Date: 20220207

File: 561-02-811

Citation: 2022 FPSLREB 7

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

KENNETH MANELLA

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Manella v. Public Service Alliance of Canada

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

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

For the Complainant: Himself

For the Respondent: Sandra Gaballa

Heard via videoconference hearing,
December 7, 9, and 10, 2021.

REASONS FOR DECISION

I. Complaint before the Board

[1] This is a complaint made under s. 190 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*"). The complainant, Kenneth Manella alleges that the respondent, the Public Service Alliance of Canada ("PSAC") failed to meet its duty of fair representation, in violation of s. 187 of the *PSLRA,* by representing him and his colleagues in a manner that was arbitrary and in bad faith. At the hearing he indicated that he did not allege that the union had acted in any way that was discriminatory.

[2] The complainant began his employment as an occupational health and safety technical advisor ("TA") with the Labour Program of Economic and Social Development Canada ("ESDC" or "the employer") on an acting basis in 2008. In 2010, he accepted an indeterminate position classified at the TI-05 group and level. The complainant retired in September of 2016.

[3] The respondent is the certified bargaining agent for the complainant's former bargaining unit. The Union of National Employees ("UNE") is the PSAC component that was responsible for providing the complainant with direct workplace assistance and representation. In this decision, either or both entities, as well as the local union, will be referred to as "the union".

[4] This complaint was received by the Public Service Labour Relations and Employment Board on August 11, 2016. On June 19, 2017, the title of the *PSLRA* was changed to the *Federal Public Sector Labour Relations Act* ("the Act") and the name of the Board was changed to the Federal Public Sector Labour Relations and Employment Board ("the Board").

[5] I find that the union breached the duty required of it by s. 187 of the *Act* by acting in an arbitrary manner.

II. Summary of the evidence

A. The structural change

[6] A structural change to the workplace began in 2014, when the employer decided to alter the work model by which the program advisors (PAs) and the TAs in ESDC's Labour Program carried out their work. Previously, the TAs had been regionally based.

They reported to a regional director and provided technical advice and guidance to the Labour Program's health and safety officers (HSOs) who worked in their regions. The PAs worked out of the Workplace Directorate at ESDC's National Headquarters. Their duties were more policy oriented, and they assisted TAs across the country. Their duties were national in scope.

[7] The essence of the change was to move from a regionally based structure to a centralized, national one. Existing TAs would remain in their regions but would no longer be TAs working in Regional Operations and Compliance. They would become PAs reporting to the Workplace Directorate, National Headquarters, and they would carry out the same job duties as the existing PAs. At the same time, a new TI-06 - Senior Investigator position was created.

[8] The complainant described his former TA position. He provided advice and assistance exclusively to HSOs in the employer's Ontario region. When issues could not be resolved regionally, he would contact a PA for assistance. This occurred, for example, with fatalities. Or, for example, when a TA needed a legal opinion, one would be obtained through a PA.

[9] The regional focus of his TA position was important to the complainant as it involved more direct contact with the HSOs than the PAs had. As well, in his view, the creation of the TI-06 - Senior Investigator position added another layer between the HSOs and the TAs, further separating the TAs from their established working relationships with HSOs in their regions. In the complainant's view, the TI-06 was similar to a TA; the employer had essentially eliminated the TA position and replaced it with the TI-06 position.

[10] In the complainant's view, this was much more than a reporting-structure change. The PA position was not just a national TA position. It was a very different job. As he put it, the employer would not develop two 12-page job descriptions to describe the same job.

[11] The complainant felt that the process, or lack of one, by which this change took place was wrong. It was certainly unusual. In his experience in the public sector, incumbents were not simply moved into different positions by a group email notice. He thought that if he or any of his colleagues did not wish to become PAs, they should have options like the workforce adjustment protocol. Alternatively, he felt that it might

be constructive dismissal. He did not know exactly what the official process should be but felt strongly that the complete lack of process was wrong. He felt that his position had been eliminated, he did not want to be a PA reporting to National Headquarters, and he hoped that he might have other options.

[12] Despite his concerns, the complainant complied with all directives and carried out his new duties as instructed. Although not happy about the conversion of his position to a PA position, he understood and accepted that the employer had the right to restructure work systems and alter job classifications. However, he assumed that this was a transitional period and that it would eventually be handled properly. That at some point, he would be asked to sign an official offer letter for the new position or be given other options to pursue.

[13] Francesco Misuraca was the local UNE president at the time. He was an HSO in 2014 and was promoted to a senior investigator position in 2016. He described the change differently.

[14] Asked how the two jobs differed, Mr. Misuraca responded that in his mind they were one and the same — the essence was to provide advice and guidance to HSOs with respect to the *Canada Labour Code* (R.S.C., 1985, c. L-2) and its regulations. He said that it was a sedentary role — a desk job with the role of helping HSOs and senior investigators in the field. He explained that both positions reference the same policy and procedures and that they have the same access to the legal team.

