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*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

VALÉRIE FORTIN

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Fortin v. Public Service Alliance of Canada

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

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Kim Patenaude, counsel

Decided on the basis of written submissions,
filed March 4 and May 3, 2022.
[FPSLREB Translation]

REASONS FOR DECISION

FPSLREB TRANSLATION

I. Complaint before the Board

[1] The complainant, Valérie Fortin, alleged that her bargaining agent, the Public Service Alliance of Canada (“PSAC” or “the respondent”) failed its duty of fair representation by not taking any steps to challenge the “Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police” (“the Policy”) that the Treasury Board adopted or to assist or support her as a public servant who refused to submit to the Policy.

[2] The respondent stated that it discharged its duty toward the complainant. It asked that this matter be summarily dismissed because the allegations revealed no breaches of its duty of fair representation.

[3] For the following reasons, I find that the complaint should be dismissed.

II. Summary of the allegations

[4] This decision is based on the parties’ written submissions and the complainant’s initial complaint.

[5] In accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Federal Public Sector Labour Relations and Employment Board (“the Board”) may decide any matter before it without holding an oral hearing.

[6] After the respondent made its reply, the parties were informed that the Board was considering making a decision in this case based on written submissions. The complainant had the opportunity to make additional written submissions, which she did. Her initial complaint comprised 14 pages and her reply 17, with 32 exhibits in support. In my view, the parties’ submitted documents are sufficient to allow me to decide the issue, namely, whether the complainant established an arguable case that the respondent breached its duty of fair representation.

[7] The complainant is a parole officer with the Correctional Service of Canada. On November 15, 2021, she was placed on leave without pay due to her refusal to comply with the Policy.

[8] The PSAC is the employee organization that represents the bargaining unit to which the complainant belongs. The PSAC component that deals with Correctional Service employees is the Union of Safety and Justice Employees (USJE).

[9] On January 21, 2022, the complainant made a complaint to the Board under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”). In essence, her complaint involves these two issues:

- the PSAC’s decision to support the Policy without question or relying on conclusive data; and
- the PSAC’s failure to assist and support her as a public servant who refused to comply with the Policy.

[10] The complaint and the complainant’s written submissions equally state her opinion about the COVID-19 vaccine and the Policy, along with her opinions that anything requiring that someone be vaccinated and disclose medical information under penalty of sanctions is illegal and that all consent provided out of fear of losing one’s job is flawed. She also made arguments and submitted many documents on events that took place well after the period during which the respondent had to decide whether to challenge or support the Policy and several months after exchanges with her about her personal situation. Those opinions, arguments, and documents are not relevant to the issue before the Board.

[11] The possible contents of a complaint before the Board should be clarified. A complaint against a union for breaching its duty of fair representation is not a context in which the Board can support a debate about the Policy’s legality or reasonableness. The Treasury Board adopted the Policy and is not a party to this case. Its actions are not at issue.

[12] A complaint of this nature is also not the forum for debating vaccination or the evolution of the COVID-19 pandemic. The exercise that the Board must undertake is to consider whether the respondent acted arbitrarily, discriminatorily, or in bad faith in its representation of bargaining unit members and the complainant, in particular. For that reason, the summary of the allegations in this decision and the resulting analysis will be limited to the respondent’s actions or inactions in its representation of bargaining unit members.

[13] The sequence of events, as described in the parties' written submissions, is as follows:

- **August 10, 2021, or thereabouts:** the Government of Canada notified the respondent of its intention to implement a vaccination policy for federal public service employees and provided it with a draft of the policy.
- **August 13, 2021:** The respondent issued a declaration supporting the vaccination requirements for federal public servants "... to protect our members, their colleagues, and our communities." The declaration still required the government to take certain steps to ensure respect for privacy, to implement accommodations for employees who could not be vaccinated for reasons protected under human rights legislation, and to consult with unions on the vaccination measures' implementation.
- **August 17, 2021:** The respondent publicly declared that terminations and disciplinary actions related to mandatory vaccination were unacceptable and stated that it had communicated that position to the federal government. It encouraged the government to consider things such as temporary reassignment to other duties, telework, and regularly screening employees who could not or did not wish to be vaccinated.
- **An unknown date that can be assumed as October 4, 2021, or thereabouts:** After the lull due to an election period, the government sent the respondent the final version of the Policy. According to the respondent, it would have received the final version of the Policy about 48 hours before its adoption was announced.
- **October 6, 2021:** The Policy was adopted. That same day, the respondent issued a news release stating that it supported adopting a vaccination policy that would protect its members and the people it served but denounced the consultation process. It specified its expectations with respect to the Policy's application, including that it be applied consistently and fairly, to respect privacy and human rights, that proper consultation be held at all stages of the process, and that health and safety and equity and inclusion principles be respected. The respondent stated its intention to represent those who would be subjected to sanctions because they were not vaccinated.
- **In the weeks following the Policy's adoption:** The respondent analyzed the Policy and the relevant case law to determine if the Policy could be challenged. After that, it determined that a legal challenge would have little chance of success and that the most effective way to represent affected members would be on a case-by-case basis, based on the merit and circumstances of each case.
- **October 11, 2021:** After an unsuccessful search for information from the USJE local about the support she could obtain from the PSAC, the complainant emailed a 4-page document entitled, "[translation] Notice to respect my rights and your duty of fair representation" to 4 people, the USJE's president and national vice-president, its regional vice-president, and the president of her local. That is how she communicated her opinion that requiring a COVID-19

vaccination to allow PSAC members to work was illegal and that the respondent had not ensured the fair representation of its members. She wrote a series of 10 questions to which she requested answers within 3 business days. Among other things, the questions were about what the union would do to protect her rights, the consequences for her if she refused to be vaccinated, and the steps that the union took and the research that it conducted before deciding to support the Policy.

· **October 13, 2021:** The Regional Vice-President acknowledged receiving the October 11 email, and she stated that a response would follow.

· **October 14, 2021:** The complainant stated that she had communicated with her local to find out about the support that the union could offer her. No copy of that communication was filed with the Board. However, she stated that a union representative had apparently told her that she was unable to reply to her questions because she was also waiting for information from the PSAC.

· **October 20, 2021:** On its website, the respondent published an update of frequently asked questions about the Policy that among other things addressed the issue of representing members who chose not to comply with the Policy. The respondent stated that it would support an individual who chose not to be vaccinated for personal reasons if human rights or labour laws had been violated.

On the same day, while waiting for the PSAC to forward a reply to the complainant's notice, the USJE's regional vice-president sent her an information document on the Policy that the Treasury Board had prepared for public service managers.

The complainant responded shortly after that, copying the members of the union executive who had received her October 11 communication. She informed them of her concerns about what she considered were the risks associated with the COVID-19 vaccination and the confidentiality of the medical information that had to be shared with her employer under the Policy. She stated that she "[translation] needed the support of [her] union" and that she felt stressed by not knowing either what she should do or her options. She asked for "[translation] a minimum of support" in her accommodation request. The communication also mentioned a change in her supervisor's behaviour toward her that according to her, occurred due to her vaccination status. She specified that she intended to address the situation herself and stated that she shared these particulars for information purposes. As soon as the email was sent, she received a notice of absence stating that the recipient would be away until the end of October 2021.

· **October 21, 2021:** The complainant stated that she again wrote to the four union executive members who had received her October 11 notice. Apparently, the email stated her concerns about the digital application that federal public servants would have to use to attest to their vaccination status. No copy of the communication was filed with the Board. The complainant received no response.

· **October 25, 2021:** The complainant wrote to the PSAC's president and national executive vice president and to PSAC-Québec's regional executive vice president. She sent them the document that she had sent to the other PSAC representatives on October 11 and stated that she had not received a satisfactory response after sending it. She stated that the deadline for confirming her vaccination status was October 29 and that no one had confirmed whether the PSAC would represent her.

· **October 29, 2021:** The PSAC's president replied to the complainant, referring to the document entitled "[translation] Notice" that she had forwarded. In an email, he explained why the PSAC had concluded that the Policy would withstand legal challenges and that in the absence of a ground protected by human rights legislation, it would be difficult to successfully challenge the Policy. He also specified that if she chose not to be vaccinated, for personal reasons, and if she believed that the Policy had been applied to her unfairly, the PSAC would review her case to determine the support that it could offer her, "[translation] ... while recognizing that violations of human rights or union rights would have the most merit".

