This closes this matter. . . . "

[33] With regards to this exchange, Mr. Bahniuk testified that he believed that the ". . . feedback is twisted and late . . . I am under attack and the union is creating barriers . . . the union is against me and not for me. . . . "

[34] Mr. Bahniuk pursued his concerns with the National President of the bargaining agent, Nycole Turmel. She asked Betty Bannon, Component President, to review the complainant's concerns. In an email dated October 16, 2003, Ms. Turmel provided the complainant with a copy of Ms. Bannon's comments:

. . .

> *This is an ex executive member who has worn out all of the local reps. He is hostile and very dictating and demanding on them. There are no local reps (Calgary) any longer who will deal with him. At out President's Conference, I met with the local President, Bob Carpenter, RVP* [Regional Vice-President]*, Terry Dupuis and Alternate RVP, Ian Daykin regarding this member. We decided that the Alternate RVP would handle and do all dealings between the Union and this member. The Alternate RVP is in Edmonton. I do not see this as a problem in this day and age of telephone, fax and e-mail. Ian is also a local President and very knowledgeable*

> *and trained individual in union matters. The member could not have a better rep.*
>
> *In my opinion, this member is attempting to demand personalized service and attempting to dictate what is done and the way it is done and it is not always in his own best interest. If he doesn't get his own way I fully expect him to file some kind of charge against the union. Unless you are prepared to assign a regional rep to him his rep, as far as UTE is concerned, is Ian Daykin, who is more than qualified to assist this member.*
>
> . . .

Ms. Turmel's comment to Mr. Bahniuk was that "I do believe that, at this point, your representatives are doing their best to provide you with the services you need".

[35] Mr. Bahniuk's reply to Ms. Turmel was on the same day:

> . . .
>
> *I don't know what Betty told you however is it appropriate not to even talk to the member when representing him in a grievance? Is it appropriate to deliberately delay grievance hearings without consulting the member when I asked him specifically not to give extensions. There are other issues that I would like to discuss in person or on the phone. My opinion is that you are not interested in helping the members of the union but more interested in collecting dues.*
>
> . . .

The complainant emailed Ms. Turmel about two hours later to add that it would have been appropriate for her to talk to both parties, including him, before coming to any conclusion. Then, on November 4, 2003, he wrote to Ms. Turmel that, "Obviously you don't feel that talking to me is warranted". In his evidence, Mr. Bahniuk characterized this exchange as an extension of his problems; it was ". . . collusion among all the people involved. . ." and the problem was ". . . far broader than the local union. . . ."

[36] In another exchange of emails, Mr. Bahniuk asked Mr. Dupuis on June 22, 2004, to provide a representative for a "potential disciplinary issue". Mr. Dupuis responded in an email of the same day that the complainant should take notes, as described previously by Mr. Daykin. The next day, the complainant wrote to Mr. Dupuis and said, "I take it you are refusing me union assistance in this matter". Mr. Dupuis replied the

same day, "No such words were in my message, please read my message again. Thank you".

[37] As above, Ms. Jackson represented and assisted Mr. Bahniuk until her leave in June 2003 She returned to work in September 2003, and, some time after there was an incident involving her and the complainant. According to undated notes taken by Ms. Jackson, the complainant approached her at her desk at work. He asked her about whether she had any information about his situation. She replied that she had been away and had not had time to look into his situation, but she could meet with him to discuss what had happened. There was also a discussion about representation for the complainant at meetings with the employer, and Ms. Jackson again indicated she was not up to date. She also said she thought things may have changed since she left on her leave, because of a harassment grievance and another grievance filed the day before. Then, according to Ms. Jackson's notes, the following occurred:

. . .

> *- I asked him why he filed a grievance without any discussion with a local rep and without requesting union representation. He claims that no union representative was available. He stated that Bob was always busy and I was away. I replied that Michael Ell was available, probably would have signed a grievance and that Mike works right in the section.*
>
> *- At this point, he claimed that he he* [*sic*] *was handling this grievance exactly the same way that I handled his grievance "with no discussion or consultation." He stated he wanted to be "assisted" by a local rep on his situation.*
>
> *- At this point, I* [deleted in original exhibit] *I replied that I was not his puppet where he pulled the strings and I did what he told me to do. He went into a rant about his rights as a union member and that this was his right and this was what he paid his dues for.*
>
> *- I raised my voice at this point and stated that UTE determined the grievance procedure and how the grievance will be handled and that if he did not like it to talked (sic) to Betty Bannon. He kept going on about what he pays his dues for.*
>
> *- I told him to go away and leave me alone. The barrage continued. I stated emphatically that I did not want to discuss the situation with him, that I found him* [deleted in original exhibit] *and to leave me alone. He continued. I forcefully*

> *stated that I did not want to talk to him and that I wanted him to leave my work area and that if he continued I would charge him with harassment.*
>
> *- He walked a few feet away from my desk and asked if I was sure that I said that loud enough and thanked me.*
>
> . . .

