

Date: 20220121

File: 561-02-41670

Citation: 2022 FPSLREB 2

*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

JACQUELINE GABON

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Gabon v. Public Service Alliance of Canada

In the matter of a duty of fair representation complaint made under section 190(1)g of the *Federal Public Sector Labour Relations Act*

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Aaron Lemkow

Decided on the basis of written submissions,
filed March 4 and October 28 and 30, 2020, and January 8 and 21, March 3, September
17, 21, and 23, and October 7, 2021.

REASONS FOR DECISION

I. Summary

[1] This complaint alleges that her union (the Public Service Alliance of Canada; also referred to as “the respondent” in this decision) owes a member a duty of fair representation (DFR) in the course of a mediation process for a staffing complaint made under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”). And further that the bargaining agent failed to discharge that duty adequately in handling the preparation for that process.

[2] The respondent objects to the jurisdiction of Federal Public Sector Labour Relations and Employment Board (“the Board”) to deal with the matter, arguing that the DFR is statute barred from applying to staffing complaints.

[3] The complainant (Jacqueline Gabon) disagrees. She argues that the respondent’s failure to participate in the Board’s mediation process with respect to her staffing complaints made under the *PSEA* prevented her from discussing many other issues related to other grievances and human-rights actions that she had filed against her employer. Consequently, she submits that the Board has jurisdiction to hear her DFR complaint.

[4] For the reasons set out below, I conclude that the Board does not have jurisdiction to hear her DFR complaint because it is solely related to the respondent’s representation in her staffing complaints, and not matters arising from the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *FPSLRA*”) or arising from her collective agreement.

[5] While it may not seem just for a union to choose to represent a member in a PSEA staffing matter and then not be held to account for its actions through a potential DFR complaint before this Board, the jurisprudence is well-settled that this is the reality by means of the Board’s authority as set out by Parliament.

[6] Therefore, the complaint is dismissed.

II. The essential nature of the complaint

[7] The complainant is employed at Environment and Climate Change Canada as Head, Procurement and Document Management (EG-06). She made her DFR complaint under

s. 190(1)(g) of the *FPSLRA* against the respondent on March 4, 2020. It included supplemental information totalling 36 pages. The complaint and supplements provide highly detailed allegations and accompanying documentation, including many emails to and from her, which would have otherwise formed exhibits at a hearing of the matter.

[8] The union promptly replied with a motion to dismiss the complaint, arguing that the Board had previously determined that a union does not owe a DFR to a member if it chooses to represent her in a staffing complaint under the *PSEA*.

[9] After convening a case management conference to discuss the file and the next steps, I confirmed with the parties in writing that the respondent's objection would be determined based upon written submissions. The complainant sought and was granted an extension to submit her reply to the respondent's submission.

[10] Part of the complainant's reply to the motion to dismiss her complaint was her request to amend it. She proposed many pages of amendments to her originating complaint. The proposed amendments referred, for the first time, to grievances and human rights complaints that she claims to have made to the employer and argued that the mediation process with respect to staffing complaints filed under the *PSEA* would have allowed her to discuss issues related to these grievances and human-rights actions against her employer.

[11] She therefore submitted that this complaint is actually about the respondent's breach of its DFR as a staffing and labour relations matter.

[12] Given the complainant's motion to amend her originating complaint to add many references to these other matters, it is necessary for me to analyze the original DFR complaint.

[13] I have read it carefully and in its totality. I find no reference to the complainant proposing, discussing, or strategizing the proposed additional grievance matters with her union representatives, the Board's mediator assigned to the file from its Mediation and Dispute Resolution Services, or Darlene Marchand, another employee who had also filed staffing complaints similar to the complainant's and which had been consolidated with hers.

[14] I set out below relevant excerpts from the original DFR complaint and attachments that support this observation. I have highlighted in bold non-italic lettering the passages that show that the complainant was only alleging that the respondent failed to fairly represent her in the context of her staffing complaints:

...

4. Concise statement of each act, omission or other matter complained of, including dates and names of person involved

*This is a Duty of Fair (DFR) complaint under section 190(1)(g) of the PSLRA that the PSAC component Union of Health and Environment Workers (UHEW) has acted arbitrarily and in a discriminatory manner regarding several staffing complaints for Darlene and myself. This DFR deals with the **Dec. 5, 2019** email from the FPSLREB mediator and actions and lack thereof that led up to this email. Paige, our Local President, agreed to represent us on our **staffing complaints**. The following statements and supporting information in 8 and 10 below demonstrate that the process to represent on the **staffing complaints** was not done fairly, presented several gaps in analysis and assessment, did not properly communicate decisions to us as complainants and employed discriminatory practices which resulted in harm to Darlene and myself (based on our communication to the Local and UHEW National Office of our disabilities). There were several instances where our union reps did not communicate with Darlene and myself on **our staffing complaints**, and early resolution through mediation was fettered by the union reps lack of fair and appropriate actions. It is important to note that the Local was aware that there are many staffing issues in the Branch and staff are afraid of reprisal by the employer, including limitations on an employee's career, bullying, discrimination and impact on mental health (from employees and PSES results); this assessment of the workplace conditions have alerted the Local to breaches of the collective agreement no discrimination article, based on the Local and UHEW experience with the employer, in addition to its experience from participating in union-management consultation committee meetings.*

