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File: 561-02-547

Citation: 2014 PSLRB 14

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

CRAIG OLLENBERGER ET AL.

Complainants

and

DOUG MARSHALL

Respondent

Indexed as
Ollenberger et al. v. Marshall

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 Complainants: Craig Ollenberger

For the Respondent: Deb Seaboyer, Public Service Alliance of Canada

Heard at Vancouver, British Columbia,
August 7 to 9, 2013.

I. Complaint before the Board

[1] On February 7, 2012, Craig Ollenberger and 21 others, as listed in Appendix "A" ("the complainants"), filed a complaint against Doug Marshall (President, Union of National Employees PSAC) ("the respondent") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"), as follows:

> *Grievances were filed during early 2010 by members of the Labour Locals of the National Component through out* [*sic*] *Canada-[British Columbia – 20089] (now known as the Union of National Employees, UNE) requesting new work descriptions that were a complete, current and accurate statement of duties for the position of Labour Affairs Officer, who conduct one (or two) of the positions as a Fire Inspector, Labour Standards or Health and Safety Officer. Similar grievances were filed by other Labour locals in Alberta, Ontario, Quebec and Atlantic Canada.*
>
> *On September 20th, the various locals were informed (BC Labour Local was not on the call) by National Vice-President Eddie Kennedy (acting as the National President in the absence of National President Doug Marshall) at the end of a Labour Affairs Officer national teleconference that the Union would not support the grievances for job classification based on an opinion of a PSAC Classification Officer who also participated in the teleconference. Labour Relations Officer of UNE created a letter on November 8, 2011 stating no representation for classification grievances. This letter was received on November 18, 2011.*

[2] As relief, the complainants requested that the Union of National Employees ("UNE") be required to support and represent them in their pursuit to have the employer provide them with a complete, current and accurate statement of duties for labour affairs officers (LAOs).

[3] The respondent raised an objection to the timeliness of the complaint; however, that objection was withdrawn before the start of the hearing.

[4] The parties filed an agreed statement of facts ("ASF") and a joint brief of documents ("JBD") in conjunction with the ASF, which contained 62 tabs. The JBD was marked as Exhibit C-1.

[5] Mr. Ollenberger testified on behalf of the complainants. The respondent called three witnesses: Howard Edward Kennedy, Franco Picciano and Jacqueline Préfontaine-Moore.

II. Summary of the evidence

[6] The complainants are LAOs and are employed at Department of Employment and Social Development ("the department") at various locations throughout the country. The LAO job description includes three separate business lines, identified to me as labour standards officer ("LSO"), fire protection inspector ("FPI"), and occupational health and safety officer ("OHSO").

[7] The Treasury Board is the employer.

[8] The UNE is a component of the Public Service Alliance of Canada ("PSAC"), which is the bargaining agent for the LAOs.

[9] The respondent, Mr. Marshall, was at all material times the president of the UNE.

[10] Mr. Ollenberger is an LAO, and he testified that he commenced his employment with the department in 2004.

[11] On September 24, 2004, a memorandum of settlement ("MOS") was entered into between the employer and what was then the National Component of the PSAC regarding settlement of Public Service Staff Relations Board ("PSSRB") File No. 179-02-91, being the settlement of grievances filed with respect to the statement of duties of the LAOs.

[12] The MOS was arrived at after five days of PSSRB-assisted mediation. The parties to the MOS had agreed to a new national generic work description ("the 2004 work description") (Exhibit C-1, Tab 2) for the LAOs that the employer agreed to classify without delay. As part of the MOS, the statement-of-duties grievances related to PSSRB File No. 179-02-91 were withdrawn.

[13] I was not provided with copies of the statement-of-duties grievances related to PSSRB File No. 179-02-91; nor was I provided with the work description, which was the subject matter of that grievance.

[14] On June 14, 2007, a Classification Grievance Committee ("CGC") heard a classification grievance related to the 2004 work description. The CGC issued its decision on August 21, 2007, and it was accepted by the deputy head's nominee on August 27, 2007 ("the 2007 CGC decision") (Exhibit C-1, Tab 3). The 2007 CGC decision

as accepted was that the LAOs would be classified Technical Services (TI) Group, level 5 (TI-05).

[15] For there to have been a CGC, the classification of the 2004 work description must have been done in such a manner that the LAOs disagreed with the group and level assigned by the employer. I was not provided with a copy of the classification grievance that led to the 2007 CGC decision.

[16] At the CGC hearing, both the employer representative and the grievor representatives confirmed that the 2004 work description, which was being put forward to the CGC was the complete and current job description. At the time it was classified as a Program Administration Group level 4 ("PM-04"). At the CGC the LAOs were represented by Susan O'Reilly, a grievance and adjudication officer ("GAO") of the PSAC, as well as Robert Grundie, Serge Marion, and Annie Laurin, all incumbent LAOs. At the CGC hearing, the LAOs were seeking a classification of TI-06.

[17] Mr. Ollenberger testified that he recalled that he signed on to the grievances that were eventually mediated and subjected to the MOS, which led to the 2004 work description. He also confirmed in his evidence that he was one of the grievors with respect to the classification grievance that went to the CGC and that was the subject of the 2007 CGC decision, which classified the 2004 work description at the TI-05 group and level.

[18] A judicial review of the 2007 CGC decision was commenced; however, it was later abandoned.

[19] In November of 2007, shortly after the 2007 CGC decision, 19 LAOs from various parts of the country, including Mr. Grundie and Mr. Ollenberger, filed statement-of-duties grievances ("the 2007 grievances") about the newly classified (TI-05) national generic LAO work description (Exhibit C-1, Tab 4). The allegation contained in the grievances was as follows:

> *That the employer has violated Article 57 as well as any other relevant or related Article of the Collective Agreement (Technical Services – Table 3) as they have not provided me with a complete, current and accurate statement of duties of my present position and responsibilities.*
>
> *That I be provided with a complete, current and accurate statement of duties that reflects my present position and*

> *responsibilities in accordance with Article 57 of the Collective Agreement (Technical Services – Table 3), as well as any other relevant or related Article.*

[20] The National Component of the PSAC wrote to those LAOs who filed the 2007 grievances, sometime after November of 2007 and before January of 2008 (Exhibit C-1, Tab 5), advising those LAOs that the bargaining agent would not be pursuing these grievances. The bargaining agent stated as follows:

. . .

> *The current generic LAO job description was achieved after five (5) days of mediation to address outstanding statement of duties grievances. The case was mediated with the assistance of the Public Service Staff Relations Board (now replaced by the Public Service Labour Relations Board). The resulting job description and memorandum of settlement was signed on September 24, 2004 by the employer, the Union and two (2) Labour Affairs Officers who were elected to represent the interests of their colleagues. The job description was twenty-eight (28) pages in length. In signing the Memorandum of Settlement, it was recognized at the time that the generic LAO job description was by definition broadly written and all-encompassing; in order to assure that it covered the work of all LAOs.*
>
> *The classification grievance was heard on June 14, 2007, by a Classification Committee composed of three (3) management officials, pursuant to the regulations prescribed by Treasury Board Policy and the Financial Administration Act. During the hearing the Union and the two Labour Affairs Officers elected to represent the interests of their colleagues reaffirmed the accuracy of the job description. Classification grievances do not proceed until there is a common agreement of the job content.*

. . .

