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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

CAROLE PRONOVOST

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, DEBI DAVIAU, NEIL HARDEN, DUNG NGUYEN, AND GAIL QUINN

Respondents

Indexed as
Pronovost v. Professional Institute of the Public Service 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: Herself and Carmine Paglia, audit advisor

For the Respondents: Isabelle Roy, counsel

Decided on the basis of written submissions, filed August 28, November 12, and December 6, 2019.
(FPSLREB Translation)

I. Complaint before the Board

[1] The complainant, Carole Pronovost, filed an unfair-labour-practice complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against the Professional Institute of the Public Service of Canada (PIPSC or "the Institute") and some of its members. Debi Daviau, its president, who is also named as a respondent, refused to accept the complainant's request to be appointed as a steward. The complainant maintains that the refusal is arbitrary and discriminatory and that it is based on false grounds. She asks that the Board intervene and remedy the situation.

[2] For the following reasons, the Board is of the view is that the complaint is not founded in law. Therefore, it is dismissed.

II. Background

[3] This decision follows the parties' filed written submissions. The facts alleged by the parties are uncontested, even though their perspectives differ considerably. In the following paragraphs, I present the facts that I deem true.

[4] The complainant has worked at the Canada Revenue Agency (CRA) since 1993. She filed grievances against actions by her employer that were finally settled as part of an agreement reached in December 2018. She stated that from the experience, she gained a great deal of knowledge about workplace harassment, which she wished to share with employees. So, she believed that she was an ideal person to be a steward.

[5] The complainant first applied to be appointed as a steward in November 2017. Her application was rejected, apparently on the recommendation of Valérie Charette, PIPSC's manager for the Quebec Region. She wrote a lengthy email to the complainant in February 2018 to explain her recommendation but also to emphasize that the decision to appoint a shop steward rested with the president, Ms. Daviau, according to internal PIPSC rules.

[6] In her email, Ms. Charette explained that her recommendation arose from PIPSC's Steward Policy ("the Policy"). She cited the following excerpt from it:

…

> *Members applying to become a steward who is [sic] currently involved in any conflicts with their employer or any other member may have their application held in abeyance until the conflicts are resolved. Decisions on whether to postpone an application will be made by the President who will inform the member of this decision. Review of the application will proceed when the member advises the Institute that the situation has been resolved….*
>
> …

[7] Ms. Charette then explained that this part of the Policy is based on the idea that the steward must have some perspective to represent members effectively. She added that someone who has conflicts with an employer and is involved in several proceedings would have less time to devote to others' problems. She was still optimistic about an eventual appointment, as the following excerpt attests:

> [Translation]
>
> …
>
> *That said, I am certain that everything you have gone through and continue to go through today will be very useful to you in your future steward role and that members experiencing workplace conflicts or harassment at work will benefit from your experience. Thus, the experience gained will help you as a member representative in your efforts to change things and improve procedures that are often deficient in many respects.*

[8] In December 2018, the complainant reached an agreement with her employer to settle the grievances. The agreement is confidential, and I have no intention of saying more than is necessary about it to understand the events that followed. Therefore, it suffices to say that under the agreement, the complainant is to no longer appear at her workplace except "[translation] as required", and she is to retire before the end of 2020.

[9] Once the issues were settled with her employer, the complainant again applied to be appointed as a steward.

[10] The President refused to appoint her and gave as reasons in her March 20, 2019, letter the facts that she would no longer be present in the workplace and that she was to retire in 2020.

[11] The complainant had recourse to the appeal process. She maintains that using the confidential agreement without checking with her seriously infringed the principles of procedural fairness. According to her, the President should not have illegally used a

confidential agreement or at least should have consulted her to interpret it. The decision's arbitrary and discriminatory nature makes it invalid. She objects to the President's interpretation of her absence from the workplace, which she considers unreasonable, since she is able to go there "as required", which includes the need to meet with or accompany a member. According to her, her retirement should also not have been a factor.

[12] The complainant is part of the executive of the PIPSC local in Montreal, which voted unanimously to recommend that she be appointed as a steward.

[13] On May 24, 2019, the appeal committee, made up of Neil Harden, Dung Nguyen, and Gail Quinn (also named as respondents in this complaint), upheld the President's decision. The committee specified that under the guidelines adopted by PIPSC's Board of Directors, its mandate was limited to verifying whether the President's refusal to appoint someone as a steward was a decision made in bad faith or in an arbitrary or discriminatory manner.

