Date: 20131205

File: 561-34-620

Citation: 2013 PSLRB 157

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

PETER CHERWONOGRODZKY

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Cherwonogrodzky v. Professional Institute of the Public Service of Canada

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

REASONS FOR DECISION

Before: John G. Jaworski, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondent: Martin Ranger, counsel

Decided on the basis of written submissions, filed April 23 and May 16 and 30, 2013.

I. Complaint before the Board

[1] On April 23, 2013, Peter Cherwonogrodzky ("the complainant") filed a complaint against the Professional Institute of the Public Service of Canada ("the PIPSC" or "the respondent") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*").

[2] The details of the complaint are that the complainant did not receive fair representation from the PIPSC with respect to pursuing a grievance against his employer for not reimbursing him for certain expenses incurred when he was required to attend jury selection or jury duty.

[3] On May 16, 2013, the PIPSC filed its response to the complaint, denying that it had breached its duty under paragraph 190(1)(*g*) of the *Act*. The complainant filed a reply to the response on May 30, 2013.

[4] On September 30, 2013, the Public Service Labour Relations Board's ("the Board") registry wrote to the parties, advising them that the panel of the Board assigned to the matter had decided to proceed by way of written submissions and advising them that any further submissions the complainant might have were to be filed by October 21, 2013, that any response submissions the respondent might have to the further submissions of the complainant were to be filed by November 12, 2013, and that any reply submissions the complainant might have were to be filed no later than November 19, 2013.

[5] On October 21, 2013, the complainant wrote to the Board, advising it that he would not be filing any further submissions.

[6] On October 24, 2013, the Board wrote to the parties, advising them that the written submissions process was closed.

II. Summary of the evidence

[7] It would appear from the material provided that the complainant, at all material times, was employed by the Canada Revenue Agency ("CRA" or "the employer") as an auditor. I was not provided with his classification level.

[8] On September 4, 2012, the complainant sent an email to Cheryl Owens-Carr, an employment relations officer with the respondent. The complainant stated as follows:

. . .

> *I would like to inquire as to the reimbursement PIPSC's members in CRA would receive when being summoned for jury selection/jury duty.*
>
> *According to the Collective Agreement, Article 17.15, Court Leave with Pay, PIPSC members would be granted leave with pay for jury selection, or jury duty; however, the Collective Agreement is silent with respect to reimbursement of expenses – e.g. km, parking, meals, etc.*
>
> *As the court is part of the Crown, and the Crown – either provincial or federal – is the employer of CRA staff; therefore, the Crown/Employer is designating where a PIPSC member is to report for jury selection/jury duty. It is my view that this is similar to the Employer directing a PIPSC member to report directly to a taxpayer's place of business to conduct an audit. As the PIPSC member is directed by law to report to place, other than their headquarters; therefore, the PIPSC member should receive compensation to mitigate any damages incurred in adhering to this direction - e.g. km, parking, meals, etc. This position is further supported by my understanding that if a PIPSC member is summoned to appear before a legislative body [e.g. committee for the Senate, House of Commons, legislative council/assembly], a PIPSC member would be reimbursed travel, accommodation, and other reasonable related costs to appear before that body in compliance with that legal order.*
>
> *It is my recollection that as an Ontario public servant [OPS], the time and cost would be covered by the Employer; however, any compensation received by the Court would be given to the Employer so that the OPS would not 'double dip' on this issue. Is this the case for CRA members summoned for jury selection, or jury duty?*

. . .

> [*Sic* throughout]

[9] Ms. Owens-Carr wrote back to the complainant via email on September 18, 2012, at 3:37 p.m., advising that she had looked into his query and that there was no entitlement under the collective agreement for the reimbursement of expenses, which he had asked about. She suggested to him that he check with the court to see if it would reimburse him such costs. The collective agreement is between the employer and the respondent for the AFS group; expiry date December 21, 2011 ("the collective agreement").

