Date: 20140708

Files: 561-34-595 and 627

Citation: 2014 PSLRB 71

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

DUNG TRAN

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Tran v. *Professional Institute of the Public Service of Canada*

In the matter of complaints under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Steven B. Katkin, a panel of the Public Service Labour Relations Board

For the Complainant: Herself

For the Respondent: Martin Ranger and Patrizia Campanella, counsel

Decided on the basis of written submissions filed November 23 and December 11, 2012, May 21, June 26 and 28, July 18, August 22, September 12 and 30, 2013, and July 2, 2014.
(PSLRB Translation)

I. Complaints before the Board

[1] On October 31, 2012, Dung Tran ("the complainant"), who was employed by the Canada Revenue Agency ("the employer") as an auditor at the AU-03 group and level, filed an initial complaint against the Professional Institute of the Public Service of Canada ("the union") with the Public Service Labour Relations Board ("the Board"). The complainant alleged that the union had failed in its duty of fair representation in refusing to pursue an application for judicial review further to the rejection of her application in a staffing process conducted by the employer (PSLRB file 561-34-595).

[2] The complainant filed a second complaint against the union on May 29, 2013 (PSLRB file 561-34-627). The complainant, who lives in the Quebec City area, alleged that the union had failed in its duty of fair representation in refusing to pay the cost of her travel to attend the hearing of a second judicial review, held in Ottawa.

[3] Both complaints were filed under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *PSLRA*"), which reads as follows:

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

[4] Section 185 of the *PSLRA* defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1) of the *PSLRA*. The provision of the *PSLRA* referenced under section 185 that best applies to the circumstances of this complaint is section 187, which provides 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.*

[5] The Board considered the two complaints together.

II. Summary of the evidence

A. PSLRB file 561-34-595

[6] The main facts giving rise to this complaint are not in dispute. I could do no better than to reproduce the Federal Court's account of the facts in *Tran v. Canada Revenue Agency*, 2011 FC 1010 ("*Tran 2011*"), which reads as follows:

> *[5] The Agency's Staffing Program states that a selection process is one of the primary mechanisms the Agency uses to promote and appoint its employees. This selection process is the method by which applicants can express their interest in a vacant position and then be assessed. If they qualify in the inventory, they may then be considered for, and appointed to, this position.*
>
> *[6] On January 10, 2010, as part of the selection process, Ms. Tran applied for three positions within the Agency at TSOs in the province of Quebec at the AU-04 level, namely:*
>
> | | |
> |---|---|
> | *First position:* | *Senior International Auditor* |
> | *Second position:* | *Senior Tax Avoidance Auditor* |
> | *Third position:* | *Senior Large File Auditor.* |
>
> *[7] In accordance with the Directive on Recourse for Assessment and Staffing (the Directive), a selection board was constituted for each selection process.*
>
> *[8] The Directive provides that selection processes consist of three main steps:*
>
> *(1) Pre-requisite stage: assessment of applications against the pre-requisites stated on the selection process poster;*
> *(2) Assessment stage: assessment of applications against the qualifications and skills required by the selection process;*
> *(3) Placement stage: placement of one or more qualified persons on the basis of one or several placement criteria stated on the selection process poster.*
>
> *[9] At the pre-requisite stage, a board may preselect or screen out an applicant by taking into account the pre-requisites required by the selection process, including the following:*
>
> *(1) application deadline*
> *(2) area of selection*
> *(3) language requirements*
> *(4) studies/level of education*
> *(5) professional certification*
> *(6) experience sought*

> *[10] On January 25, 26 and 28, 2010, the selection boards decided, at the qualification stage (pre-requisite review), that Ms. Tran did not have the required experience, thus screening her out as a candidate for the three positions for which she applied. On February 19, 2010, in accordance with the Directive on Recourse, Ms. Tran filed a request with each selection board chair for reconsideration (individual feedback on the board's decision). In early March 2010, each chair refused Ms. Tran's application for reconsideration.*
>
> *[11] Following the refusals to reconsider, the applicant filed the following three applications for judicial review against these decisions:*
>
> *(1) T-493-10: the decision of Chair Michel Adam, dated March 1, 2010, regarding the position of Senior International Auditor,*
> *(2) T-494-10: the decision of Chair Mario Trembay* [sic]*, dated March 1, 2010, regarding the position of Senior Tax Avoidance Auditor, and*
> *(3) T-503-10: the decision of Chair Trassi, dated March 3, 2010, regarding the position of Senior Auditor, Large Files.*
>
> [Emphasis in the original]

[7] On April 30, 2010, Frédéric Durso, a labour relations officer with the union, informed the complainant by email that the union had received a legal opinion from its outside counsel (Exhibit "A" of the union's arguments) recommending that, in light of the slim chance of success in judicial review, the proceedings be abandoned. Mr. Durso notified the complainant that he would be accepting that recommendation.

[8] On May 6, 2010, the complainant used the union's internal appeal process to challenge the decision not to pursue the judicial review proceedings (Exhibit "B" of the union's arguments). She had the opportunity to provide additional information in support of her appeal. That information was considered by the union's outside counsel.

[9] In an email to the union dated May 7, 2010 (Exhibit "C" of the union's arguments), counsel stated that the additional information provided by the complainant had not changed their initial opinion that the judicial review proceedings were unlikely to be successful. In a letter dated May 11, 2010, signed by the union president (Exhibit "D" of the union's arguments), the complainant was informed that the decision not to pursue judicial review would stand. As the complainant pointed out, her copy of the letter is dated March 11, 2010. That anomaly has no effect, since it

is not consistent with the chronology and since the complainant acknowledged that she had received the letter on May 11, 2010.

