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File: 561-02-38180

Citation: 2022 FPSLREB 48

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

PAUL ABI-MANSOUR

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Abi-Mansour 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: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Sherrill Robinson-Wilson and Mariah Griffin-Angus, Public Service Alliance of Canada

Decided on the basis of written submissions, filed April 9, May 22 and May 31, 2018, December 22, 2021, January 21 and 28, February 28; March 15 and 25, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] On April 9, 2018, Paul Abi-Mansour ("the complainant") made a complaint alleging that the Union of Canadian Transportation Employees (UCTE) committed an unfair labour practice. UCTE is a component of the Public Service Alliance of Canada (PSAC or "the respondent").

[2] The complaint relates to a ban on the complainant entering Employment and Social Development Canada ("ESDC") buildings. At the time he made his complaint, he was employed at the Department of Fisheries and Oceans (DFO) in the Administrative Services (AS) group. The collective agreement that applied to him was the Program Administration (PA) collective agreement. He has alleged that the respondent's failure to represent him in relation to this ban is a breach of its duty of fair representation (see s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[3] In his submissions of January 21, 2022, the complainant suggested that he would bring a constitutional challenge against ss. 190 and 187 of the *Act*. He has not met the requirements for raising a constitutional challenge, including serving notices on all provincial and territorial attorneys general, so the constitutionality of these provisions is not properly before me (s. 57 of the *Federal Courts Act* (R.S.C., 1985, c. F-7).

[4] In his submissions of January 21, 2022, the complainant also raised new allegations against ESDC. He stated that he would file a grievance against ESDC but that he had not yet done so. He speculated that UCTE would refuse to support this new grievance and asked the Federal Public Sector Labour Relations and Employment Board ("the Board") to create a new duty-of-fair-representation complaint file. I denied this request on February 11, 2022. I explained that the Board will deal with any new complaint that may be filed by the complainant relating to these allegations, through the Board's usual process as set out in the Board's regulations for making a complaint under s. 187 of the *Act*.

[5] In his submissions of February 28, 2022, the complainant sought to amend his complaint based on a document filed in the respondent's initial response to it on May

22, 2018. The new allegation relates to a grievance that the respondent filed in September 2017 and its alleged failure to amend the grievance to include corrective actions for "damages suffered" from the ESDC ban.

[6] The respondent objected to an amendment to the complaint as including allegations related to this grievance would substantially alter the nature of the complaint. The respondent also submitted that the complainant had the onus to review the respondent's response to his complaint and file a complaint within 90 days of becoming aware of that grievance.

[7] The complainant submitted that the bargaining agent also forgot about this grievance and had no explanation for its failure to raise it in subsequent submissions to the Board.

[8] The complainant also submitted that the appropriate test for determining whether amendments to a complaint are appropriate is the test set out in the *Public Service Staffing Complaint Regulations* (SOR/2006-6) at s. 23(1)(b): "the interests of fairness". The complainant submitted that the alleged delay in raising the allegation only caused an inconvenience to the respondent "since their position on the merits would be weak".

[9] Amendments to a complaint can be accepted if they expand, clarify, or correct the essential subject matter of the allegations in the original complaint: see *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100 (affirmed on other grounds in 2011 FCA 98). However, if the amendments add a new dimension to the complaint, it will constitute a new complaint. The amendment being sought in this case is different from the original allegations, as it relates to a different action of the respondent. In addition, the information relied upon to support the new allegation was provided to the complainant over three years ago. These new allegations are therefore also untimely.

[10] I do not accept that the regulations for staffing complaints have any bearing on complaints under the *Act*. Besides, fairness is a consideration in all discretionary decisions. However, in this case, the complainant is making a new allegation based on a grievance he should have been fully aware of in 2018. It is unfair to allow an amendment based on information that was readily available to the complainant. The

fact that the respondent did not refer to this grievance is not relevant, as the onus of proving a breach of the *Act* rests on the complainant, not the respondent.

[11] I deny the request to amend the complaint.