[14] The appeal committee noted that the Policy provides that in the event of an absence of more than 90 days, the status of steward is suspended for the duration of the absence. Exceptional circumstances could arise to justify maintaining the status during the absence, but the decision rests with the president.

[15] According to the appeal committee, it means that a steward must normally be present in the workplace. Thus, first and foremost, the President had a valid reason to reject the complainant's application. Before the appeal committee, it was up to the complainant to show that the refusal had in fact been decided in bad faith or in an arbitrary or discriminatory manner.

[16] According to the appeal committee, using the protocol agreement did not violate any confidentiality rules, since PIPSC, as the complainant's representative in the discussions with her employer, was also a party to the agreement. Therefore, it was normal that the President knew the agreement's terms.

[17] The appeal committee was sensitive to the fact that creating an obligation for the complainant to go to the workplace to meet with members to some extent skirted the agreement with her employer that she was not to appear at the workplace.

[18] The appeal committee expressly excluded the resolution of the Montreal local's executive supporting the complainant's candidacy for steward, stating that it could consider only the parties' arguments.

[19] Finally, the appeal committee concluded that the President's decision was reasonable given the circumstances, that it was not tainted by bad faith, and that it was not arbitrary or discriminatory. Therefore, the appeal was dismissed.

[20] The complainant wrote the following in her complaint:

> [Translation]
>
> *Debi Daviau and the appeal committee (Neil Harden, Dung Nguyen, and Gail Quinn) have penalized me by the refusal and by maintaining the unjustified, discretionary, abusive, and discriminatory refusal to become a steward.*

[21] As corrective measures, she asked to be appointed as a steward and to receive exemplary and punitive damages for the breaches of procedural fairness and natural justice and for the harm caused by the discriminatory, discretionary, unjust, and abusive refusal.

III. Summary of the arguments

A. For the respondents

[22] According to the respondents, the Board has no legislative jurisdiction to deal with the complaint. They emphasize that the complainant did not specify the legislative provision that applies in this case. She simply made an unfair-labour-practice complaint under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). Because she terms the President's decision a penalty, the application of s. 188(c) of the *Act* should be considered. It is worded as follows:

> ***188*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> …
>
> ***(c)*** *take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner ….*

[23] Yet, the decision not to appoint the complainant as a steward does not constitute a penalty. The respondents cite *Veillette v. Professional Institute of the Public*

Service of Canada, 2009 PSLRB 64 at para. 32, for the definition of "penalty" in the context of s. 188(c) of the *Act*. The definition reads as follows: "[translation] a sanction established or imposed by a statute or authority to suppress a prohibited act." According to the respondents, a penalty means the loss of an advantage or the imposition of a disadvantage. That is not the complainant's situation. She has no inherent right to be appointed as a steward.

[24] Furthermore, the respondents maintain that even if the Board had to deem that not appointing the complainant as a steward constituted a penalty, it would also have to establish that the penalty was applied in a discriminatory manner. Yet, the decision was not discriminatory. Nothing indicates that the rule and the policies were applied to the complainant's application in any way other than how they would have been for other members. The Policy defines the steward role as follows:

> …
>
> *As representatives of the Institute, stewards are responsible for ensuring the flow of information to and from the membership. They act as the employees' representative within the workplace by assisting in the handling of complaints and grievances. Stewards represent the Institute at formal and informal consultation meetings with the employer. They also act as a referral agent and a guide to the members requiring union service.*
>
> …

[25] The respondents add that when stewards are absent for prolonged periods, they normally lose their status during that absence. The Policy provides as follows:

> …
>
> *Stewards on extended periods of leave (for more than 90 days) will see their stewardship interrupted for the duration of the leave. Under exceptional circumstances, Steward [sic] may wish to maintain their stewardship during this period. In such cases, stewards will send a written request, including the reasons why they wish to maintain their stewardship, to the PIPSC Steward Coordinator who will submit the request to the President.*
>
> …

[26] According to the respondents, the President's decision represents a consistent interpretation of the Policy, given the complainant's particular circumstances. No discrimination is evident there. In addition, she had recourse to the appeal process. Finally, hers was not the only application rejected. The President must keep the interests of PIPSC and its members in mind; she applied the Policy in good faith.

B. For the complainant

[27] First, the complainant emphasizes PIPSC's delay filing its response and asks the Board to reject the response for that reason. However, if the Board accepts the response, the complainant argues as follows.