The employer conducted an investigation of this incident. There was at least one witness to this exchange and the employer spoke to Mr. Bahniuk about their policy against harassment. An email dated October 24, 2003, records that the complainant ". . .had significant concerns with the harassment discussion we had with him today. . ." and that the complainant would be advising Internal Affairs.

[38] In an email dated October 23, 2004, Mr. Bahniuk asked Internal Affairs to conduct "an immediate investigation", but a reply dated November 4, 2003, explained that a request for an investigation had to come from someone at the director level or above. The alternative of making a request for an investigation to the Human Resources Regional Director was provided. The evidence does not indicate that the complainant's concerns went further or that the complainant was disciplined for this incident. In his evidence, the complainant described this situation as, ". . . I am being proactive here but nothing was done. . . . "

[39] In his evidence, Mr. Bahniuk maintained that this ". . . did not become an incident until it was brought up in consultation meetings. . ."; and this is apparently a reference to a regular meeting of November 6, 2003, conducted pursuant to the action plan. Notes from that meeting record the complainant stating that, ". . . Gwen wanted to put on a big public display. . . [she] . . . wanted to 'make a scene' deliberately to protect herself. . . " and her actions were "inappropriate".

[40] In any event, according to Mr. Bahniuk, the significance of this incident is that it ". . . created an environment where there was no way I felt comfortable getting help from the union. They colluded with management to raise barriers so there is no way I could meet the action plan. . ." and they ". . . colluded with management to undermine me". Further, the incident is proof of a "very close relationship" between the employer and the union and ". . . I am out there by myself because the union is creating more frustration than I can experience. . . . "

[41] At the end of his evidence, Mr. Bahniuk provided something of a summary of his concerns. He identified five situations where there were important consequences to him as a result of the lack of union representation.

[42] The first situation was a request Mr. Bahniuk made to record all meetings with management. He was allowed to record one meeting, and then the employer wanted him to pay duplication and other costs; he refused. The employer refused the request to record the meetings, the complainant grieved this and his grievance was in turn denied. In his evidence the complainant stated, ". . . I chose not to go to level four . . . at that point [there was] no point. . . . "

[43] A second situation involved Mr. Bahniuk's attempt to grieve the denial of his performance leave (as discussed above) under clause 54.03 of the collective agreement. This grievance went to the final level. The employer wrote to the complainant on January 7, 2004 to advise him that section 91 of the *PSSRA* stated that an employee is not entitled to present a grievance involving the interpretation or application of the collective agreement unless he has the approval of and is represented by the bargaining agent. The complainant did not have this approval and the bargaining agent did not represent him. In his evidence, the complainant testified that this, ". . . shows how I was impacted. I lost any representation I could have . . . I had no alternative and I was bombarded by the union to tell me to do this or do that. . . . "

[44] A third situation involved the action plan dated February 18, 2003 (also discussed above). The complainant explained in his evidence that he did not receive representation for the regular meetings required by the action plan after Ms. Jackson went on leave. The plan includes a statement that failure to meet the expectations of the plan will result in consideration of administrative action ". . . which may include termination of employment". The complainant's evidence was that this was a "serious matter" and the bargaining agent ". . . represented me originally and then abandoned me".

[45] Mr. Bahniuk was, fourthly, also concerned with the responses of the bargaining agent with regards to his performance reviews. One of these was entered in evidence, and the complainant described it as ". . . page after page of my failures in every conceivable way". He also stated that it describes "poor interaction with people" and "paints me as incompetent." The problem, as he testified, was that ". . . several years had passed without any determination of the employer's bad faith and harassment".

[46] The final situation raised by Mr. Bahniuk as an important consequence of the lack of union representation relates to a second action plan, for the period July 1, 2004 to March 31, 2005. He testified that the employer ". . . chose to isolate me and they gave me no choice about what I had to do and where I had to go. . . . " This was "still harassment", it was a ". . . consequence of being abandoned by the union . . ." and ". . . I do not believe the union would represent anyone else this way. . . . " The complainant also entered into evidence an email dated April 12, 2006, from a representative of the bargaining agent, Deb Seaboyer, to another representative of the bargaining agent, Jacquie de Aguayo, with a copy to the complainant. Ms. Seaboyer discussed the merits of proceeding with three grievances that were all at the fourth level. The subjects of the grievances are not stated, but the discussion is about performance appraisals and the complainant's allegation that the employer is ". . . punishing him by withholding his management leave". Ms. Seaboyer compared this grievance with three previous grievances and her opinion was that, ". . . I was pretty sure that the fact we lost the last one was significant unless a different pattern could be proven". I understand from the complainant's evidence that these grievances did not proceed to adjudication.