[10] The complainant responded to Ms. Owens-Carr's email by sending her email to Marcia Kredentser of the PIPSC on September 18, 2012, at 4:02 p.m., and stated as follows:

> . . .
>
> *Please advise where the collective agreement states reimbursement of travel costs for CRA staff travelling on CRA business travel (e.g. assigned audits by the Employer), yet PIPSC members receive km, lunch, parking, accommodation, etc. reimbursement?*
>
> *Is it the position of PIPSC that if I was summoned to appear before a Parliamentary committee I would be required to pay for my travel costs - also found in Article 17.15 of the collective agreement?*
>
> *I would like to have clarification that while an item is not entitled under the collective agreement, this does not preclude it from being reimbursed under authority such as policy, practice, etc.*
>
> . . .
>
> [*Sic* throughout]

[11] On September 18, 2012, at 4:36 p.m., Ms. Kredentser emailed the complainant and advised him she was forwarding his email of September 18, 2012, sent at 4:02 p.m., to Ms. Owens-Carr for any further clarification or response.

[12] On October 23, 2012, the complainant emailed Doug Mason, the PIPSC Audit, Financial and Scientific Ontario representative, stating in part as follows:

> . . .
>
> *I have been denied expenses arising from being issued a summons to appear for jury selection.*
>
> . . .
>
> *Does PIPSC represent its members on policy grievances (e.g. travel costs) or are members to file individual grievances with respect CRA's policies?*
>
> *I find it difficult to believe that if I am summoned before a Parliamentary committee I must bear the travel costs, as summons before Parliamentary or Legislative committees are in the same article of the collective agreement as jury selection. . . .*

. . .

[13] On November 1, 2012, Mr. Mason replied to the complainant's email of October 23, 2012, advising him that clause 17.15 of the collective agreement provides authorized time off with pay for court leave. He explained to the complainant that this meant that it is leave from work and not part of the complainant's work at the CRA. He further advised the complainant that absent a specific provision in the collective agreement that would provide for the reimbursement of costs related to being on leave from work, the presumption is that these costs would be personal to the complainant. Mr. Mason stated that although clause 34.07(4) of the collective agreement states that an employee may not present an individual grievance relating to the interpretation or application of the collective agreement without the approval of or being represented by the PIPSC, since this was something that was not covered by the collective agreement, the complainant was able to file a grievance without the support of the PIPSC. Finally, he confirmed to the complainant that if he wished to pursue the matter any further, he should contact Joanne Harvey at the PIPSC National Office.

[14] The complainant was unsatisfied with the response from Mr. Mason, and on December 5, 2012, he sent an email to Ms. Harvey, Chief of Regional Operations at the PIPSC. In that email, he reiterated the position he had taken in the correspondence he had already provided to Ms. Owens-Carr, Ms. Kredentser and Mr. Mason.

[15] Ms. Harvey responded to the complainant by email on December 5, 2012, stating that based on a quick review of the facts as set out in the email he had sent to her, she agreed with the advice given to him from the PIPSC representatives he had been previously dealing with. That said, she confirmed to him that she would review the matter in more detail and get back to him.

[16] On December 20, 2012, Ms. Harvey wrote to the complainant. In her correspondence to the complainant, Ms. Harvey stated as follows:

. . .

> *As you noted in your September 4th email, the collective agreement is silent concerning the reimbursement of costs when attending jury selection/jury duty.*
>
> *Your attendance for jury selection and jury duty is not based on your employment and CRA is not directing you to attend jury selection in your capacity as an employee. In fact, it is*

