Date: 20221223

Files: 561-02-44478, 597-02-44687, and 597-02-44688

Citation: 2022 FPSLREB 105

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 Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

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

In the matters of a complaint under section 190 of the *Federal Public Sector Labour Relations Act* and two applications for consent to prosecute under section 205 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 and Applicant: Himself

For the Respondent: Kim Patenaude, counsel

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

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint and applications before the Board

[1] On January 26, 2022, the Federal Public Sector Labour Relations and Employment Board ("the Board") rendered the decision in *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLREB 4 ("the 2022 FPSLREB 4 decision"). In that case, the complainant was David Lessard-Gauvin ("the complainant"), and the respondent was the Public Service Alliance of Canada ("the respondent"). The Board found that the respondent had failed its duty of representation and ordered it to make, on the complainant's behalf, a request for an extension of time under s. 61 of the *Federal Public Sector Labour Relations Regulations*.

[2] The Board asked the respondent to file with the Board its written submissions supporting the request for an extension of time by no later than February 25, 2022. The respondent did not meet the February 25, 2022, deadline. The Board granted it additional time to file its written submissions, which the Board eventually received on March 7, 2022. The first matter under the complaint bearing number 561-02-44478 and made on March 4, 2022, was the respondent's failure to meet the February 25, 2022, deadline. According to the complainant, given the respondent's ongoing negligence toward him, the failure to meet that deadline can be described only as arbitrary and gross negligence.

[3] On March 4, 2022, the complainant also made an application with the Board for consent to prosecute the respondent for failing its duty of fair representation that the Board recognized in the 2022 FPSLREB 4 decision (file 597-02-44687). To clarify, the term "complainant" is used throughout this decision even though, for the purposes of this application and the next one, Mr. Lessard-Gauvin is an applicant and not a complainant. On March 4, 2022, the complainant made a second consent-to-prosecute application with the Board (file 591-02-44688) related to the complaint (file 561-02-44478), this one about the respondent's failure to meet the February 25, 2022, deadline.

[4] On May 24, 2022, the Board held a case management conference with the parties. Later on, it decided to first address the files on the basis of written submissions. On July 29, 2022, its registry wrote the following to the parties:

> [Translation]
>
> …
>
> *Complaint 561-02-44478, dated March 4, 2022, and applications 597-02-44687 and 44688 all refer to the 2022 FPSLREB 4 decision. To date, they have all been pending, and they will be addressed as part of the same submissions process. The Board Member asked Mr. Lessard-Gauvin to file with the Board by no later than September 30, 2022, his written submissions for complaint 561-02-44478 and applications 597-02-44687 and 44688.* ***Note that once those submissions are received, the Board Member may render a final decision on the complaint and the two applications, without further notice.*** *At that time, he may also decide, based on a schedule to be determined, to request further submissions or details from the parties before rendering a decision.*
>
> …
>
> [Emphasis in the original]

[5] On September 15, 2022, the complainant advised the Board that he wanted to "[translation] open a dialogue" with the respondent to reach an amicable settlement, given the respondent's decision to use the services of external counsel to represent it at the adjudication of his grievance. On October 5, 2022, I was informed that the respondent had refused to participate in mediation in the context of these files. On October 6, 2022, I resumed the written submissions process that had started on July 26, 2022, with a change that the deadline for the complainant to file his submissions was now October 28, 2022. Given that nothing was received from him on that date, the Board asked him to file his submissions by no later than November 3 at 4:00 p.m. It received his submissions via email on the afternoon of November 3, 2022.

II. Summary of the respondent's reply to the complaint and to the consent-to-prosecute applications

[6] In the 2022 FPSLREB 4 decision, the Board ordered the respondent to make, within 30 days of its decision, a request for an extension of time to file the complainant's grievance within the specified timeframe. Note that such a request had already been made with the Board on August 4, 2020, but had not yet been processed. Nevertheless, the Board ordered the respondent to file with the Board its written submissions to support an extension of time by February 25, 2022. After not receiving the respondent's submissions, the Board changed the date from February 25 to March 7 and then to March 14, 2022.