[47] The bargaining agent called one witness, Ms. Jackson, an officer with the bargaining agent since 1990. As noted above, she represented Mr. Bahniuk until she went on leave in June 2004. She testified that the bargaining agent is not required to send a representative to every meeting management has with an employee. If the meeting is about discipline, they "usually try to attend" if the meeting is to render a decision on discipline. With regards to the complainant, Ms. Jackson explained that she had signed every grievance he had brought to her, and she was not aware of any situations where he was not provided with representation when he asked for it. In cross-examination, Ms. Jackson was asked whether she had ever refused to attend a meeting required by an action plan when she was asked to do so and when she was available. She answered, ". . . not that I am aware of".

Reasons

[48] The bargaining agent's duty of fair representation is described in section 187 of the new *Act* (formerly sub-section 10(2) of the *PSSRA)* as follows:

> ***187.*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is*

> *arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[49] The judgment in *Canadian Merchant Service Guild v. Gagnon,* [1984] 1 S.C.R. 509, is commonly used to explain the principles underlying the 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. (at 527).*
>
> . . .

[50] A subsequent judgment of the Supreme Court of Canada, *Centre hospitalier Régina Ltée v. Québec (Labour Court)*, [1990] 1 S.C.R. 1330 at 1349, discussed these principles in more detail at para. 38:

> . . .
>
> *As Gagnon pointed out, even when the union is acting as a defender of an employee's rights (which in its estimation are valid), it must take into account the interests of the bargaining unit as a whole in exercising its discretion whether or not to proceed with a grievance. The union has a*

> *discretion to weigh these divergent interests and adopt the solution which it feels is fairest.*
>
> . . .

[51] The decision of *James W.D. Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000 (*2003), 91 CLRBR (2d) 33 (BCLRB), citing an earlier decision, *Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can LRBR 196 (BCLRB), is also instructive. The actions of a union must not be in bad faith in the sense of personal hostility, political revenge or dishonesty. There can be no discrimination, including unequal treatment of employees, whether on account of such factors as race and sex (which are prohibited grounds under the *Canadian Human Rights Act)* or simple personal favouritism. And a union cannot act arbitrarily by disregarding the interests of one of the employees in a perfunctory manner. Rather, a union ". . . must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations." (*Rayonier,* at page 201-202).

[52] Finally, *Judd* summarizes the difficult judgment that a bargaining agent must make:

> . . .
>
> ***42.*** *When a union decides not to proceed with a grievance because of relevant workplace considerations – for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit* – it is doing its job of representing the employees*. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of* [the duty of fair representation]*.*
>
> . . .

[53] In this case, Mr. Bahniuk believes he has been (and continues to be) "bombarded" and "harassed" by the employer. He goes further and says the employer believes he ". . . should not even be on this planet". Examples of the employer's

wrongdoing are the action plan and the performance appraisals. A particular concern of the complainant with regards to the appraisals is that he did not receive his management performance leave because he did not meet or exceed in the performance assessment category.

[54] I am unable to assist Mr. Bahniuk with regards to the problems he has with the employer. My role is to determine whether the bargaining agent breached its duty of fair representation in this case.

[55] The evidence, with regards to the performance appraisals, is that at least one grievance was filed by the bargaining agent on behalf of Mr. Bahniuk, perhaps as many as four. One of these grievances proceeded to adjudication before the Board, where the bargaining agent represented the complainant. The 2005 decision of the adjudicator denied that grievance. As that decision makes clear, the grounds available for an employee to challenge a performance appraisal through the grievance procedure are very limited; they require an employee to demonstrate that the employer acted in bad faith. Nonetheless, the bargaining agent took the complainant's grievance through the levels of the grievance procedure and to adjudication. The evidence is also that the bargaining agent commenced other grievances about the performance appraisal or appraisals of the complainant. These were withdrawn at various stages, sometimes at the fourth level, and did not proceed to adjudication.

