Date: 20221208

File: 561-09-44826

Citation: 2022 FPSLREB 101

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

LUC TRAN

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Tran v. Professional Institute of the Public Service 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: Christine Poirier, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions, filed June 29, July 14, August 1, and October 25, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] Luc Tran ("the complainant") made a complaint against the Professional Institute of the Public Service of Canada ("the respondent" or "the Institute") alleging that it failed its duty of fair representation. The complainant is a National Research Council of Canada (NRC or "the employer") employee and occupies a position in the RO/RCO bargaining unit for which the respondent is the bargaining agent.

[2] In his May 23, 2022, complaint, the complainant alleged that the respondent committed an unfair labour practice within the meaning of s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which prohibits an employee organization from acting in an arbitrary and a discriminatory manner or in bad faith in the representation of any employee who is a member of a bargaining unit for which it is the bargaining agent.

[3] Specifically, the complainant blamed the respondent for refusing to file a group grievance against the Government of Canada's COVID-19 vaccination policy and for refusing to represent him on a grievance about it, among other things. He claimed that the respondent colluded with the NRC with respect to one of the remedies sought in his grievance.

[4] In his complaint, the complainant stated that he provided the respondent with extensive evidence about the ineffectiveness of COVID-19 vaccines, their side effects, and their lethality. As corrective measures, he requested that the respondent file a group grievance to end the vaccination obligation and that it support him fully and completely in pursuing his grievance.

[5] At my request, on August 10, 2022, the Registry of the Federal Public Sector Labour Relations and Employment Board ("the Board") wrote the following to the complainant:

> [Translation]
>
> …
>
> *The Board Member decided for the moment to deal with the complaint by written submissions. The Board Member already has in hand the May 23, 2022, complaint, the respondent's*

> *June 29, 2022, reply, the complainant's July 14, 2022, reply, and the respondent's August 1, 2022, supplementary reply.*
>
> ***By October 28, 2022**, the complainant must submit to the Board his written submissions to support complaint 561-09-44826 in addition to what he has already submitted or in reply, as he deems appropriate, to the respondent's arguments.*
>
> *Please note that after the complainant's submissions are received, the Board Member may render a final decision on the complaint without further notice. He may then decide to ask for further submissions or clarifications from the parties before rendering a final decision or to summon them to a hearing.*
>
> …
>
> [Emphasis in the original]

[6] After receiving the complainant's submissions dated October 25, 2022, I concluded that I had enough information to render a decision on the complaint and that additional submissions from him or the respondent were not needed.

II. The summary of the facts, as submitted by the parties

[7] With a few exceptions, to which I will return if necessary, the facts that the parties submitted were consistent. They were in the complaint, the respondent's June 29, 2022, reply, the complainant's July 14, 2022, reply, the respondent's August 1, 2022, supplementary reply, and the complainant's October 25, 2022, submissions.

[8] In his complaint, the complainant blamed the respondent for refusing to file a group grievance against the federal government's mandatory vaccination policy and refusing to represent him in his grievance.

[9] The complainant contacted the respondent in August 2021 about the Government of Canada's announcement with respect to the mandatory vaccination of its employees. He then provided several documents supporting the argument that the existing vaccines were ineffective and that they had grave side effects. He also later submitted documents to the respondent supporting the argument that messenger RNA vaccines could alter human DNA in the long term.

[10] On August 19, 2021, Pierre Villon, an Institute employee, informed the complainant that the respondent was continuing discussions with the Government of Canada on the vaccination policy's implementation. Mr. Villon also informed the

complainant that members with special concerns should contact one of the Institute's labour relations officers. The next day, the complainant notified Mr. Villon that he disagreed with the COVID-19 vaccination.

[11] On October 7, 2021, the complainant wrote to Mr. Villon after the Government of Canada announced its *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* ("the vaccination policy"). The complainant then asked about the actions that the respondent intended to take to protest the vaccination policy and about the recourses available against it.

