Date: 20110513

File: 561-34-471

Citation: 2011 PSLRB 69

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

GEORGE EDWARD BOULOS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Boulos v. 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: John Steeves, Board Member

For the Complainant: Himself

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

Decided on the basis of written submissions filed,
February 28, March 28, 29, April 11, 14, 28, and May 3, 2011.

Complaint before the Board

[1] This is a decision with regards to a complaint by George Edward Boulos (the "complainant) that his bargaining agent, the Public Service Alliance of Canada (PSAC or the "respondent"), breached its duty of fair representation. The complaint is pursuant to section 190 of the *Public Service Labour Relations Act,* S.C., 2003, c.22 (the *Act*) and it alleges that the respondent has violated section 185 of the *Act*.

[2] The original complaint is dated June 8, 2010 and the complainant has also provided other, subsequent submissions. The respondent provided a submission dated July 28, 2010, to reply to the complainant's original complaint. By agreement between the parties this matter is proceeding by way of written submissions and without an oral hearing. The complainant filed submissions dated February 28, 2011 (with 30 attachments) and March 29, 2011, and the respondent filed a submission dated March 28, 2011. I requested further submissions from the parties on the scope of the complaint and these are dated April 11, 14, 28, 2011 from the complainant and April 28 and May 3, 2011, from the respondent.

[3] A preliminary issue arose between the parties with regards to the potential disclosure of information by the Public Service Labour Relations Board ("the Board") to the complainant's employer. It is the Board's practise to copy employers on submissions in these types of proceedings but the complainant objected to disclosure in his case. Submissions were received from the parties on this issue and, in the meantime, the Board directed that the employer would not receive information from the Board file. The complainant relied on litigation privilege and he pointed to the fact that the information on the Board file included advice to him from the respondent. This advice included an opinion about the merits of the complainant's grievances against the employer. This information was primarily contained in the respondent's submission of July 28, 2010. The respondent, in a document dated September 13, 2010, submitted that the complainant's submission on litigation privilege was "vague" and "must be denied". However, the respondent took no position on the Board's direction that no copy of the respondent's submission of July 28, 2010 should be provided to the employer. By letter of September 24, 2010 the Board advised the parties that, "The respondent's submission to the complaint, dated July 28, 2010, will not be disclosed to the employer at this time."

[4] A related matter is that, as will be seen, the dispute in this case involves a difference over what grievances should proceed to adjudication. The complainant's position is that all of his grievances should proceed and in the way he defines them; the respondent takes a different view. In short, there is a difference over the merits and tactics of the grievances and whether some or all of them will proceed to adjudication. For these reasons, in this decision I have generalized the evidence that discusses merits and tactics so as not to prejudice any future discussion or adjudication of the grievances.

Positions of the parties

[5] The complainant has six grievances against the employer and the respondent was representing him in each of those grievances. About March 2010 the complainant decided that he did not agree with the respondent's approach to the grievances and he has conducted them on his own since then. These differences are now the subject matter of this complaint. There is also a difference about whether the complaint includes events in 2005 and 2006; there is no dispute it includes events in 2007 and 2008.

[6] According to the complainant's submissions of February 28, 2011 and March 29, 2011, the respondent was seriously negligent and did not represent the complainant in a way that was thorough and "forceful". Further, the respondent "deliberately omitted relevant information" and "effectively barred my ability to have an impartial review of my grievances ..." (as described in the complainant's submission of March 29, 2011). According to the complainant, everything in his complaint is factual and is supported by relevant documentation; on the other hand, he submits that the respondent's submission is inaccurate and it omits relevant information in order to support its decision not to support all of the grievances. Many of the respondent's claims are "preposterous" and the employer, based on the facts as presented by the respondent, was "very motivated" to make sure the grievances never reached adjudication. The complainant alleges there was an "impaired process" when the respondent considered his grievances and the respondent's actions "demonstrated negligence, complacency, indifference and/or demonstrations of bad will or faith."

[7] By way of remedy, the complainant seeks three orders in his June 8, 2010 complaint. The first is an order that would address, according to the complainant, a failure by the respondent to raise the relevant provisions of the collective agreement in

at least one of his grievances. He describes this as the "Burchill Barrier" and his concern is that, as a result of the conduct of the respondent, he will not be able to raise these issues at adjudication; he seeks an order to correct this concern. Second, the complainant seeks an order that the respondent "... provide financial assistance with respect to adjudication costs for any of the six grievances in question that reach a hearing stage." Finally, the complainant seeks an order that the respondent "... provide consultation and facilitation assistance, when desired, with respect to ..." the six grievances.

[8] The respondent denies that it breached any provisions of the *Act* when it represented the complainant. Specifically, the respondent submits that it acted fairly, genuinely and with integrity and competence towards the complainant. Further, there was no hostility by the respondent against the complainant and his grievances were thoroughly prepared and forcefully presented to the employer. However, the respondent prepared an analysis of all of the grievances and made a number of decisions about how it would proceed or not proceed. The complainant disagrees with these decisions but, according to the respondent, there was no violation of the *Act.* The respondent seeks the dismissal of the complaint.

Background

[9] The complainant was an employee of the Canada Revenue Agency (CRA). He commenced his employment with the employer in November 2001 and his last indeterminate position was as a tax/excise auditor (classified as SP-05, formerly as PM-02) in Burnaby, British Columbia. He alleges that he was terminated from his employment in April 2008; the employer says he abandoned his employment. The complainant is also a member of the respondent employee organization.