[28] The complainant specifies that her complaint was made under s. 188(c) of the *Act*. She states the issues in the following terms:

> [Translation]
>
> …
>
> *8. Are the rendered decisions* [the President's, refusing to appoint her as a steward, and the appeal committee's, upholding the President's decision] *inherently unreasonable and in violation of the principles of procedural fairness and natural justice, particularly the fact that the respondents deliberately used grounds to exclude the complainant as a steward, which therefore constitutes discriminatory treatment, thus allowing for reversing the decisions and allowing the complainant to become a steward?*
>
> *9. Are the rendered decisions unreasonable compared to other members, thus constituting discriminatory treatment, allowing for reversing the decisions to allow the complainant to become a steward?*
>
> *10. Were the decisions to refuse and to uphold the refusal of the complainant's application to be a steward tainted by an error in law or based on an erroneous finding of fact, made in an abusive, arbitrary, or discriminatory manner or tainted by bad faith, without accounting for her evidence and without respecting procedural fairness? In that event, does the arbitrary, discriminatory, or bad-faith decision constitute a penalty or (disguised) disciplinary action that has harmed the complainant?*
>
> *11. Did Debi Daviau, by refusing the complainant's application to become a steward, exercise her discretionary power in bad faith and based on discriminatory criteria or bad faith or arbitrarily?*
>
> *12. Can Ms. Debi Daviau properly act as PIPSC's president when she no longer holds a position in the federal public service, a position that is required to act as PIPSC president? In the event that she cannot properly act as PIPSC president, all the decisions that Ms. Debi Daviau made are null and void.*
>
> *13. Did the appeal committee respondents act in bad faith and in violation of the principles of procedural fairness and natural justice by upholding the refusal of the complainant's application?*
>
> *14. Did the appeal committee respondents act in bad faith and in violation of the principles of procedural fairness by adding grounds for upholding the refusal?*

> *15. Can the bad faith and the harm give rise to moral, punitive, and exemplary damages?*

[29] As corrective measures, the complainant asks to be appointed as a steward without delay and asks for moral, exemplary, and punitive damages for the harm she suffered.

[30] The complainant raises a number of flaws in the contested decisions. For example, despite the support she enjoyed within PIPSC and from the executive of the local, the President refused to appoint her as a steward, contrary to her obligation to conduct consultations honestly.

[31] According to the complainant, the reasons that the President and the appeal committee stated are false and unjustified. She continues to have access to the Montreal Tax Services Office. Neither the President nor the appeal committee heard her arguments showing that according to her, she could fully represent the members as a steward.

[32] The complainant repeated several times that the decision is discriminatory, without specifying the ground of discrimination. The only explanation she provides is the following: "[Translation] The term 'discriminatory' means arbitrary or in bad faith."

[33] The complainant's argument is long and detailed, and in it, she returns to the themes of the issues by trying to show that the President and the appeal committee acted in bad faith and arbitrarily and that they violated the rules of procedural fairness and natural justice. In particular, she accuses the appeal committee of adding another item to the President's grounds for rejecting her application; namely, allowing her unrestricted access to the workplace would to some extent skirt the agreement reached with her employer.

[34] I cite the following excerpt from the complainant's arguments:

> [Translation]
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> …
>
> *86. … the complainant denies that her only recourse is to prove that a penalty was imposed in a discriminatory manner. The respondents cannot legally deny justice to the complainant, which they are attempting to do, especially when the decisions were rendered in bad faith based on discriminatory or arbitrary criteria, which was counter to the members' interests.*

IV. Analysis

[35] For the purposes of the analysis, the phrase "the Board" designates not only this Board but also those that preceded it.

[36] PIPSC filed its response on November 12, 2019, while the complaint was made on August 28, 2019. The complainant first filed a complaint on July 26, 2019, but the Board asked her to submit it in the required form, which was done on August 28, 2019.

[37] On September 25, 2019, the Board sent the complaint to PIPSC, requesting a response within 15 days, with the deadline falling on October 10, 2019. PIPSC's response was served on the complainant that day. PIPSC inadvertently forgot to file the response with the Board. Given the date of the response, I am of the view that PIPSC did indeed respond to the Board's request, and I accept the explanation of inadvertence. Since the complainant received the response on the prescribed day, she suffered no harm from PIPSC's oversight. Therefore, the response is accepted, even if it was filed late, following a request by the Board.

