Date: 20190918

File: 561-02-713

Citation: 2019 FPSLREB 88

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

ROY RICHARD

Complainant

and

ROBYN BENSON AND PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Indexed as
Richard v. Benson and Public Service Alliance of Canada

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

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondents: Patricia Harewood, Public Service Alliance of Canada

Heard at Ottawa Ontario,

December 6 and 7, 2016.

I. Complaint before the Board

[1] On August 19, 2014, Roy Richard ("the complainant") filed a complaint with the Public Service Labour Relations Board (now named the Federal Public Sector Labour Relations and Employment Board ("the Board")) against the respondents, who are his bargaining agent, the Public Service Alliance of Canada (PSAC or "the union"), and its then national president, Robyn Benson. He alleged that they had failed in their duty of fair representation, contrary to ss. 190(1)(g) and 187 of the of the *Public Service Labour Relations Act* (now named the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*")).

[2] For the reasons that follow, I dismiss the complaint.

II. Background

A. Classification grievance

[3] At all material times, the complainant was employed by the Department of National Defence (DND) at Canadian Forces Base Trenton. In 2002, he was assigned a new job description as a facilities support officer classified at the GT-03 (General Technical) group and level. In 2009, the position was rated, and he was informed that the classification was unchanged.

[4] In July 2010, he was one of three grievors who filed a classification grievance challenging that position's rating. A classification grievance committee (CGC) heard the grievance on June 1, 2011. The complainant attended the hearing in person, while the two other grievors attended via teleconference. Paul Dagenais of the Union of National Defence Employees (UNDE), a component of the PSAC, represented the grievors at the hearing.

[5] In a decision dated August 12, 2011, the classification grievance was denied, although the rating for one factor (dealing with environment and hazards) was increased.

[6] The complainant was dissatisfied with the decision and undertook lengthy efforts to rectify it through DND. He eventually contacted Ms. Benson, who referred the matter to Edith Bramwell, who was then the coordinator of the PSAC's Representation Section.

[7] On March 18, 2014, the complainant attended a meeting in Ottawa, Ontario, to discuss his concerns with Ms. Bramwell and Tiffani (Murray) Tyner, then a PSAC classification officer.

[8] On May 4, 2014, the complainant emailed Ms. Benson concerning the March 18, 2014, meeting and indicated his intent to file an unfair labour practice complaint against Mr. Dagenais.

[9] In a letter to the complainant dated May 15, 2014, and apparently emailed on May 16, 2014, Ms. Benson stated as follows:

…

> *… I asked Edith Bramwell and Tiffani Murray to meet with you on March 18th because they are legal and classification experts who could explain the Classification Standard and hearing process. I wanted to ensure you got the best information possible and that you had an opportunity to discuss what had occurred.*
>
> *Prior to meeting with you, Sisters Bramwell and Murray thoroughly reviewed your file, contacted Brother Dagenais twice for information, and analyzed your former position in detail using the Classification Standard and Bench Marks. They concluded independently that your former position was rated appropriately.*
>
> *Their analysis of your file also revealed no wrongdoing or errors committed by your representative. They reminded you that Brother Dagenais' argument was successful in getting one factor increased, which is a rare accomplishment in classification grievances.*
>
> *During the two-hour meeting, Sisters Bramwell and Murray reviewed the materials that you brought with you. They listened to your concerns and answered your questions. They explained the process, step by step, including why your grievance was not wholly successful and why no appeal avenues exist. They encouraged you to remember that you made a presentation at the grievance hearing, in person and in writing. The Committee recorded much of your presentation in its decision over a full page and a half.*
>
> …
>
> *I had hoped that meeting with our experts at PSAC would assist you. I understand that this is not the result that you had hoped for but unfortunately, there is nothing more the union can offer to advance your case, since the decision was rendered several years ago and no right of appeal exists.*
>
> …

[10] In an email to Ms. Benson on May 19, 2014, the complainant disputed the facts set out in her letter and, among other things, accused Ms. Bramwell and Ms. Murray of having lied to her about the March 18, 2014, meeting.

[11] In a lengthy email to Ms. Benson on June 5, 2014, the complainant again complained about the March 18, 2014, meeting.

B. Complaint of June 20, 2014 (File 561-02-690)

[12] On June 20, 2014, the complainant filed a complaint under s. 190(1)(g) of the *Act*, in which Mr. Dagenais and the UNDE were named as respondents ("the first complaint"). The complainant alleged that Mr. Dagenais had failed in his duty to fairly represent him at the June 1, 2011, classification grievance hearing. As corrective action, he requested "… a fair Classification hearing …".

[13] While the complainant indicated on the complaint form that the date of the occurrence was June 1, 2011, he also indicated that the date that he knew of the act, omission, or other matter giving rise to the complaint was March 18, 2014.

[14] In a letter dated July 17, 2014, the respondents objected to the Board's jurisdiction to hear the complaint on the basis that it was untimely; namely, it had been filed beyond the 90-day time limit set out in s. 190(2) of the *Act*. The complainant emailed his response to the objection on the same day.