> *the Attorney General calling upon your civic duty as a Canadian citizen, not as an employee of the public service.*
>
> *As you were not required by the Employer to attend jury selection, and as the collective agreement is silent on the matter, I concur with Mr. Mason and Ms. Owens-Carr that you are not entitled to reimbursements of costs such as parking, kilometres, meals, etc pursuant to article 17.15 of the collective agreement. Consequently, I concur with the advice that there is no merit to a collective agreement grievance.*
>
> *As a policy grievance is clearly defined as being in respect of the interpretation or application of the collective agreement and since your issue is not a collective agreement issue, there is no basis for a policy grievance* per se*.*
>
> *If your intention was to grieve an employer policy (such as the Leave with Pay Policy you cite in your e-mail to me), I concur with Mr. Mason's advice that since the matter is not related to the collective agreement, you did not need PIPSC support or representation, and could file an individual grievance on your own.*
>
> . . .
>
> *Under the Institute's Policy on Conflict Resolution Procedures for Internal Labour Relations Matters, you may request reconsideration of my decision to the General Counsel, Ms. Isabelle Roy. . . .*
>
> . . .

[17] On January 9, 2013, the complainant requested a reconsideration of Ms. Harvey's decision. On January 29, 2013, Isabelle Roy responded to the complainant and denied his request, stating as follows:

> *Your submissions have been carefully considered and we have determined that there is no basis to file an individual grievance or a policy grievance as you have requested for the reasons that follow.*
>
> *With respect, neither the collective agreement nor in [sic] the* Public Service Labour Relations Act *offer any support for your contention that you are entitled to costs relating to attending jury selection.*
>
> *Article 17.15 of the AFS Collective Agreement (Court Leave with pay) was negotiated to ensure that an Employee could fulfill his/her civic duty without having his/her salary affected. Neither the Employer nor the Institute intended that costs such as parking or travelling would be compensated by*

> *the Employer. Such costs are not contemplated in the CRA and Institute Collective agreement. As such, we concur with both the ERO and Joanne Harvey's assessment.*
>
> . . .

[18] I was not provided any evidence of whether the complainant filed a grievance.

[19] I was not provided any evidence of what, if any, amount the complainant claimed he expended with respect to attending jury selection or jury duty or for what purpose.

[20] I was not provided with any policy of the CRA that provides for the payment of expenses while attending jury selection or jury duty; nor was I provided with any other policy of the CRA.

[21] I have not been provided with any PIPSC policies.

A. <u>The collective agreement</u>

[22] I was not provided with a date when the complainant was required to attend jury selection/jury duty or when he requested his employer for a reimbursement of expenses, if he did. The complaint is dated April 23, 2013. On July 10, 2012, the CRA and the respondent entered into a collective agreement which expires on December 21, 2014. Prior to that, the CRA and the respondent were bound by a collective agreement which expired December 21, 2011. Depending on when the events that are described in the complaint took place, one or the other of these collective agreements would have been in place.

[23] In this decision I have referred to those sections of the collective agreement that expires December 21, 2014. The sections set out herein are the same in the collective agreement which expired December 21, 2011, save and except the definition of weekly-rate of pay which is found at clause 2(*w*) and not clause 2(*x*) and at clause 17.15(*c*)(*v*) the words 'or umpire' follow the word arbitrator.

[24] Article 2 of the collective agreement is the interpretation section and does not define "pay."

[25] Clause 2.01(f) of the collective agreement states as follows:

> *(f)* ***"daily rate of pay"*** *means an employee's weekly rate of pay divided by five (5) . . . .*

[26] Clause 2.01(w) of the collective agreement states as follows:

> *(x)* ***"weekly rate of pay"*** *means an employee's annual rate of pay divided by 52.176 . . . .*

[27] Clause 5.01 of the collective agreement states as follows:

> *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*

[28] Article 9 of the collective agreement addresses compensation for working overtime. Clause 9.06 addresses meal allowances when working overtime and states as follows:

> *(a) An employee who works three (3) or more hours of overtime immediately before or immediately following his scheduled hours of work shall be reimbursed for one meal in the amount of ten dollars and fifty cents ($10.50) except where free meals are provided. . . .*
>
> *(b) When an employee works overtime continuously extending four (4) hours or more beyond the period provided in (a) above, he shall be reimbursed for one additional meal in the amount of ten dollars and fifty cents ($10.50) except where free meals are provided. . . .*
>
> *(c) Clause 9.06(a) and (b) shall not apply to an employee who is in travel status which entitles the employee to claim expenses for lodging and/or meals.*