[15] Mr. Misuraca testified that the way the field officers access advice is different now. Instead of going directly to a TA in their regional office they seek guidance by compiling all the background, jurisprudence, and issues into a PA guidance request form that goes into a general delivery mailbox. The request is then dispatched to a PA with expertise on the issue that the request raises. He stated that other than that, not much had changed with respect to the field officers seeking guidance.

[16] This centralized system eliminates the possibility of some HSOs (for instance, those who work in the Toronto, Ontario office) being able to simply go to a TA's cubicle and obtain some immediate guidance. As well, HSOs outside a regional office, for instance, in other parts of Ontario, can no longer directly call a regional TA for advice.

[17] However, an advantage of the centralized system is that all requests are now documented. This provides the employer with statistical information about the number of requests received on different issues, which helps inform staffing decisions. Because the type of request determines which PA it is sent to, according to the PA's technical expertise, HSOs have a wider array of options for accessing specialized guidance. The new system also benefits from the different time zones across the country; for example, an HSO in Toronto can access advice after hours from a PA in Vancouver, British Columbia.

B. Chronology of events

[18] In response to an access to information and privacy (ATIP) request, the complainant received documents that revealed some of the employer's internal email discussions about this change. They showed that the employer had been working toward it since at least January 2014.

[19] They also revealed some last-minute internal discussions, that took place just before the notice went out, between the two directors general who reported directly to Assistant Deputy Minister Kin Choi. Annik Wilson (Director General, Regional Operations and Compliance) asked Brenda Baxter (Director General, Workplace Directorate, National Headquarters) if she had any concerns with the wording about the TA realignment. Ms. Baxter responded with a concern about funding. She said that it was not what they had discussed and that they had agreed that five TAs would report to the Workplace Directorate, with Regional Operations and Compliance providing funding for four. She asked if something had changed. Ms. Wilson responded as follows:

> *Sorry, I forgot that you weren't with me when Kin brought up the strategy. With only 7 people to worry about, he said we should message that the function is moving over to you (expecting the reduction would be from attrition and some folks becoming TI-6s).* ***He doesn't want to raise a flag with Union*** *and thinks we will "lapse more than ever" and it's hard to argue when u [sic] look at our track record. He does think that there should be economies of scale.*
>
> [Emphasis added]

[20] Of course, neither the complainant nor the union was privy to this communication.

[21] On August 13, 2014, Ms. Wilson sent a memo notifying the TAs that "… all current technical advisor positions will be realigned to report to the Workplace Directorate - OHS Compliance and Operations … This realignment will occur in September 2014." Mr. Misuraca testified that the union was advised and was aware of the change.

[22] The complainant asked his regional director for information about this pending change but was told nothing. However, he assumed that if National Headquarters was doing it, it was being done correctly.

[23] The change took place in the fall of 2014. The TAs were told to stop referring to themselves as technical advisors in correspondence, or at all. They were to refer to themselves only as program advisors. In January 2015, the employer brought the old and new PAs (former TAs) together for a conference at National Headquarters, advised them that they were all PAs now, and welcomed the former TAs to the team.

[24] The complainant continued to assume that this was a transitional period and that the change would be made official at some point. However, this proved to be incorrect when he received a notice of an essential services designation on May 6, 2015, nine months after the change had taken place. It was addressed to him but referenced his former TA position title and number. He realized that he still officially held his TA position, as did the other TAs who had all received essential services designations. He also discovered that the original PAs were not designated essential, only the former TAs.

[25] Receiving this notice was highly significant for the complainant. It was now clear to him that this transition was not being implemented properly and that although he was performing the duties required by his new position, apparently, he was still officially in his old position. It was particularly concerning for him that this information came to him in the form of an essential services designation, which the employer and the union jointly develop and agree upon.

[26] As the complainant pointed out, had there been a strike during this time, he would have been in an unclear and difficult position. Should he refuse to participate in a strike, given that for the last nine months, the employer had told him that he was a PA? If he was a PA then he would not be designated essential. However, the notification advised him that as a TA, he was in an essential position, that refusing to cross a

picket line was prohibited, and that doing so would risk being found liable on summary conviction for a fine of up to $1000.

[27] Mr. Misuraca testified that he was aware of the essential services designations that the former TAs received, that the union local was always made aware of who was on the list. He did not know that the PAs were not so designated because they were not in his local at that time, just the HSOs, the TAs, and the administrative staff. He did not have any discussion with management about the inherent contradiction in these notices or about what their recipients would be expected to do in the event of a strike. He testified that these lists are just sent out periodically, they come and go, and that in general, the union simply tries to keep the numbers down to make for a more effective strike.