[21] The grievors, including Mr. Ollenberger, attempted to pursue the 2007 grievances on their own; however, the employer advised them by letter dated January 25, 2008, (Exhibit C-1, Tab 6) that without bargaining agent support, it would not accept the grievances. The employer also reminded the grievors that during the CGC hearing, the parties agreed that the 2004 work description was complete and current.

[22] At some point after January of 2008, some of the LAOs who had filed the 2007 grievances, including Mr. Grundie and Mr. Ollenberger, filed duty-of-fair-representation

complaints under paragraph 190(1)(*g*) of the *Act* against the National Component of the PSAC ("the 2008 DFR complaints"). These complaints were subsequently withdrawn.

[23] On or about March 3, 2010, 17 LAOs (including 10 of the 22 complainants) filed new statement of duties grievances against the 2004 work description ("the 2010 grievances"). Of these 17 grievors, only 3 were the same as those who participated in the 2007 grievances, including Mr. Ollenberger. The 2010 grievances (Exhibit C-1, Tab 8) were all worded exactly the same as the 2007 grievances, and stated as follows:

> *That the employer has violated Article 57 as well as any other relevant or related Article of the Collective Agreement (Technical Services – Table 3) as they have not provided me with a complete, current and accurate statement of duties of my present position and responsibilities.*
>
> *That I be provided with a complete, current and accurate statement of duties that reflects my present position and responsibilities in accordance with Article 57 of the Collective Agreement (Technical Services – Table 3), as well as any other relevant or related Article.*

[24] The 2010 grievances are at the root of the complaint before me.

[25] Clause 57.01 of the Agreement Between the Treasury Board and the Public Service Alliance of Canada Technical Services Group ("the collective agreement") states as follows:

> *Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted by factor to his or her position, and an organization chart depicting the position's place in the organization.*

[26] According to paragraph 5 of the ASF, the parties agree that sometime in or about April of 2006, the department changed its practice of cross-training the LAOs in at least two of the three business lines and began to use the LAOs in just one business line. The evidence presented to me was that despite being called an LAO and despite the 2004 work description being all-inclusive and having contained therein the work of all three business lines (LSO, FPI and OHSO), if an employee worked in one of the business lines, he or she did not work in the other business lines. The evidence was

that until April of 2006, the department cross-trained employees in at least two business lines but that after that date, even that stopped.

[27] The justification for the request by the LAOs for three distinct work descriptions is set out in a letter written by Mr. Grundie dated February 9, 2010 (Exhibit C-1, Tab 9), which states as follows:

. . .

> *. . .please find attached examples of proposed separate work descriptions that we are advocating to replace the current all inclusive LAO work description.*
>
> *These work descriptions are based on the 3 separate and distinctive business lines now utilized by the HRSDC Labour Program to deliver its mandated services to the public.*
>
> . . .
>
> *. . .I believe that these separate work descriptions do give a clear picture of the duties relative to each of the 3 business lines. These propose work descriptions clearly illustrate the distinctiveness of the knowledge and challenge requirements needed to successfully delivered duties specific to each of the 3 very different business lines in a competent and professional manner. Up until this point, the distinguishing characteristics of the duties necessary for the required delivery of the 3 very different business lines have been confusingly buried within the convoluted and incredulous morass of the LAO work description.*
>
> . . .
>
> *LAOs across the country are for the most part specializing solely in one of the 3 business lines. Cross training in a secondary business line simply no longer occurs (and hasn't for many years).*
>
> . . .
>
> *As you will note by the content of these 3 separate work descriptions, there is nothing in common relative to the respective specialized duties other for the fact that the delivery of all 3 business lines is the responsibility of the Labour Program.*
>
> . . .
>
> *In North West Pacific Region, the 3 business lines have been entrenched since April 1, 2006, almost four years ago.*

. . .

> *It has now been over 2 years since we last sought the support of the Union in our efforts to demand new, separate work descriptions.*
>
> . . .
>
> *The current LAO work description cannot be appropriately classified. It is an amalgamation of 3 unrelated jobs, each of which most likely belongs in a different occupational group for purposes of classification. One only needs to read the last classification decision to realize that the Labour Standards duties were given no consideration as it was concluded that the Labour Standards duties simply do not belong within the TI group.*
>
> [*Sic* throughout]

[28] I was not provided with how many LAOs there were in total at the department, at any given time. I was not provided with a breakdown as to how many LAOs worked in any specific business line. I was not provided with a breakdown as to how many LAOs worked in the different regions of the country at any given time in the different business lines.

[29] Much of what Mr. Ollenberger testified to about the work of the LAOs was very similar if not exactly the same as set out in Mr. Grundie's letter of February 9, 2010.

[30] Mr. Ollenberger testified that as an LAO, he performs OHSO work; in other words, he does only those tasks as set out in the 2004 work description that would be done by the OHSO business line. He does not carry out any of the tasks related to the FPI or LSO business lines, nor does he have any experience in those business lines. He testified that if employees work in one business line, they do not work in either of the other two. He stated that the statement of merit posted for the position he was hired into (Exhibit C-1, Tab 38) was specific to the OHSO business line and did not refer to work in either of the two other business lines.

[31] Mr. Ollenberger testified that not only are the business lines distinct from one another, but also they do not have the same reporting structure; they report upwards to separate managers. He also testified that they have different training programs and that since 2006, there has been no cross-training anywhere in Canada.

[32] It was the evidence of Mr. Ollenberger that because he does the tasks associated only with the OHSO business line and because, according to information provided to him by the other complainants' they only do tasks associated with only one business line the 2004 work description should be divided into three separate work descriptions, one for each of the OHSO, LSO and FPI business lines. I was provided with three different draft work descriptions created for the three separate business lines (respectively, Exhibit C-1, Tabs 12, 13 and 14). The authors of these draft separate work descriptions were not identified, but it was clear from the evidence that they were not generated by the employer.

[33] At Exhibit C-1, Tabs 15 through 26 are a variety of different work descriptions of various different jobs within the federal public service that the complainants' submit are in some ways similar to one of each of the three business lines. Some of these also have attached classification rationales attached. The evidence of Mr. Ollenberger was that these different work descriptions are proof positive that the position of the complainants of dividing the 2004 work description into three separate work descriptions was meritorious and would have resulted in an upward classification.

[34] In cross-examination, Mr. Ollenberger was brought through the "Key Activities" portion of the 2004 work description and the Key Activities portion of the draft job description for an OHSO LAO (Exhibit C-1, Tab 12) and was asked if the tasks as set out in the draft OHSO LAO job description were contained in the 2004 work description. Mr. Ollenberger conceded that, in fact, the tasks contained in the draft OHSO LAO work description are contained in the 2004 work description.

[35] When asked in cross-examination if there was anything not in the 2004 work description that he is asked to do, Mr. Ollenberger stated that writing prosecution briefs was something that, as an LAO doing OHSO work, he spends a lot of time doing, and it is not contained in the 2004 work description. There is no evidence that Mr. Ollenberger conveyed this fact to anyone at either the UNE or the PSAC before this hearing.

