Date: 20230113

File: 561-02-45141

Citation: 2023 FPSLREB 3

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 DROUIN

Complainant

and

PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS

Respondent

Indexed as
Drouin v. Professional Association of Foreign Service Officers

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

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Self-represented

For the Respondent: Bertrand Myre, general manager, Professional Association of Foreign Service Officers

Decided on the basis of written submissions.

REASONS FOR DECISION

I. Introduction

[1] On July 6, 2022, the complainant, David Drouin, made a complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") with the Federal Public Sector Labour Relations and Employment Board ("the Board"), alleging that his union, the Professional Association of Foreign Service Officers (PAFSO or "the union"), breached its duty of fair representation to him.

[2] The union disputed the allegations and stated that the complaint should be dismissed for these reasons:

1. it was made out of time, and
2. in any event, it does not disclose a *prima facie* breach of the union's duty of fair representation.

[3] Having carefully reviewed the complainant's submissions and the documents he relied upon, as well as those of the union, I am satisfied with respect to the following:

1. the complaint is out of time, and
2. even if it was made in time, it fails to disclose an arguable case.

[4] The facts and reasons for this decision are set out in the following paragraphs.

II. The facts

[5] In March 2020, the complainant was offered and accepted a foreign services officer position that was subject to a 36-month probationary period. It was also bilingual imperative and required the successful completion of a 5-week, full-time course on the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27; "*IRPA*"). If he failed to complete the course, he would be removed from the Foreign Service Development Program (FSDP) and immediately rejected on probation or terminated for unsatisfactory performance.

[6] At that time, the complainant was married. He and his spouse (who also worked for the federal government) had two children, aged three and six months respectively.

[7] The complainant started the *IRPA* course, which included three exams and required a final grade average for the three of 75%. He wrote all three.

[8] On November 4, 2020, Sylvain de Cotret, Assistant Director, Workforce Management, advised the complainant that his final grade average total was 73.15% and that accordingly, he had failed to meet the requirements of the course and was terminated. In the termination letter, he was advised that he had the right to file a grievance.

III. The union becomes involved

[9] The complainant emailed Marc Leclaire, a PAFSO labour relations advisor, on November 4, seeking the union's assistance. He challenged his termination for the following reasons:

> …
>
> *I am very distraught by this turn of events, especially since I have not been given a chance to go over my exam and see my mistakes. In addition, this was the first time the course was taught in a half online/in-person format due to the pandemic. The training this year has been done partially online and partially in person due to COVID, which has been very challenging and less than ideal. Nonetheless, my teachers and classmates can attest that I was a very active and engaged student, leading study groups and helping others.*
>
> *I need help from PAFSO to contest this since being fired for being less than two percentage points [sic] is unfair, unjust and unreasonable. The fact that there is no consideration to the COVID environment and the less than ideal virtual/classroom training is problematic.*
>
> …

[10] I note that the email makes no mention of any family responsibilities issues.

[11] Mr. Leclaire responded to the complainant the same day, stating that he would call the complainant the next day, once he had more information.

[12] The two spoke on November 4. The complainant emailed Mr. Leclaire later that day. He recorded his recollection of the discussion as follows:

> …
>
> *Thank you for taking the time to discuss this issue with me. I will follow your advice, namely:*
>
> *1) Contact IRCC and ask to see my exam and be provided with the score sheet.*

> *2) Ask if there are any possibilities to move into another position which is not FS to take advantage of the skills and tools I have learnt [sic].*
>
> *I understand that you do not think a grievance will be successful due to the fact that less than 5% of cases of termination are decided in the employee's favour. Nonetheless, I do not feel my mark was deserved and that my earlier test results demonstrate a high level of understanding. I do not understand how it could have changed so suddenly.*
>
> …

[13] Mr. Leclaire responded the same day. He said that the two steps were good. He also suggested that an observer be present at any meeting. He added the following (with respect to what it might take): "… to demonstrate that the end of your term was not proper/correct/should not have occurred, I can forward a list of decisions rendered by the labour board which would give you a sense what we are up against. Let me know if that is of interest."

IV. The allegation of discrimination based on family status

[14] The complainant first raised the suggestion that his performance in the *IRPA* course might have been affected by his family status (at least in the documents filed before me) on November 6, 2020. It came in an email he sent to Mr. Leclaire and Paul Raven (also a labour relations advisor for the union) about a draft letter that he proposed to send to Director General (DG) Pemi Gill.