1. November 2015 – complainant's first contact with the union

[28] On November 6, 2015, the complainant contacted Andrew Shaver, Assistant Regional Vice-President, UNE, Ontario Region, providing a summary of his concerns, as follows:

> *Hi Andrew*
>
> *…*
>
> *I was wondering if we could talk sometime or perhaps you could put me in touch with someone that knows HR in relation to perhaps the Public Service Staff Relations Act or collective agreement.*
>
> *I believe my ER has not officially changed my job despite calling me by the new title which although has the same pay classification is a different job with a different job description.*
>
> *HR is not available to us, only management apparently. Below is a rough chronology of events. I am within a year of retirement but still it bugs me they seem to be doing something very wrong here.*
>
> *1. In August of 2014 DG A. -Wilson sends an e-mail saying TA(s) will report to WD vs. ROC and become PA(s).*
>
> *2. Starting in October of 2014 we assume both TA and some PA duties.*
>
> *3. We are told to call ourselves PA(s).*
>
> *4. Same classification but different job descriptions.*
>
> *5. Labour (ROC) introduces Senior Investigator position - Tl - 06 to assume some but not all of TA duties. They are also like a Sr. HSO.*

> *6. In May of this year the TA(s) now called PA(s) by NHQ an essential designation listing our position number and TA job in case of a strike.*
>
> *7. NHQ admits they have not officially changed us over to PA(s).*
>
> *8. Our leave requests still list us as TA(s) and our reporting person is RD AA.*
>
> *9. We have to change that each time we request leave to put in Marcia Edgar's name.*
>
> *10. My union local is still Toronto and not NHQ.*
>
> *…*

[29] Both Mr. Shaver and Mr. Misuraca contacted the complainant by phone to discuss this. Three days later, on November 9, 2015, the following communication took place between the UNE's labour relations officer, Linda Koo and Director General, Regional Operations and Compliance, Annik Wilson. The complainant accessed these emails via his ATIP request:

> ***From:*** *annik.wilson…*
>
> ***Sent:*** *November-09-15 11:18 AM*
>
> ***To:*** *Linda Koo*
>
> ***Subject:*** *FW: Pilot Project - Program Advisor Guidance Request*
>
> *Linda,*
>
> *I've verified with a number of HSO's and Senior Investigators (SI) in the Atlantic. The e-mail below was discussed at a number of OHS teleconferences with all officers during the summer. Because of absences in the office, I can't confirm if/when it was confirmed in writing but I can assure you that HSOs know that the request for information goes to the SI first who tries to address it and they fill out a template to be sent to a centralized e-mail for Program Advisors (PA) to respond. There is a PA in the Atlantic (Bob Reid) but the program is moving away from dedicated regional program advisors but all requests are addressed and it's working well. As well, a separate e-mail provided clarity around the roles and responsibilities in the LP, in terms of Pas and TI-6s.*
>
> *…*
>
> ***From:*** *Linda Koo…*
>
> ***Sent:*** *Monday, November 9, 2015 12:02 PM*
>
> ***To:*** *Wilson, Annik AC [NC]*
>
> ***Subject:*** *RE: Pilot Project - Program Advisor Guidance Request*
>
> *Hi Annik, thanks. This is the first time that I hear that the Technical Advisor is being called a Program Advisor and that there is a pilot project. There should have been consultation with*

> *the Union on this (at the Labour Program UMCC) at the very least. When is ESDC Labour Program planning on consulting the UNE on this?*
>
> …

[30] Ms. Wilson forwarded Ms. Koo's email to her Workplace Directorate counterpart, Ms. Baxter, and to Glen Linder, Senior Director. The evidence does not reveal what, if anything, happened between the employer and the union after that.

[31] On November 17, 2015, the complainant provided the union (Messrs. Misuraca and Shaver) with more detailed information, elaborating on what he had sent on November 6, 2015:

> …
>
> *I have some questions to ask with regards to my work position as a Technical Advisor- OHS – PM 05. I will provide some background information below and then elaborate a bit.*
>
> *1. In August of 2014 Labour Program's Director General of Regional Operations and Compliance Annik Wilson sent an e-mail to the entire Labour Program workforce stating a number of things one of which was that starting later in the year all seven Technical Advisors (TAs) working in various Regions will report to NHQ and our Workplace Directorate vs. our Regional Directors (Regional Operations and Compliance) and would then become Program Advisors(PAs) – PM 05 (same classification but different job descriptions and duties) and working in Workplace Directorate.*
>
> *2. We have been told to call ourselves PA(s).*
>
> *3. Labour (ROC) introduces Senior Investigator position - TI - 06 to assume some but not all of TA duties. They are very much like a Senior Health and Safety officer.*
>
> *4. In May of this year the TA(s) now called PA(s) by NHQ receive an essential designation listing our position number and TA job title in case of a strike.*
>
> *5. NHQ admits they have not officially changed us over to PA(s).*
>
> *6. Our leave requests under my EMS (PeopleSoft) list us as TA(s) and our reporting person is still our Regional Director.*
>
> *7. We have to manually change that each time we request leave to put in Marcia Edgar's name.*
>
> *8. When I log into my computer each morning states in GC Profile – Logon settings Advisor – Tech OSH similar to PeopleSoft.*
>
> *9. My union local here in Toronto - Local 00258 (UNE Component) is receiving my dues with me still a member here versus NHQ.*

> *10. We were recently told by our Manager in NHQ that the change would occur shortly and it is just a matter of time so to speak.*
>
> *11. My Performance Agreement is done as a PA and not as a TA.*
>
> *12. There are two separate job descriptions for the TA job and the PA job.*
>
> *I am of the opinion that something is very wrong here. I have never been officially notified that my TA positon [sic] that I have occupied since October of 2008 has been eliminated. I have never been offered officially and signed anything with regards to a new job. In addition over the past year I have been given Program Advisor duties which to this day I do not believe to be my real job.*
>
> *…*

[32] On November 23, 2015, the complainant forwarded the essential services designation he had received in May to Messrs. Misuraca and Shaver. He also sent his original signed acceptance of the TA position he had occupied from 2010. He advised that he had never received confirmation that this position had ended or received any offer of a PA position.