[29] Article 10 of the collective agreement addresses "call-backs," which are defined at clause 10.01. A call-back occurs when an employee has completed his or her normal hours of work, has left his or her place of work and before reporting for his or her next regularly scheduled work period, is called back to work for a period of non-contiguous overtime. Clause 10.04 of the collective agreement addresses only employees classified CS. It states as follows:

> ***10.04*** *When an employee is called back to work under the conditions described in clause 10.01 and is required to use transportation services other than normal public transportation services, he shall be reimbursed for reasonable expenses incurred as follows:*

> *(a) the payment of the Employer requested mileage rate as specified in the Employer's Travel Policy or the use of a taxi, as determined by the employer, from the employee's residence to the work place and/or return, if necessary;*
>
> *(b) additional out-of-pocket expenses associated with parking or other transportation deemed appropriate by the Employer.*

[30] Articles 14 through 17 of the collective agreement address several types of leave.

[31] Clause 17.15 of the collective agreement is as follows:

> ***17.15 Court Leave With Pay***
>
> *The Employer shall grant leave with pay to an employee for the period of time the employee is required:*
>
> *(a) to be available for jury selection;*
>
> *(b) to serve on a jury;*
>
> *or*
>
> *(c) by subpoena or summons to attend as a witness in any proceeding held:*
>
> *(i) in or under the authority of a court of justice or before a grand jury;*
>
> *(ii) before a court, judge, justice, magistrate or coroner;*
>
> *(iii) before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons otherwise than in the performance of the duties of the employee's position;*
>
> *(iv) before a legislative council, legislative assembly or house of assembly, or any committee thereof that is authorized by law to compel the attendance of witnesses before it;*
>
> *or*
>
> *(v) before an arbitrator or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.*

[32] Article 18 of the collective agreement addresses career development. Clause 18.03 addresses attendance at conferences and conventions, and clause 18.04 addresses professional development.

[33] Clause 18.03(c) of the collective agreement states as follows:

> *(c) The Employer may grant leave with pay and reasonable expenses including registration fees to attend such gatherings, subject to budgetary and operational constraints.*

[34] Clause 18.03(e) of the collective agreement states as follows:

> *(e) An employee invited to participate in a conference or convention in an official capacity, such as to present a formal address or to give a course related to his field of employment, may be granted leave with pay for this purpose and may, in addition, be reimbursed for his payment of convention or conference registration fees and reasonable travel expenses.*

[35] Clause 18.04(f) of the collective agreement states as follows:

> *(f) An employee on professional development under this clause may be reimbursed for reasonable travel expenses, and such other additional expenses, as the Employer deems appropriate.*

[36] Appendix A of the collective agreement contains the pay notes and provides for the rates of pay of the different groups and levels covered by the agreement, set out either as an annual rate of pay or as a weekly rate of pay, a daily rate of pay or an hourly rate of pay.

III. Summary of the arguments

A. For the complainant

[37] The complainant argues that the basis for his complaint is that the respondent refused to pursue a grievance against the employer for an alleged breach of clause 17.15 of the collective agreement.

[38] The complainant states that although he has been told by the respondent that clause 17.15 of the collective agreement, "Court Leave With Pay," was negotiated to ensure that an employee could fulfill his or her civic duty without having his or her

salary affected and that neither the employer nor the respondent intended that costs such as parking or travelling would be compensated by the employer, the respondent has not provided any documentation to uphold this statement, only its opinion. Without a memorandum of understanding or jurisprudence, the respondent can only make an assertion, the employer can make an assertion and the complainant can make an assertion, and as such without the benefit of this, the collective agreement must be read without the benefit of such jurisprudence.

