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File: 561-02-38243

Citation: 2019 FPSLREB 48

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

GENEVIÈVE BERGERON

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Bergeron v. Public Service Alliance of Canada

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

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Kim Patenaude, counsel

Heard at Ottawa, Ontario,
November 27 to 29, 2018, and January 16 and 18, 2019.
(FPSLREB Translation)

I. Complaint before the Board

[1] On April 17, 2018, Geneviève Bergeron, the complainant, made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against her bargaining agent, the Public Service Alliance of Canada (PSAC or "the respondent"). In her complaint, she alleged that the PSAC committed an unfair labour practice by violating s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which provides that no "… employee organization … shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation …" of the members of a bargaining unit for which it is the bargaining agent.

[2] For the reasons that follow, the complaint is dismissed.

II. Summary of the evidence

[3] The complainant testified on her own behalf. The respondent called Guylaine Bourbeau, a PSAC grievance and adjudication officer, to testify. I will summarize the evidence of the two witnesses and highlight the conflicts in the testimony.

[4] In 2009, the complainant started in an administrative assistant position, classified at the AS-01 group and level, with the Canadian Coast Guard. When her position was eliminated in 2010, she accepted a transfer to a position classified AS-01 in the Fleet Safety and Security Branch of the Canadian Coast Guard.

[5] The complainant's relationship with management became adversarial. It led to several disciplinary measures, which she contested through grievances. This decision deals with only the relationship with the bargaining agent. I have no evidence about the grievances and therefore cannot rule on their merits.

[6] In August 2011, the complainant made a harassment complaint against her managers. In March 2012, after being investigated, it was deemed unfounded. Its dismissal was also grieved.

[7] In May 2012, the complainant's treating physician recommended that she temporarily take a position in another branch, given the stress caused by her workplace relationships. According to the complainant, the request was refused. The refusal was grieved.

[8] From September 2012 to February 14, 2014, the complainant received several assignments to areas other than the branch of her substantive position. When she

found herself without an assignment, it fell to the Deputy Commissioner of Operations of the Canadian Coast Guard, who met with her on March 18, 2014, in the presence of her union representative, Nathalie Saint-Louis. Ms. Saint-Louis represented the members of the bargaining unit that was represented by the Union of Canadian Transportation Employees, a PSAC component. At that meeting, the Deputy Commissioner gave the complainant three months to find another position in the Department of Fisheries and Oceans (of which the Canadian Coast Guard is part) or in the federal public service, failing which she would be terminated. The Deputy Commissioner added that she could also return to her substantive position but with a doctor's note confirming her fitness for work.

[9] The complainant tried to find another position but was unsuccessful. She filed a grievance about a transfer that did not go through. According to her, her treating physician refused to provide her with another medical note. She was terminated on June 19, 2014, which also was grieved.

[10] The final-level hearing of the grievance process for the eight filed grievances took place on January 13, 2015, before the Deputy Commissioner, who had just been appointed as the Commissioner. The complainant was represented by Ms. Saint-Louis, who let her know that on March 10, 2015, her grievances had been referred to the PSAC for an analysis to determine if they should be referred to adjudication.

[11] On April 17, 2015, the PSAC referred the grievances to adjudication before the Board (then named the Public Service Labour Relations and Employment Board). In June 2015, the complainant received the final-level response for the eight grievances, which were all dismissed.

[12] At the beginning of June 2015, the complainant had an interview with Daniel Kinsella, a PSAC file analyst. He told her that he was considering withdrawing the grievance against a three-day suspension. According to her, the suspension was imposed as a reprisal because she had made a harassment complaint. She added that Mr. Kinsella told her that it was difficult to prove a reprisal, that the Board's jurisdiction to decide the issue could be contested because the grievance was filed long after the disciplinary action, and that it would be better to drop it. She refused. She wanted the Board to rule on her grievance.

[13] Mr. Kinsella told her that he planned to ask the Board to proceed via mediation because the complainant would receive more that way. She reluctantly agreed, since

she did not believe in mediation. On June 12, 2015, the PSAC contacted the Board to withdraw the grievance against the three-day suspension.

[14] Another PSAC agent, Ms. LeCheminant-Chandy, took over on September 21, 2015. The complainant told her quite clearly that she would not agree to an out-of-court settlement unless her employer retroactively reinstated her or paid her a salary until retirement (the complainant is in her forties).

