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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

ANGELA JOSHI

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Joshi v. Public Service Alliance of Canada

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Andrew Raven and Morgan Rowe, counsel

Decided on the basis of written submissions,
filed July 23, October 28, and November 8, 2019.

REASONS FOR DECISION

I. Complaint before the Board

[1] Angela Joshi (“the complainant”) was employed with the Labour Program at Employment and Social Development Canada (“the employer”) and was a member of the Union of National Employees (“UNE”, a Public Service Alliance of Canada (“PSAC” or the “union”) component). In May 2018, she became involved in a workplace harassment issue related to the dissolution of a personal relationship with a co-worker. The co-worker subsequently began a personal relationship with a third co-worker. The three employees, all members of the PSAC, made harassment complaints against each other.

[2] On May 31, 2019, the complainant made this complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*) against the PSAC, alleging that it had breached its duty of fair representation under s. 187 of the Act. The respondent denied the allegation and submitted that it has represented the complainant in good faith and in a manner that was neither arbitrary nor discriminatory. Indeed, the PSAC states that it continues to provide ongoing representation to the complainant on workplace issues.

[3] The respondent raised a preliminary objection to the complaint, noting that the complainant’s allegations were not particularized and that she had simply asserted breaches of the duty of fair representation without factual foundation. She has failed to make out a “*prima facie*” case, therefore, the complaint should be dismissed without a hearing.

[4] The complainant did not respond to the motion. Since she is self-representing, the Board afforded her a second opportunity to particularize her complaint and respond to the respondent’s motion, which she did.

[5] I will apply the arguable case analysis often applied by this Board when presented with an objection like this. Therefore, I must determine whether, by taking the complainant’s alleged facts as true, there is an arguable case that the PSAC contravened its duty of fair representation.

[6] After particularizing her complaint, I find that the complainant has shown an arguable case that the PSAC contravened the *FPSLRA*. As such, the matter will proceed to a hearing on the merits.

II. Submissions of the parties

[7] The complainant argues that the respondent's motion to dismiss is a breach of the duty; that the motion itself is an example of the ongoing bad faith and alienating treatment of the complainant in her dealings with her union. In her view, the fact that the respondent brings such a motion supports her view that the PSAC representatives have acted to malign and alienate her. She further suggests that for the PSAC to spend members' dues on private legal representation, especially at this early stage of the proceedings, is a conflict of interest.

[8] The respondent submits that these allegations do not fall within the scope of the duty of fair representation under s. 190(1)(g) of the *FPSLRA*; nor do they disclose a *prima facie* breach of that duty. Therefore, they should be struck from the scope of the complaint.

[9] Section 190(1)(g) of the *FPSLRA* states that:

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.*

...

[10] Section 185 sets out several sections that define unfair labour practices. The applicable one to this matter is found in s. 187, as follows:

Unfair representation by bargaining agent

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.*

[11] I agree with the bargaining agent. These allegations do not fall within the scope of the duty of fair representation. They will not be further addressed.

A. Grievance “5038” and allegations against Linda Koo

[12] The complainant alleged that after a first-level grievance hearing in May 2018, she was forced to change representatives. Then, after spending time and effort to bring this new representative up to speed on the details of the case, a third representative, Linda Koo, took charge of it.

[13] The complainant alleged that she felt that Ms. Koo was likely homophobic or at least prejudiced against her in favour of the other PSAC members involved. She alleged that Ms. Koo’s dealings with her were hostile, patronizing, and dismissive, that Ms. Koo misunderstood her grievance, and that she inappropriately interfered in the complainant’s relationship with her employer.

[14] She advised Ms. Koo that her grievance was not a harassment grievance but rather a grievance against management for its failure to protect her health and safety at work. She tried unsuccessfully to explain that her grievance contained no allegations against other members, was related only to management actions, and did not allege employer harassment. She alleged that Ms. Koo had not read her grievance, had no understanding of its contents, and had stressed the fact that the union had obligations to all its members, not just to the complainant. In Ms. Koo’s view, her grievance did not concern the enforcement of any provision of the relevant collective agreement, and therefore, the union was not obligated to represent her.