[12] That same day, Mr. Villon replied to the complainant that the Treasury Board of Canada rushed the vaccination policy consultation process and that the Institute's opinion was that that process was unsatisfactory but that it was necessary to work with the vaccination policy as it stood. Mr. Villon explained that given the serious consequences of failing to comply with the vaccination policy, the Institute sought to ensure that its members complied with the rules, either by becoming vaccinated or by obtaining an exemption, in accordance with the vaccination policy.

[13] The complainant responded by asking whether the exemption also covered the obligation to disclose one's vaccination status. Mr. Villon told him that he should contact a labour relations officer at the appropriate regional office, in this case the Montréal office, for the answer to his question. Mr. Villon then informed him that the Institute would do everything possible to help its members in the coming weeks and months. Mr. Villon also recommended that he contact one of the Institute's labour relations officers at the Montréal office.

[14] On October 18, 2021, the complainant asked Mr. Villon for the Institute's action plan. The complainant suggested that the Institute compile a list of members who shared his position against the vaccination policy and that it share that list with them. He also suggested that the Institute initiate a class-action lawsuit against the Government of Canada. On October 21, 2022, Mr. Villon replied, stating that the Government of Canada, as an employer, has the right to implement policies. He also addressed accommodation issues, the right to privacy, the reasonableness of a policy, and several other issues. That same day, the complainant informed Mr. Villon that he disagreed with the Institute's position with respect to the vaccination policy and accused Mr. Villon of being complicit with the Government of Canada.

[15] On November 19, 2021, the complainant wrote to Mr. Villon, indicating that he wanted to file a grievance and asking for a union representative's assistance to do it. Mr. Villon referred him to the Institute's Montréal office. The complainant then contacted Robert Melone, a labour relations officer at that office. He asked for Mr. Melone's help to file a grievance against the obligation to disclose his vaccination status as a condition of employment. Mr. Melone reiterated the Institute's position on the vaccination policy. He told the complainant that the Institute's opinion was that the employer's requirements could be legally justified. He informed the complainant that the case law already supported that position. He also clarified that the Institute could not support the complainant's proposed grievance. However, Mr. Melone informed him that he could file a grievance without the Institute's support. Mr. Melone provided him with the requisite forms and information.

[16] The complainant filed his grievance on November 26, 2021. The employer heard it and then dismissed it on December 14, 2021. The grievance read as follows:

> [Translation]
>
> …
>
> *- On October 28, 2021, I received an email from the NRC's president, informing me that the NRC's mandatory COVID-19 vaccination policy would come into effect on Monday, November 8, 2021.*
>
> *- I will be granted leave without pay as of December 15, 2021, due to the policy being applied to me.*
>
> *- In fact, under clause 22.22 of my collective agreement, the NRC may "grant leave without pay for any purpose".*
>
> *- Grant is defined as what the person who receives the favor had asked for, in French and in the spirit of the collective agreement with respect to other articles dealing with leave without pay.*
>
> *- I did not ask for such a favour, which, in addition, will hurt the NRC, in particular my work team.*
>
> *- By applying the policy to me, I will also be granted no compensation for the overtime I worked for the closure in December 2021. In my view, this consequence is unacceptable.*
>
> …

[17] Note that under the vaccination policy, with some exceptions, federal government employers placed unvaccinated employees on unpaid leave; for the NRC, it was effective December 15, 2021.

[18] In his complaint, the complainant also blamed the respondent for negotiating "[translation] in collusion" with the employer, without his agreement and without informing him, an agreement on the issue covered in the last paragraph of his grievance; that is, not compensating overtime for the employer's office closure in December 2021.

[19] According to the reply to the grievance dated December 14, 2021, the complainant had already accumulated 26.25 hours for the NRC's half-day closure on December 24, 2021, and three days on December 29, 30, and 31, 2021 "[translation] … in accordance with the NRC's *Hours of Work* policy (section 5.17, appendix 5.17-A) …". In its response, the employer indicated that he could use the overtime hours as paid leave by March 31, 2022. However, he would not be able to use the 26.25 hours accumulated for paid leave on December 24, 29, 30, and 31 as he was to be on unpaid leave during that period because of his vaccination status.