[10] According to the complainant the events giving rise to his complaint began in 2005 and 2006. At that time he "butted-heads" with management, as he put it in his February 28, 2011 submission, over issues such as lack of support for employees and the employer was (and is) "... extremely adverse to any bad publicity, legitimate or not, and ministerial letters." The complainant explained in this submission that he had approached the respondent to file a grievance on these issues and he had a discussion with the local president of the respondent. According to the complainant,

. . .

> *... she failed to get back to me as she had promised to do. She advised me that she had gotten busy and preoccupied and had forgotten to act on the grievance. She advised that, as a result, the deadline to file the grievance had expired. She was extremely apologetic and advised that she would instead raise the issue before the next Union Management Consultation ... . I accepted her apology and was satisfied with what she promised to do as an alternative remedy. She advised that she would keep me informed. She never did and when I contacted her myself several times thereafter to see whether anything came of her commitment to me, I learned that she had reneged on that commitment.*
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> . . .

[11] The complainant describes approaching the respondent again in 2006 to obtain their assistance with another grievance. The subject matter of the grievance is not explained and it may have been further issues about management's failure to support the complainant and other employees. In any event, according to his submission of February 28, 2011, he was "... more wary of the process this time ... After my last experience I wanted to take greater charge of this grievance. ..." At first the shop steward agreed but a conflict arose because the complainant wanted the steward to conduct several interviews. In the end the steward was uncomfortable doing this and would not conduct the interviews. "He also communicated ... that he never wanted to represent me for the grievance as he did not believe it would be successful". According to the complainant, the 1st level of the grievance process was "... for all intents and purposes, bypassed." He was not "... given an opportunity to adequately review and approve it prior to its submission. It was poorly written, contained errors and I actually found it embarrassing to me particularly as the steward wrote it in the 1st person as if I had written it." The grievance was not allowed at the second level and, according to the complainant, he wrote "... better-formulated arguments ..." for the third level. The result was that, "... the Employer ... allowed only the corrective actions sought for the grievance that would preclude adjudication before the Board. It was therefore decided not to proceed with the grievance any further."

[12] A question arises between the parties about whether these events in 2005 and 2006 are part of the June 8, 2010 complaint before the Board. The respondent points out that they are not referenced in that complaint and it requests that the Board not allow the complaint to be expanded in this way. The complainant submits his original complaint was "... in no shape or form the full and substantive submission of my

complaint ..." and he maintains that he is entitled to rely on the 2005 and 2006 events. This dispute is discussed below.

[13] The next events occurred in 2007 and they are a significant focus of the complainant. In that year two taxpayers filed complaints against the complainant about his work. One complaint was found by the employer to be unfounded; for the other complaint the employer decided to assign the file in question to another auditor. A meeting involving the complainant did not resolve the situation to the complainant's satisfaction.

[14] In his submission of February 28, 2011 the complainant describes how this incident escalated. On November 15, 2007 he wanted to start a grievance relating to the Employer's conduct and bring it to adjudication before the Board. The subject of the grievance was the employer removing the complainant from "... several audit cases involving ... taxpayers as a result of an unfounded complaint which the Employer also found to be without merit." This complaint was, according to the complainant, harmful to his reputation. Then,

. . .

> *I staged a very peaceful sit-in protest in front of my manager's office after senior management confirmed that they would not change the decision. Management was aware that I was protesting .... The sit-in lasted about two hours until I received the written suspension. I willingly left the workplace immediately thereafter but was also escorted in the process of leaving the building. I expected the disciplinary measure (the suspension) I sought would be in keeping with what I actually did and based on my history. Management ultimately however suspended me for five months for the protest I staged under the guise that they believed I may have been "sick". ... This of course was in addition to much circumstantial evidence which also supported a disguised disciplinary agenda.*

. . .

[15] A letter from a manager to the complainant, dated November 22, 2007 (cited in the respondent's letter of March 25, 2010), discussed this incident and said, among other things, "... Your aggressive reaction and subsequently abnormal behaviour caused me concern for your well-being and for the safety and well-being of others ..." Another letter from the employer dated January 15, 2009 (also cited in the

March 25, 2010 letter from the respondent) described the complainant as acting "... aggressively and in a belligerent, erratic and unreasonable manner." This was "a significant disruption and distraction in the work environment and other employees and their union representatives expressed concern for their personal safety." The letter also expressed concern that the complainant might have "an illness or medical condition ..." that contributed to his behaviour. The complainant was given a suspension from work by the employer. Ultimately, this was changed to leave without pay and then to sick leave with pay, retroactive to the date of the original suspension.

[16] On December 20, 2007 the complainant filed four grievances about these events. The first grievance alleged that the employer placed the complainant on sick leave when he did not request sick leave. The second grievance alleged that the employer "compelled" the complainant to resort to a suspension or termination of employment in order to protest the re-assignment of his files. The third grievance alleged that the employer placed the complainant on leave without pay, effective December 17, 2007. Ultimately, through the actions of the complainant as well as the respondent, the complainant was placed on special leave with pay, pending a fitness to work assessment of the complainant by Health Canada. The respondent characterizes this as a partial allow of the grievances. However, the complainant objects to this result because it raises an issue about whether there was discipline and whether the Board has jurisdiction. He desires to have a public hearing at the Board to present his concerns about the employer and this would not be possible if there was no discipline. Ultimately Health Canada declined to conduct an assessment of the complainant and the information on file suggests that this was because it believed he was fit to work. Certainly the complainant takes that view.

