Date: 20201221

Files: 561-02-840, 38681 and 39691

Citation: 2020 FPSLREB 119

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

JOHN BURNS

Complainant

and

UNIFOR, LOCAL 2182

Respondent

Indexed as
Burns v. Unifor, Local 2182

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

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Michelle Arruda, Unifor Local 2182

Decided on the basis of written submissions,
filed October 25 and November 22, 2019,
and January 6, February 11, and June 30, 2020.

REASONS FOR DECISION

I. Introduction

[1] John Burns holds a substantive position as a marine communications and traffic services officer instructor with the Canadian Coast Guard. As such, he is an employee of the Treasury Board ("the employer"). His position is classified in the Radio Operations Group bargaining unit ("the RO bargaining unit").

[2] I am seized with three duty-of-fair-representation complaints that Mr. Burns made against Unifor, Local 2182 ("the union", "Unifor", or "the respondent"). It is the bargaining agent certified to represent employees in the RO bargaining unit. The first of the three complaints was made in May of 2017.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9), received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act* and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act* ("the *Board Act*"), the *Federal Public Sector Labour Relations Act* ("the *Act*") and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[4] The most substantive complaints are the first and third filed by Mr. Burns. They address the same set of issues and concerns, although over different time frames. The underlying issue behind them concerns Mr. Burns' absence from the workplace starting in mid-2015. He asked for and received assistance from his union in dealing with that issue. In these complaints, Mr. Burns describes dozens of telephone calls, exchanges of correspondence, and meetings he had with Unifor officers and staff over a period exceeding three years (November 2015 to December 2018).

[5] It is evident that Mr. Burns was very frustrated with the assistance provided by his union. He cited difficulties and lapses in communication. He disagreed with many of the union's recommendations about strategy for resolving his situation. The areas of disagreement included applications for long-term disability (LTD) benefits and

worker's compensation benefits, access to medical services, and access to emergency and long-term housing. His complaints alleged that Unifor failed its duty of fair representation by acting in ways that were arbitrary, discriminatory, or in bad faith.

[6] In the second complaint, Mr. Burns alleged that Unifor failed its duty of fair representation by not notifying him about the ratification process for a collective agreement.

[7] For its part, Unifor took the position that Mr. Burns' complaints were untimely, as they were filed outside the 90-day time limit set out in the *Act*.

[8] To the extent that the Board finds any portion of Mr. Burns' complaints timely, Unifor took the position that his complaints do not make out a "*prima facie*" case that it violated the *Act*. It asked that the Board rule on these preliminary objections on the basis of written submissions and that it dismiss Mr. Burns' complaints without an oral hearing.

[9] I will apply the "arguable-case analysis" often applied by this Board when faced with an objection such as this. In other words, even if all Mr. Burns' allegations were accepted as true for the purpose of that analysis, I will determine whether he has shown an arguable case that Unifor violated the *Act* by providing representation that was arbitrary, discriminatory, or in bad faith.

[10] I initially asked for and received the parties' written submissions on the timeliness issue. Following a case management teleconference with Mr. Burns and Unifor, I then asked for Mr. Burns' written submissions on how his complaints would show an arguable violation of the *Act*. Before making those submissions, Mr. Burns was provided with some leading cases on the duty of fair representation.

[11] I have decided to dismiss all three complaints without an oral hearing. I will provide detailed reasons for this decision in the pages that follow but will briefly introduce them now.

[12] It will become clear in the analysis that follows that the vast majority of the specific events about which Mr. Burns complained took place well before the 90-day window set out in the *Act*. His first complaint was made in May of 2017, but many of the key events about which he complained took place much earlier, in 2015 and 2016.

Only a few events listed in his complaints took place within the 90-day window provided for in the *Act*.

[13] The more significant challenge with his complaints is that nowhere does he make a specific allegation that the union misrepresented him in dealing with issues that arose out of his absence from the workplace. All his allegations concern a difference of opinion about strategy, communication conflicts between him and his union representatives, or delays getting back to him when he was promised a reply.

[14] Specifically, nowhere in his complaints did Mr. Burns allege that Unifor refused to represent him concerning his absence from the workplace. Nowhere did he allege that it refused to represent him during a grievance process. He did not claim that he ever requested the filing of a grievance. He did not allege that Unifor should have counselled him to file one.

[15] I acknowledge that the duty of fair representation under the *Act* is not necessarily limited to representation during the grievance process, though that is the most common context in which duty-of-fair-representation complaints are made. However, I could not find within Mr. Burns' allegations a clear indication of what other process of representation he was complaining about that would engage the duty of fair representation under the *Act*.

[16] For remedy, Mr. Burns quoted from s. 192(1)(d) of the *Act,* which says that the Board may order an employee organization to "… take and carry on any proceeding that the Board considers that the employee organization ought to have taken …". But he made no specific proposal for remedy that might help me understand what proceeding he thinks Unifor ought to have fairly represented him in, other than at one point arguing that it should retain independent legal advice to assist him.

[17] The complaint documentation shows that during almost the entire period covered by his three complaints, Mr. Burns was on **leave with pay** while absent from his workplace. His submissions indicated that the union helped him obtain that leave. He stated that Unifor arranged with his employer that he would continue on leave with pay while he applied for LTD benefits.

[18] Ultimately, based on the events as described by Mr. Burns, I cannot conclude that, if I accepted all of his allegations as true for the purpose of this discussion, Unifor may have committed an unfair labour practice as described in the *Act*.

[19] I appreciate that Mr. Burns feels deeply frustrated about his working relationship with his union representatives. I understand that he has complained about the quality and timeliness of service and communication. I understand that he feels that their advice was confusing, inconsistent, or untimely. He wants the Board to conduct a full hearing of his complaints, in the hope that it may fix these problems.

[20] However, without a timely and arguable case of violation of the *Act*, the Board cannot justify investing its limited resources into the conduct of full hearings into complaints like those of Mr. Burns. The Board is not an ombudsperson with the power to address complaints of general dissatisfaction with a union.

[21] Therefore, I make no findings as to whether Mr. Burns' specific allegations against Unifor were founded. In the pages that follow, I will attempt to explain the reasons for dismissing his complaints without an oral hearing. I will reference both the *Act* and the case law (or jurisprudence) of this and other labour boards when it comes to duty-of-fair-representation complaints.

[22] I will also note that in June of 2019, a few months **after** the filing of his third complaint, Mr. Burns' employer changed his employment status from leave **with pay** to leave **without pay**. The submissions before me show that he filed a grievance about that change. The submissions before me also show that Unifor is providing him with representation in that grievance process.