[15] In that draft, he explained that his total grade average was within 2% of the cutoff. He went on to state that while he understood that there was a requirement to meet certain test standards, he believed that his results had been "… adversely impacted by [his] family status and that this is a case of inadvertent discrimination." He went on to provide these examples of the adverse impact:

> …
>
> *• On October 5th my son's daycare was closed due to Covid-19. On October 6th I spoke to a manager in Workforce Management who was organizing the training and was informed that I could not miss any days of class and it was stated that they did not know when there would be another IRPA training. The manager said that if I did not complete the training I would be let go of [sic] the program. This information made me fearful and caused me extreme stress in my family life as I now had to balance required*

> *trainings with my responsibilities at home due to my son's daycare closure.*
>
> *• Due to Covid-19 the training was held (for the first time ever) in a dual in-person/classroom format. I was required to be online 6.5 hours a day several days a week. My son was at home and during breaks and lunch I was required to care for him to take some of the childcare stress on [sic] my spouse. Nonetheless, there were times when I had to complete training with my son or daughter in the room. Many of the trainers noticed me comforting my children as I attempted to follow along with the required training. On days where I was physically present for the training, my evenings were spent taking care of my children so that my spouse could catch up on work and get a break from child caring responsibilities.*
>
> *• In an e-mail sent to all the participants of the training on September 18th, it was stated that our training hours would be 8:30am-4:00pm and that we were to use 30 minutes to review and study in the evening. I found time to study and organized several study sessions with my colleagues. However, I was the only participant who had children. Many of my classmates spent more than 15 hours preparing for the final exam in the last few days. They were able to do so because they did not have the same family responsibilities as myself. We were told at the beginning of the course that very little outside class time needed to be dedicated to studying. However, the actions of my colleagues demonstrate it was paramount to their success which was something I could not do because of my family status.*
>
> …

[16] He concluded his description with the following observation:

> …
>
> *These are just a few of the ways I believe that I was unintentionally discriminated against due to my family status. There are other incidences [sic] of this treatment which extend back to my time as an Ab-Initio student. On the surface, rules that seem to be neutral at first glance are not always equitable in their implementation. Rigid rules, with no flexibility for the personal circumstances of individuals, are often a source of unintentional discrimination as in this case.*
>
> …

[17] Mr. Raven responded first on the same day. He recommended that the complainant wait to speak to Mr. Leclaire before sending anything. The complainant agreed.

A. The November 9 email chain

[18] Mr. Leclaire responded to the complainant as follows on November 9, 2020:

> …
>
> *First of all, just so you know, I was unaware of the issues you are raising in the letter. If indeed you pointed out and sought accommodation for your particular family situation, then, you may have a case of discrimination and abuse of authority. The employer must make reasonable accommodations when issues are raised and accommodations are requested. That said, if the employer/DG rejects any possible review of your situation, then you will need to submit a grievance, a complaint to the Canadian Human Rights Commission (CHRC), or both.*
>
> *Second, I would remove any term suggesting this was unintentional as it may weaken your complaint. There is either discrimination or there is no discrimination. It will be up to others to decide if it was unintentional.*
>
> *Finally, please keep in mind that you do have a time limit (25 working days) to submit a grievance on the matter. You have up to one year to submit a complaint to the CHRC.*

[19] The complainant responded to Mr. Leclaire the same day, stating in part as follows:

> …
>
> *Thank you for your response in regards to my letter and email. I agree that you were unaware about the issues I raised in my letter. I was not focused on what the core of the problem with IRCC, namely discrimination, but as I reflected on the situation I realized my situation was a bona fide case of discrimination due to family status and abuse of power. Our conversation focused on the unfairness of the test and not on how I was always at a disadvantage in comparison to other employees.*
>
> …

[20] He also asked a series of questions, including the following:

> …
>
> *5) I understand the union will handle the grievance. However, would the union also help me file a human rights complaint at the Ontario Human Rights Tribunal?*
>
> *6) Should I seek outside counsel in this matter? If so, can the union recommend any labour lawyers who have experience in discrimination based on family status?*
>
> …

[21] Mr. Leclaire responded to the complainant's email and, in particular, to these two questions on that day (November 9):

> …
>
> *5. We can offer support in the submission of the complaint.*
>
> *6. Seeking outside legal advice and support is a personal matter. If you submit a grievance and a complaint, chances are that the CHRC will set the complaint aside* ***until such time as the grievance process runs its course. If at the end of the process, you are not satisfied, then you can ask them to review your complaint.*** *You will have quite some time to think about whether you want to go to an external legal provider.*
>
> *These issues do not get corrected quickly. The grievance process within the department can be reasonably quick, but if you do not get satisfaction, there is a quite lengthy wait before being heard by a third party (Public [sic] Sector Labour Relations and Employment Board). If you await such a decision, you will be without employment for a few years. Something to keep in mind when launching into these things.*
>
> …
>
> [Emphasis added]

[22] The complainant replied to Mr. Leclaire. He acknowledged that these cases can take years to resolve. Nevertheless, he wanted to move forward. He added that he had revised his draft letter to DG Gill, as follows:

> …
>
> *I am writing to you because I was unexpectedly terminated by IRCC last week. I am an FSDP officer who was undergoing training.*
>
> *Part of the process for FSDP officers, as you are no doubt aware, is to complete required training as mandated by the department. On the IRPA course,* ***I was told my final mark was 73.5% and that the cut-off was 75%****. Subsequently, I was terminated on November 4th.*
>
> *I understand the department sets the standards for tests and trainings and it is the requirement of employees to meet these benchmarks. However, I believe that my termination in this instance stems from a bona fide case of discrimination based on family status.*
>
> *What I am seeking is a way to have my results reassessed in light of the fact that there are legitimate accommodation concerns in the manner these tests were administered in my case. In effect, I*