[36] Mr. Picciano is the coordinator of membership representation for the UNE. He is responsible for supervising the component's labour relations officers ("LROs"). Gail Myles, the LRO assigned to handle the 2010 grievances, reported to him. He testified that while the LROs generally work independently, if there are issues with a

file, he will become involved. Mr. Picciano testified that he was familiar with the history involved in the LAO grievances.

[37] Mr. Picciano testified that Mr. Grundie was an active player in all of these matters, dating back to the 2004 MOS.

[38] Mr. Picciano testified that Mr. Grundie signed off on the 2004 work description and represented the LAOs at the 2007 CGC hearings.

[39] Mr. Picciano stated that a work description grievance is based on an alleged breach of the collective agreement and as such requires the support of the bargaining agent to proceed. A classification grievance, unlike a work description grievance, is not rooted in the collective agreement and as such can be pursued by individual employees without the support of the bargaining agent.

[40] Mr. Picciano described the process engaged by the bargaining agent with respect to work description grievances. The key is the difference between what is stated in the work description and the duties that the incumbent employee is required to carry out. When the UNE receives a work description grievance, it looks at the current work description and determines if the tasks being carried out by the member are covered. He stated that the two important components of a work description grievance are whether the work is being done and whether the work that is being done is being assigned by the employer.

[41] Mr. Kennedy testified that the matter of the LAO work description was brought to his attention at the August 2011 UNE Convention when he met with some LAOs (specifically whom, he did not remember), who advised him that they were having difficulty moving work description and classification grievances forward. At the time, he was running for national executive vice president. He stated that at that time, he told the LAOs that if he were elected, he would see what he could do to look at the issue.

[42] In September of 2011, after the August 2011 UNE Convention, where Mr. Kennedy was elected as the national executive vice-president, he was in Ottawa for three weeks, acting as the national president. During this timeframe, he was copied on emails about the 2010 grievances. Mr. Kennedy stated that he spoke with Ms. Myles and received background information on the 2010 grievances.

[43] Exhibit C-1, Tab 62, is an email chain that was identified by Mr. Kennedy. The last email in that chain was sent on September 10, 2011, by Mr. Kennedy to Mr. Ollenberger, Mr. Grundie and others, in which Mr. Kennedy stated he was trying to get a PSAC GAO who was familiar with classification matters to be available for a conference call with the grievors on September 20, 2011.

[44] Mr. Kennedy confirmed that he was successful in arranging for a PSAC GAO familiar with classification, Ms. Préfontaine-Moore, to participate in the conference call to discuss the 2010 grievances. The conference call was scheduled for September 20, 2011.

[45] Mr. Grundie prepared a package of material under the cover of a memo dated September 12, 2011 (Exhibit C-1, Tab 10), which was addressed to the respondent, Mr. Kennedy and Ms. Myles. The documents referred to in the memo of September 12, 2011, were attached to it and are found at Exhibit C-1, Tabs 11 through 39, and included the draft work descriptions for the separate LSO, FPI and OHSO positions.

[46] Ms. Préfontaine-Moore testified that in addition to handling classification grievances, she has handled other grievances, including work description grievances. As part of her job, she represents grievors and the PSAC and its components before CGCs.

[47] Ms. Préfontaine-Moore explained the process involved in a classification grievance. She explained that classification is done by the employer without input from the bargaining agents. Paragraph 11.1(1)(*b*) of the *Financial Administration Act* R.S.C. 1985, c. F-11 ("the *FAA*") states as follows:

> ***11.1****(1) In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may*
>
> ***. . .***
>
> *(*b*) provide for the classification of positions and persons employed in the public service . . . .*

[48] If the employer classifies a position and an affected employee does not agree with the classification, the employee may grieve the classification. If the employee is unhappy with the result of the grievance, the Treasury Board has established a

classification grievance procedure, and the grievance would be heard by the CGC. A copy of the classification grievance procedure is provided in Exhibit C-1, Tab 48.

[49] Section IV of the "Classification Grievance Procedure", under the heading "**Preliminary Action**", subheading "**A. Initial examination of a classification grievance**," states as follows:

> *4. A classification grievance will be considered valid even if the work description is not signed by the employee, provided the employee is not contesting the job content.*
>
> *5. A classification grievance cannot be considered valid when the job content is being contested. The department will inform the employee and his or her representative that a new classification grievance will have to be submitted once the job content is resolved. The department must review the new work description and issue a new classification decision, whether or not changes were made to the work description, thus providing the employee with the right to submit a new grievance.*

[50] Both Mr. Picciano and Ms. Préfontaine-Moore stated that the employer owns work descriptions and classification and that to get a work description changed, the employer either has to agree to change it, or it has to be ordered to change. They also testified that the difficulty with the 2010 grievances over the LAO work description was that in 2004, the MOS was reached after a long negotiation with the employer over what became the 2004 work description.

[51] Ms. Préfontaine-Moore testified that on September 15, 2011, she received a package of documents from Ms. Myles, which included the draft OHSO, draft LSO and draft FPI work descriptions, as well as Mr. Grundie's letter of February 9, 2010. It was this material that she reviewed before the teleconference scheduled with the LAOs for September 20, 2011.

[52] Ms. Préfontaine-Moore stated that she prepared for the scheduled teleconference call of September 20, 2011, over the weekend of September 17 and 18, 2011, and prepared speaking notes for that call. The notes were marked as Exhibit R-3.

[53] Mr. Kennedy testified that originally, it was agreed that Mr. Grundie should come to Ottawa to participate in the conference call from there; however, due to scheduling issues, Mr. Grundie did not attend the conference call in Ottawa.

[54] The September 20, 2011, conference call to discuss the 2010 grievances did take place as scheduled. All the witnesses who testified before me participated in that call.

[55] Mr. Picciano testified that before the conference call of September 20, 2011, there was a pre-call meeting involving him, Ms. Myles, Ms. Préfontaine-Moore and Mr. Kennedy. He also stated that there was a post-call discussion as well.

[56] Ms. Préfontaine-Moore testified that she advised those participating in the teleconference, including Mr. Ollenberger, who she was and what she did as a GAO working in classification. She further advised how classification grievances work, how the bargaining agent prepares for them and how employees win them.

[57] Ms. Préfontaine-Moore explained in the conference call that the *FAA* gives the Treasury Board the power to organize the public service and to classify positions, and those powers and the management rights clause contained in the collective agreement are fettered only by the statement-of-duties clause also contained in the collective agreement.

[58] Ms. Préfontaine-Moore testified that during the teleconference call of September 20, 2011, she asked the participant grievors how they thought they could get a classification increase by breaking up a large, all-inclusive work description into three separate smaller ones. She stated that when job descriptions are broken apart, and duties removed, it is done so by the employer so that it can save money (via a lower classification).

[59] Ms. Préfontaine-Moore stated that splitting up the work description from one into three separate ones presented a serious problem from a classification perspective. Every duty in a work description has a value; more duties equal more value. If one removes duties, are removes value. There was a substantial risk of the classification going down. It was simply a matter of removing two streams of work from each of the new separate proposed work descriptions and the value of the duties attached to those streams of work. For example, the LAO work description was classified at the TI-05 group and level, but that was based on all three job streams. A new OHSO-only work description would contain only those tasks identified in the OHSO stream; as such, any points awarded in a classification exercise for tasks done for the LSO and FPI streams would be deleted.

