Date: 20111208

File: 561-09-481

Citation: 2011 PSLRB 141

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

KRISTIAN PAUL MARTELL

Complainant

and

RESEARCH COUNCIL EMPLOYEES' ASSOCIATION and JOAN VAN DEN BERGH

Respondents

Indexed as
Martell v. Research Council Employees' Association and Van Den Bergh

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

REASONS FOR DECISION

Before: Stephan J. Bertrand, Board Member

For the Complainant: Himself

For the Respondents: Steve Waller, counsel

Heard at Vancouver, British Columbia,
August 3 to 5, 2011.

I. Complaint before the Board

[1] On August 25, 2010, Kristian Paul Martell ("the complainant") made a complaint against the Research Council Employees' Association ("RCEA") and one of its representatives, Joan Van Den Bergh ("the respondents"). Although the complainant originally indicated in his complaint form that his complaint was based on paragraphs 190(1)(*c*), (*d*), (*f*) and (*g*) of the *Public Service Labour Relations Act* ("the *Act*"), he clarified at the hearing that it ought to be restricted to paragraph 190(1)(*g*). The complainant alleged that the respondents breached their duty of fair representation by failing to provide adequate representation in connection with the negotiation of a Memorandum of Agreement (MOA) signed on February 18, 2010 and by refusing to grieve its alleged improper implementation. It should be noted that although the parties chose to entitle the document as "memorandum of agreement", they could have easily referred to it as a settlement agreement given the true nature of the agreement. Be that as it may, I will continue to refer to the document in question as the MOA.

[2] This complaint was filed under paragraph 190(1)(*g*) of the *Act*, which reads as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
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> . . .
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

Section 185 of the *Act* defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1). The provision of the *Act* referenced under section 185 that applies to this complaint is section 187, which provides 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.*

This provision was enacted to hold employee organizations and their representatives to a duty of fair representation, a duty that, according to the complainant, the respondents did not fulfill.

[3] The respondents raised two preliminary objections. First, they submitted that the MOA, which the complainant voluntarily entered into, is a binding agreement that constitutes a complete bar to having this complaint heard under the *Act*, as a result of specific language to that effect. Second, the respondents submitted that the complaint is untimely. Alternatively, the respondents submitted that even if the complaint were timely and not barred from being heard, no violation of section 187 of the *Act* took place.

II. Summary of the evidence

A. For the complainant

[4] The National Research Council (NRC or "the employer") initially hired the complainant on June 26, 1996, for a four-month casual employment as a tool and die maker. The complainant later agreed to another four-month casual employment, during which he expressed an interest in an apprenticeship with the employer, which was prepared to look into such an opportunity. As a result, the complainant and the employer entered into an apprenticeship agreement in December 1996, using a standard form that originated from the British Columbia Ministry of Labour. The respondents were not involved.

[5] The apprenticeship agreement was for 60 months, beginning December 2, 1996 and ending July 1, 2001, and it credited the complainant's five months of experience as an apprentice. Before entering into the agreement, the complainant was a casual employee. His employment was scheduled to end at the end of February 1997.

[6] After obtaining a third four-month casual employment, the complainant accepted, on June 27, 1997, a four-year term appointment with the NRC Innovation Centre as an instrument and tool maker apprentice. His initial terms and conditions of employment specified the following:

. . .

> *Your salary is at an annual rate of $23,000 until 30 June 1997. Effective 1 July 1997, you will receive a merit increase, based on superior performance during the past year. Your new annual salary will therefore be $24,486.*

. . .

[7] In July 2000, the complainant changed his trade designation from "Tool and Die Maker" to "Machinist", a trade that required only a four-year apprenticeship, which would allow him to obtain his certificate as a machinist on July 28, 2000. The complainant nevertheless continued with the tool and die maker apprenticeship and obtained his certificate for that trade as well. In cross-examination, the complainant admitted that he did not consult or involve the respondents in that process.

