Date: 20101209

File: 561-02-483

Citation: 2010 PSLRB 128

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

KENNETH SAMUEL MANELLA

Complainant

and

TREASURY BOARD OF CANADA SECRETARIAT AND PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as
Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada

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

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Complainant: Himself

For the Respondents: Patricia A. Phee, Treasury Board of Canada Secretariat, and Krista Devine, Public Service Alliance of Canada

Decided on the basis of written submissions,
filed July 29, August 24, September 17, October 13 and November 10, 2010.

I. Complaint before the Board

[1] Kenneth Samuel Manella ("the complainant") filed a complaint with the Public Service Labour Relations Board ("the Board") on July 29, 2010, under paragraphs 190(1)(*f*) and (*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). His complaint alleged that the respondents, the Treasury Board of Canada Secretariat ("TBS") and the Public Service Alliance of Canada ("PSAC"), failed to meet their duty under section 132 to observe terms and conditions of employment and committed an unfair labour practice within the meaning of section 185.

[2] The complainant stated the details of his allegations and the corrective action sought as follows:

> *Failure of both Treasury Board and the PSAC to recognize that I qualify for the Lump Sum payment despite my year contract as an Acting PM 05 that I was in on December 15, 2008.*
>
> [corrective action]
>
> *Payment of Lump Sum with that amount counting towards my yearly salary to be used in calculating my pension. I am in the final five years of service with the government.*

[3] The complainant attached the following statement:

> . . .
>
> *Subject:* *(2008) Pay Equity Settlement with the Public Service Alliance of Canada for Program and Administrative Services (PA) and Library Science (EB) groups*
>
> *I am writing this letter to officially complain about my recent exclusion from the above settlement. I do not agree with this at all.*
>
> . . .
>
> *On October 1, 2008 I commenced a one year acting assignment. Later that year both PSAC and Treasury Board announced an agreement regarding the Lump Sum. A date of December 15, 2008 was given as the key date with regards to eligibility. We as employees of Treasury Board and members of the union were never provided a copy of the actual agreement between PSAC and Treasury Board. Instead we were provided with a Question & Answer format by both on their respective web sites.*

It should be noted that the union did not support my efforts. At one point I was told by the union to check the PSAC web site Q & A. My local refused to accept a grievance when I asked them if that was possible. Their response was similar to that of Pay & Benefits. You are not entitled; check the Q & As and we have not seen the actual agreement.

I have tried everything possible to obtain a copy of the agreement. My point is that if the agreement states one ***must have been*** *acting for four months as of December 15th (more closely what the PSAC Q & A states) vs.* ***must be*** *in an Acting position for four months as of December 15th (more closely what the Treasury Board Q & A states) it makes a huge difference to me. On December 15, 2008 I was in an acting position for greater than four months with my one year contract but I had only been acting as of December 15th for approximately 2.5 months.*

I was astounded when both PSAC and my own Pay & Benefits told me that they ***had not*** *seen a copy of the agreement. I was even more shocked when I contacted Treasury Board and they informed me that the agreement was* ***confidential****.*

I then tried ATIP but obviously without success. My next avenue was that of a complaint to the Office of the Information Commissioner of Canada.

The above Office was able to get me via two attempts parts of the confidential agreement. I was never able to obtain a copy of the full agreement.

I was informed by the Office of the Information Commissioner of Canada that my particular situation is not addressed in the agreement whatsoever.

The only relevant part appears to be 3 which states:

"Every employee who is a member of the bargaining unit on December 15, 2008 shall receive a personable lump sum payment of $4000.00, payable within the 150 day implementation period as of the date of signing. Employees who occupy acting positions outside of the bargaining unit of 4 months duration or more on December 15, 2008 are not eligible for this payment."

My argument is that the reverse logic should apply.

I believe anyone outside the bargaining unit that occupy an acting position within the bargaining unit for duration of 4 months or more on December 15, 2008 should be eligible for this payment.