[60] Ms. Préfontaine-Moore also pointed out that the 2007 CGC decision (Exhibit C-1, Tab 3) made a finding that the total points for the 2004 work description, as classified, was 490. In the TI group, the TI-05 level is anything between 451 and 550 points. To be classified TI-06, any new work description would have to get to 551 points. Equally, a reduction in points to below 451 points would reduce the classification to the TI-04 level.

[61] Ms. Préfontaine-Moore stated that nothing that was presented to her, either in the material she reviewed or during the teleconference call of September 20, 2011, demonstrated how removing duties from the 2004 work description that was just 39 points (of a possible 100 points) over the point rating cut-off for a TI-05 would result in points over the 551-point cut-off for a TI-06. She stated that it was very likely that if there were three separate work descriptions, the classification exercise that would follow would result in a reduction of points. A reduction of only 40 points to any of the three separate work descriptions would put it into a lower classification level. With respect to the LSO business line, the evidence from Mr. Picciano was that there was a risk that this position not only would lose points and potentially go into a lower classification level but also that it would be moved back to the PM group.

[62] Ms. Préfontaine-Moore testified that during the teleconference call, she explained to the grievors that the draft work descriptions that they had provided to her were of a "Universal Classification System" ("UCS") style, which had gone out of trend with the employer. The UCS was a style that was quite extensive and often had many pages. She stated that she explained to the grievors that the new trend being used by the employer was a much leaner style, comprising only two to three pages per classification.

[63] Ms. Préfontaine-Moore stated that she told the grievors she understood the arguments for a TI-06 classification level and stated that she also would have tried for a TI-06 classification level at the 2007 CGC hearing. However, she stated that in 2011 the burden to reach that plateau was much more difficult, given that the 2004 work description with all three streams contained therein was classified only at the TI-05 level during the 2007 CGC hearing.

[64] Ms. Préfontaine-Moore stated that although the grievors had provided a number of good relativities with respect to similar jobs, this is only one factor in the process and alone would not win a classification grievance.

[65] Ms. Préfontaine-Moore testified that she was familiar with one of the cases put forward by the grievors during the 2007 CGC hearing, that of aviation inspectors, which the complainant's suggested supported their contention that the LAO position was worthy of a TI-06 classification. Ms. Préfontaine-Moore stated that she was the GAO on that grievance and explained that in that case, the aviation inspector's supervisor position was subject to a classification change from TI-06 to TI-07 before the aviation inspectors' grievance was heard. She also stated that a new regulatory program had been instituted such that the aviation inspectors had a lot more responsibilities and required an increased knowledge base. This caused the change from TI-05 to TI-06.

[66] Ms. Préfontaine-Moore also testified that the existence of the technical advisor position found in the organizational chart, which is classified at the PM-05 group and level, was a hurdle to obtaining an increased classification. While the LAOs did not report to this person, and nor could the person in this position instruct an LAO what to do or how to do it, he or she did provide an important advisory role. The technical advisor position is there in case information is needed by the LAOs. It is a knowledge-based position, and knowledge is highly valued in classification. The technical advisor position is a hurdle, not because of a reporting structure issue but because it is a resource to the LAOs, and the employer had signalled that this position was important within the organizational structure.

[67] Ms. Préfontaine-Moore testified that she also explained to the grievors what was needed to be successful in a work description grievance. She advised the grievors that they should provide to Ms. Myles a list of changes in duties and responsibilities. Those changes to the duties and responsibilities must be significant additions because the 2007 CGC decision as accepted by the deputy head is final and binding and will not be reopened unless there are significant duties that have been added to the work description such that they may impact the classification.

[68] At Exhibit C-1, Tab 47, is a 15-page email chain. The first email in the chain is dated September 22, 2011, and was sent by Ms. Myles to the respondent, Mr. Kennedy, Mr. Grundie, Mr. Picciano and several others, after the September 20, 2011, conference call. While Mr. Ollenberger's name did not appear in that initial email, his name is found in the subsequent emails in the chain, and as such, he did receive a copy. The email stated as follows:

. . .

> *As an update to the LAO job content and classification grievances, we had a teleconference on September 20, 2011. A Grievance and Adjudication Officer/Classification of the PSAC attended and explained to the grievors that, as a result of the final and binding classification decision issued in 2007 and the fact that there has been no significant change to the organizational structure or the duties related to the job since then, the PSAC would not be able to provide representation on these files at this time. As a reminder to all, the Union generally will not argue to have duties removed from a job description, especially where a risk exists of a downgrading of the classification of some of our members' positions which we have serious reasons to believe could happen in this case should we support the rewrite of the existing LAO job description into 3 generics.*
>
> *As a result, the job content and classification grievances filed by the LAOs will be withdrawn and the files with the Component will now be closed.*

[69] Subsequent to the initial email of Ms. Myles of September 22, 2011, several emails were sent back and forth between various LAOs and the respondent, Ms. Myles Mr. Kennedy, debating the position of withdrawing union support. Predominate in the exchange was Philip Healey, an LAO out of St. John's, Newfoundland. It is clear that the UNE's decision to not support the 2010 grievances moving forward did not receive a favourable response from him. The penultimate, email in the chain was sent by Ms. Myles on October 3, 2011, at 11:54 a.m. and stated as follows:

> *I think it's important to clarify a few issues so that you understand it is not the union setting the rules; but rather legislation which restricts your rights tremendously in addition to case law. It's also important to remember why you received the reply from the union that you did.*
>
> *1. The LAO's sole focus by some was around the splitting off of duties into the 3 business lines. I raised the issue several times that when you argue a job content grievance you are generally arguing duties "that are missing" from the job description. We also raised that issue in the first teleconference with Eddie in September. Rather than focussing on any additional duties, you wanted to remain fixed on the 3 separate business lines in comparison to other similar jobs. Jacqueline, the classification officer, explained that relativity arguments at this time cannot be the focus. You also at no time provided me with a list of your missing duties; even when I asked you to "highlight" those in the new proposed generics. So to be clear – your focus throughout this*

> *time was to attempt to get your "expertise" recognized through the provision of 3 separate job descriptions by business lines. You now understand why that won't proceed, including the fact that unions will generally not argue for the removal of duties from a job description.*
>
> *2. Having said that, you now seem to want to potentially argue the "duties that are missing" from the existing job description. . . .it is up to you to provide me a list of those duties that are missing from the existing job description, and with examples of that work performed, and evidence the employer either ordered that work or was aware you were doing it as required by the employer. . . .*
>
> *. . . .you must ensure that those duties are not already subsumed within your existing job description and they must be "significantly different".*
>
> *. . . .I suggest that if you want to go this route, that Phil and 1 or 2 others can review the health and Safety Officer Job description to see if there are such duties that are worthwhile arguing for. If some of you also want to do this, or feel there are duties missing that could or should be added, considering the above, you can do that as well. I have not yet formally withdrawn the union's representation on your files, and would be willing to review any missing duties – if they are provided within the next 2 weeks – by October 17, 2011.*
>
> *. . . .I do not want to raise expectations. Even with additional substantially different duties, you still have the barrier to face with the existence of the Technical Advisor position (PM-05) in the organizational structure that will bar you from obtaining a higher classification. I don't see a way around this unless the PM-05 grieved successfully and from what I understand that likely won't happen.*
>
> *. . . .go to Treasury Board Classification Grievance Procedure below to Section VI, Subsection B, Paragraph 2 which talks about the significance of a "final and binding" decision and of the need to prove "significant change" thereafter.*
>
> *. . .*
>
> *Talk to you soon - & please provide that info by Oct. 17 if you want me to review the file again – keeping in mind the restrictions to potential reclassification upwards.*
>
> *. . .*
>
> [*Sic* throughout]