> *am asking for your help in addressing these concerns so as to arrive at a more equitable result.*
>
> …
>
> [Emphasis in the original]

B. December 2020 - the grievance process

[23] On December 3, 2020, Mr. Drouin filed a grievance, seeking to reverse the termination. As remedy, he sought an order that he be returned to the Foreign Service training program effective November 4, 2020, that he be compensated for all salary and benefits lost as a result of the termination, that he be provided with an opportunity to rewrite the training exams, and that he be made whole.

[24] At about that time, Mr. Leclaire prepared a statement on the complainant's behalf for use in the grievance process.

[25] The document is somewhat confusing and is entitled "Termination Grievance - David Drouin submitted December 3rd, 2020 Final Level Grievance Hearing - February 2nd, 2021". The title evinces the two-part nature of the complainant's rights under the collective agreement (between the Treasury Board and PAFSO for the Foreign Service Group that expired on June 30, 2022 ("the collective agreement")). Clause 11.11 provided that in general, all grievances went through three levels. By way of exception, clause 11.12 provided that grievances involving termination went straight to the final level. Since the complainant had alleged discrimination on the basis of family status, the Treasury Board ("the employer") and the union treated the grievance as requiring a three-level grievance process.

[26] The allegation of family status discrimination was laid out in the document. Here are the substantive parts:

> …
>
> *In addition, though the departmental contacts appear to indicate that he was offered some accommodation, Mr. Drouin contests this. They may have done so, but it was never clear to him that they had. He believes he was not provided with reasonable accommodations and there appears to be nothing available that would support that he was provided with such options.*
>
> *Prior to embarking on the training program leading to the exams, he had, on several occasions, pointed out issues he and his spouse faced in ensuring he could attend training sessions. Once in the*

> *training sessions, he did request accommodations, including the ability to leave some courses a bit early and to possibly extend his program, because Covid-19 exacerbated childcare demands. Some form of accommodation could have alleviated these issues and provide him with the flexibility to both attend to familial matters and have a proper opportunity to successfully meet course attendance and study demands.*
>
> *These requests were met with refusals and indications that not only were the arrangements unchangeable, but that failure to meet the demands would result in his being dropped from the Program. This only increased the pressure Mr. Drouin was under and reduced his chances of successfully completing the training program and the final exams.*
>
> *None of the other participants in the program were under the same family and childcare pressures and any accommodations would have been short lived [sic] and specific only to him. His family responsibilities were the reason for his inability to fully commit to the strict program requirements and resulted in his not being properly prepared for the exams.*
>
> *In the end, his failure on the final exam is a direct result of his family responsibilities intruding on his ability to study and master the material which, ultimately led to his failing to meet the necessary passing marks. We therefore believe that the decision to terminate his employment is discriminatory and in contravention of the basic human rights to be accommodated for reasons of family status as stated in Article 43 of the FS collective agreement and the Canadian Human Rights Act (Part 1, section 3(1)).*
>
> …

[27] A grievance hearing took place December 10, 2020. As already noted, the complainant was advised that because the issue related to a termination during a probationary period, it would be a first-level grievance hearing.

[28] After the meeting, the complainant emailed Mr. Leclaire on December 10 and attached two documents, one listing "… ALL [the complainant's] discrimination claims and actions that occurred…" beginning from when he applied for the position until Mr. de Cotret heard his claim. The second included the claims that he "… put forward to Mr. Leclaire when [they] had [their] conversation in late November." (Those two Microsoft Word documents, entitled "IRCC Discrimination Events - Family Status" and "Conversation with De Cotret", were not included in the materials that the complainant submitted to the Board.)

C. The second-level grievance hearing

[29] The second-level grievance hearing took place on February 2, 2021.

[30] On February 26, 2021, Mr. Drouin received the employer's second-level response to his grievance, which noted in part as follows:

> …
>
> *In my review of the allegations you presented, I have examined evidence and testimony from the parties implicated in your situation. Based on the evidence available, I have determined that, while you raised concerns relating to your family situation, you did not establish that you required accommodation to fulfill a legal requirement to care for your children, nor did you pursue your requests for accommodation beyond the initial mention of these difficulties. I also note, per your own testimony, that you did not raise any concerns with your ability to understand materials or prepare for your tests, making it impossible to have accommodated that element, if indeed such a need had existed.*
>
> *Based on the evidence I have available, I also find that at no point were you given reason to believe that your employment would be in jeopardy if you found yourself unable to meet the attendance requirements of the program due to your family situation or if you asked for accommodation. While I acknowledge that the pandemic situation added a certain amount of uncertainty, I find that you discussed various options with the training team in the event that your family situation prevented you from meting [sic] the attendance obligations for the training session in October 2020 and would therefore be required to delay your training to a later date. Based on those discussions and your future attendance record, which shows you were able to attend all sessions, management concluded you had arranged your childcare situation in order to be able to continue the training in October 2020.*
>
> …

[31] Accordingly, the grievance was denied. In denying it, the employer went on to note in the last sentence of the letter as follows: "Please note that if the decision is not satisfactory to you, you may elevate your grievance at [*sic*] the next level in the grievance procedure within ten (10) days after receiving this response."