II. Preliminary issues

A. Interim remedy request

[12] On May 31, 2018, the complainant sought an interim remedy in the complaint, as follows:

- to order UCTE to sign his grievance against ESDC as of February 2018 or to vary the timelines for filing the grievance;
- to order the DFO to schedule a hearing of the grievance "forthwith";
- in the alternative, to order the DFO to accept his grievance against ESDC without the bargaining agent's signature and to vary the timelines for submitting the grievance and to order the DFO to hear the grievance at the second level and then transfer it to ESDC for a reply; and
- in the further alternative, if the Board "… believes it is impossible to file a grievance in these circumstances …", and an application for judicial review is the only remedy against ESDC, to order the PSAC to provide reasonable representation for him in filing a judicial review application and to vary the timelines for filing the application.

[13] The Board sought the submissions of the respondent and of the Treasury Board (the employer). Both parties objected to granting interim relief. On July 27, 2018, the Board denied the request for interim relief and provided the following reasons:

> …
>
> *The Board is a creature of statute. It is not a Superior Court of inherent jurisdiction. Its mandate and powers are circumscribed by its enabling legislation.*
>
> *In Division 13 of the* Act *Parliament sets out the jurisdiction of the Board with respect to complaints. Section 192(1) states that 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.*
>
> *Section 192(1) of the* Act *clearly sets, as a pre-condition of the Board granting relief, that the Board determine if the complaint made is well founded. From the material set out by the parties, it appears that there are issues in dispute, which cannot be addressed without a hearing by the Board. As such, at this time the Board cannot, based on the very limited material before it, determine if the complaint is well founded.*

> *The Board has addressed the issue of interim relief in* Marchand v. Deputy Head (Canada School of the Public Service)*, 2015 PSLREB 63, wherein it held at paragraphs 27 and 28 that the Board's powers are as they are explicitly set out in the legislation. The powers of the Board are set out in s. 20 of the* Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365. Those powers are limited to pre-hearing procedural processes and do not authorize the interim relief that the complainant is seeking.*
>
> …

B. Anonymization request

[14] The complainant requested that any decision relating to his complaint not be publicly released. Since the Board's decisions are public, I considered that he requested the anonymization of the decision and a sealing order for the documents. I also sought submissions from the parties on this request.

[15] The respondent objected to the anonymization request and sealing order, stating that it remains in the public interest for the decision to be published, given the complainant's frequent appearances before this Board. The respondent also noted that the complainant had made multiple requests for anonymization before the Board and the courts and all had been denied (those cases are discussed later in this section).

[16] The Board operates under the open court principle, which is a significant component of the Canadian legal system and should be departed from only in exceptional circumstances; see *Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 89 at paras. 13 and 14.

[17] The Board has established a *Policy on Openness and Privacy* (updated on April 6, 2021; "the Policy"), which is available on its website and reads as follows:

> …
>
> *The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, except for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability, and fairness in its proceedings.*
>
> …

> *Parties and their witnesses are subject to public scrutiny when giving evidence before the Board. When the identity of a party and a witness is publicly known, the reliability of their testimony is enhanced. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*
>
> *At the same time, the Board acknowledges that in some instances, mentioning an individual's personal information during a hearing or in a written decision may affect that person's life.*
>
> *Privacy concerns arise most frequently when some identifying aspects of a person's life become public. These include an individual's home address, personal email address, personal phone number, date of birth, bank account number, SIN, PRI, driver's license [sic] number, or credit card or passport details. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.*
>
> …
>
> *The Board's policy is consistent with the statement of the Heads of Federal Administrative Tribunals Forum (endorsed by the Council of Canadian Administrative Tribunals) and the principles found in the "Protocol for the Use of Personal Information in Judgments" approved by the Canadian Judicial Council.*
>
> …

[18] The Supreme Court of Canada has recently addressed the open court principle in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 3, as follows:

> *[3] … Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.*

[19] The complainant submitted that whether a tribunal follows the open court principle must be expressed or implied in its statute or rules. He submitted that there is nothing in the *Act* that suggests that complaints should be public or that the Board is equivalent to a superior court of record.

[20] The open court principle applies to all tribunals that exercise quasi-judicial functions, such as the Board. I also note that the preamble to the *Act* states that the public service labour-management regime "… must operate in a context where protection of the public interest is paramount …". There is a public interest in transparency, and the open court principle enhances that transparency.