> *I believe that since I signed a contract on October 20, 2008 for an acting position within the bargaining unit for duration of one year (October 2, 2008 – September 30, 2009) means I should be eligible for this lump sum payment and more importantly for myself the addition to the year of salary for pensionable earnings. I am in my final five years of employment with the government and this would help my pension a great deal.*
>
> *I understand the timelines are stretched here to say the least but I have documented my attempts to seek the wording of the agreement. I have been met at every turn by both my union and Pay & Benefits with indifference and a complete lack of assistance.*
>
> *It is only through the Office of the Information Commissioner of Canada I was able to find out that the agreement does not address employees acting inside the bargaining unit. I believe that what is there does mean I am eligible for this lump sum payment.*
>
> *I apologize for the delay but it was only about a month ago that I received my final letter from the Office of the Information Commissioner of Canada stating that they had completed their efforts and no other relevant information could be obtained.*
>
> *Also, I mistakenly thought this issue fell under the jurisdiction of the National Joint Council but was told otherwise.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[4] The complainant also attached to his Form 16 ("Complaint under Section 190 of the Act") a number of documents, correspondence and emails involving the respondents, access to information officials and the Office of the Information Commissioner of Canada (OICC).

[5] Following my initial review of the complaint, I directed the Registry of the Board to seek clarification from the complainant on several points. The information sought from him concerned the following: (1) the foundation for the complaint under paragraph 190(1)(*f*) of the *Act*, (2) the specific nature of the unfair labour practice allegedly committed by the TBS, (3) how the complaint against the TBS was timely,

(4) the specific nature of the unfair labour practice allegedly committed by the PSAC, and (5) how the complaint against the PSAC was timely.

[6] The Board received the complainant's response on August 24, 2010. The following are excerpts from that response:

> . . .
>
> *I erred by indicating that . . . 190(1)(f) was applicable.*
>
> . . .
>
> *The essential issue is my entitlement to a lump sum payment as per the Memorandum of Settlement (MOS) signed on November 23, 2008 by Treasury Board (TB) and PSAC.*
>
> . . .
>
> *My employer (TB) failed to provide a copy of the MOS upon completing the agreement with the union and informing me via e-mail that the agreement was confidential. This caused confusion on my part regarding exercising my rights and immediately challenging their interpretation. I believe this is a violation of sub-paragraph 186.(2)(c)(iii) and sub-section 208. (1).*
>
> *PSAC likewise failed to provide me with a copy of the agreement and refused to accept my request for a grievance to be filed. I was informed repeatedly by my local union steward (Michael O'Donnell) that the union would not accept it. I believe this is a violation of paragraph 189. (1)(b) and sub-section 208. (1).*
>
> . . .
>
> *I did not know until approximately June 4, 2010 after the Office of the Information Commissioner of Canada wrote to me indicating that they could not provide any additional information (that is the entire agreement) regarding the MOS confirming to me that the agreement did not specifically mention my situation.*
>
> *I believe both TB and PSAC erroneously extracted information from the MOS dealing with employees in acting positions outside the bargaining unit. Thus, I felt justified in filing this complaint.*
>
> . . .
>
> *. . . The union still would not accept a grievance after I informed my steward of the latest information on*

> *June 4, 2010 from the Office of the Information Commissioner of Canada.*
>
> . . .
>
> [*Sic* throughout]

II. Replies to the complaint and the complainant's rebuttal

A. The TBS's reply

[7] The TBS filed its reply submission with the Board on September 17, 2010. It objected to the complaint because the complainant allegedly filed it outside the prescribed time limits and because, according to the TBS, the Board does not have jurisdiction over its subject matter.

[8] The TBS identified the following as the actions on its part impugned by the complainant: (1) its failure to provide the complainant with a copy of the memorandum of settlement (MOS) upon its completion, (2) its email informing the complainant that the MOS was confidential, and (3) its failure to recognize that the complainant was qualified to receive the lump sum pay equity payment. According to the TBS, the identified actions are not properly within the Board's jurisdiction. It detailed its argument as follows:

> . . .
>
> *In his letter of August 23, 2010, Mr. Manella specifies that his complaint pertains to paragraph 190(1)(f) and 186(2)(c)(iii) of the* PSLRA. *The complaint itself does not mention a failure on the Employer's part to observe the terms and conditions of employment during a strike for the incumbent of a position identified in an essential agreement of the* PSLRA *as per paragraphs 190(1)(f) and 132 of the* PSLRA. *The complaint also does not mention any intimidation, and threats made by an Employer or representative of the Employer to compel or refrain an employee from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from making an application or filing a complaint as per subsection 186(2)(c)(iii) of the* PSLRA.
>
> *Mr. Manella also states in his letter of August 23, 2010, that he believes the actions of the TBS are a violation of sub-paragraph and* [*sic*] *208(1) of the* PSLRA. *The complaint is an allegation that the employee should be included in a pay equity settlement between the TBS and the PSAC, which*