[17] A fourth grievance, also dated December 20, 2007, alleged that the employer had "disciplined and demeaned" the complainant following an "unfounded" complaint from a taxpayer. The corrective action sought by the complainant included a request that the employer issue a statement that the complaint from the taxpayer was unfounded as well as a statement from the employer that the employer did not support the complainant.

[18] In his submission of February 28, 2011, the complainant characterizes the employer's actions that gave rise to these grievances as follows:

> *... CRA decided to exploit the situation in order to discipline and make an example of me. They embellished and outright lied about certain events to try and legitimize forcing me on sick leave and undergoing a fitness to work evaluation by Health Canada.*

The complainant submits that the evaluation was not done because he told Health Canada that "this was actually office politics at play ... Ultimately I was suspended (forced on sick leave when I wasn't sick) for five months through this campaign wherein too the CRA dragged their feet to slow down the process."

[19] The complainant, still in his submission of February 28, 2011, describes problems with the respondent over these grievances. At first he "favoured representing myself ... until the Final Level" of the grievance process. However, a representative of the respondent advised him that, if he wanted representation, the respondent would have to be involved at the beginning of the process. The complainant eventually agreed to this. A dispute between the complainant and the respondent about the number of grievances and their wording followed. Representatives of the respondent drafted the grievances and the complainant was told, in his words, "... I would not be allowed to make any changes." The complainant expected that he and the respondent would have to "negotiate/debate" the content. Ultimately the respondent decided "out of embarrassment" that its wording had to be amended because the wrong provision of the collective agreement was referenced, according to the complainant. There were other disagreements including ones about damages. In June 2008 the complainant wanted the respondent to advance the issue of aggravated damages and the respondent declined to do so. As a result of an exchange of emails the respondent changed his mind and agreed to proceed with aggravated damages. Then, in September 2009, there was an exchange of emails about the quantum of damages. In an email of September 10, 2009 the complainant wanted to know from the respondent whether the employer had been told the quantum was $100,000, a figure presented by the complainant to the respondent. The complainant, in an email of September 21, 2009, then objected that the respondent had disclosed this figure to the employer:

. . .

> *What possible reason did you have to disclose that information to the Employer outside the grievance presentation? If it's not apparent to you, I take exception that you did particularly due to your reaction to that figure when I first provided it to you on March 26th. There was absolutely*

> *no legitimate reason for you to have provided that figure to them at that time ...*
>
> . . .

[20] About mid-April 2008 there were discussions about a return to work by the complainant. As part of these discussions he wrote a letter to the employer that was, in his words (his February 28, 2011), "... extremely critical and it advised that I would not discuss my return to work with those responsible for suspending me as they had." As well, in a letter dated April 14, 2008, he wrote to the employer stating, among other things, that they had "... gone to great efforts to have me discredited and humiliated. ... Your actions demonstrate dishonesty, the deliberate misuse of government resources, a lack of ethical behaviour, poor moral judgement, and a will to cause harm to another." The complainant set a number of conditions that had to be met before he returned to work. For example, he stated his

> . . .
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> *... unwillingness to return to work under the same management and also my lack of desire to have such direct communications with you about my return to work ... It is not my intention to contact you further to discuss my return to work other than to submit a new grievance on this day. If it is CRA's position to remain inflexible having awareness of some of the circumstances surrounding this matter, then it should proceed as it may. I will consider myself as having been constructively dismissed. ...*
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> . . .

[21] On April 14, 2008 the complainant filed a fifth grievance alleging harassment by the employer. His objective was to be reinstated to his original position as an auditor. According to an attachment to an October 15, 2009 email, from the complainant to the respondent, this grievance related to various harassing actions by the employer including: "improperly placing me on an approximate 5-month Leave period." As well, the employer included as "unacceptable terms" that the complainant return to work "with one of the persons who has engaged in this harassing behaviour and who continues to hold a position of authority over me"; and the employer was "... intimidating mental health concerns [*sic*] and forcing me on sick leave."

[22] In July 2008 the complainant was offered a temporary assignment to a different position as a Canada Pension Plan/Employment Insurance (CPP/EI) rulings officer. This

was not a return to work as an auditor, the complainant's position in November 2007. In a letter to the employer dated August 27, 2008 the complainant explained that he had "concerns" about this alternate work but, "Despite my concerns and discomfort relating to the work environment, and also because it was recommended by my union representative to accept it, I did accept the position, beginning on July 22, 2008." However, he did not realize that the position had "next to no relevancy to my accounting profession". That realization "came quickly" but the complainant, in his words to the employer,"... begrudgingly continue[d] to accommodate your office by remaining in the position for an approximate 3 to 4 month period ..."

[23] Problems arose with this alternate position. The complainant objected to directions from his coach/technical advisor that he obtain certain information from people that he was interviewing. He refused to do this because he did not agree the information was relevant. When the complainant was faced with a clear direction to do the work, he again refused and he advised the employer that he was leaving the temporary position. He handed in his identification pass and left the premises. A manager telephoned the complainant and asked him to return to work and he said he would not do so because he did not want the employer to discipline him for insubordination. On August 22, 2008 a Team Leader wrote to the complainant that his behaviour was "inappropriate" and he was instructed to return to work on August 25, 2008. Upon returning to work there would be "further discussion" that "may result in disciplinary action." As well, "If you continue to refuse to return to work, a recommendation will be made to senior management to terminate your employment." On August 26 and 27, 2008 a representative of the respondent contacted the complainant to urge him to return to work. He did not.

