Date: 20221004

File: 561-02-44054

Citation: 2022 FPSLREB 83

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

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

DAVID LESSARD-GAUVIN

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

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

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

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

For the Complainant: Himself

For the Respondent: Kim Patenaude, counsel

Decided on the basis of the documents on file and the written submissions filed on March 3 and August 24, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On January 24, 2022, David Lessard-Gauvin ("the complainant") made a complaint with the Federal Public Sector Labour Relations and Employment Board (for simplicity, in this decision, "Board" refers to both the Federal Public Sector Labour Relations and Employment Board and the boards that preceded it) against the Public Service Alliance of Canada ("the respondent" or PSAC), alleging that it committed an unfair labour practice under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*). The complainant alleged that the respondent failed its duty of fair representation, thus infringing s. 187 of the *FPSLRA*.

[2] Sections 4 and 9 of the unfair-labour-practice complaint form read as follows:

> [Translation]
>
> *On January 24, 2022, I received a final follow-up report from the Office of the Commissioner of Official Languages (2016-0282-EI / 2018-0608-SEIF). It noted the refusal/failure of Shared Services Canada to implement a recommendation of the* [Commissioner of Official Languages of Canada] *with respect to a language-rights violation at work.*
>
> *The union's refusal to take action is, in my view, a case of unfair representation within the meaning of section 187 of the FPSLRA.*
>
> …
>
> *I asked the union, local, and national representative to take action. I provided them all the documents to analyze the situation. I also collaborated with the* [Commissioner of Official Languages of Canada].

[3] According to the information in section 10 of the unfair-labour-practice complaint form, the complainant seeks the following corrective measures:

> [Translation]
>
> *That the* [Board] *declare that work-related language rights are among the rights over which the union has a duty of fair representation.*
>
> *That the PSAC take action to correct the language-rights violation or that the PSAC pay the costs so that I may, with my choice of lawyer, take appropriate action with respect to the language-rights violation.*
>
> *That the PSAC pay me monetary damages for failing/refusing to represent me with respect to my language rights.*

> *All other appropriate measures.*

[4] After reviewing the unfair-labour-practice complaint and the respondent's March 3, 2022, reply, I determined that this complaint could be dealt with based on the parties' written arguments. On July 28, 2022, at my request, the Board's registry wrote the following to the parties:

> [Translation]
>
> …
>
> [The Board] *accepts Mr. Lessard-Gauvin's proposal to send it, no later than August 22, 2022, his written submissions with respect to complaint 561-02-44054, dated January 24, 2022.* ***Please note that after the submissions are received, it is possible that*** [the Board] ***will make a final decision on the complaint, without further notice.*** *It is also possible that* [it] *may then decide to request other submissions or clarifications from the parties before making a decision.*
>
> …
>
> [Emphasis in the original]

II. Summary of the facts alleged by the parties

[5] I noted few contradictions in the facts that each party alleged. I restated in my words and summarized both the respondent's March 3, 2022, reply submission to the unfair-labour-practice complaint and the complainant's August 24, 2022, reply.

[6] In July and August 2016, the complainant worked at Health Canada in Montréal. He then made an official-languages complaint with the Commissioner of Official Languages of Canada ("the Commissioner") about the WebEx software, with which he had to work. Some of its information was not available in French.

[7] In December 2018, the Commissioner found that the complainant's official-languages complaint was founded and recommended that Shared Services Canada ensure that within three months, WebEx's generated emails comply with the obligations set out in the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.); *OLA*).

[8] On October 21, 2021, the Commissioner sent the complainant a draft of the follow-up on the Commissioner's recommendations. That same day, the complainant submitted his comments and invited the Commissioner to consider a series of actions, including a legal remedy under the *OLA*.

[9] On October 21, 2021, the complainant also contacted representatives of the respondent for assistance on the follow-up to the Commissioner's recommendations. According to the respondent, on October 26, 2021, Bruno Laganière, one of its local representatives, would have advised the complainant that it was not necessary to make an additional official-languages complaint and that the Commissioner should deal with Shared Services Canada's lack of follow-up on the recommendations. However, according to the complainant, the respondent's local representative reportedly did not reply to his request for assistance.

[10] On November 8, 2021, Patricia Harewood, who was then in charge of the respondent's legal services, reportedly notified the complainant that his request would be sent to his former PSAC component so that it could follow up on the violation of his language rights. She also recommended raising the matter at labour-management meetings.

[11] On January 24, 2022, the complainant received the final version of the follow-up report on the Commissioner's recommendations. He then reportedly found that Shared Services Canada refused or failed to implement one of the Commissioner's recommendations. That same day, he sent the report to Ms. Harewood and Mr. Laganière, along with all the documents for analyzing the situation. He asked them to take action. He then suggested a remedy under Part X of the *OLA* or filing an individual or a policy grievance.

