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Citation: **2021 FPSLREB 23**

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

SONIA RICHARD

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Richard v. Professional Institute of the Public Service of Canada

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

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

For the Complainant: Éric Le Bel and Gabrielle Harvey, counsel

For the Respondent: Allison Tomka, counsel

Heard by videoconference,
January 12 to 14, 2021.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] Sonia Richard, the complainant, made a complaint against her bargaining agent, the Professional Institute of the Public Service of Canada ("the Institute" or "the respondent") under s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). She alleged that the respondent represented her negligently and in bad faith, notably due to a conflict of interest that fundamentally undermined the relationship of trust between her and the respondent.

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

II. Summary of the evidence

[3] The complainant testified. The respondent called the following witnesses: Robert Melone and Frédéric Durso, labour relations officers, the Institute; Jean Ouellette, retired, but occasionally hired by the Institute; and Isabelle Roy, General Counsel and Chief of Labour Relations Services, the Institute.

[4] The complainant is a social worker at the Department of National Defence ("the employer"). Since 2012, she has worked in the Mental Health Unit at the Bagotville military base in Quebec. Since 2014, she has been certified as a psychotherapist.

[5] The Mental Health Unit is made up of different professionals. Its offices are located in the basement of the medical clinic at the Bagotville military base. The complainant testified that she had an office in the Unit from 2012 to 2018. In October 2017, her doctor put her on medical leave. The doctor diagnosed an adjustment disorder and post-traumatic stress disorder (PTSD).

[6] The complainant's health problems were precipitated by treatment from one of her colleagues, "AB", starting in July 2015. According to the complainant, AB treated her coldly or made offensive remarks, which caused her to experience a great deal of anxiety. She talked about it with other colleagues, but they denied that there was a problem of any kind. According to the colleagues, in the complainant's words, everything was for the best, and the team got along very well. That reaction just worsened her anxiety, right up to her leave.

[7] As of October 2017, the complainant sought help from the Institute, as evidenced by several emails sent to Mr. Melone. She made a workplace-violence complaint against AB. It is clear from the exchanges that Mr. Melone was aware of the content of the complaint and that he advised the complainant on how to present her information if she wanted to maintain some confidentiality. It is also clear that he was available to discuss the different aspects of the harassment complaint with her.

[8] When she returned to work on April 24, 2018, the complainant returned to her office for a half-day. The next day, her manager informed her that she was to be moved to another building on the Bagotville military base. It appears that her colleagues did not want her to return to the Mental Health Unit. The employer decided to place her elsewhere. On May 1, 2018, she obtained a note from her doctor insisting that she resume her duties and return to her office. In fact, from April to September 2018, she had no office or clinical functions. She was placed in an office that was also used for hiring interviews, so she had to leave it rather often. She was then left without a workstation, idle, on a chair in a corridor or, during the summer, outside, at a picnic table.

[9] Mr. Melone had several email exchanges with the employer to stress the complainant's right to return to her office. The employer cited difficulties in the working environment in light of her complaint against a colleague. But Mr. Melone pointed out that the complaint was made in November 2017 and that the employer had done nothing to deal with it between November 2017 and the end of April 2018, when the complainant returned to work. In May 2018, the investigation into the workplace-violence complaint had not yet begun. In an email to management dated May 3, 2018, after reviewing the complainant's problems returning to work, Mr. Melone concluded as follows:

> [Translation]
>
> *… Ms. Richard has always been willing to cooperate with management to promote both a successful return to work and a healthier working environment in general.*
>
> *She is careful to maintain a harmonious working relationship with her colleagues but also with her management. For example, she confirmed that she was willing to participate, if necessary, in a possible activity to promote dialogue with her colleagues.*
>
> *Consequently, we do not want this email interpreted as a denial on our part of management's efforts. We are not questioning the good*

> *faith of Ms. Mercier* [the Mental Health Unit's manager] *and her team. We simply consider it necessary to correct, as soon as possible, what to us appear to be factors likely to jeopardize the goal we all share: Ms. Richard's successful return to her work environment, and an improved working environment for everyone.*
>
> *In addition, we ask that:*
>
> > *1) The employer fully comply with the return-to-work conditions prescribed by Ms. Richard's attending physician and that she return to her office on her next return to work.*
>
> *As I pointed out to you, for us, this is not negotiable.*
>
> > *2) The employer provide us with a very clear picture of the action it intends to take between now and the start of the investigation to ensure that the workplace environment is improved.*

[10] The gradual return advised by the doctor should have ended in June 2018, but at that time, the complainant still had no office or clinical duties. Mr. Melone helped her write a grievance, which was filed on May 30, 2018.

[11] The complainant's grievance was worded as follows:

> [Translation]
>
> *I deplore how my gradual return to work has been managed.*
>
> *In particular, I dispute that:*
>
> *- My employer refuses to implement the accommodations that my attending physician prescribed, since the date of my return to work.*
>
> *By doing so, the employer is jeopardizing my medical return-to-work plan and is creating an obvious risk to my health.*
>
> *I allege that I am being subject to discrimination based on my state of health. I also allege that I have been subject to reprisals after making the workplace-violence complaint.*
>
> *This attitude of the employer constitutes a violation of the collective agreement, in particular, but not limited to, article 43.*
>
> *It is also a violation of the conditions of employment in the public service and any applicable legislation and policy, notably the Canadian Human Rights Act (the Act).*

[12] In her grievance, the complainant sought the following corrective measures:

> [Translation]
>
> *I ask that:*

> *- the employer acknowledge that it has failed its legal duty to accommodate and implement without delay my attending physician's recommendations;*
>
> *- the discriminatory treatment cease to which I have been subject since returning to work;*
>
> *- my employer ensure that the reprisals cease that I have suffered since my return to work;*
>
> *- I be compensated for any moral damage caused by my employer's conduct, in accordance with section 53(1)(e) of the Act; and*
>
> *- any other measure necessary to correct the situation.*

[13] Despite Mr. Melone's note, which said that the complainant was prepared to discuss solutions, she refused the employer's offer of using an alternative dispute resolution method.