[15] The complainant alleged that Ms. Koo said that she alone would decide whether the union would continue to represent her in her harassment grievance, that it could take months for her to make that assessment and that the complainant’s situation did not warrant priority treatment, despite the pending criminal charges against her. In the complainant’s view, Ms. Koo had taken the file from the previous representative, who had already spent time informing herself of the details of the case, only to treat it with no importance. When she complained about Ms. Koo and asked for another representative, she was told that Ms. Koo had accused her of harassment and that for the union to have any further dealings with her, she would have to sign an acknowledgement that she had read its harassment policy.

[16] The respondent describes it differently. It states that the complainant’s grievance related to her allegation that the employer had advised her former partner to pursue criminal charges against her. It also contained 26 allegations about different

ways in which the employer had mishandled its procedural response to the workplace issues between the complainant and the two other co-workers. These allegations included failing to disclose information to the complainant and taking inappropriate and inadequate steps to ensure the health and safety of the three co-workers during the harassment investigation process.

[17] The grievance made a brief reference to clause 22.01 of the collective agreement between the PSAC and the Treasury Board which pertains to the employer's responsibility for health and safety in the workplace. However, it contained no specific allegation of a breach of that clause.

[18] The complainant was represented by the UNE local at the first level of the grievance process. The parties then agreed to skip the second level, at which point the grievance was sent to Ms. Koo, a UNE labour relations officer, for an assessment of its merits to determine whether the PSAC would support referring it to adjudication. Ms. Koo also began the process of scheduling the final-level grievance hearing.

[19] In late 2018, the complainant became frustrated with the process and sent abusive and harassing emails to Ms. Koo. The PSAC was obligated, as Ms. Koo's employer, to step in and address the complainant's behaviour as part of its obligation to provide Ms. Koo with a harassment-free work environment. The PSAC advised the complainant in writing that her correspondence could be considered harassment. It proposed a process for re-establishing a collaborative working relationship with Ms. Koo that was to involve a teleconference with the complainant, Ms. Koo, and UNE representatives.

[20] The respondent states that the allegations against Ms. Koo have no merit; that she conducted herself professionally in her dealings with the complainant. As part of Ms. Koo's obligation to review the complainant's grievance and to provide her with appropriate representation, at times Ms. Koo had to give the complainant information that she disagreed with or did not want to hear.

[21] The PSAC confirms that the complainant contacted Andrew Shaver, UNE National Executive Vice-President, and that she raised her concern about alleged homophobia on the part of Ms. Koo. This was approximately the third phone call between Mr. Shaver and the complainant to discuss her workplace concerns and her

grievance. She did not provide any foundation for her allegation, beyond a general assertion.

[22] However, Mr. Shaver acknowledged her perception and the seriousness of the concern. He reassured her that homophobia was not a factor in Ms. Koo's representation and confirmed to her that the UNE was an inclusive and equity-forward PSAC component. Following this confirmation, the complainant changed the topic, and the conversation proceeded positively. She did not request any further action and never raised the subject again.

B. The self-representation agreement

[23] The complainant states that because of urgency, and uncertainty as to whether the union would represent her at the second level, and when that decision would be made, she reluctantly decided to represent herself at the next level and to release the union from responsibility in respect of grievance 5038. In her view, the union had always taken the position that her complaints against management were not a collective agreement issue, so it was content to delete all references to the collective agreement to allow her to proceed as a self-represented grievor.

[24] She alleges that in January 2019, Franco Picciano, Coordinator of Member Representation for the UNE, confirmed that the union could not delete references to the collective agreement and allow her to self-represent if the collective agreement was implicated. He indicated that the union was obligated to maintain jurisdiction over such a grievance regardless of a member's preference to self-represent.

[25] The respondent states that in December 2018, the complainant reached out to Mr. Picciano, to inquire about ways to expedite the final-level hearing. She advised that she needed the hearing to proceed within a short time frame, ideally before the end of January 2019, as she needed information from the process to help defend herself against criminal charges. On December 17, 2018, they discussed the options available to her.