[23] However, that grievance is not an issue before me. Neither is Unifor's representation of him during that grievance process. I am cognizant of the fact there may be some overlap of issues or events between these complaints and that grievance. Therefore, I have endeavoured to keep the reporting of his work situation to the bare minimum required to explain my decision whether there is an arguable case for these three complaints.

II. Context surrounding the complaints

A. The three complaints before the Board

[24] This section provides background details regarding Mr. Burns' three complaints along with a chronology of events, including their filing, Unifor's replies to them, and the steps taken by the Board.

1. The first complaint

[25] Mr. Burns emailed his first complaint to the Board's Registry on May 4, 2017 (Board file number 561-02-840; "Complaint #1"). The complaint form named Michelle Arruda as the respondent. Ms. Arruda is a Unifor staff representative. The Board has always considered this complaint (and all three of them) as being against his bargaining agent, Unifor Local 2182.

[26] The Board's Registry, however, registered the complaint as having been filed on May 15, 2017, which is the date it received the original copies from Mr. Burns. At the time the complaint was made, the *Regulations* provided that a complaint was received when the Board received it in duplicate, or if it was faxed, it was deemed to be received on the date of the fax if the fax was followed up with the original complaint and a copy of the complaint sent to the Board.

[27] Mr. Burns' complaint was made using Form 16, then part of the *Regulations*. It was used to make an unfair labour practice complaint under s. 190 of the *Act*. At section 5 of that form, Mr. Burns stated the date on which he "… knew of the act or omission or other matter giving rise to the complaint …" as February 3, 2017. Section 9 of that form asked for the corrective action that a complainant sought, and Mr. Burns quoted verbatim from s. 192(1)(d) of the *Act*. At all relevant times, paragraph 192(1)(d) provided as follows:

> ***192 (1)*** *If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> . . .
>
> *(d) if an employee organization has failed to comply with section 187, an order requiring the employee organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the Board considers that the employee organization ought to have*

> *taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;*

. . .

[28] During the written submission process, Mr. Burns submitted that he had emailed his complaint to the Board on May 4, 2017, and that initially, an officer of the Board's Registry informed him that that date would be recognized as the filing date. She later told Mr. Burns that she had misinformed him but that nevertheless, his emailed documents would form part of the record.

[29] The substance of Complaint #1 consisted of a seven-page listing of events dating from November 10, 2015, through February 3, 2017. In this document, Mr. Burns reported on telephone calls, in-person meetings, or email discussions with Unifor officials and staff. For each event, he explained what he thought the respondent had done wrong.

[30] Unifor responded to Complaint #1 on June 16, 2017. It took the position that it had been helping Mr. Burns apply for LTD benefits, had been very engaged with his case, and would continue to assist whenever possible. It also took the position that the complaint did not support an arguable case of violation of the *Act*.

[31] Mr. Burns responded on June 22, 2017. He said that he had accepted Unifor's assistance with LTD but that he wanted to address concerns of harassment, bullying, violence in the workplace, and libel on the part of his employer in grievance responses and communications with the Worker's Compensation Board of Nova Scotia. He said that "… independent legal advice is necessary and requests the Respondent to provide such for him." He also specified that his complaint was made under s. 187 of the *Act*, which read as follows at all relevant times:

> ***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.*

[32] Following the filing of the Complaint #1, the parties mutually agreed to access the Board's Mediation and Dispute Resolution Services. A mediation session was held in the fall of 2017. However, no settlement was reached.

[33] On September 14, 2018, the respondent raised an objection to Complaint #1, arguing that it was untimely, as all the events listed in it had taken place more than 90 days in advance of its filing.

2. The second complaint

[34] Mr. Burns made his second complaint on June 12, 2018 (Board file number 561-02-38681; “Complaint #2”). He alleged that Unifor had violated s. 187 by not notifying him that a ratification vote of a collective agreement had taken place. In his complaint form, Mr. Burns stated that he learned of the respondent’s violation on March 26, 2018.

[35] In Complaint #2, Mr. Burns also stated that he had not yet received a signing bonus or retroactive pay associated with the new collective agreement. As for corrective action, he quoted again from s. 192(1)(d) of the *Act*.

[36] The respondent’s reply to Complaint #2 was dated July 3, 2018. It stated that Mr. Burns had access to its website, including its members-only area, where voting instructions had been published. It said that as a former vice president of the local, Mr. Burns knew that the union published collective bargaining updates on its website. It said that he had asked to be removed from receiving union updates via email.

[37] The respondent also stated that Mr. Burns had been on paid leave from his position with the Canadian Coast Guard since June 8, 2015. It explained that the collective agreement it had reached did not contain a signing bonus but that it did provide for retroactive pay increases. It acknowledged that the employer was having significant problems processing retroactive pay, due to issues with the Phoenix pay system. It said that it had filed a policy grievance on the matter and that it was seeking damages for its members. Finally, it said that Mr. Burns had never reported any pay problems to it but that he continued to have the ability to file a grievance. It asked for Complaint #2 to be dismissed without a hearing.

[38] On February 25, 2019, Unifor took the position that Complaint #2 was also untimely in its entirety. It included documentation showing that the tentative agreement had been reached in January of 2017, that the ratification process took place between February and March of that year, and that a new collective agreement

had been signed on May 23, 2017, more than a year before the June 12, 2018, date on which Mr. Burns made Complaint #2.

3. Scheduled hearing for Complaints #1 and#2

[39] The Board scheduled a hearing into Complaints #1 and #2 for September 18 to 20, 2018, in Thunder Bay, Ontario, the major city nearest Mr. Burns' location. The respondent requested a postponement of the hearing due to a scheduling conflict, which Mr. Burns supported. A previous panel of the Board assigned to that hearing denied the request. Mr. Burns then made a request to change the hearing location to Ottawa, Ontario. That same previous panel of the Board also denied that request. Mr. Burns then made a request to postpone the hearing based on a death in his family.

[40] A case management conference was held on September 13, 2018, at which the previous panel of the Board agreed to postpone the hearing.

4. The third complaint

[41] Mr. Burns' third complaint was made on January 22, 2019 (Board file number 561-02-39691; "Complaint #3"). It contains what he described as "… a simple chronological listing of shortcomings Mr. Burns experienced at the hands of his Union, Unifor Local 2182, while attempting to address work related issues causing Mr. Burns to refuse work on 2015-06-08." Over the course of more than 30 pages, Mr. Burns lists 41 separate communication events with his union.