[10] The union allowed the complainant to receive a copy of the legal opinion, and a teleconference involving the union president and the complainant, among others, took place on May 21, 2010. The complainant reportedly raised facts that in her opinion had not been considered in the legal opinion. The union president asked her to submit the facts to him in writing, which she did on May 27, 2010.

[11] During the teleconference the complainant asked the union president to consider the expenses she incurred if the judicial review were to be successful. The president agreed to that request.

[12] In *Tran 2011*, the complainant, represented by her own counsel, was successful in Federal Court. The Court set aside the selection boards' decisions and referred the files back to the employer for reconsideration of the complainant's application by a differently constituted board.

[13] The complainant then contacted the union to seek reimbursement for the expenses she had incurred for the judicial review proceedings. On July 18, 2012, she sent a letter to the union president claiming such reimbursement. In a letter dated August 3, 2012, the union president informed the complainant that her expenses would not be reimbursed (Exhibit "F" of the union's arguments). The letter contained the following explanations for that decision:

> [Translation]
>
> . . .
>
> *Our review of the case indicates that, further to the individual feedback upholding the employer's decisions that you did not have the required experience, the Institute filed three notices of application for judicial review with the Federal Court. As is the case whenever we file a notice of application for judicial review, we engaged a private law firm to give us an opinion on the merits of proceeding with each of the applications in Federal Court.*
>
> *The opinion we received at that time raised doubts regarding the likelihood of success for each application. In light of that opinion, which was obtained in good faith and which was also prepared in good faith, we decided to withdraw from the*

> *case. You then chose to continue the proceedings at your own expense, and ultimately you were successful.*
>
> *Please note that a union's legal obligation of fair and equitable representation does not mean that it must proceed with every request for representation from its members. Rather, fair and equitable representation means that a union is required to assess the merits of each case in a manner that is not arbitrary or discriminatory and that is in good faith, which is precisely what we did in assessing your files.*
>
> . . .

[14] On October 12, 2012, the complainant sent an email to the union president (Exhibit "H" of the complainant's arguments), which reads as follows:

> [Translation]
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> . . .
>
> *During our conference call of May 21, 2010, you promised me that you would reconsider your position if I were to be successful in the judicial reviews sought in Federal Court. However, on August 3, you informed me of your refusal to reconsider your position. Could you clarify why you are unable to keep your word?*
>
> . . .

[15] In a letter dated October 25, 2012 (Exhibit "E" of the union's arguments), the union president replied as follows:

> [Translation]
>
> . . .
>
> *I did in fact tell you during our conference call of May 21, 2010, that I would reconsider your claim for reimbursement if you were successful. That is precisely what I did, and the conclusion of that reconsideration was shared with you in my letter of August 3, 2012. At no time did I commit the Institute to reimbursing you for any amount of money.*
>
> . . .

[16] One of the measures the complainant claimed as corrective action was compensation for the expenses she incurred for the judicial review proceedings.

[17] Subsequent to the closing of the written arguments process, I found that this complaint raised a potential issue relating to the Board's jurisdiction with regard to the

timeliness of one of the allegations made in this complaint, namely that the union failed in its duty of fair representation in refusing to pursue the application for judicial review. Because that issue had not been addressed in the written arguments, at my request, the Board's registry asked the parties to provide their comments regarding the following questions:

1. *Was the complaint in file 561-34-595, with regard to the bargaining agent's refusal to pursue the judicial review, filed by the complainant within the 90-day time limit?*

2. *If not, given that this argument had not been raised by the bargaining agent, what impact might this have on the Board's jurisdiction to decide this complaint?*

B. PSLRB file 561-34-627

[18] As the Federal Court directed in *Tran 2011*, the employer constituted a new selection board. That selection board rejected the complainant's application at the screening stage and informed her that the employer's staffing program did not provide for any recourse further to the application of a corrective measure. The union filed an application for judicial review with the Federal Court on the complainant's behalf and engaged an Ottawa law firm to that end.

[19] In the fall of 2012, the complainant contacted the union about having the Federal Court hearing held in Quebec City or Montreal, to no avail. The complainant then asked the union to cover the cost of her travel to attend the hearing scheduled for April 22, 2013, in Ottawa and notified the union that she wished to participate in the preparation of additional arguments for the hearing.

[20] In a letter dated March 8, 2013 (Exhibit "A" of the union's arguments), the union replied to the complainant as follows:

> [Translation]
>
> . . .
>
> *I must begin by addressing a fundamental element that underlies all of the decisions made in your case and all cases managed by our office: the Institute has a responsibility to manage the funds remitted to us by all of its members as effectively and efficiently as possible, without infringing their rights.*

> *When the Institute exercises its discretion with respect to the selection of a firm in order to proceed with an application for judicial review, it is quite normal for us to select an Ottawa firm which is well versed in administrative law in the context of staffing within the federal public service and with which the Institute has a long-standing relationship. Hearings are therefore heard in Ottawa even if the applicant lives in another city or province.*
>
> *Furthermore, no testimony is heard at those hearings, and counsel is confined to the arguments made in the documents already before the Court. A member does not need to be present to be properly and competently represented. Accordingly, it is not the Institute's practice to cover the travel expenses of members who wish to attend a Federal Court hearing. We are not prepared to make an exception in your case. If you wish to attend the hearing, you will need to cover the cost of doing so.*
>
> *Regarding the preparation of arguments, we will be pleased to coordinate a conference call with you and the firm representing us in this matter in order to review the arguments that will be made.*
>
> . . .