[8] The complainant met with Ms. Van Den Bergh for the first time in early 2001 to discuss his concerns about the calculation of his wages. Shortly after that, she informed him that the employer was not prepared to look into the wage issue and that it would be difficult at that late stage to challenge an issue dating as far back as 1996. In cross-examination, the complainant admitted that although he believed that he was being underpaid as far back as 1998, he always agreed to the terms of employment outlined in the many letters of offer he received, including the salary provisions, and that he never grieved or instructed the respondents to grieve this issue.

[9] The complainant stated that he became so frustrated with the wage issue that in June 2001 he resorted to asking his supervisor for a letter of recommendation with the intention of securing employment elsewhere. However, because his ongoing health issues were becoming more serious, the complainant accepted a one-year term appointment with the employer, from August 7, 2001 to August 6, 2002, as he felt that he would be unable to secure employment elsewhere at that time. The complainant nevertheless believed that he should have been earning the same salary as that of a co-worker with 30 years of seniority, but the employer did not share that view.

[10] Shortly after that, the complainant's health deteriorated. Although the complainant was off work for an extended period, his term appointment was nevertheless extended in July 2002 and again in July 2003. In November 2003, his term appointment was converted into an indeterminate appointment, which he accepted despite his concerns about his remuneration. He was informed that his salary could

not be revised and that an employee can negotiate a higher wage only upon initial hiring.

[11] Shortly after his indeterminate appointment, the complainant again went on sick leave for over a year. Upon returning to work in April 2005, he approached his employer in an attempt to revisit his remuneration but once again faced nothing but opposition. The complainant left once more on sick leave in early 2006, this time for in excess of a year.

[12] In 2007, the complainant applied for and received a disability pension under the Canada Pension Plan. He was already receiving benefits under the Disability Insurance Plan.

[13] In November 2008, faced with the grim reality that his health was not improving, the complainant agreed to look into medical retirement and was provided with information and options by the employer. However, he did not exercise any of those options, as he felt that the information was either erroneous or lacking detail.

[14] On October 30, 2009, the employer wrote to the complainant and requested to be advised as to whether he would return to duty, resign or take medical retirement. By then, the complainant had been on uninterrupted sick leave without pay for more than two years. The employer provided another information package on November 27, 2009, and a response was expected by December 1, 2009.

[15] That led to an extensive exchange of emails between the complainant and representatives of the RCEA, including Ms. Van Den Bergh, who by then had agreed to meet with the employer to convince it to reconsider the complainant's wage dispute. Negotiations between the employer and the respondents followed with the view to resolving all outstanding issues related to the complainant's employment at the NRC.

[16] On February 18, 2010, the complainant, the RCEA and the employer entered into the MOA, which provided among other things that the employer (i) would pay a lump sum to the complainant to compensate him for an underpayment of his pay and benefits that began on the date on which he was originally hired, subject to deductions as required by law or by the applicable collective agreement, (ii) would inform the Disability Insurance Plan provider of the underpayment, which would in turn create an underpayment of his disability benefits and entitle him to a lump sum from the

provider, and (iii) would provide the complainant with severance pay upon the approval of his medical retirement. The MOA also provided that the complainant agreed to apply for medical retirement by February 26, 2010. Attached to the MOA was a detailed salary revision spreadsheet that covered July 2, 1996 to April 30, 2010.

[17] The MOA also provided the following:

. . .

> *12. By signing this agreement, the Employee does hereby remise, release and forever discharge the Bargaining Agent, its officers, employees and agents from all claims and proceedings of any kind arising out of or connected to the subject matter of this Memorandum.*
>
> *13. By signing this agreement, the Employee acknowledges and agrees that he has read, understood, and accepts the terms of this Agreement. . . .*
>
> . . .
>
> *15. The Parties agree that this Agreement constitutes full and final settlement of all the matters referred to herein.*
>
> . . .
>
> *18. The Parties understand the irrevocability of this agreement and its terms and have had the opportunity to seek the advice of legal counsel or any other counsel including, for the Employee, a representative of his bargaining agent, before signing this Memorandum of Agreement.*
>
> . . .

