Date: 20130430

File: 561-02-544

Citation: 2013 PSLRB 48

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

JEFFREY BROWN

Complainant

and

UNION OF SOLICITOR GENERAL EMPLOYEES AND JOHN EDMUNDS

Respondents

Indexed as
Brown v. Union of Solicitor General Employees and Edmunds

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 Respondents: Amarkai Laryea, Public Service Alliance of Canada

Heard at Kingston, Ontario,
February 13, 2013.
Written submissions filed January 12 and 13, March 1 and 27, April 10, and May 3 and 17, 2012.

I. Complaint before the Board

[1] On December 9, 2011, Jeffrey Brown ("the complainant") filed a complaint against the Union of Solicitor General Employees ("the USGE") and its president, John Edmunds, (collectively, the "respondents") under paragraphs 190(1)(*a*),(*c*)(*e*)(*f*)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"). The complainant provided additional details on January 12, 2012, as follows:

> *The President of the USGE, (Union of Solicitor General Employees) Mr John Edmunds directly intervened in PSST (Public Service Staffing Tribunal) complaint Jeffrey Brown vs Correctional Service of Canada.*
>
> *The action was done in a "Arbitrary" manner from a superficial and careless examination and assessment of the relevant facts.*
>
> *Further this action directly contravened the decision by the PSST to issue a subpoena for Commissioner Don Head for this hearing severely undermining this case.*
>
> [*Sic* throughout]

[2] On January 13, 2012, the complainant sent further details of his complaint as follows:

> *The President of the USGE, Mr John Edmund violated his duty to act fairly in his actions to cancel the subpoena authorized by the PSST requiring the Commissioner of the Correctional Services of Canada Mr Don Head to provide vital testimony in the writer's PSST Ajudication Tribunal. (Complaint #2009-0446)*
>
> *This direct action compromised the position of the complaint in this hearing and caused significant damage to the case before the Tribunal. This action was Arbitrary, Discriminatory and in bad faith.*
>
> *A e-mail appeal was made by the writer to Mr Edmund to reverse his decision to revoke the subpoena and make no further intervention in these proceedings. This request was denied by the respondent. Further the e-mail response by Mr Edmund illustrated a level of collusion with the CSC as his noted rationale was verbatum the argument made by the Justice Department lawyer representing the CSC in the PSST Hearing. *that was rejected by the Adjudicator of the PSST who authorized the subpoena for Mr Head)*
>
> *Mr Edmund as President of the USGE is directly responsible for these violations and as such should be held to account.*

[*Sic* throughout]

[3] The Board sought the particulars of the complaint, which were received on March 1, 2012 and read as follows:

> *"Arbitrary Conduct"*
>
> 1) *Mr Edmunds in his capacity as the National President of the USGE, took arbitrary direct and unilateral actions interfering in my Public Service Staffing Tribunal complaint #2009-0446 (Brown). Mr Edmunds actions had a negative effect on this hearing by undermining the evidence presented at the hearing and the case presented.*
>
> 2) *Mr Edmunds over-ruled the requested subpoena by my representative in the above noted hearing Mr Boone. This action was taken without sufficient investigation by Mr Edmunds of the case particulars or rationale for the subpoena request.*
>
> 3) *Despite the ruling by the Executive Director of the Public Service Staffing Tribunal in the above mentioned Arbitration Hearing supporting the requested subpoena. In his decision the following statement was made.*
>
> > *"Finally, whether or not the written synopsis of Mr Head's 2010 consultations constitutes an admission of systemic discrimination in the Ontario Region, his evidence regarding the existence of discriminatory practices within the Ontario Region would be relevant to the issues in this complaint."*
>
> 4) *Mr Edmunds actions rise to the level of serious negligence.*
>
> [*Sic* throughout]

[4] The Board wrote to the complainant on February 13, 2012 and advised him that paragraphs 190(1)(*a*)(*c*)(*e*)(*f*) are normally intended to address issues between a bargaining agent (union) and the employer. The Board requested the complainant confirm which paragraphs of the *Act* he was basing his complaint upon. On March 1, 2012, the complainant confirmed to the Board that he was only relying on paragraph 190(1)(*g*) of the *Act*.

[5] The respondents filed a response to the complaint on March 27, 2012, and the complainant filed a rebuttal to the response dated April 3, 2012, which the Board received on April 10, 2012. The complainant re-sent the April 3, 2012 rebuttal to the Board in May; it was dated May 3, 2012.