[15] By December 2015, the complainant was unhappy that the mediation was taking so long, since the grievances had been referred in April 2015. On December 18, she learned that after studying the file, the person in charge of the Board's mediation services had deemed that the situation was not conducive to mediation. Therefore, the grievances would be scheduled with the Board. Despite repeated calls to the PSAC, things did not seem to be moving. Finally, on August 4, 2017, she was informed of the hearing date (November 2017) and the name of the grievance adjudication officer, Guylaine Bourbeau, who would represent her at the hearing.

[16] Ms. Bourbeau testified at the hearing. She is now retired. She was a grievance adjudication officer from 2006 to 2018. Before that, from 1994 to 2006, she was a union consultant, representing members before the Commission des lésions professionnelles and other tribunals. From 1989 to 1994, she was the union consultant with the PSAC component for employment and immigration. At that time, she represented members up to the final level of the grievance process in staffing cases and before the arbitration council and the referee in employment insurance cases. She started in the public service in 1971 and until 1989, she worked at what was then called the Unemployment Insurance Commission. Specifically, she worked as an employment counsellor, helping unemployed people find work.

[17] During the period relevant to the complaint, Ms. Bourbeau was a grievance officer for the Quebec region. Her office was in Montreal, but she was often called to represent members in other locations in Quebec, including Gatineau, and Ottawa.

[18] When she learned that Ms. Bourbeau was to represent her at the adjudication of her grievances, the complainant contacted her. Ms. Bourbeau told her that she had not yet received her file and that she would leave shortly on vacation from August 11 to September 11, 2017. They discussed the treating physician. On August 10, 2017, Ms. Bourbeau's assistant sent a consent form to the complainant requesting her permission for Ms. Bourbeau to speak with her doctor.

[19] Ms. Bourbeau testified that she had acquainted herself with the file before leaving on vacation. She looked at the grievances and the analyses conducted to that point by several union parties, including Ms. Saint-Louis, who represented the complainant from the component level up to the final grievance level; Mr. Kinsella; Ms. LeCheminant-Chandy; and Lyndsay Cheong, from the PSAC's grievance analysis section. She contacted Ms. Saint-Louis directly for more detail about the termination.

[20] On August 10, 2017, the complainant contacted Ms. Bourbeau. They talked about the medical evidence. According to the complainant, her treating physician did not want to sign a return-to-work certificate, which would have been required for her to remain in her position.

[21] On her return from vacation, Ms. Bourbeau spoke with the complainant by phone. They agreed that they would meet at the beginning of October and that before then, Ms. Bourbeau would speak with the complainant's family doctor.

[22] Ms. Bourbeau spoke with the doctor on September 22. The doctor stated that the complainant had no functional limitations. Ms. Bourbeau asked her why she had not wanted to sign a fitness-to-work note. The doctor replied that the complainant had not wanted a note that would reinstate her in her substantive position. The doctor had refused to provide a certificate under false pretences.

[23] The doctor also stated that she had no progress notes about fitness to work. According to Ms. Bourbeau, had those notes existed, the PSAC would have been prepared to ask an expert to testify about fitness to work. Since they did not exist, there was no point having a medical expert or the family doctor testify. On September 25, 2017, she reported the conversation with the doctor to the complainant.

[24] On October 2, 2017, Ms. Bourbeau sent the hearing notice, together with a list of requests from the employer's counsel, Sean Kelly, about the evidence for the hearing. The complainant emphasized that according to the email chains, Ms. Bourbeau had received the notice on September 27 and Mr. Kelly's requests on September 29. However, the documents were not forwarded until October 2.

[25] Ms. Bourbeau pointed out that she had been in Québec on September 27, 28, and 29, 2017, and thus far from her office. She received her messages, but it was easier for her to work from her office. The following Monday, October 2, she forwarded the

documents to the complainant and made an appointment with her for a meeting on October 5 at the PSAC's Gatineau offices.

[26] The complainant claimed that at that first meeting, Ms. Bourbeau addressed her casually and familiarly from the start, which bothered her. For her part, Ms. Bourbeau affirmed that she had never addressed the complainant casually and that doing so would have been completely contrary to her professional methods, which involved being formal with people she met. According to her, she was casual and familiar only with those she had known for a long time and only with their permission.