[24] According to a letter he wrote to the employer on August 27, 2008, the complainant's position was that he was accommodating the employer by taking the temporary position and, "I didn't wish to be any more accommodating by accepting working conditions that did not reflect my length of time with CRA and certain privileges or confidences that I had earned." He left the temporary position after one month because of "certain aggravating factors" that amounted to "... a concerted effort by certain CRA staff members to seize an opportunity to rid itself of an employee who has upset the establishment to some degree and who has forced the resentment of some high-ranking managers." The complainant closed his August 27, 2008 letter by stating the following: "I intend to continue to seek a certain level of accountability for

those managers who have abused their authority with respect to my existing grievances."

[25] The complainant maintains he was terminated from his employment for disciplinary reasons; the employer decided that he abandoned his employment and the employer says this is not a disciplinary matter. The significance of whether the situation was disciplinary or not is that an adjudicator can only have jurisdiction if the matter is disciplinary and, as recorded above, the complainant seeks to air his concerns about the employer before an adjudicator. The complainant was concerned that the employer's reduction in discipline meant that there was an argument that an adjudicator did not have jurisdiction. This dispute - termination versus abandonment - is set out in emails during September 2008. For example, an email dated September 15, 2008 from the complainant to the employer, among other things, stated,

. . .

> *... with all due respect I advise once again that I will not return to that temporary position given the reasons in my Aug. 27, 2008 letter. My indeterminate position with the CRA is that of an Income/Excise tax auditor and I have not rejected that position only the location due to the harassment matter. If the temporary position/relocation that you offer me is inflexible/steadfast, then I accept the consequences of my actions subject to any recourse available to me. It is not my expectation, however, that any consequences should be improper.*
>
> *It is my opinion that the temporary employment contract I had with CRA as a CPP/EI Rulings officer ended on Aug. 20, 2008 when I chose to leave that position. On that basis, I question LPRA's [Legislative Policy and Regulatory Affairs] perceived role that they continue to manage me. If my employment as an auditor with the CRA is to be terminated, I believe that, under the circumstances, it is most appropriate that you should terminate my employment. If you believe that delegating this authority to LPRA is proper, I will not challenge that I have been terminated if this in fact occurs through notice from LPRA. I will however seek recourse.*
>
> *I apologize if I am coming across as argumentative and difficult. I unfortunately perceive that you are viewing me more as an agitator rather than a victim of certain bad will by CRA managers (and certain of their support staff). I am only trying to seek accountability and wish not to perceive that I am being further punished for trying to do so.*

. . .

[26] Ultimately the employer directed the complainant to report to work on September 22, 2008. To this the complainant replied by email dated September 19, 2008,

> *If your sole intention for my attending the workplace on Sept. 22 is to perform the duties of a CPP/EI Rulings officer, then I am advising you that I will not attend the office for that purpose. If you wish that I attend for other reasons, then you should advise now otherwise I will not be attending. My reasons for this position have already been made known to CRA management.*

[27] In his submission of February 28, 2011 the complainant described the circumstances of his refusal to attend work in the temporary CPP/EI rulings officer position as follows:

. . .

> *... When I refused to return to that particular job under uncompromising threats of termination, I was terminated. Despite the communications that were exchanged that demonstrated bad will on the part of the Employer and despite communications which clearly demonstrated that I was not abandoning my indeterminate auditor position, the Employer nevertheless classified the termination as an abandonment of position - certainly in my mind as a way to try and avoid the jurisdiction of the PSLRB.*

. . .

[28] On September 24, 2008 the employer advised the complainant that his employment was terminated because he had abandoned his position of CPP/EI rulings officer.

[29] A sixth grievance from the complainant, dated September 26, 2008, alleged that the employer had terminated his employment. In an attachment to his October 15, 2009 email the complainant explained to the respondent that this grievance was "... largely due to the Employer's failure to adhere to its Preventing and Resolving Harassment policy ..." As well there were options other than termination available and "The fact they preferred termination was indicative of the bad will that existed and supports the premise that what took place was disciplinary in nature

(concerted effort to seize an opportunity to get rid of me)." The complainant stated to the respondent "I want that argued", among other directions.

[30] On March 25, 2010 an official of the respondent prepared an analysis and opinion of the six grievances at issue. This official was with PSAC, rather than the Union of Taxation Employees (UTE), and the matter had apparently been referred to PSAC for this analysis and opinion. As will be seen, the complainant is distrustful of both organizations. The March 25, 2010 letter was an internal document but it was forwarded to the complainant the same day. The overall conclusion of the respondent was that it was prepared to support the adjudication of some of the issues in the six grievances, but not all issues. The March 25, 2010 letter is a lengthy document and I summarize it as follows,

(a) The history of the six grievances was set out by the respondent in some detail. The letter also included lengthy notes from the representative of the respondent who assisted the complainant in his grievances.

(b) According to the respondent, "... two things are very clear from the documentation ... First, the motivation of the complainant "... was to find a way to bring before an adjudicator the whole incident related to management's decision to remove from [the complainant] certain taxpayer's files ...". Second, the complainant was not satisfied with the temporary assignment, at the same salary, to the CPP/EI rulings officer because it did not take into account his expertise as an auditor and did not give him the same discretion to do the work. "On the other hand" the complainant advised the employer that he would not be prepared to return to work in his substantive position (i.e. auditor) "... under the same management."

