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Citation: 2016 PSLREB 87

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

SUSAN BIALY, KAMALARANJINI MYLVAGANAM, NAUSHEEN KHAN, KENNETH MAYHEW, LAURIE JARVIS AND ANDREA SINCLAIR

Complainants

and

JOHN GORDON, ANTHONY TILLEY, JEANNETTE MEUNIER-MCKAY, STEVE McCUAIG, PUBLIC SERVICE ALLIANCE OF CANADA, GARY TRIVETT AND ROBYN BENSON

Respondents

Indexed as
Bialy v. Gordon

In the matter of complaints 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 Complainants: Susan Bialy, Kamalaranjini Mylvaganam and Nausheen Khan

For the Respondents: Morgan Rowe, counsel

Heard at Toronto, Ontario,
July 7 to 9 and September 8, 2015.

I. Complaints before the Board

[1] Through five separate complaints, filed between June 2011 and February 2014, Susan Bialy, Kamalaranjini Mylvaganam, Nausheen Khan, Kenneth Mayhew, Laurie Jarvis and Andrea Sinclair ("the complainants") alleged that their bargaining agent, the Public Service Alliance of Canada (PSAC), John Gordon, Anthony Tilley, Jeannette Meunier-Mckay, Steve McCuaig, Gary Trivett and Robyn Benson ("the respondents"), failed in their duty of fair representation on their behalf. These complaints were all filed under s. 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*
>
> …
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

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

[3] Section 187 was enacted to hold employee organizations and their representatives to a duty of fair representation, a duty that according to the complainants, the respondents did not fulfill. The repondents have consistently responded that they have fulfilled their duty of fair representation and that none of the complainants' allegations amounts to a breach of s. 187.

[4] Following two case management conferences, it was determined that all five complaints would be consolidated and heard together. At the hearing, the complainants clarified that they were not alleging that the respondents had acted in a discriminatory manner, but rather that they had acted in an arbitrary manner and in bad faith in connection with a settlement agreement reached between the PSAC and the complainants' employer, Human Resources and Skills Development Canada ("the

employer"), which provided for, among other things, withdrawing salary protection grievances that had been filed on the complainants' behalf.

[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] The relevant facts pertaining to these complaints were summarized from the documentary evidence filed by the parties and the testimonies of Susan Bialy, one of the complainants; Anthony Tilley, president of the National Health Union, a PSAC component; and Ian Thompson, a senior representative with the Canada Employment and Immigration Union, another PSAC component.

[7] The complainants are service delivery agents II ("SDAs") employed in the employer's Income Security Programs area. A national generic work description developed in 1994 applied to all SDAs who performed duties in relation to administering the Canada Pension Plan and the *Old Age Security Act* (R.S.C., 1985, c. O-9) and covered three channels of service delivery: processing, call centre, and in-person service delivery. In some of the employer's facilities, SDAs performed all three channels interchangeably, while in others, no overlap took place. Under that work description, all SDAs were classified at the CR-05 group and level.

[8] Between 1996 and 2004, the PSAC presented numerous grievances on behalf of SDAs related to their pay, classification, and work description, which led to

consultations with the employer that ultimately resulted in an agreement on the content of a new SDA work description in 2005. In the meantime, the outstanding grievances that had been filed on behalf of SDAs were held in abeyance.

[9] The employer provided a draft version of the new work description to some employees in August 2005 as part of a final-level grievance reply to earlier job content grievances. That reply allowed the grievances in part and acknowledged that the new work description better reflected the SDA's duties. However, as Ms. Bialy acknowledged in her testimony, that work description was a draft; it did not refer to the position number or to its classification, provided no effective date, and was unsigned.

[10] Although Ms. Bialy referred me to a classification committee report dated May 25, 2006, which seemed to suggest that the new SDA work description had been reclassified at the PM-02 group and level, she also acknowledged that this report is unsigned and that it could very well be nothing more than a draft. The summary of a conference call that was held on March 29, 2007, which Ms. Bialy took part in, seems to suggest that much. What is clear is that the employer never implemented or classified the work description attached to the August 2005 final-level grievance reply (see tab 25 of Exhibit 1, pages 33 to 35).

