Date: 20220126

Files: 561-02-40521, 40715, and 40787

Citation: 2022 FPSLREB 4

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

DAVID LESSARD-GAUVIN

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Lessard-Gauvin v. Public Service Alliance of Canada

In the matter of complaints under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Kim Patenaude, counsel

Decided on the basis of the documents on file and on written submissions, filed November 9 and December 8 and 16, 2021.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaints before the Board

[1] Between June and July 2019, David Lessard-Gauvin ("the complainant") made three complaints with the Federal Public Sector Labour Relations and Employment Board ("the Board") against his bargaining agent, the Public Service Alliance of Canada ("the respondent"). In each complaint, he alleged that the respondent committed an unfair labour practice, contrary to s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which prohibits an employee organization that is certified as the bargaining agent for a bargaining unit from acting in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any employee in the bargaining unit. At all material times, s. 187 read 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] In his first complaint, made on June 3, 2019 (file no. 561-02-40521), the complainant alleged that the respondent breached its duty of fair representation by failing to file on time the grievance that it was supposed to file for him. His employer, the Canada School of Public Service ("the employer"), dismissed the grievance on the grounds that it was untimely. He asked that the Board still declare the grievance timely.

[3] In his second complaint, made on July 9, 2019 (file no. 561-02-40715), the complainant alleged that the respondent breached its duty of fair representation by referring his grievance to adjudication prematurely, even before a decision was received from the employer at the final level of the grievance process. He requested authorization to refer his grievance to adjudication with the aid of counsel of his choice, at the respondent's expense.

[4] In his third complaint, made on July 24, 2019 (file no. 561-02-40787), the complainant alleged that the respondent breached its duty of fair representation by refusing to represent him further to complaints he made with the Canadian Human Rights Commission (CHRC) and the Office of the Commissioner of Official Languages (OCOL).

[5] On August 7, 2019, the respondent made a motion with the Board that it summarily dismiss the second complaint (file no. 561-02-40715) because the complainant's allegations did not reveal any arguable breach of the duty of fair representation.

[6] On August 14, 2019, the respondent made a motion with the Board that it summarily dismiss the third complaint (file no. 561-02-40787) because it was premature, and the complainant's allegations did not reveal any arguable breach of the duty of fair representation.

[7] After a summary analysis of the three complaint files, the Board decided to deal with them together based on the documents on file and the parties' written submissions.

II. The facts that the complainant alleged and those that the respondent admitted to

[8] The complainant worked for the employer in a term position classified at the CR-04 group and level. On September 5, 2018, the employer notified him that it was terminating his employment effective October 5, 2018. He considered that termination, which the employer described as administrative, a constructive dismissal.

[9] The complainant wanted to file a grievance to contest the termination. He then had discussions with union representatives at the national level, including Sylvie Rochon. She is a labour relations officer working full-time for the Agriculture Union, one of the respondent's components.

[10] On September 21, 2018, the complainant sent Ms. Rochon a grievance form that he signed, to contest his termination. The statement of grievance reads as follows:

> [Translation]
>
> *I am filing this grievance against my employer's decision to terminate/dismiss me.*
>
> *I am relying on all the provisions of my collective agreement, employer policies, and all other applicable laws and regulations.*

[11] As the grievance involved a termination, the complainant believed that it was "normal" for it to be sent directly to the Agriculture Union's National Office. Once his

grievance was signed and completed, he believed that it would be filed in a timely manner and that it would proceed.

[12] The respondent admitted that upon receiving the complainant's documents, Ms. Rochon printed them without reading the email chain. She did not notice that the employer had not signed the complainant's grievance, and therefore, it had not been filed. She did not understand that he expected her to file the grievance. Normally, local union representatives file grievances. However, an Agriculture Union regional vice president had worked with the complainant on his case. And between September 2018 and January 2019, Ms. Rochon spoke with him a few times to prepare the file for the grievance hearing.

[13] On January 9, 2019, the employer informed the complainant that no grievance contesting the termination of his employment had been filed, contrary to what he believed. The respondent admitted that Ms. Rochon did not file his grievance until January 9, 2019. She then asked the employer to accept the grievance, even though it was untimely. She then spoke with the complainant on January 10, 2019. She accepted responsibility for not filing the grievance on time and advised him that she had spoken with the employer's representative and that she was awaiting a response. He also contacted the employer's Labour Relations section on January 11, 2019, to have his grievance accepted, even though it was untimely.