[21] The Federal Court found in the complainant's favour again in *Tran v. Canada (Attorney General)*, 2013 FC 455 ("*Tran 2013*"). Among other things, the Court ordered as follows: ". . . Further to the agreement reached between the parties with regard to costs, the respondent shall pay the sum of five thousand dollars ($5,000.00) to the applicant."

[22] As a corrective measure in respect of this complaint, the complainant asked that the union be directed to pay her expenses and interest in addition to compensation for inconvenience, as well as a penalty.

III. Summary of the arguments

A. PSLRB file 561-34-595

1. For the complainant

a. Issue of jurisdiction

[23] The complainant's arguments centred on her allegation that the union failed in its duty of fair representation in not covering the expenses she had incurred for the judicial review. The complainant submitted that the union had acted in a manner that

was arbitrary and in bad faith in leading her to believe it would reconsider its position and cover her expenses if she were successful in Federal Court. According to the complainant, during the teleconference of May 21, 2010, the union president promised to reimburse her for her expenses if she were successful.

[24] The complainant asserted that she had not become aware of the union's bad faith until she received the letter from its president dated August 3, 2012, informing her that her expenses would not be reimbursed. Given that her complaint was filed on October 31, 2012, she acted within the 90-day time limit.

[25] The complainant maintained that the union had put in place an internal appeal mechanism and that there had not been a definitive end to this process until August 3, 2012. Prior to that date, the union had not definitively refused in that it had allowed the complainant to provide new facts or arguments enabling it to reconsider its position. The complainant argued that therefore she could not have known of the unfair practice prior to August 3, 2012. In support of that argument, the complainant referred me to the Supreme Court of Canada judgment in *Upper Lakes Shipping Ltd. v. Sheehan et al.*, [1979] 1 S.C.R. 902.

b. Merits

[26] The complainant asserted that the union's attitude towards the application for judicial review was neither fair nor objective and that she had not been entitled to interact directly with the union's counsel.

[27] The complainant submitted that the union had failed in its duty of fair representation in that the legal opinion issued by the union's counsel, on which the union had relied, entailed significant inaccuracies and erroneous facts. Moreover, a number of issues raised by the union's counsel had no relevance to the selection competition involving the complainant.

[28] The complainant asserted that she had pointed out that some of the facts were inaccurate during the May 21, 2010, teleconference and in writing in her email of May 27, 2010. She maintained that the union had displayed a lack of judgment in relying on a legal opinion that was based on erroneous and irrelevant facts. In that regard, the complainant referred me to *Cloutier v. Public Service Alliance of Canada*, 2008 PSLRB 12, at paragraph 11.

[29] The complainant asserted that the union had committed gross negligence in not carrying out a serious review of her work description and in assuming that she did not meet the experience criterion, since her work description was not up to date. In support of that argument, the complainant cited *Tran 2011* at paragraph 71, as follows:

> *[71] In my opinion, such an error is fundamental and determinative. In all three cases, the selection process was flawed. This Court must intervene. The chairs acted arbitrarily in upholding the decisions.*

[30] The complainant argued that the union did not carry out a thorough investigation regarding the manner in which the employer had treated her and that such an investigation would have shown that the rejection of her application was part of a trend of harassment. In this regard, the complainant referred me to *Jutras Otto v. Brossard and Kozubal*, 2011 PSLRB 107, at paragraph 70.

[31] As for the reimbursement of her judicial review expenses, the complainant maintained that the union president did not keep the promise he had made to her in this regard.

[32] The complainant asserted that her success in Federal Court had shown the arbitrary nature of the selection boards' conduct and had benefited the union membership as a whole. In its failure to support the complainant, the union displayed an unreasonable and unfair attitude towards its members and towards the employer's auditors in particular. In this regard, the complainant relied on *Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency),* 2004 FC 507 ("*PIPSC*"), at paragraph 168. The union's request for a declaration that the recourse mechanism implemented by the employer in connection with the staffing program was unreasonable was rejected by the Federal Court.

[33] In support of her argument that the union had failed in its duty of fair representation, the complainant cited the criteria established in the following decisions: *Canadian Merchant Service Guild v. Gagnon et al.,* [1984] 1 S.C.R. 509, at page 527; and *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, at paragraph 22.

2. For the union

a. Issue of jurisdiction

[34] The union submitted that, on April 28, 2010, the complainant was notified by its labour relations officer, Mr. Durso, that the union had decided not to pursue the judicial review proceedings. That decision was confirmed on April 30, 2010.

[35] The union asserted that the complainant had availed herself of the union's internal appeal process and had asked for reconsideration of the decision not to proceed with the judicial review. In a letter dated May 11, 2010, the union president informed the complainant that the decision not to proceed would stand.

[36] The union submitted that the complainant knew of the union's decision not to pursue the judicial review on April 28, 2010. It further submitted that the complainant did not give a logical or convincing reason to justify the delay.

[37] The union maintained that in fact the complainant knew definitively on May 11, 2010, that it was not proceeding with the judicial review. The union argued that, since this allegation by the complainant was untimely, the Board had no jurisdiction to rule on it.