[42] The first 27 of these communication events, from November 10, 2015, to February 3, 2017, repeat the events covered in Complaint #1. For each event, Mr. Burns added an explanation as to why he considered the respondent's actions arbitrary, discriminatory, or made in bad faith.

[43] The new allegations, numbered 28 to 41, started at November 1, 2017, shortly after the mediation held for Complaint #1. The final date listed in the chronology is December 11, 2018.

[44] The respondent responded to Complaint #3 on February 22, 2019. It argued that the complaint was untimely or that at least all the events that occurred 90 days before the filing date were untimely and ought to be dismissed. It submitted that only items 39 to 41 fell within the 90-day period and made alternative objections to those 3 which I will address later in my reasons.

5. Written submissions and the case management conference

[45] I became seized of Mr. Burns' three complaints in September of 2019.

[46] I then directed the parties to provide written submissions on the respondent's timeliness objections. Unifor's written submissions were received on October 25, 2019; Mr. Burns' reply was received on November 22, 2019.

[47] Following a review of those written submissions. I decided I wanted to hear further submissions from the complainant as to how his allegations showed an arguable case that Unifor violated the *Act.* On December 13, 2019, I asked the Board's Registry to write to the parties and explain that I was considering inviting written submissions or holding a one day oral hearing. The parties were asked for their availability for a case teleconference to discuss the matter.

[48] Mr. Burns provided some initial written submissions on January 6, 2020. The case management conference was held on January 29, 2020.

[49] During the case management conference, Mr. Burns indicated a preference to make additional submissions in writing. A deadline of February 28, 2020, was initially set.

[50] Mr. Burns then made a request for more time to complete his submissions. In replying to his extension request, I asked the Board's Registry to answer a further question from him about what he was being asked to do. He was invited to answer the question, "…if his version of events is believed, how has the *Act* been violated?" He was told that the Board did not expect him to file evidence that would normally be brought to a hearing, but that he was free to attach any relevant supporting documents he wished to provide with his arguments.

[51] On February 11, 2020, the respondent provided some clarifications with respect to its objections to Complaint #3.

[52] Mr. Burns was granted an extension until June 30, 2020. He made his final written submissions on that day.

[53] In the analysis portion of this decision, I consider the contents of Mr. Burns' complaints, Unifor's replies to them, and the parties' written submissions.

B. Complaints about Mr. Burns' employer

[54] Before dealing with Complaints #1, #2 and #3, I would like to address a question Mr. Burns asked about whether his complaints were also being made about his employer.

[55] When Mr. Burns made his November 22, 2019, submissions on the timeliness of his complaints, he sent the Board a second email. In it, he explained that the Canadian Human Rights Commission (CHRC) had recently notified his employer of his intent to pursue discrimination allegations. He then asked this question:

> *I am unfamiliar with the process, but CHRC did ask if my FPSLREB complaint covered the employer side of the discrimination. I believe that allegation statements 18 and 29 of* [Complaint #3] *demonstrate the employer's involvement. My question is thus: To satisfy CHRC's request to pursue all procedures available to me, would the currently submitted complaints cover the necessary FPSLREB grievance process in my case (i.e. is it simply a matter of adding the employer as a respondent?) or do you require that I submit a fresh grievance to handle the employer's side of the discrimination I am experiencing?*

[56] In response, I directed that the Board's Registry write to Mr. Burns as follows: "[t]he complaints you have filed with the Board are against your bargaining agent, Unifor Local 2182. They are not grievances against your employer. The procedure for filing grievances is set out in your collective agreement."

[57] I felt that it was important to inform Mr. Burns that his duty-of-fair-representation complaints against Unifor were not a grievance against his employer. This point will be reinforced during my review of the relevant jurisprudence on duty-of-fair-representation complaints.

C. Complaints about the Board

[58] In that supplementary November 22, 2019, email, Mr. Burns also explained that he had attempted to submit a complaint to the federal minister "… responsible for handling complaints regarding Federal Tribunal processes supported by the [Administrative Tribunals Support Service of Canada]." (That portion of the federal public service provides support services to the Board and 10 other administrative tribunals). He explained that in November and December of 2018, he had sent emails and letters to the Honourable Dominic Leblanc, on the understanding that he was the appropriate minister, but that he had not received a reply. He asked if the Board could

provide information "… on the Ministry now responsible for handling complaints regarding Federal Tribunal processes supported by the [Administrative Tribunals Support Service of Canada]."

[59] In reply, I directed that the Board's Registry inform Mr. Burns that the Honourable Anita Anand was the minister responsible for both the *Act* and the *Board Act*. However, that reply also stated as follows:

> *The Board would like to add that if you have concerns with respect to how the Board has treated your three complaints […] you are encouraged to make those concerns known directly to the Board. Should you wish to do so, prior to the Board considering your written submissions on these complaints, you are asked to do so no later than December 11, 2019. Any supplementary submission must be copied to the respondent and other parties.*

[60] On December 11, 2019, Mr. Burns provided the Board with the correspondence he had directed to Ms. Anand. Upon review, it became clear that his correspondence concerned events related to the scheduling of his hearing in September of 2018 and the nature of his discussion with the previous panel of the Board during the case management conference of September 13, 2018. In his correspondence, he questioned that panel's impartiality.

[61] At my direction, on December 13, 2019, the Board's Registry wrote to Mr. Burns to inform him that I had been appointed a new panel of the Board to adjudicate Complaints #1, #2 and #3. That same email indicated that his further submissions on the three complaints were being sought, as was the parties' availability for a case management teleconference (which eventually was held on January 29, 2020).

[62] In addition, on April 1, 2020, the Board's chairperson wrote to Mr. Burns, responding to the correspondence he had sent to Ministers Leblanc and Anand. She reminded him that the previous panel of the Board assigned to his complaints had passed away in 2019 and that I had been assigned as a new panel of the Board. She invited Mr. Burns to raise with me any issues he might have as to how his case was proceeding.

[63] The chairperson also informed Mr. Burns that if he was not satisfied with a decision made by the Board, the appropriate recourse would be to make an application to the Federal Court of Appeal for a judicial review of the decision.

[64] Following that correspondence, I received no further submissions from Mr. Burns on the Board's handling of Complaints #1, #2 and #3.

III. Analysis

A. Issues before the Board

[65] The following are the issues that I will consider with respect to Mr. Burns' three complaints:

- Are Mr. Burns' complaints timely, either in whole or in part?
- To the extent that all or parts of his complaints are timely, has he shown an arguable case of violation of the *Act*?