[14] The complainant and respondent agree that Ms. Rochon, who was aware of the consequences of failing to file the grievance, would have advised him to make a complaint with the Board against the respondent. Then, if the employer denied the grievance because it was untimely, the Board could order that the grievance be heard on its merits. She also allegedly suggested that he wait for the employer to rule on his grievance before making a complaint. He took her advice. He made one with the Board shortly after the employer raised the untimeliness issue in its decision at the first level of the grievance process, dated May 8, 2019.

[15] The employer dismissed the grievance at each level of the grievance process, noting that it was not filed within the time set out in the collective agreement. It also dismissed the grievance after considering the merits and arguments that Ms. Rochon raised.

[16] The respondent referred the complainant's grievance to adjudication for the first time on July 9, 2019. After realizing that the referral to adjudication was premature because the employer had not yet responded to the grievance at the final level of the grievance process, the respondent requested that the Board close the case. The Board's Registry closed the case and confirmed that the grievance could again be referred to adjudication in a timely manner.

[17] After receiving the employer's decision at the final level of the grievance process, the respondent again referred the complainant's grievance to adjudication on December 17, 2019, within the time limits. Board Forms 20 and 21 were used, on one hand to challenge a violation of the no-discrimination clause of the collective agreement (file no. 566-02-41345), and on the other hand to challenge the termination of employment (file no. 566-02-41346). When this decision was being written, those files indicated that the Board had not yet scheduled an adjudication hearing of the grievance. However, on July 22, 2020, the employer objected to the grievance being referred to adjudication because it had been filed outside the time specified in the collective agreement.

[18] After losing his job, the complainant also made complaints with both the CHRC and the OCOL. After reviewing the case, speaking with him, and reviewing the employer's decision at the final level of the grievance process, the respondent stated that it had decided not to support him in his efforts with the OCOL.

[19] The respondent pointed out that it had not yet decided if it would represent the complainant in the complaint before the CHRC because the CHRC's process was on hold pending the outcome of the grievance referral to adjudication. He claimed that the respondent refused to represent him before the CHRC. It stated that Ms. Rochon had already advised him that referring the grievance to adjudication would allow addressing the contents of the OCOL and CHRC complaints. Note that the OCOL's complaint process completed on June 16, 2021.

III. Summary of the respondent's submissions

[20] The complainant sent a signed copy of his grievance to Ms. Rochon on September 21, 2018. Due to a lack of communication within the Agriculture Union, it was not filed within the time set out in the collective agreement. As soon as the error was discovered, Ms. Rochon contacted the employer's representative to inform it of the

situation and to apply for an extension of time. Despite the respondent's explanations, the employer raised the issue of timeliness in its grievance decisions.

[21] The respondent acknowledges that it made an error. The issue that the Board must decide with respect to the first complaint, file no. 561-02-40521, is whether the respondent's error violated s. 187 of the *Act*. It maintains that it acted in good faith and that there is no evidence of arbitrary or discriminatory behaviour.

[22] After discovering the error, Ms. Rochon filed the grievance right away. The respondent later referred the grievance to adjudication and continued to represent the complainant in his grievance.

[23] In his second complaint, file no. 561-02-40715, the complainant alleged that the respondent failed its duty of fair representation by prematurely referring his grievance to adjudication. The respondent did not act arbitrarily or in bad faith in handling that grievance. When it was determined that the referral to adjudication was premature, it contacted the Board to request that the referral be cancelled. The request was granted. The complainant suffered no prejudice as a result of the premature referral.

[24] In his third complaint, file no. 561-02-40787, the complainant alleged that the respondent failed its duty of fair representation by not representing him in his CHRC and OCOL complaints. First, the respondent argued that it had no duty to represent him on matters not covered by the *Act* or not involving applying the collective agreement. And the CHRC complaint is currently on hold pending the outcome of the referral of his grievance to adjudication. The respondent will make a final decision on the representation matter if the complaint in question is reactivated based on a decision rendered as part of the referral to adjudication.