[33] On November 24, 2015, Mr. Misuraca contacted Mr. Shaver to discuss possible next steps or the action to be taken on the issues that the complainant raised. Mr. Shaver said that he would seek Ms. Koo's advice.

[34] However, nothing further happened until February 1, 2016.

2. February 2016 – complainant followed up with the union – group conference call

[35] On February 1, 2016, the complainant took matters back into his own hands and wrote to Marcia Edgar, his Workplace Directorate manager, on behalf of himself and his TA colleagues, four of whom were listed as signatories. The letter noted that it was 16 months since the change and that no real clarification had ever been provided. It reads in part:

> *We are asking for the following information to help clarify this very unusual situation.*
>
> *1. We would like a copy of our current job description.*
>
> *2. We would like confirmation of our current position number.*
>
> *3. Why have we not received any official documentation that our TA jobs have been eliminated?*
>
> *4. Why have we not received any official documentation offering us our new PA positions?*

[36] On February 3, 2016, Ms. Edgar responded by sending the complainant and the other TAs a PA job description dated 2001 and indicating that she would set up a conference call with the TA group to better discuss their concerns. The evidence does not indicate whether such a call took place.

[37] The complainant forwarded his request to Ms. Edgar and her response to Messrs. Shaver and Misuraca with an "FYI", to which Mr. Shaver responded: "Thanks so much for keeping me in the loop – please don't hesitate to be in touch if there's any more direct support I can provide on this."

[38] On February 16, 2016, Jane Shimono, one of the other TAs affected by this position change, followed up with Mr. Misuraca as to whether he had yet heard back from Mr. Shaver about having a conference call.

[39] On February 17, 2016, Mr. Misuraca emailed this to the complainant:

> *This section may buy time to file a "G".*
>
> *18.07 The parties recognize the value of informal discussion between employees and their supervisors and between the Alliance and the Employer to the end that problems might be resolved without recourse to a formal grievance. When notice is given that an employee or the Alliance, within the time limits prescribed in clause 18.15, wishes to take advantage of this clause, it is agreed that the period between the initial discussion and the final response shall not count as elapsed time for the purpose of grievance time limits.*
>
> …

[40] It was confirmed in testimony that "G" meant "grievance". Neither Mr. Misuraca nor Mr. Shaver took any steps or attempted to give the employer notice that the union wished to take advantage of clause 18.07 to hold the timelines and allow for discussion.

[41] On February 18, 2016, Ms. Shimono followed up again with Mr. Misuraca about having a conference call with Mr. Shaver. He responded that a call could be set up for the week after next and continued:

> …
>
> *Both Andrew and I want to better understand from the both of you, what the group wants from this. We discussed WFA and job*

> *descriptions, but we are still a bit unclear on what is being sought. When we have the tele call we hope to have things figured out. In the meantime, section 18.07 of your Collective Agreement can allow for the waiting of a response from Marcia and will not start the grievance clock to start ticking [sic]. Please have a read of that section.*
>
> …

[42] Although this step had now been suggested to two members of the affected group, neither Mr. Misuraca nor Mr. Shaver took any steps to try to take advantage of clause 18.07. There is no evidence that it was ever mentioned again.

[43] There was also no evidence that the union considered the possibility of applying for an extension of time to file a grievance. Mr. Misuraca could recall no such consideration and the documentation reveals none.

[44] On February 22, 2016, Ms. Shimono and Mr. Shaver communicated by email to set up a call with the TA group, which Mr. Misuraca and Ms. Koo would also join. All three levels of the union were represented: Mr. Misuraca for the local, Mr. Shaver for the regional, and Ms. Koo for the national. As Mr. Misuraca testified, in his view, he had all the right people at the table. The purpose of the call was for the TA group to air their concerns and to discuss a course of action.

[45] On the call, the members were advised that instead of filing a grievance, it would be best to ask the employer for clarification. There was no evidence that the union told the members that it had already contacted the employer about this issue three months earlier.

[46] The union also advised that the matter would best be pursued at future union-management consultation committee meetings. However, it did not undertake to do so. There are three levels of those meetings: local, regional, and national. It is not clear which meeting level was being suggested as the appropriate forum, but it was never raised at any level. Mr. Misuraca testified that he did not raise it at the local level. He said that if Mr. Shaver had raised it, it would have been at the regional level, but he did not think that that had happened. Not that he had heard, in any case.

