**Date:** 20110405

**File:** 561-02-474

**Citation:** **2011 PSLRB 41**

*Public Service Labour Relations Act*

Before the Public Service Labour Relations Board

BETWEEN

**JULIE SHOULDICE**

Complainant

and

**JEAN-PIERRE OUELLET**

Respondent

Indexed as
*Shouldice v. Ouellet*

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:*** Herself

***For the Respondent:*** Jerry Kovacs, Public Service Alliance of Canada

Decided on the basis of written submissions
filed September 17, November 15 and December 7 and 17, 2010.

**I. Complaint before the Board**

[1] On July 16, 2010, Julie Shouldice ("the complainant") made a complaint against Jean-Pierre Ouellet ("the respondent"), the president of Local 70044 of the National Component of the Public Service Alliance of Canada ("the bargaining agent"). The complaint is based on paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"), which refers to section 185. The complainant alleges that the respondent breached his duty of fair representation by failing or refusing to represent her in a matter involving a staffing process. The complaint specifically refers to the following provisions of the *Act*:

*. . .*

> ***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.*
>
> *. . .*
>
> ***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).*
>
> *. . .*
>
> ***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.*

*. . .*

[2] The complainant alleges that, on May 19, 2010, the respondent sent a letter to the president of the Canadian International Development Agency, the complainant's employer, asking that an ongoing PM-06 staffing process be cancelled. At that time, the complainant was allegedly participating in that process while performing the duties of the position being staffed in an acting capacity. A copy of the respondent's letter was attached to the complaint. In essence, the complainant argues that that letter and the

respondent's failure to adequately address her concerns are tantamount to a violation of section 190 of the *Act*. For the reasons that follow, I find otherwise.

## II. <u>Summary of the arguments</u>

### A. <u>For the complainant</u>

[3] Although the complainant does not dispute the respondent's right to file a complaint against a staffing process or the role of her bargaining agent in such circumstances, she takes issue with the fact that the respondent's letter specifically referred to her by name as the acting incumbent of the position for which the staffing process was being challenged.

[4] The complainant is of the view that that mention constituted a breach of section 190 of the *Act* for the following two reasons.

[5] First, the complainant alleges that, by referring to her by name rather than simply as "the incumbent" or "the employee acting in the position being staffed", and by referring to the outcome of a previous process in which she had participated, the respondent made its request to the employer needlessly personal. In doing so, it acted in bad faith.

[6] The complainant argues that, since her name is the only name mentioned in the letter of May 19, 2010, and since none of the representatives of the employer involved in the staffing process are personally named in the letter, wrongdoing on her part is implied.

[7] The complainant further alleges that, by sending the letter of May 19, 2010 without marking it as "confidential" or "secret," the respondent allowed accusations of wrongdoing on her part to be circulated within her workplace and potentially more broadly. However, I noted that the complainant led no corroborative evidence or further clarification on this issue.

[8] The complainant argues that, since the personalization of the respondent's request served no substantive purpose other than to target her personally, I must find that he acted in bad faith.

[9] Second, the complainant alleges that, by choosing to implicate her in what she qualifies as a dispute, and specifically by referring to her by name in the May 19, 2010 letter, the respondent undertook a *de facto r*esponsibility to represent her interests to the same extent as for those who had raised concerns about the staffing process.

[10] The complainant further argues that the respondent failed to represent her interests as a member of the bargaining unit by refusing to acknowledge or discuss the matter with her, despite her request for input from her bargaining agent. That, according to the complainant, amounts to arbitrary use of the respondent's authority.

[11] As a result of the alleged violation, the complainant seeks the following relief:

1) An apology from the respondent for how the situation was handled.

2) A review, by the bargaining agent, as to how these types of situations should be addressed in the future.

3) Compensation equivalent to the union dues that she paid in the year preceding her complaint, estimated at $1 298.00.

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

[12] The respondent argues that the complainant made unwarranted inferences and wrong assumptions about his motives. According to the respondent, none of the facts alleged by the complainant disclose any indication of personal feelings of hostility or ill will on his part toward her. In addition, the respondent indicates that he has always denied having such motivation.

[13] The respondent alleges that several bargaining unit members presented him with information that suggested that the employer was acting improperly in a particular staffing matter. The respondent argues that, by bringing that information to the employer's attention and by seeking a corrective approach, he was acting responsibly, diligently, fairly and in good faith as a bargaining agent leader.