[15] In a decision dated August 12, 2014, based on the documents filed, the Board dismissed the complaint for lack of jurisdiction on the basis that it was untimely. The Board found that the issues giving rise to the complaint and the time in which the complainant knew or ought to have known of the action or circumstances giving rise to it had occurred on or around June 1, 2011.

C. Complaint of August 19, 2014 (File 561-02-713)

[16] As previously stated, the present complaint was filed on August 19, 2014.

[17] In section 4 of the complaint form, which asks for a "[c]oncise statement of each act, omission or other matter complained of …", the complainant wrote the following in an attached document:

> *As President of the PSAC and responsible for the actions of all the Union's & employee's that ultimately report to her, Robyn Benson failed to use the information that I had supplied to her, which resulted in her taking no action on my request to deal with one of her employee's in a particular matter. Ms. Benson failed to consider all the information needed to make a rational decision and only relied on the fictional account told to her by two of her employee's, PSAC lawyers, Ms. Tiffani Murray and Ms. Edith Bramwell and did not consider my factual information. Her decision to do nothing for me in this very serious matter, was both unjustified and unfair to both my Family and I.*
>
> [*Sic* throughout]

[18] On the complaint form, the complainant indicated May 19, 2014, as the date on which he knew of the act, omission, or other matter giving rise to the complaint.

[19] The corrective action he sought was as follows: "I want a meeting with Ms. Murray, Ms. Bramwell and Robyn to discuss her reason for failing to respond to my action request."

[20] Following a request by the Board's Registry, the complainant provided particulars of his complaint on October 25, 2014.

[21] The Board's "Request for Particulars" form sets out the following at section 5: "Please indicate, in the applicable category below, why you believe that the respondent(s) acted in a manner that was arbitrary, discriminatory or in bad faith in regard to your rights under the collective agreement."

[22] The complainant did not provide particulars for sections 5A ("Arbitrary Conduct") or 5B ("Discriminatory Conduct") of the form. For section 5 in general and section 5C ("Bad Faith Conduct") in particular, he set out the following:

> *#5*
>
> *Ms. Benson failed to address the real facts of the problem that I had provided to her and my request to resolve this injustice once and for all.*
>
> *#5c*
>
> *Ms. Benson failed to properly address the misconduct and actions of the Union Representative who failed to do his duty to act fairly in representing me. For unknown reasons, at least to me, Paul Dagenais was very hostile toward the Treasury Board Representative and prejudicial to me for a fair decision based on*

> *facts in the review process. I was informed that Mr. Dagenais, having a private meeting with the hearing representatives without informing me, should not have taken place and only confirmed his deceitful and dishonest action toward me.*

[23] The respondents filed their response to the complaint on December 12, 2014, and submitted that the complainant had failed to establish a *prima facie* (at first view) violation of s. 187 of the *Act*.

III. Summary of the evidence

[24] At the outset of the hearing, the respondents raised two objections to the Board's jurisdiction to hear and determine the complaint.

[25] The first objection was that the complaint was filed beyond the 90-day time limit stipulated in s. 190(2) of the *Act*.

[26] The second objection was based on the doctrine of *res judicata*, which prevents a party from relitigating an issue that has already been decided. The respondents submitted that the issue raised in the present complaint is identical to that raised in the first complaint, numbered 561-02-690.

[27] I took the objections under reserve and heard the evidence on the merits of the complaint.

A. Mr. Richard

[28] In his testimony, the complainant dealt exclusively with the representation that Mr. Dagenais provided at the classification hearing on June 1, 2011, which in his view was unsatisfactory. Among other things, he criticized Mr. Dagenais' English language abilities and stated that he should have done more than read key points. He stated that while he had had a telephone discussion with Mr. Dagenais, he had met with Mr. Dagenais only shortly before the hearing began.

[29] The complainant also criticized what he perceived as an inappropriate interaction between Mr. Dagenais and the Treasury Board representative on the CGC. When the complainant and Mr. Dagenais entered the hearing room before the hearing began, Mr. Dagenais asked that committee member to leave the room during his discussion with the complainant by using the phrase, "Get out."

[30] The complainant stated that his complaint was that Mr. Dagenais did not recognize obvious errors in the classification decision and did not speak to DND, even though the complainant asked him to. He further stated that Mr. Dagenais did not inform him of the availability of the recourse of filing an application for judicial review of the classification decision or of the 30-day time limit for doing so. He said that he learned about that recourse only at his meeting with Ms. Bramwell and Ms. Murray on March 18, 2014.

[31] The complainant asserted that during the June 1, 2011, hearing, he did not read from a prepared statement, as the committee members had the document that he had prepared.

[32] In cross-examination, the complainant was referred to the section of his first complaint, beginning with, "The Union representative, Mr. Dagenais …", and setting out several allegations of Mr. Dagenais' perceived failure in his representation.

[33] The complainant acknowledged that he filed the present complaint essentially because of what he perceived as misconduct by Mr. Dagenais at the hearing of June 1, 2011.

[34] The complainant exchanged emails with Mr. Dagenais in late August 2011 concerning the classification decision in which Mr. Dagenais advised him that the decision was final and binding and that no other recourse was available. This was reiterated in Mr. Dagenais' email to the complainant on September 1, 2011, in which he also informed the complainant that should he wish to escalate his concerns, he could contact the UNDE's executive vice-president.