[20] When his grievance was transmitted to the second level, the complainant informed the employer that he amended it to specifically include the use of overtime accumulated during the December 2021 holiday. In its March 31, 2022, response to the grievance, the employer informed him that out of an agreement with the respondent, the 26.25 hours that he had accumulated for the NRC's closure in late December 2021 would be converted to annual leave.

[21] In its June 29, 2022, reply to the complaint, the respondent stated that on March 30, 2022, the employer and the two unions representing its employees signed an agreement that provided that overtime that employees still on unpaid leave as of March 31, 2022, accumulated would be added to their annual leave banks. According to the respondent, the agreement was made not specifically for the complainant but for all employees in the two bargaining units involved who were on "[translation] forced" unpaid leave.

[22] The complainant appealed Mr. Melone's decision to not support his grievance to the Institute's president, who dismissed it, and the decision to not represent the grievance was maintained.

[23] The complainant annexed several documents to his arguments supporting his comments on the ineffectiveness of the COVID-19 vaccines and their potentially serious side effects. I will not repeat or summarize them except to state that clearly,

they support his position as to the vaccines and their hazardousness. The issue before me is not to determine whether his vaccine position is correct, either scientifically or empirically. Instead, the issue is to determine whether the respondent breached its duty of fair representation to him.

III. The complainant's arguments

[24] I will present the complainant's arguments first. However, he made the last submission, which was received on October 25, 2022. At that point, he had the respondent's submissions.

[25] The complainant reiterated that the respondent admitted that it entered into an agreement with the employer for the use of the 26.25 hours of accumulated overtime. It also admitted that it did not consult him before entering into the agreement.

[26] The complainant claimed that the respondent was lax in its approach to determining whether the vaccination policy was reasonable. Its position consisted of confirming that it had consulted "[translation] experts" in the field. It argued that it considered the matter seriously before deciding not to file a policy grievance against the vaccination policy.

[27] One of the key questions about the vaccination policy's reasonableness is the risk-benefit balance. On that point, the analysis of the experts that the respondent consulted did not address that issue correctly.

[28] However, the complainant claimed that in August 2021, he provided the respondent and its Montréal regional office empirical evidence supporting the argument that the existing vaccines were ineffective and that they had serious side effects. He claimed that the existing vaccines' benefits were almost negligible while the risks were truly considerable as multiple independent sources had confirmed. The respondent's laxness contributed to potentially endangering the lives of most of the employees it represents.

[29] The respondent did not explain why filing a policy grievance against the employer would have been inconsistent with a position to defend the interests of most of the employees it represents. Its main argument for not filing a policy grievance was based on a superficial assessment of the likelihood of success. In addition, it refused to cooperate with the complainant, who asked it for a list of employees who shared his

concerns, to set up a forum to discuss the issue transparently. However, the defendant instead suggested that he carry out research, on social networks.

[30] The complainant stated that the respondent did not inform him that it would negotiate an agreement with the employer on the issue of overtime for the December 2021 closure. He learned of it from the employer when it responded to his grievance. To him, the agreement short-circuited his grievance and was aimed at demonstrating the employer's disciplinary, not administrative, action against him. The remedy that the respondent negotiated was in no way satisfactory. In addition, before concluding the agreement, it failed to demonstrate that it consulted other employees who were in the same situation.

[31] In *Vaughan v. Canada*, [2005] 1 S.C.R. 146, the Supreme Court of Canada ruled that when the legislator has established a comprehensive regime for settling labour relations disputes, it should not be jeopardized by allowing routine access to the courts, which generally should decline to exercise their discretion to hear employment-related disputes, even if they have jurisdiction. In a context in which the Federal Court of Canada has had to decide multiple vaccination-policy cases by relying on the comprehensive regime in question, the regime summarily dismissing a case without a hearing could undermine public trust in the rationale for such a regime.