(c) With regards to the first three grievances, the change from a suspension to special leave with pay was noted and the issue of aggravated damages was discussed.

(d) The fourth and fifth grievances were also considered. The respondent noted that the complainant was concerned about how the employer was not supporting its employees but it disagreed with the complainant about how these grievances should proceed.

(e) The sixth grievance, challenging the "termination" of the complainant "via the abandonment declaration", was considered to be "the most important" grievance. The March 25, 2010 letter noted the complainant's view that CRA was motivated by a desire to "seize an opportunity to rid itself of an employee who had upset the establishment and who has fostered the resentment of some high-ranking managers." A number of previous decisions were specifically reviewed as a result of an "exhaustive review of all the decisions of the Board dealing with abandonment declaration." The respondent's conclusion was that it would be preferable to proceed with the grievance in a different way than that proposed by the complainant.

(f) The result, as set out in the March 25, 2010 letter of the respondent, was as follows,

> *Brother Boulos should be aware that he has the right to attempt to pursue any or all of these grievances independently and on his own before the Public Service Labour Relations Board on the basis of alleged discipline, but not as interpretation of the collective agreement since he does not have the bargaining agent's support. This is not something PSAC is recommending, but it is within his rights under the Act. Should he choose to proceed on his own, he must understand this would be entirely at his own expense. [Emphasis in the original].*

[31] In an email dated March 29, 2010 the complainant said to the respondent that he disagreed with the conclusions of the March 25, 2010 letter. He described "errors that were made with certain facts" but he also said "I will not correct them at this time but only note to you that there are errors present." As well, the complainant disputed that he had been paid during the eight month period he had been off work. He also alleged that the respondent's letter was "poorly balanced" and it reflected the respondent's "willingness to rationalize/mitigate management's role in the 5-month suspension ..." As well, there was "more than ample evidence" that the fourth grievance involved discipline. The complainant also took issue with the respondent's reliance on a number of previous decisions and, for example, described one decision as a "poor comparable". The email ended with the following,

> . . .
>
> *It is very much a strong part of my nature to want to thank you for the amount of time you obviously expended in*

> *preparing your analysis but I can't yet do that if I feel you/PSAC intend to remain steadfast in your restricted offer of representation which unfortunately falls short in light of the issues which I don't believe you fully appreciate. Please get back to me when you are ready.*

[32] The respondent replied to the complainant in an email dated April 1, 2009. On the basis of new information provided by the complainant the decision of March 25, 2010 was altered to the extent that the respondent was prepared to support the complainant with his fifth grievance. However, there was a "possibility" that the employer would raise a preliminary objection that the nature of the grievance was being changed; this is the so-called "Burchill barrier", after the leading case on this issue (*Burchill v. Attorney-General of Canada,* [1981] 1 F.C. 109). The respondent stated that it believed this objection could be overcome. There was no change in the position of the respondent with regards to the other five grievances.

[33] A subsequent email of April 7, 2010 from the complainant questioned the good faith of the respondent in the following terms,

. . .

> *... since all my grievances were related and intertwined, it would not have been a major leap or involved a great effort to refer certain of the others and allow an adjudicator to make a decision with respect to jurisdiction and possibly with respect to allowing other corrective actions rather than coming to a conclusion on your own with respect to what you "consider" will happen. While I certainly appreciate that that is part of your job, such a statement is very easy to make and can be incredibly self-serving to justify a decision. Such consideration by PSAC was and is also partly flawed since it was clear to me based on your analysis that you did not fully appreciate the facts of the issues and my limited rebuttal certainly wasn't intended to address those deficiencies fully. The existence of shortcomings within that analysis certainly however didn't surprise me given certain UTE's preparation of my grievance files and UTE's influence with PSAC.*
>
> *There wasn't much you needed to do with respect to accommodation of my wishes to actually demonstrate good faith and, given reasons I had to be mistrustful of UTE, it would have been appropriate for PSAC to want to reach out and demonstrate good faith. You unfortunately opted not to do so.*

. . .

[34] The complainant proceeded to take conduct of the six grievances without the support of the respondent. He has scheduled hearing dates with the Board for all of his grievances and without the assistance or participation of the respondent. In the complaint that is the subject matter of this decision, he seeks orders from the Board directing the respondent to assist him in the adjudication of all of these grievances and an order on one other issue. Specifically, the corrective action sought by the complainant, taken from the original complaint of June 8, 2010, is,

> *1. An Order, if necessary, which would remedy an inability for the reference to adjudication #566-34-3672 to proceed to adjudication based on the Employer's "Burchill barrier" argument;*
>
> *2. An Order that PSAC provide financial assistance with respect to adjudication costs for any of the six grievances that are in question that reach a hearing stage;*
>
> *3. An Order that PSAC provide consultation and facilitation assistance, when desired, with respect to any of the six grievances that are in question that reach a hearing stage.*

[35] In his submission of April 14, 2011 the complainant seeks to amend the corrective action he requested in his original June 2010 complaint to include a request "to be made whole". In its reply submission of May 3, 2011 the respondent opposes "... this attempt by the Complainant to alter the scope of his complaint, including the corrective action sought."

Reasons

[36] The general context for complaints under section 187 of the *Act* has been set out in a previous decision of the Board (*Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13),

. . .