[12] On April 28, 2022, the complainant received an amended version of the Commissioner's report. He then sent a reminder to the respondent to find out what it wanted to do about the situation. According to him, the respondent did not reply to that request.

[13] The complainant rebuked the respondent for not following up on his requests for assistance in January 2022 and April 2022. He also rebuked it for taking no action to protect his language rights, which were violated.

III. The respondent's reply to the unfair-labour-practice complaint

[14] According to the respondent, the Board does not have jurisdiction to hear the unfair-labour-practice complaint because it did not arise from applying the *FPSLRA* or

the collective agreement in this case. The respondent has no duty to represent the complainant before the Commissioner or as part of a remedy under s. 77 of the *OLA*.

[15] Therefore, the unfair-labour-practice complaint should be dismissed preliminarily. The Board does not have jurisdiction to decide this complaint.

[16] In addition, the unfair-labour-practice complaint does not meet any of the necessary criteria to demonstrate that the respondent failed its duty of fair representation. The complainant did not allege that the respondent would have acted in an arbitrary, discriminatory, or bad-faith manner. Therefore, the respondent asked the Board to summarily dismiss this complaint, without a hearing.

[17] The respondent pointed out that if the Board determines that it has jurisdiction to decide the unfair-labour-practice complaint and decides to hear it on its merits, the complainant would have the burden of proof and would have to adduce evidence to establish that the respondent failed its duty of fair representation. The respondent denied his allegations. It submitted that it fulfilled its duty of fair representation at all times with respect to him.

[18] The respondent referred me to the following decisions: *Abeysuriya v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 26; *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLREB 4; and *Ouellet v. St-Georges*, 2009 PSLRB 107.

IV. The complainant's response to the respondent's reply

[19] First, the complainant stated that his arguments respond to the respondent's jurisdictional objection and to the request to summarily dismiss the complaint without a hearing and that they do not constitute a reply on the unfair-labour-practice complaint's merits.

[20] The respondent argued that the Board does not have jurisdiction to consider the unfair-labour-practice complaint since the issues raised are not covered by the *FPSLRA* or the applicable collective agreement.

[21] The scope of the expression "in the representation" seems to be the key issue. However, the *FPSLRA* does not specify what that expression covers. Therefore, an exercise in legislative interpretation is required to avoid the appearance of legal

reasoning without substance as was the case at paragraph 60 of *Lessard-Gauvin*, which reads as follows:

> *[60] The other part of the third complaint, file no. 561-02-40787, involves the respondent's refusal to represent the complainant further to a complaint that he made with the OCOL. Considering his allegations as proven only for the purposes of my analysis, I conclude that there is no arguable case that the respondent breached its duty of fair representation in the third complaint, file no. 561-02-40787. I agree with the respondent that it had no duty to represent him before the OCOL. This scope of representation has nothing to do with the respondent's exclusive representation authority that the* Act *provides to it due to it being accredited as the complainant's bargaining agent. It had no duty to represent him before the OCOL, and such a complaint does not involve a labour relations dispute but rather rights protected by the* Official Languages Act. *Therefore, the respondent cannot be blamed for breaching a duty that it does not have.*

[22] The *FPSLRA*'s preamble provides the best tool for interpreting the expression "in the representation". In addition, it states that bargaining agents represent employees' interests in collective bargaining and in resolving workplace issues and rights disputes. The expression "workplace issues and rights disputes" is broader in scope than simply working conditions negotiated collectively.

[23] Paragraph 60 of *Lessard-Gauvin* is based on the premise that the duty of fair representation is limited to working conditions negotiated collectively. While union accreditation has the effect of granting a monopoly on the collective bargaining of working conditions, it does not automatically mean that it is the only source of responsibility for a bargaining agent for the purposes of the duty of fair representation. *Lessard-Gauvin* is based on an intellectual shortcut that in light of the *FPSLRA*'s preamble, is an error in law. In fact, Parliament has specified that union responsibilities go beyond collective bargaining alone.

[24] In other words, and in summary, the expression "in the representation" refers to both the collective bargaining of all working conditions and the resolution of any working conditions issue or dispute, whether those working conditions were negotiated, imposed unilaterally by the employer, legislative (determined by the Crown), or of the public system, determined by the courts. The duty of fair representation applies whether those working conditions may or may not be subject to a grievance and whether or not they are adjudicable. In addition, nothing in the

FPSLRA allows concluding that a bargaining agent's duty of fair representation with respect to issues and disputes is limited to the grievance process.