[70] Ms. Myles' email of October 3, 2011, which was sent to a number of people, including Messrs. Ollenberger, Grundie and Healey, as well as the respondent and

Mr. Kennedy, was replied to that same day by Mr. Ollenberger. It would appear from Mr. Ollenberger's email that he replied to everyone who received the earlier email from Ms. Myles. Mr. Ollenberger, in his response to Ms. Myles, stated as follows:

> *I would recommend that you folks at National Component spend a bit of time reading the material we sent you. We didn't assemble it because we needed something to do. It is intended to clearly communicate our case to you so that you might provide us with expert review and strategy for moving forward.*
>
> *The differences between our proposed job descriptions and the current job description are obvious. Nothing is gained by our dissecting the material into simple "additional duties".*
>
> *The importance of this grievance is in the specifics as expressed in proposed job descriptions. The specifics of what we do provide all the context for a classification review and they are not represented in the current, generic job description.*
>
> . . .
>
> [*Sic* throughout]

[71] Exhibit C-1, Tab 49, is an email chain. The last email in the chain is dated October 3, 2011, at 11:04 a.m., and is from Mr. Ollenberger to the respondent as well as several other people, including Messrs. Healey, Grundie, Kennedy and Picciano. Mr. Ollenberger states as follows:

> . . .
>
> *My members find it unacceptable that our grievance would be disregarded on the basis of a cursory review and off-hand comments by the PSAC classification assistant.*
>
> *Worse still is the fact that we were unable to adequately engage in the discussion due to it having occurred during a last minute teleconference of which most of the grievors were not adequately informed.*
>
> *There are numerous and substantial changes to our work which are not represented in the current job description. The classification assistant's having overlooked this fact only emphasizes the superficiality of the classification review.*
>
> *Before abandoning such a substantial and widely acknowledged grievance, I would expect at least a formal review of the proposed separate job descriptions by PSAC classification staff. This formal review should follow the*

> *process of a genuine classification review and must result in the expected classification for each job description, supported by a point ranking and comparable positions underlying the ranking.*

[72] Exhibit C-1, Tab 51, is another email, chain. The final email in that chain is dated October 3, 2011, at 7:12 a.m., from Mr. Healey to a number of people, including the respondent and Messrs. Ollenberger, Grundie, Kennedy and Picciano and Ms. Myles. Mr. Healey states as follows:

> *To be clear, this is where we stand . . . We have included all the duties that we perform in the proposed job descriptions that we submitted. The information pertaining to other positions in other departments was submitted as proof that we are not being treated fairly in the evaluation of our duties.*
>
> *My request for expert union assistance refers to the assembly of our information which we provided to the union. We need guidance and assistance in the review of this situation. We need expert union advice on how to put forward our argument. For a PSAC classification officer to say that the last job description is final and binding, and to advise us to look elsewhere for employment is not at all helpful.*
>
> *I do not understand why we have to submit our grievances all over again. The grievance is the same, we feel the employer has not provided a true and accurate job description. Why are we wasting our time, jumping through administrative hoops instead of discussing the important issues here.*
>
> *The main issue I understand is the union does not want to break up the job descriptions into the three job positions. O.k. fine, lets* [*sic*] *put all the duties together and combine them into a concise, detailed job description.*

[73] Exhibit C-1, Tab 53, is another email chain The emails therein address the PM-05 technical advisor position and its relation to the LAOs. On October 7, 2011, at 7:37 a.m., Mr. Healey emails a number of people, including the respondent and Messrs. Ollenberger, Grundie, Kennedy and Picciano and Ms. Myles. Mr. Healey states as follows:

> *. . .we discussed the fact that the Labour Program structure is a possible road block to LAO receiving a TI-06 because of the PM-05. I checked it out, and the PM-05 positions are the Technical Advisors. LAOs do not report to the TA, but to managers who are PM-06 or higher. This should not impead*

> [*sic*] *the progress of our grievance, and eventual reclassification.*

[74] Ms. Myles replied to Mr. Healey's email of October 7, 2011, at 7:37 a.m., with an email that same day, at 10:44 a.m. Ms. Myles replied as follows:

> *I've attached a copy of the Class. Committee report. I know it's confusing because your org chart shows you reporting to the PM-06.*
>
> *However this was addressed in the report – p. 3. While the PM-5 does not supervise you, they do play a role which obviously the committee considered.*
>
> *I know it's frustrating to all of you, but I think the report itself will shed some light on the matters as addressed by the classification officer.*
>
> [*Sic* throughout]

[75] On October 11, 2011, at 8:58 a.m., Mr. Healey replied to Ms. Myles' email of October 7, 2011, sent at 10:44 a.m., which she also sent to the respondent, and Messrs. Ollenberger, Grundie, Kennedy, Picciano and others. Mr. Healey states that there was nothing in the CGC decision that would present a roadblock to the work description grievance and the eventual reclassification of the position. Ms. Myles responded to this email on October 11, 2011, at 10:29 a.m., stating as follows:

> *As Jacqueline said – this decision is binding unless there is a reorganization. Arguments were made on the issue – it stands.*
>
> *you can't get around it.*
>
> *sorry – not my doing.*
>
> [*Sic* throughout]

[76] Exhibit C-1, Tab 56, is another email chain. On October 11, 2011, at 9:45 a.m., Mr. Healey responded to Ms. Myles' email of October 11, 2011, sent at 8:58 a.m. In that email, which was also sent to the respondent and Messrs. Ollenberger, Grundie, Kennedy and Picciano, as well as to many others, Mr. Healey restates the position taken by the grieving LAOs with respect to the PM-05 technical advisor position. He further states that he was working on a general job description rewrite. On October 17, 2011, at 10:27 p.m., Ms. Myles sent a response to Mr. Healey's email of October 11, 2011,

sent at 9:45 a.m., which was also sent to the respondent, and Messrs. Ollenberger, Grundie, Kennedy, Picciano and others. In this email, Ms. Myles states as follows:

> *Just to confirm – you can have until October 30, to provide me a "list of duties" that you perform that are not contained in the existing job description, with evidence you do that work and that the employer has requested it. I would then review it to ensure those duties are not already subsumed in the existing job description. Remember – these duties must be substantially different than those now described.*
>
> *Having said that, I will reiterate – The PSAC has determined they will not provide representation on the classification grievances while the existing organizational structure exists with the PM-05 position in place. That position exists and the employer has expectations of that position. If you wish to do the work and attempt to get your job description changed, that will not change the organizational structure; nor the PSAC's decision to not represent on the classification grievances on that basis. I just want to ensure that you don't have any expectations that decision will change.*

[77] Mr. Healey replied to Ms. Myles' email of October 17, 2011, at 10:27 p.m., with an email on October 20, 2011, at 6:01 a.m., which was also sent to the respondent and Messrs. Ollenberger, Grundie, Kennedy, Picciano and others. In this email, Mr. Healey states as follows:

> *I am not wasting anymore* [*sic*] *of my time with this. This situation is much more complicated than correcting a job description. I have tried to work with the Union to get this issue resolved, but the union is not interested in finding a solution. It is obvious that the union will not work with the team of Labour officers who are working to correct a wrong. A mistake has been made here, and it needs to be corrected, but I am not taking it on all by myself. The situation has developed as if the union and the employer are on the same side, fighting against the officers.*

[78] On November 8, 2011, Ms. Myles wrote to the LAOs involved in the 2010 grievances and advised them as follows:

. . .