[18] After signing the MOA, the complainant applied and qualified for medical retirement. He received a lump-sum payment under the Disability Insurance Plan as a result of the employer's recalculation of his past wages. However, he did not agree with the employer's deductions from his lump-sum amount and felt that the result was that what he received did not accurately reflect the amounts that he had negotiated. According to the complainant, the MOA was not implemented as it should have been. The complainant brought his implementation issues to the attention of the respondents on April 15, 2010. Ms. Van Den Bergh immediately brought them to the employer's attention. It responded by providing a detailed explanation of the deductions to the complainant on April 16, 2010.

[19] The complainant acknowledged that, before signing the MOA, he had reviewed the salary revision spreadsheet with an accountant, which apparently could not make much sense of it, and had sought and obtained independent legal advice from a private practitioner specializing in public sector employment law issues. Although the complainant also exchanged numerous emails with the respondents and with the employer before signing the MOA, requesting information and clarifications, he never requested that the respondents provide him with a calculation or a specific breakdown of the deductions that would be applied to the payments he was entitled to. None was provided. On more than one occasion, the respondents referred the complainant to the employer's human resources expert for any inquiries about those deductions or about the amounts that appeared in the draft MOA or in the attached spreadsheet. In cross-examination, the complainant admitted that, before signing the MOA, he believed that the calculations in it were incorrect but felt that, if he did not sign it, he risked receiving no financial compensation.

[20] The email exchange that followed in April and June 2010 reveals that, although the respondents felt that there were no apparent improprieties about the implementation of the MOA, or any reason to challenge its implementation, they nevertheless asked the employer to look into the accuracy of the amounts being deducted. The employer provided responses and stood by its calculations.

[21] The complainant requested that the respondents take action to ensure that the MOA was being implemented correctly. The respondents refused, on the basis that the matter could not be grieved and that their analysis of the facts did not appear to reveal any improprieties about how the MOA was implemented. The complainant subsequently filed this complaint, alleging that the respondents violated section 187 of the *Act* by acting arbitrarily, in bad faith and in a manner that was discriminatory.

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

[22] Ms. Van Den Bergh has been a negotiator and labour relations officer with the RCEA since 1999. She has worked in labour relations, on both the union and the employer sides, for the past 30 years.

[23] Ms. Van Den Bergh indicated that, although her position required her to perform many duties on a daily basis, calculating pay and benefits or statutory deductions is not one of them. She stated that she never gets involved in such matters, preferring to

leave them to pay and benefits experts. She added that she has no say in how statutory deductions should be applied or in how the Canada Revenue Agency (CRA) should interpret such deductions, as she never deals with those issues or with CRA representatives. When such issues are raised, she consults with the employer's pay and benefits specialists.

[24] Ms. Van Den Bergh indicated that she was first approached by the complainant in 2001, at which time she received a copy of the 1996 apprenticeship agreement, which she in turn provided to the employer. It immediately expressed no desire to honour that agreement. At that time, Ms. Van Den Bergh advised the complainant that any grievance based on the apprenticeship agreement would likely be limited to the previous 25 days, that the agreement had expired before these 25 days and that it might not be possible to refer such a grievance to adjudication since the subject matter did not involve an interpretation of the collective agreement. She added that the complainant did not request that a grievance be filed at that particular time or at any other time.

[25] Ms. Van Den Bergh's next contact with the complainant was in November 2009. At that time, the complainant was contemplating medical retirement, and Ms. Van Den Bergh provided advice about the benefits of opting for that option as opposed to facing a potential termination for incapacity. After all, the complainant had been on sick leave without pay for an extended period. The apprenticeship agreement and the alleged underpayment resurfaced at that time. Ms. Van Den Bergh indicated that she felt badly for the complainant, especially in light of the seriousness of his health condition, and contacted the employer to revisit the issue, hoping that there would be some will to resolve all the outstanding issues of the complainant's employment with the NRC. According to Ms. Van Den Bergh, the employer never considered the apprenticeship agreement binding, which explains why it always compensated the complainant in accordance with the applicable collective agreement. To her surprise, the employer nevertheless agreed to revisit the issue, even though it would entail recalculating the complainant's wages over 14 years.