*a) Darlene and I were denied the opportunity to early resolution of our staffing complaints when our union representative, Robert, failed to follow through with making arrangements for the employer-requested mediation with the FPSLREB mediator for July 8 or the week of July 8. Both Darlene and I **agreed to mediation for our staffing complaints**. We wanted to **address issues on staffing actions and discrimination** in our area of work and we feared more reprisal in the workplace if the complaints could not be addressed quickly including being black-listed by the employer. We had hoped that there would be some resolution at the proposed July mediation and that we would be considered for assignments and career advancement opportunities in the organization (to address discrimination*

based on age and disability exhibited by the employer in the workplace). After June 4, 2019, Robert stopped communicating with the mediator, didn't respond to her emails or voice messages, and didn't let Darlene or I know what was going on with the mediation arrangements. He provided no explanation or rationale to us which was strange - **arbitrary behaviour** - and he didn't return my phone calls which gave us the impression that he didn't care about our **staffing complaints** even though the Local executive was aware that there were several issues on **staffing actions, discrimination and workplace violence in this part of the organization** (from staff and PSES results). This lack of action (**negligence & arbitrary behaviour**) affected our mental health and **discriminated** against us since there we were not provided any accommodation for our disabilities (mental) in consideration or anticipation that this lack of action would definitely have an impact on our mental health. PSAC and its components are involved in workplace accommodation for employees with disabilities, and union reps are trained and experienced to deal with the duty to accommodate and the no discrimination article in collective agreements applicable to PSAC members. Training on this was also provided during the June 2019 UHEW Regional Conference which was attended by Robert and Paige from the Local, and Shimen and Stephen from UHEW National Office. As well, there is information on the UHEW website regarding grievances and the staffing complaint process (see 10F below) which was referred to during the conference which could have been utilized to **understand the responsibilities of the union rep in the staffing complaint process** and also recognize the need for accommodation of union members who have disabilities. By July 5, 2019, both Darlene and I were in panic mode, and we couldn't locate Rob. We also couldn't locate him on July 8 (date that he had indicated to the mediator that he was available for the mediation).

- b) Since meditation arrangements had not been made by Robert (in his capacity as our union rep) for the week of July 8, 2019, and the **staffing complaints were not resolved**, there were still matters that needed to be addressed by Robert **in these staffing complaints** (participation in Exchange of Information meetings, formulation of allegations, replies to Deputy Head and other motions, to meet timelines). In the following months, I emailed Robert and Paige about arranging for **mediation for the staffing complaints** as the mediator had indicated to me on July 22, 2019 that the employer was still agreeable to mediation and that it would take a few weeks to book off-site meeting rooms for the mediation. I discussed mediation with Paige on several occasions, letting her know that Darlene and I were still interested in mediation and that Robert wasn't taking action to make arrangements for mediation nor to represent us on other aspects of our **staffing complaints**. I also kept her up to date on additional questionable staffing actions in the organization, and the reprisal affecting Darlene and I following the filing of our

staffing complaints. Emails (2019) were sent to Paige on July 22, Oct. 5, and Nov. 28. Paige assured me verbally that Robert would represent us and that she would address our concerns with him. I stressed that timelines needed to be respected on the **staffing complaints** as well. She assured me that Robert was still our union rep and that **she had talked to him about his responsibilities on the staffing complaints.** However, this didn't resolve our concerns and resulted in further aggravation to our mental health as more time elapsed and no mediation had been arranged and lack of action on **complaint matters** grew, resulting in no accommodation being provided by Paige or Robert to Darlene and I (**discriminatory actions**) to prevent anxiety attacks and deeper depression. The **Dec. 5, 2019** email from the mediator indicated that the employer had withdrawn its consent to participate in mediation, and that this had been conveyed to Paige in an Aug. 9, 2019 email. I was not aware of this until January 2020 when I returned to work following several weeks of sick leave and opened this email. Paige **neglected** to inform Darlene and I about the Aug. 9, 2019 email which was directly relevant to our interests in the staffing complaints. It was a shock to me to learn that Paige had not informed me of the Employer's withdrawal from mediation as this was an indication that **our staffing complaints were not being handled properly and fairly and that the UHEW Local was more than likely perceived as not being interested in helping their members to resolve the complaints.** Paige was aware that Darlene and I wanted to participate in mediation with the employer and by not relaying the Aug. 9, 2019 Information to us, she failed to take into consideration our interests (as stated above) and acted **arbitrarily.** By not letting us know about this, Paige's lack of action enabled the employer to continue to further their discrimination and reprisal against Darlene and I. The Local had knowledge that there had been members complaining about staffing, bullying and discrimination over several years to the Local executive however the members were fearful of reprisal. It was reasonable to expect that this organization would continue its discriminatory practices against complainants to intimidate them in to not filing complaints, and that the discriminatory practices would escalate after the staffing complaints were filed. Delaying mediation worsened the discrimination, and this ought to have been anticipated by the Local who didn't take steps to mitigate harm from these practices; rather, the Local is perceived to have enabled the discrimination by not taking appropriate action to stop the discrimination and other forms of reprisal. I became further depressed after finding out that my union had not kept me update to date on the mediation; I became very anxious as well about the hearings to be scheduled, and my doctor insisted that I take time off work in February 2020. Paige still has not let Darlene and I know about mediation being taken off the table even though I've discussed mediation with her on several occasions and emailed her requests about mediation that are

dated after the Aug, 9, 2019 email. Paige has also not informed Darlene and I that mediation could be requested through the registry as indicated in the Aug. 9, 2019 email (neglected to inform us, an arbitrary action). Had we known, we would have asked Robert (union rep) to request mediation through the registry back in Aug. 2019. There has been ample opportunity for Paige to advise us that mediation was off the table - this lack of action is also **discriminatory** since she failed to take into account the impact to our mental health through the union's actions and lack thereof. Paige is aware that PSAC components **are to represent (not support) on staffing complaints** (PSAC direction to components provided during June 2019 UHEW Regional conference at which Paige was a participant) and that the Local President is responsible for arranging for union representation to members on grievances and staffing complaints (more on this in c below).