[47] Minutes after the group call, the complainant sent Mr. Shaver the TA and PA job descriptions, along with the message, “Hi Andrew Here they are.” It seems that Mr. Shaver had asked that they be sent to him. Although the complainant had highlighted

that there were two different job descriptions when he sent the union two detailed emails back in November 2015, there is no evidence that the job descriptions had ever been requested by or provided to the union.

[48] Mr. Misuraca was asked if a grievance under clause 54.01 (statement of duties) was considered. He noted that that was a common type of grievance; in fact, it was the most common type of grievance filed by his local. There was no clear explanation as to why that route was not taken or if it was even considered.

[49] He also agreed on cross-examination that he could not think of any other situation where a position had been changed in this way, via a group e-mail and without any official documentation.

3. May 2016 – complainant contacts employer and considers group grievance

[50] After the group call in February, nothing further happened for another three months, until the complainant contacted the employer again on May 9, 2016, on behalf of himself and his TA colleagues, four of whom were also listed as signatories to this letter. The letter requested an update on the issues raised in the complainant's February letter.

> *Hello/Bonjour Marcia*
>
> *It has been approximately three months since we sent you a letter enquiring about the TA/PA situation (see attached).*
>
> *Since that time you have provided to us a with [sic] a job description for the PA position dated August 24, 2001 (see attached). In addition, we have had a discussion with both you and Glen Linder in which apologies were sincerely offered and we were informed that you would be contacting Human Resources and Labour Relations.*
>
> *You have indicated to us recently as part of our PMAs that you have contacted HR and that Classification, Staffing and Labour Relations are looking into this matter since it is complicated.*
>
> *We were wondering when we might be informed about any new information received from both Human Resources and Labour Relations related to the Technical Advisor- Program Advisor situation?*
>
> *It is our request that we as a group have this discussion with you rather than individual one-on-one discussions.*

[51] Next, the complainant turned his thoughts and his discussions with his colleagues to the idea of a group grievance. On May 31, 2016, he advised the group

that he was assembling the documents to attach to one. He then contacted Mr. Shaver to ask about the possibility of filing a group grievance. He was referred to Ms. Koo, who, according to the agreed statement of facts, "gave him information regarding the process." The evidence does not disclose what Ms. Koo told him.

[52] The union took no steps to file a group grievance.

4. June 2016 – complainant files an individual grievance

[53] Finally, on June 10, 2016, the complainant filed an individual grievance alleging that the employer had arbitrarily changed his duties, constructively dismissed him, and violated Appendix D of the collective agreement by failing to notify him of a workforce adjustment. He copied Mr. Misuraca, who advised the complainant that he had forwarded the grievance to Ms. Koo and Mr. Shaver as the union had to authorize and vet it, in order for it to be valid.

[54] The ensuing correspondence from the employer illustrates that the complainant was unsure as to whom he should submit the grievance. He received an email about that from Ms. Edgar, and he explained things as follows:

> *Since this is relatively new to me, I only cc'd you as an FYI. I am guessing it goes to my local union rep Francesco M.* [Misuraca] *here in Ontario. But he would normally deal with Luciano I believe at first level but now maybe it is you. Not sure…Needless to say it is rather confusing.*

[55] On June 15, 2016, the three union representatives discussed the grievance and decided that it did not have merit and that the union would not support it. Ms. Koo advised the complainant, in writing, of the union's reasoning, as follows:

> *Hi Ken,*
>
> *I am writing to you as the Labour Relations Officer of UNE assigned to ESDC. Thank-you for your e-mail and for providing the documentation and information that you did, as it provided helpful background information and documentation into your case. Francesco, Andrew and I discussed this grievance and the concerns that you raise in it during a conference call today so as to ensure that we all had the same information and understanding of the case.*
>
> *Upon reading and reviewing the documentation and information that you provided, unfortunately I must advise you that the UNE/PSAC cannot support your grievance for the following reasons:*

> *1. This is not constructive dismissal*
>
> *2 constructive dismissal does not apply in a unionized working environment*
>
> *3 You have not been workforce adjusted and it is not in your best interest or that of the union to press for any of our members to have their jobs cut. The Union exists to fight and protect the rights of our members and to negotiate the best working conditions for them that we can through collective bargaining.*
>
> *4 Your grievance is untimely. You are referencing decisions and actions that date back to 2014 in your grievance. … "In August of 2014 it was announced that Technical Advisors - OHS (TA(s)) would be reporting to NHQ as Program Advisors (PA(s)) effective the end of September 2014." …*
>
> *You would have up to 25 working days to file a grievance from the date that you first became aware of the decision or action giving rise to the grievance. You became aware of this situation back in 2014 it appears and despite the fact that there may be some issues that are not clear, you have been provided with job descriptions for both the PA and the TA and for [sic] with a work transition chart for both of those positions as well as for the SI position.*
>
> *5 Reorganizations, assignment of duties and responsibilities and restructuring are all part of management's rights. Management has the right to manage. You are still receiving the same pay and benefits but are reporting to Brenda Baxter, NHQ.*
>
> *As your grievance references the collective agreement, including the WFA Appendix which is part of the collective agreement, the bargaining agent has sole jurisdiction over the collective agreement and any grievances regarding same. UNE's jurisdiction includes being responsible for grievances. Because of all of these reasons, we cannot support the filing of your grievance.*
>
> *We think a better way of addressing your issues would be to have them addressed at the LPUMCC (Labour Program UMCC) as this issue is of a national scope since there are TA/PA's in different regions across the Labour Program as it seems to be a matter of seeking additional clarity as to each of your roles and responsibilities, especially since the creation of the TI-06 position of Sr. Investigator.*
>
> *Should you have any questions or concerns with regards to any portion of this e-mail, we would be willing to hold a conference call with you and any of your colleagues that you have listed (that are bargaining unit members) in your documentation. Please let us know.*
>
> *…*