[21] The complainant also submitted that the Board is subject to the *Privacy Act* (R.S.C., 1985, c. P- 21, as amended). He noted that the allowance for the disclosure of private information under the *Privacy Act* is narrower than that under the open court principle.

[22] The Board is not subject to the *Privacy Act*. That Act applies to "government institutions". Section 3 of the *Privacy Act* defines a "government institution" as any body or office listed in the schedule. The Board is not listed in the schedule.

[23] The complainant submitted that the Policy should not be given any effect. He submitted that it is not within the Board's mandate to create policies that deprive complainants of a right of recourse or expose them to penalties when they use recourse processes. He submitted that such choices should be left for Parliament to determine. He stated that the Policy is an assault on the role of the legislative branch and that it was not made in good faith. He stated that the Policy's ultimate objective is to deter litigants from exercising recourse rights under s. 190 of the *Act* and under other provisions. He also submitted that the Policy frustrates the purpose of the *Act*, which is intended to give litigants a broad right of complaint, without fear of an invasion of privacy.

[24] The Board has the authority to create policies that can serve as guidance to Board members and parties. The Policy balances the public interest in open and transparent hearing processes with the privacy interests of parties appearing before the Board. There is no indication that the open court principle has deterred parties from exercising their rights under the *Act*. It certainly has not deterred the complainant from pursuing recourse related to other issues before the Board. I also do not accept that the purpose of the *Act* is to give parties a broad right of complaint without fear of invasion of privacy, as he suggested. The *Act* provides recourse rights for certain disputes in the federal public sector but does not promise to provide that recourse with full privacy.

[25] In a letter included with his complaint, the complainant requested anonymization and a sealing order based on the "sensitivity of the situation" and because issues related to his banning are "… seen [as] extremely serious by the public service managers and any publishing of these issues would mean the end of the complainant's career." He submitted that revealing a party's name on the public record causes serious consequences, including exposure to discrimination, deprivation of employment, attacks on reputation, reprisals, and invasion of highly private information (such as medical information). He submitted that given these consequences, a person would hesitate to exercise a right of complaint because the fear of disclosure outweighs the positive effects of an allowed complaint. He submitted that this is a severe restriction to access to justice.

[26] As the respondent noted, the complainant has submitted similar anonymization and sealing-order requests to the Board, and he has been denied in all cases; see *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53 ("*Abi-Mansour* (2018)"); *Abi-Mansour v. Deputy Head of Employment and Social Development*, 2020 FPSLREB 36; and *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2021 FPSLREB 3 ("*Abi-Mansour* (2021)").

[27] In *Abi-Mansour* (2018), the Board concluded that the harm to the open court principle in granting such an order far outweighed the complainant's wish to escape the "… notoriety he has created for himself by his frequent appearances before this Board." The Board also noted that the stated risk to his employment prospects was speculative.

[28] The Board's ruling in *Abi-Mansour 2018* was subject to judicial review. The complainant filed a motion before the Federal Court of Appeal for an order to stay its publication, leave to commence an application under the pseudonym "Mr. P.", and other stays (see Federal Court of Appeal file no. 18-A-32). The motion was dismissed with costs on August 24, 2018. He then filed for leave to appeal to a three-person panel of that Court, which was dismissed with costs on December 20, 2018. Finally, he filed for leave to appeal the decision in file no. 18-A-32 with the Supreme Court of Canada on May 31, 2019, seeking several orders, including one requesting anonymization (see Supreme Court of Canada file no. 38728). On October 31, 2019, the Supreme Court denied leave to appeal and dismissed the anonymization request, among other matters. As a result, the dismissal of the anonymization request in *Abi-*

Mansour 2018, and the reasons for that dismissal, remain authoritative case law of the Board.

[29] In *Abi-Mansour* (2021), the complainant alleged that things had worsened since 2018. The Board determined that very little had changed since 2018 and declined to order the anonymization.

[30] The respondent submitted that the Board's rulings in three instances relating to this complainant should be determinative. It stated that his request in this complaint is no different than his earlier requests. The complainant submitted that these decisions are not binding on me, as the doctrine of precedent does not apply to administrative tribunals. He also submitted that this complaint was factually different from the staffing complaint decisions on anonymization.

