Date: 20230222

File: 561-02-890

Citation: 2023 FPSLREB 21

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

MATT DAIGNEAULT

Complainant

and

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN (UCCO-SACC-CSN)

Respondent

Indexed as
Daigneault v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

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

Before: Caroline Engmann, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself, self-represented litigant

For the Respondent: Franco Fiori, counsel

Heard via videoconference,
March 21 to 23, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] The complainant, Matt Daigneault, made a complaint on December 21, 2017, against his bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent" or "union") in which he stated that it failed its duty of fair representation, contrary to s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] The complainant made two allegations that the bargaining agent acted in an arbitrary manner in relation to each of two grievances that the complainant had filed, one on September 19, 2016 ("grievance 58019"), and one on September 25, 2017 ("grievance 61347"). The bargaining agent denied that it acted arbitrarily in processing his grievances. It also claimed that the Federal Public Sector Labour Relations and Employment Board ("the Board") has no jurisdiction over the complaint because it is untimely.

[3] At all relevant times, the complainant was employed as a correctional officer at the Warkworth Institution ("the WI" or "the Institution") in Ontario. He began his opening statement with the well-known adage that "justice delayed is justice denied". According to him, this is what his complaint is about. He was concerned about delays in processing grievances through the internal grievance procedure. The bargaining agent and the Correctional Service of Canada ("the employer") had an agreement in place at the Institution to hold all grievances in abeyance at the second level of the internal grievance procedure until hearings were scheduled ("the second-level abeyance agreement"). According to the complainant, it resulted in grievances expiring or undue delays moving them forward to adjudication, thus denying justice to him and other grievors.

[4] True as the adage may be, unfortunately, I find that it does not apply in this case. The evidence clearly demonstrated the complainant's frustration with the bargaining agent and the employer at the Institution. He perceived that the bargaining agent's regional executive was in cahoots with local management, which led to certain managerial decisions that were detrimental to correctional officers' health and safety. He was particularly concerned about the second-level abeyance agreement. According

to him, such agreements result in grievance timelines expiring and in grievances being dismissed as abandoned.

[5] Based on the evidence presented, I find that the complaint as it relates to grievance 58019 is untimely while it is timely as it pertains to grievance 61347. The evidence further demonstrated that the bargaining agent processed and advanced the two grievances appropriately and that there was no arbitrariness or bad faith in its dealings with the complainant with respect to processing both grievances. Therefore, I dismiss the complaint.

[6] The grievances underlying this complaint are about harassment, which would normally not be referable to adjudication; however, this does not mean that they should not be processed in a timely manner.

[7] I empathize with the complainant with respect to his concerns about delays in the internal processing of grievances, particularly those that are potentially not adjudicable. The only way grievors in the complainant's situation could receive closure to alleged harassment would be through an expeditious processing of their grievances, leading to potential judicial review applications for those grievances that are unsuccessful under the employer's harassment policy. Holding such grievances in abeyance at the second level without any investigation could allow an untenable situation to fester, with potential dire consequences for grievors.

[8] I was informed at the hearing that the current interactions between the bargaining agent and the complainant are cordial. I take comfort in that assurance and urge the parties to carry on in this new-found collaborative spirit.

II. Summary of the evidence

A. For the complainant

[9] The complainant testified on his own behalf and called Robert Essex and Tyler McMurray to testify.

[10] Mr. Essex was, at all relevant times, the local union president at the Institution and had held that post for a total of about 8½ years. At the local level, it was felt that the regional union executive did not always advance the local union's interests to the point that it was generally perceived that the regional executive undermined the local union's efforts. As a result of the regional executive's lack of support, several

correctional officers went on leave due to post-traumatic stress disorder (PTSD). The high number of officers on PTSD leave was a direct result of management's poor decisions with respect to the officers' health and safety and inmate activity. Management's decisions tended to make the officers' job more hazardous than it ought to have been, and the lack of support or action from the regional and national bargaining agent executive served to exacerbate the situation at the Institution.

[11] The complainant's concerns were brought to the employer's attention, as a result of which a workplace assessment was conducted at the Institution. In his role as the local union president, Mr. Essex was supportive of the complainant and did everything he could to advance the complainant's concerns.