[7] Due to the higher-than-usual volume of work and staffing changes, the respondent was unable to meet the initial deadline and did not file its submissions with the Board until March 7, 2022.

[8] According to the respondent, even though it is true that its submissions on the extension request were filed on March 7, 2022, rather than on February 25, 2022, nevertheless, it did not fail its duty of fair representation. It did not act in an arbitrary, discriminatory, or bad-faith manner. Therefore, the complaint should be dismissed because it does not meet any of the criteria that would demonstrate that the respondent failed its duty of representation. In addition, the complainant did not suffer any harm from the respondent not meeting the Board's first deadline. In support of its position on the complaint, it referred me to *Ouellet v. St-Georges*, 2009 PSLRB 107.

[9] The respondent alleged that the complainant's prosecution applications under s. 205 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") are frivolous and would serve no purpose.

[10] On January 26, 2022, the Board issued the 2022 FPSLREB 4 decision, which allowed the complainant's complaint about the respondent's failure to file his grievance within the specified timeframes. The Board ordered the respondent to make, within 30 days, a request for an extension of time to file the grievances with the employer and to represent the complainant with respect to his request. As indicated earlier, the respondent filed its submissions about that request a few days after the Board's deadline. Then, on May 19, 2022, the Board rendered the decision in *Lessard-Gauvin v. Treasury Board (Canada School of Public Service)*, 2022 FPSLREB 40, in which it granted the extension-of-time request. It also ordered the complainant's grievances scheduled, as soon as possible.

[11] The *Act* states that an employee organization may be prosecuted for an offence, with the Board's consent. Although that recourse exists in the *Act*, since it came into force in 2005, it has been invoked rarely and has almost never been granted. In *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37, the former Board indicated that those applications are extremely rare and that they almost all involve situations in which employees allegedly participated in an illegal strike.

[12] In *Bremsak v. Professional Institute of the Public Service of Canada*, 2012 FCA 91, the Federal Court of Appeal stated that that recourse should be authorized only in "… the most extraordinary situations, because of the serious legal consequences for those prosecuted, and the negative effects that a criminal prosecution is likely to have on good industrial relations …".

[13] As the case law attests, s. 205 of the *Act* is an exceptional provision that should be used only in extreme cases, when there are no other means of rectifying the harm done and when its application would be conducive to good labour relations.

[14] The complainant made two consent-to-prosecute applications against the respondent. The first was about the breach addressed in the 2022 FPSLREB 4 decision. The second was about the breach alleged in the complaint bearing file number 561-02-44478, made on March 4, 2022.

[15] The respondent maintained that the complainant did not meet his burden of demonstrating that the alleged failures were so serious that they required proceedings against it. Additionally, any harm that arose from the union's errors has been rectified, which renders moot the issue of compensation for harm.

[16] Additionally, the respondent never demonstrated bad faith or ever had any intention of hindering the complainant's interests. As stated in the 2022 FPSLREB 4 decision, when the respondent's representative realized her error, she immediately contacted the employer and tried to resolve the situation. In addition, the respondent recognized her error and accepted responsibility for her carelessness.

[17] The respondent maintained that the consent-to-prosecute applications are moot and frivolous. The case law is clear that such consent would be granted only in extremely exceptional situations. In this case, the complainant suffered regrettable but reparable harm, which the Board recognized and the respondent rectified. The Board's remedial powers were entirely adequate, and criminal proceedings would serve no purpose.