> *[48] The bargaining agent's duty of fair representation is described in section 187 of the ... Act ... as follows:*
>
> > *187.* No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.

[49] The judgment in Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, is commonly used to explain the principles underlying the duty of fair representation:

. . .

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee. (at 527).

. . .

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

. . .

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

. . .

> *[51] The decision of James W.D. Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000 (2003), 91 CLRBR (2d) 33 (BCLRB), citing an earlier decision, Rayonier Canada (B.C.) Ltd., [1975] 2 Can LRBR 196 (BCLRB), is also instructive. The actions of a union must not be in bad faith in the sense of personal hostility, political revenge or dishonesty. There can be no discrimination, including unequal treatment of employees, whether on account of such factors as race and sex (which are prohibited grounds under the Canadian Human Rights Act) or simple personal favouritism. And a union cannot act arbitrarily by disregarding the interests of one of the employees in a perfunctory manner. Rather, a union ". . . must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations." (Rayonier, at page 201-202).*
>
> *[52] Finally, Judd summarizes the difficult judgment that a bargaining agent must make:*
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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].*
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[37] In this case the complainant is plainly dissatisfied with the respondent's conduct, specifically with how the respondent has handled grievances related to events in 2005, 2006, 2007 and 2008.

[38] In his submission of February 28, 2011 the complainant discusses events involving the respondent in 2005 and 2006. These were not referenced in the original complaint dated June 8, 2010 and the respondent opposes the expansion of the

complaint to include the events in 2005 and 2006. I have noted above that the subject matter of these events is not clearly set out but I take the issue to be as the complainant presented them in his submission of February 28, 2011: he "butted-heads" with the employer over the lack of support for employees who were the subject of complaints from taxpayers and he sought redress through the grievance procedure for this issue.

[39] With respect to the events in 2005, according to the complainant, the respondent missed a deadline to file a grievance. However, the representative of the respondent apologized and proposed a different approach. In his submission of February 28, 2011 the complainant stated, "I accepted her apology and was satisfied with what she promised to do as an alternative/remedy." The representative then advised that she would keep him informed but, according to the complainant, she did not do so. At a subsequent meeting "... I communicated my dissatisfaction with her behaviour and how she had greatly let me down." From this I conclude that any substantive issue was resolved by the alternative proposed by the representative and it was accepted by the complainant. If there is a lingering issue it has to do with what the complainant describes as a lack of communication, although that also appears to have been resolved by the meeting on that issue. In any event, I am unable to find that the respondent's actions in 2005 amounted to arbitrary and discriminatory actions or that there was bad faith on its part, contrary to section 187 of the *Act*.

[40] Looking at the 2006 incident, there was apparently a difference about a grievance filed by the respondent on behalf of the complainant. The complainant says he was not given the opportunity to review a submission prepared by the respondent until just before it was presented to the employer. He describes the submission as "poorly written", it contained errors and it was "embarrassing" to him because it was written in the first person. At the next stage of the grievance procedure the complainant wrote "better-formulated arguments" to assist the representative of the respondent. The result was that "... the Employer at that Level allowed only the corrective actions ... that would preclude adjudication before the PSLRB" and it was decided not to proceed with the grievance any further. The complainant then had a discussion with a labour relations officer with the respondent "... with regards to the limitations that existed with respect to the kind of grievances that could be taken to adjudication." This officer recommended wording "... to assist a grievance reaching adjudication". I also note that the complainant stated in his February 28, 2011

submission that "I took to heart [the advice of respondent's the representative] when I assisted in writing the narrative for the grievances related to this section 190 complaint."

[41] From the complainant's account of the incident in 2006, I conclude that there were problems, by both the respondent and the complainant, with the drafting of the grievance at issue. These were explained to him afterwards and the respondent provided advice about how to draft grievances in order to avoid those problems. This would seem to be the normal development of a grievance and I am unable to find a violation of section 187 of the *Act* in this incident. However, I do accept that the 2006 and 2005 incidents provide some background for the six grievances in 2007 and 2008, these grievances being the primary focus of his complaint. It follows that I allow this information to be part of the record of the complaint before me but for this limited purpose.

[42] The following is a summary of the six grievances from 2007 and 2008 that are the focus of this complaint:

(a) An allegation that employer improperly put the complainant on sick leave when he did not request sick leave (filed December 20, 2007).

(b) An allegation that the employer compelled the complainant to resort to a suspension or termination over a disagreement about the assignment of an audit file (December 20, 2007).

(c) An allegation that the employer put the complainant on unauthorized leave effective December 17, 2007, and he did not request that leave (December 20, 2007).

(d) An allegation that the employer disciplined and demeaned the complainant following an unfounded complaint from a taxpayer (December 20, 2007).

(e) An allegation of harassment by the employer when it placed terms on the return of the complainant to his original position of auditor (April 14, 2008).

(f) An allegation that the employer terminated the complainant's employment (September 26, 2008).

[43] It may also be recalled that a suspension was given to the complainant in 2007 but it was ultimately changed to sick leave with pay. The complainant is adamant that the respondent support the adjudication of all his grievances. His objective, as he has said himself, is to appear before a public forum and challenge the employer about how it supports or does not support employees when there are complainants from taxpayers. For its part, the respondent reached a different conclusion as set out in its letter of March 25, 2010. Subsequently, after hearing from the complainant and reconsidering the grievances, the respondent changed is position and advised the complainant that it would provide more support to him. The complainant maintains that the respondent must support all issues as he has defined them. Therefore, the primary issue in this case is whether the respondent violated section 187 of the *Act* when it made a decision not to support the adjudication of all of the complainant's six grievances. Put another way, was the respondent arbitrary, discriminatory or did it act in bad faith?