[14] According to the respondent, his letter of May 19, 2010 consisted of a request for an investigation into a staffing process. He legitimately made that request on behalf of other affected bargaining unit members. His letter did not constitute an

initiation of litigation before the Public Service Staffing Tribunal ("PSST"), the administrative tribunal mandated to hear and adjudicate formal staffing complaints under the *Public Service Employment Act* S.C. 2003, c.22, ss.12, 13 ("the *PSEA*"). The respondent adds that the staffing process in question had not been finalized, that no staffing complaint had been filed under the *PSEA* and that no grievance had been filed on behalf of any affected bargaining unit members. From my review of the written materials on file, those factual contentions were not challenged by the complainant.

[15] The respondent adds that, given the limited workplace population involved in the staffing issues raised in his letter, anyone affected by the staffing process in question — including the bargaining unit members who sought the respondent's assistance, as well as the managers involved — would have known that the complainant was the incumbent acting in the position. The respondent argues that, in the circumstances, his request for an investigation justifiably referred to the complainant's name and situation and that no negative inference should be drawn from that reference.

[16] The respondent contends that, although he requested that managers to whom the employer had delegated staffing authority be held accountable to proper staffing processes and values, he never alleged wrongdoing or impropriety or any other negative behaviour by the complainant. The respondent argues that he never acted in bad faith, with malice or with any negative motive whatsoever toward the complainant.

[17] Although the respondent acknowledges the possibility — and even the likelihood — of competing interests from fellow bargaining unit members when a complaint is filed with the PSST about a staffing process, he reiterates that, when the complainant's unfair labour practice complaint was filed, no staffing complaint had been filed and no litigious proceeding of any kind had been initiated. Again, my review of the written materials before me does not suggest otherwise.

[18] The respondent denies that he implicitly or otherwise undertook a duty to offer representation to the complainant by referring to her by name in his letter of May 19, 2010, rather than referring to her as the incumbent of the position being staffed.

[19] The respondent argues that he could and would have provided representation to the complainant if representation had been required but that, at all relevant times, no

response to his letter had been forthcoming from the employer, no staffing complaint had been or needed to be filed with the PSST and no litigation had been initiated on behalf of or against the complainant. The respondent added that at no time did the complainant seek particular assistance on a particular matter, another factual contention that was not contested by the complainant.

[20] In response to the complainant's allegation that he was unwilling to discuss the matter with her, the respondent contends that he responded to the complainant on May 21, 2011 by email and indicated that he preferred not to comment further on the complainant's concerns until he was in receipt of the results of the enquiry he had requested from the employer. The email in question was attached to the complaint.

[21] The respondent also argues that the remedies sought by the complainant are beyond my remedial authority and are unsupported by the *Act* and by the previous decisions of the Board. The respondent adds that the complainant provided no specific evidence of any impact on her professional reputation or any personal impact whatsoever.

[22] In summary, the respondent argues that the complaint fails to disclose a *prima facie* violation of the *Act*.

**C. The complainant's reply**

[23] The complainant argues that the respondent's letter to her employer should have been kept confidential and that the fact that it was not jeopardized her credibility and reputation. The complainant adds that the absence of a minimal effort to preserve her privacy further evidences bad faith on the respondent's part.

[24] The complainant also takes issue with how the respondent dealt with her concerns, referring to a lack of acknowledgement and willingness to discuss the issues, which left the complainant with the impression that the respondent was no longer prepared or willing to represent her interests.

**III. Reasons**

[25] I am satisfied that the parties' written submissions on file allow me to decide this unfair labour practice complaint without convening an oral hearing, as there are

no issues aside from the characterization of the evidence. My authority to proceed in this fashion is provided by section 41 of the *Act*, which reads as follows:

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

[26] For the reasons that follow, I have concluded that the complaint does not on its face demonstrate a breach of the duty of fair representation by the respondent and have hence determined that it must be dismissed.

[27] 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 requires the complainant to present evidence sufficient to establish that the bargaining agent or one of its representatives failed to meet the duty of fair representation.

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

> . . .
>
> ***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. . . .*
>
> . . .

[29] I have closely reviewed the facts alleged by the complainant for evidence of discriminatory, arbitrary or bad faith behaviour on the part of the respondent but have found none. The two allegations made by the complainant that require consideration are that the mentioning of her name in the respondent's letter of May 19, 2010 was done in bad faith and that the respondent's refusal to represent her was made in an arbitrary fashion. Do the facts submitted by the complainant in support of those allegations make out an arguable case that the respondent acted in bad faith or arbitrarily? I do not believe so.

[30] As alluded to in *Halfacree,* the Board's role is not to determine whether the respondent's decision to represent or how to represent the complainant were

appropriate or correct, good or bad, or even with or without merit. Rather, it is to determine whether the respondent acted in bad faith or in a manner that was arbitrary or discriminatory in the representational decision-making process. The discretion accorded to bargaining agents and their representatives for determining whether and how to represent bargaining unit members is broad but it is not absolute. The scope of that discretion was set out by the Supreme Court of Canada ("SCC") in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at 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.*
>
> . . .