[25] The Board's jurisdiction over grievances must be distinguished from the scope of a union's duty of fair representation, which cannot be less in scope than the Board's jurisdiction in grievance matters, and considering the *FPSLRA*'s preamble in particular, it is also not limited to that.

[26] Although with respect to grievances, the Board has exclusive jurisdiction over the vast majority of working-conditions disputes, there are exceptions, as was recently highlighted in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42. Thus, in light of those exceptions, rare as they may be, and given the broad scope of a union's duty of fair representation in resolving workplace issues and rights disputes, the union may violate its duty of fair representation with respect to types of recourse other than the traditional grievance process.

[27] Language rights at work, including those covered by the *OLA* and those covered by the *Canadian Charter of Rights and Freedoms* (Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*"), are part of working conditions. A bargaining agent has a duty of fair representation to resolve workplace issues and rights disputes that are related to a federal public service employee's language rights in the course of his or her employment. Like the rights to equality and protection from discrimination, language rights are fundamental quasi-constitutional or constitutional rights.

[28] This unfair-labour-practice complaint addresses such a situation. The Commissioner recognized that the complainant's language rights were violated, which thus violated his fundamental rights. The violation was both personal and systemic. Unfortunately, the Commissioner does not have the authority to order any personal or systemic remedy. Since a unionized federal public service employee experienced the violation, he asked for representation from his bargaining agent, which did nothing and did not explain the reasons for its inaction. That is sufficient to resolve the issue of the Board's jurisdiction. According to the complainant, since the unfair-labour-practice complaint is based on an allegation in which the respondent failed its duty of fair representation with respect to his language rights, which is one of many forms of "workplace issues and rights disputes", the Board has jurisdiction to deal with this complaint.

[29] According to the complainant, this unfair-labour-practice complaint differs from *Abeysuriya*, which involved a staffing issue and not language rights. *Abeysuriya* relied on the principle that staffing was not an issue covered by the *Public Service Labour Relations Act* (as the *FPSLRA* then was named) or the applicable collective agreement. In addition, it was a different union and clearly a different collective agreement. Thus, it is important to analyze each unfair-labour-practice complaint separately in light of the applicable collective agreement. So, the scope of a union's duty of fair representation may vary from one case to the next.

[30] As a relevant contextual element, the applicable collective agreement helps interpret the expression "in the representation". The respondent and the Treasury Board concluded the collective agreement in this case for the Program and Administrative Services group bargaining unit (expired June 20, 2021; "the collective agreement"). The respondent's duty of fair representation should at least cover what falls within the collective agreement and the Board's jurisdiction in grievance matters. It could be interesting to consider article 1 of the collective agreement, which sets out its purpose and scope. According to that article, the employer and the union are committed to establishing effective working relationships under existing legislation. Article 5 mentions the primacy of the *FPSLRA* over the collective agreement, which, in the complainant's words, deals "[translation] a fatal blow to the ideology of autonomy in labour law".

[31] However, clause 18.02 of the collective agreement directly and explicitly establishes that the *OLA* can be part of the union's responsibilities and the respondent's duty of fair representation. That clause provides that federal public service employees may file grievances against the employer if they feel aggrieved by an interpretation or application involving them with respect to "… a provision of a statute … that deals with terms and conditions of employment; or … as a result of any occurrence or matter affecting his or her terms and conditions of employment." The working conditions referred to in this case are not just those that the union and the employer negotiated collectively.

[32] The Supreme Court of Canada has repeatedly recognized that a collective agreement is implicitly accompanied by constitutional and quasi-constitutional texts and certain laws governing public order. In that respect, the collective agreement was explicit about the fact that Acts and regulations may include working conditions and

that a dispute about a working condition mentioned in an Act or regulation may be subject to a grievance. The *OLA* is one of the quasi-constitutional Acts, and its Part V is constitutionally entrenched in s. 16(1) of the *Charter*.

[33] Since bargaining agents have a duty of fair representation with respect to quasi-constitutional working conditions, particularly those set out in the *OLA*, the Board has jurisdiction to deal with an unfair-labour-practice complaint that alleges a breach of the duty of fair representation with respect to those working conditions.

[34] Finally, according to the complainant, the Board should accept his arguments arising from the interpretation of the *FPSLRA* and reject the preliminary objection to its jurisdiction to hear the unfair-labour-practice complaint since the issue in it did not clearly emerge from what may constitute an unfair labour practice. Therefore, the Board may decide this complaint on its merits.