· **November 2, 2021:** The complainant replied to the PSAC's president. She expressed her opinion that the PSAC had not supported its members who were experiencing distress due to the Policy's adoption and application. She specified that according to her, the fact that the PSAC's president had replied to her on the last day of the time limit for attesting to her vaccination status was one example of the PSAC's failure toward its members. She ended her email by specifying this, in particular: "[translation] Be aware that I do not need your help. I will handle my defence against the employer ...".

III. Summary of the arguments

A. For the complainant

[14] According to the complainant, a labour organization with the mandate to defend its members' rights must ensure that its positions and actions are based on conclusive facts and evidence. A position taken by a union such as the PSAC must not prejudice to its members. In this case, the PSAC's decision not to challenge the Policy and its subsequent actions were negligent and inconsistent with its mandate to defend its members' rights.

[15] The complainant argued that the respondent showed arbitrary conduct and serious negligence by not replying to her communications, notably her request for assistance as part of an accommodation request and her concerns about protecting her personal information. According to her, the respondent's actions meant that several members were left to fend for themselves.

[16] The respondent also allegedly showed arbitrary conduct by supporting the Policy. According to her, the Policy's effect was to change federal public servants' working conditions by imposing a condition that could have significantly and harmfully impacted employees' health. The complainant argued that the respondent did not demonstrate that it discussed the issue with the employer or took account of the risks and health problems that could flow from the vaccine in question. She also said that she was unable to ascertain that the respondent in fact discharged its duties because it did not provide her with evidence of its discussions with the employer or the names of those who participated in them.

[17] The complainant argued that it was arbitrary conduct and serious negligence for the respondent to not rely on conclusive scientific data in its decision making and to not survey its members to determine how many did not want to comply with the Policy. She stated that after reading the respondent's November 9, 2021, memo, she was unable to determine whether it had weighed all the facts when it weighed the contradictory interests of employees and the PSAC or whether its decisions were based on hearsay or conclusive data related to COVID-19, the vaccines, and the extent of the impact that the Policy could have on its members.

[18] The complainant also argued that the respondent showed bad faith by not responding to her information requests and her request to receive its support until the day on which she had to attest to her vaccination status. According to her, not responding to a member's communications when it is known that the person must make a difficult choice is evidence of bad faith. According to her, she would have replied to the PSAC's president that she did not need the union's help because she did not trust that it would represent her fairly and objectively, due to the pressure she felt from the PSAC to comply with the Policy.

[19] Finally, the complainant claimed that the respondent displayed discriminatory conduct when it stated that it did not intend to represent members who did not want to comply with the Policy, for personal reasons.

B. For the respondent

[20] The respondent argued that it and all its representatives acted in good faith at all times and in a manner that was not arbitrary or discriminatory. After the federal

government announced its intention to adopt a COVID-19 vaccination policy, the PSAC seriously and carefully considered different ways to address the situations of employees who could not be vaccinated, who chose not to be vaccinated, and who chose not to disclose their vaccination status.

[21] The PSAC stated that it made a detailed, in-depth review of the Policy and that it took account of the case law and the applicable legal principles. It carried out an in-depth review of several available options to challenge the Policy. All those efforts led it to conclude that challenging the Policy through a policy grievance or other legal mechanism stood little chance of success. It was decided that the best approach would be to handle files case-by-case, by evaluating their individual merit. The respondent committed to evaluating the cases and to representing its members case-by-case, based on their personal situations.

[22] The PSAC communicated its decisions and the reasons for its conclusions to its members many times through several communication means, including through its website and by individual communications.

[23] With respect to the complainant's request for the PSAC's assistance with her personal situation, the respondent argued that she notified it that she did not need its help.

[24] The respondent's favoured approach cannot be characterized as arbitrary, discriminatory, or bad faith.

IV. Analysis

[25] The respondent asked the Board to summarily dismiss the complaint on the basis that the complainant did not provide *prima facie* evidence that it behaved arbitrarily, discriminatorily, or in bad faith.