[39] The complainant states that a policy grievance is clearly defined as being in respect of the interpretation or application of the collective agreement. As such, since the word "pay" is not defined in the collective agreement, this is something that is in need of an interpretation of the collective agreement. As such, the complainant should be represented on this issue, as a collective agreement grievance is required in order to have it decided what the definition of the word "pay" is.

[40] The complainant cites section 247 of the *Act,* which states, ". . . to be paid the remuneration and expenses . . . ." The term "paid" can refer to both remuneration and expenses.

[41] The complainant states that he disagrees with the respondent's assertion that clause 17.15 was negotiated to ensure that an employee could fulfill his or her civic duty without having his or her salary affected. He states that the CRA's policy on court leave with pay states that if court leave is granted, any fees or allowances paid to the employee by the court for services as a witness or for jury selection or duty may be kept by the employee and thus make it possible for an employee to make jury duty a profit-making venture.

[42] The complainant states that CRA employees travelling on CRA business receive reimbursement for mileage, lunch, parking and accommodation, yet that is not in the collective agreement except at article 10, under the call-back provisions, and only for those who are classified CS. The complainant states that he brought this to the attention of the respondent in his correspondence to it of January 9, 2013, but never received a response to it, despite the respondent writing to him on January 29, 2013.

[43] The complainant argues that if an employee is required to carry out duties for his or her employer and incurs costs, those costs should be reimbursed. The complainant provided an example of an employee being asked to assist in the United

Way and incurring travel costs such as mileage and parking, which would be reimbursed.

[44] The complainant states that although he had provided the respondent with references in support of his argument, the respondent only provided opinions to overrule his arguments.

[45] The complainant's position is that the respondent was wrong to close the discussion of this matter and that it did not objectively assess the question. He states that the respondent in fact ignored answering his questions.

[46] The complainant states that the respondent was arbitrary in its responses and that the responses were not sufficiently investigated or handled but that opinions were given without any references to any research provided to the complainant. The complainant suggests at paragraph 28 of his written submissions that the respondent admits this assertion by providing jurisprudence with its submission.

[47] The complainant's argument with respect to discrimination is as follows:

> *The Complainant is also of the position that the collective agreement provided the same consideration for leave as travel expenses in the performance of duties by the Respondent's members; however, it had decided that if expenses were denied for the latter it would defend the claim for reimbursement, but not for the other. Is this not discrimination?*

[48] The complainant argues he was summoned by the attorney general of Ontario, acting on behalf of the Crown for the Province of Ontario to appear in court for jury selection not only in accordance with legislation but also acting on behalf of the Crown and defendant in their quest for determining a jury. He states that the case he was being summoned to attend jury selection for was about an incident dating to 1997 and involving the Canada Border Services Agency when it was part of the Canada Customs and Revenue Agency. Therefore, the complainant would have been in a conflict of interest if he were a juror as his employer was involved in the case, which the Court agreed with. As such, the complainant was summoned to appear in court by his employer. As it was his duty to comply with the request of his employer, he should be reimbursed.

[49] The complainant states that according to section 14 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17, the CRA has a Board of Management that consists of 15 directors, including a director nominated by each province, and as such, the complainant, while he is a federal public servant in a federal agency, is accountable to federal and provincial authorities, which are different from a federal department. Consequently, the attorney general of Ontario is part of the same Ontario government that recommends its representative on the CRA's Board of Management. Therefore, when the attorney general of Ontario summoned the complainant, the CRA did direct him to attend the jury selection. According to the complainant, he has both of those levels of government in Canada as his employer, not just the federal government.

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

[50] The respondent submits that the onus to establish a *prima facie* case that a violation of the duty of fair representation has occurred lies with the complainant. In support of this, the respondent relies on *Exeter v. Canadian Association of Professional Employees,* 2009 PSLRB 14, and *Jackson v. Customs and Immigration Union and Public Service Alliance of Canada,* 2013 PSLRB 31.