[38] In support of its arguments, the union referred me to the following decisions: *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78, at paragraph 55; and *England v. Taylor et al.*, 2011 PSLRB 129, at paragraph 16.

b. Merits

[39] The union asserted that the onus was on the complainant to prove that the union had acted in a manner that was arbitrary, discriminatory or in bad faith.

[40] The union submitted that it had gone beyond its duty of fair representation in preserving the complainant's rights by filing a notice of judicial review on a staffing matter, which is outside the scope of the *PSLRA*. The union maintained that its duty of fair representation did not encompass matters that are outside the scope of the *PSLRA* (see *Lai v. Professional Institute of the Public Service*, 2000 PSLRB 33; and *Benoit v. Teamsters Local Union 91*, 2011 CIRB 568).

[41] The union also went beyond its duty of fair representation in engaging a law firm to conduct a thorough evaluation of all of the information available on the record. The union asserted that the complainant had been invited to submit all of the available information and that the legal opinion, which was over 15 pages in length, had been prepared on the basis of the information provided by the complainant and the employer's disclosure.

[42] The legal opinion indicated that there was little likelihood of success in judicial review, and the union was not prepared to pursue the proceedings. That opinion was shared with the complainant, who was advised that she could continue the proceedings at her own expense. The union argued that in a fair representation complaint the union simply needs to demonstrate that it has considered all of the circumstances of a case, including its strengths and weaknesses, and that an informed decision was made as to whether or not to proceed with a grievance. In support of that argument, the union cited *Canadian Merchant Service Guild v. Gagnon et al.*

[43] The union contended that its internal appeal mechanism was a way of ensuring it fulfilled its duty of fair representation by giving a member the opportunity to provide additional information that might change the recommendation not to proceed with a case. The complainant availed herself of the internal appeal process by providing additional information, which was reviewed by the union's counsel. The union maintained its decision not to proceed with the judicial review, and that decision was shared with the complainant.

[44] The union submitted that it was not required to proceed in every member's case, as long as the decision not to proceed was made in good faith and was not discriminatory or arbitrary (see *Brideau v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (AFL-CIO/CLC)*, 63 di 215; 86 CLLC 16,012 (CIRB)).

[45] The union asserted that it had considered the impact of its decision not to proceed with the complainant's judicial review. The limited chance of success, as communicated by its counsel, was the determining factor in that decision. Even though the complainant continued the proceedings and was successful, the union submitted that the analysis of her case had been honest and diligent and free of any arbitrary or bad-faith considerations and discrimination. The fact that the union advised the complainant that she could continue the judicial review proceedings at her own

expense meant that it did not act in an arbitrary manner (see *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70).

[46] The union argued that, although it had been mistaken, it had not breached the duty of fair representation when it undertook a serious evaluation of the merits of the case, in particular when it consulted counsel and relied on his advice. In that regard, the union referred me to the following decisions: *Chénier v. Communications, Energy and Paperworkers Union of Canada,* 2011 CIRB 596; *Lai*; and *Teeluck v. Public Service Alliance of Canada*, 2001 PSLRB 45. The duty of fair representation does not extend to errors made in good faith (see *Kevin Ward*, [1982] O.L.R.B. Rep. 1964, at paragraph 31).

[47] The union submitted that the complainant was incorrect in alleging that it had not taken into account the impact of her case on her and on the employer's staffing program. The union noted that it had represented the complainant in another case in Federal Court (*Tran 2013*).

[48] The union maintained that it had never made a commitment to cover the complainant's legal expenses if she were to be successful. Rather, it undertook to consider a request for reimbursement at a later date, which it in fact did.

3. <u>Additional arguments by the complainant</u>

[49] Regarding the union's argument that its duty of fair representation does not encompass matters outside the scope of the *PSLRA*, such as staffing, the complainant referred to the Federal Court ruling in *PIPSC* with regard to the principle that, in staffing matters, the employer must devise a recourse mechanism that adheres to the rules of natural justice and procedural fairness, in accordance with the *Canadian Bill of Rights*, S.C. 1960, c. 44. The complainant argued that therefore the matter of staffing could not be excluded from the scope of the *PSLRA* and that the union thus had a duty to represent her. In submitting that the union's decision not to represent her was arbitrary, the complainant also referred to the following Federal Court judgments in which the union represented employees on staffing matters: *Eksal v. Canada (Attorney General)*, 2005 FC 741; *Beaulieu v. Canada (Attorney General)*, 2006 FC 1308; *Girard v. Canada (Attorney General)*, 2007 FC 966; *Girard v. Canada (Attorney General)*, 2007 FC 1333; and *Ng v. Canada (Attorney General)*, 2008 FC 1298.

[50] With regard to the union's argument that it had not breached the duty of fair representation because it had consulted counsel and had relied on his advice, the complainant alleged that obtaining legal advice was merely a pretence used to [translation] "diminish" the union's duty. The complainant submitted that the additional information had come after the legal opinion and that therefore the opinion was of questionable value.

B. PSLRB file 561-34-627

1. For the complainant

[51] I note that some of the complainant's arguments in file 561-34-627 relate to complaint 561-34-595. Because the submissions for that complaint had already been completed, there is no need to deal with them in connection with this complaint.