[26] Mr. Picciano confirmed that he could not guarantee that the PSAC would agree to advance her grievance, as it would depend on Ms. Koo's ultimate assessment of its merits. He also could not guarantee that the PSAC would be able to complete a final-level grievance hearing before the end of January, as it would depend on both

Ms. Koo's and the employer's schedules, and on other grievances awaiting scheduling. Mr. Picciano also advised that if the employer denied the grievance at the final level, there would likely be a delay of several years before the Board would hear the grievance, should the PSAC agree to refer it to adjudication.

[27] Therefore, the complainant and Mr. Picciano began to discuss the option of allowing her to self-represent with respect to the grievance. He advised her that she was free to represent herself on a grievance, provided that no collective agreement articles were engaged. For this grievance, he advised that she would be able to represent herself if she removed the reference to clause 22.01 of the collective agreement.

[28] As the complainant was interested in this option, Mr. Picciano advised that before proceeding, the PSAC would want her to confirm in writing that she was waiving further union representation on this grievance. He further advised that the PSAC would still represent her on grievances related to other subject matters, including any discipline that might flow from the harassment investigation process. She asked whether the PSAC would be prepared to represent her on the grievance again, after the final-level grievance hearing was concluded. He confirmed that it would not, and stated that if she chose to self-represent, it would be final for the purposes of the grievance.

[29] Mr. Picciano advised that if she wished to proceed with self-representation, the PSAC would provide a written release for her to review and sign. He advised her to take whatever time she needed to consider her options and to make an informed decision about how she wished to proceed. She agreed that she would consider the matter and that she would follow up when she had reached a decision.

[30] The UNE's office closed for the holidays and the PSAC did not hear anything further from the complainant during that time. However, over this period, Ms. Koo completed a 30-page analysis of the complainant's grievance. She concluded that it had a low chance of success, as the complainant primarily sought information to which she was not entitled and disputed the steps that the employer had taken to manage health and safety in the workplace, pending the outcome of the harassment investigation. Moreover, some of the allegations raised did not relate to the workplace but rather dealt with the complainant's personal disputes with the other two co-workers. Finally,

Ms. Koo concluded that no breach of clause 22.01 was alleged on the face of the grievance or in the supporting documentation provided by the complainant.

[31] The respondent states that as of January 15, 2019, the PSAC had not heard back from the complainant, and the employer had inquired about setting dates for the final-level grievance hearing. Mr. Picciano wrote to her to follow up on her self-representation decision. She responded the next day, stating that she had decided to represent herself in the grievance process. Therefore, Ms. Koo provided a release for the complainant's review and signature, which provided as follows:

I, Angela Joshi, have voluntarily decided of my own free will to represent myself on my grievance (individual grievance reference number: 5038). My decision to represent myself on the grievance referenced herein is with the full understanding that by doing so, I am forever releasing the Union of National Employees of the PSAC of any and all responsibility with regards to the representation of this grievance. I fully understand and agree that in order to be provided with the Union's authorization to do so, that I must agree to remove any and all references to the collective agreement including to Article 22, as the union has sole jurisdiction over the collective agreement. By removing any reference made to the collective agreement in the grievance wording of grievance 5038, I can then be authorized to represent myself.

It is equally understood that I have a right to be represented on any other grievances by the Union of National Employees of the PSAC and that I am only releasing the UNE from representing me on grievance Number 5038.

[32] The complainant signed and returned the release on January 17, 2019. The PSAC subsequently advised the employer that the reference to article 22 of the collective agreement was removed from the grievance and that the complainant would represent herself going forward. Pursuant to the self-representation agreement, the PSAC had no further involvement in this grievance and closed its file.

C. Outcome of grievance 5038

[33] The complainant states that the employer denied grievance 5038 and the grievance process ended at the third level, as a grievance of this nature cannot be referred to the Board for adjudication without bargaining agent representation. The employer's denial of the grievance was based on its view that her allegations implicated the health and safety provisions of the collective agreement. Since she had not cited the collective agreement in her grievance, the allegations were dismissed.

[34] The respondent states that it holds the complainant to the strict proof of this assertion. However, it also maintains that this is a dispute with the employer, not the PSAC, for which her recourse was judicial review to the Federal Court of the final-level grievance decision.

[35] The PSAC had advised the complainant of the implications of deciding to self-represent and had provided her with substantial time to consider the advantages and disadvantages of doing so. She made an informed and voluntary decision to self-represent rather than proceed with the PSAC's representation.