[66] Before considering those issues, I will review the provisions of the *Act* applicable to Mr. Burns' complaints and the relevant jurisprudence. That legal context must inform my analysis of the complaints before me.

B. Duty-of-fair-representation complaints under the *Act*

[67] Duty-of-fair-representation complaints are made under s. 190(1)(g) of the *Act*, the relevant portions of which read as follows at all relevant times:

> ***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)*** *. . . 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.…*

[68] Section 185 of the *Act* lists several unfair labour practices, including those prohibited by s. 187, which read as follows at all relevant times:

> ***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.*

[69] Similar provisions to s. 187 of the *Act* can be found in many other pieces of legislation that are in force federally or provincially across Canada, including, for

example, Part I of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"), which is administered by the Canada Industrial Relations Board ("the CIRB"). Section 37 of the *Code* sets out the duty of fair representation as follows:

> ***37*** *A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.*

[70] While there are some differences in wording between s. 187 of the *Act* and s. 37 of the *Code*, the provisions are sufficiently similar for the purpose of this discussion. Like the *Act*, the *Code* also provides for a 90-day time limit for making duty-of-fair-representation complaints. However, unlike the CIRB, the Board has no power to extend that time-limit: *Roberts v. Union of Canadian Correctional Officers*, 2014 FCA 42.

[71] In 2004, in *McRaeJackson v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290, the CIRB set out the principles by which it decides duty-of-fair-representation complaints. I find that many comments expressed in that case are useful to help focus on the purpose of the duty of fair representation.

[72] I will briefly review what I consider some of the most helpful elements in *McRaeJackson*. The CIRB noted the duty of fair representation is common to most Canadian labour legislation.

[73] The Supreme Court of Canada set out five principles underlying any union's duty of fair representation in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509. Although the second principle does not have direct application under the individual-grievance framework set out in the *Act*, the other four principles have been used by the Board on many occasions to define the scope of the duty of fair representation under the *Act*:

> *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.*

[74] Although the CIRB's analysis of what it takes to mount a duty-of-fair-representation case focuses entirely on grievances, the following comments at paragraph 33 apply also to complaints under the *Act*:

> *[33] A union can fulfill its duty to fairly represent an employee by taking a reasonable view of the grievance, considering all of the facts surrounding the grievance, investigating it, weighing the conflicting interest of the union and the employee and then making a thoughtful judgment about whether or not to pursue the grievance. That is called balancing the circumstances of the case against the decision to be made. For example, it is legitimate for the union to consider collective agreement language, industry or workplace practices, or how similar issues have been decided. It is also legitimate for the union to consider the credibility of a grievor, the existence of potential witnesses in support of the grievor's version of the events, whether the discipline is reasonable, as well as the decisions of arbitrators in similar circumstances.*

[75] It could be argued that the CIRB's singular focus on grievances is related to the specific wording of s. 37 of the *Code*, which imposes the duty of unions to employees "… with respect to their rights under the collective agreement that is applicable to them."

[76] Under the *Act*, s. 187 imposes a duty of fair representation on unions in the "… representation of any employee in the bargaining unit." In other words, the duty of fair representation under the *Act* is not restricted to issues under a collective agreement.

[77] In *McRaeJackson*, at para. 53, the CIRB found that a complainant's ability to request a remedy "is a good indication of whether the complainant understands the duty of fair representation." I believe that the CIRB's comments can be helpful, when applied carefully to duty-of-fair-representation complaints under the *Act*. In other words, the way in which a complainant spells out the remedy that he or she seeks from the Board can help in its assessment of whether the complaint relates to a union's statutory duty to represent him or her fairly. A complaint cannot be merely about disagreements on strategy or dissatisfaction with communication between a complainant and the union; a complaint must be about the violation of the duty of fair representation set out in s. 187 of the *Act*.

[78] In *McRaeJackson* at paragraph 49, the CIRB limited its role as follows:

> *[49] The Board is an independent and adjudicative body whose role is to determine whether there have been violations of the* Code*. Although the* Code *gives the Board broad powers in relation to any matters before it, it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant, to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace. Employees who allege that their union has violated the* Code *and wish to obtain a remedy for that violation must present cogent and persuasive grounds to sustain a complaint.*

[79] In all duty-of-fair-representation complaints, the issue before the Board is expressed in these questions: Has the union violated the *Act*? Has the union performed its statutory representation role in a way that is arbitrary, discriminatory, or in bad faith? Is there, for example, a proceeding that the union did not carry out, and that it ought to have carried out, in the representation of an employee in the bargaining unit?

[80] In *McRaeJackson* at paragraph 54, the CIRB provides this conclusion as to why most duty-of-fair-representation cases are not founded:

> *[54] Ultimately, if the union has directed its mind to the employee's complaint, gathered the information relevant to making a decision, attempted to resolve the situation and reasonably exercised its discretion not to pursue a grievance or refer it to arbitration according to the criteria stated earlier, and informed the employee of its reasons for doing so, an employee will have little cause for complaint.*

[81] In paragraph 47, the CIRB also took pains to explain that a duty-of-fair-representation complaint is not a proxy for a grievance against an employer:

> *[47] The employer is not a principal party to a section 37 proceeding. Its actions are not at issue and it has no case to defend. As a matter of practice, it is added as an affected party since its interests could be affected by the outcome of the complaint. …*

[82] In the matter before me, Unifor asked that the complaints be dismissed without a hearing. Unifor asked that the Board exercise its discretion not to hear Mr. Burns' evidence. The issue before me, at this stage, is therefore not to decide whether Complaints #1, #2 and #3 are supported by evidence showing, on a balance of probabilities, that the Unifor has violated a duty of fair representation that it owed to Mr. Burns. Rather, the Board is tasked with assessing, on the basis of the sole allegations supporting the complaints, whether Mr. Burns has an arguable case that deserves to be heard.

[83] The Board has applied an arguable-case analysis in similar circumstances numerous times over the years. It is true that the Board has not always used the exact same words to express the test that it applied, but the Board's analysis was mostly uniform and consistent. I find that *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2, is a good representation of the arguable-case analysis followed by the Board. Paragraph 86 of that decision stated the test as follows: ". . . if the Board considered all the facts alleged in the complaints as true, there is an arguable case that the respondent contravened the unfair labour practice legislative provisions of the [Act]".