[6] On April 30, 2012, the Board provided the following direction to the parties:

> *The parties are invited to provide any submissions they might have on the following question:*
>
> > *"Does the right to representation before another administrative tribunal, such as the Public Service Staffing Tribunal, pertain to matters or disputes covered by the* Public Service Labour Relations Act *or by the applicable collective agreement?"*
> >
> > *In particular, the parties are invited to consider the following decisions in making their submissions:*
> >
> > *Lavoie v. PSAC and Lachappelle, 2009 PSLRB 143; and*
> >
> > *Elliott v. Canadian Merchant Service Guild et al., 2008 PSLRB 3*.

[7] Both parties provided written submissions in response to the Board's letter of April 30, 2012, the complainant on May 3, 2012, and the respondents on May 17, 2012.

[8] Upon receipt of the further written submissions, the Board ordered that the matter proceed by way of an oral hearing and scheduled it for February 12 to 15, 2013, at Kingston, Ontario.

[9] By letter dated January 14, 2013, the respondents requested that the Board consider hearing only the issue of jurisdiction, as identified in the Board's letter of April 30, 2012. The complainant objected. The Board held a pre-hearing conference to address that request and another by the respondents to start the hearing on February 13, 2013.

[10] The Board determined that it was appropriate to hear only evidence and argument on the jurisdictional question as identified in its letter of April 30, 2012, as a preliminary matter during the scheduled February hearing and ordered that the hearing would start on February 13, 2013.

II. Summary of the evidence

[11] The complainant is a parole officer, employed by the Correctional Service of Canada ("the CSC").

[12] The basis for the complaint has its genesis in a complaint filed by the complainant pursuant to paragraph 77(1)(*a*) of the *Public Service Employment Act,*

S.C. 2003, c. 22, ss. 12, 13 ("the *PSEA"*), with the Public Service Staffing Tribunal ("the PSST") against the Commissioner of the CSC; *Brown v. The Commissioner of Correctional Service of Canada and Other Parties*, 2012 PSST 0017 (the "PSST complaint"). The Public Service Commission ("the Commission") did not attend that hearing but provided written submissions. The complainant alleged, as part of the PSST complaint, systemic discrimination, and as such, the Canadian Human Rights Commission ("the CHRC") was notified of the proceeding. The CHRC elected not to make submissions. The complainant was represented in the PSST complaint by the USGE. The PSST complaint was scheduled for December 6 to 8, 2011 and proceeded on those dates.

[13] In November 2011, just before the hearing of the PSST complaint, the complainant, with the USGE's support, sought a subpoena from the PSST to compel the attendance of the Commissioner of the CSC, Don Head. The PSST issued a letter decision on November 28, 2011, stating that it would issue the subpoena.

[14] On November 29, 2011 the USGE communicated to the complainant its decision that it would instruct the PSST that they would not require the subpoena. The complainant alleged that that decision was made arbitrarily, discriminatorily and in bad faith by Mr. Edmunds and is the action that forms the basis of this complaint before this Board.

[15] The complainant continued to be represented by the USGE at the PSST hearing.

[16] At the hearing before me, neither party called any oral evidence. Both filed documentary evidence on consent.

III. Summary of the arguments

A. For the respondents

[17] The respondents argued that the Board does not have jurisdiction to hear this matter as it did not arise out of the *Act* or the relevant collective agreement.

[18] According to the respondents, Parliament created two self-contained and mutually exclusive spheres involving employment in the federal public service, staffing and labour relations.

[19] The staffing regime is governed exclusively by the *PSEA,* which provides at subsection 29(1) that the Commission has exclusive authority to make appointments to or from within the public service. The employer, which is defined by subsection 2(1) of the *PSEA* as the Treasury Board, has limited power under the *PSEA* with respect to the appointment process, which is only setting the qualification standards for potential candidates.

[20] Paragraph 7(1)(*e*) of the *Financial Administration Act* ("the *FAA*") states that the Treasury Board may act for the Queens Privy Council for Canada on all matters relating to human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it. The Treasury Board's powers are further delineated in subsection 11.1(1) of the *FAA.* The process of appointments under the *PSEA* is specifically excluded from those powers under subsection 11.1(2) of the *FAA.*

[21] The respondents argued that the overall purpose and intent of the *Act*, as set out in its preamble, is the credible and effective resolution of workplace matters in the federal public service. The respondents also referred me to paragraph 113(*b*) of the *Act,* which specifically excludes both the Treasury Board and bargaining agents from agreeing to terms and conditions of employment in a collective agreement that are otherwise governed by the *PSEA.*

[22] The respondents referred me to *Pelletier et al. v. Treasury Board (Department of Human Resources and Skills Development),* 2011 PSLRB 117, in which the Board confirmed that Parliament has in fact clearly established the two self-contained and mutually exclusive spheres of labour relations and staffing and that the Treasury Board is specifically denied the right to act in matters of staffing and that it cannot bind the Commission or a deputy head in relation to any such matter.