[35] The complainant acknowledged that he did not file a complaint against the union between September 1, 2011, and June 20, 2014; nor did he follow up with the UNDE's executive vice-president. Instead, he went through DND channels, ultimately to the Minister of National Defence.

[36] The complainant further acknowledged that the outcome he expected from the present complaint was a fair classification hearing.

[37] When he was asked about the upward change in point rating to his position's environment-and-hazard factor, the complainant stated that Ms. Bramwell had informed him at their March 18, 2014, meeting that Mr. Dagenais had told the CGC to change it. In his email to Ms. Benson of May 19, 2014, the complainant alleged that Mr. Dagenais had held a private meeting with the CGC at which the factor was increased. He testified that Ms. Bramwell had told him of it.

[38] The complainant stated that he had been involved in the UNDE from 1985 to 1992, during which time he occupied the positions of steward, chief steward, vice-president, local president, and regional vice-president. Despite that experience, he stated that he did not file a complaint against the union because he was told that he had no recourse.

[39] The complainant said that when he met with Ms. Bramwell and Ms. Murray on March 18, 2014, his issue was that Mr. Dagenais did not inform him about a recourse. When he was asked whether, when Ms. Bramwell told him that he could have filed an application for judicial review, he filed a complaint against the union, he replied that he had done so, on June 20, 2014.

[40] The complainant testified that while he learned of a recourse on March 18, 2014, he could not act until he had obtained a reply from Ms. Benson, whom he had asked to take up his concerns.

[41] The complainant stated that Mr. Dagenais had suggested that they seek to have the complainant's position classified at the EG-04 (Engineering and Scientific Support) group and level, since fewer points were required than for the GT-04 position. The complainant stated that he knew it would not be possible.

[42] When he was asked why he had not filed a complaint against the PSAC about Mr. Dagenais in 2011, when he had raised his concerns with the union at that time, the complainant replied that Mr. Dagenais said that he had done nothing wrong. He said that neither he nor Mr. Dagenais took minutes of the grievance hearing. The complainant stated that he had been at home, on medication, and that he did not speak with anyone.

B. Mr. Dagenais

[43] The complainant called Mr. Dagenais to testify. He stated that he was the only UNDE classification representative and that he conducted two or three hearings per week.

[44] Concerning his interaction with the CGC member, Mr. Dagenais acknowledged that he had jokingly said “get out” to him and that he and that individual would often joke before a hearing, to relieve stress.

[45] Mr. Dagenais asserted that at the classification hearing of June 1, 2011, the complainant read the three-page statement that he had prepared and of which copies had been provided to the CGC.

[46] Mr. Dagenais stated that he read the key activities aloud so that the two grievors who attended via teleconference could hear. He further stated that those two grievors had told him that since the complainant attended the hearing, he could be the spokesperson, and they would add comments as required.

[47] Mr. Dagenais stated that the complainant did not attend the hearing as an observer but as a grievor. The observer present had been a classification trainee.

[48] Mr. Dagenais stated that he had nothing personal against the complainant and that he represented him in the same manner as he does all union members.

[49] Concerning the upward change to the rating of one factor, Mr. Dagenais denied that he had had a separate meeting with the CGC and stated that the CGC had arrived at that conclusion, as set out in its decision.

[50] Mr. Dagenais said that while the complainant had sought classification at the GT-04 group and level, it was not feasible, as that was his supervisor’s level. That is why, based on his evaluation, he recommended the EG-04 group and level, as fewer points were required to attain that classification.

[51] When he was asked why he did not act on the complainant’s request to meet with the director of civilian classification and organization, as alleged in the complaint of June 20, 2014, Mr. Dagenais replied that it was because nothing could be done.

[52] Mr. Dagenais took great offence at how the complainant had referred to him in his emails to Ms. Benson, as follows: "… that disrespectful, disgusting lying lowlife, Dagenais" (in an email dated May 19, 2014), and "… that ignorant little thieving outright lying weasel, Paul Dagenais …" (in an email dated June 5, 2014). He asserted that in 23 years as a DND employee, in 10 years as a UNDE local president, and in the hearings he has conducted since 2004, he has never been subjected to such derogatory language.

[53] In cross-examination, Mr. Dagenais stated that he understood that the present complaint was the same as the first complaint, in that in both complaints, the complainant alleged that Mr. Dagenais had not properly represented him.

[54] Mr. Dagenais had no further discussion with the complainant after his email to him of September 1, 2011, in which he reiterated that the classification decision was final and binding. The complainant did not ask him any questions about filing a complaint against the union. In Mr. Dagenais' opinion, an individual with the complainant's union experience would know that a complaint could be filed against the union. Mr. Dagenais first heard about the issue when the first complaint was filed in June 2014.

[55] Mr. Dagenais stated that it was not very common for a factor to increase as a result of a classification hearing. When he read the classification decision, while the points of the GT standard increased from 368 to 375, the level remained unchanged. Based on his review of the decision, he determined that there was no basis on which to seek judicial review, as the decision had accurately set out the facts. He so informed the UNDE's executive vice-president.