- c) Darlene and I agreed to request Paige to provide us with another union rep, perhaps from another Local, since Robert continued to disregard the timelines, didn't take action as our union rep on **other staffing complaint matter** (e.g. request extensions to the timelines, respond to Deputy Head and other motions, formulation of allegations and Deputy Head responses to allegations, etc. Some details are provided in 8 below - requests were made by email on July 22 (Paige, Shimen), Oct. 5 and Nov. 28. To date, there has been no arrangement made for another union rep for these **staffing complaints**. This is considered to be an arbitrary action by Paige as she could have started looking for another union rep toward the end of July 2019 or make enquiries with other Locals as to availability of other union reps or consulted with the UHEW National Office as per the UHEW Grievances Procedures on the availability of trained union reps. This not being done is considered an arbitrary action (to not arrange for another union rep) particularly in the absence of analysis and assessment and communication of the union's position for these **staffing complaints** to Darlene and I. I also let Paige know that Shimen had instructed Robert to contact a UHEW Service Officer for help with various actions required ... to address timelines and other matters of the staffing complaints, and that Robert hadn't done this (**another arbitrary action**) - this lack of action was also **discriminatory** since it caused further emotional and mental stress to Darlene and I as we had to figure out to proceed with staffing complaints matters on our own without our union rep communicating with all parties, preparing and reviewing submissions, requesting extensions to timelines, etc. What is also key here is that Shimen (July 9, 2019) **warned Robert about not wanting UHEW to be in a position where a DFR could be filed based on his lack of action on the staffing complaints**. I informed Paige of a DFR complaint potential however Paige doesn't find another union rep for our **staffing complaints** - **arbitrary action** on her part. Darlene and I don't have the

authority to arrange for another union representative within or outside our Local or our component UHEW.

*d) UHEW National Office was informed of the issues and challenges with union representation for our **staffing complaints** at the June 2019 UHEW Regional Conference (Shimen, Stephen) and on other occasions (emails, phone calls). UHEW National Office was copied on emails to Paige and Robert that included impact to my mental health, however they did not monitor and address the lack of representation at the Local level. This lack of action is considered to be both an arbitrary and a discriminatory action since UHEW National Office is aware that both Darlene and I are persons with a disability and that there have been challenges with the employer-accommodating both of us. UHEW National Office is aware that Darlene and I requested representation rather than represent ourselves since union reps are experienced and trained in the issues that are of interest to us in our **staffing complaints**, and having challenges with our mental health, that we needed a union rep to be objective and present our interests to the employer, as well as formulate responses to the employer and parties to the staffing complaints. Todd was also aware that there were issues in Local union representation on these staffing complaints, and that there was impact on mental health of 2 members, however he did not take any action to address this (arbitrary and discriminatory). UHEW National Office were informed of the impact on my mental health since June 2019 and that the employer continued to discriminate against me because of my disability and my age. This is a contravention of Article 19 of my collective agreement (see 10 below).*

...

***Oct. 5, 2019 email to Paige** "I'm following up with you on the July 22, 2019 email. I haven't heard back from you as to Rob Gilmore (AVP in UHEW Local 00709), in his capacity as our union steward, arranging for the mediator to represent Darlene and I on our **FPSLREB staffing complaints** (see list below). We need to be represented by our union (PSAC - UHEW) on these **staffing complaints** and at mediation..."*

...

***Nov. 28, 2019 email to Paige** "I've heard nothing back from Rob regarding representing Darlene and I on our **staffing complaints**. You mentioned in October that you had spoken to Rob about representing Darlene and myself on the staffing complaints. Rob was at the Respect Day event today for at least a couple of hours however he doesn't have time to represent Darlene and I on **our staffing complaints**? He's missed several deadlines and still hasn't arranged the employer-requested mediation. Who else is able to represent Darlene and I at mediation with the employer? I fear that the Tribunal will do a paper review in December (before we even get to mediation) of the **staffing complaints** Instead of having a hearing." ...*

...

Dec. 5, 2019 Email from Stephanie to Darlene and I "Thanks for your email. I am sorry to advise but the employer has withdrawn their consent to participate in mediation. We had advised Ms. Gilmore of this in August (see attached email). As such, these files will remain designated for hearing scheduling. Please note that mediation remains available to the parties in this **staffing complaint process** and can be accessed at any time upon joint request by the parties."

...

E. Staffing Complaints to be mediated:

771-02-38749 (Gabon)

771-02-38750 (Marchand)

771-02-39966 (Gabon)

771-02-39964 (Marchand)

771-02-39965 (Gabon)

771-02-39428 (Gabon)

771-02-39941 (Marchand)

771-02-40295 (Gabon)

771-02-39625 (Gabon)

771-02-39628 (Marchand)

...

From: Gabon, Jacqueline (EC)

Sent: June 6, 2019 3:02 PM

To: Gilmore, Robert (EC)

Subject: RE: MEDIATION: MULTIPLE FPSLREB complaints: (Files 771-02-38749 and 38750 (Gabon and Marchand) et al.)

Sensitivity: Private

Hi Rob,

I'm concerned that there's not enough time to mediate the 4 complaints let alone all 10 of them in 1 visit, I don't believe that due process can be followed if we try to rush through everything at 1 session.

Has the duration of the mediation session been provided?

Who will be there from ECCC management? I don't know how they propose to do this, all of them at the same time, or take turns depending if it's in their division?

My personal take on this is to do the 4 together since allegations have been submitted and need to be updated for 39964 & 39965: 771-02-39441 and 771-02-39964 (Marchand) (consolidated with

771-02-39428 and 771-02-39965 - Gabon) - the 2 parties have consented to mediations

Then do the 2 complaints regarding the PC-02 on another day: Consolidated 771-02-38749 (Gabon) and 771-02-38750 (Marchand) - the 2 parties have consented to mediation

With regards to the remaining 4 (3 of which are mine, and I'm ok if Darlene is there), we can revisit this at another time. Meanwhile, **these staffing complaints are proceeding on their timelines.**

Jacqueline

...