[23] The respondents argued that, although section 187 of the *Act* appears broadly worded, the obligations that are found in that section are limited and must relate to rights and obligations as set out in the *Act* or the collective agreement. The respondents stated that Parliament could not have intended that the Board be able to review every action a bargaining agent carries out in relation to a member when the bargaining agent chooses to provide services to members. Any representation action taken by a bargaining agent that does not fall within the parameters of the *Act* or a relevant collective agreement or that could fall within the parameters of the *Act* or

under the collective agreement therefore falls outside the jurisdiction of the Board to review under the *Act*. The respondents relied on the reasoning set out in both *Lavoie v. Public Service Alliance of Canada and Lachapelle,* 2009 PSLRB 143, and *Elliott v. Canadian Merchant Service Guild et al.,* 2008 PSLRB 3.

[24] The respondents' position was that, since staffing is completely outside the parameters of the *Act,* the employer is specifically excluded from the authority to appoint, the employer and bargaining agents cannot negotiate terms and conditions of employment that would otherwise fall under the *PSEA,* and any action of a bargaining agent in dealing with its members in matters before the PSST is not covered by the *Act* or a relevant collective agreement and therefore falls outside the jurisdiction of the Board to review under paragraph 190(1)(*g*) and section 187 of the *Act*.

[25] In addition to *Lavoie, Elliot* and *Pelletier*, the respondents relied on *Albert et al. v. Hawley et al. and Union of National Defence Employees,* PSSRB File No. 161-02-447 (19871006), and *Lai v. The Professional Institute of the Public Service of Canada,* 2000 PSSRB 33.

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

[26] The complainant stated that the respondents' argument was based on the false premise of what occurred with the PSST decision. The complaint is based solely on the conduct of Mr. Edmunds and not on what happened with the PSST hearing. The complainant's position is that the duty of fair representation exists at all times and in every facet of the relationship involving bargaining unit members and their bargaining agent. It is not an umbrella so to speak that the bargaining agent can open and close depending on the issue or arena.

[27] According to the complainant, since the Board is authorized to certify a bargaining agent to represent a bargaining unit, then that is the nexus for the Board to oversee all the bargaining agent's actions vis-à-vis the members in the unit. Section 187 of the *Act* is not limited whatsoever. If the bargaining agent or its officers or representatives act in a manner towards a member that meets the definition of "arbitrary, discriminatory or bad faith," the Board has jurisdiction, which is not dependent on whether the matter at issue relates to matters arising out of the relevant collective agreement or to an issue otherwise identified in the *Act*. If the Board certifies the bargaining agent, then the Board is responsible to police their actions. Since the *Act*

does not provide any other recourse to a member with respect to the actions of his or her bargaining agent, the only recourse is to the Board.

[28] The complainant stated that the relationship between a bargaining agent and its members is a bond; the members pay dues and those dues, are paid in part to ensure that the playing field with the employer is made level. The nature of the relationship is such that the bargaining agent must represent the members in the relationship with the employer. If an organization is certified to act as a bargaining agent, it is incumbent on that organization not to cause harm to its membership. If a bargaining agent acts in a way contrary to a member's interest, and there is no diverging interest between the member and the bargaining agent, then that action is arbitrary and is therefore a breach of the duty of fair representation.

[29] The complainant reviewed the specific details of the actions taken by Mr. Edmunds with respect to the PSST complaint and spoke to the substance of those actions being determinative of the Board's jurisdiction. He urged me to consider that, because the actions taken by the respondents appeared arbitrary, his case should be heard, and I should take jurisdiction.

[30] In support of his position, the complainant referred to the decision of the Supreme Court of Canada in *Centre hospitalier Régina Ltée v. Labour Court,* [1990] 1 SCR 1330. He referred to the following comment by the Court:

. . .