[31] It is true that administrative tribunal decision makers are not bound by previous decisions in the same way that courts are. However, as the Supreme Court of Canada noted in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 129:

> *… administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.*

[32] I agree that the previous denials of the complainant's anonymization requests by the Board are not binding on me. Each anonymization request must be determined on its own facts and circumstances. However, the reasoning in those decisions is persuasive and the refusal of both the Federal Court of Appeal and the Supreme Court of Canada to grant anonymization is also persuasive.

[33] The Board has not recognized personal reputation and the impact on job prospects as issues of public importance (see *Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75 at para. 22). I agree that in this case, reputation and job prospects are not issues of public importance.

[34] The complainant also alleged that publishing his name would increase the risk of discriminatory treatment on the basis of race. This complaint does not include any allegations relating to race. He has not explained how he could face discrimination based on race as a result of a public decision.

[35] The complainant asserted that his complaint file contains medical information referred to by the respondent. I have reviewed the complaint file and there is no medical information contained in the file. The complainant is correct that sensitive medical information can be protected from public view, but in the absence of such information, it is not appropriate to grant a sealing or an anonymization order.

[36] I find that the complainant has not established a serious risk to an interest of public importance. I also find that the negative effects of an anonymization and a sealing order outweigh any benefits. Therefore, the request for anonymization and a sealing order is denied.

[37] The complainant requested that if anonymization and a sealing order are not issued, the Board delay publishing the decision until he has an opportunity to seek reconsideration or to file a judicial review application. The complainant characterized this request as a stay of proceedings. He stated that the test for a stay is as set out in *Halford v. Seed Hawk Inc.*, 2006 FCA 167 at para. 7: 1) there is serious issue to be tried; 2) evidence of irreparable harm; and 3) the balance of convenience.

[38] I do not accept that the complainant's request is a request for a stay of proceedings. When this decision is issued, the proceeding will be complete. Rather, the complainant's request is, in essence, a temporary sealing order and publication ban. In some cases, such an order might be justified, but I find that it is not justified in this case.

[39] The complainant has raised anonymization in at least four other cases before the Board, and all have been denied. The Federal Court of Appeal has denied a motion for anonymization and two similar motions at the Supreme Court of Canada have also been denied. Given the consistent response to the complainant's anonymization requests and given that he has not raised any new grounds for granting one in this complaint, I find that it is not appropriate to order a temporary sealing order or publication ban.

C. Deciding without an oral hearing

[40] The respondent initially requested that the Board dismiss the complaint without a hearing. When the complaint was scheduled for a hearing in 2022, I asked for further submissions on that request.

[41] The complainant submitted that there is no step provided for in the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *FPSLREBA*) or the *Act* that would prevent him from having his complaint heard on the merits.

[42] The complainant referred to a staffing complaint that he pursued at the Board. In that complaint process, the Board Member dismissed the respondent's request to dismiss the complaint before the hearing because "at this step of the process" the complainant was not required to prove his case. The complainant noted a similarity between a staffing complaint and a duty-of-fair-representation complaint. He invited the Board to adopt the same approach as in his staffing complaint.

[43] A staffing complaint is not the same as an unfair-labour-practice complaint. In any event, each request for a dismissal without an oral hearing is determined based on its circumstances. Besides, the issue that the respondent had raised in that staffing case was different than in the matter before me. That respondent had alleged that the complaint should be dismissed because the allegations filed by the complainant were insufficient and therefore not in compliance with the *Public Service Staffing Complaints Regulations*, (SOR/2006-6). On that basis, it had submitted that the complainant had not discharged his onus to demonstrate that there was any abuse of authority or to make out a *prima facie* (on its face) case of discrimination. The issue there was different than the one before me.

[44] The complainant also referred to the Board's authority under s. 21 of the *FPSLREBA* to "summarily" dismiss any matter that "… in its opinion is trivial, frivolous, vexations or was made in bad faith." The bargaining agent's request to have the complaint decided without an oral hearing was not made pursuant to s. 21 of the *FPSLREBA*. Therefore, I have not considered his submissions on s. 21.