From: Pieri, Stephanie

Sent: June 5, 2019 6:50 PM

To: Gilmore, Robert (EC)

Subject: RE: MEDIATION: MULTIPLE FPSLREB complaints: (Files 771-02-38749 and 38750 (Gabon and Marchand) et al.)

Hi Robert

Sorry for the delay in getting back to you. I am in Edmonton at a mediation.

To date, we have record of the following files in which both parties have agreed to participate in mediation:

Consolidated 771-02-38749 (Gabon) and 771-02-38750 (Marchand) - the 2 parties have consented to mediation

771-02-39441 and 771-02-39964 (Marchand) (consolidated with 771-02-39428 and 771-02-39965- Gabon) - the 2 parties have consented to mediations

The employer has indicated that they would like to also mediate the files below:

Consolidated 771-02-39625 (Marchand) and 771-02-39628 (Gabon)

771-02-39966 - Gabon

771-02-40295 - Gabon:

As such, the employer would like to go to mediation for all of Ms. Gabon's and Ms. Marchand's staffing complaints currently before the Board.

Please let me know if you are in agreement with adding the four files mentioned above to the six that are already scheduled for mediation.

Thanks

Stephanie

...

From: Gabon, Jacqueline (EC)

Sent: July 8, 2019 1:45 PM

To: Shimen Fayad;

Subject: 00709: CONFIDENTIAL: MEDIATION: MULTIPLE FPSLREB complaints: (Files 771-02-38749 and 38750 (Gabon and Marchand et al.)

Attachments: RE: MEDIATION: MULTIPLE FPSLREB complaints: (Files 771-02-38749 and 38750 (Gabon and Marchand) et al.) ; RE; Files 771-02-38749 and 38750 (Gabon and Marchand) - Contact info and proposed dates

...

Hi Shimen and Stephen,

I've attached 2 emails regarding the proposed mediation.

On May 13, 2019, the mediator contacted Paige Gilmore to schedule a mediation session for Darlene and myself. In this email, the union steward was changed from Paige to Robert Gilmore.

In the 2nd email (the last one that I have from Rob) - June 6, 2019, I spoke with Darlene and we agreed that doing all common complaints on 1 day was too much, so I communicated this to Rob in person and by email, and he was supposed to reply back to the mediator (Stephanie Pieri). I just got off the phone with Stephanie and she indicated that she hasn't hear back from Rob so she couldn't book a room for the mediation. Stephanie said that she also spoke to Paige (a few weeks back) who said that Rob would be replying shortly. Stephanie indicated that she had communicated to Rob that the mediation would take place over 2 days, however Rob never told Darlene and I this.

At this point in time, Darlene and I need to have a union rep to walk us through the mediation process and participate in the pre-mediation session and the proposed 2 day mediation with us. Could you please talk to Paige (as Local 00709 AVP) about this on our behalf since we're getting nowhere on this and the lack of action means that Darlene and I are NOT being represented by UHEW. If the Local doesn't have a reliable steward available, what else can be done for Darlene and I?

I'm giving serious thought to filing a DFR - where do I find the form to do this?

Cheers

Jacqueline

...

From: Gabon, Jacqueline (EC)

Sent: October 5, 2019 4:54 PM

To: Gilmore, Paige (EC)

Cc: Marchand, Darlene (EC); Shimen Fayad (shimen.fayad@uhew-stse.ca)

Subject: RE: CONFIDENTIAL: Representation at Mediation and staffing complaints (FPSLREB) - Marchand and Gabon

...

Hi Paige,

I'm following up with you on the July 22, 2019 email. I haven't heard back from you as to Rob Gilmore (AVP in UHEW Local 00709), in his capacity as our union steward, arranging for the mediator to represent Darlene and I on our FPSLREB staffing complaints (see list below).

We need to be represented by our union (PSAC - UHEW) on these staffing complaints and at mediation.

Rob indicated to Shimen on July 9, 2019 (after I contacted her about Rob not representing Darlene and I and that he hadn't contacted the mediator (FPSLREB) to schedule our mediations) that he was "able to see to local union administration / case matters starting this afternoon and Wednesday morning". From July 10, 2019 onwards, Rob hasn't contacted Darlene or myself, discussed the files with us, or replied to any communications from the Deputy Head (ECCC) or the tribunal (FPSLREB), Rob won't even discuss the files with me.

The mediator contacted me again on July 22, 2019 and indicated that Rob still had not responded to her voice messages to him or responded to the mediator's emails.

Rob isn't representing us at all - we need to file allegations, amend allegations, arrange for Exchange of Information meetings, requests for information, respond to Deputy Head's replies, correspond with the FPSLREB tribunal, and arrange for mediation (**the employer requested mediation months ago!**), Rob has completed the **staffing complaint training** a few years ago and has represented on **staffing complaints** before.

You know that I've been representing members (including Rob) during this time period, commitments have been made with the grievors and the department, and yet Rob continues to not represent Darlene and I. I'm representing on over 50 grievances, several violence complaints, and have other union matters to deal with. Darlene and I want to participate in mediation, and this hasn't been arranged.

We're requesting again, in your capacity as President of UHEW Local 00709, to address this with Rob. He was elected as AVP for UHEW Local 00709 and his duties include representing members.

We look forward to your reply for **Oct. 9, 2019**.

Thank you.

Jacqueline

...

From: Gabon, Jacqueline (EC)

Sent: July 22, 2019 9:02 AM

To: 'Paige Gilmore'

...