> *Since I have not receive a listing of duties missing from the existing job descriptions for review; your job content and classification grievances will be closed. I will inform the employer that the union will not be providing representation on these files.*

. . .

[79] On December 9, 2011, the employer wrote to the LAOs who had filed grievances and advised that since the bargaining agent was not supporting the grievances, the employer would not accept the presentation of the grievances.

[80] Mr. Grundie did not testify before me.

[81] Ms. Myles did not testify before me.

[82] Mr. Healey did not testify before me.

III. Summary of the arguments

A. For the complainants

[83] The complainants argued that the work description is a multipurpose document. It has to be accurate and reflect what the employees do. It is not just about classification.

[84] The complainants stated that in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 SCR 509, the Supreme Court of Canada stated that the following principles form a bargaining agent's duty of fair representation:

1. The exclusive power conferred on a union to act as spokesperson 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 in this case 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.

[85] The complainants stated that arbitrariness is defined in *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70, and that it comprises acts or omissions on the part of the bargaining agent that exceed the limits of a discretion reasonably exercised. For a bargaining agent to be considered as engaged in arbitrary conduct, it must have failed to engage in a process of rational decision making or failed to arrive at a thoughtful judgment.

[86] The complainants argued that they provided to the UNE a package of material, which they felt demonstrated that even by changing the work description, there was only a limited risk of downward classification. The package of material was sent by mail. Only two days after it was received, a telephone conference call took place to discuss the 2010 grievances. The complainants' stated that there has been no evidence presented by the respondent that any specific review of the material sent took place.

[87] The complainants stated that they have been provided with no explicit analysis of the 2010 grievance; only a cursory review has taken place. They argued that the respondent relied on a general assumption that if duties are not added, then an increase in classification will not occur.

[88] The complainants relied on *Cousineau v. Walker and Public Service Alliance of Canada*, 2013 PSLRB 68, at para 30, which states as follows:

> *What is required to sustain an allegation of bad faith or of arbitrary or discriminatory action has been the subject of a considerable number of Board decisions. In* Ménard v. Public Service Alliance of Canada, *2010 PSLRB 95, the Board refers to some of the leading cases in the following manner:*
>
> > **22.** With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:
> >
> > > The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no

> intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible…
>
> . . .
>
> **23.** In *International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "…a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."

[89] According to the complainants the UNE has not understood what the 2010 grievances are about; it should have sought and reviewed the relevant facts. There was no discussion by the UNE with the grievors with respect to the way forward; no honest engagement. According to the complainants the UNE should have undertaken a basic review and spoken to the people; this was not done.

[90] The complainants argue that the UNE did nothing more than a cursory review. There is nothing that the respondent has provided that would suggest otherwise. According to the complainants they were not just talking about rewriting what they did in their jobs. The UNE should have investigated the merits of the 2010 grievances. It cannot be demonstrated that Ms. Myles carried out a reasoned review.

[91] The complainants stated that they were entitled to a robust process, which they did not get. They did not get a true inquiry into the 2010 grievance, only an apparent inquiry. They stated that the respondent did not ask about any specifics of the work descriptions and the comparator work descriptions; they were satisfied to rely on general assumptions. This does not demonstrate a basic level of competence and was not a fair process. At best there was a cursory review of the material, which is not sufficient to withstand the test against arbitrariness.

[92] The complainants stated that the 2010 grievances were about the 2004 work description and that it was not current. The UNE made it about classification.

Mr. Ollenberger stated that he has a master's degree relating to occupational health and safety and that he has 15 years of experience in that specific field. He states that if the work description is not accurate, it is a real risk to an employee. He stated that he does not do the fire protection tasks; nor does he do labour standards tasks. He is not trained, nor is he qualified, to do those tasks.

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

[93] The respondent argued that the UNE and the PSAC are, in essence, between a rock and a hard place. Bargaining agents are at times required to make tough decisions with respect to what grievances they will support and those that they will not.

[94] In 2004, after extensive mediation over the work description for the LAOs that existed at that time, a settlement was reached between the UNE and the PSAC on the one hand and the employer on the other wherein the 2004 work description was agreed to be an accurate work description for the LAOs. That 2004 work description was sent to classification as part of the mediated settlement, and the classification level result was not what the LAOs had hoped for. As such, the LAOs grieved the classification of the 2004 work description which was heard by a CGC, which rendered a decision that was accepted by the deputy head on August 27, 2007. The result of the 2007 CGC decision was a change of classification group and level (TI-05), which resulted in an overall higher classification and higher salary for all the LAOs.

[95] What is problematic is that the 2004 work description may not accurately portray the work of the LAO; there may well be three separate business lines, and Mr. Ollenberger may only do the work of an OHSO. The difficulty is that if the 2004 work description is grieved, and the employer agrees with the grievance, it may well divide the one work description into three. By doing so, when it is sent to classification, it may result in the downward classification of one or more of the three business lines, which would result in a lower salary.

[96] The bargaining agent must weigh the risks involved in pursuing such a grievance in the face of losing hard-fought benefits. This is why it went through the process it did with the complainants when they filed the 2010 grievances.

[97] The bargaining agent assigned GAO Myles to represent the complainants with respect to the 2010 grievances. The matter was also referred to a classification

specialist, Ms. Préfontaine-Moore. The assessment of the UNE and the PSAC was that it was not in their best interests and of the membership as a whole to refer the 2010 grievances to adjudication.

[98] In *Cousineau*, the Public Service Labour Relations Board ("the Board") stated at paragraph 29 as follows:

> *29. As alluded to in* Halfacree v. Public Service Alliance of Canada, *2009 PSLRB 28*¸ *the Board's role is not to determine whether the respondents' decision not to represent the complainant was appropriate or correct, good or bad, or even with or without merit. Rather, it is to determine whether the respondents acted in bad faith or in a manner that was arbitrary or discriminatory in the decision-making process behind their response to the representation issue.*

[99] *Cousineau* also defines what arbitrary means, as follows, quoting from the Board's decision in *Ménard* at paragraph 30:

> **22.** With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:
>
> *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible…*
>
> **23.** In *International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.*, [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "…a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."

[100] The respondent also argued that according to *Cousineau*, when a bargaining agent acts, based on considerations that are relevant to the workplace or to its job of representing employees, it is free to decide what the best course of action is, and such a decision will not amount to a violation of the duty of fair representation.

[101] The respondent relied on *Gabris v. D'Souza and* Burt, 2013 PSLRB 47, for the proposition that the bar for establishing arbitrary conduct or discriminatory or bad faith conduct is purposely set quite high.