[31] Duty of fair representation complaints and the proof required to sustain an allegation of bad faith or of arbitrary action have been canvassed by a considerable number of Board decisions and judicial review rulings of the Federal Courts. The Board recently focussed on the nature of arbitrary decision making in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, and in doing so referred to some of the leading cases in the following manner:

> . . .
>
> 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."*
>
> . . .

[32] Those cases suggest that bargaining agents and their representatives should be afforded substantial latitude in their representational decisions. As the Board recently stated 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." It requires the complainant to make out an arguable case for a violation of section 187 of the *Act,* which in turns requires her to put forward evidence that the bargaining agent's decision not to represent her was made perfunctorily or in a cursory fashion. I find that no such case was offered by the complainant. I am unable to find in the complainant's submissions evidence of arbitrary conduct, discriminatory treatment or bad faith decision making on the part of the respondent that is sufficient to establish a violation of section 187 of the *Act*, on the balance of probabilities.

[33] I am satisfied that the respondent demonstrated that he had no obligation to represent the complainant, given that his letter of May 19, 2010 mainly consisted of a request to the employer for an inquiry into a specific on-going staffing process, an action the respondent initiated as a result of concerns expressed by bargaining unit members. In addition, no evidence on file suggests that the staffing process in question had been finalized, that the complainant was, or was about to become, the successful candidate, that the complainant would automatically be impacted negatively if the employer opted to proceed with its process in a different fashion, that a formal

staffing complaint had been filed under the *PSEA*, or that a grievance, or any other litigious procedure, had been filed on behalf of anyone affected by the staffing process in question. Similarly, no evidence suggests that the employer even responded to the respondent's letter of May 19, 2010 or that formal representations or appearances were required by the employer in connection with the staffing process. At best, the complainant's concerns, as articulated in her complaint, are premature.

[34] I am of the view that the inferences and assumptions made by the complainant about the respondent's motives are simply not supported by a reasonable factual basis. That the respondent referred to the complainant by name in the letter of May 19, 2010 and how it did so do not trigger a duty to represent as contemplated by section 190 of the *Act*; nor do they amount to bad faith or arbitrary conduct on the part of the respondent or of the bargaining agent.

[35] Even were I to assume all the facts alleged by the complainant in the texts of her complaint and her subsequent submissions as true, I am of the view that this complaint does not reveal an arguable case for a violation of section 190 of the *Act*.

[36] I do not fault the complainant for suggesting that, when a bargaining agent or one of its representatives agrees to represent bargaining unit members in a staffing complaint before the PSST, it undoubtedly does so to the possible detriment of another bargaining unit member, who was successful in the challenged staffing process. In that respect, the respondent acknowledged that the representation role that he must provide in staffing complaints, in which several members' interests may differ, is admittedly complicated, but he nevertheless argued that it was workable. Whether or not that is true, the reality is that that is not the factual situation presented to me in this proceeding, since there is no evidence that an actual staffing complaint has ever been filed with the PSST about the staffing process described in this case.

[37] Even had a staffing complaint been filed by the respondent or the bargaining agent to the possible detriment of the complainant, assuming of course that the complainant had already been successful in the challenged staffing process — two elements that are not factual — the complainant would still have been required to satisfy this Board that the right to representation before an administrative tribunal such as the PSST pertains to a matter or dispute covered by the *Act* or by the applicable collective agreement (see *Lavoie v. Public Service Alliance of Canada and Lachapelle*, 2009 PSLRB 143, and *Elliott v. Canadian Merchant Service Guild et al.*, 2008

PSLRB 3). While there may be some room to argue this point, the facts as outlined by the parties in this matter do not portray such a scenario, as there is no suggestion that the respondent filed a staffing complaint.

[38] While the manner in which the respondent chose to address the complainant's concerns could have been handled differently, this remains an internal bargaining agent matter that does not trigger, in and of itself, a violation of section 190 of the *Act,* especially given the context in which the alleged shortcoming occurred.

[39] For those reasons, I find that the complainant has failed, both in her complaint and in her submissions, to present an arguable case that the respondent committed an unfair labour practice.

[40] Since I have determined that no unfair labour practice occurred, I will not address the issue of remedy other than to state that recent Board decisions on remedial authority do not necessarily support all of the contentions of the respondent on that front.

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

*(The Order appears on the next page)*

## IV. Order

[42] The complaint is dismissed.

April 5, 2011.

**Stephan J. Bertrand,**
**Board Member**