D. Subsequent grievances

[36] The complainant submits that in January 2019, when she decided to self-represent, she clarified with the PSAC that she would be able to continue to be represented by it with respect to any new information giving rise to new allegations, specifically those in relation to grievance 5038. Mr. Picciano had explained to her that the agreement to self-represent was strict, that the union has inherent jurisdiction over all grievances, and that new grievances concerning new information would not be affected or restricted by any agreement to self-represent with respect to grievance 5038.

[37] The complainant states that she never requested union representation or assistance for any matter directly related to fellow employees — only for grievances against management. However, in her view, from the beginning, the respondent had taken it upon itself to blend the health and safety issues, the Treasury Board policy about complaints implicating employees, and her separate grievance against management.

[38] Since she had agreed to self-represent on grievance 5038, the PSAC had refused to represent her in two other grievances with respect to new information that surfaced after grievance 5038 was filed. It had claimed retrospectively that the agreement to self-represent for grievance 5038 applied to all matters related to that grievance. In her view, that was a bad-faith interpretation of the agreement that directly contradicted the union's previously stated position. It had caused her significant prejudice because, as a result, she had been unable to address the ongoing problems caused by management's actions and its failures to act.

[39] The respondent states that in April 2019, it became aware that the complainant sought to file a new grievance pertaining to the same subject matters raised in grievance 5038. Specifically, that the employer had failed to take sufficient steps to separate her and one of the other involved co-workers while the harassment investigation process was ongoing. The grievance characterized this as part of a continuing pattern of behaviour on the employer's part.

[40] Upon receiving the grievance, the PSAC reviewed it to determine whether it was a new grievance or, effectively, a continuation of grievance 5038, in which the complainant was self-representing. It concluded that while new facts were alleged, the breach claimed against the employer was the same, and the same ongoing pattern of alleged misconduct was at issue. Therefore, it concluded that the new grievance was an extension of the prior grievance and was caught by the self-representation agreement. The PSAC also noted that the new grievance did not allege a collective agreement breach; therefore, nothing barred the complainant from representing herself.

[41] Accordingly, on April 24, 2019, the PSAC advised the complainant that it considered the new grievance a continuation of grievance 5038 and that therefore, it would not provide representation, pursuant to the self-representation agreement. However, the PSAC confirmed that she was free to continue representing herself and it had no further involvement in this grievance.

[42] The PSAC did not respond to the complainant's allegation about the second grievance filed after grievance 5038, with respect to which she states that she was also refused representation.

[43] In addition, the PSAC maintains that it has continued to provide representation to the complainant with respect to any new matters she has raised or questions and clarification she has sought, including after the finding against her was made in the harassment investigation and after the duty-of-fair-representation complaint was made. And, it remains committed to advising and assisting her with respect to any new grievances she may wish to file.

E. Allegations against Linda Koo with respect to France D'Amphouse

[44] The complainant submits that Ms. Koo displayed questionable judgment, bias, lack of impartiality, and absence of loyalty by conducting a personal, preliminary,

exclusionary, and ultimately prejudicial assessment of serious allegations that the complainant had raised against France D'Amphouse, a management labour relations representative.

[45] She states that without being asked or having a mandate to pursue any inquiry, and in advance of the complainant filing any formal grievance against Ms. D'Amphouse, Ms. Koo pursued her own personal investigation into the complainant's allegations, contacting management labour relations representatives directly and discussing with them a matter that was, at that point, still confidential. The complainant alleges that Ms. Koo provided false and misleading interpretations and information to management about the complainant's position, intentions and concerns, and her views on possibilities for potential resolution.

[46] She attributes this to what she describes as Ms. Koo's wilful ignorance of the substance of her grievance and Ms. Koo's continuing efforts to distance the union from any involvement with the complainant, in this case even seeking to collude with management before the complainant filed a grievance. The complainant submits that Ms. Koo explained that she had determined the complainant's complaints to be inadmissible following a discussion with the members of management who were implicated in the allegations.