[102] *Gabris* also stands for the proposition that being unsatisfied with a bargaining agent's decision not to pursue a grievance does not provide a substantiation of an allegation that the bargaining agent has acted in an arbitrary manner or that it failed in its duty of fair representation. The complainant must demonstrate through evidence that this was the case.

[103] It is the position of the respondent that the UNE and the PSAC assessed the merits of the 2010 grievances and made an informed decision. The decision does not meet the definition of arbitrary as defined by the case law and as such the complaint must be dismissed.

[104] The respondent, in addition to requesting that the complaint be dismissed, has asked that I use my discretion and use strong language to deter the complainants from pursuing this matter again. The UNE and the PSAC have expended a considerable amount of time and money on this matter given the number of grievances and complaints brought forward since the 2004 work description and the 2007 CGC decision.

C. Complainants' reply

[105] The complainants' argued that the respondent's argument that they should stop pursuing the grievances is not acceptable. There was no process.

[106] The complainants' argued that there is no risk, that the work descriptions can be rewritten and that they could be understood properly.

IV. Reasons

[107] 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).*

[108] 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.*

[109] To be successful, the complainants had to establish that the respondent acted, in the course of his representation of him, in a manner that was arbitrary, discriminatory or in bad faith.

[110] 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.)

[111] In the argument before me, the complainants submitted that they were not alleging bad faith or a discriminatory practice, merely that the respondent's actions were arbitrary.

[112] First and foremost, the complaint must fail, as there has been absolutely no evidence tendered whatsoever of any arbitrary conduct by the respondent. There is no evidence that the respondent was in any way involved in any of the decision making relating to the issues of the work description and classification grievances. While the respondent was at all material times the president of the UNE, there was no evidence or argument that somehow the actions of other officers or employees of the UNE could vicariously attach some form of liability to the respondent.

[113] Despite my finding in paragraph 112, I shall address the evidence and arguments proffered before me, as they relate to the actions of the UNE and the officers and employees against whom the allegations in the complaint were directed.

[114] The underlying theme in this complaint is with respect to the interpretation and application of clause 57.01 of the collective agreement, which states as follows:

> *Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted by factor to his or her position, and an organization chart depicting the position's place in the organization.*

[115] This complaint has its source in a mediated settlement that took place almost 10 years ago when, in 2004, grievances involving the work descriptions of the LAOs resulted in a generic work description, identified herein as the 2004 work description in this decision. As part of that settlement, the work descriptions of all the LAOs in three different business lines, the OHSO, LSO and FPI, were all wrapped into the 2004 work description.

[116] The 2004 work description was classified by the employer, which result was not acceptable to the grievors at the time, and as such a classification grievance was pursued. Under paragraph 11.1(1)(*b*) of the *FAA*, classification is reserved to the Treasury Board. The Treasury Board has established a classification grievance procedure, a copy of which was provided to me at Exhibit C-1, Tab 48. A CGC heard the grievance about the classification of the 2004 work description and issued its report on August 21, 2007, which was accepted by the deputy head's nominee on August 27, 2007 (the 2007 CGC decision). Although a judicial review application of that decision was commenced, it was later discontinued.

[117] As part of the classification grievance procedure, a work description will not be considered by a CGC if the parties have not agreed that the work description, that is the subject of the classification grievance, is accurate. This is set out at Exhibit C-1, Tab 48 at section **IV, "Preliminary Action"**, subsection **A, "Initial examination of a classification grievance"**, paragraph 5, which states as follows:

> *5. A classification grievance cannot be considered valid when the job content is being contested. The department will inform the employee and his or her representative that a new classification grievance will have to be submitted once the job content is resolved. The department must review the new work description and issue a new classification decision, whether or not changes were made to the work description, thus providing the employee with the right to submit a new grievance.*

[118] According to the 2007 CGC decision, the CGC hearing took place on June 14, 2007. What was not in evidence was an explanation of the discrepancy of the

facts as to exactly what tasks and duties the LAOs were doing at the time of the CGC hearing. According to the ASF, paragraph 5, by April of 2006, the employer changed its practice of cross-training the LAOs in at least two of the three business lines and began to use the LAOs in just one business line. Mr. Ollenberger, in his evidence before me, also stated that this was a fact. Mr. Grundie, in his correspondence to the PSAC National Component in February of 2010, stated as follows: "In North West Pacific Region, the 3 business lines have been entrenched since April 1, 2006, almost four years ago."

[119] According to both the documentary evidence and the oral evidence of Mr. Ollenberger, it is clear that when the CGC hearing was held in June of 2007 and the 2007 CGC decision was rendered, the job description that was being presented by the LAOs was not valid. This was something that both Mr. Ollenberger and Mr. Grundie would have been aware of as they were part of the group of grievors that filed the classification grievances over the 2004 work description. Indeed, Mr. Grundie was the main representative on behalf of the grievors at the 2007 CGC hearing. This begs the question as to what was the true state of affairs with respect to the LAOs and their work description when the CGC heard the classification grievance in June of 2007. According to both the documentary evidence and the oral evidence before me, the 2004 work description was not accurate and valid, according to the grievors, for at least a year before the CGC hearing.

[120] If there is any doubt of this, it is erased by virtue of the memo Mr. Grundie sent to Messrs. Marshall and Kennedy and Ms. Myles on September 12, 2011, (Exhibit C-1, Tab 10) in an attempt to convince the PSAC and UNE executives to pursue the 2010 grievances. He stated as follows:

. . .

> *Along with the proposed separate business line specific work descriptions that were prepared earlier this year by our Brother and Sister members in the Atlantic and Pacific North West Regions, you will find copies of similar type work descriptions for positions that currently exist within other federal departments or agencies – all at higher salary levels (for OHS, Fire and mediations type duties).*

. . .

> *These similar jobs may therefore be suitable for comparison purposes when matched against the separate business line work descriptions that we've proposed to replace the current generic LAO work description.*
>
> *This has been a contentious issue for a very long time. I have personally been involved with it since the early 90s and have represented the LAOs at 2 classification hearings. . . .*
>
> *We're grieving the present LAO work description because it describes a job that doesn't* [*sic*] *simply doesn't exist anymore . . . .the Labour Program of HRSDC officially started the move to 3 separate business lines back on April 1, 2006 when North West Pacific Region formally established 3 separate business lines . . . with all 3 separate business lines reporting to separate managers. From that point on, no one was specializing in one discipline and generalizing in another. New hires were being specifically hired for one of the 3 disciplines. No more "cross training" was provided. So I think that one can argue that back on April 1, 2006, the Labour Program had an obligation to provide those of us here in NWP Region with new work descriptions, ones that accurately describe what it is that each of us in the separate disciplines actually do.*
>
> . . .
>
> *I believe that the department's shift to separate business lines in 2006 gave us the opportunity to once again make an attempt to gain the same measure of recognition and salary entitlement enjoyed by those employees in other federal departments and agencies that have similar duties. . . .*

[121] A significant amount of documents were provided, and I heard from Mr. Ollenberger how the 2004 work description was not appropriate for his work as an OHSO. I also was provided with a significant number of documents with respect to classification, and heard from Mr. Ollenberger how the classification of a new OHSO work description could be maintained at TI-05 or even upgraded to a higher classification level. However, this is not a statement of duties grievance; nor is it a classification grievance. It is an unfair labour practice complaint alleging that the respondent acted arbitrarily in not supporting the statement-of-duties grievance. Whether or not there is merit to the argument that a statement-of-duties grievance could have been maintained or that a higher classification level could potentially have been achieved is not the issue.