[11] Following the classification review process of 2006, the employer decided to divide the SDA position into two distinct positions with different work descriptions and made an announcement to that effect on July 4, 2007. According to Mr. Tilley, this decision was made in accordance with the wide grant of authority conferred to the employer by s. 11.1(1) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) and without consulting the PSAC. One work description applied to employees performing call centre duties and in-person service delivery ("the Client Contact work description"), and the other applied to employees performing processing duties ("the Eligibility and Entitlement work description"). Employees were no longer expected to perform all service delivery channels interchangeably but rather were required to perform the service delivery duties falling within the work description under which they were employed.

[12] While the Client Contact work description remained classified at the CR-05 group and level, the Eligibility and Entitlement work description was ultimately classified at the PM-02 group and level, as processing SDAs were found to work on

more complex and contentious files. The two work descriptions were to be considered in effect from April 1, 1996, to September 13, 2006. Ms. Bialy acknowledged that during the period in question, she performed mostly call centre duties.

[13] The PSAC disagreed with the employer's decision to create the two distinct SDA positions. In June 2009, it referred over 400 grievances to adjudication to challenge the employer's failure to implement the 2005 draft work description, contrary to what the employer had agreed to in its final-level grievance reply. These grievances were scheduled to be heard in March 2010 on the basis of a test case before an adjudicator ("the *Abraham* test case").

[14] The documentary evidence and Mr. Tilley's testimony clearly established that the PSAC frequently communicated with Ms. Bialy, both by email and telephone, during the preparation phase of the *Abraham* test case, to keep her advised of the case's status and to answer her questions. The evidence also clearly established that she was made aware of the PSAC's many concerns about the viability and the merits of the outstanding grievances, particularly with respect to their timeliness and to jurisdictional objections that the employer had raised. Mr. Tilley pointed to the many challenges the PSAC faced in attempting to have the 2005 draft work description implemented or recognized as binding by an adjudicator through adjudication. He added that these challenges had been shared with Ms. Bialy at the time.

[15] On the first day of the *Abraham* test case hearing, the PSAC and the employer discussed the possibility of resolving all outstanding SDA grievances. During his testimony, Mr. Tilley indicated that Ms. Bialy had been encouraged to attend this hearing, that she did, that she was consulted, and that she participated in the decision-making process about whether to engage in settlement negotiations with the employer. At that time, she was again reminded of the benefits and risks of proceeding with the outstanding SDA grievances. The PSAC felt that since not all SDAs had filed grievances, a global settlement would be beneficial for the largest number of employees in the bargaining unit, and it shared that position with Ms. Bialy at that time.

[16] After much internal consultation, the PSAC agreed to engage in settlement negotiations with the employer, a process that went on for the better part of 2010 and the beginning of 2011. The PSAC kept employees in the bargaining unit advised of the

negotiation process and of its position with respect to a possible settlement via its website and those of its components.

[17] In July 2011, the PSAC and the employer reached an agreement that essentially settled all outstanding SDA grievances, including those about the SDA work description for the period between April 1996 and September 2006. According to Mr. Tilley, approximately 1200 grievances were outstanding at that time. In exchange for withdrawing the outstanding SDA grievances, the employer agreed to compensate all employees who had worked as SDAs at approximately the PM-02 rate for the number of days they had performed duties between those dates. According to Mr. Tilley, in excess of 2000 employees were affected by this settlement agreement, and the employer paid approximately $80 000 000 in compensation.

[18] At that time, it was made clear to Ms. Bialy that the settlement agreement recognized SDAs in call centres, such as her, as only acting in PM-02 positions from 1996 to 2006 and that efforts to have her position reclassified to the PM-02 group and level permanently were being handled through a different grievance process, which was ongoing and was not covered by the settlement agreement (Exhibit 5). In fact, the evidence shows that the PSAC continued to represent Ms. Bialy after she filed her complaints against it.