Hi Paige,

The mediator for the FPSSLREB contacted me again and let me know that Rob hasn't replied back to her nor replied back to her regarding details for the upcoming mediation meetings, Rob hasn't discussed the mediation with Darlene or myself. The last date on which Rob discussed the mediation with me was on June 6, 2019 after which I sent him an email with concerns (that Darlene and I had discussed together) and instructions to follow up with the mediator. To date, we've heard nothing back from Rob. The mediation was supposed to have taken place the week of July 8, 2019 however nothing was conveyed back to the mediator by Rob so this did not take place.

As such, due to lack of representation, who else from Local 00709 would be available to participate in the pre-mediation and mediation to represent Darlene and I? If there's no one from Local 00709, perhaps from another Local? In your capacity as Local president, I'm requesting that you find representation for Darlene and I for our staffing complaints as soon as possible. (Our grievances is another matter).

I'm handling a number of cases as you're well aware (including those for Rob) and grievance hearings have been scheduled, plus I have work commitments that I cannot put aside. My health and wellbeing has been severely impacted by Rob not representing Darlene and I cannot take on any more workload. Rob is aware of the timelines and has not responded or communicated anything further to us.

Thanks

Jacqueline

...

From: Gabon, Jacqueline (EC)

Sent: November 28, 2019 12:05 PM

To: Gilmore, Paige (EC)

Subject: CONFIDENTIAL: Representation at Mediation - Marchand and Gabon - Nov. 28, 2019

...

Hi Paige,

I've heard nothing back from Rob regarding representing Darlene and I on our staffing complaints. You mentioned in October that you had spoken to Rob about representing Darlene and myself on the staffing complaints. Rob was at the Respect Day event today for at least a couple of hours however he doesn't have time to represent Darlene and I on our **staffing complaints**? He's

missed several deadlines and still hasn't arranged the employer-requested mediation.

Who else is able to represent Darlene and I at mediation with the employer? I fear that the Tribunal will do a paper review in December (before we even get to mediation) of the staffing complaints instead of having a hearing.

Cheers

Jacqueline

...

From: *Stephanie*

Sent: *December 5, 2019 11:30 AM*

To: *Gabon, Jacqueline (EC)*

Cc: *Marchand, Darlene (EC)*

Subject: *RE: MEDIATION: MULTIPLE FPSSLREB complaints: (Files 771-02-38749 and 38750 (Gabon and Marchand) et al.)*

Attachments: *FPSSLREB - Files 771-02-38749/38750/39428/39441/39964 to 39966/39625/39628 and 40295 (Gabon & Marchand) Returned to Registry*

Hi Jacqueline,

*Thanks for your email. I am sorry to advise but the employer has withdrawn their consent to participate in mediation. We had advised Ms. Gilmore of this in August (see attached email). As such, these files will remain designated for hearing scheduling. **Please note that mediation remains available to the parties in this staffing complaint process and can be accessed at any time upon joint request by the parties.***

Please let me know if you have any questions or concerns.

Thanks,

Stephanie

...

[Emphasis in the original and added]

[Sic throughout]

[15] On October 28, 2020, the respondent filed its objection to the Board's jurisdiction to hear this DFR complaint. It submitted that the Board has determined in earlier decisions that the DFR recourse as set out in the *FPSSLRA* does not extend to matters outside the *FPSSLRA* or a collective agreement, such as staffing complaints made under the *PSEA*.

[16] The respondent referred specifically to the Board decision in *Tran v. Professional Institute of the Public service of Canada*, 2014 PSLRB 71.

[17] On January 8, 2021, the complainant responded to the respondent's objection. She argued that over many years, senior representatives of the respondent had led her to believe DFR complaints can be made regarding staffing complaints made under the *PSEA*. She pointed out that documents published by the respondent outlining how grievance procedures are conducted indicate that the respondent represents its members in staffing matters. She also noted that her staffing complaints raised allegations of discrimination and that her collective agreement included a "no-discrimination" clause.

[18] On January 21, 2021, the respondent replied to the complainant's response, reiterating that *Tran* and other decisions have held that a staffing complaint cannot give rise to a DFR complaint under the *FPSLRA*.

[19] Consequently, any statements that the respondent and its representatives may have allegedly made to suggest the contrary are irrelevant. Any such remarks were made out of an abundance of caution on the respondent's part but did not create an exception to the Board's jurisprudence. With respect to the discrimination references, the respondent noted that the DFR complaint was about staffing complaints and not about grievances alleging discrimination under the "no-discrimination" clause of the collective agreement.

[20] On March 4, 2021, the complainant further addressed the respondent's objection. She restated her claim that the respondent and its representatives had repeatedly told its members that its DFR extends to grievances and staffing complaints.

[21] A case management conference call was held on May 11, 2021, following which I directed the parties to submit by September 17, 2021, any supplementary material that they wished to file regarding the motion to dismiss, including a timeline of the many unsolicited submissions that had been made to date.

[22] On September 17, 2021, the respondent provided the requested timeline along with copies of several Board decisions and other material. The complainant, however, in her response to the Board's direction, presented a request to amend her DFR

complaint "... to include more details on the grievances and [Canadian Human Rights] complaints..." to which she claimed she had referred in her original DFR complaint. She maintained in her email message accompanying the amendment request that "[t]his is not a case simply dealing with staffing complaints, it's about discrimination and discriminatory practices related to staffing." She added that mediation was important to her to resolve the discrimination issues, "... which is why grievances ... were also filed in addition to the staffing complaints."

[23] In her motion to amend her complaint, the complainant proposed adding the following text (appearing in bold and not italics):

...

