

**Date:** 20211026

**Files:** 561-34-00822  
561-34-42652  
561-34-42681

**Citation:** 2021 FPSLREB 118

*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

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BETWEEN

**MOHAMMED TIBILLA**

Complainant

and

**PUBLIC SERVICE ALLIANCE OF CANADA**

Respondent

Indexed as

*Tibilla v. Public Service Alliance of Canada*

In the matter of complaints 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:** Himself

**For the Respondent:** Kim Patenaude, counsel

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Decided on the basis of written submissions,  
filed July 12 and September 10, 2021.

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**REASONS FOR DECISION**

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**I. Complaints before the Board**

[1] Mohammed Tibilla (“the complainant”) has made three complaints to the Federal Public Sector Labour Relations and Employment Board (“the Board”). He submits that his bargaining agent, the Public Service Alliance of Canada (PSAC or “the respondent”), has failed in its duty to fairly represent his interests to his employer, the Canada Revenue Agency (CRA or “the employer”), contrary to s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”). That section reads as follows:

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

[2] The respondent argues that the complainant has not established an arguable case and that the Board should summarily dismiss the complaints.

**II. Procedural matters**

[3] On February 24, 2021, the complainant made two complaints with the Board, bearing file numbers 561-34-42652 and 561-34-42681. Before responding to them, the respondent asked for further particulars, which the complainant provided on April 11, 2021. The respondent provided its response on April 15, 2021. In its response, it asked that a third outstanding complaint, bearing file number 561-34-00822, which had been made on December 6, 2016, also be dealt with at the same time as the other two.

[4] The matter was scheduled for a hearing from July 13 to 16, 2021, by videoconference. Unfortunately, due to technical difficulties, the complainant was unable to participate in both the prehearing conference and the videoconference test. A phone conference was held, and it was determined that the parties would make written submissions.

[5] Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), I have determined that this matter can be dealt with in writing, without holding an oral hearing. For the reasons that follow, and even taking all the complainant’s allegations as true, I do not find that there is an arguable

case that the respondent failed to fulfill its duty of fair representation. Consequently, the three complaints are dismissed.

### III. The complainant's allegations

[6] The complainant has had several conflicts with his employer. The Union of Taxation Employees (UTE), a component of the respondent, represents employees at the CRA. For the purposes of this decision, the respondent is meant to include both the UTE and PSAC.

#### A. Complaint 561-34-00822

[7] The complainant made a complaint (Board file no. 561-34-651) against the respondent in 2013. It was settled by way of mediation in March 2014. However, the complainant was dissatisfied with the execution of the terms of settlement, so he made this complaint. The respondent argued that a full and final settlement had been reached, which barred any further action on the same subject matter.

[8] In essence, the settlement resolved the issue between the parties by creating an obligation for the respondent to file a grievance on behalf of the complainant, who in return agreed to withdraw his complaint. He believed that the respondent did not fulfill its end of the bargain when, after the employer rejected the grievance in the course of the grievance procedure, the respondent refused to refer it to the Board for adjudication. The complainant submits that by doing so, the respondent denied him proper representation.

[9] The subject of the grievance was the complainant's term contract not being renewed. His view was, and this was argued at the final level of the grievance procedure, that the contract had not been renewed as retaliation for his previous grievances. As well, the complainant believed that he had been unfairly evaluated, another point that was argued during the grievance procedure.

[10] The analyst who considered whether the grievance should be referred to adjudication advised that it should not be referred, given the Board's lack of jurisdiction because the *Canada Revenue Agency Act* (S.C. 1999, c. 17), provides another recourse. As well, the Board has no jurisdiction over a term contract not being renewed. Finally, in any event, the Board did not have the power to grant the remedy requested, which was an appointment within the CRA.

[11] The complainant believes that not referring the matter to adjudication shows bad faith on the part of the respondent.

**B. Complaint 561-34-42652**

[12] The complainant alleges that the bargaining agent representative refused to file a grievance on his behalf when his term contract ended and was not renewed.