[47] In the complainant's view, this was collusion with management and interference with her rights. She states that Ms. Koo's investigation resulted in the disqualification of her complaint and that Ms. Koo's inquiries with implicated parties falsely communicated to management that the complainant sought Ms. D'Amphouse's removal from the file as a remedy. The complainant states that she would never have asked for that as a possible resolution to the problem, as doing so would have been detrimental to her interests. She states that in her view, Ms. Koo set her own agenda, which was focused on disengaging the union from any representation of the complainant.

[48] The PSAC states that the complainant raised concerns to Ms. Koo about a conflict of interest on Ms. D'Amphouse's part before commencing her self-representation. She did so with a clear expectation that Ms. Koo would take action to address the concerns raised. Therefore, Ms. Koo took steps to communicate with the employer to determine whether a different employer representative could be assigned

to the complainant's matter. This was an appropriate step to take to address the complainant's concern and does not amount to a breach of the duty of fair representation.

F. Failure to advise the complainant of other complaints against her

[49] The complainant submits that in June 2018, the employer informed her that another PSAC member had made a complaint against her with the union on March 16, 2018. The PSAC had never informed her of the complaint or its allegations. She alleges that the union acted in bad faith by failing to inform her of complaints made against her that would impact her relations with management, other employees, and the union.

[50] The PSAC denies that it failed to disclose information to the complainant that it ought to have disclosed or that it did so in a manner that was arbitrary, discriminatory, or in bad faith. It further maintains that particularly in situations of alleged inter-member harassment, it has an obligation to provide fair representation and to balance the interests of all affected members, which in this case included others, along with the complainant.

[51] Finally, the PSAC maintains that this allegation, which is separate from the complainant's allegations about its representation in the grievance process, is untimely, as she became aware of the foundation for her concerns in June 2018, which was more than 90 days before she made her complaint.

III. Reasons for decision

A. Arguable case analysis

[52] As the respondent submitted, in *Canadian Merchant Service Guild v. Gagnon et al.*, 1984 CanLII 18 (SCC), [1984]1 SCR 509 at page 527, the Supreme Court of Canada established the parameters of a union's duty of fair representation, as follows:

...

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.*

...

[53] As outlined in that decision, a union retains considerable discretion as to the nature of the efforts it will undertake in a specific case.

[54] In *Ouellet v. Luce St-Georges and Public Service Alliance of Canada*, 2009 PSLRB 107, the Board stated that the burden of proof rests with the complainant. That burden requires the complainant to present evidence sufficient to establish that the bargaining agent failed to meet the duty of fair representation.

[55] To establish a breach of that duty, the basic rule requires the complainant to first make out an arguable case that the union conducted itself in a manner that was arbitrary, discriminatory, or in bad faith (see *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37).

[56] An arguable case in this context is one in which the complainant's alleged facts, if believed as true, amount to a breach of the PSAC's duty of fair representation under the *FPSLRA*. This assessment is done based on the allegations contained in the complaint and the submissions. It is important to note that the test at this stage is not whether I believe that such a breach occurred. The first step is to establish an arguable case; if that is done, the next step is to determine if the allegations have merit.

[57] After examining the complaint and the submissions, I find that the complainant has demonstrated an arguable case that the PSAC violated the *FPSLRA* with respect to her allegations about the conduct of Ms. Koo, the self-representation agreement and its alleged impact on the outcome of grievance 5038, and the PSAC's refusal to represent her on subsequent grievances.

[58] Now that an arguable case has been shown, the Board will have to determine if the complainant's allegations have merit.

B. Timeliness issue about one allegation

[59] In its reply to the particularized complaint, the PSAC submitted that the complainant's allegation concerning the failure to advise her of other complaints against her is untimely.

[60] I will hear the issue of timeliness relating to this allegation at the hearing. Given that I must first make a finding on the issue of timeliness, I cannot proceed to an arguable case analysis of this allegation at this time.

C. The next step

[61] The Board will hear the following at the hearing:

- the allegations concerning the conduct of Ms. Koo,
- the allegation about the self-representation agreement and its alleged impact on the outcome of grievance 5038, and
- the allegation that the PSAC refused to represent the complainant on subsequent grievances.
- the issue of timeliness of the allegation that PSAC failed to advise the complainant of other complaints against her.

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

(The Order appears on the next page)

IV. Order

[63] The respondent's motion to dismiss is denied, in part.

June 4, 2021.

**Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board**