[27] The complainant expected that Ms. Bourbeau would provide her with a list of questions so that she could prepare for the hearing. She maintained that despite Ms. Bourbeau's promises, she never received the list, which shook her trust.

[28] For her part, Ms. Bourbeau explained that it was a matter of preparing the file by fully understanding the sequence of events. She had reviewed the documents in the file and had intended to go over the evidence with the complainant, to prepare her testimony. They worked all day.

[29] Ms. Bourbeau testified that the discussion had been difficult because the complainant repeatedly returned to how the managers had treated her. Ms. Bourbeau tried to explain to her that facts were necessary for the hearing.

[30] According to Ms. Bourbeau, the grievance against the termination was the most important. The employer's claim was that it had done its best to accommodate the complainant, that she had not seriously looked for another position, and that no medical certificate supported a reinstatement to her substantive position or justified a medical accommodation. Solid proof of a thorough employment search was required. Ms. Bourbeau also explored the possibility of considering a position elsewhere, for example in Montreal.

[31] The complainant then shared with Ms. Bourbeau a great deal about her life. Ms. Bourbeau said that she listened attentively and compassionately. She understood that the termination, which is always difficult to go through, had added to other painful experiences.

[32] Ms. Bourbeau tried to bring the discussion back to practical matters, such as evidence of a job search. The complainant replied that all the information had been saved on a USB key that she had given to the union. It outlined her search up to 2016.

Ms. Bourbeau wanted the complainant to prepare a chart with the positions she had applied to and the results of her efforts.

[33] The complainant repeatedly returned to the idea that her termination had been a constructive dismissal. Ms. Bourbeau tried to explain to her that that could not be so, since she had been terminated — there was nothing to construct. Ms. Bourbeau promised to speak with Ms. Saint-Louis. According to the complainant, Ms. Saint-Louis had argued the constructive dismissal at the final level of the grievance process.

[34] Ms. Bourbeau explained to the complainant how the hearing would proceed. She identified the Board Member and the employer's counsel and stated that either of those two might encourage mediation. The complainant reacted strongly to that idea; she did not want it. Ms. Bourbeau told her that she understood that she did not have the mandate to suggest mediation. Ms. Bourbeau added that if, however, the employer made an offer to settle the case, she had a duty to inform the complainant, who would be free to accept or refuse it.

[35] At that October 5, 2017 meeting, the complainant was very surprised when Ms. Bourbeau told her that basically, her file was rather simple. According to the complainant, Ms. Bourbeau did not want to call any witnesses.

[36] An email dated October 10, 2017, confirmed that Ms. Bourbeau had contacted Ms. Saint-Louis about the wording of the grievance. At the hearing, the complainant strongly insisted that that had shocked her. My understanding is that it was because Ms. Bourbeau seemed to doubt that Ms. Saint-Louis had spoken about constructive dismissal. Ms. Saint-Louis' notes were adduced into evidence at the hearing. They did not speak about constructive dismissal. The grievance spoke of an "[translation] unfair decision".

[37] According to the complainant, Ms. Bourbeau seemed reluctant to argue some aspects of the case. For example, she did not wish to argue that discrimination had occurred about an accommodation for medical reasons. She maintained that the Board would have no jurisdiction to decide a staffing case, and the complainant deduced from that that she did not want to argue the transfer grievance.

[38] The complainant had filed a grievance in which she requested that a leave day she took for a medical appointment be converted to sick leave. Ms. Bourbeau opposed arguing that grievance. She was also against arguing the grievance about the dismissal

of the harassment complaint. Finally, the complainant testified that only the two suspension grievances and the termination grievance were to be argued. She felt betrayed. She had the impression that Ms. Bourbeau wanted to please the employer. The complainant did not understand why the grievances that the PSAC had referred to adjudication were suddenly no longer adjudicable.

[39] According to the complainant, Ms. Bourbeau tried to convince her to give up her rights by telling her that even if she won her case and was reinstated to her position, she would be the victim of reprisals by her employer, which would arrange the termination more effectively the next time. The complainant's trust was gravely undermined.