[13] The complainant alleges that on December 20, 2019, he asked his bargaining agent local to file a grievance on his behalf, to grieve his performance evaluation for the period from September 1, 2018, to March 31, 2019. The respondent did file a grievance, but management did not change the evaluation. There has been no further progress, and the situation remains unresolved.

**C. Complaint 561-34-42681**

[14] On December 8, 2020, the complainant again asked the respondent to file a grievance on his behalf to grieve his performance evaluation for 2020. According to him, the respondent refused.

**IV. The respondent's position**

**A. Complaint 561-34-00822**

[15] This complaint has no basis since the matter was settled by a full and final settlement. According to the terms of settlement, the respondent had committed to filing a grievance and representing the complainant throughout the grievance procedure, which it did. It had also committed to providing written reasons as to whether it would refer the grievance to adjudication. In return, the complainant agreed to withdraw his complaint and not pursue the matter further.

[16] In determining that the matter should not be sent to adjudication, the analyst considered all the information on file, including the representations made to the employer during the grievance procedure, in which the representative presented the complainant's arguments.

[17] The analyst sent a letter to the complainant explaining why the matter would not be referred to adjudication. Thus, according to the respondent, the terms of settlement were fulfilled.

**B. Complaint 561-34-42652**

[18] The respondent raises the fact that in his initial complaint, the complainant never alleged that its representative refused to file a grievance on his behalf for his term contract not being renewed. The respondent points to the fact that he has not submitted any evidence of his request for a grievance to be filed or the representative's refusal to file one.

[19] The respondent did file a grievance on the complainant's behalf against his performance evaluation. With his permission, the respondent corresponded with the employer about the grievance.

[20] The matter was pursued, and changes were made to the performance evaluation to remove part of it. The complainant contacted the representative in August 2020, but the representative was absent and did not return to work until February 2021. He was unaware of any attempt by the complainant to pursue the grievance.

**C. Complaint 561-34-42681**

[21] On December 6, 2020, the complainant emailed his bargaining agent local to ask a representative to file a grievance on his behalf with respect to his 2020 performance evaluation. The representative discussed the performance evaluation with him and then called the team leader, who explained the evaluation's content.

[22] The team leader agreed to reconsider the performance evaluation. This was communicated to the complainant, yet he still wanted to file a grievance. The bargaining agent representative advised him that they should wait to see how the informal resolution process worked out.

[23] On January 5, 2021, the team leader advised the complainant that some changes would be made to the performance evaluation, but the number grade remained the same. The same day, the complainant asked the representative to proceed with the grievance. The representative answered that doing so would be premature, as the performance evaluation should first be seen before being grieved.

[24] According to the respondent, on January 12, 2021, the complainant requested to be accompanied to a disciplinary hearing. The representative accompanied him. He made no further follow-up about the performance evaluation.

## V. Analysis

[25] The issue to be decided is whether, taking the complainant's allegations as true, there is an arguable case that should proceed before the Board. If not, the complaints will be dismissed.

[26] To find that there is an arguable case, the allegations must point to a violation of s. 187 of the *Act* that shows that the respondent acted "... in a manner that is arbitrary or discriminatory or that is in bad faith in the representation ..." of the complainant. The scope of the respondent's duty of fair representation was examined in *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, from which I quote the following:

...

*[43] The role of the Board in a complaint involving the duty of fair representation is to determine whether a bargaining agent acted in bad faith or in a manner that was arbitrary or discriminatory in its representation of the complainant. The Board does not determine whether the bargaining agent's decisions on whether to represent or how to represent were correct. The bargaining agent has considerable discretion in determining whether to represent an employee on a grievance and on how to handle a grievance. The scope of the discretion of a bargaining agent was set out by the Supreme Court of Canada ("SCC") in Canadian Merchant Service Guild v. Gagnon et al., [1984] 1 S.C.R. 509 at 527. The SCC was describing the discretion of the bargaining agent in determining whether or not to refer a grievance to arbitration, but the principles are equally valid for the decision on whether to represent an employee on a grievance:*

...