[44] This is an opportune place to point out that I am not adjudicating the merits of the six grievances that are the subject matter of the complaint before me. To be clear, the issues I am not adjudicating include: whether the complainant was disciplined by the employer, whether he was terminated from his employment, whether he abandoned his employment, whether he was appropriately placed on sick leave, whether the employer adequately supports its employees, whether an adjudicator has jurisdiction over any of the grievances, or wheth*er* the complainant was harassed by the employer. My role is only to make a decision under section 187 of the *Act*.

[45] The heart of the complainant's concern can be seen in his email of April 7, 2010, cited at some length above. He says that all his grievances are "related and intertwined" and therefore they should all proceed to adjudication. Moreover, he seeks the support of the respondent to "allow an adjudicator to make a decision" about the issues analyzed in the respondent's letter of March 25, 2010. He objects to the respondent reaching "... a conclusion on your own with respect to what you [the respondent] 'consider' will happen." This is stated in similar terms in the complainant's submission of March 29, 2011. He alleges that the respondent was negligent when it "... effectively barred my ability to have an impartial review of my grievances ..." before the Board.

[46] In my view, these statements by the complainant reflect a misunderstanding of the duty of fair representation that applies to the respondent generally and to this case specifically.

[47] As stated in *Bahniuk,* an employee organization such as the respondent is not required to proceed with every grievance an employee wants to advance. And, as the *Rayonier* decision makes clear, it is the business of an employee organization to make decisions about what grievances will proceed and what ones will not proceed, based on the requirements and resources of the organization as a whole as well as their merits. From a practical point of view, including the financial viability of an employee organization, it is simply not possible to take every grievance to adjudication. An employee organization has limited resources and the legal duty of fair representation allows considerable discretion to make reasoned decisions about how to distribute those resources. Additionally, from a legal point of view, not all grievances are meritorious.

[48] An individual member of an employee organization has the right to representation but that is not an absolute right. It does not mean, for example, that the member can insist that the employee organization support a grievance. As long as the bargaining agent is not arbitrary, discriminatory or acting in bad faith, it is entitled to distribute the limited resources of the organization in a reasoned fashion. For example, an employee organization like the respondent can decide to proceed to adjudication with a grievance, or decide not to proceed to adjudication, without interference from the Board as long as it does not act contrary to section 187 of the *Act*.

[49] It follows that the duty of fair representation does not mean that, as the complainant would have it, the respondent must advance all six of the grievances to adjudication so the adjudicator can make "impartial" decisions. The respondent's opinion of March 25, 2010 was a detailed attempt, based on significant research, to analyze the six grievances and to reach reasoned conclusions about which grievances were worthy of support and which were not. The complainant believes that all his grievances are related and "intertwined". However, the respondent was able to analyze them in a way that separated out their respective merits and thereby reach conclusions about which ones were worthy of support. This is a normal process for the analysis and assessment of grievances within an employee organization. It is also common for

an employee organization to proceed with some grievances and not proceed with others.

[50] In his email of April 7, 2010, the complainant seems to acknowledge that the March 25, 2010 letter was "certainly ... part of your [respondent's] job" but it was "incredibly self-serving to justify a decision." I disagree. In my view this letter reflected an entirely appropriate and responsible exercise for the respondent to undertake. It analyzed the relevant and conflicting considerations and provided a basis for making a reasoned decision about how the respondent would expend its resources. I cannot find anything that could be characterized as arbitrary or discriminatory or in bad faith in that letter. The decisions of the respondent to support some issues and not others were logical results of the analysis in the March 25, 2010 letter. This was not self-serving justification by the respondent, as alleged by the complainant.

[51] The complainant also objects to the reduction of the original 2007 suspension to a leave with pay. This would seem to benefit the complainant but it also meant that there was an issue of whether an adjudicator has jurisdiction over the reprimand. Normally the complainant's objection would be surprising except he perceives the change as another tactic by the employer to avoid a public airing of the real issue in dispute. This issue is the lack of support by the employer for employees who are the subject of complaints from taxpayers. That is the overriding concern of the complainant and one for which he seeks public exposure. Moreover, the complainant alleges that, when the respondent did not agree with him about all of the issues in the six grievances, it was complicit with the employer's attempt to avoid public scrutiny. That allegation is unfounded and must be rejected. I emphasize, again, that I am commenting only on whether there was a reasoned basis for these decisions and not on whether, for example, there are in fact any jurisdictional issues or, if there are, the merits of them.

[52] Another important issue for the complainant is control over his grievances. At the beginning, in his words, he "favoured representing myself ... until the Final Level." He agreed to be represented by the respondent only after he was told that this would have to take place at the beginning and not the end of the grievance procedure. Following this, the complainant was obviously quite uncomfortable with the respondent making decisions about the six grievances. He still attempted to exercise control and, as he says, he thought the wording of grievances would be subject to

negotiation and he would be able to "review and approve" them. More specific examples include his concern when he put forward the damages amount of $100,000 and then the respondent advised the employer of this figure. His objected that this was done "outside a grievance presentation". However, it is usual and generally desirable that discussions between the respondent and the employer take place on many levels including outside the grievance procedure.

