

Date: 20211027

File: 561-02-41772

Citation: 2021 FPSLREB 119

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



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

BETWEEN

RUPINDER PANESAR

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as

Panesar v. Professional Institute of the Public Service of Canada

In the matter of a complaint made under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act*

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Simon Ferrand, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions,
filed March 1 and 10, 2020, and October 1, 2021.

REASONS FOR DECISION

I. Introduction

[1] Rupinder Panesar is an employee of the Canada Revenue Agency (“the employer”). Her bargaining agent is the Professional Institute of the Public Service of Canada (“the bargaining agent”).

II. Summary of the evidence

[2] As of March 2020, Ms. Panesar was on extended leave without pay (“LWOP”), for which the circumstances were not provided to the Federal Public Sector Labour Relations and Employment Board (“the Board”). However, it appears that she had received an option letter from the employer in 2019 that arose from her extended LWOP of more than two years. At some point, she had filed two grievances, one dealing with a forced medical assessment, and one contesting a yearly performance evaluation.

[3] For some reason, Ms. Panesar believes that the option letter amounted to a termination. She appears to have taken that position with the bargaining agent, which pointed out that at least as of March 2020, she had not been terminated. The employer’s option letter did not constitute a termination (although termination might still be in the cards sometime down the road).

[4] In any event, the bargaining agent’s employment relations officer (“ERO”) worked with the employer to obtain several extensions of the option letter. At some point, Ms. Panesar also filed a third grievance, this one alleging that she had been terminated, although in point of fact, she had not been.

[5] At some point before March 2020, Ms. Panesar sent several emails to the bargaining agent in which she asked it to appoint external counsel to represent her with respect to what she thought was her termination.

[6] The bargaining agent’s *Policy on Representational Services* includes the statement that the bargaining agent “... strives to provide competent and professional services to its members to represent them in the context of workplace matters related to the interpretation and application of the collective agreement and employer policies.” In the appropriate circumstance, the policy can extend to the appointment of outside counsel.

[7] With that policy in mind, Ms. Panesar's request was forwarded to Nancy Lamarche, Institute Director, Regional Labour Relations, for the bargaining agent, who investigated the background to the request to determine whether the circumstances warranted recommending that the bargaining agent retain outside counsel.

[8] Ms. Lamarche reviewed the file materials she had on hand, spoke to Ms. Panesar's ERO, and considered the information she had received. She then wrote to Ms. Panesar on March 10, 2020.

[9] Ms. Lamarche noted that Ms. Panesar had not in fact been terminated and that the bargaining agent and the ERO had been working with her on the grievances. The ERO had obtained extensions from the employer and was still awaiting important information from Ms. Panesar.

[10] Ms. Lamarche added that Ms. Panesar had been advised a number of times that if she failed to select one of the options presented to her, she could be terminated. She urged Ms. Panesar to supply the necessary information and response to the employer and noted that the ERO was still acting on her behalf.

[11] Having considered the information available to her, Ms. Lamarche advised Ms. Panesar that she was not prepared to recommend that the bargaining agent retain outside counsel. She added that since the employment issues did not relate to interpreting the collective agreement, Ms. Panesar was free to represent herself and to retain outside counsel (at her expense). Pending that, the bargaining agent would continue to act on her behalf. Finally, Ms. Lamarche advised Ms. Panesar that she could request a reconsideration of her decision by applying to Isabelle Roy, the bargaining agent's general counsel, by March 23, 2020.

[12] It appears that Ms. Panesar did file a request for reconsideration with Ms. Roy on March 23, 2020. She asked the bargaining agent to provide her with "fair representation", that it grieve her termination, and that it retain outside counsel to represent her with respect to the termination grievance.

[13] Ms. Roy responded to that request on March 31, 2020. She pointed out that in fact, Ms. Panesar had not been terminated. She explained that under the collective agreement, a termination grievance could be filed only once the notice of termination had been received, and as of March 31, 2020, no such notice had been received. With

that in mind, Ms. Roy advised her that the bargaining agent was not prepared to file a grievance with respect to a termination that had not yet occurred and that it was not prepared to retain outside counsel. She also noted that since Ms. Panesar had levelled no complaints about the ERO's work on her behalf, there was no reason to replace the officer.

[14] On May 20, 2020, Ms. Panesar made a Form 16 complaint against the bargaining agent under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act"). She alleged that the bargaining agent had committed an unfair labour practice pursuant to s. 190(1)(g). She alleged that there was "not fair representation continuous [sic]." She stated that she had "communicated [her] concerns to the PIPSC to date no resolution. No fair representation." As a remedy, she sought "... fair representation via external counsel with costs, and other available remedies."