> *does not fall under the jurisdiction of the PSLRB. It should be noted that under sub-paragraph 208(3) of the* PSLRA, *that* [*sic*] *an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.*
>
> *The Employer respectfully submits that this complaint is being used as a review of the decision of the Office of the Information Commissioner of Canada (OICC) to not release the requested MOS to the complainant. It should be noted that as indicated in the letter of the OICC dated May 31, 2010, the proper forum for a review of this decision is with the Federal Court.*
>
> . . .

[9] The TBS also maintained that the complainant was aware of the entitlement criteria under the pay equity settlement as early as August 2009, at least 11 months before he filed his complaint. As such, he did not respect the time limit established by subsection 190(2) of the *Act*.

[10] The TBS requested that, in the alternative, the Board exercise its discretion under subsection 40(2) of the *Act* to dismiss the complaint as frivolous.

B. <u>The PSAC's reply</u>

[11] The PSAC filed its reply submission with the Board on October 13, 2010. It also took the position that the complaint was untimely and argued further that the complainant had failed to make a *prima facie* case for violations of the *Act*.

[12] On the question of timeliness, the PSAC argued that the fact that the complainant did not see a copy of the MOS until recently does not change the reality that he was aware soon after the settlement was announced of the positions of the parties to the MOS that he was not entitled to the lump sum payment. At the very least, the complainant's own email, dated September 30, 2009, indicates that he knew at that time that both respondents were of the opinion that he did not qualify for the payment. In the PSAC's words, ". . . [e]ven if one were to employ this later date for purposes of determining the time limit for filing a Complaint this is well outside the limits foreseen by the legislation."

[13] Turning to the substance of the complaint, the PSAC argued as follows:

. . .

> *According to the complainant's own rendition of the facts, the PSAC did provide him with a response when he enquired about his eligibility for the payment. The Complainant does not specify any actions which were 'arbitrary, discriminatory or in bad faith'. The mere fact that he did not agree with the conclusion of either the union or employer regarding his eligibility is not sufficient to establish a breach of the* Act.
>
> *The PSAC submits that, throughout its dealings with the Complainant . . . it has not acted in a manner which is arbitrary, discriminatory or in bad faith. We respectfully submit that a determination of this issue requires an assessment of whether a* prima facie *violation of the* Act *has been made out in the complainant's allegations. If the assessment determines that even if the allegations are taken as true, no violation occurred, then the Board is without jurisdiction.*

. . .

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

[14] The complainant filed his rebuttal with the Board on November 10, 2010. He continued to maintain that he submitted his complaint in a timely fashion once he finally received information about the MOS through the OICC. He also argued that he had made a *prima facie* case against both respondents.

[15] The following are excerpts from the complainant's rebuttal:

. . .

> *I believe I erred in my reference to paragraph 190. (1)(f) . . . in my letter dated August 23, 2010 (sixth paragraph) and should have said paragraph 190. (1)(g).*
>
> *I believe that both TB and PSAC together have violated paragraph 190. (1)(g), section 185, sub-paragraph 186. (2)(c)(iii), section 187 and sub-section 208. (1).*

. . .

> *TB did prevent me from filing a complaint as per sub-paragraph 186. (2)(c)(iii) much sooner than I did by failing to provide me with proper documentation — the actual MOS.*

I do not consider this complaint to be a grievance for equal pay for work of equal value as per sub-section 208 (3). That issue was dealt with by TB and PSAC resulting in the MOS. My complaint is that I was not paid as per the MOS.

. . .

The fact that I did not receive a copy of the entire agreement is somewhat disconcerting to me as a public servant but not relevant to my complaint. . . .

. . .

In May of 2009 when cheques were issued, I realized I was not going to get paid when I did not receive a cheque. I felt it was absolutely necessary to look at the actual agreement to bring clarity to the Q&As.