[51] The respondent states that the complainant has failed to establish a *prima facie* case. The complainant has not put forward any allegations that, if proven, would lend themselves to a finding of arbitrary, discriminatory or bad faith conduct. This is merely a case in which the complainant disagrees with the assessment of the respondent in its interpretation of the collective agreement. The complainant has failed to establish how the respondent acted either in a discriminatory manner, in bad faith or in an arbitrary way when it assessed the merits of filing a grievance.

[52] The respondent relies on *Blacklock (Re),* [2001] CIRB No. 139, for the proposition that the Board's jurisdiction is limited to determining if the complainant was treated arbitrarily, discriminatorily or in a bad faith manner.

[53] The Supreme Court of Canada, in *Canadian Merchant Service Guild v. Gagnon et al,* [1984] 1 S.C.R. 509, established that it is sufficient for a bargaining agent to demonstrate that it has examined the circumstances of a grievance, considered its merits and made a reasoned decision of whether to pursue the case. The respondent submits that the complainant has not submitted anything that would establish that the respondent did not meet its obligations.

[54] The respondent argues that even if the complainant did establish a *prima facie* case, at no time did it act in a negligent or arbitrary manner or with discrimination when it interpreted the applicable section of the collective agreement or declined to represent the complainant.

[55] The respondent also relies on *Halfacree v. Public Service Alliance of Canada,* 2010 PSLRB 64, and *Kowallsky v. Public Service Alliance of Canada et al.,* 2007 PSLRB 30.

C. Complainant's reply

[56] The complainant states that he does not dispute the facts as set out in the PIPSC response dated May 16, 2013; however, he states that the submission is incomplete as it omitted all the complainant's communications with the respondent.

[57] The complainant states that the PIPSC, in its response of May 16, 2013, does not object to any of the facts that the complainant has presented in the complaint, and as such, the complainant is of the view that there is an "agreement of facts" between them.

[58] In support of his position, the complainant refers to the Board's guide for self-represented complainants, stating that "arbitrary" generally refers to instances in which a bargaining agent has not sufficiently investigated or handled an employee's case or grievance and has not adequately considered the employee's interests, and that "discriminatory" refers to biased conduct based on illegal or prohibited grounds, such as age, race, religion, sex or a medical condition.

[59] The complainant's argument on discrimination is as follows:

> *[32] The Complainant has reviewed all submissions and the issue raised by the Complainant is that there are two members of the union that were granted leave with pay: first, the member of the union who incurred expenses while travelling in the course of his/her duties; second, the member of the same union who incurs costs due to legal obligations such as jury selection. The Complainant interpreted the Respondent's position that it cannot represent the latter member as the costs are not stated explicitly in the Collective Agreement, but will represent the former case; however, in the former case the Respondent has repeatedly avoided stating where in the Collective agreement these travel expenses are to be reimbursed? Two members of the same*

> *union, with the union stating that it will not represent one because there is no statement in the Collective Agreement stating that reimbursement of expenses is required, but will represent another member even though their expenses are also not stated in the Collective agreement – silent consent is not answering the Complainant's request for such information. Is this not discriminatory? There are two members whom the Respondent represents, but will represent one but not the other. Consequently, the Complainant is of the view that the Respondent has contravened the Complainant's constitutional right of equal benefit of the law and is thus discriminatory.*
>
> [*Sic* throughout]

[60] The complainant argues that because the respondent does engage paid labour relations specialists, including legal counsel, the standard in investigating a case should be higher for the respondent than for the complainant.

[61] The complainant states that the *Canadian Merchant Service Guild* case sets the standard that a bargaining agent must meet in determining not to represent a member whose dues it takes in part for representation.

[62] The complainant restates in his reply arguments he had previously made in his original complaint.

IV. Reasons

[63] A complaint filed under paragraph 190(1)(*g*) of the *Act* alleges an unfair labour practice within the meaning of section 185, which states as follows:

> ***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).*

[64] The portion of section 185 of the *Act* to which the complainant referred is section 187, which holds an employee organization to a duty of fair representation and states 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.*

[65] The Board has often stated that a complainant has the burden of establishing a *prima facie* case that an unfair labour practice occurred. (See, for example, *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28, *Halfacree v. Public Service Alliance of Canada,* 2010 PSLRB 64, and *Baun v. National Component, Public Service Alliance of Canada*, 2010 PSLRB 127.)