[122] Work descriptions are not bargained; they are set by the employer. The same is true of classification levels. What has been bargained and what is contained in the

collective agreement is quite simply that an employee, who is a member of the bargaining unit, is entitled to be provided a complete and current work description that includes in it the classified group and level and a copy of the organizational chart.

[123] Neither employees nor the bargaining agent are entitled to write a work description. It is the employer that decides what tasks are to be carried out by an employee and assigns them. The UNE was trying to convey this important fact to the complainants; as well, it was trying to convey to them the inherent risk of pushing the matter.

[124] The complainants' also argued that this was not about classification but about the work description. They stated that work descriptions were important, for reasons other than classification. Mr. Ollenberger stated that the work description defines what his job is; it identifies what he does as a professional, and as well, employees could be assessed by their managers against the tasks they carry out, which are contained in the work description. While those arguments may hold true, what is abundantly clear from the evidence is that the 2010 grievances were not about those things but were about getting a higher classification. In the documents put to me, as well as the oral evidence that was presented, it is clear that the purpose of the 2007 grievances and 2010 grievances was to facilitate classification change from TI-05 to TI-06, the first hurdle being the change of the work description.

[125] It is abundantly clear that the representatives of both the UNE and the PSAC were anything but arbitrary in their actions in representing the complainants. The representatives of the UNE and of the PSAC repeatedly told the complainants, both orally and in correspondence, what was required for the UNE to support the 2010 grievances, and why. On several occasions, the complainants were told that for the 2010 grievances to be supported, the LAOs were required to provide to the UNE or the PSAC representatives a list of tasks that the LAOs were carrying out that were not already contained in the 2004 work description and that the employer requested them to carry out. The LAOs never provided any list of tasks.

[126] The UNE and the PSAC representatives clearly explained to the complainants that without additional tasks, work description and classification grievances would not be successful. Quite simply put, the complainants did not like the answer they were getting from the UNE and the PSAC representatives. While the complainants might have rightfully have been frustrated that other jobs or positions within the federal or

various provincial public services might have been classified at higher levels or received better compensation packages, this does not translate into arbitrary conduct by the UNE or the PSAC by not supporting the 2010 grievances.

[127] This unwillingness to hear what their UNE and PSAC representatives were telling them is most evident in the evidence related to the TI-05 technical advisory position. Ms. Préfontaine-Moore explained why this position, in the organizational structure as it was, was a problem with respect to classification. Ms. Préfontaine-Moore accepted that the LAOs did not report to this position; however, she stated, as was already stated in the 2007 CGC decision, that the fact that the position existed in the employer's organizational structure provided a barrier in the classification system. That was clearly articulated in the 2007 CGC decision as well in what Ms. Préfontaine-Moore testified to before me. Indeed, in the email correspondence after the September 20, 2011, conference call, this fact was again succinctly set out by Ms. Myles. The complainants continued to ignore this fact, again reiterating their position that this TI-05 technical advisory position could not possibly be a barrier to higher classification.

[128] In *Cousineau,* the Supreme Court, in defining "arbitrary" in relation to union representation, stated that to avoid being found to have acted in an arbitrary manner, a union must investigate the complaint, review the relevant facts or seek whatever advice may be necessary. That being said, the Supreme Court also stated that an employee is not entitled to the most thorough of investigations possible. In *International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. and William Harris*, [2000] F.C.J. No. 1929 (C.A.)(QL), the Federal Court of Appeal stated that to prove the arbitrary nature of a decision to support a finding of a breach of the duty of fair representation, a complainant must satisfy the Board that the union's investigation was no more than cursory or perfunctory. It is clear to me that the actions taken by the representatives of the UNE and the PSAC were such that they exceeded the tests set forth by both the Supreme Court and the Federal Court of Appeal. The representatives of both the UNE and the PSAC investigated the 2010 grievances, reviewed the relevant facts and sought advice as necessary. There is no evidence that the investigation by the UNE and the PSAC was cursory and perfunctory; in fact, the preponderance of evidence is to the contrary. As set out in *Gabris,* being unsatisfied with a bargaining agent's decision is

not substantiation that supports an allegation of arbitrary conduct; there must be evidence.

[129] The decision reached by the UNE to withdraw support was made after a long period in which an extensive dialogue between the grievors and the UNE and PSAC representative had taken place. The decision reached by the UNE and the PSAC clearly was set out in the last correspondence, wherein they advised that despite requesting a listing of duties missing from the 2004 work description, none was received. This requirement and the reasoning behind it had been articulated on more than one occasion and had been repeated over a number of months. While the complainants' do not agree with the reasoning, this, as set out in *Cousineau*, is not determinative of arbitrary conduct or conduct that would amount to bad faith or discrimination.

[130] In addition to requesting that the Board dismiss the complaint, the respondent requested that the Board issue a declaration that the complaint was frivolous and that it use strong language to deter the complainants from pursuing this matter any further. The respondent argued that this process has been long, time consuming and costly. I agree with those submissions of the respondent. While the complainants may be frustrated with their work descriptions and their classification level, these frustrations are not necessarily issues that should be directed at the respondent, the UNE or the PSAC.

[131] The collective agreement provides only a limited ability to a bargaining agent to effect change in work descriptions and classification levels. In 2004, a mediated settlement led to the 2004 work description, which eventually led to the 2007 CGC decision increasing the classification for the LAOs from PM-04 to TI-05. The LAOs, since that time have filed the 2007 grievances, the 2008 DFR complaint, the 2010 grievances and this complaint over this same issue; these were all filed after the aborted judicial review of the 2007 CGC decision. The complainants are obviously unhappy with both their work descriptions and classification level; however, the respondent, the UNE and the PSAC have limited dominion in these areas and have at all times acted appropriately. The UNE and the PSAC do not have unlimited resources and can do only so much with the resources they have. Allocating valuable and limited resources to a matter such as this over and over again when there is no change limits action they can take in other disputes for their members with different employers across the larger public service that require attention and representation.

[132] In *Steiner v. Canada,* 1996 CanLII 3869 (FC), the Federal Court defined a vexatious proceeding as one that is begun maliciously or without a probable cause, or one which will not lead to any practical result. In *Yearsley v. The Queen.* 2001 FCT 732, the Court at paragraph 14 stated that the terms frivolous and vexatious define a claim which obviously cannot be sustained.

[133] For the reasons I have just articulated, I declare that the actions of the complainants in filing this complaint were vexatious.

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

(The Order appears on the next page)

V. Order

[135] This complaint is declared vexatious.

[136] The complaint is dismissed.

February 7, 2014.

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

Lance Labby
Lee Chiman
Philip Healey
Mark Fougere
Glen O'Neill
Pierre St-Arnauld
Lorna MacMillan
Dawn Macleod
Kully Poonian
Michael O'Byrne
Lorna Pearce
Holly Mitchell
Marie Krizka
Lisa Pan
Newton Eng
Charan Bhullar
Melinda Der
David Montrose
Arthur Ramos
Kimberley Rusnack
Francis Healey