[14] The grievance was referred to the second level of the grievance process and was dismissed at the end of June 2018. The complainant immediately asked the Institute to support referring the grievance to the third level of the process, which was done.

[15] Mr. Melone was on leave when the complainant received the reply to the grievance, but on his return in July 2018, he proposed to her negotiating an agreement with the new commander of the Bagotville military base. He told her that it would probably be preferable that she not be there, to allow for more frank and easy negotiations with the employer.

[16] The negotiations led to a change to the complainant's working conditions. She was assigned an office of her own in the medical clinic building and received clinical tasks.

[17] However, the complainant felt that the employer's solution was still flawed. She did not return to the Mental Health Unit in the basement, as her office was on the ground floor. She did not participate in team meetings, which was a very important component of her work by which she could be aware of new clients, new methods, and events affecting the clinic. She also felt that the grievance should still proceed, since the action taken after Mr. Melone's meeting with the employer did not include compensation for the harm she suffered from April to September 2018, which were not having an office, being relocated, and not having clinical tasks. In short, she

experienced a profoundly humiliating situation when she returned from leave due to PTSD.

[18] The complainant testified that when she asked Mr. Melone when the grievance would proceed to the third level, he replied to her that she needed to be patient, that it could take up to two years, and that she had to wait for the employer to set a date.

[19] In July 2018, two of her Mental Health Unit colleagues, AB and "CD", made harassment complaints against her. The facts dated mainly from September 2014 to July 2015, when the complainant was on an acting assignment as a team leader. It appears that her move from her office to the other building was due to AB and CD feeling discomfort when they saw her return to work. They were absent on April 24, 2018, the day she returned, and they sent an email the next day to state their discomfort at having her around.

[20] The employer conducted a summary investigation of the work climate in the Mental Health Unit, pending further investigations into the complainant's complaints (workplace violence) and those of AB and CD alleging that she harassed them. The investigation report, dated August 30, 2018, confirmed the team's discomfort with her. The investigation concluded that it was not recommended that she return to the team or occupy her office in the basement of the medical clinic.

[21] AB's and CD's complaints were also investigated. CD's complaint was not substantiated, based on the investigation's findings, but five of the six allegations in AB's complaint were found substantiated.

[22] Finally, the complainant's workplace-violence complaint was investigated and was determined unfounded. With the Institute's support, she obtained a further investigation from the employer, which was interrupted by the pandemic. As of the hearing, it had not been completed.

[23] In addition, the complainant filed a compensation claim with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST). The claim was denied, and the denial was upheld on review. Mr. Melone advised her against appealing the decision before the Tribunal administratif du travail because the chances of success were very slim. In a long email dated May 30, 2019, Mr. Melone set out in detail what he considered the weaknesses of the case.

[24] Mr. Melone sent a copy of the email to his manager at the Institute, Valérie Charrette. However, the complainant submitted as evidence an email from Ms. Charette to the employer dated November 16, 2017, which reads in part as follows:

> [Translation]
>
> …
>
> *I just spoke with the employees whose names are in this email* [several of the complainant's colleagues]. *They advised me that Ms. Sonia Richard had just made a formal complaint alleging workplace harassment.*
>
> *As a result, on behalf of the employees subject to this complaint, I request that they receive a copy of the complaint in question, without delay.…*
>
> *In addition, since this is a harassment complaint, and workplace harassment is a form of workplace violence and therefore is covered by Part XX of the Canada Occupational Health and Safety Regulations, I ask that with me as the representative and the employees involved, we be consulted on the choice of investigator.…*

[25] In a later email, Ms. Charrette specified as follows:

> [Translation]
>
> …
>
> *And since presently, different representatives have been assigned to* [the complainant], [AB], *and the rest of the employees, I would appreciate it if communications were sent separately to each representative, out of concern to protect confidentiality for all the parties involved in this process.*

[26] Mr. Melone testified that to his knowledge, Sandra Guéric, also an Institute labour relations officer, represented the complainant's colleagues as of November 2017. Mr. Melone never discussed the complainant's case with Ms. Guéric, which would have been contrary to the Institute's confidentiality standards.

[27] Mr. Melone went on paternity leave and was replaced in late January 2019 by Frédéric Durso, another Institute labour relations officer. Mr. Durso testified that he carefully reviewed the case. Many email exchanges confirm that he followed up. The complainant discussed with him her grievance against the investigation report on CD's and AB's harassment complaints.

[28] Mr. Durso tried to convince the complainant of the advantages of alternative dispute resolution over continuing the grievance, but she wanted to move ahead with the grievance. He went with that decision; the grievance was filed in January 2020 and was sent to the second level of the grievance process, at her request.

[29] On February 19, 2020, Éric Le Bel (who represented the complainant in this complaint) sent a letter to Mr. Durso and Mr. Melone about the grievances of May 29, 2018, and January 17, 2020 (the dates on which the complainant signed the grievances, not the date on which the employer received them).