[66] While the complainant stated in his material that he was denied reimbursement of monies by his employer, he has not provided any specifics. It would appear that he is concerned about some out-of-pocket expenses he incurred when he was summoned either for jury selection or for both jury selection and jury duty. I have no idea when this was or what expenses he is claiming.

[67] The essence of the complainant's argument is that absent specific wording to the contrary, clause 17.15 of the collective agreement, dealing with leave with pay for attendance at a court, means pay including any expenses he incurred attending that court. The complainant has set forth an argument for why he believes the respondent should have represented him in a collective agreement or policy grievance.

[68] The duty of fair representation that is set out by section 187 of the *Act* states that for there to be a finding of a breach of the duty, the complainant must establish that the respondent or its officers or representatives acted in a way that was arbitrary, discriminatory or in bad faith in his representation.

[69] There is absolutely no evidence in the material that the respondent acted in a manner that could be considered bad faith; nor did he allege bad faith in his argument.

[70] The complainant suggested in his argument that the respondent discriminated against him because it would not pursue his grievance when it was aware that another member of the bargaining unit was reimbursed expenses while travelling in the course of his or her work duties and the complainant was not reimbursed costs due to the requirement for him to attend jury selection. This argument is without merit. The *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 ("*CHRA*"), sets out that the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Section 3.1 of the *CHRA* states that a discriminatory practice includes a practice based on one or more prohibited grounds of

discrimination or on the effect of a combination of prohibited grounds. There is nothing in the material to suggest that there was any discrimination on a prohibited ground by the respondent in its representation of the complainant.

[71] With respect to the respondent acting in a manner that could be considered arbitrary, the evidence is overwhelmingly the opposite. The respondent responded to the complainant's inquiries and explained to him why it was that the grievance would not be supported. No less than five representatives of the respondent, at different levels, explained to him why it was that a grievance would not be pursued by the respondent alleging a breach of the collective agreement. The evidence provided to me by the complainant himself discloses that the respondent, at all levels, gave careful thought to his case and arrived at a reasonable conclusion for its action. It was the opposite of arbitrary conduct. The complainant simply did not like the responses he was getting. This does not meet the test as set out in the jurisprudence.

[72] The Board, in *Foote v. Treasury Board (Department of Public Works and Government Services),* 2009 PSLRB 142, provides guidance to decision makers on contract interpretation. The Board stated as follows:

. . .

> *[24] Several courts have provided guidance to decision makers on contract interpretation. I agree with the employer's submission that the approach that I should take is to determine the parties' true intent at the time they entered into the contract. To accomplish that task, I must first refer to the meaning of the words as used by the contracting parties (see* Eli Lilly & Co. v. Novopharm Ltd., *[1998] 2 S.C.R. 129, and* Jerry MacNeil Architects Ltd. v. Roman Catholic Archbishop of Moncton et al., *2001 NBQB 135).*
>
> *[25] In considering this issue, I must also take into account the context in which the words are used (see* Stenstrom v. McCain Foods Ltd., *2000 NBCA 13, and* Robichaud et al. v. Pharmacie Acadienne de Beresford Ltée et al., *2008 NBCA 12, at para 18).*
>
> *[26] The use of that approach by labour arbitrators has found favour with many courts, specifically the New Brunswick Court of Appeal. The adjudicator in* Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30, *2002 NBCA 30, in a well-reasoned decision , stated as follows:*

> [10] It is accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts: see *D.J.M. Brown & D.M. Beatty, Canadian Labour Arbitration* (3rd Ed.), looseleaf (Aurora, Ont.: Canada Law Book Inc., 2001) at 4-35. In the contractual context, you begin with the proposition that the fundamental object of the interpretative exercise is to ascertain the intention of the parties. In turn the presumption is that the parties are assumed to have intended what they have said and that the meaning of a provision of a collective agreement is to be first sought in the express provisions. In searching for the parties' intention, text writers indicate that arbitrators have generally assumed that the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency with other provisions of the collective agreement: see *Canadian Labour Arbitration* at 4-38. In short, the words of a collective agreement are to be given their ordinary and plain meaning unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.
>
> . . .