[56] Mr. Dagenais said that he treated the complainant's classification grievance in the same way he deals with all such grievances. He reviews the documentation provided by the union member, the work description, and the classification standard. He determines to which classification he can go, evaluates the matter, and makes a recommendation to the CGC. One week before the hearing, he calls the member to explain how the hearing will be conducted. If he is unable to contact the member, he provides an explanation before the hearing. Mr. Dagenais asserted that he worked diligently on the complainant's classification grievance.

C. Ms. Tyner

[57] Ms. Tyner, a lawyer, has been employed by the PSAC since 2010. She has held several positions, including as a classification officer and a grievance and adjudication officer. As a classification officer, she deals with classification matters, work descriptions, and acting pay grievances. She conducts an average of 24 to 36 hearings per year.

[58] While Ms. Tyner provided a thorough and helpful explanation of the classification system and a description of the classification grievance process, it is not necessary to reproduce all of that part of her testimony for the purposes of this decision. This summary of her testimony will deal with her involvement in the complainant's file. However, it should be pointed out that at the outset of her testimony, she stated that the employer controls the classification process entirely, including setting the rules, the procedure, and the decision makers.

[59] Ms. Tyner stated that the CGC's rating of the complainant's GT-03 position at 375 points was at the low end of the GT-03 range. Thus, in classification terms, it was almost impossible to increase it to the GT-04 level, which was rated at 431 points. To do that, almost every factor would have had to be argued, while if the GT-04 level had been at 415 points, only one factor would have been argued.

[60] Ms. Tyner said that the PSAC's 5 classification officers have a success rate of 10% to 15% in convincing the employer to change the rating of only 1 factor. In her experience, a change in 2 factors has occurred only twice. The PSAC will agree to defend classification grievances only when defensible arguments can be made to change a classification. One of the elements considered is the range of points. If it is at the low end, it will be almost impossible to convince the employer to change the ratings for virtually all the position's factors. Ms. Tyner stated that in the complainant's case, the fact that the environment-and-hazard factor was increased was amazing and uncommon.

[61] Ms. Tyner pointed out that at classification hearings, grievors are witnesses and provide information about their jobs. They are not observers. If the union is asked whether an observer can be present, it agrees if the person does not participate in the decision.

[62] Ms. Tyner became involved in the complainant's file in January to February of 2014. Ms. Benson had referred the file to Ms. Bramwell to try to assist the complainant by undertaking a fresh analysis, contacting Mr. Dagenais, and explaining the process to the complainant. Ms. Bramwell requested that a classification officer assist in the matter.

[63] Ms. Tyner reviewed the grievance, the CGC's decision, the organization chart, the rationale, and the work description. She also reviewed the GT classification manual and spoke twice with Mr. Dagenais. She carried out her own analysis by going through each factor and assigning it a rating. She also went through the benchmarks. She said that she put in the same amount of work as she would on one of her own files.

[64] After completing her assessment, she concluded that it was astonishing that Mr. Dagenais had obtained an increase in one factor. She was not sure that she would have taken the complainant's grievance to a hearing, due to the lack of defensible arguments. Ms. Tyner explained that the complainant's supervisor was classified at the GT-04 group and level and that in classification matters, an employee's position cannot be increased to that of his or her supervisor. In her view, Mr. Dagenais presented a skilful argument to change the group from GT to EG. She further stated that from the outset, two elements made it impossible to increase the complainant's position to GT-04: the sheer number of points required to attain that level, and the fact that his supervisor was at that level. She believed that Mr. Dagenais had done all that he could in the matter.

[65] The complainant, Ms. Bramwell, and Ms. Tyner attended the March 18, 2014, meeting. He expressed several concerns, including an alleged conspiracy between the PSAC and the CGC, whether he had been in the hearing room, and changing circumstances. It was pointed out to him that indeed, he had been in the hearing room. When he began to denigrate Mr. Dagenais, Ms. Tyner and Ms. Bramwell tried to quell it. Ms. Tyner deemed Mr. Dagenais' representation to have been very good.

[66] It was put to Ms. Tyner that during his testimony, the complainant had alleged that Ms. Bramwell told him at the March 18, 2014, meeting that Mr. Dagenais should have informed him that the classification decision could be judicially reviewed. Ms. Tyner stated that she did not recall that. When she spoke with Mr. Dagenais, he

assured her that he had considered judicial review and that the CGC had not erred. She stated that in the collective experience of the PSAC's 5 classification officers, some of whom had occupied their position for 20 years, only one classification decision had been judicially reviewed, and unsuccessfully. Ms. Tyner stated that she would never have sent the complainant's classification decision to judicial review.

[67] When she was informed that another allegation the complainant made during his testimony was that there had been a back-room conspiracy between the employer and the union to increase the environment-and-hazard factor, Ms. Tyner responded both verbally and by her demeanour that she was stunned. Ms. Bramwell did not say that, and she would not have known. Such an allegation was a complete fabrication. There was no private meeting between Mr. Dagenais and the CGC. Before the hearing, the union does not know who forms the CGC, as they are all from the employer side.