[32] I pause to observe that as of February 26, 2021, Mr. Drouin was being told that there was a "next level" to the second-level grievance process and that he could access it within 10 days. (Excluding business days, this would have put it at March 12, 2021.)

D. March 3, 2021 - the union withdraws its representation

[33] On March 3, 2021, Mr. Leclaire emailed Mr. Drouin, as follows:

…

> *As discussed, this is to formally indicate PAFSO has determined that you do not have, in our opinion, a strong enough case that would meet the criteria established by [sic] Federal Public Sector Labour Relations and Employment Board (FPSLREB) in situations of discrimination and to continue to support the grievance would not benefit our members or the application of our collective agreement. In addition, the current wait times for adjudication decisions (5+ years and increasing) would render moot much of what you are trying to achieve.*
>
> *Further, again also as discussed, should you wish to pursue the issue, though we are not supporting the continued use and interpretation of our collective agreement, you can submit a complaint to the Canadian Human Rights Commission. Since we have no jurisdiction over complaints made directly to the CHRC, you are free to do so and to seek separate legal counsel, if you so deem necessary.*
>
> *Finally, I have attached some excerpts from decisions rendered by the FPSLREB in matters of grievances alleging discrimination so that you may have a better understanding of how our perspective was achieved. Though not exactly the same situations as yours, these nevertheless highlight the level of proof a complainant is required to provide to meet the threshold of* prima facie *discrimination and what the respondent/employer needs to do in cases of accommodation.*

…

[34] The complainant then made a complaint to the Canadian Human Rights Commission (CHRC) on October 27, 2021. (The complainant did not explain why he waited roughly eight months to follow the union's suggestion that he make a complaint with the CHRC.)

E. The CHRC's response to the human rights complaint

[35] The CHRC accepted his complaint on March 15, 2022, and forwarded it to the employer. On April 14, 2022, the employer responded by noting that he had failed to exhaust the available grievance process, which was a barrier to his CHRC complaint. The complainant then emailed Mr. Leclaire on April 14, as follows:

…

> *As per your advice, I submitted a complaint to the Canadian Human Rights Commission. The process has been ongoing but I recently received a response from IRCC.*
>
> *They argue that I had access to a 3rd level grievance and after that I could have gone on to the Labour Board. It is my impression that I was only allowed a grievance up to the 2nd level because I was a probationary employee. As for the Labour Board, your email of March 3rd explained that PAFSO did not believe I had a strong enough case to go on to the Labour Board and that it would no longer support my grievance.*
>
> *Could you please confirm these two facts?*
>
> *Thank you! I hope you are doing well. I understand that PAFSO is no longer representing me but if there is any support you or PAFSO can offer for my Human Rights complaint it would be greatly appreciated.*
>
> *…*

[36] On April 20, 2022, Mr. Leclaire replied with this to the complainant's April 14 email:

> *…*
>
> *Let me be clear. Yes, you could have gone to [sic] 3rd and final level. However, the grievance was under our collective agreement and we withdrew our support after the 2nd level because we did not see a way forward with your situation. We further indicated that we would not let anyone else represent our interests under our collective agreement. This therefore left you with no alternative but to go it alone to the CHRC.*
>
> *As to access to the labour board, it is true you could have gone, but only with our support. Since we have withdrawn it, you have no access to the Board. Again, your only recourse is through the CHRC.*
>
> *…*

[37] The complainant replied as follows on April 21:

> *Thank you for your email. It will definitely help show the CHRC that I exhausted all avenues to resolve this matter through no fault of my own.*
>
> *However, I would also like to be clear. When I began the grievance process you informed me that I only had access to two levels of grievance [sic]. To find out a year later that I had access to a third level and PAFSO chose not to pursue it at that level is upsetting.*
>
> *I've cc'ed Ms. Kim Coles because I am upset about how you handled my case and my recent discovery has me questioning whether you truly were committed to trying to find a solution.*

> *I understand that a union doesn't arbitrate or litigate every case, but I would assume a minimum amount of effort and an actual attempt to resolve grievances internally could be afforded to every employee who brings forward a complaint. In my mind, this would include exhausting a relatively inexpensive internal grievance procedure.*
>
> *…*

[38] On April 22, 2022, Kim Coles, Executive Director, PAFSO, responded to Mr. Drouin's email as follows:

> *…*
>
> *Thank you for bringing your concerns to my attention. At PAFSO, we have weekly meetings with the Labour Relations Advisor team to discuss representation of member's case files. At this meeting we look at the situation and discuss what formal and informal recourses are available for possible resolution. The merits of the case are the determining factor on whether we proceed or not with formal recourse. Referring cases to adjudication is a very long process and it takes on average 5-6 years to have a final decision rendered due to the huge volume of cases in the system from the rest of the departments in the federal public service. As such, we need to only proceed with cases that have strong merit and have been wrongly interpreted by the employer in order to ensure our resources including both time and financial are used effectively.*
>
> *In your situation, it was determined that the case merits were not strong for resolution at [sic] final level at adjudication, but that a grievance would be filed to test the waters to see if the department would over rule [sic] their decision or not at the first two levels. Unfortunately, this outcome did not happen. While I understand you are upset with this decision, we wish you all the best with exploring your options at the CHRC.*
>
> *…*

[39] On April 25, 2022, Mr. Drouin emailed Ms. Coles, copying Mr. Leclaire, as follows:

> *…*
>
> *I understand that not every case moves on to the Labour Board. We are all dealing with a finite amount of resources.*
>
> *My concern lies with the fact that Mr. Leclaire informed me that I was only entitled to 2 levels of grievance because I was a probationary employee. I only found out that I had access to a 3rd level grievance when I was informed by the response form to my human rights complaint that was filled out by IRCC.*

> *It just seems like a missed opportunity because I would assume that the employer is more likely to reverse themselves on the 3rd level grievance than the 2nd. But I suppose you are the experts on this.*
>
> *I look forward to advancing my case at the CHRC. In that regard, I was hoping the PAFSO could inform me of the results of the investigation into my case and provide me with the interview notes you conducted with any outside experts in regards to family status discrimination.*
>
> …

[40] On April 26, 2022, Mr. Leclaire replied as follows:

> …
>
> *Your perspective and concerns are noted and understood. We regret any misunderstanding.*
>
> *Regarding notes and outside experts consulted, there are none to share. Your own words and statements and the information provided by the employer, along with the level of proof required in cases such as these, were enough to convince us that the case would have little chance of success.*
>
> *We recognize your disappointment with our decision, and we have taken steps to release you so that you may pursue the matter on your own. We wish you good fortune.*
>
> …

[41] On July 6, 2022, the complainant filed with the Board by email his complaint against the union under s. 190(1)(g) of the *Act*, dated June 29, 2022. He alleged that he first became aware of the alleged breach on April 14, 2022. As remedy, he sought an order requiring the union to support his Board or CHRC complaint by paying for an employment lawyer, that he receive compensation for pain and suffering, and that he be reimbursed the salary he lost as a result of being terminated.

F. The union's submissions in response to the complaint

[42] The union's submissions and statements of fact are in these two documents:

1. its initial response of August 19, 2022; and
2. "PAFSO's Rebuttal on the Complainant's Response", submitted on September 14, 2022.

[43] The union's initial response to the grievance was that it was out of time. Section 190(2) of the *Act* provides that complaints must be made no later than 90 days "… after the date on which the complainant knew or, in the Board's opinion ought to

have known, of the action or circumstances giving rise to the complaint." In the alternative, it submitted that even if the complainant first became aware of the issue on April 14, 2022, he still exceeded the 90-day period when he made his complaint on July 6, 2022; see *Crête v. Ouellet*, 2013 PSLRB 96 at para. 33.

[44] In its more detailed rebuttal of September 14, 2022, the union repeated its objection that the complaint was untimely. It added to that objection a request that the complaint be dismissed on the merits. It submitted that complaints about the duty of fair representation must set out facts that establish actions that are arbitrary, discriminatory, or in bad faith; see *McRaeJackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290 at paras. 13 and 50. It said that the onus was on the complainant and that the facts that he alleged established nothing more than his disagreement with the union's decision to cease its representation of him — and that is not a ground for a complaint; see *Bergeron v. Public Service Alliance Canada*, 2019 FPSLREB 48 at paras. 89 to 91; and *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLREB 30 at paras. 82 and 97. It said that establishing an arguable case requires more than making allegations based on speculation or assumptions.

[45] Accordingly, it sought an order dismissing the complaint summarily.

G. The complainant's submissions

[46] The complainant's allegations, statements of fact, and submissions are in a number of documents. The substantive ones are as follows:

1. "Drouin - Statement of Particulars - Duty of Fair Representation - PAFSO", sent to the Board on July 6, 2022.
2. "Drouin - Position on Respondent's Reply of August 19, 2022 Duty of Fair Representation - PAFSO", undated but filed with the Board in response to the union's reply of August 19, 2022.
3. An undated and untitled seven-page statement that he apparently prepared shortly after the first- or second-level grievance hearing.