[84] Para. 105 of *Hughes* also provided the following caution:

> *105 I agree with [Quadrini v. Canada Revenue Agency and Hillier, 2008 PSLRB 37,] that, when conducting the required assessment, I must be cognizant that, if I have any doubt about what the facts, assumed to be true, reveal, then I must err on the side of finding that there is an arguable case for the required link that the respondent contravened [the Act], and I must preserve the complainant's opportunity to have his complaints heard in a proceeding . . . .*

[85] Finally, under the *Act*, the Board and its predecessors have interpreted as mandatory the 90-day time limit to file and duty-of-fair-representation complaint.

Unifor cited a number of cases in which the Board has adhered strictly to this limit, including *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78 at para. 55, where it ruled that there is no provision that allows it to extend the 90-day time limit prescribed in the *Act*. Even if a complaint is made at day 92, the Board has ruled that it would be untimely (see *Nemish v. King, Walker and Union of National Employees (Public Service Alliance of Canada)*, 2020 FPSLREB 76).

[86] In *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7, the Board confirmed at paragraph 18 that it may not extend the 90-day time limit but that it may review when the complainant knew or out to have known of the alleged violation:

> *18 Parliament chose to impose the 90-day period on any party that wishes to make a complaint under section 190 of the* PSLRA*. The Board cannot change that provision, but it may review the circumstances used to determine the date on which the 90-day period began. Subsection 190(2) states that the period began when the complainant knew or ought to have known of the action or circumstances giving rise to the complaint. That is a factual issue.*

[87] The Board's decision in *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100, is relevant to the situation in Mr. Burns' complaints. In *Boshra*, the Board recognized that a complaint that makes many allegations over an extended period may "… illustrate elements of a broader or underlying pattern in the representation provided by the respondent", even if some of the events predate the 90-day time limit. In such a case, a "… complaint might be said to be timely if the evidence shows that he was in a position to realize that there was a pattern that violated section 187 only on a date that falls within the 90-day filing period, perhaps as the result of a precipitating event" (at paragraph 22). This requires the Board to examine the essential nature of the complaint.

[88] In *Boshra*, the Board concluded that the essential nature of the complaint was clear well in advance of the 90-day time limit provided for in the *Act*, and it dismissed the complaint.

[89] Mr. Burns argued that the Board applied a similar approach in *Jutras Otto v. Brossard and Kozubal*, 2011 PSLRB 107. In that case, a complaint was made at the end of several months of discussion and correspondence between the complainant and her union representatives. The respondent had argued that the complaint was

untimely. The Board ruled at paragraph 58 against the respondent's timeliness objection on the basis of the following analysis:

> *58 I am therefore satisfied, based on the evidence before me, that the date on which the complainant knew, or ought to have known, of the action or circumstances giving rise to her complaint was sometime shortly after March 10, 2010, which means that her complaint, which was filed on March 23, 2010 is timely. The complainant's email of March 10, 2010 confirms her realization that she was not receiving the representation services she had been promised. Until then, the complainant appeared to be under the impression that some form of representation would be forthcoming. The complainant's evidence on this issue is both credible and compelling.*

[90] In conclusion, the Board has not extended the 90-day time limit for making complaints but has inquired into the nature of a complaint being made and examined whether a precipitating or triggering event took place within the 90-day time limit.

[91] In the remainder of this decision, I will apply the principles mentioned above to the issues to be considered in relation to Mr. Burns' three complaints. Given their similarities, I will analyse Complaint #1 and Complaint #3 in order, followed by Complaint #2.

C. Complaint #1

[92] Complaint #1 was emailed to the Board on May 4, 2017. Mr. Burns indicated on the complaint form that the date he "… knew of the act or omission or other matter giving rise to the complaint …" was February 3, 2017. The original complaint form was received by mail on May 15, 2017. The complaint would be timely if I consider May 4, 2017, as the filing date as the complaint would have been filed on the 90th day of the 90-day time limit set out in the *Act*. However, the complaint would be found untimely if I consider May 15, 2017, as the filing date, as it would have been filed on day 101. It was in part on that latter basis that Unifor argued that the entire complaint should be dismissed.

[93] In his written response on that timeliness objection, Mr. Burns argued that his complaint had been filed by email on May 4, 2017, which fell on exactly the 90th day after February 3, 2017. He alleged that on May 5, 2017, a member of the Board's Registry's staff had emailed him and had said that his complaint would be registered as received on May 4, 2017, if it was followed by originals. On May 10, 2017, the same

member of the Board's Registry's staff allegedly said that she had misinformed him and that the complaint would be marked as being filed as of the date on which it was received by mail.

[94] At the time Mr. Burns made Complaint #1, the *Regulations* provided that the originating date for a complaint was either the date that it was received in duplicate at the Board or the date on which it was faxed to the Board, if the fax was followed up by an original of the complaint and a copy. The Board has previously accepted an email filing as if it were a fax filing for the purposes of s. 3(2) of the *Regulations (Hughes,* paragraph 66).

[95] I am cognizant of the fact that as of March 18, 2020, the revised *Regulations* now provide for the electronic filing of originating documents.

[96] I will follow *Hughes* and proceed on the basis that Complaint #1 was made on May 4, 2017. That makes the complaint timely with respect to the events of February 3, 2017. The question I must therefore examine is whether Mr. Burn's allegations about the events of that date show an arguable case that Unifor violated its duty of fair representation.

[97] As for events prior to that date, I could find the complaint timely if I was satisfied that something crystalized on February 3, 2017, that would amount to an arguable case of a violation of the duty of fair representation.

[98] Mr. Burns described the events of February 3 as a "… long, confusing, revealing exchange." He stated that he and Ms. Arruda discussed his treatment for mental health, the status of his claim for LTD benefits, and the union's recommendation that he be able to demonstrate an ability to return to work. He stated that he was seeing a psychologist only because the union requested it; that his doctor could not make his employer, union, or insurer speak to him; and that his circumstances did not fall in line with LTD, which is why he had wanted to pursue a worker's compensation benefits claim. He also stated that he asked Ms. Arruda to be more clear or specific about her recommendations in terms of medical treatment.

[99] I am not satisfied that the events of February 3, 2017 as described by Mr. Burns show an arguable violation of the duty of fair representation.

[100] There is no mention in Mr. Burns' narrative of events for February 3, 2017, about the filing of a grievance. There is no mention of a request for any specific form of representation that was denied to him by Unifor. There is no refusal on the part of Ms. Arruda to continue representing him.

[101] In his final written submissions, Mr. Burns claimed that Ms. Arruda closed off their February 3rd exchange with a text stating, "John I do have to leave for a meeting now I'll talk to you later." He said that at some later point (after February 3 and before the filing of Complaint #1), he concluded that she did not intend to get back to him.