. . .

In May of 2009 I began my odyssey to find the actual agreement to see what it said with regards to employees acting within the bargaining group on December 15, 2008.

It was only on July 27th with the letter from the OICC did I learn there was no more relevant information per the MOS for me to see regarding my complaint. . . .

*I knew I was not paid the lump sum in May 2009 but it was only in July 2010 that I realized both my employer and union were wrong in **not** paying me and supporting me respectfully with regards to the lump sum payment.*

. . .

July 27th of this year is when I finally knew the true circumstances, namely the MOS reference in #3 giving rise to my complaint.

. . .

I was never told by anyone [from the PSAC] *that I was not entitled to the lump sum payment until after May 2009 when I did not receive the sum. . . .*

I stand by my position that on December 15, 2008 I was in an acting position greater than 4 months. It was actually 12 months. I also believe the wording between the Q&As with Treasury Board and the PSAC is slightly different adding to the confusion.

For both PSAC and TB not to me (as both a union member and an employee) a copy of the MOS they signed or at least

> *the relevant paragraph - # 3 immediately after the contract was ratified in the spring of 2009 is truly "arbitrary, discriminatory and in bad faith."*
>
> . . .
>
> *It is obvious that both TB and PSAC extrapolated a position . . . regarding actors from outside the bargaining unit from the . . . statement in # 3. It should be noted that the wording of # 3 does not match exactly that of the Q&As from TB or PSAC. Also, the wording used by TB and PSAC in their respective Q&As is different from each other.* ***This is why obtaining the actual MOS was so vital to my complaint.***
>
> *In conclusion, I believe a prima facie case has been made with this complaint and I am prepared to attend a hearing at a date, time and location agreeable to all parties.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

III. <u>Reasons</u>

[16] I am satisfied that the written submissions received to date allow me to decide the complaint. My authority to do so without convening an oral hearing is stated in section 41 of the *Act*, which reads as follows:

> ***41.*** *The Board may decide any matter before it without holding an oral hearing.*

[17] I note that the complainant indicated in his submission of August 24, 2010 that he ". . . erred by indicating . . . that paragraph 190(1)(f) [of the *Act*] was applicable," but he later referred in the same submission to paragraph 190(1)(*f*) as "applicable." In his rebuttal submission received by the Board on November 10, 2010, he confirmed that the second reference to paragraph 190(1)(*f*) in his submission of August 24, 2010, was in error. I accept the complainant's statement as having the effect of modifying his complaint to remove the original reference to paragraph 190(1)(*f*).

[18] Therefore, the matter to be determined is whether the complainant has established the foundations for an arguable complaint under paragraph 190(1)(*g*) of the *Act*, assuming the facts that he alleges are true.

[19] While I must render my decision as a matter filed under paragraph 190(1)(*g*) of the *Act*, I respectfully suggest that the essence of the complainant's concern, then and now, is not an unfair labour practice(s) as such but, rather, an interpretation of a negotiated MOS with which he disagrees. It is abundantly clear from his own words that he became aggrieved when he did not receive the $4000 lump sum pay equity payment under the terms of the MOS concluded by the respondents. His argument is that his status acting in a position classified in the PM Group on December 15, 2008 was sufficient to entitle him to the payment. Both parties to the MOS disagreed. In the chain of events that followed, their responses to his inquiries and their alleged failures to provide him the fuller information that he felt he was owed may well have compounded his concerns. However, they did not change the fact the real issue was, and remains today, the interpretation of the MOS that disentitled the complainant from receiving $4000.

[20] While I might be convinced that there is room for disagreement about the interpretation of the MOS applied to the complainant's situation on December 15, 2008 — a disagreement not resolved by the differently-worded answers in the documents posted by the parties — that is not a matter that I may decide. The Board has no role under subsection 190(1) of the *Act* to adjudicate a disputed claim for an entitlement under a negotiated pay equity settlement. Whether the complainant could have even pursued his claim through a grievance is debatable. Subsection 208(3) of the Act reads as follows:

> ***208.*** *(3) . . . an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.*

In the end, I may only consider the complainant's problem within the specific bounds of the provisions of the Act the violation of which he alleges.