[38] The Board has only limited jurisdiction to intervene in the internal affairs of employee organizations. This was emphasized in one of the first decisions to interpret s. 188(c) of the *Act*, namely, *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, in which the Board wrote the following at paragraph 62:

> *[62] Those provisions* [ss. 188(c) and (e) of the *Act*] *raise specific issues under the* Act *and they do not authorize the Board to act as the final arbitrator of all internal disputes within a bargaining agent. They do not, for example, authorize the Board to decide the scope of offences that may be the subject of discipline within the bargaining agent or that may deny membership in the bargaining agent … Simply put, it is not for the Board to say what is a legitimate internal policy or rule or by-law of a bargaining agent except in narrow circumstances. These circumstances include where the policy, rule or by-law is itself discriminatory or its application has discriminatory consequences….*

[39] That said, I do not agree that the Board has no jurisdiction. The complaint is properly before the Board; the issue is to decide whether the facts deemed true could lead to a finding that PIPSC contravened the prohibition set out in s. 188(c) of the *Act*.

[40] In this case, to vindicate the complainant, I would have to determine that there was a disciplinary measure or penalty and that the application of the disciplinary

standards was discriminatory. Therefore, I would also have to find that there was some kind of disciplinary action.

[41] With respect, I cannot subscribe to the issues proposed by the complainant. The purpose of a complaint under s. 188(c) of the *Act* is not to determine whether the decision was unreasonable, arbitrary, or made in bad faith or whether it violated the rules of procedural fairness. Once again, the only way for the Board to analyze the complaint is to determine whether the disciplinary standards might have been applied discriminatorily. I believe that the complainant errs when she denies that her "[translation] only recourse is to prove that a penalty was applied in a discriminatory manner". That is indeed the only recourse the *Act* provides. For example, the Board cannot respond to her question as to whether the President is still properly in office. The Board has no jurisdiction to rule on the legality of an employee organization's elections.

[42] In addition, as the Board emphasizes in *Bremsak*, its intervention under s. 188(c) of the *Act* is not the same as that possible in s. 187, under which the Board determines whether a bargaining agent failed in its representation of an employee because it acted arbitrarily, discriminatorily, or in bad faith.

[43] In this case, the complainant believes that this is a disguised disciplinary action, since she considers the refusal to appoint her to be a penalty imposed by PIPSC's president.

[44] In *Veillette*, the Board, citing the *Dictionnaire canadien des relations du travail*, 2nd. Ed. (1986), defined the term "penalty" as follows: "a sanction established or imposed by a statute or authority to suppress a prohibited act." In that case, the complainant had been suspended from his union duties because he had filed a complaint with the Board against the union. Therefore, the Board was able to find as follows at paragraph 32: "Thus, by preventing him from performing his union duties, the respondents imposed a penalty on the complainant. The penalty is the suspension, and the prohibited act is the filing of a complaint."

[45] This case has nothing like that. The fact that the complainant feels aggrieved does not transform the President's and the appeal committee's decisions into a penalty or into the application of disciplinary standards. In all the submitted correspondence, I see nothing similar to a desire to punish or correct behaviour, which is a condition for

a finding of a penalty. In *Myles v. Professional Institute of the Public Service of Canada*, 2017 FPSLREB 30, the Board wrote the following:

> …
>
> *[101] A condition to being able to establish the basis for a complaint under s. 190(1)(g) of the* Act *against an employee organization or its officers or representatives under s. 188(c) is that the organization or its officers or representatives took disciplinary action against or imposed a penalty on a member. There is no evidence that that took place. Since there is no evidence of disciplinary action or any form of a penalty, the complaint cannot succeed.*
>
> …

[46] To me, that reasoning appears applicable in this case. I do not have to put the President's decision on trial, and I do not sit in appeal of the appeal committee's decision. Its mandate was broader than mine; it was to decide whether the President's decision was arbitrary, discriminatory, or made in bad faith.

[47] The complainant emphasized that the President did not consider the resolution of the Montreal local's executive, which supported her in her pursuit of the appointment. The President may conduct consultations, but at the end of the day, she decides. Those are PIPSC's rules. The complainant may feel deprived of a chance to offer her services to members, but I agree with the respondents that there is no right to be appointed as a steward. The rules of procedural fairness and natural justice apply when someone is deprived of a right. In the federal public sector, the *Act* protects employees' rights with respect to their employers. It also protects the rights of union members with respect to their unions but much more narrowly.