[45] The complainant submitted that the request to dismiss the complaint without a hearing should be dismissed and "declared an abuse of process". He argued that the

request was made without a statutory basis, it defies the "principle of proportionality", and is wasteful of the parties' and Board's resources.

[46] Procedural fairness does not always require an oral hearing. In *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) the Supreme Court stated that the "flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations" (paragraph 33). Procedural fairness requires that those affected by a decision have an opportunity to "put forward their views and evidence fully and have them considered by the decision-maker" (paragraph 22).

[47] Section 22 of the *FPSLREBA* provides that the Board "… may decide any matter before it without holding an oral hearing." The preamble to the *Act* includes the statutory objective of the "fair, credible and efficient resolution" of disputes. In *Grant v. Unifor*, 2022 FCA 6, the Federal Court of Appeal stated in relation to similar legislation (see the *Canada Labour Code* (R.S.C., 1985, c. L-2), s. 16.1) that the ability of the Canada Industrial Relations Board (CIRB) to proceed without an oral hearing "… furthers the statutory objectives of efficiency, conservation of resources and speed." I agree that deciding a case based solely on written submissions can be an appropriate approach that supports efficiency and the conservation of the resources of the Board and the parties.

[48] In determining whether it is appropriate to dismiss a complaint without a hearing, the Board has relied on an "arguable case" test or analysis: taking all the facts alleged in the complaint to be true, is there an arguable case that the respondent has contravened s. 187 of the *Act* (see *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37 at para. 32)?

[49] For these purposes, credibility is not an issue, as all the complainant's relevant (and admissible) allegations are presumed true. The decision maker then assesses whether the complainant has an arguable case that would justify an oral hearing, based solely on the allegations raised in the complaint.

[50] I am satisfied that I can decide the respondent's request to dismiss the complaint based on the written submissions filed, without convening an oral hearing.

III. The context of the complaint

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

> ***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.*

[52] The complainant was on secondment at Statistics Canada in 2017. For reasons not relevant to this complaint, Statistics Canada cancelled the secondment and banned him from entering its buildings. It is alleged that Statistics Canada communicated this to ESDC, resulting in a ban on entering ESDC buildings.

[53] The respondent was representing the complainant on grievances relating to the cancellation of his secondment agreement in 2017. At the time of the respondent's response to the complaint, the grievances were at the second level of the grievance process.

[54] The complainant contacted his PSAC representative in early 2018, requesting assistance with the ban that ESDC had placed on him. On February 13, 2018, he advised the PSAC's representative that he could not attend an interview for an ESDC position because he was barred from ESDC's building. In his email, he stated that he needed to initiate "some proceeding" against ESDC to clear his name and reputation. He asked the representative what PSAC could do to assist him.

[55] According to the respondent, the PSAC representative reviewed the request and spoke with a labour relations officer at UCTE. The officer carried out some research, made some inquiries, and concluded that there was nothing UCTE could do for the complainant in the circumstances, especially since he was not employed by ESDC. The officer then raised it with a grievance and adjudication officer at the PSAC representation section, who agreed with the assessment. The PSAC representative communicated this assessment to the complainant on February 21, 2018.

[56] In an email to a different PSAC representative dated February 13, 2018, the complainant wrote this: "The grievance process is not available here since I never worked at ESDC/HRSDC, so I do not think the component can do anything here, namely filing grievance." He then wrote that "… there are other proceedings that can

be initiated to rectify the situation." In his supplementary submissions, he stated that he was simply stating what UCTE had told him about not being able to file a grievance and that he was not expressing his views.

[57] The complainant stated in his submissions that when Statistics Canada implemented the similar ban, the bargaining agent supported his grievance and that it has continued to support it. He also stated that the bargaining agent supported a grievance against ESDC disclosing private information to the DFO.

[58] In his submissions, the complainant made allegations related to interactions with the PSAC representative that occurred in 2017. The *Act* requires that complaints be made within 90 days of the alleged breach of the duty of fair representation. Therefore, I have not considered these events in coming to this decision on the complaint.

IV. Submissions

[59] In its initial submissions from 2018, the respondent stated that the complainant's allegations, on their face, do not establish a breach of the *Act*. It stated that the complainant does not have an absolute right of representation and that it is entitled to discretion on how it makes these types of decisions in terms of carrying out its duty of representation.