[40] Ms. Bourbeau denied saying that were the complainant reinstated, she would be the victim of reprisals. Although she had thought that the disciplinary files would have had a better chance of success at adjudication, she imposed no withdrawals.

[41] Ms. Bourbeau testified that several times, she asked the complainant to provide her with the list of positions she had applied to. According to the complainant, all the information was on a USB key that she had already given to the union, which contained the steps taken up to April 2016. She had compiled the list at Ms. LeCheminant-Chandy's request. According to the complainant, Ms. Bourbeau had not examined the USB key.

[42] Ms. Bourbeau stated that she had seen all the documents but that she had wanted a clear list. In addition, she had received from the employer a list of documents requested for the hearing about the complainant's medical state and her job search efforts.

[43] The complainant complained about Ms. Bourbeau's alleged "[translation] infantilizing" remarks, such as: "[translation] Poor little girl …". Ms. Bourbeau categorically denied speaking that way.

[44] On October 10, 2017, Ms. Bourbeau presented the complainant with a settlement offer from the employer. After thinking about it, the complainant refused it. On October 11, 2017, she called the PSAC to complain about Ms. Bourbeau's actions. She stated that Ms. Bourbeau had harassed her to settle the case without a hearing. She also had the impression that Ms. Bourbeau did not understand her case.

[45] That same day, Ms. Bourbeau called her. According to the complainant,

Ms. Bourbeau spoke inappropriately, saying that she forgave but that she did not forget. The complainant did not understand; she had no reason to apologize. According to her, Ms. Bourbeau should have apologized instead, as she did not understand the termination grievance. Ms. Bourbeau denied saying that and stated that she had not been aware of the complaint at that moment.

[46] The complainant claimed that she had wanted to "[translation] limit the damage" when she sent the following email to Ms. Bourbeau after her call:

> [Translation]
>
> *A follow-up to the telephone conversation that just ended. Thank you for your call. I feel clearer about the process and the strategy. I also left an explanatory message with the coordination office stating that my concerns have been addressed.*

[47] On October 13, Ms. Bourbeau forwarded a new offer from the employer to the complainant. She indicated to the complainant that she felt that the offer was particularly generous. As the complainant understood, she would receive a tax-free amount. Ms. Bourbeau testified that she never said that the amount, based on the salary, would be tax-free, as such a condition had never been granted.

[48] The complainant insisted that the salary be at the 2017 rate instead of the rate for 2014, which had been the year of the termination. The employer agreed. The offer also included striking the disciplinary measures, along with a reference letter.

[49] By email on October 13, the complainant agreed to the settlement offer in principle, even though she was unhappy about the imposed tax. When Ms. Bourbeau received the memorandum of agreement on October 17, she found the negotiated conditions in it. She agreed to it in principle and sent a notice to the Board to cancel the hearing, according to the usual procedure.

[50] However, when the complainant received the memorandum of agreement by email on October 17, 2017, she rejected it, because the reference letter was in fact a simple confirmation-of-employment letter. On October 19, 2017, the PSAC sent her the memorandum of agreement by express post. From October 19 to November 30, 2017, the complainant ceased all contact with Ms. Bourbeau. She was convinced that she had been deceived. The hearing did not take place because of the memorandum of agreement.

[51] The complainant was convinced that by accepting the memorandum of

agreement, she would have to pay back the employment insurance benefits, which someone she had spoken with had confirmed to her.

[52] Ms. Bourbeau testified at the hearing that given the settlement and the fact that the complainant would not be reinstated, she would not have to pay back the employment insurance. She stated that that type of situation occurred often, that the union was accustomed to it, and that it would be able to advise the complainant about the procedure to follow. The complainant did not believe her.

[53] The complainant manifested her displeasure with Ms. Bourbeau to the PSAC by October 30, 2017. Ms. Bourbeau testified that she communicated with the complainant on that day. The complainant told her about the death of her grandmother, with whom she had been very close.

[54] The complainant stated at the hearing that that was impossible, since her grandmother died in December. She conceded that during that period, she had been very preoccupied by her grandmother, who was dying.