[73] At the heart of the substance of the complaint is the word "pay." It can be both a noun and a verb and has several meanings. That being said, in the context of a collective agreement, its meaning becomes very narrow and clear very quickly when one applies the contract interpretation approach as set out in *Foote*. While the word "pay" is not defined in the collective agreement, it is used in several different places in it, all of which can lead to only one conclusion, that it is meant to reflect a value in Canadian dollars to be given to an employee for work done for his or her employer. That is clear when one looks at the different provisions as set out in the collective agreement itself. What is equally clear is that it is not meant to include any expenses such as mileage, transportation costs, meals, parking, etc.

[74] Clause 2.01 of the collective agreement defines "daily rate of pay" and "weekly rate of pay." The former is the weekly rate of pay divided by 5, and the latter is the annual rate of pay divided by 52.176. Appendix A of the collective agreement sets out amounts of pay on either an hourly, a daily, a weekly or an annual basis. In none of

them is there a suggestion that pay or the rate of pay means anything other than a dollar value per specific timeframe (hourly, daily, weekly or annually) for work done.

[75] When the employer and the PIPSC wanted to address the payment of something other than pay (salary as calculated either on an hourly, a daily, a weekly or an annual basis), they set it out in other parts of the collective agreement, quite specifically. At article 9, the overtime provisions, the employer and the PIPSC dealt with pay and expenses when an employee is required to work overtime. At clause 9.06, it is clear that the employer and the PIPSC contemplated that employees, when working overtime in certain situations, shall have their meals reimbursed. At article 10, the call-back provisions, the employer and the PIPSC dealt with pay and expenses when an employee is required to return to work after leaving for the day. This article specifically does not allow for travel expenses for any employee except for employees who are classified CS. Those employees specifically are entitled to receive a mileage rate or the cost of the use of a taxi, as well as other out-of-pocket expenses, such as parking. Expenses for conferences and associated costs are specifically referred to in clauses 18.03(c) and (e), which mention paying registration fees and reasonable travel expenses.

[76] The complainant's initial document in the material is an email dated September 4, 2012, and starts as follows: "I would like to inquire as to the reimbursement PIPSC's members in CRA would receive when being summoned for jury selection/jury duty." In the second paragraph of that same email the complainant inquires specifically about being granted leave for jury selection. Leave is when one is away from work and not working for the employer.

[77] Given the limited facts that have been provided, and that the complainant, at paragraph 66 and 67 of his complaint, states that the attorney general for Ontario issued a summons for him to attend jury selection/jury duty, it is clear that the complainant's employer, the CRA, was not sending him to jury selection/jury duty in the course of his employment, but that he is asking about be required as a private citizen as part of the judicial process.

[78] It is also very clear from reading the provisions of the leave sections that leave can be with or without pay. In none of these sections is pay defined as including any form of expenses. In addition, the pay notes, which are set out at Appendix A of the collective agreement, and set out that pay is calculated either hourly, daily, weekly or

annually, do not include any reference to including expenses such as parking or transportation costs or meal allowances.

[79] Under clause 5.01 of the collective agreement, if something is not in the collective agreement, it is reserved to management. I was provided with no evidence that there is any management rule, direction, policy, guideline or regulation that states that the employer undertakes to pay an employee's expenses when summoned for jury selection or jury selection and jury duty.

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

(The Order appears on the next page)

V. Order

[81] The complaint is dismissed.

December 5, 2013.

John G. Jaworski,
a panel of the Public Service
Labour Relations Board