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

...

[44] *The Federal Court of Appeal has held that in order to prove a breach of the duty of fair representation, the complainant must satisfy the Board that the bargaining agent's investigation into the grievance "was no more than cursory or perfunctory"* (International Longshore and Warehouse Union v. Empire International Stevedores Ltd., 2000 CanLII 16578 (F.C.A)). *It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with...*

...

[27] Considering the three complaints made with the Board, I cannot conclude that the respondent acted in a discriminatory or an arbitrary manner or in bad faith. In all three cases, its representative followed up with the complainant and provided conscientious service. I shall examine each complaint in turn.

#### **A. Complaint 561-34-00822**

[28] The complainant submits that a settlement that applied to a previous complaint was not executed properly. In fact, the complaint is rather that the complainant disagrees with the respondent's analysis as to whether the complaint should be referred to adjudication. However, a disagreement on this subject is not evidence of arbitrary or bad-faith representation. As stated in the earlier quote, "It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with."

[29] As stated in *Beniey v. Public Service Alliance of Canada*, 2020 FPSLR 32, the issue is not whether there is agreement but whether the respondent provided a reasoned analysis to support its decision.

[30] The terms of the settlement of the initial complaint were clear: the respondent committed to filing the grievance and representing the complainant throughout the procedure and to providing a decision on whether to refer it to adjudication. The respondent did not commit to refer it to adjudication.

[31] The respondent provided a reasoned and reasonable assessment of the grievance's chances of success at adjudication. I cannot find any arbitrary, discriminatory, or bad-faith action on the respondent's part in this matter.

[32] The complaint is dismissed.

**B. Complaint 561-34-42652**

[33] The complainant made a complaint because he was dissatisfied with how the respondent represented his interests with respect to the performance evaluation. Yet, the documents that the respondent provided show that its representative actively engaged the employer on the performance evaluation.

[34] The matter stalled in late March 2020. The complainant tried to contact the representative in August 2020 but received no response. He made no further attempts to revive his grievance.

[35] Although the respondent bears a certain responsibility for grievances and the informal process to resolve them, grievors remains responsible for their grievances. The complainant waited until August 2020 to contact the respondent, then received no answer. I see no sign of diligence on his part to pursue the matter.

[36] There is no indication that the complainant attempted to contact any other respondent representative or official before making his complaint in February 2021. In those circumstances, I cannot see how the respondent failed its duty to represent him fairly. As far as the respondent knew, he was no longer pursuing his grievance.

[37] The complaint is dismissed.

**C. Complaint 561-34-42681**

[38] This complaint also concerned a grievance that the complainant wanted to file against his performance evaluation. He was told that he should wait to receive the new evaluation (which was changed after the respondent and the employer had discussions) before filing a grievance. The email exchange is dated January 6, 2021. The complainant states that he “expected the union to respect his right to grieve”. He made the complaint on February 22, 2021. In his recital of the facts, he does not mention that he was accompanied by a respondent representative to a disciplinary hearing held on January 13, 2021.

[39] Grievances based on a collective agreement cannot be filed without the bargaining agent’s consent (s. 208(4) of the *Act*). Therefore, the respondent has discretion to decide whether to approve the grievance and represent the employee. In this case, it advised the complainant that it would be preferable to attempt to settle



the dispute concerning the performance evaluation by way of an informal process, and that the final evaluation should be received before filing a grievance.

[40] The complainant is dissatisfied with the result of the discussions with the employer, but that does not make the respondent's related actions arbitrary, discriminatory, or done in bad faith. The numerous exchanges between the respondent and the employer show that the complainant's case was taken seriously, and a diligent effort was made to try to resolve the situation. I cannot see that the respondent advising him to wait for the final version of the performance evaluation before deciding to file a grievance was an action contrary to its duty of fair representation.

[41] Consequently, the complaint is dismissed.

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

*(The Order appears on the next page)*

**VI. Order**

[43] Complaints 561-34-00822, 561-34-42652, and 561-34-42681 are dismissed.

October 26, 2021.

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