[25] As for the OCOL complaint, the respondent argued that the grievance process would be the best way to obtain the corrective action sought because the actions set out in the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.)) are not binding. After receiving the employer's decision at the final level of the grievance process, the respondent informed the complainant that it would not support his OCOL complaint.

[26] The jurisprudence is consistent on the fact that the bargaining agent has significant discretion when determining whether and how to represent an employee. In this case, the respondent decided not to support the OCOL complaint. However, it

continues to represent the complainant in the grievance against the employer and will make a final decision on the representation before the CHRC after a decision is made on the referral to adjudication.

[27] The respondent submitted that the three complaints must be dismissed because there is no arguable case that it acted in a manner that was arbitrary, discriminatory, or in bad faith.

[28] The respondent referred me to the following decisions: *Ouellet v. St- Georges*, 2009 PSLRB 107; *Callegaro v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2012 PSLRB 85; *Abeysuriya v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 26; *Delgado-Levin-Turner v. Customs and Immigration Union*, 2013 PSLRB 136; *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52; *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13; *Brown v. Union of Solicitor General Employees*, 2013 PSLRB 48; and *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3.

IV. Summary of the complainant's submissions

[29] In this section, I will repeat only a brief portion of the complainant's very elaborate and detailed arguments.

[30] The complainant is a person with a disability. He argued that persons with disabilities are significantly underrepresented in the labour market. When they do manage to secure a job, they frequently encounter a variety of difficulties in the workplace. These individuals, particularly those requiring accommodation, lose their jobs more often than others. He said that he often lost jobs after requesting accommodation.

[31] The complainant said that he made many attempts to cooperate with the respondent at all stages of the accommodation and grievance processes. He communicated diligently with the respondent's representatives to keep them informed of any developments. He was very surprised to learn that his grievance had not been filed.

[32] As a result, despite all the respect that the complainant said he had for his former representative, Ms. Rochon, he lost confidence in the respondent's ability to provide fair representation for his fundamental rights.

[33] According to the complainant, the facts of his complaint differ from those described in *Callegaro*, to which the respondent referred. Ms. Callegaro had filed 2 grievances, for 1- and 10-day suspensions. In that case, nothing suggested that her fundamental rights were violated. In this case, the complainant alleged that the employer discriminated against him and that the termination of his employment was a discriminatory constructive dismissal.

[34] The complainant submitted that it would be reasonable to compensate him for moral and psychological damages. Given all the circumstances, he submitted that an amount of $2500 could repair the damages caused by the different aspects of the respondent's gross negligence.

[35] According to the complainant, the Board's authority to issue an order with respect to a complaint made under ss. 187 and 190 of the *Act* is broad and not limited by the *Act*. That authority should include extending a deadline for filing a grievance.

[36] The complainant also proposed that the Board withdraw the respondent's exclusive union representation privilege with respect to his former employment and related remedies. He requested authorization to file his claims with the Board within 60 days of this decision, without being restricted to the wording of the original grievance, as if it were a referral to adjudication under s. 209 of the *Act*, all at the respondent's expense.

[37] He also asked that the respondent reimburse him for reasonable expenses incurred pursuing remedies before the CHRC, the OCOL, and the Office of the Privacy Commissioner of Canada.

[38] In the alternative, the complainant asked the Board to extend the deadline for initially filing the grievance related to file nos. 566-02-41345 (challenging the violation of the no-discrimination clause of the collective agreement) and 566-02-41346 (challenging the termination), which were already referred to adjudication, and to declare that the grievance related to those files was not filed late. In the further alternative, he asked the Board to order the respondent to apply to extend the grievance filing deadline.

[39] The complainant also requested that the respondent be permitted to amend the wording of the grievance in question to include a workplace discrimination allegation

with respect to the accommodation process, a discrimination allegation under s. 62(2) of the *Official Languages Act*, and an alleged breach of the *Privacy Act* (R.S.C., 1985, c. P-21).