> *A union's duty of fair representation in the handling of a grievance may be divided into two distinct stages. First, the union must carefully consider the merits of the grievance to decide whether it should be taken to arbitration. . . At the second stage, if the union decides that the grievance has merit, it must represent the employee without serious negligence, discrimination or bad faith at all subsequent stages of the grievance procedure. . . . .*

. . .

[31] The complainant stated that the concepts enunciated by the Supreme Court in *Centre hospitalier Régina Ltée* are mirrored and elaborated in the Board's own "Guide for self-represented complainants alleging an unfair labour practice under sections 185 and 187 of the *Public Service Labour Relations Act (PSLRA)*" ("the Guide").

[32] The complainant stated that, in his view, there is no other process available for him to challenge the actions of his bargaining agent, and as such, given the wording of section 187 of the *Act,* by default, the Board must have jurisdiction.

[33] The complainant argued that *Elliot* was distinguishable from this case. In *Elliott*, timeliness was an issue, and his case before the PSST, unlike in *Elliott,* proceeded to a full hearing, and a decision was rendered. He stated that *Lavoie* was fundamentally different because the bargaining agent in that case withdrew its representation before the hearing, which was not so in this case.

[34] The complainant referred to *Noël v. Société d'énergie de la Baie James,* 2001 SCC 39, to reinforce his position that the USGE bargaining agent does not have carte blanche and that it should be held accountable for arbitrary conduct when, although there might have been no intent to harm, its representation was superficial or careless.

[35] The complainant also submitted that the cases cited in his documentation initially filed with the Board, namely, *Jutras Otto v. Brossard and Kozubal,* 2011 PSLRB 107; *Ménard v. Public Service Alliance of Canada,* 2010 PSLRB 124; *Ménard v. Public Service Alliance of Canada,* 2010 PSLRB 95; *Renaud v. Canadian Association of Professional Employees,* 2009 PSLRB 177; *Jakutavicius v. Public Service Alliance of Canada,* 2005 PSLRB 70; and *Savoury v. Canadian Merchant Service Guild,* 2001 PSSRB 79, all support his position that the Board has jurisdiction to hear his complaint.

C. <u>Respondents' reply</u>

[36] The respondents' specific conduct is not at issue and should not be considered when addressing jurisdiction. Whether their actions were arbitrary or not does not confer jurisdiction; nor is jurisdiction conferred by default. The Board is a creature of statute, and it cannot assume jurisdiction beyond what is given to it under the *Act*.

[37] The respondents stated that the Guide referred to by the complainant is not relevant, as representation before the PSST is not a matter that the USGE has exclusive representation rights over. A member is free to make a complaint without the USGE's approval.

IV. Reasons

[38] This is an unfair labour practice complaint in which it is alleged that the respondents breached their duty of fair representation by acting in a manner that was arbitrary, discriminatory or in bad faith in how they handled a part of the complainant's complaint before the PSST.

[39] The Board has jurisdiction to hear and determine complaints about alleged breaches of the duty of fair representation by virtue of the following provisions of the *Act*:

. . .

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

[40] The issue is not with my jurisdiction per se. The Board has jurisdiction to hear a complaint about the duty of fair representation as set out in section 187 of the *Act*. The issue is whether that duty applies, as set out in the *Act*, to the actions of employee

organizations when they represent members in matters that do not arise out of a collective agreement, or in matters that could not be said to be covered by the *Act*.

[41] To dispose of this matter, the following two questions must be addressed:

i. Does the duty of fair representation in section 187 of the *Act* extend to matters that fall outside the *Act* or a relevant collective agreement?

ii. Is representation before the PSST in a staffing complaint a matter that falls within the parameters of the *Act* or a relevant collective agreement?

[42] If the answer to the first question is "yes," the second question is irrelevant. If the answer to the first question is "no," then I have jurisdiction only if the answer to the second question is "yes."

A. Does the duty of fair representation in section 187 of the *Act* extend to matters that fall outside the *Act* or a relevant collective agreement?