4. Concise statement of each act, omission or other matter complained of, including dates and names of person involved

This is a Duty of Fair (DFR) complaint under section 190(1)(g) of the PSLRA that the PSAC component Union of Health and Environment Workers (UHEW) has acted arbitrarily and in a discriminatory manner regarding several staffing complaints and grievances for Darlene and myself, while also fully aware that we had filed CHR complaints regarding discrimination and discriminatory practices on the part of the employer. This DFR deals with the Dec. 5, 2019 email from the FPSLREB mediator and actions and lack thereof that led up to this email. Paige, our Local President, agreed to represent us on our staffing complaints as well as our grievances related to discrimination in the staffing processes conducted by the employer. The following statements and supporting information in 8 and 10 below demonstrate that the process to represent on the staffing complaints was not done fairly, presented several gaps in analysis and assessment, did not properly communicate decisions to us as complainants and employed discriminatory practices which resulted in harm to Darlene and myself (based on our communication to the Local and UHEW National Office of our disabilities). There were several instances where our union reps did not communicate with Darlene and myself on our staffing complaints, and early resolution through mediation was fettered by the union reps lack of fair and appropriate actions. It is important to note that the Local was aware that there are many staffing issues in the Branch and staff are afraid of reprisal by the employer, including limitations on an employee's career, bullying, discrimination and impact on mental health (from employees and PSES results); this assessment of the workplace conditions have alerted the Local to breaches of the collective agreement no discrimination article, based on the Local and UHEW experience with the employer, in addition to its experience from participating in union-management consultation committee meetings.

a) Darlene and I were denied the opportunity to early resolution of our staffing complaints and our discrimination grievances related to these staffing complaints which also contained CHR complaints when our union representative, Robert, failed to follow through with making arrangements for the employer-requested mediation with the FPSLREB mediator for July 8 or the week of July 8. Both Darlene and I agreed to mediation for our staffing complaints. We wanted to address issues on staffing actions and discrimination in our area of work and we feared more reprisal in the workplace if the complaints could not be addressed quickly including being black-listed by the employer. I had some previous experience in negotiating memorandum of agreements with the employer on staffing complaints and grievances, and union reps from other Bargaining Agents at ECCC confirmed that the employer approached mediation holistically to reach settlement encompassing staffing complaints, grievances, harassment complaints, and CHR complaints (Paige and Robert were also aware of this) – Darlene and I expected that this would also be the case for our staffing complaints, grievances and CHR complaints. To resolve and reach agreement on the path forward with the employer for inter-related grievances, staffing and CHR complaints, would have substantially reduced the amount of time required from our union representatives that would have been required to pursue all the complaints and grievances. We had hoped that there would be some resolution at the proposed July mediation and that we would be considered for assignments and career advancement opportunities in the organization (to address discrimination based on age and disability exhibited by the employer in the workplace). After June 4, 2019, Robert stopped communicating with the mediator, didn't respond to her emails or voice messages, and didn't let Darlene or I know what was going on with the mediation arrangements. He provided no explanation or rationale to us which was strange – **arbitrary behaviour** – and he didn't return my phone calls which gave us the impression that he didn't care about our staffing complaints even though the Local executive was aware that there were several issues on staffing actions, discrimination and workplace violence in this part of the organization (from staff and PSES results). This lack of action (**negligence & arbitrary behaviour**) affected our mental health and **discriminated** against us since there we were not provided any accommodation for our disabilities (mental) in consideration or anticipation that this lack of action would definitely have an impact on our mental health. PSAC and its components are involved in workplace accommodation for employees with disabilities, and union reps are trained and experienced to deal with the duty to accommodate and the no discrimination article in collective agreements applicable to PSAC members. Training on this was also provided during the June 2019 UHEW Regional

Conference which was attended by Robert and Paige from the Local, and Shimen and Stephen from UHEW National Office. As well, there is information on the UHEW website regarding grievances and the staffing complaint process (see 10F below) which was referred to during the conference which could have been utilized to understand the responsibilities of the union rep in the staffing complaint process and also recognize the need for accommodation of union members who have disabilities. By July 5, 2019, both Darlene and I were in panic mode, and we couldn't locate Rob. We also couldn't locate him on July 8 (date that he had indicated to the mediator that he was available for the mediation). **Neither Robert nor Paige kept us up to date on what was happening with the mediation with the employer after June 3, 2019. I continued to talk to Paige about mediation with the employer and that Darlene and I were preparing for this including the discrimination grievances and CHR complaints.**

...

8. Steps that have been taken by or on behalf of the complainant for the resolution of the action, omission or other matter giving rise to the complaint

Several staffing complaints were filed for myself and a co-worker, Darlene Marchand. We are both members of PSAC, the UHEW Component (Union of Health and Environment Workers) of PSAC, Local 00709. We both work at Environment and Climate Change Canada in the Meteorological Service of Canada (MSC Branch) at 4905 Dufferin Street in Toronto. **Grievances were also filed by our Local indicating Article 19 of the Collective Agreement (TC & PA; TC collective is for the Complainant) – see timeline dates for grievances and CHR complaints related to staffing by the employer.**

Paige Gilmore, President of PSAC-UHEW Local 00709 agreed to provide union representation to Darlene and I on several staffing complaints (see 10E below) filed in 2018 and 2019 as well as **for the grievances filed in relation to the staffing complaints.** Union representation for the staffing complaints was transferred on May 13, 2019 to Robert Gilmore (who had previous training and experience with staffing complaints including mediation). Both Paige and Robert were made aware that Darlene and I had disabilities and required accommodation for depression and anxiety. Robert was present at informal discussion and exchange of information meetings for a couple of the staffing complaints referred to in this DFR complaint.