[55] The discussions resumed on November 30, 2017, and Ms. Bourbeau tried to resolve the reference letter issue. The complainant was unable to suggest a manager who could write such a letter because her assignments had been too short. Ms. Bourbeau tried to convince her that a letter outlining her service at the Department of Fisheries and Oceans could suffice, but Ms. Bergeron insisted on a reference letter but did not suggest who could sign it. By letter on December 22, 2017, the complainant rejected the memorandum of agreement.

[56] On January 18, 2018, the complainant received a letter from the employer following her rejection of the agreement. Attached were email exchanges between Mr. Kelly and Ms. Bourbeau about the memorandum of agreement. The complainant stated that on October 17, 2017, Ms. Bourbeau accepted the employer's offer in its entirety, even though the complainant had not yet seen the final text. That same day, Ms. Bourbeau notified the Board about a request to postpone the hearing *sine die*. Those emails confirmed to the complainant Ms. Bourbeau's disloyalty, and at that moment, she decided to make a complaint against the union.

[57] The complainant continued her exchanges with the PSAC in January and February 2018. On March 1, 2018, the PSAC informed her that a new grievance adjudication officer had been assigned to her case. The PSAC is still representing her.

III. Summary of the arguments

A. For the complainant

[58] The promised reference letter was not a true reference letter. Ms. Bourbeau made no effort to obtain such a letter from the employer.

[59] Ms. Bourbeau did not make every effort to defend the complainant's interests. She seemed to prefer the settlement instead of arguing the case at adjudication. She made the complainant very anxious, to the point of making her agree in principle to an out-of-court settlement. She felt manipulated.

[60] The complainant criticized Ms. Bourbeau for accepting the memorandum of agreement on October 17, 2017, before even showing it to her. At the same time, the hearing was postponed *sine die*, without her knowledge. She never had the chance to argue her case before the Board.

[61] Ms. Bourbeau did not use what she had available for the case, for example a USB key with the job search evidence. The complainant had already explained to Ms. Saint-Louis and Ms. LeCheminant-Chandy the steps she had taken to find another position before being terminated. The bargaining agent had that information in hand.

[62] Ms. Bourbeau said that the case was simple and that they would have time to prepare for the hearing. At the same time, she complained about missing documents. The complainant no longer knew which way to turn. Above all, she was disappointed that Ms. Bourbeau did not seem convinced of the merits of her case.

[63] The complainant had the feeling that she had not been represented in the way she had wanted to be represented. The immediate acceptance of the memorandum was a sign of that.

B. For the respondent

[64] The wording of s. 187 is clear. The complainant had the burden of proving that the bargaining agent acted "… in a manner that [was] arbitrary or discriminatory or that [was] in bad faith in the representation …" of her. The jurisprudence has established that the burden is heavy. It is not up to the Board to decide whether the bargaining agent made good or bad decisions but rather to determine if it acted in an arbitrary or discriminatory manner or in bad faith.

[65] The respondent reviewed some decisions in the case law that confirm the

Board's role and the scope of the breach of the duty of fair representation, specifically *Basic v. Canadian Association of Professional Employees*, 2012 PSLREB 120, *Kozar v. Professional Employees' Association*, 2011 CanLII 75286 (BC LRB), *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20, and *Sayeed v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 44, which have a number of points in common with the situation in this case. I will return to them in my analysis.

[66] Essentially, the jurisprudence has established that the representation that the bargaining agent must provide is not necessarily what the member being represented wishes for or wants. None of a disagreement as to strategy, a different evaluation of the strength of the grievances, or a negotiation that does not secure everything that the member would like constitutes evidence that the union acted in an arbitrary or discriminatory manner or in bad faith.

[67] More is required to establish such actions. An arbitrary action is one that has no logical connection to the situation or that is seriously negligent. Behaving in a discriminatory manner means treating the represented member unfavourably for reasons that reflect prejudice towards the member. Finally, bad faith is displayed through behaviour that is clearly hostile and contrary to the member's interests.

[68] The respondent maintained that in this situation, there is no indication of an action that would be arbitrary or in bad faith. Discrimination was not alleged.

[69] The bargaining agent analyzed the complainant's case thoroughly and diligently. Ms. Bourbeau was at her disposal from the moment the case was assigned to her. She devoted time and energy to fully understanding all the elements of the case. She fully understood the mandate given to her by the complainant, who did not want mediation or a settlement. However, when the employer made an initial offer, it was her duty to speak with the complainant about it.