[102] I understand Mr. Burns' allegation that Ms. Arruda did not return his call. However, the lack of a returned phone call does not in and of itself show an arguable case for a duty-of-fair-representation violation. Perhaps the more significant challenge with this argument is that Mr. Burns' Complaint #3 makes it clear that Ms. Arruda did not abandon his case.

[103] As for the events that precede that date, Mr. Burns' argued that the discussion with Ms. Arruda on February 3, 2017, was a "triggering event" for his complaint. He argued that the chronology of events listed in his complaint, which started on November 10, 2015, and ended on February 3, 2017, are the "…material matter that is being discussed…" and not the triggering event. He argued that following the Board's analysis in *Jutras Otto*, his entire complaint should be found timely and heard in full at an oral hearing.

[104] Mr. Burns' summary of events in Complaint #1 lists no fewer than 35 contacts between himself and union representatives during a time frame that started on November 10, 2015, and ended on February 3, 2017, for a span of approximately 15 months. In other words, they were in touch with each other more than twice per month, on average.

[105] In January 2017 alone, Mr. Burns and Ms. Arruda spoke or emailed on at least four occasions. In his report of these exchanges, Mr. Burns stated that Unifor recommended that he complete an independent medical examination before proposing a return to work and that he continue with medical treatment, and it continued to encourage him to seek approval for LTD benefits.

[106] Once again, there is no mention of a specific need for representation, and there are no reports of any specific action or decision of the employer that would have required action on the part of Unifor.

[107] Looking comprehensively at Mr. Burns' complaint and his subsequent written submissions, he said that in March of 2015, he made a complaint about bullying and harassment and "… having to handle work related activities outside of work hours without the benefit of being able to report these hours." As of June 8, 2015, he refused work for health and safety reasons, pursuant to Part II of the *Code*. He said that he was returned to the payroll in December of 2015. He described working with his union on this and recognized that the union helped in returning him to the payroll and being placed on a leave with pay status.

[108] It is clear from Mr. Burns' narrative that he did not feel that his union understood his workplace issues or his health status. However, I looked long and hard at the contents of these submissions to see an arguable case that Unifor violated the *Act* in its attempt to assist him with his issues.

[109] There were only two mentions of specific events in which the union made strategy decisions that, arguably, might have engaged the duty of fair representation.

[110] For the dates of February 16 and 17, 2016, Mr. Burns asserted that Unifor was not prepared for a second-level National Joint Council (NJC) grievance hearing on issues related to relocation. He did not make any submissions as to how that grievance was resolved or whether it is still outstanding. However, even if there were any substance to his complaint about those events, they took place more than a year before Complaint #1 was made, or well outside the 90-day time limit. I am left with no plausible explanation why Mr. Burns could not have known of those events prior to February 3, 2017.

[111] For the date of September 8, 2016, Mr. Burns alleged that the "Employer and Respondent direct Complainant to pursue LTD, and his salary is contingent on following this direction." Taking that assertion as true for the purpose of an arguable-case analysis, it might provide the Board with some justification for a hearing on the merits of whether the union had failed to fairly represent him in the process of working with the employer to provide that direction, if it had been made in a timely fashion. However, as this event took place more than 6 months before Complaint #1

was made, it is also well outside the 90-day time limit. Again, I am left with no plausible explanation why Mr. Burns could not have known of those events prior to February 3, 2017.

[112] Even if that allegation had been made in a timely manner, I cannot reconcile Mr. Burns' allegation that Unifor collaborated with the employer in imposing LTD on him, with his statement made about that in that same month (September 2016) Ms. Arruda "… arranges with [his] employer to have them continue to pay him until such time as he receives approval of his Sun Life claim." Furthermore, the documentation attached to his written submissions suggests that his leave-with-pay status continued through 2017 and 2018, right through until June of 2019, when the employer changed his status to leave without pay.

[113] If the earlier events listed in Complaint #1 are to be considered timely, I would have to be able to conclude that either the events of February 3, 2017, or Ms. Arruda's alleged failure to contact Mr. Burns sometime between February 3 and May 15, 2017, represented a triggering or crystallizing event that made him realize that Unifor was dealing with his case in a manner that was arguably arbitrary, discriminatory, or in bad faith.

[114] I am not satisfied that is the case. The underlying issue in Mr. Burns' allegations concerns how to address his absence from the workplace starting in June of 2015. His submissions suggest that Unifor worked on his case at least twice per month, on average, from 2015 through February of 2017. To the extent that any of his allegations support an arguable case of violation of the duty of fair representation, the events alleged took place several months in advance of the 90-day time limit. His submissions suggest that not only did Unifor assist him with LTD but also that it helped him obtain an extended form of leave with pay. This strategy was well established by the fall of 2016 and Mr. Burns ought to have known of it by that time.

[115] I conclude that Mr. Burns has not shown an arguable case that the events that he alleged in Complaint #1 constitute a failure of the duty of fair representation that Unifor owed to him.

D. Complaint #3

[116] Because Complaint #3 overlaps to a considerable extent Complaint #1, I will deal with it next.

[117] Complaint #3 was made on January 22, 2019. The details provided by Mr. Burns cover 41 different allegations. Those numbered 1 to 27 repeat the allegations made in Complaint #1. Those numbered 28 to 41 cover November 1, 2017, to December 11, 2018.

[118] The respondent argued that Complaint #3 was also untimely. Alternatively, it took the position that allegations 1 to 38 were untimely, as they occurred before the 90-day period provided for in the *Act*, and it made alternate arguments on allegations 39 to 41.

[119] Unifor's calculation of the 90-day period was in error, as it listed Complaint #3 as having been made on February 12, 2019. That was not the date on which it was made, it was the date on which the Board sent the complaint to the respondent, asking for its reply to the complaint.

[120] Complaint #3 was made on January 22, 2019, and the 90-day period preceding it started on October 24, 2018. This means that a total of 5 events listed in Complaint #3 (numbers 37 to 41) fall within the 90-day period.

[121] Unifor's alternative position on items 39 to 41 fell within the 90-day period, was as follows:

> *The respondent objects with the complaint under Subject to subsection (4), no complaint may be made to the Board under subsection (1) on the ground that an employee organization or any person acting on behalf of one has failed to comply with paragraph 188(b) or (c).*
>
> [*Sic* throughout]

[122] When it first took that position, on February 22, 2019, Mr. Burns had not spelled out that his allegations were in relation to s. 187. However, he did so shortly after that. Yet, when Unifor made its final written submissions on timeliness, on October 25, 2019, it reiterated its objection to allegations 39 to 41 by referencing s. 190(4) of the *Act*.