[43] "Employee organization" is defined in subsection 2(1) of the *Act* as follows:

> *"employee organization" means an organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of Parts 1 and 2, and includes, unless the context otherwise requires, a council of employee organizations.*

[44] "Bargaining agent" is defined in subsection 2(1) of the *Act* as follows:

> *"bargaining agent" means an employee organization that is certified by the Board as the bargaining agent for the employees in a bargaining unit.*

[45] "Bargaining unit" is defined in subsection 2(1) of the *Act* as follows:

> *"bargaining unit" means a group of two or more employees that is determined by the Board to constitute a unit of employees appropriate for collective bargaining.*

[46] "Employer" is defined in subsection 2(1) of the *Act* as follows:

> *"employer" means Her Majesty in right of Canada as represented by*

> (a) *the Treasury Board, in the case of a department named in Schedule I to the* Financial Administration Act *or another portion of the federal public administration named in Schedule IV to that Act; and*
>
> (b) *the separate agency, in the case of a portion of the federal public administration named in Schedule V to the* Financial Administration Act.

[47] Part 1 of the *Act* is entitled "Labour Relations" and consists of 202 sections setting the framework for employer-employee relations in the federal public service. It sets out an extensive set of rules governing the relationship between the federal government as an employer (wearing a variety of different hats) and its employees. It sets the framework for the collective bargaining regime, including the certification of bargaining agents and their relationships with both employees and employers. It establishes the Board as the arbitrator of disputes. Much of what is set out in Part 1 of the *Act* addresses the statutory framework for establishing bargaining units for groups of employees, the certification of bargaining organizations as bargaining agents to act on behalf of those employees in those units, and the negotiation and execution of collective agreements with the employer.

[48] Some terms and conditions of the employer-employee relationship are not contained in a collective agreement, and those are generally reserved to the employer to set.

[49] Part 2 of the *Act* is entitled "Grievances" and consists of 33 sections. It sets out the framework for how parties, governed by the *Act*, shall manage the resolution of workplace disputes, including disputes arising from the interpretations of collective agreements and from discipline rendered by the employer.

[50] The Board does not have inherent jurisdiction; its authority is derived exclusively from the *Act.* While the Board has extensive dominion over labour relations issues, not all labour relations matters and disputes fall within its jurisdiction. An example is the Board's jurisdiction over disputes between the employer and employees who are not represented by a bargaining agent. Under Part 2, any employee (whether or not a member of a bargaining unit) may file a grievance with respect to an alleged breach of his or her terms and conditions of employment; however, if the employee is not represented by a bargaining agent, the dispute cannot be referred to the Board for adjudication. Indeed, even if the employee is represented by a bargaining agent, if the

bargaining agent, in a collective agreement grievance, decides that it does not want to pursue a particular grievance, it may withdraw support, and that employee cannot come to the Board and have the matter adjudicated.

[51] Section 187 is found in Part 1 of the *Act*. While it does not specify the ambit of the duty of fair representation, the *Act* itself, and the fact that it is located in the part entitled "Labour Relations," provides context. The preamble of the *Act* states as follows:

. . .

> *. . . [The Act recognizes that] effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;*
>
> *collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment;*
>
> *the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;*
>
> *the Government of Canada recognizes that public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;*

. . .

[52] Given the mandate of the *Act* and where the duty of fair representation section is situated, my view is that Parliament did not intend to give the Board unlimited jurisdiction to review all the actions of employee organizations and bargaining agents. It only makes sense that the Board's jurisdiction to hear and determine duty of fair representation complaints must in some way arise out of the parameters of the *Act* or the relevant collective agreement.

[53] This issue has been reviewed extensively by labour boards, including the Board, which did so specifically and recently in *Elliott*. I accept the reasoning in *Elliott* that the duty of fair representation as set out in section 187 of the *Act* relates to rights, obligations and matters as set out in the *Act*. The Board stated as follows in *Elliott*:

. . .

183. *As a statutory tribunal, the PSLRB's authority to act in this regard is derived exclusively from the* PSLRA. *Section 187 of the* PSLRA, *much like the provisions regarding the duty of fair representation in the British Columbia* Labour Relations Code *and the Ontario* Labour Relations Act *cited above, does not specify the ambit of the duty of fair representation. In my view, since that duty is set out in the* PSLRA, *it relates to rights, obligations and matters set out in that* Act. *Since one of the main objectives of the* PSLRA *is to regulate the relationship between employees and their employer, in my view the ambit of the duty of fair representation relates to that matter.*

184. *As in the private sector, the* PSLRA *gives unions important representation powers. For example, a bargaining agent certified under the* PSLRA *has the exclusive right to bargain for members in its unit (paragraph 67(*a*)). An employee cannot present an individual grievance relating to the interpretation or application of a provision of a collective agreement unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit (subsection 208(4)). In my view, the duty of fair representation applies to those matters since they are set out in the* PSLRA *and they concern the relationship of employees vis-à-vis their employer. Also, in light of the genesis of the duty of fair representation, the fact that the union has exclusive representation rights in the negotiation of a collective agreement and has exclusive approval rights for those grievances gives greater support to the conclusion that the duty of fair representation applies to those matters.*