V. Analysis and reasons

[35] The unfair-labour-practice complaint refers to s. 190(1)(g) of the *FPSLRA*, which refers to s. 185. Among the unfair labour practices that that provision mentions, s. 187 is the one of interest in this complaint. Those provisions read as follows:

190 (1) *The Board must examine and inquire into any complaint made to it that*	***190 (1)*** *La Commission instruit toute plainte dont elle est saisie et selon laquelle :*
…	[…]
(g) *the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*	***g)*** *l'employeur, l'organisation syndicale ou toute personne s'est livré à une pratique déloyale au sens de l'article 185.*
…	[…]
185 *In this Division,* **unfair labour practice** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1)*	***185*** *Dans la présente section,* **pratiques déloyales** *s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189(1).*
…	[…]

187 *No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.*	***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.*

[Emphasis in the original]

[36] The preliminary question of jurisdiction that this unfair-labour-practice complaint raises is knowing whether the duty of fair representation under s. 187 of the *FPSLRA* applies to the representation of a federal public service employee seeking the implementation of the Commissioner's recommendations or a remedy under Part X of the *OLA*.

[37] The Board has made several decisions about a bargaining agent's duty of fair representation with respect to matters not covered by a collective agreement or the *FPSLRA*.

[38] In *Ouellet v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2007 PSLRB 112, a bargaining agent refused to represent Mr. Ouellet, who wanted to challenge a decision of the Public Service Commission. At paragraph 34 of its decision, the Board stated the following on the limits of the duty of fair representation with respect to a working condition that cannot be negotiated collectively:

> *[34] Moreover, staffing is not negotiable under the new* Act… *This was not a matter of ensuring the application of a collective agreement provision or even the exercise of recourse under the new* Act. A priori, *barring a specific commitment by a union to provide representation outside of those areas, it cannot have the duty of representation. The complainant asked the respondent to act on his behalf. It refused to in an area where it can choose to refuse to provide representation. Equally for that reason, I dismiss the complaint.*

[39] In *Abeysuriya*, the Board, based on the jurisprudence, determined that the duty of fair representation does not apply to disputes involving issues that cannot be negotiated collectively and restricted itself to issues covered by the *FPSLRA* or that could be part of a collective agreement. The Board wrote the following at paragraph 43:

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

[40] I note that these decisions, on which the complainant supported his argument, date from 2007, 2008, and 2015 and that they all came after the *FPSLRA*'s preamble was adopted, which came into force on April 1, 2005 (SI/2005-22). It reaffirms the role of bargaining agents and their role in resolving workplace issues.

[41] The preamble's wording was the same when the Board wrote in *Ouellet* that unless a specific commitment is made for a union organization to ensure representation outside the collective agreement's scope or a remedy provided in the *FPSLRA*, there can be no duty of fair representation. The preamble's wording was also the same when the Board wrote in *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3, that the duty of fair representation involves the rights, duties, and issues set out in the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35). The Board's 2015 *Abeysuriya* decision accords. And I would add that all the Board's decisions that address this same issue are in accord; the bargaining agents' duty of fair representation is restricted to representing federal public service employees in exercising rights that may be negotiated collectively or are provided by the *FPSLRA*.

[42] The complainant also supported his argument on clause 18.02 of the collective agreement, which states that federal public service employees may file grievances against the employer if they are aggrieved by anything that impacts their working conditions. However, note that the complainant did not file a grievance against the employer for an *OLA* violation. Instead, he made an official-languages complaint with the Commissioner. In addition, he seeks that the Commissioner's recommendations made as part of that complaint be implemented. Therefore, the bargaining agent did not refuse or neglect to represent the complainant after a grievance was filed.

[43] This unfair-labour-practice complaint involves implementing the Commissioner's recommendations or filing a remedy under Part X of the *OLA*. It was not established and is even unlikely that implementing the Commissioner's recommendations or filing a remedy under Part X of the *OLA* can be negotiated collectively. And those issues are not covered by any *FPSLRA* provisions.

[44] Therefore, the duty of fair representation that the *FPSLRA* imposes on a bargaining agent should not apply to implementing the Commissioner's recommendations or to filing a remedy under Part X of the *OLA* as it does not apply to staffing disputes (see *Ouellet* and *Abeysuriya*) or those involving workers' compensation boards (see *Elliott*).

[45] Finally, the complainant claimed that *Lessard-Gauvin* was based on an intellectual shortcut that constituted an error in law. However, the decision involved the complainant. He could have sought its judicial review if he felt that it included an error in law, but he did not. Therefore, *Lessard-Gauvin* is still valid. He did not present me with any argument that persuaded me to reach a different conclusion in this case.

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

(The Order appears on the next page)

VI. Order

[47] The preliminary objection, on jurisdiction, is allowed.

[48] The complaint is dismissed.

October 4, 2022.

FPSLREB Translation

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