[30] In that letter, Mr. Le Bel stated as follows:

> [Translation]
>
> *In these circumstances, it is necessary that our client be represented by counsel of her choice and that the Professional Institute of the Public Service of Canada bear the fees. In fact, it is clear that the Institute is in a conflict of interest, considering that the grievances are about workplace harassment situations, notably between two employees represented by the Institute.*
>
> *Therefore, we ask you to confirm with us no later than five (5) days after receiving this letter that our client may be represented by the counsel of her choice on the two grievances filed to date and on any other grievances that she may file about the harassment situation experienced at work and that you will pay the resulting fees.*
>
> *If the Institute does not comply with the preceding by the noted deadline, please note that our client will have no other choice but to engage in all relevant legal proceedings without further notice or delay.*

[31] Ms. Charrette, who was the manager of Mr. Durso and Mr. Melone, replied two days later. She indicated that the Institute was taking steps to avoid conflicts of interest, as it was common for two members to be in conflict, since they were both entitled to the Institute's representation services. The complainant was perfectly entitled to be represented by outside counsel for matters that did not involve interpreting the collective agreement (for which Institute representation would be mandatory), but it would have to be at her expense.

[32] Mr. Durso asked the complainant if she still wanted the Institute to represent her. She replied as follows:

[Translation]

> *… I want the union to continue representing me, even though I still feel that you are in an apparent or real conflict of interest. In fact, the union contending that* [AB]*'s and* [CD]*'s complaints are not out of time or in bad faith is very revealing of the union's true intentions. Indeed, all the independent counsel consulted believe that these complaints are clearly out of time and are in fact acts of bad faith and reprisal. In the circumstances, I no longer want to have lengthy and difficult telephone discussions with the union and have to argue about evidence and repeat facts that the union should know very well, given the many written items on the subject that the union possesses. I simply no longer have the energy for these useless discussions. I wish only that the union would assume its role of defending my rights without trying to sabotage my arguments or mitigate the actions of the employer or my colleagues. In addition, many times you asked me to acknowledge my responsibility in the events, which I have refused and which I will continue to refuse, since I feel that I am being treated in an unfair, illegal, and completely disproportionate manner in the circumstances.…*

[33] Mr. Durso testified that he had spoken with the complainant to try to convince her of the advantage of proceeding by mediation (the alternative dispute resolution method) to resolve a situation that he felt would only get worse through numerous grievance and complaint processes. He also tried to have her understand that it might be in her interests to acknowledge the conflicts that arose when she was team leader and to explain herself to her colleagues. However, since she did not want to use the alternative dispute resolution method or attempt to explain herself to her colleagues, Mr. Durso was prepared to support her in her efforts against the employer (disputing the discipline and the harassment grievance).

[34] On March 19, 2020, the complainant learned from Mr. Durso that her accommodation-denial grievance (filed in May 2018 and referred to the third level in July 2018) had been placed in abeyance. She was very unhappy at the news, since she was never informed that the third-level hearing had been placed in abeyance, and she would never have agreed to it. She first addressed Mr. Durso, who asked Mr. Melone for an explanation.

[35] At the hearing, Mr. Melone explained that given the complainant's ongoing cases, especially the harassment complaints by and against her, he had not pushed the employer to hold the hearing at the third level. No "abeyance" as such had taken place,

which would have required the employer's agreement. But Mr. Melone admitted that he could have moved the accommodation-denial grievance file forward and that he did not because, according to him, this strategy was not to the complainant's advantage. The complaint files were not resolved. Thus, the grievance could not be dealt with properly.

[36] In an email to Mr. Durso, the complainant said that the accommodation-denial grievance was completely independent of the complaints. However, at the same time, she criticized the union for supporting AB and CD against her. And she denounced the union, which was allegedly responsible for her relocation — the very object of her grievance.

[37] One of the investigation reports indicated that Ms. Guéric, the labour relations officer who represented AB and CD, apparently advised the employer not to return the complainant to her office when she returned to work in April 2018 but rather to distance her from the complainants. Therefore, the complainant blamed the union for its role in relocating her, which is linked to the complaints file.

[38] In an email dated March 31, 2020, Mr. Durso summarized the Institute's position as follows:

> [Translation]
>
> …
>
> *As I understand it, the grievance was presented at the second level, and a reply was sent on June 28, 2018. As of then, Major Simard's upcoming arrival had been announced. According to what was reported to me, you and Robert had discussions then, and it was decided to take advantage of the Major's arrival to attempt to resolve the situation. With his arrival, discussions were held regularly, which would have resulted in an appropriate office being assigned to you and your clinical workload being re-established after an initial meeting between the Major, Robert Melone, and Pierre Potvin. Regular follow-ups would then have been carried out. I understand that the situation was not ideal, but overall, it was more acceptable in the circumstances. After that, workplace violence and psychological harassment investigations were initiated, with the results that we know today but would have wished could be different. As you know, the reports have also been contested by grievances. The second-level hearing that was set to take place next week was postponed due to the current pandemic.*

> *In this context, I presume that this matter had been discussed with Robert at that time. That said, the grievance can be reactivated as soon as things become somewhat more normal. It will mean that the entire situation can be presented at the third level, which, in my view, will have additional weight.*
>
> …

[39] At the hearing, Mr. Durso and Mr. Melone stood by that explanation. However, Mr. Melone admitted that he had not discussed it clearly with the complainant. She continued to express her dissatisfaction that she had never agreed to have her grievance placed in abeyance. Mr. Durso tried to explain the situation as follows:

> [Translation]
>
> *…On a more general note, it must be mentioned that it is not unusual for grievances to be placed in abeyance in certain circumstances. Generally, when we deal with a complex situation with a range of ramifications, we often choose not to go to the next level immediately, to allow ongoing discussions with the local level of management to continue. As you should know, it is always desirable, and often easier, to solve conflicts at the local level.…*

[40] On April 10, 2020, the complainant wrote to Mr. Durso for more details. Her email read as follows:

> [Translation]
>
> *… After your last email, I still do not understand how my accommodation-denial grievance could have been put in abeyance, and your reply did not much clear things up for me. In fact, I was never informed about this abeyance or consulted, in writing or verbally, to authorize it. Your presumption that the matter of the grievance's abeyance was discussed with Robert is completely unfounded. In fact, the abeyance was never discussed with Robert Melone. So, I will repeat my questions, and perhaps Robert could answer them directly, since he was assigned to represent the grievance at the time:*
>
> > *1-) On exactly what date was the grievance placed in abeyance?*
> >
> > *2-) Who requested placing the grievance in abeyance?*
> >
> > *2-) [sic] Is there a written statement (email or other) that confirms or mentions the grievance being placed in abeyance? If so, can I have a copy of the statement?*
> >
> > *3-) In the absence of a written statement, how was the grievance placed in abeyance (at a meeting or by telephone),*

> *and who was present at the meeting? Can I have their names and duties?*

In addition, it must be added that the grievance was filed to contest a decision by Major Casey-Campbell and, above all, to seek compensation for the harm caused by the employer's refusal to accommodate me as part of my gradual return to work.
Major Simard's arrival did not change that decision or the hardship that I suffered when I moved. In fact, when Major Simard arrived, it was already too late to accommodate me, since my gradual return to work had ended. After the July 2018 meeting with Major Simard, Robert Melone, and Pierre Potvin, from which I was absent, the regular follow-ups that were carried out were intended only to ensure that the employer reinstated me in my social-worker functions and had nothing to do with the accommodation-denial grievance. Then, in the months that followed, several times I asked Robert about what was happening with my grievance, and Robert replied that it was normal for time frames to be long. Robert never informed me that the grievance was placed in abeyance. Placing the grievance in abeyance was in no way in my interests. The grievance was also unrelated to the investigations into violence or psychological harassment. The investigations' findings do not change anything with respect to the merits of the grievance.

Thank you for answering my questions clearly and quickly, since I think that it is normal that I be kept informed of all the proceedings involved in representing my grievances.

…

[41] On April 16, 2020, Mr. Melone replied to her as follows:

[Translation]

…

On reading your email, which follows, I understand that there is some confusion about the current status of your accommodation-denial grievance. Perhaps, in our discussions about it, I should have checked your comprehension more often.
Allow me to clarify:
First, I would not say that your grievance has been placed in abeyance but instead that a hearing by the designated decision maker at the third level is being awaited.
In fact, once the employee refers the grievance to the next level, the parties' practice is that the employer contacts the union to suggest a hearing date based on the parties' availability. When the employer delays doing so, we may contact it, to ensure that a grievance is heard quickly.

> *To return to your grievance, we received a reply at the second level on June 28, 2018. It was sent to the third level on June 29, and the employer acknowledged receiving it on July 3, 2018. Therefore, the grievance was stayed at the third level, notably for the following reasons:*
>
> *- It generally takes longer to obtain hearing dates at the final level because deputy ministers have more limited availability. And it was summer at the time.*
>
> *- Knowing that Major Erik Simard would replace Major Casey Campbell, I felt that it was important take the opportunity to engage in discussions with him. I hoped that he would take a fresh look at your situation and act so that you could return to your clinical duties and a decent office as soon as possible, which was done. That was the priority for me then, given the situation you were experiencing at work.*
>
> *- In addition, given the nature of the cases, it seemed more appropriate to me to wait for the investigation reports.*
> *In the worst-case scenario, we would have had to eventually file grievances to challenge them. Those grievances could possibly have gone to the third level. From that point on, it was preferable to have all the grievances heard at the same time.*
> *In the best-case scenario, the outcome of the investigations that had just begun could have resulted in discussions to reach a resolution, including for this grievance.*
> *Unfortunately, the investigations' finding were not what we had hoped for.*
>
> *It seemed to me that at the time, we had many discussions on this subject, by telephone and in person.*
>
> *I am satisfied that I always made sure to explain to you both the strategy and the goals behind any action I took when handling your cases. I do not remember ever receiving any complaints from you about this. On the contrary, I have always felt that you followed my proposals with respect to the suggested approaches and how to implement them. However, if you feel that I have not been sufficiently clear about this specific grievance, I am sorry. That said, and as mentioned, your grievance is pending at the third level, so you have not lost any recourse. I understand from Frédéric's following email that it will be heard with all the other grievances once we regain some normalcy.*

…

[42] The complainant replied that the stated reasons "[translation] do not hold water". On the contrary, in her view, had the grievance proceeded at the third level, much of the issue with the employer could have been resolved.

[43] On April 24, 2020, the complainant sent a letter to Ms. Charrette to complain about the representation she had received from Mr. Durso and Mr. Melone. She reiterated Mr. Le Bel's request that she be represented by counsel of her choice, at the Institute's expense. In support of her request, the complainant gave the following reasons.