185. *However, the duty of fair representation in the federal public service is not entirely based, as in the private sector, on the exclusive character of union representation. For example, in my view (and this is an* obiter *since I do not have to decide that matter) that duty would apply to grievances related to disciplinary action resulting in termination, demotion, suspension or financial penalty under paragraph 209(1)(*b*) of the* Act, *even though the bargaining agent does not have veto powers over those grievances. The employee does not need union approval to present his or her grievance to the employer, and he or she may represent himself or herself or chose [sic] whomever he or she wishes as a representative. Again, in my view, the duty of fair representation covers those types of grievances because, as explained above, they relate to an aspect of the employee/employer relationship regulated by the* PSLRA. *In these matters, the union must, in my view, act in a manner that conforms to section 187 of the* PSLRA.

186. *Even though I know of no cases that have discussed the issue of whether the duty of fair representation applies to disciplinary matters, this Board has in fact in the past applied the duty of fair representation to such matters. For example, the decisions* Pavlic v. Professional Institute of the Public Service of Canada, *PSSRB File No. 161-02-792 (19970324) and* Ruda v. Public Service Alliance of Canada, *PSSRB File No. 161-02-821 (19971007) both dealt with disciplinary discharge, and in both cases the PSSRB examined whether the duty of fair representation had been breached by the union in the manner they represented the grievor at adjudication.*

187. *It cannot be said that the ambit of the duty of fair representation as set out in the* PSLRA *is limited to collective agreement matters as in the private sector. As explained above, the duty of fair representation applies, in my view, to the adjudication of disciplinary matters under paragraph 209(1)(*b*) of the* Act, *even though those matters are not usually dealt with in collective agreements in the federal public service because they are dealt with in the* PSLRA *itself. That is why, in my view, section 187 does not refer to the collective agreement. To do so would have prevented the duty of fair representation from operating in disciplinary matters.*

188. *To summarize the above, I am of the view that the duty of fair representation as set out in section 187 of the* PSLRA *relates to rights, obligations and matters set out in the* PSLRA, *that are related to the relationship between employees and their employer. In other words, the "representation" to which that section refers to is representation of employees in matters related to the collective agreement relationship or the* PSLRA, *such are [sic] representation in collective bargaining and the presentation of grievances under that* Act.

189. *That was also the view of the predecessor to this Board in the* Lai *decision. In that case, the issue was whether the union breached its duty of fair representation in refusing to represent the complainant in a judicial review proceeding of an appeal decision issued under the* Public Service Employment Act. *The Board did not decide that preliminary issue because it dismissed the complaint on its merits. The Board stated, however, that (at paragraph 49):*

. . .

> I should start out by saying that I have reservations with regard to the proposition that a bargaining agent's duty of fair representation extends to matters which are outside the scope of the *PSSRA* and which, as

> in the present case, arise out of matters coming under the *PSEA*. Rather, I am inclined to think that the duty is limited to rights arising out of the *PSSRA*.
>
> . . .
>
> [Emphasis in the original]

[54] Therefore, I find that the Board's jurisdiction to review an alleged complaint falling under section 187 of the *Act* must have its genesis either under the *Act* or the relevant collective agreement that the bargaining organization or bargaining agent had negotiated for the member that made the complaint.

B. Is representation before the PSST in a staffing complaint a matter that falls within the parameters of the *Act* or relevant collective agreement?

[55] An employee organization, once certified to act for members in a unit, becomes a bargaining agent and acts on behalf of those members in interactions with the employer.

[56] The definition of "employer" in the *PSEA* is the same as the definition in the *Act.*

[57] The CSC is a portion of the federal public administration named in Schedule IV of the *FAA*; as such, the complainant's employer is the Treasury Board.

[58] Neither "employee organization" nor "bargaining agent" is defined in the *PSEA*.

[59] Subsection 88(2) of the *PSEA* sets out the mandate of the PSST, which is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83 of the *PSEA*.

[60] Subsection 65(1) of the *PSEA* addresses complaints to the PSST with respect to lay off situations and is not relevant to this case.

