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File: 561-02-40349

Citation: 2020 FPSLREB 32

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

RÉGIS BENIEY

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Beniey v. Public Service Alliance of Canada

In the matter of a complaint 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: Himself

For the Respondent: Daria Strachan, counsel

Decided on the basis of written submissions, filed April 29, June 21, July 21, November 29, and December 13, 2019.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] Régis Beniey, the complainant, filed a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2, "the *Act*"), which allows employees to file unfair-labour-practice complaints. Section 190(1)(g) refers to s. 185, which covers several unfair labour practices. The one of concern in this case is referred to in s. 187 of the *Act*, which reads as follows:

> ***187*** *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*

[2] The complainant is part of a bargaining unit represented by the Public Service Alliance of Canada (PSAC or "the respondent"). He alleges that the respondent did not help him exercise his right of recourse to the Federal Court, namely, a judicial review of how the Canada Border Services Agency ("the Agency") handled an access-to-information request that he made. He asks that the Board order the respondent to help him exercise that recourse.

[3] The respondent maintains that the complainant made no allegation that if proven, would lead to a conclusion that s. 187 of the *Act* was violated. Therefore, it asks the Board to dismiss the complaint without a hearing.

[4] For the following reasons, the respondent's request is granted, and the complaint is dismissed.

II. Written proceedings

[5] As no hearing was held, there is no evidence in the file. However, to deal with the respondent's dismissal application, I must determine whether, on taking as proven the complainant's alleged facts, there is an arguable case that the respondent breached its duty of fair representation to him.

A. The complaint

[6] The complainant began working for the Agency in January 2014. Initially subjected to an internship period, he obtained indeterminate employment status (at the FB-03 group and level) as of August 4, 2015. He submits that the workplace was toxic, which he denounced repeatedly. He ended up filing a grievance about harassment and discrimination in September 2016. According to him, the situation only worsened after that.

[7] On July 3, 2017, according to the complainant, most employees whose shifts ended at midnight received permission to leave at 11:45 p.m. However, he was ordered to remain until the end of his shift. He denounced that injustice and filed a grievance about it. Then, on July 15, 2017, management required that he return his work tools, including his firearm. He asked management for video recordings of the workplace from July 3, 2017, to prove that it was abusive treatment and an act of discrimination. Management replied that he had to make an access-to-information request.

[8] So, the complainant made an access-to-information request. The Agency requested additional time to respond to it.

[9] On October 24, 2017, the Agency terminated the complainant. According to him, the reason behind it was the July 3, 2017, incident.

[10] According to the document entitled "[translation] Recommendation to Terminate Employment", the Agency's perspective was somewhat different. According to it, from the start of his employment, the complainant had difficulties interacting with clients, his colleagues, and management. He became hostile when he disagreed with what was communicated to him, whether from management or from his colleagues.

[11] In fact, on July 3, 2017, the complainant was told that he had to work until the end of his shift, but according to the Agency, he was not the only one in that situation. His belligerent attitude was such that his colleagues and supervisors expressed a certain worry about him continuing to carry his defensive equipment, including the firearm. For that reason, his defensive equipment was taken from him on July 15, 2017.

[12] At that time, the Agency told him that he would have to be assessed in terms of his suitability to carry the defensive equipment, for which the Agency had to contact his doctor. The complainant first gave his consent to the assessment and then withdrew it. Carrying defensive equipment was a condition of his employment, which he no longer met. Additionally, he refused the assessment of his suitability to carry the defensive equipment. The Agency concluded that it could no longer employ him, which led to the termination.

[13] In the meantime, the complainant pursued his access-to-information efforts to obtain the video recordings of July 3, 2017. He finally received them, but according to him, they had been modified and were incomplete. He filed a complaint under the *Access to Information Act* (R.S.C., 1985, c. A-1). Due to the complaint, the Agency sent a second series of videos, which were again unsatisfactory, according to him. Some of the requested video recordings that showed his colleagues leaving were not provided on the grounds that he was entitled only to the recordings in which he appeared. Otherwise, the employer had a duty to protect the others' privacy. Moreover, under the recording-retention policy, some recordings had been deleted after 30 days, even though the complainant had requested them within 30 days of the incident.