[70] At all times, Ms. Bourbeau clearly communicated what was being offered. When the complainant asked for more, Ms. Bourbeau passed that on to the employer. Based on her understanding of the email exchanges with the complainant dated October 13, 2017, the complainant would accept the offer if the salary was that of 2017. The memorandum of agreement received on October 17, 2017, reflected that condition. Therefore, she agreed to it in good faith.

[71] The complainant was not satisfied with the confirmation-of-employment letter,

which did not fully outline her service. It was corrected. Ms. Bourbeau asked the complainant for the names of managers who could sign a reference letter. The complainant did not provide her with any.

[72] Ms. Bourbeau continued to follow up. In December, the memorandum of agreement was formally refused by letter. The bargaining agent continued to ensure representation for all the grievances.

[73] At all times, Ms. Bourbeau acted with professionalism and respect. The complainant criticized her for not believing sufficiently in her case. The bargaining agent's role is to represent to the best of its knowledge, which includes advising members objectively about the strengths and weaknesses of their cases.

IV. Analysis

A. Objection to timeliness

[74] The respondent maintained that the complaint was untimely. The events related to the complaint against Ms. Bourbeau were known in October 2017. The dissatisfaction was in large part connected with the memorandum of agreement negotiated by Ms. Bourbeau and Mr. Kelly. Therefore, the start date of the time limit to make the complaint was the moment the complainant refused the memorandum of agreement, namely, October 17, 2017. As a result, she did not respect the 90-day time limit set out in s. 190 of the *Act*, which is strict according to the *Act* and to the case law that has interpreted that provision.

[75] For her part, the complainant maintained that the complaint arose when she became aware of the exchanges between Ms. Bourbeau and Mr. Kelly, on January 18, 2018. She claimed that making the complaint on April 14, 2018, was within the 90-day time limit.

[76] Section 190 applies to complaints made with the Board, specifically for unfair labour practices within the meaning of s. 185 of the *Act*, which includes bargaining unit members' complaints against their bargaining agents for failing the duty of fair representation under s. 187 of the *Act*. The relevant passage in s. 190 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)*** *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.*

[77] The question to determine is when the complainant knew of the action or circumstances that gave rise to her complaint. I am prepared to give her the benefit of the doubt since she did not see the exchanges between Ms. Bourbeau and Mr. Kelly before January 18, 2018. The main issue in her complaint is that her objections were not taken into account. Ms. Bourbeau accepted the agreement and asked the Board for a postponement based on her discussions with Mr. Kelly and before sending the final memorandum of agreement to the complainant.

[78] Therefore, I deem that the complaint was filed within the prescribed time limit.

[79] The issue is whether in her representation of the complainant Ms. Bourbeau contravened s. 187 of the *Act* by not providing her with fair representation.

B. Complaint regarding the breach of the duty of fair representation

[80] Section 187 of the *Act* 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.*

[81] Therefore, the duty is imposed by the *Act*, but the starting point for its interpretation is provided in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. In that decision, the duty was defined for unions that have exclusivity of representation before an arbitration tribunal (that is not the case under the *Act*, but nevertheless, the Board applies the same principles; so did its predecessor boards). The Supreme Court of Canada set out the following principles:

- as the spokesperson for the employees in a bargaining unit, the union must assure the fair representation of all employees in the unit;
- nevertheless, the union enjoys considerable discretion;
- its discretion must be exercised in good faith, objectively and honestly,

after a thorough study of the grievance; and

- "[t]he 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" (see *Canadian Merchant Service Guild*, at 527).

[82] In the context of complaints made to the Board about the breach of the duty of fair representation, I will draw on a few decisions that illustrate how those principles have been applied.

[83] The complainant in *Basic* was also dissatisfied with the settlement that was offered to her. She had the impression that her bargaining agent and the employer had agreed to impose it on her. In that case, the bargaining agent informed Ms. Basic that it would not represent her at adjudication. The complainant in that case, Ms. Basic, believed that the bargaining agent had poorly evaluated her case and that it had used the settlement to get rid of her.