[40] Finally, the complainant asked the Board to do the following:

- prohibit the respondent from making an out-of-court settlement with respect to grievance file nos. 566-02-41345 and 566-02-41346 without first consulting him and having him approve that agreement;
- prohibit the respondent from withdrawing grievances file nos. 566-02-41345 (challenging a breach of the no-discrimination clause of the collective agreement) and 566-02-41346 (challenging the termination) unless there is an out-of-court settlement or he requests the withdrawal;
- order the respondent to represent his interests in the CHRC's complaint process if there is no decision on the merits of the grievance and there is no out-of-court settlement (CHRC file no. 20181451);
- order the respondent to assist and represent him in the process further to the Commissioner of Official Languages' report numbered 2018-2057-EI;
- order the respondent to assist and represent him in the proceedings initiated at the Office of Privacy Commissioner of Canada with respect to and in connection with his former employment with the employer; and
- order the respondent to pay the additional interest and indemnities set out in ss. 1618 and 1619 of the *Civil Code of Québec* (CCQ-1991) and calculated based on the date on which the complaint in file no. 561-02-40521 was made.

[41] The complainant referred me to many decisions, not all of which I will cite. I will limit myself to prior decisions of the Board or its predecessors, as well as a few relevant decisions of other courts. The decisions are as follows: *D'Alessandro v. Public Service Alliance of Canada*, 2018 FPSLREB 90; *Bingley v. Teamsters Canada, Local Union 91*, 2004 CIRB 291; *Tyler v. Public Service Alliance of Canada*, 2021 FPSLREB 107; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39; *Tailleur v. Canada (Attorney General)*, 2015 FC 1230; *Dufresne v. S.C.F.P., Local 2918*, 2003 CanLII 20952 (QC TT); *Myrtil v. Syndicat du personnel d'enquête de la Commission de la construction du Québec*, 2016 QCTAT 3491; and *Larouche v. Syndicat des travailleuses et travailleurs de l'Institut universitaire en santé mentale de Québec - CSN*, 2017 QCTAT 447.

V. Analysis and reasons

[42] The complaints fall under s. 190(1)(g) of the *Act*, which refers to s. 185. Of the unfair labour practices noted in that section, the one in s. 187 is of interest in these complaints. At all material times, these provisions read as follows:

> ***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.*
>
> …
>
> ***185*** *In this Division,* ***unfair labour practice*** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> …
>
> ***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.*
>
> [Emphasis in the original]

[43] Section 187 of the *Act* does not impose on an employee organization an unlimited obligation to represent employees in a bargaining unit for which it is the bargaining agent. Rather, this section prohibits an employee organization from acting in a manner that is arbitrary or discriminatory or that is in bad faith with respect to representation. The employee organization must exercise its discretion within those parameters. In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 527, the Supreme Court of Canada stated 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.*
>
> …

[44] In principle, an employee organization's duty of fair representation is a corollary of the exclusive authority to act as spokesperson for individuals covered by the union's certification. This exclusive representation authority must be exercised in accordance with the *Act* and the courts' interpretation of it.

[45] I will deal with the three complaints in turn because, although they are related, they involve distinct allegations that must be considered separately.

[46] In his first complaint, file no. 561-02-40521, the complainant alleged that the respondent breached its duty of fair representation by failing to file his grievance within the time set out in the collective agreement.

[47] The facts that led to this complaint are not in dispute. On September 5, 2018, the employer notified the complainant that it would terminate his employment, effective October 5, 2018. He wanted to file a grievance to contest that termination, which he considered a constructive dismissal. After discussing with Ms. Rochon, he emailed her a signed grievance form to contest his termination. Once his grievance was signed and completed, he believed that it would be filed in a timely manner and that it would proceed. However, as the respondent admitted, Ms. Rochon simply printed his documents without reading the email chain and did not notice that the employer had not signed his grievance and that it had not been filed. On January 9, 2019, the employer informed him that no grievance contesting the termination of his employment had been filed, contrary to what he believed. Ms. Rochon did not file his grievance until January 9, 2019. She allegedly asked the employer to accept the grievance's filing, even though it was untimely. She spoke with him and accepted responsibility for not filing it on time.

[48] Nothing in what was submitted to me would lead me to conclude that the failure to file the complainant's grievance on time amounted to discriminatory behaviour. Also, nothing suggests that Ms. Rochon did not act in good faith. When she realized that his grievance had not been filed, she promptly filed it. She also allegedly approached the employer about agreeing to hear the grievance, even though it was filed late. Considering the complainant's allegations as proven only for the purposes of

my analysis, I find that there is no arguable case that the respondent acted in a discriminatory manner or in bad faith in filing the grievance.