[14] The Information Commissioner responded to the complaint in December 2018, concluding that there was no failure in the disclosure of the video recordings. The Information Commissioner indicated that there was no possibility of recourse against that decision but that a judicial review of the Agency's disclosure decision was possible and that it had to be done within 45 days of the Information Commissioner's response. Therefore, the deadline was January 28, 2019.

[15] In December 2018, the complainant contacted the respondent to request its help with the judicial review of the Agency's disclosure decision as he felt that the video recordings were essential to proving the abusive nature of his termination.

[16] The complainant and the respondent had numerous exchanges about the judicial review application, particularly between him and the respondent's representative responsible for the file. After receiving no response from the respondent, and watching the deadline approach, he hired a lawyer at his expense to file a judicial review application with the Federal Court. At the same time, the

respondent also decided to hire a lawyer, who filed a judicial review application with the Federal Court on the complainant's behalf, without informing him.

[17] According to the complainant, there was an error in law in the judicial review application that the respondent's hired lawyer filed. As a consequence, the application was doomed to fail. He wanted the respondent to withdraw the application that its hired lawyer had filed and to support his efforts and application by paying the lawyer he had hired. At his request, the respondent instructed its hired lawyer to withdraw the judicial review application that she had filed.

[18] I note that the respondent's hired lawyer is from the firm that the complainant had mentioned to it several times as being a good fit for his judicial review application.

[19] The complainant asks that the respondent reimburse him the legal fees associated with his judicial review application, which is still pending, and that it pay the fees of a representative of his choice for the adjudication of the grievance that he filed against his termination.

B. The respondent's reply

[20] The respondent submits that it fulfilled its duty of fair representation at all times with respect to the complainant. It did not act arbitrarily, discriminatorily, or in bad faith. Therefore, a violation of the *Act* cannot be found.

[21] The email exchange with the complainant and between the respondent's representatives clearly shows that they were aware of his concerns with the video recordings and the Agency's partial disclosure of them. It is also clear that the representatives carefully considered the possibility of a judicial review of the Agency's information disclosure, given the Information Commissioner's refusal to follow up on the complaint.

[22] As early as January 9, 2019, the respondent sought a legal opinion on the chances of success of a judicial review application.

[23] On January 23, 2019, the respondent's hired lawyer stated the opinion that the application had little chance of success as it could be hard to demonstrate that the Agency contravened the *Access to Information Act* in how it handled the video recordings. It is clear that the lawyer well understood that the Agency's action, not the

Information Commissioner's decision, should be challenged in the judicial review application. The lawyer was also well aware of the deadline for filing the judicial review application, which was January 28, 2019.

[24] On January 25, 2019, the respondent decided to file a judicial review application on the complainant's behalf, but in the meantime, he had filed his judicial review application with the Federal Court through the lawyer he had hired at his expense.

[25] On January 30, 2019, at the complainant's request, the respondent's hired lawyer withdrew the judicial review application that she had filed with the Federal Court.

[26] The correspondence between the parties at that moment illustrates the exchanges that took place. Throughout the month of January, the complainant pressured the representative responsible for his file to have the respondent hire a lawyer to file a judicial review application with the Federal Court. After doing that, the representative emailed the following to some members of the respondent's executive. He referred in it to the respondent's local representative, who referred the matter to the respondent's headquarters in December. The representative responsible for the file wrote the following:

> [Translation]
>
> … *I spoke with* [the respondent's local representative, who] *agrees with my methods (see the attachment). She states that this member is VERY difficult and that he constantly changes his mind about what he should do*….

[27] The attachment is a draft email addressed to the complainant on January 30, 2019, which reads as follows:

> [Translation]
>
> *Mr. Beniey,*
>
> *Due to your initial request that the PSAC take legal action, we have reviewed your file. I spoke with you and Chris Shuurman, the president of Local 16, on January 18, 2019, and described the steps that the PSAC would take. They included the assessment of the legal benefits of challenging the Information Commissioner's decision. I explained that independent of the challenge's merit, the PSAC would file the necessary documents to protect the timeline in which to challenge the Information Commissioner's decision.*