[52] The complainant argued that, according to the union's by-laws and regulations, its primary objective was to represent its members in their collective and individual employment. The union's decision not to cover her travel expenses was arbitrary and discriminatory, and her rights were sacrificed in the interests of the community. Because the complainant agreed to the hearing being held in Ottawa in the interests of the community, the union caused her harm in refusing to reimburse her for her travel expenses. She maintained that her presence at her own hearing was a right that could not be taken away from her.

[53] The complainant referred to the letter of March 8, 2013, in which the union wrote that it was not standard practice for it to cover the expenses associated with its members' travel. In that regard, she referred to the following extract from the union's policy on the expenses associated with its members' participation:

> [Translation]
>
> . . .
>
> *The Institute encourages member participation by paying travel expenses and compensatory salary for approved attendance at all authorized meetings. The conditions of such participation are outlined in the Institute By-Laws, Regulations and policies. An exception to the provisions of this policy can be made as long as it has first been approved by the President or the Executive Committee.*

. . .

[54] With regard to the union's argument concerning the effective management of the funds remitted by its members, the complainant noted that the union was saving money by not having to ask its counsel to travel. The complainant asserted that being effective and efficient did not mean depriving a member of her rights. In that regard, she referred to the Court's order in *Tran 2013* that "the applicant" be paid the sum of $5,000 in costs and she submitted that this amount had to be remitted to her.

[55] The complainant alleged that, according to the union's counsel, the union had not informed them that the complainant wanted to discuss additional arguments for the hearing preparation and had not coordinated a teleconference to that end.

[56] The complainant submitted that she had never maintained that she had to testify in Federal Court and that the union was confusing principle of law with legal proceedings.

[57] As regards the union's argument that the matter of staffing was outside the scope of the *PSLRA*, the complainant referred to her argument on this point in complaint 561-34-595.

[58] The complainant argued that her presence at the hearing enabled her to hear, see and gain a better understanding of the scope of the judgment of her application for judicial review as well as the arguments.

[59] The complainant submitted that the union had not respected the principle of fairness in her case.

2. <u>For the union</u>

[60] The union submitted that it had filed an application for judicial review with the Federal Court on the complainant's behalf and had engaged an Ottawa law firm to assert the complainant's rights.

[61] The union reiterated that the duty of fair representation did not encompass matters such as staffing that are outside the scope of the *PSLRA* (see *Lai*; *Benoit*). The union maintained that it had gone beyond its duty of fair representation in defending the complainant's rights on a staffing matter.

[62] The union submitted that the complainant had not presented any facts that would establish it had acted in a manner that was arbitrary, discriminatory or in bad faith.

[63] The union asserted that its decision not to proceed with the judicial review hearing in the city in which the complainant resided had been explained to her in the letter of March 8, 2013. The union argued that it had to manage the funds its members remitted to it as effectively and efficiently as possible without interfering with or harming the complainant's case. The union asserted that the complainant could not testify in Federal Court and that her testimony was not necessary. Therefore, there was no justification for the union's incurring additional expenses by asking for the hearing to be held in the city in which the complainant resided or for its covering her travel expenses.

[64] The union argued that, as indicated in the letter of March 8, 2013, it had given the complainant the opportunity to present her opinion in the preparation of the arguments in this matter. Furthermore, the complainant did not suffer any harm as a result of the union's decision to proceed with a hearing in Ottawa and not to reimburse her for the travel expenses she incurred.

[65] The union asserted that it was not required to incur additional expenses to defend a case in Federal Court in the city of residence of one of its members or to pay a member's travel expenses when that member's testimony was not necessary.

[66] With respect to the complainant's argument that the union had sacrificed one of her rights in the interests of the community in refusing to cover her travel expenses, the union maintained it had gone beyond its duty of fair representation in representing the complainant on a matter that is clearly outside the scope of the *PSLRA*.

[67] The union contended that the complainant's union membership did not entitle her to reimbursement for the travel expenses associated with this complaint. The policy cited by the complainant was not related to member representation and did not apply to the facts of this case. The union asserted that the policy (Exhibit "A" of the union's reply) pertains to reimbursement for salary when union members participate in activities it has previously authorized.

[68] The union submitted that it has a well-established practice of not covering the travel expenses that members incur to attend a Federal Court hearing given that members are not required to be present. That practice was clearly communicated to the complainant. The union asserted that the complainant had not established that she had suffered harm by not attending the hearing.

[69] The union stressed that the complainant's representation in Federal Court had been diligent and competent and that the complainant had not disputed that fact in her complaint.

[70] The union argued that it had determined that the impact of its decision not to cover the travel expenses the complainant had incurred to attend the hearing was minimal and that this had been a determining factor in its decision. The union submitted that it had made sure it would be available if the complainant wanted to discuss her case before the Federal Court hearing.

[71] The union argued that the complainant had chosen to attend the hearing after receiving the union's decision. The union's decision was made in an honest and diligent manner that was free of any arbitrary considerations, bad faith and discrimination. The union maintained that, even if it had been mistaken, it had not breached the duty of fair representation when it undertook a serious evaluation of the merits of a case or a request from one of its members. According to the union, the fact that it had advised the complainant that she could attend the hearing at her own expense indicates that it had not acted in an arbitrary manner (see *Jakutavicius*).

[72] With respect to the complainant's allegation concerning the $5,000 payment ordered by the Court in *Tran 2013*, the union maintained that the complainant had never raised that matter in her previous correspondence with the union or with the Board and that therefore it should not be considered. The union further submitted that that amount had been awarded as costs to cover the legal expenses the union had incurred in representing the complainant and should not go to the complainant, who had not incurred any legal expenses in this case.