[49] However, I note that in its written submissions, the respondent admitted that Ms. Rochon failed to read the email chain that the complainant sent her on September 21, 2018. The fact remains that acting on the respondent's behalf, she was negligent by failing to read his request that she file his signed grievance at the next level of the grievance process. Had she read his email, she could have expressed her agreement or disagreement with his proposed approach, but she did not. This oversight resulted in his grievance being filed several weeks after the 25-day time frame set out in the collective agreement.

[50] Given the respondent's admission, did it breach its duty of fair representation? In some cases, a union's negligence in handling or failing to handle a grievance may be considered arbitrary in terms of representation, much as refusing to file a grievance without reviewing it and without apparent reason might be. With respect to the term "arbitrary", the Supreme Court wrote as follows at paragraph 50 of *Noël*:

> *50 The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible.…*

[51] Does the respondent's admitted failure to file the complainant's grievance constitute serious negligence? If so, I will conclude that the respondent handled the grievance arbitrarily. In that respect, the complainant referred me to several decisions of the Quebec Labour Court, which is called upon to decide complaints involving an employee organization's breach of the duty of fair representation. On that issue, the duties of unions under the *Quebec Labour Code* (CQLR c C-27; "the *QLC*") are essentially the same as those under the *Act*, although they are not identical. These duties are defined in s. 47.2 of the *QLC*, which reads as follows:

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

[52] The decisions to which the complainant referred me largely support the conclusion that failures comparable to that of the respondent in the first complaint, file no. 561-02-40521, constitute serious negligence and a breach of the duty of fair representation. On that point, I will limit myself to a very illuminating quote from paragraph 26 of *Larouche*, which reads as follows:

> [Translation]
>
> *… With respect to grievances, and especially in terminations, unions must provide mechanisms and tools that leave nothing to chance or to be overlooked. Both small and larger unions need to provide their members with serious, effective, and thorough representation in situations involving representing a member or non-member who has suffered such a significant labour relations penalty as a termination. Nothing should be left to chance.*
>
> *When a union representative fails to take a grievance to arbitration within the time prescribed in the collective agreement, I would not hesitate to say that that is negligence as the representative did not equip him or herself with the mechanisms or tools to avoid such an oversight. It can also be qualified as reckless behaviour. And when the oversight affects the rights of a terminated employee to the point of depriving the employee of any possible recourse under the employee's collective agreement, the negligence cannot be characterized as anything other than gross negligence, with due consideration.*
>
> *Each case is unique … This is not a case of an interpretation error made in good faith but one of carelessness….*

[53] That is not the only criterion to consider; so too must be the consequences and the harm caused to the complainant when distinguishing simple from serious negligence. In the first complaint, file no. 561-02-40521, the complainant's right to employment is at stake, as well as his right to be heard on his loss of employment, which he considers a constructive dismissal and a possible violation of the no-discrimination clause of the collective agreement.

[54] In the context of the first complaint, file no. 561-02-40521, I cannot presume in any way that the complainant's grievance has merit. But one thing is certain: given the current status of his grievance file, he will have difficulty presenting his claims at adjudication because his grievance was filed late.

[55] The respondent referred me to *Callegaro*, in which the Board dismissed a complaint as a result of a union's failure to forward 2 grievances to the final level of

the grievance process within the time set out in the collective agreement. Ms. Callegaro's grievances involved 1- and 10-day suspensions without pay. The consequences of the union's negligence and the harm done to Ms. Callegaro as a result of that negligence were far less significant than they are in this case.

[56] Based on the foregoing, and in light of the respondent's admission of the facts, I allow the first complaint, file no. 561-02-40521. I find that the respondent breached its duty of fair representation by handling the complainant's grievance file in an arbitrary manner. Later in my decision, I will address the issue of appropriate remedies, given the circumstances.

[57] However, I dismiss the second complaint, file no. 561-02-40715, in which the complainant alleged that the respondent breached its duty of fair representation by prematurely referring his grievance to adjudication. The respondent admitted the error that he alleged. However, the error in question was corrected, and the premature referral to adjudication was quashed at the respondent's request. It then referred the grievance to adjudication again, this time in a timely manner. Considering the complainant's allegations as proven only for the purposes of my analysis, I conclude that the second complaint contains no arguable case that the respondent breached its duty of fair representation. Moreover, he did not allege any prejudice from the respondent's administrative error, which it was careful to correct. Thus, there is no longer any real dispute between the parties in that respect, and the second complaint, file no. 561-02-40715, now raises only a purely academic issue.

