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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

TANYA MCFARLANE

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

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

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

Before: Stephan J. Bertrand, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Martin Ranger, counsel

Heard at Toronto, Ontario,
October 8, 2014.

I. Complaint before the Board

[1] On June 17, 2013, Tanya McFarlane ("the complainant") made a complaint against the Professional Institute of the Public Service of Canada ("the respondent" or "the Institute"), which was at the relevant time the complainant's bargaining agent.

[2] The complainant alleged that the respondent breached its duty of fair representation by refusing to represent her in connection with two grievances that she had filed against her employer, the Canada Revenue Agency (CRA), and with a judicial review application that had been filed in the Federal Court. Her complaint was filed under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which reads as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
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> . . .
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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.*

[3] Section 185 of the *Act* defines an unfair labour practice as anything prohibited by subsection 186(1) or (2), section 187 or 188, or subsection 189(1). The provision of the *Act* referenced under section 185 that best applies to the facts 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.*

[4] That provision was enacted to hold employee organizations and their representatives to a duty of fair representation, a duty that according to the complainant the respondent did not fulfill.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and

transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Act* before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board.

II. Summary of the evidence

[6] At the hearing, the complainant testified on her own behalf. The respondent called Isabelle Roy, General Counsel for the Institute.

[7] The CRA hired the complainant in a term position that initially covered the period from May 2011 to February 2012. She worked as an information technology analyst, classified CS-01. That initial term was subsequently extended to May 4, 2012, at which time the complainant's term employment was not renewed, hence ending her employment with the CRA.

[8] The complainant alleged that, during the course of her term employment, she was subjected to inappropriate behaviour in the workplace, including emotional and verbal abuse, discrimination, and sexual harassment.

[9] In January 2012, with the assistance of the Institute, the complainant filed six separate harassment complaints naming several team leaders and co-workers as being complicit in the alleged harassment. An external independent investigation took place, and each of the six final reports that the independent investigator tabled between November 28, 2012, and December 7, 2012, concluded that the complainant's allegations were unsubstantiated and that no harassment had occurred. Although the Institute initially agreed to challenge these findings, which the CRA had subsequently endorsed, by filing an application for judicial review, in part to protect the prescribed time limits associated with such a proceeding, it made it clear to the complainant that it would not continue to represent her in that proceeding.

[10] In March 2012, the complainant filed a grievance alleging sexual harassment by the same co-workers she had previously named in the harassment complaints. While the Institute initially supported this grievance in the hope that the harassment complaint reports would provide some supporting evidence, it withdrew its representation following the reports' tabling, citing a lack of supporting evidence.

[11] In May 2012, the complainant filed a grievance contesting the non-renewal of her term employment. Once again, the Institute initially supported this grievance, in part because of the complainant's allegation that the non-renewal was somehow linked to her harassment complaints. However, the Institute later withdrew that support on the basis that it could find no evidence that the complainant's term had not been renewed as retaliation by the CRA for having had to deal with her harassment complaints.

[12] In May 2013, the complainant was informed in writing of why the Institute would not provide its support or representation for the two grievances and the judicial review application. Through two separate internal appeals, the complainant exhausted the Institute's internal reconsideration process, without success. In the end, the Institute's decisions not to provide representation in those three separate proceedings were maintained and were communicated to the complainant in writing on June 7, 2013, and on July 17, 2013.

[13] Since the complainant through this complaint sought representation from the respondent in the pending application for judicial review, the Institute sought and obtained a stay in that proceeding before the Federal Court on July 2, 2013, pending the outcome of this complaint. The Institute bore all costs associated with the stay. According to the respondent, this was done out of fairness to the complainant and to preserve her rights. However, the Institute always made it clear to the complainant that it would not represent her unless ordered to by me.

[14] Ms. Roy testified that she had sought a legal opinion on the merits of the judicial review application from a private law firm specializing in labour and employment matters. The lengthy opinion she received on May 13, 2013, concluded that the investigation into the complainant's harassment complaints had been consistent with the rules of procedural fairness and that the Federal Court was likely to find that the investigator's conclusions were reasonable.