[68] Ms. Tyner was referred to the complainant's email to Ms. Benson of May 19, 2014, the first sentence of which reads as follows: "Now the ill mannered [sic] lawyer Tiffani and the bully lawyer Edith are lying directly to you." He accused Ms. Tyner and Ms. Bramwell of lying to Ms. Benson twice more in the next three sentences. Ms. Tyner was deeply offended that he impugned her integrity and found it abusive, especially after she had tried to assist him. She stated that his May 19, 2014, email was not an accurate reflection of the March 18, 2014, meeting. At that meeting, she had presented the facts of her analysis and had tried to provide him information that would help him.

[69] Concerning Ms. Benson's letter to the complainant dated May 15, 2014, Ms. Tyner said that its purpose was to explain to him why Ms. Benson had asked Ms. Bramwell and Ms. Tyner to meet with him, as they were the best placed to provide information. Ms. Tyner said that the letter was likely emailed on Friday, May 16, 2014.

[70] In cross-examination, Ms. Tyner stated that at the March 18, 2014, meeting, they discussed the topics that the complainant wished to talk about and did not refuse to discuss any subject. The complainant raised concerns; Ms. Tyner had her research, his file, and the GT classification manual. They reviewed the classification decision.

[71] When she was asked whether it would have been unusual had Mr. Dagenais not made a presentation, Ms. Tyner replied that the decision stated that he had made one, and he had said that he had made one. She also stated that he had said that the complainant had spoken at the hearing, which the decision also indicated.

[72] When she was asked whether she knew that the complainant's supervisor grieved his position on the same day, Ms. Tyner replied that she would not have known had he not told her and that in any event, it was irrelevant until that grievance had been heard and decided.

[73] Ms. Tyner asserted that as a result of her analysis of the complainant's file, she would have recommended that the PSAC not represent him in his grievance. Her assessment did not change after discussing the classification decision; nor did her conclusion change after the complainant told her about several aspects of his job, such as its scope and the amount of the budget for which he was responsible. She also stated that it was not typical for a subordinate to receive a higher salary than his or her supervisor.

IV. Summary of the arguments

A. For the complainant

[74] The complainant stated that what Mr. Dagenais did to him has affected his life since then. He asserted that everything he said in his testimony was true as he recalled it. He submitted that what he had said about Mr. Dagenais during the hearing of this matter and in his emails arose from his ignorance of the conduct of his classification grievance hearing. He had never attended serious meetings at which laughter and joking occurred.

[75] The complainant was adamant that contrary to Mr. Dagenais' testimony and the classification decision, he had not read anything at the hearing. He said that he was incapable of speaking properly because of a medical condition. He stated that he might have answered questions from a committee member and that the grievors attending via teleconference also answered questions.

[76] The complainant submitted that he had not known that he would be expected to speak. Mr. Dagenais called him, informed him of the hearing location, and stated that

he would meet with the complainant to discuss what would occur at the hearing. The complainant said that at the hearing, the three grievors did not agree that he would be the spokesperson and suggested that that might have been determined before the hearing.

[77] The complainant further submitted that his summary of the March 18, 2014, meeting with Ms. Bramwell and Ms. Tyner was accurate, based on his recollection.

B. For the respondents

[78] The respondents submitted that this complaint is about how Mr. Dagenais represented the complainant at the June 1, 2011, classification hearing. As such, they argued that the complaint should be dismissed on the basis that it is untimely and that the complainant is attempting to relitigate his previous complaint that was dismissed by the Board. In the alternative, if the merits are addressed, then they submitted that they acted properly and that there was no violation of s. 190(1)(g) of the *Act*.

[79] The respondents submitted that the time limit stipulated in s. 190(2) of the *Act* is mandatory; see *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55; and *Hajjage v. Bannon and Union of Taxation Employees*, 2011 PSLRB 105 at paras. 23 and 24.

[80] The respondents addressed the date on which the complainant knew or ought to have known of the action or circumstance giving rise to the complaint. They submitted that the date should be that of the hearing on June 1, 2011, since he then had full knowledge of Mr. Dagenais' representation. The second date they submitted was September 1, 2011, when the complainant was informed that the classification decision was final and binding and that the union would not proceed further with the matter. They further suggested the date of the March 18, 2014, meeting, at which the complainant would have known that the union would not proceed, if I accept that that was when he was told that Mr. Dagenais should have informed him of the recourse of judicial review. The respondents submitted that Ms. Tyner refuted that evidence. If the date is that of Ms. Benson's May 15, 2014, letter, which Ms. Tyner stated was likely sent on May 16, 2014, then the 90-day time limit expired on August 15, 2014. Lastly, even accepting that the date is that of the complainant's response to Ms. Benson on May 19, 2014, the time limit expired on August 18, 2014.

[81] The respondents next submitted that the doctrine of *res judicata*, which prevents a party from relitigating an issue that has already been decided, applies in this complaint. They advanced that the substance of the present matter is identical to that of the complainant's first complaint, namely, Mr. Dagenais' representation.

[82] The respondents pointed to the complainant's testimony that his complaint was that Mr. Dagenais did not recognize the errors in the classification decision. The respondents emphasized that the complainant had acknowledged that his first complaint concerned Mr. Dagenais' representation at the classification hearing and that the corrective action he sought as stated in that complaint was a fair classification hearing. They submitted that he also testified that the outcome he expected from the present complaint was a fair classification hearing. In support of this argument, the respondents cited *Fournier v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 65.