[21] In what follows, I have found it unnecessary to rule on the timeliness objections raised by the respondents. For the reasons that will be outlined, I conclude that the complainant has failed to make out an arguable case that either respondent committed an unfair labour practice — presuming that, for the purpose of my analysis, he submitted his complaint in a timely fashion.

A. Alleged unfair labour practice by the TBS

[22] In his clarification submission of August 24, 2010, the complainant identified subparagraph 186(2)(*c*)(iii) and subsection 208(1) as the provisions of the *Act* violated by the TBS. In his rebuttal, he added that the TBS violated section 187 "together" with the PSAC.

[23] Subparagraph 186(2)(*c*)(iii) of the *Act* provides as follows:

> ***186****. (2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *. . .*
>
> *(*c*) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from*
>
> *. . .*
>
> *(iii) making an application or filing a complaint under this Part or presenting a grievance under Part 2.*

[24] An arguable case for a violation of subparagraph 186(2)(*c*)(iii) of the *Act* must indicate how the TBS sought ". . . by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means . . ." to refrain the complainant from "making an application or filing a complaint under this Part or presenting a grievance under Part 2." The only argument of possible relevance that I find in the complainant's submission is that the TBS prevented him from filing a grievance sooner by failing to provide him with a copy of the MOS. If, for the purpose of evaluating that argument, I accept as true that the respondent's actions prevented him from filing a grievance, it remains for the complainant to outline how the respondent's behaviour comprised intimidation, a threat of dismissal or any other kind of threat, or the imposition of a penalty. In my view, none of the facts alleged reveal any of those elements. Paragraph 186(2)(*c*) includes the phrase, "by any other means," but the normal rules of statutory interpretation require that I read that phrase as meaning, "by any other means <u>of a similar kind</u> [emphasis added]." In my opinion, I

have not been offered any arguable basis for finding that the TBS's failure to provide the complainant with a copy of the MOS, or with any other information that he felt that he needed, was an action similar in nature to intimidation, a threat of dismissal, any other kind of threat or the imposition of a penalty. For that reason, I find that the complainant has not established any foundation for a violation of subparagraph 186(2)(*c*)(iii).

[25] I note that, by virtue of subsection 191(3) of the *Act*, a reverse burden of proof applies to complaints that allege a breach of subsection 186(2). However, the Board has found that a complainant remains under the obligation to make an arguable case for a violation of subsection 186(2) before the reverse burden is triggered; see, for example, *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37, at para 33.

[26] Subsection 208(1) of the *Act* reads as follows:

> ***208.*** *(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> *(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[27] Section 185 identifies the provisions of the *Act* the violation of which may comprise an unfair labour practice in a complaint filed under paragraph 190(1)(*g*). Section 185 states the following:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

Subsection 208(1) is not among the provisions listed. Therefore, the complainant's allegation that the TBS violated subsection 208(1) cannot found an unfair labour practice complaint. Beyond that, subsection 208(1) does not state a prohibition.

Instead, it outlines the right of employees to present individual grievances on certain subject matters. While adjudicators may address questions of jurisdiction regarding the use of subsection 208(1), the notion of a "violation" of the subsection probably does not apply — and certainly is not germane in the context of a complaint filed under section 190.

[28] Section 187 of the *Act* is commonly known as the "duty of fair representation" provision of the *Act*. It reads 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.*

The obligation under section 185 is owed to an employee by a bargaining agent, not an employer. By definition, the TBS cannot be found to have violated section 187.

[29] For the reasons stated, the complainant has not offered an arguable case that the TBS committed an unfair labour practice. With respect to the TBS, I dismiss the complaint.

B. <u>Alleged unfair labour practice by the PSAC</u>

[30] In his clarification submission of August 24, 2010, the complainant identified paragraph 189(1)(*b*) and subsection 208(1) as the provisions of the *Act* violated by the PSAC. In his rebuttal, he added that the PSAC violated subparagraph 186(2)(*c*)(iii) and section 187 "together" with the TBS.