[84] The Board (the Public Service Labour Relations Board at that time) ruled that the bargaining agent had acted in good faith and not in a discriminatory or arbitrary manner. It concluded its analysis as follows:

…

> ***113*** *The complainant criticized almost every aspect of the union's involvement in the settlement negotiations, from the pace of the negotiations, to the contents of the settlement, to the fact that she believed that she was being forced to accept an inferior settlement. Her dissatisfaction with the process stemmed, as I have noted, from her refusal to accept the union's assessment of the strength of her grievances and from the union's decision that it would not represent her at adjudication, neither of which is an issue before me. There is no evidence that the union approached the settlement negotiations in anything other than a professional and diligent manner. There is no evidence of bad faith, arbitrariness or discrimination in its treatment of the complainant and therefore, I cannot allow the complaint.*

…

[85] The complainant in *Kozar* was dissatisfied with the payment procedures with respect to the amount he obtained as part of his settlement. Mr. Kozar believed that his union had represented him poorly and that it had pressured him to accept his employer's proposed settlement. The arbitrator found that the pressure was not undue but rather that it was an integral part of negotiating labour relations agreements. He

concluded that the union had represented Mr. Kozar diligently and stated that it was not for him to rule on whether the settlement could have been improved.

[86] In *Paquette*, Ms. Paquette was represented by a bargaining agent at adjudication, but the Board dismissed the two grievances. She then made a complaint against the bargaining agent on the grounds that it had not represented her well. The Board dismissed the complaint because it was unsubstantiated. It wrote the following on the scope of s. 187:

…

> ***38*** *Section 187 does not necessarily cover disappointments, disagreements, or unfulfilled expectations. In this case, the complainant suggested that the union breached its duty of fair representation because she was dissatisfied with the representation she received, which did not meet her expectations. However, the purpose of s. 187 is not to serve as a remedy for complainants who invoke a breach of the duty of representation as soon as they are dissatisfied with a decision or action taken by an employee organization; its purpose is to address serious wrongdoing. However, in her complaint, the complainant does not mention serious wrongdoing. The simple fact that the Board dismisses a grievance does not in itself constitute evidence that a union representative acted arbitrarily, discriminatorily, or in bad faith when representing a public servant.*

…

[87] In this case, the grievances had not yet been heard. However, there is a similarity between Ms. Paquette's dissatisfaction and the complainant's, in the sense of dashed hopes with respect to representation.

[88] In *Sayeed*, the Professional Institute of the Public Service of Canada (PIPSC), the bargaining agent in that case, advised Mr. Sayeed to accept the settlement offer because, according to the PIPSC, he could not expect to gain more at adjudication. The PIPSC also indicated to Mr. Sayeed that he would no longer be represented if he refused the offer. Mr. Sayeed was greatly disappointed with his bargaining agent's representation, specifically because he did not feel that he had been defended with respect to the harassment that he claimed to have suffered. He disagreed completely with the memorandum of agreement that had been negotiated, which he claimed deprived him of his right to be heard by the Board. When he rejected the memorandum of agreement, the PIPSC ceased to represent him. Nevertheless, the Board ruled that there was no unfair representation.

[89] Those decisions are part of the Board's established case law, by which an

employee does not establish a breach of the duty of fair representation simply because he or she is dissatisfied with the representation or does not agree with the strategy or because the bargaining agent recommends a settlement that the employee does not want.

[90] In this case, I feel that the complainant did not establish that the respondent, through Ms. Bourbeau, acted "… in a manner that [was] arbitrary or discriminatory or that [was] in bad faith …" in its representation of her.

[91] The complainant's clear dissatisfaction with Ms. Bourbeau's representation is not the standard for the Board. The complainant said it at the hearing, as follows: "[translation] I wanted someone who would give me their 110 percent, who would completely believe in my case and defend me to the end."

[92] Ms. Bourbeau conducted a thorough analysis of the file. Her duty was to provide the complainant with a clear picture and to tell her what she could hope to gain and what seemed less promising, hence the advice to abandon some of the grievances. Once again, the grievances were not heard, and it is impossible for me to say whether they would be successful before the Board. That said, Ms. Bourbeau had substantial experience in that area. With all due respect to the complainant, she had none. Many of the criticisms levelled against Ms. Bourbeau reflected a lack of knowledge of labour relations.