[47] The complainant's four-page response to the union's reply of August 19, 2022, alleged that its response continued in this way:

> *… its pattern of ineffectually researching and evaluating grievances and performing union business in a manner that is unprofessional. This continues to demonstrate their arbitrary and bad faith conduct because they are incapable of establishing facts*

> *when the evidence is within their possession, performing basic arithmetic in order to determine elapsed time, and adhering to deadlines.…*
>
> …

[48] He alleged that the union's response contained a number of factual errors, such as the number of exams he would have been required to pass (three not two) or that he was terminated in November rather than October 2020. He returned to his allegation that Mr. Leclaire had told him that he had access to only two levels of the grievance process, instead of three, because he was a probationary employee. He explained that he did not make a complaint on March 3, 2021, because then, he "… thought Mr. Leclaire and PAFSO had done everything within their power to help …" him. Only on April 14, 2022, when he received the correspondence from the CHRC, did he realize that he had had access to a third level of the grievance process. He went on to repeat the statements and allegations that the union and its officials were, at best, negligent and incompetent, and at worst, intentional, as follows:

> …
>
> *Mr. Myre's response continues PAFSO's arbitrary and bad faith conduct in regards to my case. It is perfunctory in nature with glaring inaccuracies. Furthermore, when completing basic arithmetic PAFSO fails miserably. Finally, the FPSLREB required PAFSO to respond by a deadline. They did not meet that deadline and they do not have a good reason for having missed the deadline. There are only two conclusions I can draw from PAFSO [sic] actions. One, is that PAFSO and its agents are completely inept and incapable of completing the simplest of tasks with professionalism and aplomb and therefore engaged in arbitrary negligence and are violating their duty of reasonable care. Or, the second option is that PAFSO is intentionally misrepresenting the case, making "errors" to strengthen their position and not affording this process the respect it deserves.*
>
> …

[49] He concluded by saying that the union "… did engage in arbitrary, discriminatory and bad faith conduct when they handled [his] grievance."

[50] In general then, and with respect to timeliness, the complainant submitted that he was unaware — and that he had no reason to suspect — that the union had breached its obligations to him until April 14, 2022. That being the case, the complaint made on July 6, 2022, was well within the 90-day period.

[51] As for the merits, and as already noted, he submitted that his grievance of discrimination based on family status was valid and that the union ought to have pursued it. He alleged that it failed to because it had no experience with such claims, it failed to seek outside legal assistance or opinion on the matter, and it generally handled his file in an inept and discriminatory fashion.

V. Analysis and decision

[52] Two questions are before me about the union's motion to dismiss the complaint.

[53] First, was the complaint out of time?

[54] Second, and if not, should the complaint be dismissed on a summary basis?

A. Was the complaint out of time?

[55] It is clear that a complaint under s. 190(1)(g) of the *Act* must be made within 90 days of when the complainant knew, or in the Board's opinion ought to have known, of the alleged breach of a union's duty of fair representation; see *Crête*, at paras. 24 to 26.

[56] What then was the union's conduct that the complainant claimed was arbitrary, discriminatory, or in bad faith? It comes down to an allegation that the union was under a duty to tell him that there was a third level in the grievance process.

[57] The complainant stated a number of times that Mr. Leclaire told him verbally that there were only two levels in the grievance process. Mr. Leclaire denied this allegation after the dispute arose, but I was not persuaded in any event that it was or would ever be safe to accept the complainant's statement at face value. There are several reasons for this conclusion.

[58] First and foremost, what contemporary documentary evidence there is does not support that allegation. The union's email to him of March 3, 2021, does not state that there are only two levels in the grievance process. Instead, it states that the union has reached the following decision: "… **to continue to support the grievance** would not benefit our members or the application of our collective agreement" [emphasis added]. The emphasized words do not suggest that the grievance process has come to an end. Rather, they suggest that it remains in place but that the union is no longer prepared to support it.

[59] Second is the fact that in its second-level response of February 26, 2021, the employer made it quite clear that another level in the grievance process was available to him, as follows: “Please note that if the decision is not satisfactory to you, you may elevate your grievance at [*sic*] the next level in the grievance procedure within ten (10) days after receiving this response.”

[60] Third, the complainant’s statement that Mr. Leclaire had told him that there were only two levels in the grievance process was first made more than a year later and only after he had learned that his human rights complaint would fail because he had not pursued all three levels of the grievance process. In other words, what he said he remembered was first expressed more than a year after it was supposedly said, is not supported by the contemporary documentation, and was made when he was upset after learning of the cause of his human rights complaint’s lack of success.

[61] Finally, the complainant’s insistence that he did not know about the existence of a third level is belied by the collective agreement’s provisions, which make it clear (in clause 11.11) that a grievance (other than a termination grievance) was processed in three steps. (Clause 11.12 makes it clear that termination grievances were an exception and were presented only at the final level.) The complainant, on the strength of his written correspondence and submissions, is clearly a highly intelligent person who is, moreover, quick to insist strongly on his rights. He offered no explanation for why he did not then raise the issue with Mr. Leclaire.

[62] These facts lead me to conclude that the complainant knew, or ought to have known, the following as of March 3, 2021:

1. he had a right to pursue his grievance to the third level; and
2. the union, for whatever reason, denied that right or, at the least, refused to support the assertion of that right.