[19] The employer then wrote to the complainants in August 2011 to advise them of their eligibility for compensation pursuant to the terms of the settlement agreement and to request that they execute a release form signifying that they agreed to those terms and authorizing the withdrawals of their grievances. The release form specifically provided as follows:

> *WHEREAS on July 8, 2011, the Public Service Alliance of Canada…and the department of Human Resources and Skills Development…executed a settlement agreement that constituted a full, complete and final settlement of all grievances and claims that any SDA2 employee…had, have or may have…*
>
> *[…]*
>
> *…I Susan Bialy, now and forever release and discharge (the employer)…of and from any and all…grievances…*
>
> *[…]*

> *I UNDERSTAND AND AGREE that upon receipt of the above-mentioned payment, my classification grievance(s) is (are) bereby withdrawn and, if requested by the Employer, I should execute whatever documentation is required to withdraw such grievance(s).*
>
> *I FURTHER UNDERSTAND, AGREE AND DECLARE that I have sought Union advice and have been fully and fairly represented prior to executing this Release, or have chosen to waive that right, and have read this Release and fully understand the terms and legal effect of this Release and that there are no representations, warranties, promises, inducements, agreements or conditions with respect to this Release or the parties' liability under it other than those contained in this Release.*

[20] On December 2, 2011, the complainants each executed the release form in question and returned it to the employer with the following notation: "signed under duress and undue influence". It responded by indicating to them that it would be unable to process their payments on the basis of release forms signed in that manner.

[21] On December 29, 2011, the complainants executed another set of release forms, without any notations or remarks. They led no evidence of duress or undue influence at the hearing. In addition, Ms. Bialy acknowledged receiving a copy of the settlement agreement through an access-to-information request several months before signing the release form. She also acknowledged reading the settlement agreement and seeking further clarification from the PSAC before signing it.

[22] The payments of all compensation provided by the settlement agreement, including to the complainants, were completed by mid-January 2014. A significant lump-sum payment was issued in Ms. Bialy's name to bring her salary to approximately the PM-02 rate for the period between April 1996 and September 2006. The PSAC then withdrew all outstanding grievances about the SDA work description for the 1996 to 2006 period, as it had agreed to do. Mr. Tilley asserted that at any time, the PSAC could have withdrawn those grievances in accordance with s. 209(2) of the *Act* since its approval was required to refer them to adjudication. The complainants could not have pursued those matters on their own, without the PSAC's approval.

[23] A great number of email exchanges between the PSAC and Ms. Bialy were introduced as evidence, which clearly show numerous attempts PSAC representatives made to answer her questions, to address her concerns, to inform her of its positions,

and to provide advice. Following the settlement agreement, the PSAC continued to answer the complainants' questions about its nature and implementation. It also advised them that it remained prepared to pursue future meritorious grievances on their behalf, including about their post-2006 classification.

III. Summary of the arguments

A. For the complainants

[24] Ms. Bialy presented me with a 117-page document that she proposed to read verbatim as her arguments. It contained no titles or subtitles and appeared to be a collage of assertions and opinions the complainants had made over the years. When asked, Ms. Bialy was unable to direct me clearly to the salient portions that best supported her arguments.

[25] Unfortunately, the complainants' submissions are extensive and mix facts, assertions, and arguments in a manner that makes them impossible for me to summarize. The thrust of the focus of their concerns shifts from submission to submission.

[26] However, what appears abundantly clear is that the complainants disagreed with the PSAC's strategies and with its decision to agree to the withdrawal of all outstanding SDA work description grievances, especially theirs, as part of a global settlement affecting all SDAs. Despite the fact that the complainants each signed a release form indicating that they had been fairly represented and had received significant compensation payments, they continued to proclaim that the PSAC should never have agreed to the settlement it reached in July 2011, that it should never have agreed to the withdrawal of their outstanding grievances, and that it should have continued to challenge the employer's failure to implement the 2005 SDA work description. According to the complainants, those actions were done arbitrarily and in bad faith, contrary to s. 187 of the *Act*.