[26] When deciding whether to summarily dismiss a complaint, decision makers must take the complainant's alleged facts as true and, on that basis, decide whether the complainant established an arguable case that the union violated the *Act* by providing representation that was arbitrary, discriminatory, or in bad faith. I shall do that.

[27] Section 187 of the *Act* provides the following:

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

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.

187 Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.

[28] The complainant had the burden of proof. She was responsible for presenting evidence sufficient to raise a presumption that the respondent failed its duty of fair representation. She had to specify the facts on which her complaint was based (see *McRae/Jackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290 at paras. 13 and 50).

[29] In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 527, the Supreme Court of Canada clearly established that a union member does not have an absolute right to adjudication. The union enjoys considerable discretion when making its representation decision, but it must exercise that discretion in good faith, objectively and honestly, after a thorough study of the grievance and the case. When it exercises its discretion, the union must account for the grievance's significance and its consequences for the member on one hand and the union's legitimate interests on the other. Its decision must not be arbitrary, capricious, discriminatory, or wrongful. Finally, the Supreme Court stated that the union's representation must be fair and genuine. It must be undertaken with integrity and competence, without serious or major negligence, and without hostility toward the employee.

[30] A member has a right to union representation, but it is not an absolute or unlimited right. Provided that the union does not act arbitrarily, discriminatorily, or in bad faith when it exercises its judgment in such matters, it is entitled to make a reasonable choice about the circumstances under which the representation will be offered (see *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13 at para. 69).

[31] The complainant's allegations arose in part from her perception of the events, in particular her perception that the respondent supposedly supported the Policy without question and without analyzing all the circumstances and issues. She also alleged that

she did not receive assistance or support as a public service employee who refused to be vaccinated.

[32] The goal of the Board's review is not to determine whether the respondent was right or wrong when it decided not to challenge the Policy. The review must be about the issue of whether the respondent made the decision without discrimination, objectively and honestly, and after a thorough review of the case, the issues, and its interests and those of its members. The Board must also review the representation that the complainant was offered; that is, whether it was genuine and undertaken with integrity and competence and without hostility (see *Canadian Merchant Service Guild*).

[33] Taking all the complainant's alleged facts as true, I am unable to find that she established an arguable case that the respondent allegedly violated the *Act* by providing representation that was arbitrary, discriminatory, or in bad faith when it decided not to challenge the Policy through a policy grievance or other means. I find the same with respect to the complainant's representation.

[34] One of the reasons the complainant cited to support this complaint is that she was unable to determine the steps that the respondent took to account for the risks associated with the vaccine, the analyses it conducted, and the information and data behind its decision not to challenge the policy. Yet, the respondent does not have the burden of proof. The complainant must present facts sufficient to establish that the respondent provided representation that was arbitrary, discriminatory, or in bad faith.

[35] The complainant's allegations were based on assumptions and speculations (see *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLRB 30 at paras. 80 and 81). She filed many documents in support of her complaint, including some on the spread of COVID-19 and the efficacy of the vaccination. The documents are of unequal credibility. None serves to support a finding that the respondent would have acted arbitrarily, discriminatorily, or in bad faith when it decided not to challenge the Policy.

[36] The respondent replied to and refuted the complainant's speculations by presenting a detailed chronology of the steps it took and the factors it took into account in its decision making.

[37] A union enjoys the discretionary power to weigh divergent interests and to find the solution that appears to it the most fair in the circumstances. In this case, the respondent had to account for the interests of all its members when it exercised its discretionary power to pursue or not pursue a grievance or other means to challenge the Policy. As is clearly stated in *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000* (2003), 91 C.L.R.B.R. (2d) 33 (BCLRB), the respondent must determine the grievances that it will or will not pursue, based on the circumstances and accounting for different relevant factors (see also *Rayonier Canada (B.C.) Ltd. v. International Woodworkers of America, Local 1-217*, [1975] 2 C.L.R.B.R. 196 (BCLRB), and *Bahniuk*). That is what it did.