[44] Beyond the Institute's conflict of interest in representing both the complainant and those who had made complaints against her, she now felt that the Institute refused to advance her accommodation-denial grievance to protect itself because it had been involved in the decision to relocate her. In addition, Mr. Melone and Mr. Durso did not fully defend her interests. For example, Mr. Melone believed that the employer had the right to investigate AB's and CD's complaints, even though the events that gave rise to them went back more than three years, meaning that in the complainant's view, they were out of time.

[45] The complainant also blamed Mr. Melone for not raising the investigator's deficiencies for AB's and CD's complaints and blamed Mr. Durso for trying to convince her to accept the investigation's findings to move to reconciliation.

[46] So, the complainant asked Ms. Charrette to allow her to retain counsel of her own choice at the Institute's expense. If she were denied, she requested that the procedure set out in the Institute's representation policy be followed and that the general counsel and chief of labour relations services be seized of it.

[47] Isabelle Roy is general counsel and chief of labour relations services, and she testified at the hearing. She confirmed that in fact, she was seized of the complainant's request. After studying the file and reviewing the complainant's arguments, she recommended that the Institute's president continue to refuse to pay the fees of the complainant's chosen counsel. According to her, the labour relations officers had acted well and had diligently defended the complainant's interests. According to Ms. Roy, the Institute's representation of the members in conflict was not in itself a conflict of interest. Action was taken to ensure full and confidential representation for the complainant. The labour relations officers working on her case communicated nothing from the case with the officer representing AB and CD. According to Ms. Roy, this type of situation is not unusual, and the Institute is well aware of its obligations to all its members.

[48] Before Ms. Roy was seized of it, Ms. Charrette first sent the request to Nancy Lamarche, the director of regional labour relations services. Ms. Lamarche wrote to the complainant on May 11, 2020, to tell her that she had reviewed the case, that she found that Mr. Melone and Mr. Durso had carried out their duties properly, but that she found that the complainant's trust had eroded. As a result, she had assigned the complainant's case to another representative, Jean Ouellette, who did not work in the same office as did Mr. Melone and Mr. Durso. The next day, the complainant asked Ms. Roy to review Ms. Lamarche's decision.

[49] Nevertheless, Mr. Ouellette started to work on the complainant's case. To understand the case in its entirety, first, he compiled a table of the different items in the file, which were her complaints and grievances. The table showed the following files for her, which the Institute dealt with:

- Accommodation grievance, referred to the third level on June 29, 2018; follow-up: plan for a third-level hearing.
- Grievance about the report on AB's harassment complaints, filed on January 21, 2020, and referred to the second level around February 19, 2020; follow-up: plan for a second-level hearing (the employer cancelled the hearing scheduled for April 9).
- Grievance - discipline on February 19, 2020 (letter of reprimand); follow-up: the Institute did not receive a copy of the grievance, if it was filed. Obtain a copy of the grievance and plan for a first-level hearing.
- Complaint of psychological harassment made by the complainant on November 14, 2017; preliminary report submitted on November 16, 2018. The investigation is still underway. She and her representative must meet with the investigator; follow-up: contact her and the investigator to proceed with the meeting.
- Performance evaluation; the last communication was an email from her on April 14, 2020; follow-up: to clarify.
- Staff assistant visit – the employer received the report - Major Simard's May 12, 2020, email; follow-up: await teleconference to be held - scheduled for the week of June 1.

[50] Mr. Ouellette emailed the complainant on June 3, 2020. He attached the table and asked her if she wanted Institute representation for those matters. Only one of the grievances, about the performance evaluation that she challenged, needed Institute support to proceed, in accordance with s. 208(4) of the *Act*. For all the other grievances, she could represent herself or be represented by counsel of her choice at her expense.

[51] He repeated his request on June 16, giving the complainant 24 hours to respond. Meanwhile, she made her complaint against the Institute. Emails were exchanged, but Mr. Ouellette understood that she no longer wanted Institute representation. He informed the employer of it and indicated that the withdrawal of representation rendered the grievance against the performance evaluation null and void.

[52] It appears that Mr. Ouellette acted somewhat quickly. The complainant was upset at the loss of her performance evaluation grievance. Mr. Ouellette set everything right and confirmed with the employer that the grievance was maintained with Institute support. Her other files were placed in abeyance pending the outcome of this complaint.

[53] Once the Institute's evidence was complete, the complainant asked to submit reply evidence. I agreed to hear it, subject to its relevance.

[54] First, she presented her doctor's notes, starting from May 1, 2018, which showed that the doctor recommended that she be returned to her office (in the medical clinic basement) and that she resume her clinical duties. The purpose of this evidence was to demonstrate that the Institute had not fully resolved the issue raised in the grievance.

[55] I have no difficulty acknowledging that the accommodation-denial grievance was ongoing and that it was not fully resolved. However, the doctor's notes did not establish that the Institute acted in bad faith by not insisting that the complainant return to her office in the medical clinic basement. The doctor did not testify. I take it for granted that he had only her version in this case. I have no indication that he was fully aware of the situation and the particular dynamic of the Mental Health Unit. In any event, the notes cannot establish the Institute's bad faith.

[56] The complainant also presented as evidence the email that Mr. Melone sent her when he was to go on leave; he passed the file to Mr. Durso. In the email, Mr. Melone wrote that Mr. Durso "[translation] … has extensive experience with DND" and that she would be in good hands. However, as she pointed out, Mr. Durso testified that he was not familiar with the Department of National Defence.