[83] With respect to the merits of the complaint, the respondents argued that nothing in it or in the evidence indicated that their conduct toward the complainant had been arbitrary, discriminatory, or in bad faith.

[84] The respondents submitted that the evidence demonstrated that the union had provided diligent representation. Mr. Dagenais described his preparation for the hearing: he reviewed the documentation, the work description, and the classification standard. He determined that he should recommend a classification in the EG group to avoid the conflict of a GT-04 position reporting to a GT-04 position. At the hearing, he provided an opportunity for the complainant and the two other grievors to speak about their jobs. He reviewed the classification decision and determined that there was no basis for a judicial review application, as the decision accurately reflected what took place at the hearing.

[85] The respondents further submitted that in January to February of 2014, the union reviewed the complainant's file. Ms. Tyner carried out a thorough analysis of the classification grievance, the CGC's decision, the organization chart, the rationale, and the work description. She also reviewed the GT classification manual and spoke twice with Mr. Dagenais. Ms. Tyner reviewed the chances of success and stated that she would not have referred the grievance to a hearing. She concluded that the union could

not do anything further and lauded Mr. Dagenais' work in the matter. The union subsequently met with the complainant to discuss his concerns.

[86] In support of their arguments, the respondents relied on the following decisions: *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509; *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107 at paras. 29 and 30; *Ollenberger et al. v. Marshall*, 2014 PSLRB 14 at paras. 126 and 131; *Jackson v. Public Service Alliance of Canada*, 2016 PSLREB 64 at para. 55; and *Charinos v. Public Service Alliance of Canada*, 2016 PSLREB 83.

V. Analysis

[87] The relevant provisions of the *Act* read 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.*
>
> …
>
> ***185*** *In this Division,* **unfair labour practice** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> …
>
> ***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.*
>
> …
>
> [Emphasis in the original]

A. Objection based on *res judicata*

[88] As previously stated, the doctrine of *res judicata* prevents a party from relitigating an issue that has already been decided.

[89] The present complaint was filed one week after the Board's decision dismissing the first complaint and the complainant cited a new date of May 19, 2014, as being the date on which he claimed to have known of the act, omission, or other matter that gave rise to it. In addition, Ms. Benson was added as a respondent, and he alleged that she had failed to act on information he had provided so that she could deal with Mr. Dagenais.

[90] However, as stated previously, the complainant's evidence and argument dealt almost exclusively with the alleged misconduct by Mr. Dagenais at the hearing of June 1, 2011, and not with any subsequent events, including on May 19, 2014. The complainant even acknowledged that he filed the present complaint essentially because of what he perceived as misconduct by Mr. Dagenais at the hearing of June 1, 2011 and, as in his first complaint, the outcome he expected from the present complaint was a fair classification hearing. Ms. Benson's only involvement in the present complaint was that she arranged the March 18, 2014, meeting and wrote the May 15, 2014, letter to him.

[91] In my view, the complainant introduced a new date and a new respondent into the present complaint in an attempt to revive the issues set out in his initial complaint. The Board had already dismissed those allegations as being untimely. That decision was final. Accordingly, I find that the doctrine of *res judicata* applies and the complaint should be dismissed on that basis.

B. Objection based on time limits

[92] Even were I not to dismiss the complaint based on the doctrine of *res judicata*, I would dismiss it as being untimely. As indicated above, the time limit for filing an unfair labour practice complaint is prescribed in s. 190(2) of the *Act.*

[93] Decisions rendered by the Board and its predecessors have consistently found that the 90-day time limit stipulated in s. 190(2) of the *Act* is mandatory and that the

Act does not confer authority on the Board to extend that time limit. The Board stated as follows at paragraph 55 of *Castonguay*:

> *[55] That wording is clearly mandatory by its use of the words "must be made no later than 90 days after the events in issue". No other provision of the* PSLRA *gives jurisdiction to the Board to extend the time limit prescribed in subsection 190(2). Consequently, subsection 190(2) of the* PSLRA *sets a boundary, limiting the Board's power to examine and inquire into any complaint that an employee organization has committed an unfair labour practice within the meaning of section 185 (under paragraph 190(1)(*g*)) of the* PSLRA*) and that is related to actions or circumstances that the complainant knew, or in the Board's opinion ought to have known, in the 90 days previous to the date of the complaint.*

[94] In dismissing the first complaint for lack of jurisdiction as it was untimely, although the complainant had indicated that the date on which he knew of the act, omission, or other matter giving rise to the complaint was March 18, 2014, the Board found that the issues giving rise to it and the time in which the complainant knew or ought to have known of the action or circumstances giving rise to it had occurred on June 1, 2011, the date on which the classification hearing took place.

[95] In the present complaint, the complainant indicated May 19, 2014, as the date on which he knew of the act, omission, or other matter giving rise to it. That is the date of his response to Ms. Benson's letter of May 15, 2014, which, from the evidence, appears to have been emailed to him on May 16, 2014.