[93] The complainant was dissatisfied because Ms. Bourbeau did not seem convinced that all her grievances had a chance of success. That evaluation on Ms. Bourbeau's part did not come from a lack of conviction about the importance of the representation but rather from her experience. Ms. Bourbeau tried to explain her reasoning, but the complainant perceived the explanations as defeatism or as concessions to the employer.

[94] Ms. Bourbeau questioned the complainant's insistence on the idea of a constructive dismissal. It was not unreasonable for Ms. Bourbeau to think that the termination was not a construct. It was plainly stated in the termination letter.

[95] Ms. Bourbeau did not withdraw any grievances from the file she was assigned. Nevertheless, it was her duty to underscore the weaknesses of the case as she saw them. She would have failed in her duty by not doing so.

[96] Ms. Bourbeau fully understood that the complainant did not want an

out-of-court settlement and that she preferred adjudication. That said, Ms. Bourbeau had a duty to present the employer's offer. She negotiated with the employer to improve the offer and expressed her opinion about its generosity and about the uncertainty of adjudication. There was no malice or bad faith in that opinion, which was based on Ms. Bourbeau's experience as a grievance officer.

[97] One of the key elements in the complaint is the fact that Ms. Bourbeau accepted the memorandum of agreement and requested a hearing postponement before presenting the final version of the memorandum of agreement to the complainant. Had the memorandum of agreement been significantly different from what the complainant had agreed to, there might have been cause for criticism. But the agreement was the same as the one the complainant had already accepted. The only difference was that the employer offered only a confirmation-of-employment letter instead of a true reference letter.

[98] Ms. Bourbeau thoroughly explained the patient steps that she took to obtain a letter that would satisfy the complainant. The letter was changed to include an omitted part of the complainant's employment history. That said, the complainant could not suggest the name of a manager who could sign a true reference letter. Given the complainant's numerous short-term assignments, the confirmation-of-employment letter seemed an acceptable compromise.

[99] The memorandum of agreement matter was handled competently and in the complainant's interests. She refused to accept the agreement. That was her right. Ms. Bourbeau made sure to follow up, despite the complainant's silence of almost two months.

[100] Ms. Bourbeau did her best, but the complainant was dissatisfied. Once again, dissatisfaction is not a criterion that the Board uses to find that a breach of representation occurred. The complainant did not show me any evidence that Ms. Bourbeau acted in a discriminatory or arbitrary manner or in bad faith.

[101] It is obvious that Ms. Bourbeau dedicated a great deal of time and effort to the complainant's case. She carefully reviewed the file, communicated with the complainant's doctor and with the union representative who presented the grievance to the employer up to the final level of the grievance process. She was not looking to settle the case, but when a settlement offer was made, she presented it to the complainant, as she was required to. She negotiated better conditions at the

complainant's behest. She sincerely believed that the offer had been accepted, and the emails that the complainant sent on October 13, 2017, show that that belief was reasonable.

[102] Therefore, Ms. Bourbeau cannot be criticized for accepting the memorandum of agreement that the employer sent on October 17, 2017. She sincerely thought that it was generous and acceptable. Despite the efforts expended to reach a satisfying settlement, which she believed in good faith was in the complainant's interests, she did not seek to end the PSAC's representation. In fact, the PSAC continues to represent the complainant.

[103] It is not for me to rule on the memorandum of agreement or the complainant's chances of success had the matter proceeded before the Board. Nevertheless, I can conclude that Ms. Bourbeau acted with diligence by relying on her experience when advising the complainant. The few discrepancies between their respective testimonies do not alter my analysis. The numerous email exchanges and the conversations that they both attested to amply demonstrated the work that Ms. Bourbeau did. I noted no lack of respect in how she spoke of her interactions with the complainant. It was striking to note in the testimony Ms. Bourbeau's detached analysis of the situation compared to the complainant's perfectly understandable emotional involvement. It seems that the disagreements over their exchanges can be attributed more to their different perspectives than to a lack of respect on Ms. Bourbeau's part (infantilization, being informal, and inappropriate remarks), which the complainant alleged.

[104] I cannot conclude that there was bad faith, discrimination, or arbitrariness in the PSAC's representation. Consequently, I find the complaint was not substantiated.

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

(The Order appears on the next page)

V. Order

[106] The complaint is dismissed.

April 25, 2019.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board