[57] That was not Mr. Durso's exact testimony. He testified that when Mr. Melone passed him the complainant's file, the Department of National Defence was not part of his assigned files. He was not asked about his experience with the department. More important still, Mr. Melone was not asked to explain his email. Thus, I cannot accept this evidence, which seeks to question Mr. Melone's credibility without giving him the opportunity to explain himself.

III. Summary of the arguments

A. For the complainant

[58] The test for establishing whether the Institute violated its duty of fair and equitable representation does not require that the action be intentional. In this case, gross negligence and gross misconduct occurred in how the complainant's file was handled. Mr. Melone did not follow up on the accommodation-denial grievance.

[59] Still more important, clearly, the Institute was in a conflict of interest. The complainant's relocation, which was the basis of her denial-of-accommodation grievance, was imposed on her after a recommendation from an Institute labour relations officer, which fact was clearly evident from the summary workplace investigation conducted in summer 2018.

[60] The Institute created the problem, and therefore, it is impossible for it to represent the complainant in her disputes with the employer. The Institute refused to recognize its conflict of interest. All the witnesses denied it. The conflict of interest explains the Institute's inaction in the accommodation-denial grievance.

[61] Not only did Mr. Melone do nothing to move the matter forward, but also, he did not inform the complainant so that she would know that the grievance was placed in abeyance.

[62] A November 2017 email showed that Ms. Charrette represented AB and CD. Mr. Durso and Mr. Melone report to her as a manager.

[63] The conflict of interest is obvious. The complainant cited two Quebec court decisions, to which I will return in my analysis.

[64] In no way did the Institute seek to resolve the conflict of interest; it simply denied it. The approach taken following the complainant's request to be represented

by independent counsel was meaningless — the Institute did not investigate, and she could not plead her case. In short, the Institute did not consider her concerns in any way.

B. For the respondent

[65] The complainant made a complaint against the Institute on June 15, 2020, for not dealing with a grievance she had filed in May 2018. She knew that no third-level hearing had been held, yet she waited until March 2020 to inquire. Mr. Durso then offered to reactivate the file to obtain the hearing, but she did not reply to that offer. The delay was hers, and she went well beyond the firm 90-day deadline to make her complaint.

[66] With respect to the substance of the complaint, the complainant did not establish that the Institute was in a conflict of interest. It has a duty to represent all its members, which it did. When two members are in conflict, as in this case, the Institute takes steps so that the labour relations officers deal with the files independently. That was done in this case. Mr. Melone and Mr. Durso dealt only with the complainant's case and represented only her interests.

[67] Ms. Charrette protected members' interests, but from the start, another labour relations officer defended AB's and CD's interests. There is no indication that Mr. Durso or Mr. Melone contacted that labour relations officer about the complainant's files. They defended her interests at all times.

[68] Mr. Durso and Mr. Melone did their best for the complainant. In no way did she establish that the Institute or its representatives acted discriminatorily, arbitrarily, or in bad faith.

IV. Analysis

[69] The Institute raised an objection about the time limit for making the complaint. It is well established in both the *Act* and the case law that the 90-day time limit under s. 190 to make a complaint against a union is mandatory and cannot be extended. Section 190(2) reads as follows:

> ***190 (2)*** *Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's*

> *opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[70] The complainant made her complaint against the Institute on June 15, 2020. Based on all the evidence heard and her arguments, I find that there are two main facts behind the complaint: the fact that the Institute's labour relations officers, Mr. Melone in particular, did not press to have her denial-of-accommodation grievance heard at the third level, and the fact that the Institute refused to recognize a conflict of interest and to pay the fees of the counsel she chose to represent her.

[71] On March 19, 2020, the complainant learned that the accommodation-denial grievance had been stayed or placed in abeyance. Regardless of the wording used, it is clear that Mr. Melone did not insist on it being heard at the third level and that he thought that he should first settle the other matters in her case involving the complaints and the working environment. The other aspect of the complaint is the Institute's refusal to pay her counsel's fees, which was confirmed on May 27, 2020, in a final decision by the Institute's president.

[72] With respect to the two main facts that gave rise to the complaint, I find that it was filed within the time limit set out in the *Act*.

[73] A complaint is the recourse before the Board for a bargaining agent's representation. The complainant has the onus of proving that the bargaining agent failed its duty of fair and equitable representation, in violation of s. 187 of the *Act*, which reads as follows:

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

[74] The issue that I must determine is not whether the complainant was entitled to counsel of her choice, paid by the Institute. Instead, I must determine whether the Institute failed its duty of fair and equitable representation. I have no doubt that she would prefer to be represented by counsel of her choice. That is entirely her prerogative. However, even were I to determine that the Institute acted discriminatorily, arbitrarily, or in bad faith, the remedy would not necessarily be to order it to pay the fees of the counsel she chose. The Board hears the complaint, and if

it allows the complaint, it then determines the remedy in the circumstances. In any event, I do not get to that point, because I find that the Institute did not violate s. 187 of the *Act*.

[75] To justify her request for the counsel of her choice, the complainant relied on two Quebec court decisions in which the Commission des relations de travail (CRT) recognized that the union's clear conflict of interest prevented the fair and equitable representation of the employee at issue and ordered that the union pay the employee the fees of the employee's choice of counsel. The decisions were then confirmed, one by the Quebec Superior Court, and the other by the Court of Appeal of Quebec.