> *As the deadline was nearing, the PSAC instructed its lawyer to file a notice of a challenge to the Information Commissioner's decision (attached). After reviewing the jurisprudence, the PSAC's view is that we would not be successful in challenging the Information Commissioner's decision under s. 41 of the Act, but nonetheless, the PSAC believes that we must move forward as doing so can contribute positively to the grievance challenging your termination when the Federal Public Sector Labour Relations and Employment Board (FPSLREB) hears it. At the least, we feel that even an unsuccessful challenge of the Information Commissioner's decision can help the PSAC convince the PSLREB's adjudicator that the CBSA acted in bad faith when it destroyed the video recordings in question.*
>
> *On January 25, 2019, you informed me that you had retained the services of a lawyer and that you wanted to proceed on your own. Given the proximity of the deadline for filing the challenge against the Information Commissioner's decision, the PSAC filed a notice of application challenging the Information Commissioner's findings.*
>
> *On January 25, 2019, you also informed me that you thought that the PSAC would proceed incorrectly to "obtain access to documents required to review its decision on reports that the Commissioner did not return". The PSAC believes that this position is incorrect in law.*
>
> *Nevertheless, the decision is yours to challenge the Information Commissioner's decision. If you wish, the PSAC can withdraw its notice of application or inform the Federal Court that your lawyer will handle the matter. Please note that* ***the PSAC will not reimburse you any expenses related to the external lawyers whom you have hired.***
>
> *In short, you have the following options:*
>
> > *1) Give the PSAC permission to pursue the Information Commissioner's legal decision on your behalf;*
> >
> > *2) Ask the PSAC to withdraw the judicial review of the Information Commissioner's decision;*
> >
> > *3) Ask the PSAC to inform the Federal Court that your lawyer will handle the matter (the challenge of the Information Commissioner's decision under s. 41 of the Act).*
>
> *Please advise me of your decision by* ***February 1, 2019****.*
>
> [Emphasis in the original]

[28] The judicial review application that the respondent's hired lawyer filed did not challenge the Information Commissioner's decision but instead the Agency's decision to provide incomplete video recordings and to destroy certain recordings.

[29] As the Board's jurisprudence confirms, a bargaining agent fulfils its duty of fair representation if it carefully reviews the case of an employee in the bargaining unit that it represents and makes a reasoned decision that is neither discriminatory nor arbitrary. Indeed, that is found in this case. Everything indicates that the respondent carefully reviewed the complainant's file, sought a legal opinion, and ensured compliance with deadlines by filing a judicial review application on time. Therefore, it cannot be concluded that it acted discriminatorily, arbitrarily, or in bad faith.

[30] The respondent cited a number of Board decisions in support of its arguments. I will return to them in my analysis.

[31] The respondent claims that because the complainant's alleged facts cannot establish a violation of s. 187 of the *Act*, the complaint should be dismissed without a hearing.

C. The complainant's reply

[32] The complainant strongly opposes the dismissal of the complaint without a hearing. According to him, the facts clearly show the arbitrary and dishonest actions of the respondent and its representatives.

[33] According to the complainant, the judicial review application that the respondent's hired lawyer filed clearly demonstrates that the respondent acted in bad faith.

[34] By filing a judicial review application on January 28, 2019, given that the complainant had filed one on January 25, 2019, the respondent acted against his interests.

[35] The complainant disagrees with the strategy adopted in the judicial review application that the respondent's hired lawyer filed as it does not mention the exception to the requirement to disclose with respect to protecting privacy under s. 19(1) of the *Access to Information Act*. Indeed, the Agency cited as grounds to refuse to disclose certain video recordings the fact that the complainant did not appear in them and therefore is not entitled to them as the privacy of those who appear in the recordings must be considered. The complainant wants the videos because they demonstrate differential treatment between the employees who left undisturbed at

11:45 p.m. on July 3, 2017, and how he was treated in that the employer kept him at work.

[36] The complainant submits that the Agency could have blurred the faces of the other people in the video recordings if there was a privacy issue. The respondent's failure to support him in his efforts to pursue this argument before the Federal Court is a violation of his right to fair representation.

III. Subsequent arguments

[37] Once the complainant's reply was received, I decided to proceed by means of written submissions to decide the application for summary rejection. I held a conference call with the parties to discuss the matter. The complainant asked to be allowed to put questions to the representative responsible for the file in writing, which I granted.