B. For the respondents

[27] The respondents reminded me that the complainants bore the burden of proof and were required in this type of case to provide evidence sufficient to establish that the respondents behaved in a manner contrary to their duty under s. 187 of the *Act*. They argued that my role when assessing such a complaint is to determine whether the

respondents behaved in a manner that was arbitrary, discriminatory, or in bad faith, not whether they made a correct or incorrect decision in their representation of the complainants. According to the respondents, the inquiry should be limited to whether their decision-making process was consistent with their duty of fair representation. In support of that argument, they referred me to *Cousineau v. Walker and Public Service Alliance of Canada*, 2013 PSLRB 68.

[28] The respondents argued that certain decisions of the new and former Boards have recognized that a bargaining agent may decide not to proceed with an employee's grievance, even over that employee's objection, without violating the duty of fair representation. They suggested that similarly, this principle applies to circumstances in which a bargaining agent chooses to settle a grievance over the grievor's objection. In support of that argument, they referred me to *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13, *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC LRB), and *Cousineau.*

[29] The respondents suggested that by reaching a global settlement with the employer, the PSAC considered not only the complainants' interests but also those of all employees in the bargaining unit, including SDAs who had not filed grievances but who would benefit from a settlement. They referred me to *Buchanan v. Canadian Telecommunications Employees' Association*, 2006 CIRB 348, a decision of the Canada Industrial Relations Board (CIRB) that addressed a very similar fact situation.

[30] In that case, the complainant alleged that her union had violated its duty of fair representation to her by withdrawing a pay equity complaint, by negotiating a settlement agreement with the employer, which she felt discriminated against some employees, and by failing to provide her with representation in her own parallel pay equity complaint. The CIRB rejected both arguments and found that the union was required to consider the interests of all its affected members, not just those of the complainant. It added that it was not its role to decide the legitimacy of the agreement or to interpret its contents.

[31] The respondents further contended that a simple disagreement with a bargaining agent's interpretation of the law or assessment of a grievance's merit does not give rise to a breach of s. 187.

[32] The respondents also reminded me that the complainants had signed a release

that had included a provision stating that the PSAC had represented them fairly in the course of the settlement negotiations.

IV. Reasons

[33] The issue that I must decide in these complaints is whether the respondents' actions amounted to a violation of s. 187 of the *Act*. As I indicated earlier, that provision was enacted to hold employee organizations and their representatives to a duty of fair representation.

[34] While the *Act* provides that any employee can grieve any term or condition of employment (s. 208), the reference to adjudication does need the support of the employee's bargaining agent if the grievance concerns the application or interpretation of a collective agreement (s. 209), which is the case for the outstanding SDA grievances. However, whether a bargaining agent will provide that support cannot be divorced from its duty of fair representation.

[35] The seminal case in the interpretation of this duty is *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, in which the following statement on the duty of fair representation is found at page 527:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[36] Applying the Supreme Court of Canada reasoning, to be successful in these complaints, the complainants had to establish that they had been treated in a manner that was arbitrary, discriminatory, or in bad faith, not merely that they did not agree with the decisions the respondents made in connection with the outstanding SDA grievances. Barring that, the respondents must be shown substantial latitude with respect to their decision-making process.