[26] The employer recalculated the complainant's wages and drafted the MOA, which included a salary spreadsheet that went back to 1996. At that time, a large amount of emails was exchanged between the complainant and Ms. Van Den Bergh about the content of the proposed MOA.

[27] Given the complainant's concerns over some of the language in the MOA, Ms. Van Den Bergh arranged to have him consult with private counsel that specialized in employment law for independent legal advice, at the RCEA's expense. The solicitor contacted Ms. Van Den Bergh to inquire about the meaning of certain provisions of the MOA but never raised the salary issue or the proposed deduction provision with her. She added that she never made any promises to the complainant about the wages or salary that would be used in the salary spreadsheet, the amounts he was entitled to for compensation or the deductions that would apply to his settlement agreement.

[28] When the complainant signed the MOA, he appeared, according to Ms. Van Den Bergh, very satisfied with its content. He first expressed his disenchantment with how the employer was implementing the MOA on April 15, 2010. After numerous exchanges with the complainant, she wrote to the employer to obtain a better understanding of the deductions that were applied to the MOA, which were passed on to the complainant. According to Ms. Van Den Bergh, she made it clear to the complainant that the RCEA would not grieve the implementation issue, as it was not adjudicable. After the complainant's repeated requests, she agreed to obtain further explanation from the employer about the deductions. On June 9, 2010, Ms. Van Den Bergh wrote a detailed email to the complainant, in which she relayed the information that she had obtained from the employer and to which she attached seven separate charts that outlined her understanding of the different deductions. It sparked a very negative response from the complainant.

[29] Despite the complainant's disappointment, Ms. Van Den Bergh felt that she had achieved a reasonable agreement, given the circumstances.

III. Summary of the arguments

A. For the complainant

[30] The complainant's arguments were succinct. In essence, he faulted the respondents for not seeking and obtaining a clear breakdown of statutory or other deductions that would apply to the payments he was entitled to under the MOA and for failing to notice an alleged discrepancy between the wage calculation that should have been used and the one that was used. I note that he established no discrepancy either during his testimony or in argument.

[31] He stated that he had no issues with the terms of the MOA but rather with how the employer implemented it, especially as it applied to the deductions taken from the lump-sum he was entitled to. He faulted the respondents for failing to challenge the MOA's improper implementation.

[32] The complainant is of the view that the respondents violated section 187 of the *Act*, both before and after the implementation of the MOA.

[33] The complainant did not allege that the MOA was reached in an unconscionable manner or that he was deceived or forced to execute it. He does not seek, and never did, a revocation of the MOA on those grounds or on any other grounds, for that matter.

B. For the respondents

1. Timeliness

[34] The complaint was filed on August 25, 2010. Subsection 190(2) of the *Act* requires that a complaint be filed within 90 days of the date on which the complainant knew or ought to have known of the action or circumstances giving rise to the complaint. That, according to the respondents, means that the complainant must have learned of the action or circumstances giving rise to the complaint on May 27, 2010 or later. Otherwise, his complaint is untimely.

[35] The respondents argued that all the issues existed before May 27, 2010, in that the complainant was already well aware of the extent of the respondents' role and implication before the signing of the MOA, he had already expressed his dissatisfaction with the employer's implementation of the MOA and particularly of the deductions made, and he knew before May 27, 2010 that the respondents had looked into the deduction issue and that they were not prepared to challenge the employer's implementation of the MOA. All of this, according to the respondents, is supported by the documentary evidence on file and makes the complaint untimely.

[36] The respondents further argued that the complainant apparently did not contradict those contentions, as evidenced by his comments at page 2 of a short summary of events that was attached to his complaint.

[37] The respondents contended that the complainant knew in April 2010 that they would not challenge the implementation of the MOA. The fact that the complainant kept asking them to revisit the implementation issue and that they agreed to contact the employer one last time should not extend the period within which the complainant was expected to take action under subsection 190(2) of the *Act*.