[31] Paragraph 189(1)(*b*) of the *Act* provides as follows:

> ***189.*** *(1) Subject to subsection (2), no person shall seek by intimidation or coercion to compel an employee*
>
> *. . .*
>
> *(*b*) to refrain from exercising any other right under this Part or Part 2.*

Without ruling whether the PSAC is a "person" for the purpose of subsection 189(1), I have found no evidence in the complainant's submissions that, if proven, would suggest "intimidation or coercion" on its part. It is clear that the complainant disagrees with the PSAC's interpretation of the MOS, with its alleged failure to provide him with

a copy of the MOS and with its refusal to represent him in a grievance claiming an entitlement to the lump sum pay equity payment. However, none of those "failures" can be reasonably interpreted as manifesting intimidation or coercion. The complainant has not presented an arguable case for a violation of paragraph 189(1)(*b*).

[32] For the reasons cited in the preceding section, the complainant's allegation that the PSAC violated subsection 208(1) cannot found an unfair labour practice complaint.

[33] The prohibitions stated in subparagraph 186(2)(*c*)(iii) of the *Act* apply to ". . . the employer [or] a person acting on behalf of the employer, [or] a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer. . . ." Once more, without ruling whether the PSAC is a "person" for the purpose of subparagraph 186(2)(*c*)(iii), there is no evidence that it was acting on behalf of the employer in this case — if, in fact, such a finding is possible in any circumstance. Therefore, the prohibition stated in subparagraph 186(2)(*c*)(iii) does not apply.

[34] For a foundation to be laid for a violation of section 187 of the *Act* — the duty of fair representation provision — the complainant must make out an arguable case that the PSAC acted arbitrarily, in a discriminatory manner or in bad faith. Has the complainant outlined facts that, if proven, could found such a case?

[35] It appears clear that representatives of the PSAC refused on one or more occasions to carry a grievance on the complainant's behalf about the lump sum pay equity payment. That refusal was apparently based on an interpretation of the MOS shared by both parties to the settlement. The complainant maintains that the PSAC was wrong in its interpretation of the MOS. However, as the case law amply provides, being wrong does not on its own establish grounds for arguing a breach of section 187 of the *Act*. Something more is required. I have closely reviewed the facts alleged by the complainant for evidence of discriminatory or bad faith behaviour but have found none. The one specific allegation made by the complainant that does require consideration is his charge that the PSAC's decision not to represent the complainant was made by representatives who did not have the benefit of the full text of the MOS. Does that allegation make out an arguable case that the PSAC acted arbitrarily?

[36] A considerable number of Board decisions and judicial review rulings have focussed on the nature of arbitrary decision making in the context of a duty-of-fair-

representation complaint and on the proof required to sustain an allegation of arbitrary action. Very recently, for example, the Board in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, referred to leading cases as follows:

. . .

> ***22*** *With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of* Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:*
>
> > The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible . . .
>
> . . .
>
> ***23*** *In* International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "… a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."*

. . .

[37] In *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, at para 44, also a very recent decision, the Board noted the guidance provided in *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.), as follows:

. . .

> *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].
>
> . . .

[38] The cited cases are consistent with the general theme in the duty-of-fair-representation jurisprudence that bargaining agents should be accorded substantial latitude in their representational decisions. The bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high. Examining the facts alleged by the complainant, I do not find the basis for an arguable case that the PSAC's decision not to support the grievor was made perfunctorily or in a cursory fashion. I find no sense of capriciousness in what occurred or any indication that decisions were made for reasons other than the official interpretation given by the PSAC — apparently concurred with by representatives of the employer — that the complainant's circumstances did not give rise to an entitlement to the lump sum payment. Whether a given representative of the PSAC had access to the actual text of the MOS when he or she declined to carry the complainant's grievance forward seems to me not to determine the matter. As long as the evidence suggests that representatives were acting in accordance with an authoritative interpretation of the pay equity settlement held by the respondent PSAC the decisions made by the individual representatives who declined the complainant's case should not be viewed as arbitrary. Has the complainant suggested other evidence as to why the behaviour of the PSAC was arbitrary? I think not. In the absence of such evidence, the complainant has not made out an arguable case for a violation of section 187 of the *Act*.

[39] For the reasons stated, I find that the complainant has not offered an arguable case that the PSAC committed an unfair labour practice. With respect to the PSAC, I dismiss the complaint.

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

(The Order appears on the next page)

IV. Order

[41] The complaint is dismissed.

December 9, 2010.

Dan Butler,
Board Member