A. The complainant's questions

[38] The questions are about the decision by the representative responsible for the file to ask the respondent's hired lawyer to file a judicial review application with the Federal Court without expressly seeking the complainant's authorization. Here are two examples:

> [Translation]
>
> *10. … On **January 25, 2019, at 2:12 p.m.**, you told the PSAC lawyer … to act without my knowledge; please explain why you did not send me the necessary documents, such as the legal representation mandate, the service agreement, and the legal authorization to use and distribute my personal information?*
>
> …
>
> *12. … did you (or anyone else at the PSAC) inform* [the respondent's hired lawyer] *of my decision in my email of **January 25, 2019, at 12:33 p.m.*** [in which he informs the respondent that he asked his lawyer to file a judicial review application with the Federal Court]*? If so, please indicate the exact date and time and how you forwarded her what I stated in my email of **January 25, 2019, at 12:33 p.m**.*
>
> [Emphasis in the original]

[39] The questions go into great detail about the parties' exchanges. The complainant returns to the comment about him, which was that he is very difficult, and asks the following question of the representative responsible for the file:

> [Translation]
>
> *15. … in your email of* ***January 29, 2019, at 9:41 p.m.****, you affirm that* [the respondent's local representative] *labelled me a VERY difficult member who constantly changes his mind; please indicate why you sent that allegation to PSAC management? What did the allegation help you claim and prove when you sent it? On what evidence did* [the respondent's local representative] *support her statements? Did you consider this allegation true when it was sent? Do you consider it true today?*
>
> [Emphasis in the original]

B. The respondent's reply

[40] The respondent presented its position on the complainant's allegations and questions as follows:

> [Translation]
>
> *3. The PSAC's position is fully set out in its submissions of June 21, 2019. In addition, the documentation produced with its submissions clearly shows that the union remained in regular contact with the complainant, analyzed the matter in detail, and obtained a legal opinion on how to proceed. When he decided that he wanted the PSAC to withdraw the judicial review application because he wanted to hire his own legal counsel, the PSAC respected his decision.*
>
> …
>
> *16. In this case, the evidence clearly shows that there were frequent communications with the complainant, that there was a careful review of the facts and the relevant jurisprudence, that a legal opinion was obtained, that the applicable laws and policies were reviewed, and that the response given was timely, logical, and reasoned.*

[41] The respondent then took up certain points raised in the complainant's questions and relied on the jurisprudence to show that his allegations could not support an arguable case that it had acted in contravention of the *Act*.

[42] According to the respondent, unions have considerable discretion to decide when and how they will offer representation support in grievances and legal proceedings. In particular, the duty of fair representation does not create an obligation to follow the represented employee's instructions on how to proceed. The union and the employee may disagree; it does not constitute a failure to represent. The union is entitled to decide on the allocation of its resources, provided it acts fairly.

[43] I will return to the jurisprudence in support of these principles in my analysis.

[44] The respondent submitted that it protected the complainant's rights by filing the judicial review application within the required time. He preferred to proceed with his application, which he had filed through another lawyer, and insisted that the respondent withdraw its filed application, which it did. Bad faith cannot be seen in those actions.

C. The complainant's reply

[45] The complainant submitted that the representative responsible for the file displayed bad faith, arbitrary behaviour, and discriminatory acts. He also submitted that a hearing is required to decide the merits of his complaint against the respondent.

[46] In his reply, the complainant repeated the facts alleged in his complaint. At the heart of his complaint is the fact that after many exchanges with the respondent, and still not knowing if it would file a judicial review application with the Federal Court, he filed an application, only to find out a few days later that the respondent had also done so, in his name and without informing him. He then received an explanation from the representative responsible for the file that showed that the representative did not understand the judicial review issue.

[47] According to the complainant, the judicial review application that the respondent's hired lawyer filed clearly shows that the respondent acted in bad faith and that it engaged in arbitrary behaviour.

[48] According to the complainant, the issues are as follows:

1) Did the representative responsible for the file and the respondent act in bad faith, and did they engage in discriminatory behaviour?
2) Did the representative responsible for the file, the respondent, and the respondent's hired lawyer act arbitrarily and demonstrate gross negligence by the following actions:
   a) failing to analyze and obtain a legal opinion on the Agency's application of s. 19(1) of the *Access to Information Act* to refuse the complainant access to the video recordings used to recover his defensive equipment and to terminate his employment; and
   b) limiting their analysis of the file to the possibility of a judicial review of the Information Commissioner's investigation report, since the *Access to Information Act* does not allow for it? In particular, did they engage in arbitrary behaviour and show gross negligence by filing a judicial review

> application under s. 41 of the *Access to Information Act* to mitigate the Agency's destruction of part of the video recordings?