[96] There are several dates in 2011 on which it could be determined that the complainant knew or ought to have known of the circumstances giving rise to his complaint. Among them are June 1 (the date of the classification hearing), August 12 (the date of the classification decision), and September 1 (the date of Mr. Dagenais' email to him that the decision was final and binding). The complainant acknowledged that he did not file a complaint against the PSAC between September 1, 2011, and June 20, 2014, or follow up with the UNDE's executive vice-president. In his testimony, the complainant further acknowledged that he had filed the present complaint essentially because of what he perceived as misconduct by Mr. Dagenais at the hearing of June 1, 2011.

[97] However, I need not make such a determination. Even if I accept May 19, 2014, as the date on which he knew of the act, omission, or other matter giving rise to his complaint, it is untimely.

[98] Calculating from May 19, 2014, the 90-day time limit for filing the complaint expired on Sunday, August 17, 2014. The *Interpretation Act* (R.S.C. 1985, c. I-21), at s. 35(1), defines Sunday as a holiday. Section 26 provides that "[w]here the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday." Thus, the last day on which the complaint could have been filed on a timely basis was Monday, August 18, 2014. However, it was filed on Tuesday, August 19, 2014. Consequently, the complaint is untimely, as it was filed beyond the mandatory time limit stipulated in s. 190(2) of the *Act*. Accordingly, I would dismiss it on that basis as well.

C. The merits of the complaint

[99] I would also conclude that the complaint must be dismissed on the merits.

[100] To succeed, the complainant had the onus of establishing that the respondents' representation of him was arbitrary or discriminatory or that they acted in bad faith (s. 187 of the *Act*). The Board has often stated that a complainant has the burden of establishing a *prima facie* case that an unfair labour practice occurred; see *Halfacree v. Public Service Alliance of Canada*, 2010 PSLRB 64; and *Ollenberger et al.* In my view, the complainant did not meet this onus.

[101] As stated earlier in this decision, the duty of fair representation is set out in s. 187 of the *Act*. The criteria of that duty to be met by unions were set out as follows in *Canadian Merchant Service Guild*:

…

> *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.*
>
> …

[102] In the present complaint, the issue is not whether the union would represent the complainant with respect to his classification. Rather, he alleged that Mr. Dagenais did not properly represent him at the June 1, 2011, classification hearing and that Mr. Dagenais did not inform him of the availability of the recourse of an application for judicial review of the CGC's decision. Accordingly, I will examine the issues he raised while bearing in mind the fifth criterion set out in *Canadian Merchant Service Guild*.

[103] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at para. 100, the Board stated the following with respect to the duty a union owes in representing its members:

> ***100*** *Just as a union has considerable discretion in determining for which grievances it will provide representation and which grievances it will settle, it also has considerable discretion in determining how the cases that it supports should be argued. The fact that a union does not rely on the arguments or case law that a union member wants presented does not necessarily establish that it has violated its duty of fair representation. As noted in* Boshra*, at para 61:*
>
> > There is much in the complainant's submissions that quite obviously suggests a pronounced disagreement between him and the respondent as to the grounds on which his case should have been argued and perhaps the specific representations that should have been made at different points in the grievance process. However, disagreement does not substantiate a complaint. To be sure, it could be the case that the respondent made "incorrect" decisions as to the grounds on which the complainant's grievances should have been argued and perhaps even debatable choices concerning strategies and tactics along the way. However, being "incorrect" or making debatable decisions about what to do during the grievance process is not in

> itself proof of arbitrary, discriminatory or bad-faith conduct.

[104] As stated earlier in this decision, the complainant did not provide particulars for sections 5A (Arbitrary Conduct) or 5B (Discriminatory Conduct) of the Board's Requests for Particulars form. Furthermore, he did not introduce evidence of arbitrary or discriminatory conduct by the respondents; nor did he make such submissions in argument. For section 5C (Bad Faith Conduct), he set out the following:

> *Ms. Benson failed to properly address the misconduct and actions of the Union Representative who failed to do his duty to act fairly in representing me. For unknown reasons, at least to me, Paul Dagenais was very hostile toward the Treasury Board Representative and prejudicial to me for a fair decision based on facts in the review process. I was informed that Mr. Dagenais, having a private meeting with the hearing representatives without informing me, should not have taken place and only confirmed his deceitful and dishonest action toward me.*

[105] Contrary to the complainant's allegation that Ms. Benson failed to address his concerns with Mr. Dagenais' representation, the evidence established that she fully considered the claims with the assistance of Ms. Bramwell and Ms. Tyner. A fresh analysis of the classification matter was undertaken by Ms. Tyner. She determined that Mr. Dagenais had done all that he could in the circumstances. Ms. Bramwell and Ms. Tyner subsequently met with the complainant to present their analysis of the matter and hear his concerns. As confirmed in the letter of May 15, 2014, Ms. Benson then reviewed the situation with Ms. Bramwell and Ms. Tyner and informed the complainant that there was no wrongdoing or error committed by Mr. Dagenais and that there was nothing more the union could offer to advance his case. In my view, Ms. Benson's consideration of the complainant's claims, with the assistance of Ms. Bramwell and Ms. Tyner, was fair and undertaken with integrity and competence.

[106] With respect to the underlying allegations against Mr. Dagenais, who has lengthy experience as a union representative, he testified that he prepared for the complainant's classification grievance hearing the same way he deals with all such grievances. He reviewed the documentation, the work description, and the classification standard. He determined the classification that he could propose, evaluated the matter, and made a recommendation to the CGC at the hearing. His testimony on this point was not challenged.