[63] That being the case, I am satisfied that the complaint is out of time.

[64] If I am wrong in that conclusion, I turn to the second issue — whether the complaint should be dismissed on its merits summarily.

B. Should the complaint be dismissed summarily?

[65] Before me is a complaint that the union breached its duty of fair representation to the complainant. The union made a motion to dismiss the complaint on a summary basis. Thus, these three issues arise:

1. What is necessary to establish a breach of the duty of fair representation?
2. How should the union's motion be addressed?
3. Did the complainant establish an arguable case of such a breach?

1. The duty of fair representation

[66] First, a union must exercise its duty of fair representation in good faith, objectively and honestly, and only after thoroughly considering a grievance while taking into account the employee's interests on one hand and its and those of its membership on the other. It must not act in an arbitrary, discriminatory, capricious, or wrongful manner and must act without serious negligence or hostility toward the employee; see *Canadian Merchant Service Guild v. Gagnon*, 1984 CanLII 18 (SCC) at 526; and *McRaeJackson*.

[67] What does "arbitrary" mean? *The Canadian Oxford Dictionary* (1998) defines "arbitrary" as follows: "**1** based on the unrestricted will of a person, not according to a scheme or plan; capricious. **2** established at random. **3** despotic."

[68] A union that conducts a grievance in a perfunctory fashion, merely going through the motions simply to preserve appearances, is acting in an arbitrary fashion; see *Gagnon*, at 526. The British Columbia Labour Relations Board commented that "… a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter." It went on, stating, "Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations." The Supreme Court of Canada adopted those comments in *Gagnon*, at 520, in its discussion of a union's duty of fair representation; see also *Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70 at para. 43. As long as a union does not conduct its preparation for a grievance in a perfunctory or cursory fashion, and as long as it has gathered sufficient (not all) information necessary to arrive at a sound (not perfect) decision, then its duty of fair representation is satisfied; see *Cadieux v. Amalgamated Transit Union, Local 1415*, 2014 FCA 61 at paras. 30 to 33.

[69] Second, and flowing from the first, the assessment of whether a union acted in an arbitrary fashion does not involve armchair quarterbacking. It does not involve second-guessing the decisions that the union made when processing a grievance. As a general rule, the question of whether, in retrospect, the union was right or wrong in its assessment of a grievance's merits is irrelevant; see, for example, *Vilven v. Air Canada Pilots Association*, 2011 CIRB 587 at para. 36. All that matters is whether the union acted reasonably when it made its decisions.

2. How should the motion be assessed?

[70] The complainant alleged that the union breached its duty of fair representation. The union sought an order summarily dismissing the complaint on the grounds that it did not disclose an arguable case on the merits. Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *FPSLREBA*") empowers the Board to decide "… any matter before it without holding an oral hearing:" *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 at para. 3; aff'd *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159 at para. 10. The onus on the complainant on such a motion is, at the very least, to present factually supported allegations that if proven could establish that the union failed its duty of fair representation: see *Holowaty v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 44 at para. 13.

[71] Indeed, in my view the Board's jurisdiction under s. 22 is not limited to deciding whether a party has an arguable case. It also includes the ability to decide such a motion on the merits, at least where there is sufficient uncontested material to permit it to reach an appropriate decision. Procedural fairness and natural justice do not require that every dispute be decided by way of a full hearing with *viva voce* evidence and cross-examination. Procedural fairness may be satisfied so long as the parties are provided with an opportunity to know the case they have to meet, and a chance to make their own case: see generally *McRaeJackson*, at paras. 1, 2, 13 and 50; *Sganos*, at paras. 71 to 73; and *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers*, 2007 CanLII 65617 (ON SCDC).

[72] There is nothing procedurally unfair about such an approach. The Board receives hundreds if not thousands of grievances each year that range in importance from terminations at one end to disputes over travel allowances at the other. Some grievors are represented by experienced union representatives or lawyers and others

are self-represented. If the Board is not to be overwhelmed — and if grievances are to handled expeditiously — some onus must be placed on complainants to provide some support for their allegations. It is not enough, in other words, to allege facts (without support) that if true would give rise to an arguable case. To conclude otherwise would mean that securing a full Board hearing would require no more than bald allegations of discrimination, bad faith, or arbitrary conduct. That would be unfair to those with substantive grounds for complaint since their right to expedition would be frustrated by ultimately ungrounded complaints that would absorb the Board's time and resources. Nor is it unfair to expect complainants (represented or not) to be able to provide such evidence since, after all, they are usually in the best position to lay out the evidence that supports the facts they would seek to prove if the matter went to a full hearing.

[73] Meeting that onus will also be relatively easy. The almost universal use of texts, emails, and social media platforms means that there is generally a wealth of contemporary documentation of the facts, events, opinions, and statements of the parties involved. Such evidence is direct evidence of what the parties thought, said, and did at the relevant time. It may not be sworn evidence, but it can be and often is accepted by courts as well as administrative tribunals. And if such evidence would be used and relied upon at a full hearing, there is no reason that the Board cannot use it on a motion for summary dismissal, particularly given the Board's jurisdiction pursuant to s. 20(e) of the *FPSLREBA* to accept any evidence, whether admissible in a court of law or not.