[12] As a result of harassment issues that the complainant raised, he became a target and had strained relationships with certain managers at the Institution.

[13] Mr. Essex testified that he was asked to convince the complainant to withdraw his grievances. He confirmed in cross-examination that the regional union representatives asked him to do it.

[14] Mr. Essex believed that the union's grievance coordinator, Karrie Ann Lake (also known as Karrie Ruttan), did everything that was required when she handled the complainant's grievances. He denied that the second-level abeyance agreement was a management plot to let grievances expire; nor did he find anything wrong with how Ms. Lake handled grievances.

[15] In his capacity as the local president, he also did everything he could on the complainant's behalf. The complainant had been an elected official, a grievance coordinator, at the former Kingston Penitentiary in Kingston, Ontario. When he arrived at the WI, he unsuccessfully ran for office three times against Ms. Lake for the grievance coordinator position.

[16] Mr. McMurray started as a shop steward, became a local vice president, and then acted as the union's local president. He is currently not part of the bargaining agent as he is in an acting manager position at the Institution. He testified that he did not have any involvement in processing the complainant's grievances.

[17] In cross-examination, Mr. McMurray was asked to evaluate Ms. Lake's performance as the local grievance coordinator and as to how she handled the

complainant's grievances. He stated that while he could not specifically comment on the complainant's grievances, based on his knowledge of Ms. Lake's work, he was certain that she performed her duties professionally and competently. He knew her as a very serious professional with "top-notch" performance.

[18] The complainant testified that he was the grievance coordinator at Kingston Penitentiary and that he had first-hand knowledge and experience that management would often put grievances on hold. He did enter into similar second-level abeyance agreements with the employer in the past but on an individual grievance basis, not on a blanket basis over all grievances. The employer always wanted to put grievances in abeyance, and in his grievance coordinator experience, his insistence that grievances be moved forward in the procedure caused some anger with management. He was unfamiliar with a blanket second-level abeyance agreement applicable to all grievances. He generally understood that the purpose of placing a grievance in abeyance was to allow the parties the opportunity and time to carry out investigations, and he had no issues with that approach, in principle. His main concern was with respect to the automatic and blanket placing of grievances in abeyance without regard to their subject matter.

[19] When he arrived at the WI in 2011, he was no longer the grievance coordinator, and he was not an executive on the local union. He testified that the WI is isolated from the Kingston area. The timeline of his claims goes back 10 years. He does not remember receiving any invitations to a grievance hearing. He testified that Robert Finucan, Regional President for the bargaining agent, once asked him to list all his issues for a meeting, which he did. He heard nothing after that.

[20] Most of his grievances are about harassment. He files a grievance each time management harasses him. He entered into evidence a list of all his grievances. Two are the heart of his complaint: grievance 58019 (filed in September 2016), and grievance 61347 (filed in September 2017). His union representative encouraged him to mediate those grievances with the employer, but he had no interest in doing so.

[21] In cross-examination, he was asked why it took him eight months from March 24, 2017, when he threatened to make a complaint with the Canada Industrial Relations Board (CIRB), to December 2017 to make this complaint. He was unable to provide any clarity on the delay.

[22] The evidence showed that in March 2018, the bargaining agent referred two harassment grievances to adjudication, including grievance 61347.

B. For the bargaining agent

[23] The bargaining agent called Ms. Lake and Mr. Finucan to testify. A will-say statement from Sheryl Ferguson was also submitted; at the relevant time, she was the union advisor for the Ontario region.

[24] Ms. Lake testified that she is a full-time correctional officer at the WI. She became the local grievance coordinator in December 2009. The complainant chose not to have any verbal communications with her; rather, he simply dropped off papers for her in a mailbox. They competed in the local union elections in 2015 and 2018 for the grievance coordinator position, and she prevailed both times. She confirmed that the complainant has a list of grievances that have been processed internally. Some of his grievances were successful, while the employer dismissed others. She has never refused to file a grievance on his behalf.

[25] She encountered challenges receiving mandates from the complainant to process his grievances. He did not always provide the information necessary to process his grievances. She explained that at the local level, she could not withdraw a grievance; any such decision had to be processed at the bargaining agent's regional and national levels. She has personally never withdrawn any grievance.