[61] Section 74 of the *PSEA* addresses complaints made to the PSST with respect to the revocation of an appointment. Section 83 deals with an appointment made as a result of a complaint process under section 77. Section 77 address complaints made with the PSST with respect to a person not being appointed or proposed for appointment either due to an abuse of process or to not being assessed in the official language of his or her choice.

[62] Subsection 77(1) of the *PSEA* states as follows:

> ***77.*** *(1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may – in the manner and within the period provided by the Tribunal's regulations – make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of*
>
> (a) *an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2) . . . .*
>
> . . .

[63] Under the *PSEA,* the parties who are identified as having the right to be heard by the PSST are the complainant, the deputy head, the Commission, and the person appointed or proposed for appointment. In circumstances in which a complainant raises an issue involving the interpretation or application of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6, and the CHRC has been notified, the CHRC may make submissions on that issue.

[64] The employer is not entitled to be heard.

[65] Under the *PSEA,* a complainant can be a person whose appointment was revoked under that *Act* or a person who was not appointed or proposed for appointment under that *Act*.

[66] The *PSEA* states that parties are entitled to be represented, but it does not specify or identify who those representatives can be. No reference is made to a bargaining organization or a bargaining agent with respect to hearing complaints. That is in stark contrast to the *Act*, in which, at subsection 209(2), to proceed to adjudication against his or her employer with a grievance that involves an interpretation of a collective agreement, a grievor must not only have the approval of his or her bargaining agent but must also be represented by his or her bargaining agent.

[67] Like the Board, the PSST is a creature of statute. Its jurisdiction is limited as set out in the *PSEA*. Under the sections that govern the PSST's mandate, reference is made to the actions of the Commission or the deputy head when making decisions in the staffing process. The employer is not referred to; nor are bargaining organizations and

bargaining agents. The corrective action power that the PSST is granted under the *PSEA* allows it to make orders against the Commission and the deputy head to either revoke an appointment (if one has been made) or to not make an appointment. Section 82 of the *PSEA* specifically states that the PSST does not have the authority either to order the Commission to make an appointment or to order that a new appointment process be conducted. Those powers remain with the Commission, or deputy head, if so delegated.

[68] Paragraph 7(1)(*e*) of the *FAA* states in part as follows:

> ***7.*** *(1) The Treasury Board may act for the Queen's Privy Council for Canada in all matters relating to*
>
> *. . .*
>
> *(*e*) human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it . . .*

[69] Subsection 11.1(1) of the *FAA* further delineates the powers of the Treasury Board in carrying out its responsibilities under paragraph 7(1)(*e*) of the *FAA;* however, those powers are limited by paragraph 11.1(2)(*b*) of the *FAA*, which states as follows:

> ***11.1*** *(2) The powers of the Treasury Board in relation to any of the matters specified in subsection (1)*
>
> *. . .*
>
> *(*b*) do not include or extend to*
>
> *(i) any power specifically conferred on the Public Service Commission under the* Public Service Employment Act*, or*
>
> *(ii) any process of human resources selection required to be used under the* Public Service Employment Act *or authorized to be used by the Public Service Commission under that Act.*

[70] Section 113 of the *Public Service Labour Relations Act* ("the *Act*") states as follows:

> ***113.*** *A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if*
>
> *. . .*

> (b) *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act.

[71] Paragraph 211(*a*) of the *Act* states as follows:

> ***211.*** *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> (a) *any termination of employment under the* Public Service Employment Act . . . .

[72] A review of the relevant sections of the *PSEA*, the *FAA* and the *Act* suggests that Parliament was seeking to keep separate and distinct the processes of evaluating, choosing and appointing suitable candidates for positions within the federal public service on the one hand and of negotiating and regulating terms and conditions of employment on the other.

[73] There is no evidence that, in the PSST complaint, the employer was a party. The employer is not a party by right. As set out earlier in this decision, the only parties as of right are the complainant, the Commission, the deputy head (where so delegated) and the person or persons either appointed or proposed for appointment. In the PSST complaint, the party against whom the complainant had alleged an abuse of authority was the Commissioner of the CSC.

[74] Since the employer is not a party by right, the only way it can be brought into the proceeding is as an intervenor. Section 19 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, states that "[a]nyone with a substantial interest in a proceeding before the [PSST] may apply . . . for permission to intervene in [a] proceeding."