[73] With respect to the complainant's argument that the union had not arranged a teleconference to give her an opportunity to discuss arguments with the union's counsel, the union argued that the letter of March 8, 2013, included an invitation to the complainant to review the oral arguments with the counsel the union had engaged.

The union never received any indication from the complainant that she was interested in following up on that invitation.

IV. Reasons

[74] The complainant filed two unfair labour practice complaints. In the first, she alleged that the union had failed in its duty of fair representation in refusing to pursue an application for judicial review further to the rejection of her application in a staffing process conducted by the employer and in refusing to reimburse her for the expenses she had incurred in connection with the judicial review proceedings (PSLRB file 561-34-595).

[75] In her second complaint, she alleged that the union had failed in its duty of fair representation in that it refused to cover the cost of her travel to attend the hearing of a second judicial review held in Ottawa (PSLRB file 561-34-627).

[76] In both of her complaints, the complainant alleged that the union had acted in a manner that was arbitrary, discriminatory or in bad faith pursuant to section 187 of the *PSLRA*.

[77] I will first deal with the issue of timeliness as it relates to the allegation in the first complaint that the union failed in its duty of fair representation in deciding not to pursue the complainant's judicial review proceedings.

A. Timeliness

[78] In her complaint filed on October 31, 2012 (PSLRB file 561-34-595), one of the complainant's allegations is as follows:

> [Translation]
>
> . . .
>
> *PIPSC refused to pursue my application for judicial review further to the rejection of my application for the CRA (employer)'s selection processes.*
>
> . . .
>
> *The relevant period is from 2010 to today.*
>
> . . .

[79] On the matter of timeliness, subsection 190(2) of the *PSLRA* states as follows:

> ***190.*** *(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[80] The Board found that the 90-day time period prescribed by subsection 190(2) of the *PSLRA* was mandatory in the following decisions: *Castonguay; Panula v. Canada Revenue Agency and Bannon*, 2008 PSLRB 4; *Dumont et al. v. Department of Social Development,* 2008 PSLRB 15; and *Cuming v. Butcher et al.,* 2008 PSLRB 76. No other provision of the *PSLRA* empowers the Board to extend that time limit.

[81] In *England*, the Board states as follows at paragraph 16:

> *16 The only possible discretion for the Board when interpreting subsection 190(2) of the* Act *is determining when the complainant knew, or ought to have known, of the action or circumstances that gave rise to the complaint.*

[82] I must therefore determine at what point the complainant knew, or ought to have known, of the circumstances giving rise to her complaint.

[83] The union initially claimed that it was through Mr. Durso's email of April 28, 2010, that the complainant learned of its refusal to pursue the judicial review proceedings. That email informed the complainant that the union's counsel was recommending that the judicial review proceedings not be pursued and indicated that she would be notified of the union's decision in that regard. It was not until Mr. Durso's email dated April 30, 2010, that the complainant was advised that the union had decided to accept its counsel's recommendation and that she could appeal that decision through the union's internal appeal mechanism.

[84] On May 6, 2010, the complainant challenged the union's decision through the internal appeal process. In a letter dated May 11, 2010, the union president informed the complainant that the decision not to pursue the judicial review would stand.

[85] The complainant argued that the union had refused to pursue her application for judicial review. Therefore, the circumstance giving rise to the complaint must necessarily be the date on which the complainant knew of the union's refusal.

That date was May 11, 2010. It is true that the union gave the complainant another opportunity to raise facts that in her opinion had not been considered in the legal opinion, which she did on May 27, 2010. That did not change the union's decision.

[86] The complainant's arguments primarily concern her second allegation in this complaint, namely that the union president had promised to cover her expenses if she were successful in judicial review. That allegation is not untimely and was not part of the issues raised with the parties by the Board's registry.

[87] For all the foregoing reasons, I find that the allegation made in the complaint that the union failed in its duty of fair representation in refusing to pursue the complainant's application for judicial review was not filed within the time limit prescribed by subsection 190(2) of the *PSLRA*.

[88] In case my determination is incorrect, I will now deal with the argument submitted by the union in each of the complaints that its duty of fair representation does not encompass matters that are outside the scope of the *PSLRA*. The issue here is staffing.

B. Does the union's duty of fair representation encompass matters that are outside the scope of the *PSLRA*?

[89] It must be noted at the outset that this argument is not a jurisdictional matter as such. The Board has jurisdiction to hear a complaint about the duty of fair representation under section 187 of the *PSLRA*. In fact, the issue is whether that duty, as it is set out in the *PSLRA*, applies to the actions of employee organizations when they represent their members in matters that cannot be said to be governed by the *PSLRA* or that do not arise out of a collective agreement.

[90] At this point it would be appropriate to reproduce the relevant definitions set out in subsection 2(1) of the *PSLRA,* 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.*

. . .

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

[91] In this case, the employer is a separate agency named in Schedule V to the *Financial Administration Act*, (R.S.C. (1985), c. F-11) ("*FAA*"). Section 50 of the *Canada Revenue Agency Act*, (S.C. 1999, c. 17) ("CRAA"), provides as follows:

> ***50.*** *The Agency is a separate agency under the* Public Service Labour Relations Act.