III. The complainant's arguments supporting his complaint and his consent-to-prosecute applications

[18] For practical reasons, and at the risk of misinterpreting the complainant's arguments supporting his complaint and applications, I have chosen to reproduce them in full, as follows:

> [Translation]
>
> …
>
> *As for complaint 561-02-44478, I maintain that my file is subject to ongoing negligence comparable to "unfair representation" within the meaning of the Act.*
>
> *I will take the opportunity to make a few comments on "how" it is possible to reach the conclusion of unfair union representation. First, like discrimination, unfair representation can appear on three levels, regardless of the type of allegation against the union (arbitrariness, negligence, discrimination, bad faith, etc.):*
>
> *Micro: This level of analysis focuses on the individual and his or her interactions with others.*
>
> *Meso: This level of analysis focuses on organizational culture and policies. For the PSAC, there are three sublevels: local union, element, and bargaining agent.*
>
> *Macro: This level of analysis focuses on legislation and social culture.*
>
> TABLE 2: A RELATIONAL FRAMEWORK FOR DIVERSITY MANAGEMENT
>
Relational level	Description	Examples of variables	Examples of research questions
Macro-national	Institutional structures; social difference codes and processes	Legislative framework of equal opportunity and diversity; socio-political policies; labour market; economy; demography; history.	–To what extent does the history of the local context shape diversity management practices? –To what extent do national laws and labour policies effectively provide equal opportunities to diverse workers? –What stereotypes attach to different groups of diverse workers?
Meso-organisational	Organisational policies and hierarchies	Organisational approaches towards diversity; benchmarking and evaluation.	–To what extent do organisational structures and policies afford equal opportunities to diverse workers? –To what extent do interactions and relationships at the level of the organisation inform the logic of diversity management policies and practices?
Micro-individual	Identity and subjective experience in the workplace	Individual agency, perspectives and experiences; multiple identities.	–To what extent do diverse workers' individual lifestyles and values affect their integration or lack thereof in the workplace? –To what extent do diverse workers' multiple and intersecting identities influence their career trajectories?
>
> *I did not find an explanatory table specific to unions; all the same, I submit the above. Of course, it should be read by adapting it to the realities specific to unions.*

Additionally, unfair representation can essentially appear in two ways:

1 By analyzing the acts/omissions taken individually; that is, one or more acts/omissions taken in isolation can constitute a case of unfair representation;

2 By analyzing the acts/omissions with a "continuum" view, a systemic view, or an overall view; i.e., no single act/omission can constitute a case of unfair representation but could all the same constitute unfair representation when the situation is viewed as a whole.

However, the FPSLREB should address a complaint by combining those two ways. In other words, whether or not there is an act/omission that could, on its own, constitute a case of unfair union representation, the FPSLREB should always analyze the situation as a whole, to assess the presence or absence of unfair representation.

To obtain an overall view, the FPSLREB should take into account:

- *The allegations and facts mentioned in the complaint;*
- *The allegations and facts that occurred after the complaint; and*
- *The factual context before the allegations in the complaint.*

The first item goes without saying and I will not dwell on it.

The second item's purpose is to ensure better access to justice. To avoid the complainant making a new complaint for each act or omission that may constitute unfair representation, the FPSLREB should analyze any facts and any allegations from after the complaint but before the ruling, provided that the union receives a chance to reply to those facts and allegations.

The third item should take into account the timeframe stipulated by the Act and, as in this situation, compliance with the judgment. By staying within those two key items, the FPSLREB's approach should favour considering the prior factual context. As such, the FPSLREB should take into account the factual context analyzed in the files of the 2022 FPSLREB 4 decision. Thus, with respect to the third item, it is important to distinguish between "facts at issue" and "factual context". Only the first two items can be used to establish the facts at issue.

In addition, unfair representation may be direct; i.e., it may be clearly apparent or be "through detrimental effects". That is particularly important in cases of arbitrariness, gross negligence, and discrimination by the union. Only the notion/proof of "intent" should be required for bad faith. Also remember that all the criteria in section 187 can be proven by a presumption of facts; i.e., with inductive reasoning supported by "serious, specific, and corroborating" facts.

Historically, the FPSLREB has taken a conservative approach in which it analyzes only the "micro" level and based only on

acts/omissions taken individually, even when asked to analyze a situation from an overall perspective. That approach should evolve. Unfair union representation can manifest in many ways and levels, and the FPSLREB's legal analysis should be adapted to that reality.