[76] The *Labour Code* (L.R.Q. c. C-27) contains a provision similar to s. 187; it reads as follows:

…

> ***47.2*** *A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members.*

…

[77] The CRT made its determination under that provision in *Alliance des syndiquées interprofessionnelles du CHUQ (FIQ) v. Commission des relations du travail (CRT)*, 2011 QCCS 6171 ("*Alliance des syndiquées interprofessionnelles*"), and in *Vallières v. Alliance du personnel professionnel et technique de la santé et des services sociaux (CPS et APTMQ)*, 2011 QCCA 588.

[78] In *Alliance des syndiquées interprofessionnelles*, the CRT determined that the complainant at issue, Ms. DS-A, received no support from her union with respect to her alleged harassment by her supervisor, which culminated in discipline and, ultimately, dismissal. After Ms. DS-A made a complaint about a lack of representation, the union determined that no psychological harassment had occurred. The CRT ordered the union to pay the fees of the counsel Ms. DS-A chose to represent her before a labour arbitrator in her dispute with the employer. The CRT determined that the union had abandoned Ms. DS-A at the hands of her harasser by offering her no support.

[79] Even more important is that the CRT determined that the supervisor's conduct would have justified making a harassment grievance. However, the union, based on its

investigation, determined that no harassment had occurred. For that reason, it became untenable to ask the union to represent Ms. DS-A's interests before a labour arbitrator. That led to the decision to order the union to pay the fees of the counsel that Ms. DS-A chose.

[80] In that case, the harassment continued, but the union did not act. In the current case, the Institute acted. The accommodation-denial grievance was important to the complainant, in her words, to punish the employer for how it treated her when she returned to work. The July 2018 solution was not perfect, but it addressed some aspects of her difficult situation. Furthermore, it cannot be said that the Institute abandoned her. There is no evidence that she was concerned about her grievance until she raised it in March 2020. Her energies and those of the Institute were much more focused on the situation with her colleagues, with complaints and related investigations. On top of that, the labour relations officers who worked on her file never cast doubt on her right to challenge the employer's decisions.

[81] The conflict of interest that the complainant raised in this case is not of the same nature as the one that the CRT found and the Quebec Superior Court confirmed. In that case, the union did not defend Ms. DS-A's interests. Worse still, it could have been in the union's interests for Ms. DS-A to lose her case before a labour arbitrator, which would have proven that it was right to find that no harassment had occurred. That is not so in this case. The Institute did not side against the complainant's case; it offered her the services of representatives committed to defending her interests as best they could.

[82] It is true that the Institute also offered representation to the colleagues in conflict with the complainant. It also appears that the colleagues' representative insisted on preventing her from returning to her office; therefore, she played a role in her relocation. However, Mr. Melone always acted to defend the complainant's interests, insisting that the employer return her to a suitable office in the medical clinic's building. While she did not return to her basement office, it was not due to the Institute's actions. It was the employer's decision, managing a difficult dynamic. The realistic attitude of not insisting on the basement office is not equivalent to the union's abandonment noted in *Alliance des syndiquées interprofessionnelles*.

[83] *Vallières*, somewhat as in this case, involved a conflict between two employees represented by the same union. The union had adopted a representation policy in cases of violence or sexual harassment, which provided that it could not support a challenge to a disciplinary penalty if, after carrying out an investigation, it found that the penalty was merited.

[84] The union committee tasked with reviewing the complaint heard only the representatives of the two employees, the one who made the complaint, and the one who defended it (the appellant before the Court of Appeal of Quebec). The appellant's representative told the committee that she did not find the appellant's defence credible. The committee decided that the union would not represent the appellant were a grievance filed against the employer's disciplinary penalty.

[85] The CRT found that the union was in a conflict of interest. The Quebec Superior Court allowed the judicial review application, but the Court of Appeal of Quebec overturned the Superior Court's decision and agreed with the CRT's decision. It was reasonable for it to find that the union had failed its duty of fair and equitable representation.

[86] The employer had made a complaint against the appellant, despite a flawed procedure and a lack of objective facts. The union did nothing to oppose the employer's findings — quite the opposite. It found the same, with a procedure that was just as flawed.

[87] The union's mistake in that case was to establish itself as the arbitrator between the two members in conflict, which is not its role. Its role is to defend members and to seriously consider a grievance's chance of success. Having determined (without objective evidence and with a flawed procedure) that the appellant was wrong, it was impossible to represent the appellant appropriately before the employer.

[88] In the current case, the Institute's position was to not take sides in its members' dispute but to represent their rights before the employer. Mr. Durso greatly assisted the complainant with her grievance against the disciplinary penalty resulting from the investigation, and the email exchanges seem to indicate that she appreciated his comments. Mr. Melone and Mr. Durso never stopped supporting her, and through their efforts, the employer allowed reopening the investigation into her harassment complaint. If, at some point, Mr. Durso advised her to try mediation to resolve the

problem, it was not to say that she was wrong but because negotiation often goes further than a decision that determines a dispute.

[89] Mr. Melone did not insist with the employer that the accommodate-denial grievance proceed more expeditiously to the third level. He explained his reasoning to the complainant. She did not agree, but I do not believe that Mr. Melone acted that way because of a conflict of interest. His reasoning showed that he sought the best solution for her. The fact that the Institute also represented AB and CD was simply not part of that reasoning.

[90] The complainant made much of an email sent in November 2017 by the manager of Mr. Durso and Mr. Melone, Ms. Charrette, who asked that the respondents be provided with details of the complainant's complaint and that she be informed, as a representative, of the investigator's name.