[53] The complainant also objects to extensions of time being obtained by the respondent but, within reasonable bounds, that too is a normal and sometimes necessary function of the grievance procedure. And the complainant is adamant that the respondent made a serious and negligent error when it concluded that he had not lost any pay when he was off work. It is true that the respondent took this position initially but, after hearing from the complainant, they changed their mind. This reflects a process of consultation by the respondent, including the acceptance of changes, and there is no basis for a finding that the respondent has been arbitrary in decisions like this or that it was otherwise hostile to the complainant.

[54] The complainant objects to other matters such as how the respondent drafted some of the grievances and the emphasis by the respondent on certain issues or facts to the exclusion of others. The general answer to these concerns is that the respondent is entitled to make substantive and tactical judgements about grievances as long as those judgements are not arbitrary, discriminatory or motivated by bad faith. In my view it is not objectionable for the respondent to have made the decisions they made in this case. The complainant undoubtedly believed, and still believes, that the grievances at issue should have and could have been handled differently and he believes he could have handled them better. But those beliefs do not amount to a violation of the respondent's duty of fair representation. The compelling fact is that the current status of all six grievances is as a result of analysis and judgement by the respondent, after listening and making changes in response to some of the concerns of the complainant. He was not able to convince the respondent to do everything he wanted but, again, that is not a violation of section 187 of the *Act*. Finally, it is necessary to add that there is no evidence that the respondent "deliberately omitted relevant information and wrote [the July 28, 2010 submission] to both support its decisions with respect to the adjudication referrals and to also defend itself of this complaint", as alleged by the complainant in his submission of March 29, 2011.

[55] The following issues are also raised by the complainant:

(a) The complainant states in his April 7, 2010 email to the respondent that,

> *There wasn't much you needed to do with respect to accommodation of my wishes to actually demonstrate good faith and, given reasons I had to be mistrustful of UTE, it would have been appropriate for PSAC to want to reach out and demonstrate good faith. You unfortunately opted not to do so.*

From this I take it the complainant distrusts both the UTE and PSAC and he suspects that the latter is beholden to the former. I acknowledge that suspicion but I am unable to find, on the evidence, that it amounts to a reliable description of the situation or that it otherwise has any significant weight in adjudicating this complaint.

(b) The complainant takes issue with the respondent's handling of the issue of aggravated damages. He was concerned in June 2008 that this issue was not going to be argued by the respondent and, indeed, in an email dated June 4, 2008, the respondent said just that. However, after hearing from the complainant, the respondent decided to pursue the issue of aggravated damages. This is a normal process of assessing the issues involved in a grievance, making a tactical judgement about how to proceed with the grievance and then altering a judgement in the face of new information. I might add that this issue indicates that the respondent did not have a closed mind about the issues that could be adjudicated. Another example is that the respondent changed its position for the harassment grievance and ultimately decided to proceed to adjudication with it, albeit in a manner that the complainant did not like. It follows that I do not agree with the complainant that these events reflect negligence or worse on the part of the respondent.

(c) The complainant has specifically requested an order from the Board that would "remedy an inability" for the employer to use the so-called "Burchill-Barrier". This reflects the respondent's concern in an email dated April 1, 2010 that there was a "possibility" of a preliminary objection from the employer that the nature of the harassment grievance was changed because the issue of financial penalty was not raised in the original grievance document of April 14, 2008. For the reasons given above I cannot comment one way or the other about this issue

> and it will have to be decided by an adjudicator with the appropriate authority. However, as a matter under section 187 of the *Act*, I find that it was a responsible comment for the respondent to make; they identified the issue, assessed it and made a judgement about the substance and tactics involved.

[56] Finally, I note that the respondent was able to obtain some relief for the complainant in some of these grievances. Specifically, the original suspension in 2007 was replaced with leave with pay. The complainant's submissions no doubt played a part in this development but I also find that the respondent played an important role. On this basis, therefore, it is clear that this is not a case where the respondent has been inactive and ignored the complainant or his concerns. Indeed, it is appropriate to point out that the respondent has expended considerable time, resources and patience in a number of attempts to assist the complainant.

[57] In light of the above conclusions it is not necessary to decide whether the complainant can amend his June 2010 complaint to include a "make whole" order as part of the corrective action. He made this request in his submission of April 14, 2011 and it was opposed by the respondent.

Summary and conclusion

[58] The complainant seeks orders from the Board pursuant to sections 187 and 190 of the *Act* that would require the respondent to support the adjudication of six grievances. The respondent reviewed all of the grievances and decided it would support the adjudication of some issues but not others.

[59] The duty of fair representation requires an employee organization to represent employees in the bargaining unit in a way that is not arbitrary, discriminatory or in bad faith. This duty does not require an employee organization to advance to adjudication every grievance that an employee wants to adjudicate. Instead, a reasoned decision is required about whether there is merit to a grievance. In the context of this judgement a decision can be made about how to expend the scarce resources of the organization in ways that are effective and appropriate.

[60] During the grievance procedure the respondent was successful (working with the complainant) in obtaining changes to the employer's decisions including ones that benefitted the complainant. As well, in this case, the respondent conducted a careful,

detailed and researched analysis of the complainant's grievances. The decision not to support adjudication of all of the complainant's grievances was a reasoned one. In particular, there was no arbitrariness, discrimination or bad faith.

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

(The Order appears on the next page)

Order

[62] The complaint is dismissed.

May 13, 2011.

John Steeves,
Board Member