[56] I am unable to find that the bargaining agent breached its duty of fair representation with regards to its actions involving the performance appraisals. Again, the bargaining agent advanced one grievance to adjudication and others to the fourth level of the grievance procedure. The evidence is that these grievances were not adjudicable and the bargaining agent all it could in advancing them. Indeed, Mr. Bahniuk acknowledges that the bargaining agent assisted him on some grievances. The complainant disagrees with the result of the previous decision of the adjudicator and with the decision of the bargaining agent not to proceed to adjudication on all grievances related to his performance appraisals. However, the bargaining agent is not required to proceed with every grievance an employee wants to advance. As *Judd* makes clear, it is the business of the bargaining agent to make decisions about which grievances will proceed and which ones will not proceed, based on the requirements and resources of the organization as a whole. In this case, the complainant had more

than adequate representation on more than one occasion on an issue that was very difficult to win.

[57] Mr. Bahniuk raises a concern in his various emails about the bargaining agent agreeing with the employer to extend the time limits for various levels of the grievance procedure. In his view, this delayed his grievances and is a breach of the duty of fair representation. I appreciate the complainant's concerns about his grievances proceeding in a timely manner. However, in my view, it has to be recognized that extensions of time limits are a normal, and even necessary, aspect of the practicalities of managing grievances. Certainly, an agreement to extend time limits is preferable to letting time limits lapse, thereby jeopardizing the validity of the grievance itself. There are undoubtedly situations where excessive and objectionable delay has been caused by extensions of time, but that is not the evidence in this case.

[58] The action plan is obviously a significant concern for Mr. Bahniuk. As above, he disagrees with the reasons for the plan in the first place and with the impact it has had on him and his work. The main issue for the purposes of this complaint is representation at the regular meetings required by the plan. As noted above, Ms. Jackson attended with the complainant until her leave in June 2004, and then there were the sometimes-heated exchanges with Messrs. Dupuis and Daykin. The complainant asserts that he was denied representation for these meetings.

[59] It is true that the action plan itself stated that failure to meet the requirements of the plan would result in administrative action, ". . . which may include termination of employment." However, Mr. Bahniuk agreed that no administrative action was taken as a result of the action plan. There is no evidence that any of the regular meetings were about discipline or even to discuss discipline. Nor is there any evidence that the meetings were critical in the sense of gathering information or interviewing the complainant for the possibility of disciplinary action. I accept that the meetings were upsetting for the complainant, and that he was anxious about attending them. However, I do not agree with the complainant that the duty of fair representation requires the bargaining agent to expend resources for this type of meeting.

[60] As Mr. Bahniuk pointed out, Ms. Jackson represented and assisted the complainant at the regular action plan meetings until she left on leave in June 2004. However, when she gave evidence, it was clear that she had a high-personal standard when it came to representing members. The complainant valued and relied on

Ms. Jackson's involvement in his case. However, if a bargaining agent representative exceeds the legal duty of fair representation, that is a matter of personal choice by the representative and not something that I can impose. A related matter is Ms. Jackson's evidence that she was not aware of any situations where she had ever refused to attend a meeting required by an action plan when she was asked to do so and was available. That is evidence of, again, Ms. Jackson's personal approach to representing her members, rather than a statement of the legal requirements of the duty of fair representation.

[61] I also acknowledge the comments by Mr. Daykin in his email exchanges with Mr. Bahniuk. Certainly, the tone and contents of his messages reflected impatience and frustration on Mr. Daykin's part. For example, there is the statement that any expectation of ". . . individualized service . . . will not happen". I accept there may have been a more diplomatic way to state this. But, despite the hard language, the statement is an accurate description of the duty of fair representation. Further, Mr. Daykin advised the complainant to get someone else to take notes, or to compare his notes with the employer's at the end of the meeting. This was not what the complainant wanted to hear, but it was responsive to a situation that required monitoring and did not involve actual disciplinary issues.

[62] The evidence also demonstrates that by this time Mr. Bahniuk was on something of a campaign against the bargaining agent. He was upset that he could not get the same level of service he had received from Ms. Jackson. By fall 2003 no local representatives would work with the complainant, including Ms. Jackson. He was spending a large amount of time sending emails and raising various questions. Some of these questions were valid ones. Again, it is understandable that the complainant would want some assistance if it was available (as it was with Ms. Jackson). However, he was given an answer early on in the exchanges, he did not accept it and he persisted beyond the point where there was any reason to believe the result would change. Then, at about the same time, there was the unfortunate exchange with Ms. Jackson just after she returned from her leave in fall 2003. At the beginning of the conversation, she was willing to help the complainant and even to meet with him again. But by the end, she had to tell him to leave her alone because he was on a "rant".