2. Release provision of the MOA

[38] The respondents reminded me that the complainant never demanded an exact breakdown of the deductions that would apply to his lump-sum payment before signing the MOA and that, in the end, he agreed with its terms and released the respondents from all claims and proceedings of any kind arising out of or connected to the MOA's subject matter. This complaint, according to the respondents, is covered by that release, which deprives the Public Service Labour Relations Board ("the Board") of jurisdiction over it.

[39] In support of that proposition, the respondents relied on *Vogan v. Public Service Alliance of Canada*, 2004 PSSRB 159, particularly on the following paragraphs:

> . . .
>
> *[34] What essentially Mr. Vogan is complaining about is that the terms of the settlement agreement were not fulfilled by the PSAC. This is not an issue that I have the authority to decide under the* PSSRA *as indicated in* Myles (supra) *and* Carignan (supra)*, neither the Board nor an adjudicator appointed under the* PSSRA *is a competent tribunal to decide whether the terms of a settlement have been fulfilled.*
>
> . . .
>
> *[37] I have reviewed the agreement and I find no clause indicating that it was a conditional agreement or that the agreement would be null and void if one of the parties did not fulfill any of its obligations under the agreement. I therefore find that the settlement agreement signed by the parties is a binding agreement.*
>
> *[38] The next question to be determined is whether a binding settlement agreement constitutes a bar to having a complaint against a bargaining agent by one of its members adjudicated under the* PSSRA*.*
>
> . . .

> *[41] In* MacDonald v. Canada *(1998), 158 F.T.R. 1 (affirmed, [2000] F.C.J. No. 1902, leave to appeal dismissed, [2001] S.C.C.A. No. 30), Justice Gibson found that when an employee grieves and then enters into a binding settlement agreement with the employer, the employee loses the right to pursue the matter under the* PSSRA. *I see no reasons why this principle should not apply to a complaint.*
>
> *[42] A member who complains against his bargaining agent and then enters into a binding settlement agreement with the bargaining agent is in the same position as a grievor who enters into a binding settlement agreement with his employer.*
>
> . . .
>
> *[44] I therefore find that the binding agreement between the parties constitutes a complete bar to having the complaint proceed to a hearing.*
>
> . . .

[40] For the same reasons as those outlined in *Vogan*, the respondents argued that this complaint should be dismissed.

3. <u>Merits of the complaint</u>

[41] The respondents argued that the apprenticeship agreement is a private contract between the complainant and the employer and that it cannot create a legal right under the collective agreement or under the *Act*. The fact that the employer had no regard for the wage provisions contained in the agreement should come as no surprise, as it always paid the complainant in accordance with the applicable collective agreement. Therefore, any dispute about the alleged wage discrepancy could not be referred to adjudication since it does not trigger a provision of the collective agreement or of the *Act*.

[42] According to the respondents, they were never instructed to grieve the wage discrepancy. Had they been, they would have had very little to go on, given that the apprenticeship agreement ended more than 25 days before the complainant's conversation with Ms. Van Den Bergh in 2001. The respondents added that, altough they are required to provide fair representation to employees, it applies only to matters in which an employee's entitlement arises under the collective agreement or under the *Act*, which is not so in this case.

[43] The respondents argued that, even though they had no duty to provide representation or assistance in this matter, they nevertheless met the standard expected of them.

[44] The respondents added that, but for the negotiated MOA, the complainant would not have been entitled to an additional lump sum under the Disability Insurance Plan, which was almost as significant as the salary recalculation he received from his employer.

[45] According to the respondents, the recalculation exercise that the employer agreed to undertake was complex and complicated and covered a long period of employment. For that reason, the RCEA agreed to pay for independent legal advice from an experienced employment law practitioner who specialized in federal public service matters before the MOA was signed. The respondents argued that, although the statutory deductions to be made by the employer fell outside their control, they felt reassured by the fact that the complainant was requesting information and clarification directly from the employer's compensation and benefit advisor and that he had sought advice from his own accountant.