The purpose of my comments above is not to amend the criteria of section 187 of the FPSLRA (gross negligence, arbitrariness, discrimination, bad faith …). I simply suggest a more holistic method of analyzing the facts at issue and the factual context of the dispute that is more respectful of the employee's human dignity and fundamental rights (access to justice, right to fair and reasonable work conditions, right to equality and protection from discrimination, etc.).

As for the factual context, I ask that the FPSLREB consider the facts stated in the earlier complaints, particularly those underlying the 2022 FPSLREB 4 decision. I feel that there is a continuum of negligence by the union, which should be assessed based on all the circumstances. I will not repeat the circumstances because the Board Member assigned to this complaint is the same as for my earlier complaints. Thus, I encourage the Board Member to reread the earlier complaint files, as needed.

As for the factual context and the facts at issue in this complaint, I encourage the FPSLREB to reread my complaint form.

I will focus on highlighting the facts that occurred after the complaint and that support my allegation of unfair union representation, ***when the situation is considered as a whole.*** *Thus, it is a matter of adding new allegations (facts at issue) and strengthening the factual context by considering all the circumstances that have occurred to date.*

• As part of the representation for the extension request, the representative, Christine Dutka, never communicated with me to explain the situation to me, to consider my point of view, or for anything else.

• The union maintained its position that it wants to force an out-of-court settlement on me, even if I find it unfair/unsatisfactory.

• The lawyer seemed to not have the will or the resources necessary to represent me. He was unable to tell me the documents that the union had given him, and he omitted things with respect to what Board Member Lavictoire had asked of him for the settlement conference.

• It was difficult to arrange my transportation in French to attend the settlement conference.

• The PSAC waited too long to appoint someone to represent me for my grievance.

Therefore, I ask the FPSLREB to deny the preliminary motion to dismiss and to set a deadline to adduce all the evidence about the

> *union's failure and the harm suffered. I would like to present my arguments at a hearing.*
>
> *As for applications 597-02-44687 and 44688, it appears that the FPSLREB and the organizations that preceded it automatically dismiss that type of application.*
>
> *That is not surprising considering the type of labour relations scheme we are under. Employees are stripped of their legal status and their human dignity and are no more valuable than a green plant. It would make no sense, according to the current scheme's principles, to determine that a union might have committed a criminal offence against a green plant. It would take a rather "woke" Board member to consider the possibility of allowing such an application. In light of his prior decisions, the Board Member assigned to my applications has a political view anchored in neoliberalism and the principle of union "self-regulation". Even the best arguments in a case even more solid than mine would not defeat such a conservative mentality. Therefore, it appears pointless to me to argue for the applications because their fate was decided well before they were made.*
>
> [Emphasis in the original]

IV. Analysis and reasons

[19] The complaint refers to s. 190(1)(g) of the *Act*, which refers to s. 185. Among the unfair practices noted in that section, s. 187 is of interest in this complaint. Its 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]

[20] The complainant's consent-to-prosecute applications refer to ss. 202(1) and 205 of the *Act*, which read as follows:

202 (1) *Every employee organization that contravenes, and every officer or representative of one who contravenes, section 187 or 188 is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.*	***202 (1)*** *L'organisation syndicale ou chacun de ses dirigeants et représentants qui contrevient aux articles 187 ou 188 commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de mille dollars.*
…	[…]
205 *A prosecution for an offence under this Division may be instituted only with the consent of the Board.*	***205*** *Il ne peut être intenté de poursuite pour infraction prévue dans la présente section sans le consentement de la Commission.*

A. The complaint of a failure of the duty of fair representation

[21] The basis of the complaint made on March 4, 2022, was founded on the respondent's delay responding to the Board's requests for written submissions with respect to a request for an extension of time made on the complainant's behalf. The Board asked the respondent to file its submissions by no later than February 25, 2022. It did so on March 7, 2022; that is, exactly eight business days after the deadline established initially.

[22] Even though the delay was only a few days, the complainant recalled that it was part of a continuum of negligence on the respondent's part. According to him, the negligence is still ongoing in the upcoming adjudication of his grievance.