[63] Mr. Bahniuk's response was to counter employer's allegation of harassment by making his own charge of harassment. I am unable to find any aspect of this incident

that raises an issue of unfair representation, and, in particular, I cannot agree with the extreme view of the complainant that it reflects "collusion" between employer and the bargaining agent to "undermine" him. Nor can I agree that it was collusion when the employer interviewed the complainant about the alleged harassment of Ms. Jackson at work in fall 2003. He does not dispute the events as recorded in Ms. Jackson's notes, and there was a witness to the incident (or part of it) available to the employer.

[64] The complainant seems genuinely convinced there has been collusion, but the evidence does not support that conclusion. Personal hostility by a bargaining agent against a member is an important element to consider in a complaint of unfair representation, but I am unable to find that it is a factor in this case.

[65] There is also the history of Mr. Bahniuk being the president of the Calgary local of the bargaining agent. Obviously, things did not go well during his tenure, especially with his disclosure of the picketing tactics of the bargaining agent to the employer, and then his resignation. And he alleges there was "sour grapes" from the person he defeated in the election for president. The complainant submits that this history was the beginning of his problems with the bargaining agent and that its refusal to represent him was motivated by this history; as he put it, ". . . It turned out I was fighting the local" as well as the employer. I can infer that there was dissatisfaction within the membership about the complainant while he was president. That much is self-evident. However, the evidence is also that the complainant engaged virtually every level of the bargaining agent, from the Local President to the Alternate Regional Vice-President to the Regional Vice-President to the National President. I am unable to find that all of these people were intent on violating the duty of fair representation, as submitted by the complainant. Nor can I find that they inadvertently violated their duty. At times, a bargaining agent representative was direct with the complainant, such as Mr. Daykin. But the many communications between the complainant and officials of the bargaining agent are characterized by appropriate advice and, it has to be said, considerable patience.

[66] I note the reference in Ms. Bannon's report to Ms. Turmel (in the latter's email of October 16, 2003) that Mr. Bahniuk was an ". . . ex executive member who has worn out all the local reps. . . . " The complainant submits that this is evidence that his prior history as president influenced the bargaining agent against him. I am unable to reach that conclusion. The statement by Ms. Bannon is a statement of fact with respect to the

complainant's former position with the union and with respect to his relationship with the Calgary local. A degree of exasperation can be read into Ms. Bannon's report, but this does not transgress into partisanship or hostility. Overall, it is measured and accurate.

[67] I agree with the bargaining agent that Mr. Bahniuk wanted it to provide a representative whenever he thought he needed one. I also agree with the bargaining agent that the duty of fair representation does not require it to comply with the complainant's requests. The duty of fair representation recognizes that a bargaining agent has limited resources and it has considerable discretion to make reasoned decisions about how to distribute those resources. Within the context of the duty of fair representation, I am unable to find fault with the judgments made by the bargaining agent in this case.

[68] As a final matter, it is important to point out that Mr. Bahniuk has simply misread some of the exchanges with the bargaining agent. For example, in an exchange with Mr. Ell, the complainant asked for someone to attend a meeting to confirm what was said. Mr. Ell replied that the complainant could get someone to take notes. Further, if the complainant wanted it ". . . to be more confidential. . . ", Mr. Ell provided some dates when a member of the executive would be available. In my view, this was an entirely appropriate response from the bargaining agent. However, the complainant testified that this was the ". . . first inkling that I was going to be attacked by the union, as well as the employer". That is simply not a reasonable interpretation of this incident.

[69] In summary, Mr. Bahniuk makes a number of extreme allegations against the bargaining agent, including collusion with the employer to undermine him, which are not supported by the evidence. Further, the duty of fair representation does not require the bargaining agent to take the direction of individual members when deciding what grievances to pursue, when to negotiate extensions of time and what grievances to settle. Finally, an individual member of a bargaining agent has the right to representation, but that is not an absolute or unlimited right. It does not mean, for example, that the member can insist that the bargaining agent provide a representative whenever he wants one. As long as the bargaining agent is not arbitrary or discriminatory or acting in bad faith when it exercises its judgment in these matters, it is entitled to distribute the limited resources of the organization in a reasoned fashion.

[70] As is the case in many complaints of unfair representation, Mr. Bahniuk believes the bargaining agent deliberately breached its duty of unfair representation when it did not represent him. However, it is an essential part of the bargaining agent's job to make the kind of judgments it made in this case, and I am unable to find that it breached its duty of fair representation.

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

(The Order appears on the next page)

Order

[72] The complaint is dismissed.

January 25, 2007.

John Steeves,
Board Member