[15] Ms. Roy spoke of the minimal benefit that the judicial review application could have had on the complainant from a practical level, since she was no longer employed by the CRA. She had already explained to the complainant that the Federal Court proceeding could not result in a new term of employment or in an extension of the term that had ended in May 2012 and that it could not result in any financial or other type of compensation.

[16] Ms. Roy also confirmed that the complainant's two grievances were being held in abeyance pending the outcome of this complaint, once again in order to protect the complainant's rights.

[17] Finally, Ms. Roy referred to a number of communications from the Institute to the complainant, which in her view demonstrated that it had given serious and legitimate consideration to the complainant's grievances and judicial review application and that it had explained in great detail why it would not provide her with representation in these matters.

[18] It should be noted that I felt obligated to intervene on numerous occasions during the complainant's cross-examination of Ms. Roy, given the complainant's insistence on asking questions that appeared to lack relevance and clarity, on interrupting Ms. Roy's testimony, and on directing antagonizing statements towards her, including an allegation that Ms. Roy and the Institute were involved in organized crime.

III. Summary of the arguments

A. For the complainant

[19] In her arguments, the complainant repeated the evidence that had been placed before me either through the testimonies of the witnesses or via the documents filed as exhibits. According to her, those facts cried out for representation.

[20] The complainant submitted that the respondent had failed to meet its duty of fair representation, in its decision-making process, by acting in a manner that was clearly arbitrary, discriminatory and in bad faith.

[21] In particular, the complainant argued that the Institute treated her differently because of a number of medical conditions she claimed to be suffering from, which, according to her, constituted nothing less than discrimination on the Institute's part. It

should be noted that the complainant filed no relevant or sufficiently clear, convincing and cogent independent evidence in support of this position.

[22] The complainant submitted that the respondent acted arbitrarily by not sufficiently investigating and considering the merits of her grievances and the serious nature of her application for judicial review.

[23] The complainant further submitted that the respondent acted in bad faith by withdrawing its representation without providing any explanation as to why it was refusing to pursue these matters and by deliberately causing prejudice to her judicial review application before the Federal Court.

[24] The complainant argued that she ought to be provided with independent legal representation for her two outstanding grievances and her pending judicial review application at the Institute's cost.

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

[25] The respondent reminded me that the onus of establishing a violation of the duty of fair representation rested with the complainant.

[26] The respondent argued that it had met its duty of fair representation by providing diligent and competent representation to the complainant when warranted and by ensuring that its assessment of the merits of her grievances was supported by relevant and legitimate considerations. According to the respondent, the evidence showed that it gave serious consideration to the complainant's issues and that it responded fully and diligently, without arbitrariness, bad faith or discrimination. In fact, it went beyond what was expected of it by obtaining an independent legal opinion on the judicial review matter.

[27] The respondent submitted that it is well established that the former Board did not sit in appeal of representation decisions made by bargaining agents and that it would not second-guess such a decision unless it was made in an arbitrary, discriminatory or bad-faith manner. In support of this position, the respondent referred me to *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28, and *Shouldice v. Ouellet*, 2011 PSLRB 41.

[28] According to the respondent, the evidence clearly demonstrated that the circumstances of the complainant's matters were examined by several Institute representatives, who considered the relevant legislative and collective agreement provisions and all the available evidence, as well as the applicable jurisprudence. In doing so, the Institute made a reasoned decision as to whether it would pursue the complainant's matters and met the criteria that the Supreme Court of Canada set out in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509.

[29] The respondent argued that it ought not to be required to take every grievance it presents on behalf of an employee to the ultimate or final step of a grievance process. In this case, the complainant's rights and interests were weighed against the broader interests of the Institute as a bargaining agent with limited resources representing several tens of thousands of employees.

IV. Reasons

[30] As the former Board stated 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 establishing that, on a balance of probabilities, the respondent failed to meet its duty of fair representation.