[49] The argument goes on to demonstrate that in light of these questions, the respondent showed bad faith, dishonesty, and discriminatory behaviour, thus contravening s. 187 of the *Act*.

[50] The respondent and its representatives did not communicate enough with the complainant. They ignored his email informing them that he would file an application with the Federal Court. The judicial review application that the respondent's hired lawyer filed was contrary to his interests. He alleges that all this demonstrates their bad faith.

[51] The respondent could have filed a judicial review application on its behalf before the Federal Court; instead, it chose to file one on the complainant's behalf, without informing him. He never gave the mandate to the respondent's hired lawyer; nor did he authorize the use of his personal information to file the judicial review application.

[52] The respondent did not follow up on the complainant's many requests for explanations about the procedure it planned to follow with respect to the judicial review application.

[53] The respondent showed gross negligence by failing to properly specify the judicial review application and by failing to refer to s. 19(1) of the *Access to Information Act*.

[54] To allow the complainant to prove the abusive nature of his termination, it is essential that the judicial review be adequate. Notably, he wrote the following:

> [Translation]
>
> …
>
> *90. Since the recordings I seek are related to CBSA employees performing duties, it is clear that I can make an argument as part of a judicial review application under s. 41 of the Access to Information Act that the exception created by s. 3(j) of the Privacy Act applies in this case. Therefore, I am entitled to obtain the unredacted and unmodified versions of the recordings that still exist and to use them in the framework of my grievances.*

> *91. The importance of a measure such as the abusive ending of my employment, the editing, the truncating, and the destruction of the videos and the fact that I had been a Government of Canada employee since October 2012 should have led the PSAC to act more seriously but also with caution, particularly as my fundamental rights are being attacked by the actions of certain managers.*
>
> …

[55] The complainant reiterated that the judicial review application had to raise the fact that the Agency uses s. 19(1) of the *Access to Information Act* to refuse to provide information on the pretext of protecting the privacy of third parties.

[56] By ignoring the complainant's arguments and concerns, the respondent failed its duty of just and fair representation.

IV. Analysis

[57] The issue before me is the respondent's request to dismiss the complaint without a hearing. Therefore, I must determine whether, by taking the complainant's alleged facts as proven, there is an arguable case that the respondent contravened its duty of fair representation. Considering proven all the facts that he alleged (I speak of the facts, not the arguments), I find that he has no arguable case that the respondent contravened its duty of fair representation with respect to him.

[58] The complainant submitted a significant amount of jurisprudence to support his claim that the judicial review application that the respondent's hired lawyer filed was unfounded. However, this jurisprudence is of no use to me in terms of deciding the issue of which I am seized.

[59] The scope of the duty of fair representation was examined in *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, from which I quote the following:

> …
>
> *[43] The role of the Board in a complaint involving the duty of fair representation is to determine whether a bargaining agent acted in bad faith or in a manner that was arbitrary or discriminatory in its representation of the complainant. The Board does not determine whether the bargaining agent's decisions on whether to represent or how to represent were correct. The bargaining agent has considerable discretion in determining whether to represent an employee on a grievance and on how to handle a grievance. The*

> *scope of the discretion of a bargaining agent was set out by the Supreme Court of Canada ("SCC") in* Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509 at 527. The SCC was describing the discretion of the bargaining agent in determining whether or not to refer a grievance to arbitration, but the principles are equally valid for the decision on whether to represent an employee on a grievance:*
>
> …
>
> 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.
>
> …
>
> *[44] The Federal Court of Appeal has held that in order to prove a breach of the duty of fair representation, the complainant must satisfy the Board that the bargaining agent's investigation into the grievance "was no more than cursory or perfunctory" (*International Longshore and Warehouse Union v. Empire International Stevedores Ltd.*, 2000 CanLII 16578 (F.C.A). It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with….*
>
> …

[60] It is well-established in federal public sector labour-relations jurisprudence that a simple disagreement on how to proceed does not necessarily raise concerns about how a bargaining agent chooses to represent an employee in the bargaining unit. *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13, addresses that point as follows at paragraph 67:

> *[67] … I also agree with the bargaining agent that the duty of fair representation does not require it to comply with the complainant's requests. The duty of fair representation recognizes that a bargaining agent has limited resources and it has considerable discretion to make reasoned decisions about how to distribute those resources….*

[61] The issue is whether the complainant's alleged facts could show that the respondent's action was arbitrary, discriminatory, or in bad faith. An arbitrary decision is defined in *Cousineau v. Walker and Public Service Alliance of Canada*, 2013 PSLRB 68, as one made superficially, with no true examination of the facts.