Both Darlene and I had agreed to mediation for the staffing complaints; we wanted the opportunity to address the issues and resolve them with the employer **along with the grievances and CHR complaints;** we had hoped to avoid having hearings for these complaints as **this would be more time consuming than going through mediation with the employer to address staffing issues (staffing complaints, grievances and CHR complaints) .** We also

wanted the ongoing discrimination by the employer to be addressed as an issue and the mediation would have been an opportunity to do so (we had also filed grievances, Darlene had filed a human rights complaint and I was working on mine – submitted Sept. 26, 2019). The employer requested mediation using the FPSLRB process, with Stephanie Pieri as the mediator, proposed for the week of July 8, 2019. There was some initial email communication by Robert with the mediator on file #s on June 3 and 4. After June 5, 2019, we heard nothing from Robert about the upcoming mediation and we weren't prepared by our union representative for mediation.

Dec. 20, 2018

Exchange of Information meeting for FPSLRB 771-02-39441 & 771-02-39428. Management representative was Christine Best. Paige Gilmore was representing both Darlene and I who were present for the teleconference. At this meeting, Christine Best indicated that the person on the PC-03 assignment was doing a bit of PC-03 work, doing his substantive PC-02 job, while Hilary Friessen was acting in the PC-02 job and still doing her AS-01 work but none of the PC-02 job. Paige Gilmore composed and filed discrimination grievances for both Darlene and myself based on this information, and the fact the neither Darlene or myself, in qualified PC-02 pool, were considered for the PC-02 assignment opportunities in the organization.

Jan. 28, 2019

Grievance 9513 was submitted by Paige Gilmore for me under Article 19 (TC) in relation to the information provided by management (see above). Grievance 9519 was submitted under Article 19 for Darlene (PA collective agreement) and in reference to file 771-02-39428 (consolidated). This grievance was agreed to by the union representative, under FPSLRAct, and would have been included in mediation with the employer. All grievances are run by the local President (Paige) for advice and to secure representation. There 2 grievances were supported by the Local, and are covered under FPSLRAct, and would have been included in mediation with the employer. The employer's practice at ECCC in mediation is to address all relevant grievances and complaints and work to resolve them, where required, through an MOA which also requires withdrawal of grievances and complainants when an agreement has been reached. Union representatives at ECCC, no matter the union, know this through representation of members over many years.

...

Robert was sent and received email communications between the parties to the staffing complaints. Paige confirmed that Robert was still the union representative assigned to represent us on our staffing complaints and staffing-related discrimination

grievances . On several occasions following the mediation that didn't take place, I told Paige about the lack of representation by Robert and also asked Paige about have another union representative, perhaps from another Local. Paige said that she would talk to Robert about representing us. I continued to copy Paige on communications to Robert regarding the staffing complaints (Paige was not sent communications from the parties) however she was made aware of the timelines and what was required to meet the timelines....

...

Sept 27, 2019

Grievance 9836 was submitted by the Local for me, referencing Article 19 No Discrimination clause in the TC collective agreement. This grievance was filed based on information for file 771-02-39966 (May 21, 2019 Exchange of Information meeting and OPIs). This grievance was agreed to by the union representative, under FPSLRAct, and would have been included in mediation with the employer. Paige, as Local President, was aware of all grievances filed by the Local as she keeps these files as part of her role as President, and she is advised before grievances are filed for her guidance and commitment to represent; still, Paige did not mention to either Darlene or myself that the employer had withdrawn their agreement to mediate with us

...

[Emphasis in the original]

[Sic throughout]

[24] The respondent objects to the amendment request. It notes that the proposed amendments fundamentally change the nature of the complaint and constitute a separate complaint, which is now time-barred. Furthermore, the respondent had made it clear for over a year that the Board had no jurisdiction to hear the DFR complaint because it only concerned the respondent's representation on staffing complaints. Yet the complainant filed multiple submissions over the year and never mentioned any grievances. The delay between the filing of the DFR complaint and the attempt to amend it so many months later is unreasonable.

[25] I have read the entire originating complaint and the attached pages. I draw special attention to the complainant's email of July 22, 2019, at 9:02 a.m., which includes this passage:

...

As such, due to lack of representation, who else from Local 00709 would be available to participate in the pre-mediation and mediation to represent Darlene and I? If there's no one from Local 00709, perhaps from another Local? In your capacity as Local president, I'm requesting that you find representation for Darlene and I for our staffing complaints as soon as possible. (Our grievances is [sic] another matter).

...

[Emphasis added]

[26] Given these many references to the staffing complaint and mediation process that she has tried to manage and the many confirmations of the PSEA complaint files at issue in this matter, I conclude that the essential nature of her complaint is detailed as follows at section 4 of her original complaint form:

*This is a Duty of Fair (DFR) complaint under section 190(l)(g) of the PSLRA that the PSAC component Union of Health and Environment Workers (UHEW) **has acted arbitrarily and in a discriminatory manner regarding several staffing complaints for Darlene and myself. This DFR deals with the Dec. 5, 2019 email from the FPSLREB mediator and actions and lack thereof that led up to this email. Paige, our Local President, agreed to represent us on our staffing complaints. The following statements and supporting information in 8 and 10 below demonstrate that the process to represent on the staffing complaints was not done fairly***

...

[Emphasis in the original and added (non-italic)]

[27] The complainant wrote that other grievances have been filed, but stated that they are "another matter," suggesting that they are not to be dealt with in the PSEA staffing complaint mediation.

[28] It is of no consequence that in her submissions on this motion, the complainant stated that human-rights violations were alleged as part of the staffing complaints. Human-rights matters related to a staffing appointment process are heard as part of a staffing complaint hearing, in accordance with s. 80 of the PSEA, which provides that when considering whether a complaint under s. 77 is substantiated, the Board may interpret and apply the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[29] If, as the complainant claimed in her motion to amend her complaint, she intended to seek to include discussions about her grievances in the context of the

mediations of her *PSEA* staffing complaints, it was not mentioned in her original complaint.