[92] "Collective agreement" is defined as follows in subsection 2(1) of the *PSLRA:*

> *"collective agreement" means an agreement in writing, entered into under Part 1 between the employer and a bargaining agent, containing provisions respecting terms and conditions of employment and related matters.*

[93] This is not the first time the Board has had to consider the question of whether an employee organization's duty of fair representation applies to its actions when it is representing its members in the context of matters that cannot be considered to be governed by the *PSLRA* or that do not arise from a collective agreement. In *Elliott v.*

Canadian Merchant Service Guild et al., 2008 PSLRB 3, which makes reference to *Lai*, the Board stated as follows:

. . .

> ***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 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 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]
>
> [*Sic* throughout]

[94] The reasoning in *Elliott* was followed in *Brown v. Union of Solicitor General Employees and Edmunds*, 2013 PSLRB 48, in which the scheme of the *PSLRA* was explained as follows:

> . . .
>
> ***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.

. . .

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.*

. . .

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.*
>
> . . .

[95] Since the instant case involves a staffing matter, it must be determined whether staffing falls under the *PSLRA* or the applicable collective agreement.

[96] With regard to the collective agreement, the *CRAA* provides as follows at section 54:

> ***54.*** *(1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.*
>
> *(2) No collective agreement may deal with matters governed by the staffing program.*

[97] Given that the complaints arise from the complainant's recourse under the employer's staffing program, they do not fall under a collective agreement. It is therefore necessary to turn to the *PSLRA*.

[98] Subsection 208(2) of the *PSLRA* provides as follows in the section entitled "Individual Grievances":

> ***208.****(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act*.*

[99] In this case, the complainant availed herself of the recourse that was open to her under the employer's staffing program established under the scheme of the *CRAA*. It therefore follows that the origin of the complaints under consideration is not found in the *PSLRA*. Furthermore, these avenues of recourse established under section 54 of the *CRAA* can be considered an "… administrative procedure for redress …" under subsection 208(2) of the *PSLRA*.

[100] As the *FAA*, the *CRAA* and the *PSLRA* show, the statutory scheme has clearly established two separate and mutually exclusive spheres, namely labour relations and staffing. Given that the complaints come under the area of staffing, I find that the Board does not have jurisdiction to deal with them and that therefore they must be dismissed.

[101] Although such a finding is sufficient to dispose of the complaints, on the premise that the union had a duty of fair representation in matters that do not fall under the *PSLRA*, I will now deal with them on their merits.

C. Merits of complaints

[102] Before the merits of each of the complaints are considered, the criteria that apply to a complaint filed under section 187 of the *PSLRA* should be recalled. Those criteria were summarized as follows in *Shouldice v. Ouellet*, 2011 PSLRB 41:

. . .

> ***27*** *As stated by the Board in* Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, the burden of proof in a complaint under section 187 of the* Act *rests with the complainant. That burden requires the complainant to present evidence sufficient to establish that the bargaining agent or one of its representatives failed to meet the duty of fair representation.*
>
> ***28*** *In* Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28, at para 17, the Board commented as follows on the right to representation and rejected the idea that it was akin to an absolute right:*
>
> > **17.** The respondent, as a bargaining agent, has the right to refuse to represent a member, and a complaint to the Board is not an appeal mechanism against such a refusal. The Board will not second-guess the bargaining agent's decision. The Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision. …
>
> . . .
>
> ***30*** *As alluded to in* Halfacree*, the Board's role is not to determine whether the respondent's decision to represent or how to represent the complainant were* [sic] *appropriate or correct, good or bad, or even with or without merit. Rather, it is to determine whether the respondent acted in bad faith or in a manner that was arbitrary or discriminatory in the representational decision-making process. The discretion accorded to bargaining agents and their representatives for determining whether and how to represent bargaining unit members is broad but it is not absolute. The scope of that discretion was set out by the Supreme Court of Canada ("SCC") in* Canadian Merchant Service Guild v. Gagnon et al.,

[1984] 1 S.C.R. 509, at 527. In that decision, the SCC describes the principles underlying the duty of fair representation as follows:

. . .

> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

. . .

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

. . .

> 22 With respect to the term "arbitrary," the Supreme Court wrote as follows at paragraph 50 of *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39:
>
> > *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible.*

. . .

> In *International Longshore and Wharehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd. et al.,* [2000] F.C.J. No. 1929 (C.A.) (QL), the Federal Court of Appeal stated that, with respect to the arbitrary nature of a decision, to prove a breach of the duty of fair representation, "… a member must satisfy the Board that the union's investigation into the grievance was no more than cursory or perfunctory."
>
> . . .
>
> ***32*** *Those cases suggest that bargaining agents and their representatives should be afforded substantial latitude in their representational decisions. As the Board recently stated in* Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128, at para 38, "[t]he bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high." It requires the complainant to make out an arguable case for a violation of section 187 of the* Act*, which in turns* [sic] *requires her to put forward evidence that the bargaining agent's decision not to represent her was made perfunctorily or in a cursory fashion. . .*

1. <u>PSLRB file 561-34-595</u>

[103] In this complaint, the complainant alleged that the union failed in its duty of fair representation in refusing to pursue an application for judicial review after her application in a staffing process conducted by the employer had been rejected. She also alleged that the union president did not keep his promise to reimburse her for the expenses she had incurred in connection with the judicial review in *Tran 2011*.

[104] In deciding not to pursue the complainant's judicial review, the union relied in good faith on a legal opinion obtained from an independent law firm on April 27, 2010. In doing so, the union went beyond its duty of fair representation. The union even provided a copy of the legal opinion to the complainant.