[37] A considerable number of decisions of the new and the former Boards have discussed the requirements to sustain an allegation of bad faith or of arbitrary or discriminatory conduct. In *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95, the former Board refers to some of the leading cases in the following manner:

…

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

[38] In *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, the former Board also examined a bargaining agent's determination as to whether it should provide representation. That decision offered the following guidance and useful concepts:

…

> ***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.):*
>
> …
>
> > 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]*.
>
> …

[39] In *Buchanan*, in circumstances similar to the ones that apply in these complaints, the CIRB dealt with the issue of conflicting interests and made the following statements at paragraph 101:

> *[101] … it is not uncommon for a union to have to deal with the diverging and even sometimes opposing interests of the employees whom it represents. In* Fred Blacklock et al., *[2001] CIRB no. 139, the Board commented on this as follows:*

> *[19] The Board does not sit in appeal of a union's decision as to whether or not to process a grievance, nor will it substitute its opinion or second-guess the union's assessment of a particular situation. It is not a tribunal of last resort, intended to deal with disgruntled union members. Complainants must be able to persuasively demonstrate, in a timely fashion, that the union acted in a manner that was arbitrary, discriminatory or in bad faith.*
>
> *[20] The union is entitled to consider the legitimate interests of the bargaining unit as a whole as well as the interests of individual employees. It is entitled to base its decision on its experience in prior matters. It is not even the Board's role to rule whether the union should have proceeded otherwise, or whether it is in agreement with the union's decision. …*

[40] In my view, those principles apply to the circumstances of these complaints. The evidence has satisfied me that the repondents undertook significant steps to represent the complainants before, during, and after their grievances went through the process. They engaged in significant informal negotiations with the employer to attempt to resolve issues related to the work duties, classification, and pay of over 2000 SDA employees, including the complainants. In the legitimate pursuit of a resolution to long-standing issues, the PSAC agreed to represent a great number of SDAs at adjudication, agreed to proceed with a test case, and engaged in mediation with the employer that ultimately led to a global settlement that benefited the greatest number of employees in the bargaining unit. This decision was not made lightly. It was reasoned and was based on both (i), the legitimate interests of the SDAs as a whole, and (ii), the respondents' genuine concerns with respect to the merits of the *Abraham et al.* test case and all outstanding SDA grievances. In doing so, they met the essential part of their duty of fair representation.

[41] In no way does the evidence suggest that the respondents demonstrated an uncaring or cavalier attitude toward the complainants' interests; nor was it established that they acted out of improper motives or out of hostility toward the complainants personally or that the PSAC or its representatives distinguished between employees in the bargaining unit based on illegal, arbitrary, or unreasonable grounds. To the contrary, the evidence suggests that the respondents provided representation with integrity and competence, which, in great part, was demonstrated by the numerous email exchanges between Ms. Bialy and PSAC representatives. Those exchanges show a

bargaining agent willing to answer an employee's questions and concerns and to rationalize the motivation behind its decision-making process.

[42] Even when a bargaining agent decides to pursue one set of interests to the detriment of another, which I do not believe occurred in these cases, such a decision is not objectionable as long as the bargaining agent has turned its mind to all the relevant considerations and its decision is not motivated by improper intentions.

[43] Having considered all the evidence presented by the parties, both written and verbal, I conclude that the complainants have failed to satisfy their burden of demonstrating that the respondents acted in an arbitrary, discriminatory, or bad faith manner when they negociated a global settlement in July 2011. While the complainants may not agree with the respondents' strategies and with the decisions they made, they did not provide any cogent and compelling evidence to suggest that these strategies and decisions constituted a violation of the duty of fair representation. To the contrary, the evidence established that the respondents thoroughly considered the advantages and disadvantages of settling the outstanding SDA grievances and that they took into account both the complainants' concerns and the interests of over 2000 other bargaining unit employees affected by this settlement. The respondents underlying motivation and the methods used to arrive at their decisions were legitimate and reasonable in the circumstances.

[44] While the respondents were not themselves parties to the complainants' grievances and could not withdraw them without the complainants' consent, that consent was, for all intended purposes, provided when the complainants executed the release form (see paragraph 19.)

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

(The Order appears on the next page)

V. Order

[46] The complaints are dismissed.

[47] I order that files 561-02-519, 537, 541, 561, and 671 be closed.

September 19, 2016.

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