[74] With that in mind, and at least in a complaint that a union has breached its duty of fair representation, the Board has accepted the process that the Canada Industrial Relations Board adopted to deal with such complaints. Once the respondent challenges the merits of the complaint, the onus shifts to the complainant to present at least some of the factual evidence upon which he or she relies for the complaint. When such evidence, if accepted, could support the allegations made, then it would be appropriate to deny a motion to dismiss the complaint. But absent such evidence — or if the evidence offered falls short of supporting the allegation — the complaint must be dismissed; see *McRaeJackson*, at paras. 1, 2, 13, and 50; and *Sganos*, at paras. 71 to 73.

3. Did the complainant establish an arguable case?

[75] The complainant's argument came down to these five points:

1. that the union misled him in its email to him of March 3, 2021, into thinking that there were only two levels in the grievance process, as opposed to three;
2. that as a result, he did not pursue the grievance to the third level and instead made a complaint with the CHRC;
3. that because he failed to pursue his grievance to the final level, his complaint to the CHRC failed, which he discovered only on April 14, 2022;
4. that the union's refusal to represent him beyond the second level was the result of inadequate legal research or analysis and that in any event, as a union, it owed him the duty to pursue his termination grievance to the very end of the process; and
5. that the union's failure to advise him of his right to pursue his grievance to the third level was the result of, at best, gross incompetence or negligence and, at worst, discrimination against him.

[76] After considering the correspondence, statements, and submissions that the complainant relied upon, I was not persuaded that he made out an arguable case.

[77] First, the complainant's central focus, both in his termination grievance and in his complaint, was that the union failed to analyze his claim of family status discrimination correctly. That allegation would not in itself be sufficient. The union was not required to be correct in its analysis of the strength of his claim. All that was required of it was that it analyze the issue fairly, reasonably, and carefully. It is, in other words, entitled to be wrong as long as it meets those requirements.

[78] Having said that, the evidence that the complainant relied upon suggests that the union was in fact correct in its analysis of the weakness of his case. To establish a *prima facie* case of family status discrimination, a claimant must establish these four things:

1. a family member is under his or her care and supervision;
2. the family obligation at issue engages the claimant's legal responsibility for the family member as opposed to a personal choice;
3. the claimant has made reasonable efforts to meet the family obligation through another solution, and no alternate solution to granting the requested accommodation is available; and
4. the workplace rule at issue interferes in a manner that is more than trivial or insubstantial with fulfilling the family obligation; see *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; *Canadian National Railway Company v. Seeley*, 2014 FCA 111; and *Flatt v. Canada (Attorney General)*, 2015 FCA 250, (leave to appeal to the Supreme Court of Canada refused in [2016] C.S.C.R. No. 8 (QL)).

[79] But the complainant's examples provided to the union in November 2020 fell short of satisfying the second, third, or fourth of these requirements. There was nothing to suggest that his obligations to his children were not being met because of

the test requirements imposed on him by the course. Indeed, his argument was that he **was** meeting those requirements but that in doing so, his ability to perform on exams was, he alleged, adversely impacted. That, however, is not family status discrimination.

[80] Second, the email correspondence that the complainant relied on makes it clear that the union did act fairly and reasonably in its representation. It responded quickly to his initial complaint and concern. Once he raised the issue of family status discrimination, it made that argument to the employer. And having done so, it also came to a considered decision — which it explained to the complainant — that the claim was not sufficiently strong enough to warrant it acting further for him. Nor was the union required to cite chapter and verse — that is, to provide a detailed legal analysis — to explain or justify its decision, at least in a case where, as here, the decision fell within the accepted jurisprudence on the issue. None of this points to or supports, even on a *prima facie* basis, an allegation that the union breached its duty of fair representation.

[81] Third, and as to the allegation that the union misrepresented the complainant's right to a third-level grievance hearing, I have already concluded that he knew or ought to have known that there was in fact a third level open to him. Moreover, even assuming (without accepting) that he was misled would not meet the test. As I have already noted, a union is not required to be correct in its opinions or statements as long as they are not made in an arbitrary or discriminatory manner or in bad faith. That conclusion extends to a union's interpretation of the rights available to employees under a collective agreement. Nor is there anything in the material before me — other than a bald allegation — that the union intentionally misled or misrepresented the complainant's rights under the collective agreement.

VI. Conclusion

[82] For all these reasons, I am satisfied with respect to the following:

1. the complaint was filed out of time; and
2. it failed on the evidence to establish either a breach by the union of its duty of fair representation, or an arguable case for such a breach.

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

(The Order appears on the next page)

VII. Order

[84] The complaint in FPSLREB file no. 561-02-45141 is dismissed, and the file is ordered closed.

January 13, 2023.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board