[105] The complainant submitted that there had been some inaccuracies in the legal opinion or certain facts that counsel had not considered. The complainant availed herself of the union's internal appeal process to challenge the decision not to pursue the judicial review proceedings. On May 6, 2010, she had the opportunity to provide additional information in support of her appeal. The union's outside counsel considered that information and advised the union, in an email dated May 7, 2010, that the additional information the complainant had provided had not changed their initial

opinion that the chances of success in judicial review were low. In his letter of May 11, 2010, the union president notified the complainant that the decision not to pursue the judicial review proceedings would stand.

[106] The complainant had another opportunity to raise facts that, according to her, had not been considered in the legal opinion during the teleconference of May 21, 2010. The union president asked her at that time to submit the facts to him in writing, which the complainant did on May 27, 2010.

[107] Even if I were to accept the complainant's argument that there were inaccuracies regarding certain facts in the legal opinion, it is not up to the Board to evaluate that opinion. Even if it is assumed that the opinion contained inaccuracies or that the complainant did not agree with the opinion, it does not necessarily follow that the union failed in its duty to represent the complainant fairly. In *Lai*, a decision of the Board's predecessor, the complainant alleged that his bargaining agent failed in its duty of fair representation when it relied on a legal opinion in refusing to represent him in judicial review. According to the complainant, the legal opinion did not consider all the evidence applicable to the case. That argument was dealt with as follows in *Lai:*

. . .

> *[58] It is clear that the complainant has a difference of opinion with both counsel who gave the two legal opinions. In the end, his own opinion on the likelihood of success of his application in Federal Court may prevail, but that in and of itself would not mean that he did not receive fair representation from his bargaining agent.*

. . .

[108] In the instant case, the Federal Court ultimately found in the complainant's favour in *Tran 2011*. The union filed the notices of judicial review to preserve the complainant's rights but subsequently withdrew from those proceedings on the basis of a legal opinion from an independent law firm. The union explained its decision to the complainant and gave her the opportunity to provide additional information after the initial decision was made. The complainant was not successful in establishing, on a balance of probabilities, that the union had acted in a manner that was arbitrary, discriminatory or in bad faith. I am therefore of the opinion that the union considered

the matter properly in deciding not to represent the complainant in judicial review and therefore did not fail in its duty to represent the complainant fairly.

[109] With regard to the corrective measure sought by the complainant for reimbursement of the expenses she had incurred for the judicial review, I note that the complainant did not pursue that claim in her written submissions. The Board file indicates that the complainant sent an email dated November 19, 2012, to the Board asking to amend her complaint by having that corrective measure removed. I find from this that the complainant abandoned that claim.

[110] Even if the complainant had pursued her claim seeking reimbursement for the expenses she had incurred for the judicial review, I would have found that the union did not fail in its duty to represent the complainant fairly. During the teleconference of May 21, 2010, the union president undertook to reconsider the matter of reimbursement of the complainant's expenses if she were to be successful. The complainant alleged that the union president had promised to cover the expenses if she were successful but did not keep that promise.

[111] I do not share the complainant's point of view. The president explained the union's position in his letters of August 3 and October 25, 2012, to the complainant. It did consider the complainant's request but denied it. The complainant has not established that the union president made a promise in that regard. The union's refusal to cover the complainant's expenses makes sense in light of its decision not to represent her in judicial review. It also seems to me that the union's decision not to cover expenses incurred by one of its members in a legal proceeding in which it is not representing that member does not constitute a breach of the duty of fair representation but is instead a matter of internal management of the union's funds.

2. PSLRB file 561-34-627

[112] The complainant is seeking reimbursement for the expenses she incurred to attend the hearing of her second judicial review, which took place in Ottawa, as well as the sum of $5,000 as ordered by the Federal Court in *Tran 2013*.

[113] The union agreed to represent the complainant in her second judicial review. It engaged an Ottawa law firm which specialized in this area and with which it had a business relationship. The union had the discretion to choose that firm. As the union

explained in its letter of March 8, 2013, to the complainant, such hearings were always held in Ottawa. That same letter explained that it was not the union's practice to reimburse members for expenses incurred to attend hearings in Ottawa when they live in another city or province. Furthermore, it was not necessary for the complainant to attend since she did not have to testify at the judicial review hearing.

[114] I find that the complainant's complaint does not fall within the ambit of the duty of fair representation pursuant to section 187 of the *PSLRA* given that it is not a matter of member representation. In the instant case, the union had made the decision to represent the complainant. Reimbursement of the complainant's travel expenses is a matter of internal management of the union's funds.

[115] Although this complaint could be considered a matter of fair representation, the complainant's request was considered by the union, which decided not to make an exception to its practice. The complainant has not established that the union's decision deprived her of her rights or that she suffered harm. I am of the opinion that the union did not act in a manner that was arbitrary, discriminatory or in bad faith in failing to reimburse the complainant for the expenses she incurred in travelling to attend the hearing in Ottawa.

[116] With regard to the claim for payment of the sum of $5,000, as indicated in *Tran 2013*, that claim relates to a Federal Court order in respect of costs further to an agreement reached between the parties. It is not appropriate for the Board to interfere with such an order, and in any event I find nothing arbitrary, discriminatory or in bad faith in this regard.

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

(The Order appears on the next page)

Order

[118] The complaints are dismissed.

July 8, 2014.

PSLRB Translation

Steven B. Katkin,
a panel of the Public Service Labour Relations Board