[56] The complainant responded the next day and stated that he could discuss a possible conference call with his colleagues. He also asked for any advice with respect

to challenging the union's decision through the Board. And, he contacted Mr. Shaver, who confirmed the union's position that it would not support the grievance.

[57] The complainant testified that subsequently, the employer asked him if he wanted to proceed with his grievance in the absence of union support. He indicated that he did, although he was surprised that he could. His manager said that she would check with labour relations about the process. Apparently, she received approval, and ultimately, the complainant did have a first-level grievance meeting with the employer. It was not explained why or how this was allowed to take place.

[58] In preparation for this hearing, the complainant contacted a former TA colleague for an update on what had taken place since his retirement and where matters stood now. On November 3, 2021, she advised him by email that she did not recall signing anything when the changeover was finalized but that she had been asked to sign an indeterminate deployment letter on October 29, 2020, to deploy her from the TA to the PA position and that this letter of offer had been based on a new job description.

III. The complainant's submissions

[59] The complainant submitted that the choices confronting him in 2014 were to retire early with a reduced pension, to continue to work as a TA and be disciplined, or to carry out his new duties as a PA, despite not having received or accepted any offer of such a position or having been given any other options. He determined that refusing to do the new job would let his colleagues down, both the TAs and the PAs. They would have had to pick up the slack as the HSOs in the field often needed advice and assistance in a hurry. Accordingly, he carried out the new duties as instructed.

[60] He submitted that if his complaint is dismissed, it would send a message to the employer that this sort of thing can be done with impunity. The Assistant Deputy Minister at the time hoped to effect this change quietly, without following the rules or having to engage with the union and the employees. Unfortunately, he was successful.

[61] Dismissing this complaint would send a message that if an employer chooses to ignore the rules, it can be successful because the union may choose not to challenge it. This case is important for employees because if something significant happens to an employee's job, the union has a role to play. The message that a dismissal would send

to current employees is that the employer can alter their positions with impunity, and the union cannot or will not do anything.

[62] The employer made an end-run around the collective agreement and waited six years before starting to correct itself. It is hoped that the union learns from this that sometimes employers do not follow the rules, and that the union cannot ignore it but must decide what to do in response.

IV. The respondent's submissions

[63] As Mr. Misuraca testified, the change was largely related to the reporting structure and the identities of the field officers that the complainant would advise. The structure became national rather than regional, but the complainant continued to work at the same desk in the regional office. He acknowledged that many of the TA position's knowledge requirements applied equally to his new PA position.

[64] There was no classification decision, no staffing decision, and no deployment that could have been grieved. The complainant's job was not eliminated. Ultimately, the union concluded that the grievance was without merit. Not every issue raised by a member is a breach of the collective agreement, which is silent with respect to how the employer can modify jobs.

[65] It was more than a year after the change when the complainant raised the issue with the union. And it was six months after he received the essential services notice, even though he said that that was when he truly realized that there would be no official process. When the union raised the timeliness issue, the complainant did not follow up. He was told that an employee can notify the employer that he wishes to take advantage of clause 18.07, to stop the clock ticking but he did not do so. He also failed to contact the union for several months at a time and never asked the union representatives to accompany him when he met with the employer.

[66] The complainant submitted internal employer documents that he received through an ATIP request but called no witnesses to speak to the email communications they contained. The respondent had no opportunity to cross-examine the senders and recipients of the emails. The contents were hearsay and ought to be given reduced weight. In any event, the matters to which they refer do not speak to this case, which is not about what the employer did or did not do but only about whether the union acted

arbitrarily or in bad faith. The complainant is still focused on what the employer did, but that is beside the point for this matter.

V. Reasons for decision

[67] The union has a duty to fairly represent the members of a bargaining unit because, especially with respect to matters concerning their collective agreement, it holds the exclusive power to speak and act for them. Section 187 of the *Act* states:

> ***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.*

[68] The Supreme Court of Canada summarized the principles governing the duty of fair representation in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, 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.*
>
> …

[69] I have reached the unfortunate conclusion that the union breached its duty by acting arbitrarily in the representation of the complainant. When the complainant brought his concerns forward to the union, it did not thoroughly study the case or take

into account the significance of those concerns to the complainant and the rest of the TA group affected. Its representation was merely apparent, it went through the motions of being available to the members for discussion but took no action.