[15] The Board reviewed the Form 16. It also reviewed the correspondence to her from Ms. Lamarche and Ms. Roy.

[16] On September 29, 2021, the Board wrote to the parties and noted as follows:

...

This complaint pursuant to various sub-sections [sic] of s.190 of the Public Service Labour Relations Act [sic] has been referred to me as Adjudicator for review and possible decision.

In essence, Ms. Panesar alleges that her bargaining agent has failed in its duty to represent her fairly and in good faith. In particular, she alleges that she was terminated and that the bargaining agent failed to grieve that termination or to represent her interests.

The bargaining agent has replied to the effect that Ms. Panesar was represented by it, and that as a result of that representation she has not been terminated.

I have reviewed the file and propose to determine whether the complaint can be decided on the basis of the written submissions made to date. Before doing so, I would ask whether Ms. Panesar and the bargaining agent have any additional submissions they wish to make touching on:

- a) the events leading to Ms. Panesar's complaint;*
- b) the bargaining agent's response; and*
- c) what it is that Ms. Panesar says constitutes a failure of the bargaining agent's duty of fair representation.*

*Any additional statements or submissions must be provided **by no later than Friday, October 1, 2021**. The parties will then have*

until Friday, October 15, 2021 to make any reply to each other's submissions.

Please note that following receipt of these submissions, the matter may either be scheduled for an oral hearing, or, the matter may be dismissed based on the written submissions and the file would then be closed.

...

[Emphasis in the original]

[17] The bargaining agent provided the following response on October 1, 2021:

...

As a result of workplace issues Ms. Panesar encountered with her employer (the Canada Revenue Agency (CRA)), the Institute filed grievances challenging the work performance assessment she received and the CRA's request to send her to a Fitness to Work Assessment. The Institute continues to represent Ms. Panesar and will continue to do so. At no time has the Institute withdrawn its representation.

...

[18] The bargaining agent's response was copied to Ms. Panesar. No submission or advice was received from her by either October 1 or October 15, 2021.

[19] After reviewing the materials and the submissions, I was satisfied that a decision could be made in writing.

III. Analysis and decision

[20] The jurisprudence in this area is clear. A bargaining agent's control over the grievance process carries with it the obligation to exercise that power fairly, in good faith, and in a non-arbitrary and non-discriminatory fashion. A bargaining agent's decisions with respect to how it decides to represent its members — and whether representation is required in any particular case — is subject to the same duties.

[21] In the matter before me, Ms. Panesar remains an employee. She has not been terminated, albeit an option letter has been issued. The bargaining agent has represented her with respect to the letter, and continues to. In the absence of a termination, there is nothing for the bargaining agent to grieve. The fact that Ms. Panesar disagrees with that conclusion is not in itself evidence of bad faith, negligence, or any breach of the bargaining agent's duty of fair representation. As Adjudicator

Marie-Claire Perrault noted in *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLRREB 48 at para. 100, "... dissatisfaction is not a criterion that the Board uses to find that a breach of representation occurred." The same adjudicator noted as follows in *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLRREB 87 at para. 36:

[36] The bargaining agent must represent its members fairly, genuinely, with integrity and competence, and without hostility towards them (Canadian Merchant Service Guild v. Gagnon, [1984] 1 SCR 509 at 527). As the Board has often held, this does not mean that the bargaining agent must follow instructions from its members on filing a grievance every time a member wants to. Bargaining agents have limited resources, and the Board certainly cannot dictate to them how to use those resources. Based on the facts to which the parties agreed, I am satisfied that the respondent and the CEIU fulfilled their obligations toward the complainant. Although he was not satisfied with the services offered, it does not mean that the respondent's actions were arbitrary, discriminatory, or made in bad faith.

[22] With that jurisprudence in mind, it is clear to me that what Ms. Panesar sees as bad faith is nothing of the kind. She has not pointed to any arbitrary, capricious, or discriminatory conduct or decision making by her bargaining agent. It continues to represent and assist her in her dealings with the employer. She had the onus to provide evidence of bad faith or arbitrary conduct or decision making on the part of her bargaining agent, which she failed to do. Her "evidence" rests solely in her argument that the bargaining agent is wrong in its conclusion that at the moment, there is nothing to grieve. She offered nothing to suggest that its opinion on that point is wrong, let alone that it was made in bad faith.

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

(The Order appears on the next page)

IV. Order

[24] The complaint under s. 190(1)(g) of the *Act* in Board File No. 561-02-41772 is dismissed, and the file is closed.

October 27, 2021.

**Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board**