[62] The facts that the complainant alleged in this case do not support an arguable case of arbitrary treatment by the respondent. He acknowledges that the respondent reviewed the file, hired a lawyer, and filed a judicial review application before the Federal Court, within the required time. Therefore, arbitrary treatment cannot be brought up.

[63] The facts that the complainant relies on suggest that the representative responsible for the file responded to his emails and followed up to ensure that the judicial review deadline was respected. It is clear that there was a lack of communication as of the simultaneous filing of the two judicial review applications. The representative responsible for the file seems to have misunderstood the nature of judicial review, as he thought that the judicial review application was related to the Information Commissioner's decision.

[64] The complainant saw the wording of the judicial review application filed with the Federal Court. He disagreed with the application. According to him, his rights were not adequately protected, and there was another way to deal with the Agency's refusal.

[65] Bargaining agents cannot be asked to never make a mistake in their representation of an employee in the bargaining unit, and they cannot be faulted for making a mistake on a specific point of a law. The complainant did not trust the approach taken on his behalf and chose to proceed on his own before the Federal Court. A mere disagreement with a legal strategy cannot be an arguable case that the respondent acted in an arbitrary or discriminatory manner or in bad faith in its representation of him. The following comment, from *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100, expresses well how to consider legal arguments in a case:

…

> *[60] In the very recent decision in* Martel et al. v. Public Service Alliance of Canada, *2009 PSLRB 16, the Board decided against the complainants, finding in part that a disagreement over the case*

> *law applicable to the merits of their case did not found a violation of the duty of fair representation. Similarly, in* Cyr v. Public Service Alliance of Canada, *2006 PSLRB 57, the Board found that the respondent did not act arbitrarily, in bad faith or in a discriminatory manner when, based on its analysis of the circumstances of a case, it chose to exclude from its representations arguments that the complainant felt should have been pursued.*
>
> *[61] Applying the principles established in the foregoing cases and in other Board decisions, it would be difficult, in my view, to find in the complainant's submissions evidence of arbitrary conduct, discriminatory treatment or bad faith decision making on the part of the respondent that would be sufficient to prove a violation of section 187 of the Act, on the balance of probabilities. 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.*
>
> …

[66] A bargaining agent that uses its funds to retain the services of a lawyer in the representation of an employee in the bargaining unit is entitled to give that lawyer the mandate it considers appropriate. It can certainly take into account the private interests of the employee, the broader collective interests of all employees in the bargaining unit, and even its interests.

[67] In particular, an action made in bad faith is marked by such hostility that the bargaining agent cannot properly represent the interests of the employee in the bargaining unit (see, for example, *Benoit v. Trimble*, 2014 PSLRB 46).

[68] The complainant submits that the negative comment about him, which was that he is very difficult, shows the respondent's bad faith. However, he does not allege that that comment would have prevented the respondent from obtaining a legal opinion and filing a judicial review application. Instead, apparently, the representative responsible for the file made the comment while looking into the file to determine

whether the letter that he planned to send to the complainant was appropriate in the situation.

[69] Finally, to determine that the respondent's actions were discriminatory, indications of differential treatment based on an inherent characteristic of the complainant would be required (see, for example, *Gilkinson v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 62; and *Myles v. Professional Institute of the Public Service of Canada*, 2017 FPSLREB 30). He did not allege any facts to suggest discriminatory behaviour by the respondent or its representatives.

[70] I find that the complainant did not present any allegations that could give rise to an arguable case that the respondent acted in an arbitrary or discriminatory manner or in bad faith in its representation of him.

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

(The Order appears on the next page)

V. Order

[72] The request to dismiss the complaint without a hearing is allowed.

[73] The complaint is dismissed.

March 26, 2020.

FPSLREB Translation

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