[107] Mr. Dagenais testified that he had nothing personal against the complainant and that he represented him the same way he represents all union members. The complainant presented no evidence of hostility towards him by Mr. Dagenais or the union.

[108] The complainant's allegations concerning Mr. Dagenais' conduct at the classification hearing of June 1, 2011, appear to have been largely driven by his unfamiliarity with the hearing process. What he perceived as hostility between Mr. Dagenais and the Treasury Board representative on the CGC before the hearing began was, according to Mr. Dagenais, simply banter. While the complainant alleged in his particulars that this was prejudicial to a fair decision from the CGC, he presented not a whit of evidence in support of that allegation.

[109] According to the complainant, Mr. Dagenais' participation during the hearing was confined to reading the key activities. Mr. Dagenais testified that he read them aloud so that the two grievors attending via teleconference could hear. For reasons unknown, at the hearing of this complaint, the complainant persisted in denying that he had spoken or made a presentation during the classification hearing. This was convincingly contradicted by Mr. Dagenais' testimony and by the classification decision in its section titled, "Representation by or on behalf of the grievors", as follows:

> *Mr. Richard began his presentation by reading from a prepared three page document. Copies of this document were provided to the Committee members, and a copy of it was placed on the grievance file. The document consisted of a description of the scope of duties of the Grieved Position (GP) - specific to Mr. Richard, and is summarized below.*
>
> …

[110] Below the summary of the complainant's duties, the classification decision set out the following:

> …
>
> *The grievors continued their presentation by outlining roles and responsibilities and, as requested by the Union Representative, Paul Dagenais, explained each of the position's Key Activities to the Committee and elaborated, when necessary, in response to the Committee's questions.*
>
> …

[111] After setting out the key activities, the classification decision continued, as follows:

…

> *Mr. Paul Dagenais then presented the Committee members with a document that showed a table of the current factor ratings and his proposed factor ratings for the GPs.*
>
> *A copy of this table was placed on the grievance file. Mr. Dagenais proposed that the GPs be classified at the EG-04 group and level instead of the GT-03 group and level and provided the following factor ratings to support his recommendation ….*
>
> *This concluded the presentation by Mr. Richard, the grievors and Mr. Dagenais.*

…

[112] The classification decision supports Mr. Dagenais' testimony of how the classification hearing unfolded and his role representing the complainant at the hearing.

[113] The complainant also alleged that during the March 18, 2014, meeting, Ms. Bramwell told him that Mr. Dagenais had held a private back-room meeting with the CGC members, which had resulted in the points increase to the environment-and-hazard factor. Mr. Dagenais and Ms. Tyner emphatically denied it, and the complainant did not prove it.

[114] Also noteworthy is the evidence of Ms. Tyner, an experienced PSAC classification officer, concerning the representation provided by Mr. Dagenais. She reviewed the grievance and the classification decision, the organization chart, the rationale, and the work description. She also reviewed the GT classification manual and spoke twice with Mr. Dagenais. She carried out an analysis by going through each factor and giving it a rating. She also went through the benchmarks. Ms. Tyner stated that based on her assessment of the complainant's file, she would have recommended that the PSAC not represent him at the classification hearing and that in her view, Mr. Dagenais had done all he could in the circumstances.

[115] With respect to the allegation that Mr. Dagenais did not inform the complainant of the availability of judicial review, while Mr. Dagenais did not explicitly inform the complainant of this recourse, he did consider it. His evidence was that, based on his review of the CGC decision, there was no basis on which to seek judicial review, as the

decision had accurately set out the facts and there was no error in the decision. Similarly, Ms. Tyner indicated that, when she spoke with Mr. Dagenais, he assured her that he had considered judicial review. Ms. Tyner also concurred in his assessment that there was no basis to judicially review the complainant's classification decision. Mr. Dagenais did not inform him of the possibility of judicial review. However, the complainant did not otherwise establish how that, alone, constituted negligence, hostility or bad faith.

[116] The onus was on the complainant to establish that the respondents acted in a manner that violated s. 187 of the *Act*. He presented no evidence of arbitrary or discriminatory conduct on their part.

[117] Moreover, the complainant failed to present evidence to support the allegation of bad faith he set out in the Board's Request for Particulars form. In fact, the evidence contradicted this allegation. Paragraph 49 of *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC LRB), referred to in *Jackson*, states as follows: "Representation in bad faith will typically involve either representation with an improper purpose or representation with an intention to deceive the employee." Nothing of the kind occurred in the present matter.

[118] Based on the evidence, Mr. Dagenais and the union represented the complainant diligently and professionally. In this respect, Ms. Benson's courteous letter to him of May 15, 2014, stands in stark contrast to the abusive and calumnious language he directed at the union's representatives. While he might have been dissatisfied with how the classification hearing unfolded and with the classification decision, it is not sufficient to substantiate his complaint. There is no evidence that the respondents' representation of him was arbitrary or discriminatory or that they acted in bad faith. Accordingly, the complaint must be dismissed.

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

(The Order appears on the next page)

VI. Order

[120] The complaint is dismissed.

September 18, 2019.

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board