[23] The respondent explained that the delay in question occurred due to a higher-than-usual work volume and staffing changes. According to it, the complainant did not suffer any harm from the delay.

[24] It seems to me that it is futile to go any further in terms of analyzing the parties' arguments. The complaint should be dismissed because nothing in the respondent's actions could be described as arbitrary, discriminatory, or bad faith. Certainly, it submitted its arguments eight days late, but that did not constitute gross negligence. In fact, it was only the level of negligence associated with arbitrary treatment (see the 2022 FPSLREB 4 decision) or a failure of the duty of fair representation. The complainant did not submit anything to me to convince me that gross negligence or a failure of the duty of representation occurred. Finally, as the respondent submitted, the delay had no negative impact on him. In fact, in its May 19, 2022, decision, the Board granted the request for an extension of time that the respondent made on his behalf.

B. Consent-to-prosecute applications

[25] According to s. 205 of the *Act*, the complainant must obtain the Board's consent to prosecute the respondent for its offences committed under s. 187 of the *Act*.

[26] In the preceding paragraphs, I dismissed the complaint bearing file number 561-02-44478 since I found that the respondent did not violate s. 187 of the *Act*. Thus, it cannot be fined under s. 202(1) of the *Act*, which renders inoperable the application of s. 205. Therefore, the application bearing file number 597-02-44688 is dismissed.

[27] The other application (file number 597-02-44687) refers to the respondent's violation of s. 187 of the *Act* when it failed to file the complainant's grievance within the specified timeframe (see the 2022 FPSLREB 4 decision). At the relevant time, a respondent representative had been negligent by failing to file the grievance that the complainant had submitted to her. She mistakenly thought that he had already filed it on his own. In its decision, the Board found that gross negligence and a failure of the duty of fair representation had occurred. It ordered the respondent to request an

extension of time on the complainant's behalf. It granted that request (see 2022 FPSLREB 40).

[28] The respondent claimed that any harm that arose from its errors in not filing the grievance by the deadline was rectified when the Board granted the extension request. On that point, I fully agree with the respondent. There is nothing in the complainant's arguments that would convince me otherwise.

[29] According to the Board's case law on the consent referred to in s. 205 of the *Act*, it is rarely granted. In *Quadrini*, at paragraphs 67 and 68, the former Board stated as follows:

> *[67] I would like to point out that, to the best of my knowledge, there have been no other proceedings before the PSLRB under section 205 of the new* Act *since it came into force on April 1, 2005. Under the former* Act, *applications for consent to prosecute under a similar provision (its section 107) were exceedingly rare and almost all involved situations where it was alleged that employees participated in an illegal strike.*
>
> *[68] It is entirely appropriate, in my view, that the PSLRB view the very few consent-to-prosecute requests that come before it as extremely serious and exceptional applications. Section 205 of the new* Act *is not a provision that should be invoked lightly given the possibility of extraordinary legal consequences for those persons against whom prosecutions are proposed. I have no clear sense in the case before the PSLRB that the complainant appreciated the PSLRB's very limited case law in this area. It may be that he believed that it is relatively routine practice to invoke section 205 when making an unfair labour practice complaint. If so, it is a practice that should be discouraged.*

[30] This case is clearly not about an illegal strike but instead about a violation of the *Act*, the effects of which were entirely rectified by the extension request that the Board granted.

[31] Consent-to-prosecute applications should be allowed only in exceptional situations in which, at the very least, the applicant suffered significant harm that cannot be rectified by the *Act*'s remedial processes. This application in no way meets that exception criterion.

[32] Therefore, the consent-to-prosecute application is dismissed.

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

(The Order appears on the next page)

V. Order

[34] The complaint bearing file number 561-02-44478 is dismissed.

[35] The application bearing file number 597-02-44687 is dismissed.

[36] The application bearing file number 597-02-44688 is dismissed.

December 23, 2022.

FPSLREB Translation

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