[31] The former Board has often commented on unionized employees' right to representation. In *Halfacree*, at para 17, it rejected the idea that it was an absolute right, as follows:

> *[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. . . .*

[32] My role is to determine whether the respondent acted in bad faith or in a manner that was arbitrary or discriminatory in its representation of the complainant.

[33] As the former Board 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 required the complainant to establish a violation of

section 187 of the *Act*, which in turn required her to put forward the factual foundation supporting the claim that the respondent acted in a manner that was arbitrary, discriminatory or in bad faith. I find that the complainant in this case offered no such foundation. Based solely on the facts alleged in the complaint, I am unable to find an evidentiary foundation of arbitrary conduct, discriminatory treatment or bad faith on the part of the respondent sufficient to establish a violation of section 187 of the *Act*. To meet her burden, the complainant was required to adduce sufficiently clear, convincing and cogent evidence to show that the respondent had somehow failed to meet its duty of fair representation, which in my view she failed to do.

[34] As the respondent correctly suggested, the Supreme Court of Canada set the scope of the duty of fair representation in *Canadian Merchant Service Guild*, at page 527. In that decision, the Supreme Court 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.*
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> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
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> *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.*

. . .

[35] The former Board also canvassed the meaning of "arbitrary conduct" as follows in *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, at para 22 and 23:

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

[36] The former Board also examined a bargaining agent's determination as to whether it should provide representation in *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, which offers the following guidance and useful concepts:

> . . .
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> *[44] . . . It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (*Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in* Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.):*
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> . . .
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> 42. When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit -- it is doing its job of representing the employees. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are

> relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of [the duty of fair representation].
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> . . .
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> . . .

[37] The evidence in this case has satisfied me that the respondent demonstrated that the circumstances of the complainant's matters (the two grievances and the judicial review application) were fully and seriously investigated, that their merits were properly considered, that reasoned decisions were made as to whether to pursue those matters on her behalf, and that its reasons for not pursuing those matters were explained in great detail to the complainant on more than one occasion. The lengthy outside legal opinion of May 13, 2013, and the Institute's letters to the complainant dated June 7 and July 17, 2013, clearly demonstrate this point.

[38] The respondent did not demonstrate an uncaring or cavalier attitude toward the complainant's interests; nor was it established that the respondent acted out of improper motives or out of personal hostility or that it or its representatives distinguished between employees in the bargaining unit based on illegal, arbitrary or unreasonable grounds.

[39] I am satisfied that the respondent's decisions not to support the complainant's grievances and application were motivated by genuine workplace considerations, that the respondent's analysis was detailed and complete, that it dealt with the relevant facts, that it referred to employment-related concerns, that it covered the pertinent tests to be met in adjudication, and that it raised genuine concerns about the lack of key factual elements and documentary evidence to support the complainant's grievances and application and about their resulting chances of success.

[40] In so doing, the respondent was performing its duty of representing the employees in the bargaining unit, including the complainant. A bargaining agent's duty of representation is not defined by a blind acceptance of representing all the employees in the bargaining unit, irrespective of the circumstances. When a bargaining agent decides, based on legitimate considerations, not to proceed with a grievance such as those referred to in this decision, it meets an essential part of its duty of fair

representation. It is entirely free to decide the best course of action for all the employees it represents, as a whole.

[41] I would go even further and suggest that a bargaining agent has the right to make the wrong decision, provided it has made the necessary enquiries giving rise to its decision and so long as its decision-making process is not tainted by actions or conduct that is tantamount to arbitrariness, discrimination or bad faith.

[42] A bargaining agent ought to be entitled to base representation decisions on its experience in prior matters. It should not be restricted to consider solely the interests of individual employees, but rather, it has a duty to consider the legitimate interests of the bargaining unit as a whole when making such decisions.

[43] Having considered all the evidence that was submitted to me during the course of this hearing, I find that the complainant failed to present clear, convincing and cogent evidence outlining the details of her complaint to the extent sufficient to establish how the acts or omissions of the respondent violated section 187 of the *Act*.

[44] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[45] The complaint is dismissed and I order the file closed.

March 19, 2015.

Stephan J. Bertrand,
a panel of the Public Service Labour Relations and Employment Board