[60] In addition, the respondent submitted that its duty of fair representation applies only to its conduct relating to matters arising out of the application of the *Act* or a collective agreement; see *Brown v. Union of Solicitor General Employees*, 2013 PSLRB 48, and *Millar v. Public Service Alliance of Canada*, 2021 FPSLREB 68. The complainant's allegation that he was unable to access a staffing process is not an issue arising out of the *Act* or the collective agreement. The allegation, if true, does not give rise to an arguable case, the respondent concluded.

[61] The respondent submitted that a bargaining agent has a right to exercise discretion when deciding whether to represent a member of the bargaining unit in any complaint or grievance process, as long as that discretion is not exercised in a manner that amounts to bad faith or that is arbitrary or discriminatory. The respondent submitted that it is sufficient for the bargaining agent to demonstrate that it has examined the circumstances of a grievance or complaint, considered its merits,

including any divergent interests that may be involved, and made a reasoned decision on whether to pursue the matter; see *Ouellet v. Union of Canadian Correctional Officers - Syndicat des agent correctionnels du Canada - CSN*, 2007 PSLRB 112, and *Nowen v. UCCO-SACC-CSN*, 2003 PSSRB 98.

[62] The respondent submitted that its decision not to provide representation was made because the complainant was not an ESDC employee. It investigated other possible options and concluded that it could do nothing to help him, which it communicated to him. He noted that it continues to assist him with grievances not related to these allegations.

[63] The complainant stated that it was unclear to him at the time whether he required bargaining agent approval to file a grievance against the ban. He submitted that the bargaining agent never informed him that he could proceed with a grievance without its support; had he known, he would have submitted a grievance.

[64] In his submissions, the complainant stated that the only avenue available to him to challenge the ban decision was filing a grievance under s. 208 of the *Act*. Subsection 208(4) prevents an employee from filing a grievance relating to the interpretation of a collective agreement without the bargaining agent's approval. The complainant stated that this was supported by the bargaining agent's filing of grievances related to his bans from other departments.

[65] The complainant submitted that the standard for reviewing bargaining agent decisions on grievances that an employee cannot refer to adjudication without bargaining agent support should be the one set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[66] The complainant submitted that the bargaining agent never assessed the merits of the proposed grievance and that reasons for not filing a grievance were not provided in 2018. He also submitted that the bargaining agent's statement that it did not pursue the proposed grievance because it was a staffing matter was simply "invented" after he had made his complaint.

[67] He submitted that the bargaining agent committed an error in principle and that whether that amounted to "arbitrariness" could be determined at the oral hearing. He submitted that the bargaining agent's decision deprived him of any recourse against

the ban decision and the resulting defamation, breach of privacy, and loss of employment that flowed from it.

[68] The complainant also submitted that the bargaining agent's position on the anonymization and the sealing order demonstrated that it had no concern about his reputation being tarnished. He stated that given this position, it was reasonable to infer that the bargaining agent did not act in good faith when it took no action to clear his reputation in 2018.

V. Reasons

[69] As I have set out earlier in this decision, the test to apply in a request to dismiss a complaint without an oral hearing is whether, after taking all the facts alleged in the complaint to be true, there is an arguable case that the respondent has contravened s. 187 of the *Act*. For the reasons set out in this section, I have concluded that the complainant has not established an arguable case that the respondent breached its duty of fair representation set out in s. 187.

[70] As I have noted earlier in this decision, the complainant has raised allegations that date to more than 90 days before the complaint was made as well as allegations that arose out of events after it was made. As I have concluded that I do not have jurisdiction over these allegations, I have not considered them.

[71] The complainant submitted that the standard for reviewing a complaint relating to a grievance that required bargaining agent support should be assessed against the reasonableness standard set out in *Vavilov*. Since I have concluded that ESDC's action did not engage the collective agreement (discussed later in this section), I have not addressed this submission.