[75] There is no evidence that the employer brought an application to intervene; nor is there evidence that it was granted that status. Nothing in the submissions filed with the Board or the PSST decision identifies the employer as having a status at that hearing. The *PSEA* specifically defines "employer" as the Treasury Board. The Commissioner of the CSC is a deputy head; he or she is not the employer. The power to appoint is granted exclusively to the Commission by the *PSEA* and can be delegated to the deputy head. The Commission is not the employer.

[76] As neither party chose to call any witnesses, I was left with very little to assess whether the dispute in which the complainant suggested that the respondents breached their duty of fair representation, arose out of the *Act* or the relevant collective agreement. The evidence that I have been provided indicates that neither the Commission nor the Commissioner of the CSC is the employer, and there is no evidence that the Treasury Board was a party to the PSST complaint. As there is no evidence that the employer was a party to the PSST complaint and no evidence that the PSST complaint arose out of either the *Act* or the relevant collective agreement, the answer to the second question, in these circumstances, must be in the negative, and as such, I have no jurisdiction.

[77] The complainant referred extensively in his submissions to the respondents' duty of fair representation in cases when they represent members in matters against or with respect to the employer. In support, the complainant cited, in both his oral argument and his written submissions of January 12 to 13, 2012, *Jutras Otto,* both *Ménard* decisions, *Renaud, Jakutavicius* and *Savoury*. Those decisions do not support his position; nor are they relevant to the issue I have to determine. Each involves a grievance by employees against actions by their employers arising out of their employment, involving either the relevant collective agreement or discipline. The *Act* specifically refers, in section 209, to the Board having jurisdiction over matters involving discipline.

[78] *Jutras Otto* involved a complaint due to an alleged failure to transmit a grievance to the second level of the grievance process. The *Ménard* decisions involved the failure of the bargaining agent in that case to submit a grievance to the employer about the work environment. *Renaud* involved a complaint that the bargaining agent in that case failed to seek an extension of time to refer a grievance against her employer to adjudication. *Jakutavicius* deals with a complaint with respect to the failure of the bargaining agent in that case to represent the complainant for an alleged breach by the employer of the relevant collective agreement. *Savoury* is about an allegation that the bargaining agent in that case failed in representing the complainant in a grievance against her employer about discipline. All those cases involve complaints about some aspect of the employer-employee relationship and either the *Act* or the relevant collective agreement. They do not assist in determining whether a complaint made under the *PSEA* relates to the *Act* or to the relevant collective agreement.

[79] The complainant relied on *Centre hospitalier Régina Ltée*. However, the substance of the complaint in that case was based on inadvertence by both the employer and the bargaining agent, which allowed the employee's grievance against her dismissal from her employment to be withdrawn. It clearly deals with a matter of the employee-employer relationship, which was the act of the employer terminating the employee in that case from her job. It does not assist in determining whether a complaint under the *PSEA* relates to the *Act* or to the relevant collective agreement.

[80] The complainant relied on *Noël* for the proposition that a bargaining agent cannot act arbitrarily and that intent is not required for arbitrary conduct. *Noël* involved a grievance about the discharge of an employee from his employment in which he was represented during the grievance process by his bargaining agent. After the grievance was dismissed, the bargaining agent (which had exclusive representation rights) chose not to pursue any routes of appeal or review. The case is not about unfair representation but about whether the employee had the standing to bring his own claim as against the employer to challenge the discharge. During the course of the decision, the Supreme Court opined on the definition of "arbitrary." While that assists in understanding the meaning of "arbitrary," in the course of an unfair labour practice complaint, it does not assist in answering the question of my jurisdiction.

[81] The complainant also relied on the wording of the Guide as support for his position that the Board has jurisdiction to hear his complaint. Unfortunately, the complainant took phrases contained in the Guide out of context. As the complainant submitted, the Guide's preamble does set out that the Board certifies employee organizations; however, the balance of the preamble provides context to that statement by stating as follows:

. . .

> *. . . the employee organization has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit. By the same token, an employee cannot grieve the interpretation or application of a collective agreement (or of an arbitral award), nor refer such a grievance to adjudication, without the support of his or her bargaining agent. Thus, in some cases, an employee will not be able to proceed with what he or she considers a legitimate grievance.*

. . .

[82] The Guide goes on to explain what is meant by "duty of fair representation." It does not suggest that the Board has an exclusive and unlimited jurisdiction to police all the actions of a bargaining agent in relation to its actions with respect to its members. The Guide provides a very specific description of the duty of fair representation and how it is applied.

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

(The Order appears on the next page)

V. Order

[84] The complaint is dismissed.

April 30, 2013.

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