[30] As was noted in *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100 (affirmed on other grounds 2011 FCA 98) an amendment proposed by a complainant may be accepted if it expands, clarifies or corrects the original complaint with respect to the essential subject matter of the original allegations. But if it instead it adds a new dimension to the complaint proposal that alters the nature of the original complaint, it will constitute a new complaint.

[31] The amendments being sought by the complainant in this case are entirely different from the original complaint's allegations and would add a completely "new dimension." It is evident that their purpose is to modify the original complaint to get past the objection that the respondent has raised with respect to the Board's jurisdiction to deal with the original complaint. As such, the complainant's amendment request is denied.

[32] This leaves us only with the original complaint. I have already explained that I find that the essential nature of the DFR complaint is the respondent's conduct in a *PSEA* staffing complaint mediation process. Although the complainant does allege in her DFR complaint that the employer had tried to intimidate her into not filing the staffing complaints and engaged in reprisals against her, the specific inaction that she attributes to the respondent is its failure to appear at the mediation of her staffing complaints.

[33] As the former Public Service Labour Relations Board ("PSLRB") noted in *Tran*, at paragraph 89, the issue in these types of cases is whether the DFR, the authority for which is set out by Parliament in the *FPSLRA*, applies to actions of employee organizations when they represent their members in matters that cannot be said to be governed by the *FPSLRA* or that do not arise out of a collective agreement.

[34] *Tran* dealt with a complaint that that the union breached its DFR by not pursuing the judicial review of a staffing decision taken by the separate employer in that case (the Canada Revenue Agency) and in not reimbursing the employee's expenses to attend the hearing of a second judicial review where the union did represent her. The PSLRB concluded that given the DFR complaints arose from the

employee's recourse under the employer's staffing program, they did not fall under the applicable collective agreement or in the *FPSLRA*. It went on to state as follows:

...

100 As the FAA, the CRAA and the PSLRA show, the statutory scheme has clearly established two separate and mutually exclusive spheres, namely labour relations and staffing. Given that the complaints come under the area of staffing, I find that the Board does not have jurisdiction to deal with them and that therefore they must be dismissed.

101 Although such a finding is sufficient to dispose of the complaints, on the premise that the union had a duty of fair representation in matters that do not fall under the PSLRA, I will now deal with them on their merits.

...

[35] The respondent did not deny in its submissions that it voluntarily represents its members in non-grievance related matters such as staffing, workers compensation, Canada Pension Plan, employment insurance, and the like. But as determined in *Tran*, there is no obligation in the *FPSLRA* that unions represent their members in these types of proceedings, notwithstanding what the respondent's representatives may have stated in the exchanges and documents to which the complainant referred in her submissions. These statements have no bearing in determining whether the Board has the authority from Parliament to deal with a matter under its enabling legislation.

[36] As the Board noted quite recently in *Millar v. Public Service Alliance of Canada*, 2021 FPSLREB 68 (citing the earlier decision of *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3):

...

[20] The PSLRB upheld the jurisdictional objection in a lengthy decision, the summary of which may be found at paragraphs 188 to 195, as follows:

[188] To summarize the above, I am of the view that the duty of fair representation as set out in section 187 of the *PSLRA* relates to rights, obligations of matters set out in the *PSLRA*, that are related to the relationship between employees and their employer. In other words, the "representation" to which that section refers to [sic] is representation of employees in matters related to the collective agreement relationship or the *PSLRA*, such are [sic] representation in collective bargaining and the presentation of grievances under that Act.

...

[193] To accept the argument put forth by the complainant would mean that the duty of fair representation would apply to all services a union decides to offer to its members, whether or not it is obliged to offer that service and whether or not the service is related to the *PSLRA* or the collective agreement relationship. It would also mean that Parliament intended to give this Board the broad mandate to supervise the provision of representation services offered voluntarily by a union in relation to claims before workers' compensation tribunals, disciplinary matters before professional organizations, claims relating to the Canada Pension Plan, matters relating to unemployment insurance, matters before transportation tribunals, actions before courts of law, etc., all areas over which this Board has no special expertise. In my view, if Parliament had intended to give this Board such a broad jurisdiction over matters unrelated to the *PSLRA* or the collective agreement relationship, it would have given an indication to that effect. In this case, there is no such indication.

...

[195] The services that the union decides to offer to its members that are not linked to the *PSLRA* or the collective agreement relationship are matters between the union and its members. If the union fails to properly represent its members in those matters, there may be some relief in another forum (possibly on a contractual basis as expressed in the union's constitution), but that matter is not within the jurisdiction of this Board.

[21] The Board adopted that decision recently, in Abeyasuriya v. Professional Institute of the Public Service of Canada, 2015 PSLREB 26. That case involved a complaint that a bargaining agent had failed its duty of fair representation by not providing assistance to the complainant with a staffing complaint. The Board concluded at paragraphs 43 and 44 as follows:

[43] The former Board's jurisprudence is consistent (*Lai, Ouellet, Elliott, Brown and Tran*) that complaints to the new Board that the bargaining organization or agent breached the duty of fair representation set out in section 187 of the *PSLRA* applies only to matters or disputes covered by either the *PSLRA* or an applicable collective agreement. The present case involves staffing matters.

[44] As explained in the analysis, since the staffing matters raised in this complaint do not fall under either the *PSLRA* or the applicable collective agreement, I conclude that the new Board lacks the jurisdiction to examine the complaint on its merits....

...

[37] Given my finding that the true nature of the complaint is a *PSEA* staffing mediation matter and in light of the long-established jurisprudence of this Board which find that the voluntary union conduct of such matters is not amenable to a DFR complaint before this Board, I conclude that I lack jurisdiction to hear this matter.

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

(The Order appears on the next page)

III. Order

[39] For the reasons stated, I order the complaint dismissed.

January 21, 2022.

**Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board**