[123] Section 190(4) sets out the circumstances under which the Board can determine a complaint made under s. 188. Section 188(b) prohibits employee organizations from expelling or suspending an employee's membership in a discriminatory manner. Section 188(c) prohibits employee organizations from taking any disciplinary action or imposing a penalty in a discriminatory manner.

[124] Unifor's objection did not make sense to me. Perhaps it had wanted to suggest that Mr. Burns had not exhausted it internal processes to deal with his complaints. However, none of Mr. Burns' allegations or submissions claimed that he was expelled or suspended from membership in Unifor. None claimed that he had been disciplined or penalized by Unifor. Those would have been the only basis on which an objection to allegations 39-41 through reference to s. 188 and s. 190(4) could have been made.

[125] When I asked Unifor if it wished to clarity its position on allegations 39 to 41, it took the position that the allegations were not made in accordance with s. 190(2), which sets out the 90-day time limit for making such complaints. I did not find this clarification helpful, as it was simply a reiteration of its position that the complaint as a whole was untimely.

[126] However, Unifor also submitted that Mr. Burns' allegations in Complaint #3 did not establish an arguable case of violation of its duty of fair representation set out in s. 187.

[127] I have determined that allegations 37 to 41 took place within the 90-day period before the filing of Complaint #3; therefore, they are timely. The question remaining is whether Mr. Burns showed an arguable case of violation of the *Act* with them.

[128] In allegations 37 to 41, Mr. Burns reports on his discussions with Ms. Arruda about correspondence with Sun Life with respect to his LTD claims and the NJC issue. They had 5 discussions over the period of about 2 months. Mr. Burns argued that Ms. Arruda acted in an arbitrary way by treating him in an indifferent and a superficial manner. He argued that she demonstrated bad faith by not getting back to him when she promised to. Within these 5 allegations, he also refers to earlier events, including those enumerated in Complaint #1. Therefore, I will consider whether these 5 allegations either establish an arguable case of violation of the duty-of-fair-representation or represent a crystallizing event that establishes one in relation to earlier events.

[129] In relation to the test set out in *Canadian Merchant Service Guild*, Mr. Burns stated that Unifor failed to fairly represent him, to thoroughly study his case, and to undertake its representation with integrity and competence, without serious or major negligence, and without hostility.

[130] Mr. Burns argued that the employer's insistence in 2015 that he exhaust his sick leave and then go on sick leave without pay was disciplinary.

[131] In relation to paragraph 27 of *McRaeJackson*, which provided examples of bad-faith actions on the part of a union, Mr. Burns argued that the respondent conspired with the employer to have him pursue LTD as a means to resolve his work refusal.

[132] In relation to paragraph 29 of *McRaeJackson*, which provided examples of arbitrary behaviour on the part of a union, Mr. Burns argued that Unifor acted arbitrarily by having him continue with the Informal Conflict Management System in place at the Canadian Coast Guard.

[133] In relation to paragraph 30 of *McRaeJackson*, which stated that "[i]t is arbitrary to only superficially consider the facts or merits of a case" and arbitrary "… not to investigate and discover the circumstances surrounding the grievance", Mr. Burns argued that Unifor failed to make a reasonable assessment of his case and that it conveyed an attitude of not caring toward his interests.

[134] None of these arguments, however, have satisfied me that Mr. Burns showed an arguable case that Unifor violated the *Act*.

[135] There is no doubt that Mr. Burns experienced conflict with his Unifor representatives. There is no doubt that he disagreed with some of the strategies they recommended. He felt that they encouraged him to continue with the Informal Conflict Management System even though he wanted to pursue an investigation into workplace harassment. He did not understand why the respondent continued to recommend pursuing LTD instead of a worker's compensation benefits claim to solve his workplace issues.

[136] However, his allegations make it clear that despite his obvious conflict with Ms. Arruda over a period of several years, Unifor never stopped dealing with his case. Complaint #3 describes close to 50 interactions over a period of nearly 3.5 years. While he objected to some of the strategies Unifor recommended and claimed that certain

communications were not followed up, at no point did he claim or show that Unifor walked away from assisting him with his problems. Nothing in the complaint suggested negligence or hostility towards his situation.

[137] There is no allegation, for example, of a request on his part for specific representation under the *Act*, no mention of a refusal on the part of Unifor to represent him under the *Act*, and no allegation that Unifor should have counselled him to pursue specific rights during any period covered by the complaint or in relation to allegations 37 to 41.

[138] As with his earlier complaint, in Complaint #3, Mr. Burns did not provide any clear indication of the remedy he seeks. Such clear indication may have helped assess whether his allegations, taken as true for the purposes of this analysis, reveal an arguable case of a violation of Unifor's duty of fair representation.

[139] Mr. Burns rightly argued that representation under the *Act* is not restricted to collective agreement matters. However, representation still must be in relation to terms and conditions of employment for which the union has a representational role.

[140] The content of Mr. Burns' complaint made it clear that he disagreed with Unifor's recommendations with respect to the importance of making an LTD claim. However, the union's recommendation of a particular strategy does not make it arbitrary, discriminatory or in bad faith. Following from the principles outlined in *Canadian Merchant Service Guild*, Mr. Burns' allegations do not show an arguable case that Unifor's recommendation of this strategy was made without a thorough study of his case, or could be found to be negligent or hostile. Furthermore, his own allegations make it clear that it was not the sole representation strategy adopted by Unifor.

[141] Mr. Burns alleged that Unifor's recommendation that he work with a physician to develop a treatment plan engaged the duty of fair representation under s. 187. His report of those discussions suggests that Unifor recommended that strategy so that he could succeed in returning to work. I see nothing arbitrary, discriminatory or suggesting bad faith in that recommendation. Taking the allegations as true for the purpose of this analysis, I cannot find that they support an arguable case of violation of Unifor's duty of fair representation. Mr. Burns may not have liked the strategy Unifor was recommending, but it is clear from his own allegations that they continued to work with him and did not cease their efforts to provide him with representation.

[142] When it comes to an action that does clearly engage the duty of fair representation under the *Act*, the fact remains that in September 2016, Unifor assisted Mr. Burns by asking his employer to place him on paid leave status while he was away from the workplace. That paid leave status continued throughout the entire remaining period covered by the complaint and ended only in June of 2019, when the employer placed him on leave without pay. Mr. Burns allegations also stated that he filed a grievance against the employer when it placed him on leave without pay and that Unifor is representing him in that grievance.