[38] After carefully considering the factual and legal framework, the respondent decided to support the vaccination measures, monitor the Policy's application, and represent members whose individual circumstances met certain preestablished, objective criteria. As the Ontario Labour Relations Board recognized as follows in *Pasternak v. Service Employees International Union*, 2022 CanLII 6766 at para. 18:

... From a duty of fair representation perspective, there is nothing wrong with a union promoting vaccination and/or concluding that an employer's vaccination policy is in the best interests of its membership as a whole - provided that the union does not act in a manner that is arbitrary, discriminatory or in bad faith.

[39] The respondent's study, analysis, and thinking are reflected in the written communications described in the sequence of events. Its communications to its local representatives and its components outline continuous efforts to communicate the evolving situation and its thinking on the Policy. Those communications demonstrate that the respondent thought about several issues or risks relevant to its members and that it analyzed them. The complainant acknowledged being aware of all the communications. She was informed about the steps that the respondent took and its analyses.

[40] The communication from the PSAC's president to the complainant reveals the reasons that led the respondent to conclude that supporting the Policy was the best way to protect its members' rights and illustrates that the related decision was in no way arbitrary, discriminatory, or in bad faith. It states as follows:

- consultations with the PSAC's legal team led to the conclusion that the Policy would withstand legal challenges, including challenges citing the *Canadian Charter of Rights and Freedoms*;
- the case law on mandatory vaccination was unequivocal and stated that in the absence of a ground protected by human rights legislation, it would be difficult to successfully challenge such a vaccination policy; and
- had legal challenges been raised, they would not have delayed the Policy's implementation and would not have offered a respite to those who had no intention of complying with it.

[41] The respondent recognized its duty to fairly represent all bargaining unit members, including those who hesitated or refused to comply with the Policy. The PSAC decided the approach it would adopt to represent the members; in particular, it decided that it would study the cases of members who chose not to be vaccinated for personal reasons, and who felt that the Policy had been unjustly applied to them, as well as those who had been victims of an infringement of a right provided in a collective agreement or in health, safety, and human rights legislation.

[42] The Board, the Canada Industrial Relations Board, and the Ontario Labour Relations Board have all dismissed complaints about the duty of fair representation in similar cases (see, among others, *Musulino v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46; *Watson v. Canadian Union of Public Employees*, 2022 CIRB 1002; *Bloomfield v. Service Employees International Union*, 2022 CanLII 2453 (ON LRB); and *Sloan v. Ontario Secondary School Teachers' Federation*, 2021 CanLII 131991 (ON LRB)). In all cases, the complaint against the union was dismissed due to evidence that it conducted a careful review of the situation and the issues and that it took the necessary steps to evaluate the chances of success of a challenge to the vaccination policy at issue.

[43] The situation is the same in this case. The respondent reviewed the situation carefully and made a thoughtful decision in light of the chances of success of a policy grievance or another approach aimed at challenging the Policy. It considered the issues and the interests. It did not breach its duty of fair representation.

[44] Aside from outlining her situation, the complainant presented nothing but unfounded allegations to support her argument that the respondent would not have communicated with its members and would have ignored their needs.

[45] The complainant's allegation that the respondent breached its duty by not following up on her request for assistance is based on the time that elapsed before she received a detailed response from it.

[46] To demonstrate an arguable case, the complainant had to present allegations that taken as true, could lead to a finding that the slowness of the response to her questions was arbitrary or discriminatory conduct or was in bad faith.

[47] The respondent communicated with its members using several means. The communications were also addressed to the complainant. She acknowledged being aware of them. Thus, the communications cannot be disregarded in an examination of the PSAC's conduct because they provided the complainant with an overview of the PSAC's thinking and decision making about the representation that it would provide to its members who refused to comply with the Policy, for personal reasons.

[48] The complainant was dissatisfied with the delay receiving written communications from the respondent, including a written confirmation about whether she would be offered representation. However, dissatisfaction with the slowness of communication does not constitute evidence of bad faith, arbitrary conduct, or discrimination. In addition, the complainant informed the respondent that she did not need its help. The respondent was entitled to believe that no review of the case was then required. It would be unreasonable to criticize the respondent for respecting the complainant's wishes.

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

(The Order appears on the next page)

V. Order

[50] The application to dismiss the complaint without a hearing is allowed.

[51] The complaint is dismissed.

August 5, 2022.

FPSLREB Translation

**Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**