[32] In its response to the complaint, the respondent remained vague about who initiated the discussions that led to the agreement on the use of overtime accumulated during the year-end holidays. It also did not specify the basis for its initial position when it entered into negotiations with the employer. The complainant claimed that his grievance triggered those discussions. I note that none of the documents that he submitted explicitly supported that assertion.

[33] The respondent's good faith cannot be presumed as it had discussions with the employer without informing the employees concerned. Good faith also cannot be presumed given that the employer had already begun preparing the March 2022 agreement in December 2021.

[34] The complainant condemned the respondent's June 2022 policy grievance. I will not deal with that issue as the events took place after this complaint was made in May 2022.

[35] Finally, the complainant alleged that based on the information they had, the respondent and its representatives should have intervened by preventing or stopping the vaccine inoculations. Their repeated refusals were unwarranted, especially since the respondent is the largest Canadian union of scientists and professionals, which gives it significant influencing power. The respondent's lack of intervention was contrary to s. 2 of the *Quebec Charter of Human Rights and Freedoms* (*CHRF*), which states that every human being whose life is in peril has a right to assistance. Although the Board considers that the *CHRF* does not fall within its jurisdiction, the complainant asked that it forward his entire complaint file to the relevant authorities.

IV. The respondent's arguments

[36] The respondent asked the Board to summarily dismiss the complaint because it does not reveal any breach of the *Act*. The respondent argued that it did not fail its duty of fair representation and that it fully met its duty to the complainant. The letter of agreement with the employer on the use of overtime during the holiday period is negotiated annually. In addition to that, the respondent, another bargaining agent, and the employer entered into an additional agreement in March 2022 to address the situation of all employees placed on unpaid leave under the vaccination policy. The respondent did not initiate discussions with the other parties to address the complainant's specific situation. It stated that the negotiator in charge of this file was also unaware of the complainant's grievance. The additional agreement addresses the situation of both the complainant and the other employees affected by the vaccination policy.

[37] The complainant suffered no harm from the agreement of the respondent and the employer or the additional March 2022 one as the additional hours already worked and set aside for the December 2021 closure period were converted to annual leave. Thus, he still has access to those hours upon his return from unpaid leave and may even choose to liquidate them if he can, under the applicable collective agreement's annual-leave provisions.

[38] In his complaint, the complainant alleged that the respondent failed its duty of fair representation by not filing a policy grievance challenging the employer's vaccination policy. However, he submitted no facts that could support his allegations and demonstrate that the respondent acted in an arbitrary, a discriminatory, or a bad-faith manner.

[39] The respondent sought both labour relations and legal advice on the merits of challenging the employer's mandatory vaccination policy. Based on that advice, and considering the best interests of the bargaining unit as a whole, it chose not to file a policy grievance. Instead, it was prepared to file grievances case-by-case when the particular circumstances warranted doing so. Following that strategy, it informed the complainant that he could file a grievance without its support and offered him its support for the accumulated-overtime issue.

[40] The respondent was not consulted when the Government of Canada developed the vaccination policy. The respondent hired Steven Welchner, a labour relations consultant, to provide a detailed assessment of the merits of challenging the federal government's vaccination policy. He is a retired lawyer and has worked closely with the respondent in the past. He submitted to it a detailed assessment of the possibilities of challenging the vaccination policy. He concluded that there was "[translation] a reasonable probability" that an adjudicator would uphold the government's policy and find it reasonable. The respondent also consulted as counsel Colleen Bauman and Peter Engelmann on the likelihood of successfully challenging the federal government's vaccination policy. They are labour-law counsel at the Goldblatt Partners law firm. They provided advice similar to that of Mr. Welchner, which was that the federal government's mandatory vaccination policy could be upheld as reasonable at adjudication.

[41] The respondent concluded that it would not file a policy grievance against the vaccination policy but instead that it would consider individual grievances, case-by-case. When it made its decision, the respondent also felt that it was in all employees' best interests to take that position. In addition, it considered different stakeholders' perspectives, including the members who supported vaccination, those who did not, labour relations experts, and the legal advice mentioned earlier. This included the significant health-and-safety benefits of a vaccinated workforce in the context of the COVID-19 pandemic.