[46] According to the respondents, Ms. Van Den Bergh spent 2 years trying to rectify a wage dispute that had allegedly been ongoing by then for over 12 years. She fought hard for the complainant, and in the end obtained a positive result, which could not have been obtained through a grievance.

[47] Although the respondents had no obligation to provide representation in this type of matter, they did, in a manner that surpassed the duty expected of them. On that issue, the respondents referred me to paragraphs 35 to 48 of *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44.

[48] The respondents further contended that the duty of fair representation is limited to matters that arise under the collective agreement or the *Act,* rather than to the resolution of a dispute arising out of a non-binding private apprenticeship agreement, as in this case. In support of that proposition, the respondents referred me to paragraphs 193 to 195 of *Elliott v. Canadian Merchant Service Guild et al.*, 2008 PSLRB 3, which stated the following:

> *[193] To accept the argument put forth by the complainant would mean that the duty of fair representation would apply*

> *to all services a union decides to offer to its members, whether or not it is obliged to offer that service and whether or not the service is related to the* PSLRA *or the collective agreement relationship. It would also mean that Parliament intended to give this Board the broad mandate to supervise the provision of representation services offered voluntarily by a union in relation to claims before workers' compensation tribunals, disciplinary matters before professional organizations, claims relating to the Canada Pension Plan, matters relating to unemployment insurance, matters before transportation tribunals, actions before courts of law, etc., all areas over which this Board has no special expertise. In my view, if Parliament had intended to give this Board such a broad jurisdiction over matters unrelated to the* PSLRA *or the collective agreement relationship, it would have given an indication to that effect. In this case, there is no such indication.*
>
> *[194] Where Parliament wanted to impose obligations on unions vis-à-vis their members in the* PSLRA*, other than matters relating to the employee/employer relationship, it did so expressly. For example, subsection 188(*b*) of the* PSLRA *provides that a bargaining agent may not expel or suspend an employee from membership in the employee organisation by applying rules in a discriminatory manner.*
>
> *[195] The services that a union decides to offer to its members that are not linked to the* PSLRA *or the collective agreement relationship are matters between the union and its members. If the union fails to properly represent its members in those matters, there may be some relief in another forum (possibly on a contractual basis as expressed in the union's constitution), but that matter is not within the jurisdiction of this Board.*

[49] The respondents added that, at the time they refused to represent the complainant, the case law unequivocally supported their position that the implementation of a settlement agreement was not adjudicable. The respondents did not have the benefit of the Federal Court of Appeal's direction in *Amos v. Attorney General of Canada,* 2011 FCA 38, at the relevant time, as it was issued on February 3, 2011. Even if they had, *Amos* could easily be distinguished from the factual basis of this case because, in this particular case, no grievance was associated to the MOA that was still alive or that had not yet been withdrawn. In fact, the issue that led to the original dispute was not adjudicable, as it did not arise from the collective agreement or the *Act* but from a non-enforceable apprenticeship agreement that had expired about nine years before the MOA was signed.

[50] According to the respondents, no violation of section 187 of the *Act* occurred in this case, either before or after the MOA was signed.

IV. Reasons

A. Timeliness

[51] The key element of timeliness is prescribed in subsection 190(2) of the *Act,* which reads as follows:

> ***190.*** *(2) . . . a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

The 90-day time limit is strict, and I have no authority to extend it. The Board has repeatedly affirmed the mandatory nature of subsection 190(2) of the *Act.* In fact, in *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100, at para 45, the Board stated the following:

> *[45] . . . Once a bargaining agent has clearly communicated a position in representing a member that the latter considers to be evidence of representation that violates section 187, subsection 190(2) does not allow for a delay in starting the 90-day filing period, however good the reason for a delay. Once again, the language of the statute is mandatory. It is different from what applies to certain other types of actions under the* Act.

[52] I agree with the respondents' contention that, if the circumstances giving rise to the complaint were known or ought to have been known by the complainant before May 27, 2010, then his complaint is untimely.