[143] I am not seized of that grievance; nor am I seized of any complaint by Mr. Burns over how Unifor is representing him on it. As noted, I have endeavoured to keep out of this decision as many details as possible about events that may relate to the issue in that grievance. I have done so with a view to minimizing any impact this decision might have on that proceeding, while having to report a certain number of details in order to make a clear ruling regarding these complaints.

[144] As with Complaint #1, the only other events that might engage the duty of fair representation date to 2015 and 2016, such as his allegation that he had to use up his sick-leave credits and that the imposition of leave without pay due to illness was disciplinary. But he provided no argument as to why allegations 37 to 41 of Complaint #3 would represent a triggering event in those matters.

[145] Mr. Burns' written submissions on Complaint #3 demonstrate confusion on his part about the nature of his duty-of-fair-representation complaint. In it, he makes a number of allegations about decisions of his employer dating from 2015 and 2016, when he started his absence from work. As described in his correspondence to the Board, he asked if his complaint would serve the purpose required by the CHRC that he exhaust the grievance process before proceeding with a complaint under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[146] In conclusion, although I have found that some portions of Complaint #3 were made in accordance with the 90-day time limit set out in s. 190(2) of the *Act*, I do not find that any of Mr. Burns' allegations suggest an arguable case of violation of the *Act*.

E. Complaint #2

[147] In Complaint #2, Mr. Burns alleged that Unifor failed in its duty to fairly represent him by not informing him about the ratification of a collective agreement for the RO bargaining unit.

[148] In his complaint, Mr. Burns stated that he became aware of the act or omission on March 26, 2018. In later submissions, he explained that that was the day on which he learned from a Unifor staff member that a new collective agreement had been reached. The complaint was made on June 12, 2018.

[149] In its response, Unifor attached materials from its website that showed that on January 20, 2017, it reached a tentative agreement with the Treasury Board for the RO bargaining unit. It announced how the electronic ratification process would unfold in a February 13, 2017, bulletin. On March 6, 2017, it released a bulletin stating that the tentative agreement had been ratified. On May 24, 2017, it released a bulletin indicating that the new collective agreement had been signed.

[150] Unifor took the position that Mr. Burns had access to the Local 2182 website and its members area, where voting instructions were available, and that as a former vice president of the local, he knew that the voting instructions were published there. It also reported that he had asked to be removed from the union's email updates.

[151] Responding to Mr. Burns' complaint that he did not receive a signing bonus or retroactive pay, it reported that the tentative agreement did not contain a signing bonus. It recognized that there were delays processing retroactive pay due to the Phoenix pay system, that it had filed a policy grievance on that matter, and that it was seeking damages. It indicated that if Mr. Burns was having issues with respect to his back pay, he was entitled to file a grievance.

[152] Later, on February 25, 2019, Unifor took the position that Complaint #2 was untimely. It did not find it credible that Mr. Burns learned about the new collective agreement only on March 26, 2018, given that it had been reached, ratified, and signed between January and May of 2017.

[153] On the timeliness objection, I could have requested Mr. Burns to explain why he did not learn of the 2017 tentative agreement until a year later.

[154] However, I will decide this complaint on the basis that Mr. Burns did not show an arguable case that Unifor violated its duty of fair representation. First, he made an allegation that he had not received a signing bonus. Unifor responded that the tentative collective agreement did not include a signing bonus, which Mr. Burns did not refute. Mr. Burns alleged that he had received no retroactive salary adjustment but did not respond to Unifor's position that the Phoenix problem with back pay had delayed retroactive payments for all its members and that he still could file an individual grievance if he wanted to.

[155] Finally, the Board's jurisprudence with respect to ratification votes is that they are an internal union matter than does not engage the duty of fair representation (see *Bernard v. Professional Institute of the Public Service of Canada*, 2020 FPSLREB 11, and *Sturkenboom v. Professional Institute of the Public Service of Canada and Dunn*, 2012 PSLRB 81).

[156] I therefore find that, in light of *Bernard* and *Sturkenboom*, Mr. Burns has not shown an arguable case that the events covered by Complaint #2 constitute a violation of Unifor's duty of fair representation.

IV. Concluding comments

[157] It is very clear that Mr. Burns has not been satisfied with the assistance his union has provided him since he left his workplace in June of 2015. He stated that he has experienced many communications difficulties with Unifor and its representatives. He has not agreed with several of their recommendations about strategy with respect to medical treatment and to applications for LTD and worker's compensation benefits.

[158] However, in none of his complaints have I found a clear articulation of how Unifor's actions may constitute a violation of the *Act*. He could not point to any clear instances in which the respondent refused to represent him in any dealings with his employer.

[159] The only specific instances that might have engaged s. 187 took place in 2015 and 2016, well outside the 90-day time limit for making his complaints under s. 190 of the *Act*.

[160] I think that it is important for Mr. Burns to know that the Board's role with respect to duty-of-fair-representation complaints is very limited. It does not have

general powers of inquiry that might be of assistance to a complainant who is having trouble with a union. It is not an ombudsperson charged with investigating whether a union is providing the best possible advice or service.

[161] Unifor made some technical errors in its responses to Complaint #3, which I pointed out earlier so that it too might better understand the *Act*. However, its errors do not alter my basic conclusions.

[162] I have concluded that on the basis of the parties' written submissions, most aspects of Mr. Burns' complaints are untimely, and that to the extent that some portions are timely, they do not put forward an arguable case of violation of the duty of fair representation set out in s. 187 of the *Act*. Given those conclusions, I do not believe that this matter justifies investing the Board's limited resources into the conduct of full hearings into the merits of the complaints.

[163] The best the Board can offer in a situation like this is mediation, to help the parties develop a solution that allows them to create a better working relationship. Mediation was attempted with respect to the Complaint #1, but without success. The parties did not agree to attempt mediation when the Board offered it a second time.

[164] Ultimately, many of Mr. Burns' submissions do not concern decisions made by Unifor; they challenge decisions made by his employer. I have pointed out why a duty-of-fair-representation complaint is not the proper process for pursuing such a claim. The appropriate process for that is usually the grievance process, and I have noted that Mr. Burns has a grievance in process that Unifor has supported.

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

(The Order appears on the next page)

V. Order

[166] The application to dismiss the complaints without a hearing is allowed.

[167] I order these files closed.

December 21, 2020.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board