[48] Only had PIPSC imposed a disciplinary action or some kind of penalty by applying disciplinary standards in a discriminatory manner would I have been able to intervene. Once again, the issue is establishing whether, considering the alleged facts, disciplinary standards were applied. I see nothing in the allegations that would lead to a conclusion of disciplinary action.

[49] I understand that the complainant feels aggrieved by being deprived of her coveted position. She certainly may feel that she is being punished, but I see nothing in the actions of PIPSC or the President that would have a punitive motive. The President expressed reasons for not appointing the complainant that subscribe to the Policy's logic — the presence of stewards in the workplace, every day, is more than desirable; it

is essential for healthy labour relations and the continual representation of the bargaining unit members' interests. The investment in training a steward justifies the expectation of the performance of his or her duties for a certain time.

[50] The complainant might disagree with these reasons, but to me, they appear reasonable enough to not be false grounds. However one interprets the agreement that settled her conflicts with her employer, the fact is that the parties agreed that she would not be in the workplace except as required. That cannot mean being there at any given time or being there to witness the day-to-day work activities. That the President sees in the agreement an obstacle to the effective representation that the steward must provide does not seem outlandish to me and especially, for the purposes of my decision, does not appear to me an imposition of disciplinary standards.

[51] In addition, no facts support a discrimination allegation. In *Gilkinson v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 62, in which a disciplinary consequence flowed from a substantiated harassment complaint, the complaint under s. 188(c) of the *Act* was dismissed for the reason that Mr. Gilkinson did not submit any discrimination allegation, as the term is understood in labour law. The reasoning appears in the following paragraphs:

> …
>
> *[16] Parliament has given the Board a very narrow jurisdiction to interfere in the internal affairs of employee organizations. The only grounds on which the Board can interfere in disciplinary actions by an employee organization against its members are discrimination or the denial of rights protected by the* Act*. The complainant alleges discrimination. There must be some indication, if all the facts that are alleged were true, that the employee organization would have discriminated against him.*
>
> *[17] Discrimination is not defined in the* Act*. However, the French version of the* Act *speaks of "*distinctions illicites*", or illegitimate distinctions, to translate discrimination. Black's Law Dictionary defines discrimination as "differential treatment"; the Concise Oxford Dictionary defines the verb discriminate as "to make an unjust distinction in the treatment of different people".*
>
> *[18] In* Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, the Board considered the meaning of "discriminatory" in s. 188(c) in the following manner:*
>
> > **85.** With regards to the matter of discrimination I consider this to be the hallmark of the prohibition in paragraph 188(c). I say this because it is not every disciplinary action or every imposition of a penalty that is prohibited; the

> action or penalty has to be in the context of the employee organization's standards of discipline, and the action or penalty must be taken or applied "in a discriminatory manner" to come within the prohibition in paragraph 188(c)….
>
> …
>
> **86.** In the context of administrative justice and labour relations, a broad interpretation of discrimination within the bounds of the legislation is appropriate, and the Board must consider not only the "… result of the application of disciplinary standards but also the basis for their application and the manner in which they have been applied." Further, in *Daniel Joseph McCarthy*, [1978] 2 Can LRBR 105; cited in *Beaudet-Fortin* at paragraph 84, the following was stated:
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> …
>
> > *In our opinion the word "discriminatory" in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by [human rights legislation]; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that there is no fair and rational relationship with the decision being made …*
>
> **87.** In my view, those comments can be applied to considerations of discrimination under paragraph 188(c) of the Act. The goal of preventing discrimination under that provision is inclusive and is achieved by preventing bargaining agents from excluding employees from the activities of an employee organization based on attributed rather than actual abilities. The essence of the protection is to prevent illegal, arbitrary or unreasonable barriers.…
>
> …
>
> *[19] Discrimination, then, involves an illegitimate distinction based on irrelevant grounds. In this case, the complainant has not shed any light on the nature of the distinction he alleges. No grounds are invoked. Rather, a conflictual situation has arisen.*
>
> …

[52] The same reasoning applies in this case. The complainant did not mention any grounds for an illicit distinction that would have led to the discriminatory application of disciplinary standards.

[53] As a result, s. 188(c) of the *Act* does not apply in this case, and the Board will not intervene to change the President's decision to refuse to appoint the complainant as a steward.

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

(The Order appears on the next page)

V. Order

[55] The complaint is dismissed.

March 2, 2020.

FPSLREB Translation

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