[53] After reviewing the testimonial and documentary evidence submitted by the parties, I am satisfied that any alleged violation by the respondents in connection with the negotiation and signing of the MOA were known or in my opinion ought to have been known by the complainant before his signing of the MOA and by April 15, 2010, at the latest. Therefore, that portion of his complaint is clearly untimely.

[54] However, I disagree with the respondents' contention that their refusal to represent the complainant in his challenge to the employer's implementation of the MOA was known to him before May 27, 2010. In my view, the respondents' position

was not clearly communicated to the complainant until June 9, 2010, which was within the time limit set out in subsection 190(2) of the *Act*. Therefore, I find that the complaint, as it applies to that allegation, is timely.

[55] In the event that I am found to have erred in the conclusion that part of the complaint is untimely, I will address the other preliminary objection as it applies to the actions and conduct of the respondents both before and after the implementation of the MOA.

B. Release provision of the MOA

[56] For the following two reasons, I agree with the respondents' contention on the release issue as it pertains to the complainant's allegations concerning their actions or conduct before the implementation of the MOA. First, the MOA clearly states that the complainant releases and forever discharges the RCEA, its officers, employees and agents from all claims and proceedings of any kind arising out of or connected to the subject matter of the MOA. Nothing about the language used in the release provision is ambiguous. By signing the MOA, the complainant acknowledged that he had read its terms, that he understood them and that he accepted them. In addition, he had consulted his own accountant and had been provided with independent legal advice before signing the MOA. I believe that the reasoning of the Board in *Vogan*, at paragraphs 38 to 44, can easily apply to this case, in that a binding agreement between the parties can constitute a complete bar to a complaint against one of those parties proceeding to a hearing, at least as far as the respondents' pre-MOA actions or conduct is concerned. Second, the complainant did not allege that the respondents acted in an unconscionable manner, that he signed the MOA under duress from the respondents or that the respondents deceived him in signing the MOA. No such allegations were made in the documentation submitted or in his testimony.

[57] However, I disagree with the respondents' contention that the release provision can act as bar to a complaint about their refusal to represent the complainant in connection with the implementation dispute. That would be akin to contracting out of a future duty, which I do not believe was intended by the MOA.

[58] Once again, in the event that I am found to have erred in the conclusion that the Board has jurisdiction to hear part of the complaint, I will address the merits of the

complaint as it applies to the actions and conduct of the respondents, both before and after the implementation of the MOA.

C. Merits of the complaint

[59] As stated by the Board in *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, the burden of proof in a complaint under section 187 of the *Act* rests with the complainant. That burden required the complainant to present evidence sufficient to establish that the respondents failed to meet their duty of fair representation.

[60] The Board has often commented on unionized employees' right to representation. In *Halfacree v. Public Service Alliance of Canada,* 2009 PSLRB 28, at para 17, it rejected the idea that it was an absolute right, as follows:

> *[17] The respondent, as a bargaining agent, has the right to refuse to represent a member, and a complaint to the Board is not an appeal mechanism against such a refusal. The Board will not second-guess the bargaining agent's decision. The Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision. . . .*

[61] The Board's role is not to determine whether the respondents' decision to not represent the complainant was correct; instead, it is to determine whether the respondents acted in bad faith or in a manner that was arbitrary or discriminatory in their decision-making process. However, as broad as that discretion may appear, it is not absolute.

[62] The scope of the duty of fair representation was set by the Supreme Court of Canada (SCC) in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at page 527. In that decision, the SCC describes the principles underlying the duty of fair representation as follows:

. . .

> *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.*
>
> . . .

[63] The Board also canvassed the meaning of "arbitrary conduct" as follows in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, at para 22 and 23:

> *[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."*

[64] In *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, the Board commented as follows:

> . . .
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> *[44] . . . It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance

> of Canada, *2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in* Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):*
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> . . .
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> > 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].
>
> . . .

[65] Undoubtedly, bargaining agents and their representatives should be afforded substantial latitude in their representational decisions. As the Board stated recently in *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128, at para 38, "[t]he bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high. . . ."