[58] I also dismiss the third complaint, file no. 561-02-40787, in which the complainant alleged that the respondent breached its duty of fair representation by refusing to represent him in his CHRC and OCOL complaints.

[59] First, the respondent argued that it did not refuse to represent the complainant before the CHRC or on human rights issues. Furthermore, among other things, his grievance was referred to adjudication to challenge a violation of the no-discrimination clause of the collective agreement. Considering his allegations as proven only for the purposes of my analysis, I do not see how I could conclude that an arguable case was made that the respondent breached its duty of fair representation before the CHRC.

[60] The other part of the third complaint, file no. 561-02-40787, involves the respondent's refusal to represent the complainant further to a complaint that he made

with the OCOL. Considering his allegations as proven only for the purposes of my analysis, I conclude that there is no arguable case that the respondent breached its duty of fair representation in the third complaint, file no. 561-02-40787. I agree with the respondent that it had no duty to represent him before the OCOL. This scope of representation has nothing to do with the respondent's exclusive representation authority that the *Act* provides to it due to it being accredited as the complainant's bargaining agent. It had no duty to represent him before the OCOL, and such a complaint does not involve a labour relations dispute but rather rights protected by the *Official Languages Act*. Therefore, the respondent cannot be blamed for breaching a duty that it does not have.

[61] Therefore, I allow only the first of the three complaints, on which I conclude that based on the respondent's admission of fact, it breached its duty of fair representation by negligently failing to file the complainant's grievance with the employer. It is important to remember that that grievance involved a termination of employment. Still to be determined is how that breach can be corrected.

[62] The following provisions of the *Act* give the Board fairly broad powers when it concludes that a complaint under s. 190 of the *Act* is founded. The provisions read as follows:

> ***192 (1)*** *If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> …
>
> ***(d)*** *if an employee organization has failed to comply with section 187, an order requiring the employee organization to take and carry on on behalf of any employee affected by the failure or to assist any such employee to take and carry on any proceeding that the Board considers that the employee organization ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on ….*
>
> …

[63] In principle, the remedy for the respondent's breach is quite simple. My order is to remedy, to the extent possible, its error so that there is no prejudice to the complainant. Based on the facts submitted by the parties, his grievance should have been filed in the days following September 21, 2018, the date on which he sent his

duly signed and completed grievance to Ms. Rochon. Had that been done, then it would have been filed in the time set out in the collective agreement.

[64] In the circumstances before me, there is only one way to remedy the respondent's error, which is to order it to apply to the Board for an extension of time to file the grievance with the employer and to represent the complainant as part of that request. Although the complainant asked the Board to consider his grievance filed on time, such a remedy would really be binding only on the employer, even though it is in no way responsible for the respondent's error, and even though it based all its decisions in the grievance process on the untimeliness of the grievance. Although I am seized with the first complaint, in file no. 561-02-40521, I am not seized with the grievance that the complainant referred to adjudication. I also note that file no. 562-02-40521 indicates that contrary to the requirements of s. 7(2)(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79), neither the complainant nor the respondent gave the employer a copy of the written submissions dealing with the remedy that he sought, which deprived the employer of any opportunity to be heard on that issue in defending its interests.

[65] Remember that the complainant's grievance was referred to adjudication on December 17, 2019. When this decision was being written, the Board had not yet scheduled an adjudication hearing of the grievance.

[66] The complainant proposed several measures that he believed should be included in my order. I do not agree with them, except for the one that addresses the timeliness issue. I am confident that the respondent will provide quality representation to him. In addition, he can always make a new complaint if he believes that the respondent has breached its duty of fair representation under the *Act* in the adjudication of his grievance.

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

(The Order appears on the next page)

VI. Order

[68] The complaint in file no. 561-02-40521 is allowed.

[69] I order the respondent to make with the Board, within 30 days of this decision, an application for an extension of time in which to file the grievance with the employer and to represent the complainant as part of that application.

[70] The complaint in file no. 561-02-40715 is summarily dismissed.

[71] The complaint in file no. 561-02-40787 is summarily dismissed.

January 26, 2022.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board