[70] The union was made aware of the structural change when it occurred in August 2014. It raised no issue with the employer, sought no clarification, and initiated no contact with the TA group at that time. Giving the union the benefit of the doubt, the evidence suggests that the employer was trying to do this quietly to avoid raising any flags and it may be that the impact of the change on the TA group simply went unnoticed.

[71] Later, the union also knew that the former TAs were designated as essential service positions and that the other PAs were not. These designations are developed jointly with the employer. Giving the union the benefit of the doubt again, it is possible that it simply did not realize that this discrepancy might bear looking into.

[72] However, when the complainant brought his specific concerns to the union on Friday, November 6, 2015, with detailed information that the employer had moved seven employees out of their positions and placed them in different ones, giving them no official documentation or any other options, there was no excuse for the union not to give the matter some serious attention.

[73] Indeed, on Monday, November 9, 2015, Ms. Koo started asking questions. She told the employer that this was the first she had heard of TAs becoming PAs. She chastised the employer for failing to use the union-management consultation process before implementing such a change. She demanded to know when the employer would be consulting with the union.

[74] The respondent's representative objected to this email correspondence that the complainant had acquired through an ATIP request. While acknowledging that the Board can accept hearsay evidence, she submitted that the respondent's inability to cross-examine on it should go to the weight accorded to it. I agree, and I have considered that when determining its weight. I also note that there was nothing in the evidence to indicate what preceded or followed that correspondence between the union and the employer, which also affects the weight that can be placed on it. However, I do accept that at minimum, these emails show that the union raised the issue with the employer after receiving the complainant's information.

[75] The only contact between the union and the complainant during the next three months after he first raised the issue in November, 2015 were informal chats that he initiated with Mr. Misuraca. As they worked in the same office, the complainant would, at times, update Mr. Misuraca on the lack of progress the complainant was making with the employer. As far as the complainant knew, he had been left to continue trying to deal with the matter on his own, but he sought to keep the union informed.

[76] Accordingly, in February 2016, he tried, in writing, to obtain information from the employer. He kept the union informed of his efforts. Mr. Shaver thanked the complainant for keeping him in the loop and to not hesitate to call if he could offer any more direct support. I find this response odd, given that the complainant had specifically asked for the union's help three months earlier in November and had provided detailed information and documents.

[77] The complainant did contact Mr. Shaver again in February 2016, and so did his colleague Ms. Shimono. They both asked for a conference call with the TA group and the union agreed. Prior to the call, Mr. Misuraca told each of them about clause 18.07 suggesting that it might be used to buy some time for discussion with the employer before having to file a grievance. However, the union did not follow up on that possibility beyond telling the complainant and Ms. Shimono that the clause existed.

[78] On the group call, the union advised the members that rather than filing a grievance, the employer should be asked for clarification and the matter should be raised at a union-management consultation meeting. There was no evidence that the union representatives told the members that Ms. Koo had already asked the employer for clarification and for union-management consultation in November, 2015.

[79] Immediately after the call, the complainant sent Mr. Shaver the two job descriptions, apparently in response to a request to do so. It is concerning that the union would need the complainant to provide it with the job descriptions at that stage. He had advised in November that there were two different job descriptions. Did the union not ask for them at the time? In any event, surely Mr. Misuraca had them? Did none of the three union representatives review the job descriptions prior to the conference call, during which they kiboshed the idea of a grievance in favour of the union-management consultation route?

[80] Apart from the complainant sending Mr. Shaver the job descriptions, there was no follow up after the February conference call. The union took no steps to act on the only suggestions it had made – to ask the employer for clarification or to raise the matter at union-management consultation.

[81] Three months later, in May, the complainant tried again to obtain information from the employer. Then he turned his thoughts to a group grievance and consulted Mr. Shaver, who referred him to Ms. Koo. It was not explained why Mr. Shaver did not simply inform him that he could not file a group grievance without union support. The only evidence on the matter is the agreed statement of facts, which indicates vaguely that Ms. Koo "gave him information regarding the process."

[82] In June, the complainant attempted to file an individual grievance. It was clear in the subsequent correspondence with the employer that he did not know to whom he should submit it or what the protocol was. However, he knew that the union had to be involved, and he copied Mr. Misuraca who sent it up the union chain for consideration and vetting. The union had internal discussions and decided not to support the grievance. Ms. Koo put the reasons for that decision in writing, as outlined in full, earlier in this decision.

[83] Firstly, Ms. Koo explained that the grounds for the grievance on which the complainant sought to rely were not tenable. In the union's view, it was neither a constructive dismissal nor a workforce adjustment situation. Again, giving the union the benefit of the doubt, it is possible that it genuinely thought that these arguments would not be helpful. However, nothing in the evidence suggests that a serious analysis was applied to them. In any event, the union's job is not to critique a member's efforts to find the right argument, having been left on his own to do so.

