

**Date:** 20160208

**File:** 561-02-594

**Citation:** 2016 PSLREB 12

*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

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BETWEEN

**THERESA NAVIKEVICIUS**

Complainant

and

**PUBLIC SERVICE ALLIANCE OF CANADA**

Respondent

Indexed as  
*Navikevicius v. Public Service Alliance 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:** No one

**For the Respondent:** Jacek Janczur, Public Service Alliance of Canada

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Heard at Toronto, Ontario,  
January 20, 2016.

**Complaint before the Board**

[1] On October 23, 2012, Theresa Navikevicius (“the complainant”) made a complaint against the Public Service Alliance of Canada (“the respondent”). She alleged that it breached its duty of fair representation by refusing to represent her in connection with two grievances, one dealing with her employer’s collection of an overpayment, and the other dealing with her employer’s alleged refusal to provide her with a detailed accounting of that overpayment.

[2] The complaint was filed under s. 190(1)(g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”). That provision reads as follows:

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

...

*(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[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 applies to this complaint is section 187, which reads 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] In essence, section 187 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 when it refused to provide her with representation in connection with her grievances.

[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 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 Board.

### **The hearing**

[6] On December 8, 2015, the parties were notified that the hearing of this matter would be held in Toronto, Ontario, on January 19 to 21, 2016. The complainant's work site was, at all relevant times, located in Toronto, Ontario. On January 8, 2016, the parties were notified that the hearing would commence on January 20, 2016, at 9:30 a.m., rather than on January 19, 2016.

[7] On January 15, 2016, the complainant requested that the hearing venue be moved to Hamilton, Ontario. She stated that the commute to Toronto would cause her financial hardship, without providing any particulars in support of that statement. I noted that the complainant had been notified as far back as July 2014 that this proceeding would be held in Toronto, Ontario, and that she had never raised this issue in her numerous subsequent correspondence with the Board. Her request was denied.

[8] On January 19, 2016, the complainant advised the Board by email that she would not attend the hearing, for financial reasons. She did not provide any particulars; nor did she seek a postponement. That email was brought to my attention only shortly before the hearing began on January 20, 2016.

[9] Given the complainant's statement that she would not attend the hearing, the fact that she did not seek a postponement, the costs that would be expended unnecessarily for the hearing accommodations, and the fact that the respondent's representative and witness had both travelled to Toronto and were ready to proceed, I decided to proceed with the hearing in the complainant's absence.

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**Summary of the arguments**

[10] The respondent submitted that there is simply no factual foundation to support a section 190 complaint and that the complainant had failed to meet her onus of establishing grounds for an unfair labour practice.

[11] The respondent added that the complainant's materials failed to establish a *prima facie* case that it had acted in bad faith or in a manner that was arbitrary or discriminatory in its representation of her or in any of its dealings with her.

[12] The respondent argued that there is no absolute right to union representation and that bargaining agents benefit from significant latitude in determining which matters they will support. The respondent recognized that while they are required to act fairly, genuinely, and with integrity and competence when making such determinations, in her materials, the complainant demonstrated no failure to meet these requirements in this case. Her failure to attend the hearing made it impossible for her to meet her burden of establishing such a failure.

**Reasons**

[13] As I mentioned, the complainant was notified of the date and time of the hearing and chose not to attend. She did not seek a postponement. The respondent's representative and witness both travelled to Toronto, at the respondent's cost, and were ready to proceed. Furthermore, the Board incurred significant costs to secure proper accommodations for the hearing.

[14] 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.

[15] The Board and its predecessors have often commented on unionized employees' right to representation. In *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28 at para. 17, the former Board 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 ....*

[16] The Board's role is to determine whether the respondent acted in bad faith or in a manner that was arbitrary or discriminatory in its representation of or dealings with the complainant.

[17] 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." That bar required the complainant in this case to establish a violation of section 187 of the *Act*, which in turn required her to put forward the factual foundation supporting the allegation that the respondent acted in a manner that was arbitrary, discriminatory, or in bad faith. I find that the complainant offered no such foundation.

[18] Based solely on the facts alleged in the complaint, I am unable to find a 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 sufficient evidence to show that the respondent had somehow failed to meet its duty of fair representation. She certainly did not help her case by not appearing at the hearing and by allowing the matter be heard *in absentia* (in her absence).

[19] I find that the complainant failed to present evidence outlining the details of her complaint to the extent necessary to establish how the respondent's acts or omissions violated section 187 of the *Act*. I can conclude only that she does not intend to pursue her complaint and that, for all intents and purposes, she has abandoned it.

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

*(The Order appears on the next page)*

**Order**

[21] The complaint is dismissed.

February 8, 2016

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