[91] In the email, I do not see an interest contrary to the complainant's interests; Ms. Charrette sought to preserve the colleagues' rights. Later, it becomes clear that she did not represent AB and CD, and I have no evidence that she instructed Mr. Durso and Mr. Melone against the complainant's interests. On the contrary, once again, I find that Mr. Durso and Mr. Melone were attentive to her requests. As soon as the accommodation grievance was dismissed, Mr. Melone intervened to change her situation, which he did by negotiating with the employer. He supported her by his efforts to challenge the investigations' results, as did Mr. Durso. He carefully considered the other grievances that she wanted to file.

[92] In short, I do not find that the apparent conflicts of interest in the two cited decisions, which justified making an order against the union to pay the fees of counsel, are present in the complainant's situation.

[93] It remains to be determined whether the Institute acted arbitrarily or in bad faith when representing the complainant. She did not allege discrimination by the Institute.

[94] The case law has defined the obligation of fair and equitable representation for bargaining unit members by their union, which is reflected in the legislation at s. 187 of the *Act*. The leading case is *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509, which defines union obligations as follows (at page 527):

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> > *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.*

[95] The Board has often ruled on this issue, following the principles in *Gagnon*. Representation made in good faith, without discrimination or arbitrary character, need not be perfect.

[96] In *Ouellet v. St-Georges*, 2009 PSLRB 107, the complainant criticized his union representative for not representing him adequately. However, the Board found that he did not demonstrate that the bargaining agent acted contrary to s. 187. The Board need not determine whether the union made the right decisions but instead whether it acted seriously, without discrimination, in good faith, and not arbitrarily.

[97] The Board wrote the following:

> *[39] In short, the bargaining agent's obligation is to carry out its duty of representation in a reasonable manner, taking into account all the related facts, investigating the situation, weighing the conflicting interests of the employee, drawing considered conclusions as to the potential outcomes of the grievance and then informing the employee of its decision on whether to pursue the grievance.*

[98] In the current case, it was not that the union did not want to follow up on the complainant's grievance. Instead, in a strategic calculation, the labour relations officers, Mr. Melone and Mr. Durso, put their energies into what appeared were her pressing problems, the workplace complaints and investigations.

[99] The represented employee might disagree with or be dissatisfied with his or her representation. That is not the measure of the obligation (see *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLREB 48). Rather, to determine a violation of s. 187 of the *Act*, it must be found that the employee's right to be represented without discrimination, in good faith, and in a manner that was not arbitrary, was infringed.

[100] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, the Supreme Court of Canada wrote the following about arbitrariness and bad faith in representation:

…

> ***50*** *The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case ….*

…

> ***52*** *Bad faith and discrimination both involve oppressive conduct on the part of the union. The analysis therefore focuses on the reasons for the union's action. In the case of the third or fourth element, what is involved is acts which, while not motivated by malicious intent, exceed the limits of discretion reasonably exercised. The implementation of each decision by the union in processing grievances and administering the collective agreement therefore calls for a flexible analysis which will take a number of factors into account.*

…

[101] One of these factors is the importance of the grievance to the employee. The complainant insists that the accommodation-denial grievance was important to her. I

have no doubt that it is true, but it is one factor among others, including in particular the bargaining agent's assessment of the entire case.

[102] The complainant's situation was particularly complex, due to workplace dynamics. I do not have to rule on the actions of the parties involved — her, the employer, and the colleagues. My only point is to determine whether the Institute handled her case seriously and sought to protect her interests.

[103] The evidence indicates to me that that is so in this case. Mr. Melone guided her through her first complaint in November 2017. He helped her with her grievance in May 2018. He negotiated better working conditions with the employer in July 2018. He helped her challenge the investigation reports. Mr. Durso helped her write the grievance against the discipline and tried to organize meetings with the investigator for a further investigation. It is clear from her exchanges with the Institute's labour relations officers that they knew her file well, were attentive to her requests, and did their best to respond to them.

[104] Mr. Melone could have been more transparent about his reluctance to advance the denial-of-accommodation grievance to the third level. However, I have no evidence that the grievance was on the complainant's mind when compared to all the other matters she handled with Mr. Melone and Mr. Durso. The correspondence shows that her emails were detailed and had much to say. Had the grievance been a constant concern, signs of it would have arisen between July 2018 and March 2020. However, there were none.

[105] When Mr. Ouellette replaced Mr. Durso and Mr. Melone, he tried to contact the complainant. He prepared a complete overview of her disputes with the employer and tried to find out how she wanted to proceed.

[106] It appears that he was already too late and that the complainant preferred to proceed on the advice of her counsel. She was dissatisfied with Mr. Ouellette hurrying her by asking her one day to answer on the next. In fact, he had corresponded with her two weeks earlier and had not received a reply.

[107] Mr. Ouellette acted somewhat quickly by withdrawing the only grievance that required union support, but he corrected it once the error was reported. Once again, I cannot see any arbitrary character or bad faith in the Institute's representation.

[108] The complainant's files with the employer were placed in abeyance, by mutual agreement, pending this decision. She will need to decide who will represent her. The Institute, through its representatives, acted seriously and in good faith to represent her. She was not satisfied, but again, it is not the measure of the bargaining agent's obligation. The Institute has no obligation to bear the fees of the counsel she chose.

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

(The Order appears on the next page)

V. Order

[110] The complaint is dismissed.

March 9, 2021.

FPSLREB Translation

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