[84] Ms. Koo also explained as follows that the grievance was untimely, in language that laid the responsibility for that squarely at the complainant's door:

> …
>
> *… Your grievance is untimely. You are referencing decisions and actions that date back to 2014 in your grievance. … "In August of 2014 it was announced that Technical Advisors - OHS (TA(s)) would be reporting to NHQ as Program Advisors (PA(s)) effective the end of September 2014." …*

> *You would have up to 25 working days to file a grievance from the date that you first became aware of the decision or action giving rise to the grievance. You became aware of this situation back in 2014 it appears and despite the fact that there may be some issues that are not clear, you have been provided with job descriptions for both the PA and the TA and for [sic] with a work transition chart for both of those positions as well as for the SI position.*
>
> …

[85] This is surprising language blaming a member for the timeliness of "his" grievance, given that the union had taken no action in August, 2014 and that the complainant had explicitly asked for help in November, 2015 and again in February and May, 2016. Since that time, the union had neither attempted to use clause 18.07 to stop the clock ticking, nor considered whether it might be a continuing grievance, nor whether it could apply for an extension of time to file. Nor did Ms. Koo's letter discuss any of these ways that the union might have been able to deal with the timeliness issue.

[86] Ms. Koo's letter then noted that reorganizations, assignment of duties and responsibilities, and restructuring are all part of management's rights and that the complainant was still receiving the same pay and benefits, only the reporting structure had changed. She did not address the fact that the employees had been moved out of their positions and put into different ones, with no official process or documentation.

[87] Finally, she suggested that:

> …
>
> *… a better way of addressing your issues would be to have them addressed at the LPUMCC (Labour Program UMCC) as this issue is of a national scope since there are TA/PA's in different regions across the Labour Program as it seems to be a matter of seeking additional clarity as to each of your roles and responsibilities, especially since the creation of the TI-06 position of Sr. Investigator.*
>
> …

[88] The union had already suggested this course of action in the February conference call and the letter takes the same approach as did the conference call. That is, the idea of taking it to union-management consultation was just put out there as a suggestion. Although the letter concludes by saying that the union is willing to hold another group conference call "should the members have any questions or concerns" it

does not say that the union will do anything specific, such as actually putting the matter on the agenda for the next consultation meeting.

[89] Further, despite Ms. Koo's conclusion that it was a matter of seeking additional clarity as to roles and responsibilities, her letter does not mention the possibility of grieving under clause 54.01 to obtain a current statement of duties. Her statement that "you have been provided with job descriptions for both the PA and the TA" refers to a PA job description from the year 2001, long pre-dating the structural change that took place in 2014. Mr. Misuraca testified that in his mind the jobs were basically the same, but as the complainant pointed out, there would not typically be two 12-page job descriptions for the same job, one designated essential and one not. Further, Mr. Misuraca testified that a grievance to obtain a current statement of duties was far and away the most common type of grievance filed by his local. Yet, this was not seriously considered.

[90] It is certainly true, as the union argued, that every issue raised by a member is not necessarily a breach of the collective agreement that must be grieved. The union enjoys considerable discretion in this regard. However, this discretion must be exercised after a thorough study of the issue, considering the significance of the case and its consequences to both the employee and the union.

[91] In my view, the complainant has established, on a balance of probabilities, that the representation by the union was not genuine and was merely apparent. Despite concluding that the TA group needed clarity as to their roles and responsibilities, the union did not consider filing the local's most common type of grievance to obtain a current statement of duties. Despite suggesting to the complainant for more than six months that a grievance was a possibility, the union did not seriously consider any grievance until the complainant filed one, which it then simply critiqued. The union's only suggestions for action were to ask the employer for clarification and to raise the matter at union-management consultation. It did not tell the members about its contact with the employer on this issue in November, 2015. It did not put the matter on the agenda for discussion at union-management consultation. These discrepancies in the union's approach show that it did not seriously turn its mind to the merits of the case or make an objective and rational judgement about how to resolve the matter.

[92] Six years after the events giving rise to this complaint, in 2020, the employer apparently reached its own conclusion that a change like this should be done properly. It developed a new job description for the PA position and asked the former TAs to sign letters of offer accepting that position. Had the union acted in 2014, or in 2015 when the complainant put the issue squarely before it, it may well have been able to prompt the employer to at least take those steps. That alone would have reduced the confusion and benefitted the TA group, and it is at least possible that other options might have been made available to the members as well.

[93] As the complainant described it, the employer made an end-run around the union. The union knew it, at least by November 2015, if not before then. It was not required to file a grievance but it had to adequately consider the impact on the complainant and engage in a process of rational decision making. I have concluded that it failed to do so and, therefore, find that the union acted in an arbitrary manner.

[94] Although I find that the union acted arbitrarily and, in my view, ought to have been more transparent with respect to how it was dealing with the issue, the complainant bears the burden of proof and on the evidence before me I do not find that the union's actions amounted to bad faith.

[95] Section 192(1) of the *Act* allows the Board to make any order considered necessary in the circumstances. The complainant did not request any specific corrective action, aside from a decision against the union.

[96] For all of these reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[97] The complaint is allowed.

[98] I declare that the respondent violated s. 187 of the *Act*.

February 7, 2022

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