[66] The sheer volume of correspondence between the complainant and the respondents before and after the signing of the MOA that has been produced in evidence at the hearing before me indicates that the respondents genuinely attempted to assist him throughout the process, and in good faith.

[67] While I sympathize with the complainant's situation, which was compounded by his serious medical condition, I believe that much of his frustrations were brought on by the employer's alleged actions and positions. The respondents' shortcomings, if any, do not amount to conduct that could be labelled as arbitrary or bad faith.

[68] The complainant faulted the respondents for not seeking and obtaining a clear breakdown of statutory or other deductions that would apply to the payments agreed

to under the MOA and for failing to notice an alleged discrepancy between the wage calculation that allegedly should have been used and the one that was used. Yet, he consulted an accountant and was provided by the RCEA with paid independent legal advice before signing the MOA. He signed it voluntarily, with the knowledge that it contained many release provisions. Moreover, in cross-examination, he admitted that he signed the MOA, believing that the calculations it contained were incorrect.

[69] Even were I to accept that the respondents committed a series of mistakes during the negotiations that led to the MOA, that potentially impacted the complainant's entitlements, which I do not believe is the case, the nature of the mistakes could not be labelled as capricious or careless. To the contrary, it appears that the respondents acted in good faith and that they made genuine efforts to support and assist the complainant in obtaining some form of compensation for the alleged underpayment of his pay and benefits.

[70] As for the complainant's allegation that the respondents breached their duty of representation in relation to the implementation of the MOA, I am of the view that the complainant appears to be attempting to hold the respondents to a very high standard even though the facts of this case point to a matter that involved complex salary revisions that covered a span of roughly 14 years and that dealt with overpayments, underpayments and applicable statutory deductions. As the complainant put it, his own accountant could not make sense of it. To hold the respondents to such a high standard is not reasonable in the circumstances.

[71] The respondents deployed genuine efforts to obtain information from the employer and to reach a resolution that would compensate the complainant. Although they might not have achieved everything that the complainant was hoping for, it does not amount to arbitrary or discriminatory conduct or bad faith. Ms. Van Den Bergh appears to have gone out of her way to assist the complainant and to obtain a fair resolution for him both prior and after the implementation of the MOA.

[72] The complainant could have refused to sign the MOA until he was provided with a breakdown of the proposed deductions, but he chose to go ahead. No promises were made to him from the respondents as to what the deductions would consist of.

[73] The complainant was required to establish a violation of section 187 of the *Act*, which in turn required him to present evidence demonstrating that the respondents'

failure to represent him, both before and after the implementation of the MOA, was arbitrary, discriminatory or in bad faith. My examination of the facts and of the evidence submitted by the parties did not reveal any signs of discriminatory, arbitrary or bad faith behaviour on the part of the respondents. Nothing that the complainant presented in the course of the hearing established, on a balance of probabilities, a violation of section 187 of the *Act*.

[74] In addition, nothing in the evidence led me to conclude that the respondents displayed an uncaring or cavalier attitude toward the complainant's interests or that they acted fraudulently, with improper motives or out of personal hostility. I have no reason to believe that the respondents acted negligently or that they treated the complainant differently than other employees and that such distinction was based on illegal, arbitrary or unreasonable grounds.

[75] On the other hand, I am satisfied that the respondents legitimately examined the complainant's case, that they considered relevant and genuine factors, that they provided adequate representation before, during and after the implementation of the MOA, and that a reasoned decision was made as to whether to pursue the complainant's implementation concerns.

[76] For those reasons, I find that the complainant failed to establish that the respondents committed an unfair labour practice or that they violated section 187 of the *Act*.

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

(The Order appears on the next page)

V. Order

[78] The objection to timeliness is allowed with regard to events relating to the negotiation of the settlement agreement.

[79] The objection to jurisdiction is allowed with regard to the release provision of the MOA as it concerns events relating to the negotiation of the settlement agreement.

[80] The complaint is dismissed.

December 8, 2011.

Stephan J. Bertrand,
Board Member