[42] It is well established that the duty of fair representation does not require that a union pursue all grievance requests, even when one may have merit. Instead, it has the right to consider the best interests of the bargaining unit as a whole and to compare them with the likelihood of a successful challenge and with the severity of the impact on those involved.

[43] The respondent referred me to the following decisions: *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28; *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC LRB); *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52; *Ataellahi v. Service Employees International Union*, 2012 CarswellOnt 8570; *Watson v. Canadian Union of Public Employees and Air Canada*, 2002 CIRB 1002; and *Gordon v. Hotel, Restaurant and Culinary Employees and Bartenders Union*, 2004 CarswellBC 1321.

V. Analysis and reasons

[44] The complaint referred to s. 190(1)(g) of the *Act*, which refers to s. 185. Among the unfair labour practices referred to in that section, s. 187 is the one of interest to 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]

[45] Section 187 of the *Act* does not require an employee organization to represent employees in any dispute they have with their employer. Rather, it prohibits an employee organization from acting in an arbitrary or a discriminatory manner or in bad faith when it represents an employee or when it decides whether to represent one.

[46] In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, the Supreme Court of Canada stated as follows at page 527:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[47] The burden of proof was on the complainant. He had to prove on a balance of probabilities that the respondent's decisions not to support his grievance, to enter into an agreement that affected his grievance without consulting him, and not to file a group grievance to challenge the vaccination obligation were arbitrary or discriminatory or were made in bad faith. The support for his grievance and the failure to file a group grievance were related to the same issue; that is, the respondent's decision not to challenge the vaccination policy. I will analyze that issue first. Then, I will analyze the respondent's agreement with the employer on the use of accumulated overtime.

A. The respondent's decision not to challenge the vaccination policy

[48] It is clear that the complainant is convinced that the COVID-19 vaccines are ineffective and that they pose risks to the health of those inoculated. In addition, he submitted many scientific studies or documents that support his beliefs. I respect his point of view, but it is not my role to decide that issue. Nor do I have the required skills. Rather, my role is to determine whether the respondent acted in an arbitrary or a discriminatory manner or in bad faith when it refused to challenge the vaccination policy.

[49] According to the facts submitted, which were not contradicted, the respondent sought legal advice on the merits of challenging the vaccination policy. Based on the advice it received, it was likely that an adjudicator would uphold the vaccination policy and find it reasonable. The policy would without doubt be upheld as reasonable at adjudication. Based on that, the respondent decided not to file a policy grievance to challenge the policy but to consider individual grievances, case-by-case. It also stated that it considered the views of several stakeholders, including employees who supported vaccination and those who did not. It saw "… the significant health-and-safety benefits of a vaccinated workforce in the context of the COVID-19 pandemic".

[50] The complainant did not demonstrate to me that the respondent's decision not to challenge or support a challenge to the vaccination policy breached its duty of fair representation. It did not make its decision lightly. Nothing in his submission could lead me to believe that the respondent's decision was made in bad faith or that it was discriminatory. Rightly or wrongly, it saw benefits to vaccination. In addition, it relied on the relevant case law to make its decision.

[51] In *Gordon*, the union, based on a legal opinion, concluded that the employer had the right to compel its employees to be vaccinated against hepatitis A and that it would not file a grievance. One of its members made a complaint, stating a breach of the duty of fair representation, and was opposed to the vaccine because of concerns about its safety. The British Columbia Labour Relations Board dismissed the complaint and concluded that the union acted reasonably when it did not challenge the vaccination program.

[52] In *Ataellahi*, the complainant, an ambulance attendant, refused to be vaccinated against influenza, contrary to the employer's obligation. The union filed a grievance

but refused to refer it to arbitration. The Ontario Labour Relations Board dismissed the ambulance attendant's complaint of a breach of the duty of fair representation. It concluded that the union reasonably considered the merits of the grievance before deciding not to refer it to arbitration.