[72] The complainant alleges that the respondent did not assess the merits of his proposed grievance and that it did not provide reasons for not filing a grievance. However, in an email to the respondent in February 2018, he stated: "The grievance process is not available here since I never worked at ESDC/HRSDC, so I do not think the component can do anything here, namely filing a grievance." This indicates that he was aware that since he never worked at ESDC, the UCTE could not file a grievance and the grievance process was not available to him. In his submissions, he stated that the respondent told him as much but that he did not believe it. Whether the complainant

believed what he was told or not is irrelevant. From his email and his submissions, I can conclude that he knew that the bargaining agent had assessed the merits of the proposed grievance and that it had provided a reason for not doing so.

[73] Before determining whether the bargaining agent breached its duty of fair representation, it is necessary to determine the nature of the actions that the complainant wished to grieve. ESDC's action to prevent him from entering its premises did not engage the PA collective agreement or any terms and conditions of employment. He was not working at that location, and the sole purpose of seeking access to ESDC buildings was to participate in staffing processes governed by the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13).

[74] I do not accept the complainant's assertion that the respondent "invented" a reason for not pursuing a grievance after this complaint was made. In its submissions, the respondent referred to a staffing matter only to support its argument that ESDC's action to prevent him from entering a building to be assessed in a staffing process was not a matter that could be addressed under the collective agreement. This argument was not raised as an explanation of its decision; it was raised in the context of the issue of the scope of its duty to represent the complainant.

[75] The complainant asserted that since the bargaining agent had supported earlier grievances relating to similar issues, there was an indication that the proposed grievance against ESDC was a collective-agreement grievance as set out in s. 208 of the *Act*. However, a bargaining agent's support for a grievance does not transform it into a collective-agreement grievance.

[76] In *Brown*, the Board stated that it "… only makes sense that the Board's jurisdiction to hear and determine duty of fair representation complaints must in some way arise out of the parameters of the *Act* or the relevant collective agreement." This conclusion flowed from a line of cases before the predecessor boards that similarly found that the duty of fair representation was limited to matters under the *Act* or in the collective agreement (see, for example, *Lai v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 79, and *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3).

[77] In *Ouellet*, in which the bargaining agent refused to represent the complainant in a judicial review of a Public Service Commission decision, the predecessor Board

stated that "barring a specific commitment" by a bargaining agent to provide representation outside the areas under the *Act* or the collective agreement, "… it cannot have the duty of representation."

[78] This does not mean that a bargaining agent can represent its members only in grievances that fall under either the *Act* or the collective agreement. The complainant has stated that the bargaining agent did provide representation on grievances relating to similar bans. This does not change the fact that the duty of fair representation applies only to matters arising under the *Act* or a collective agreement.

[79] A ban from entering a building that is not an employee's workplace does not engage either the collective agreement or the *Act*. Since the dispute with ESDC does not engage either the collective agreement or the *Act*, the duty of fair representation does not apply to the bargaining agent's response to the complainant's request for representation in February 2018.

[80] The complainant's assertion that the bargaining agent's failure to file a grievance on his behalf deprived him of recourse is not correct. Since ESDC's actions did not engage a collective agreement provision, the complainant had no restrictions on his ability to exercise his rights through other recourse mechanisms, if any were available. I do not need to determine the appropriate avenue of recourse that was open to the complainant. My sole responsibility under this complaint is to determine if the duty of fair representation applies, in the circumstances.

[81] The complainant asserted that opposing the request for anonymization and a sealing order demonstrated that the respondent had no concern about his reputation and that it acted in bad faith when it did not help him clear his name. However, the complainant has had his requests for anonymization and sealing orders dismissed on several occasions. In the circumstances, opposition to anonymization and a sealing order does not establish bad faith.

[82] The complainant also asked that I take "judicial notice" of the animosity demonstrated by the respondent in its submissions. He submitted that I could consider the actions of the respondent up to and at the hearing, as was done in *O'Bomsawin v. Abenakis of Odanak Council*, 2017 CHRT 4 at para. 62.

[83] The actions of a party during a proceeding can be considered by a decision-maker in coming to a decision. However, in this case there is no evidence of animosity by the respondent that rises to the level of bad faith, discrimination or arbitrary conduct. Providing a full answer and defence to an allegation of a breach of a duty of fair representation is not evidence of a breach of the duty.

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

(The Order appears on the next page)

VI. Order

[85] The anonymization request and sealing order are denied.

[86] The complaint is dismissed.

June 6, 2022.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board