[53] In *Watson*, the Canada Industrial Relations Board (CIRB) dismissed an employee's complaint against her union, alleging a breach of the duty of fair representation. The union decided, on the basis of a legal opinion, to not file a policy grievance against the employer's mandatory COVID-19 vaccination policy. The CIRB dismissed the complaint, stating that the union had no obligation to refer a particular grievance to arbitration. The union fulfilled its duty of representation by taking the necessary steps to assess its chances of successfully challenging the policy in question.

[54] In *Musolino v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46, the Board found that the bargaining agent, in this case the respondent, did not act arbitrarily when it decided to not file a policy grievance against the vaccination policy. The bargaining agent based its decision on legal advice, reviewed the jurisprudence in similar cases, and concluded that a policy grievance had almost no chance of success.

[55] The complainant submitted no case law to me to support his position. Instead, he emphasized the vaccines' ineffectiveness and their degree of hazardousness, which, however, are not the issues.

[56] The complainant also referred to s. 2 of the *CHRF*, which states that every human being whose life is in peril has a right to assistance. I need not comment on such an issue, which nevertheless to me seems somewhat far-fetched. If he wishes to pursue such an issue, he should go directly to the relevant authorities in Quebec.

B. The agreement on the use of accumulated overtime

[57] According to the vaccination policy in place when the complaint was made, the complainant was "forced", since he was unvaccinated, to take unpaid leave as of December 15, 2021. Under the agreement of the respondent and the employer, the employer's offices were to close in the afternoon on December 24, and then on December 29, 30, and 31, 2021. To compensate for the loss of salary from the closure, the employees would use 26.25 hours of accumulated overtime so that they would

receive their full pay during the closure. According to the respondent, the agreement was not new in 2021, which the complainant did not contradict.

[58] Given that the complainant was on unpaid leave, and was certainly forced to be on it on December 24, 29, 30, and 31, he could not then use the 26.25 hours of accumulated overtime. In its response to his grievance, the employer informed him that he could convert those hours into paid leave, to be taken by March 31, 2022. The employer's proposal did not address the problem if the complainant was still on "forced" unpaid leave as of March 31, 2022.

[59] The complainant stated that the respondent did not inform him that it would negotiate an agreement with the employer on the issue of overtime for the December 2021 closure. He learned that from the employer when it responded to his grievance. To him, the agreement short-circuited his grievance, to demonstrate the employer's disciplinary, not administrative, action against him.

[60] The effect of the agreement in question is that the 26.25 hours that the complainant accumulated for the December 2021 closure were to be added to his annual-leave bank. In that way, he would not lose his accumulated overtime. However, his status as an employee without pay remained for the December 2021 closure. According to the respondent, the agreement was not made specifically for the complainant but for all bargaining unit employees on "forced" unpaid leave. On that point, he disagreed with the respondent, but he submitted nothing to me to convince me that he was right. Instead, I tend to believe that the respondent had to find a "solution" for all employees affected by the situation. Clearly, the agreement in question was not perfect, but at the very least, it allowed the employees concerned not to "lose" the overtime accumulated as of March 31, 2022. In addition, the respondent, as the bargaining agent, had no obligation to consult the complainant or other employees involved before concluding such an agreement.

[61] My role is not to decide whether the respondent made the right decision when it concluded that agreement but instead to determine whether it acted in an arbitrary, a discriminatory, or a bad-faith manner when it entered into the agreement. Nothing in the facts submitted leads me to conclude that the respondent acted that way.

C. Conclusion

[62] In summary, the complainant did not demonstrate to me on a balance of probabilities that the respondent failed its duty of fair representation. He did not present me with a preponderance of evidence to that effect. Therefore, his complaint is dismissed based on the facts submitted to me and the case law. In addition, after analyzing the parties' submissions to me, I conclude that it is not necessary to hold an in-person hearing to deal with the complaint, as the complainant requested.

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

(The Order appears on the next page)

VI. Order

[64] The complaint is dismissed.

December 8, 2022.

FPSLREB Translation

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