[26] A second-level abeyance agreement, signed on September 19, 2016, was entered into evidence. It applied to all grievances filed on or after that date. In essence, the parties agreed that all existing and future second-level grievances would be held in abeyance until they could be heard at the next scheduled grievance-committee meeting. Under the agreement, either party could provide a written notification to withdraw any grievance from abeyance. Finally, either party could terminate the agreement upon written notification.

[27] Ms. Lake explained that the blanket second-level abeyance agreement was important in the context of their work environment because correctional officers are shift workers, and in that context, an agreement that any grievance at the second level will be held in abeyance ensures that the timelines will not expire and that the

employer will not deem grievances abandoned. According to her, such agreements exist at the local level in most of the employer's institutions.

[28] The complainant's harassment grievances were held in abeyance at the second level until a decision was rendered with respect to the corresponding harassment complaints. As for the grievances subject to this complaint, as soon as he withdrew the corresponding harassment complaints, the grievances were removed from abeyance and were processed. The bargaining agent never abandoned him but rather continued to represent him.

[29] She felt humiliated by the complainant when he sent an email accusing her of "working with management to ignore grievances".

[30] With respect to grievance 58019, in March 2017, Ms. Lake explained to the complainant that the time limit had not expired and that it was placed in abeyance pending the outcome of the harassment investigation. She also mentioned to him that the employer was waiting for him to provide further information. She then stated that were the harassment file closed, she could remove the grievance from abeyance and proceed to the next level. He was apparently dissatisfied with her explanation and informed her that he would make a complaint against the bargaining agent with the CIRB.

[31] On cross-examination, Ms. Lake confirmed that she had never withdrawn any grievance on the complainant's behalf. She was disappointed when the employer dismissed his grievance. She confirmed that a fairly large number of correctional officers were on PTSD leave.

[32] Mr. Finucan is the bargaining agent's regional president in Ontario. He has been a correctional officer for 35 years and has been the regional president for the past 9 years. He has always been active in the bargaining agent as a founding member; he has never attempted to become a correctional manager. As the Ontario region regional president, he has regular meetings with the regional deputy commissioner. He also sits on several national committees. There are 10 penitentiaries in the Ontario region where about 1200 of the bargaining agent's members are employed.

[33] He explained that a grievance cannot be withdrawn at the local level without concurrence from both the regional and national offices. In his nine years as the

regional president, it has occurred only three or four times. The bargaining agent has unilaterally withdrawn none of the complainant's grievances.

[34] He has had quite a few exchanges with the complainant, and he was aware that the complainant did not have a good relationship with some members of the Institution's management team. The complainant has the perception that management is out to get him. According to Mr. Finucan, the complainant has, comparatively speaking, filed more grievances than does the average member.

[35] Mr. Finucan acknowledged that many correctional officers were on PTSD leave, but contrary to the complainant's view, it is not linked to the existence or the operation of second-level abeyance agreements.

[36] Ms. Ferguson submitted a will-say statement. In her union advisor role, she operated as a neutral party. If there was reason to believe that Ms. Lake was intentionally allowing grievances to expire, the union advisor would have been called in immediately to address the situation, but it never happened during her tenure in Ontario.

[37] She knew the complainant and had worked with him on different files in the past. Her view was that the union had always supported him in the processing of his grievances. She was also aware that he was growing increasingly frustrated with the process, which he once described as a "kangaroo court", and that he had complained that he was not being treated fairly.

[38] According to Ms. Ferguson, Ms. Lake worked extremely hard and was dedicated to representing the members' interests in their grievances and complaints. It was also often difficult to acquire the complainant's documents or even his signature on transmittal forms. He would drop things off at the very last minute.

III. Summary of the arguments

[39] The complainant relied on the following decisions: *Edmunds v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 28; *Lemoire v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 45; *St-Laurent v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 4; and *Weinstein v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 100.

[40] The complainant believes that Ms. Lake colluded with management, to let his grievances expire. He felt coerced to mediate with the employer. The bargaining agent behaved in an arbitrary manner to delay the processing of his grievances. Based on his grievance coordinator experience, he knew about the timelines and about submitting documents; therefore there would have been no reason for him not to provide documents on time. He persistently inquired about his grievances.

[41] The complainant referred to *Edmunds*, at para. 20, and argued that it was evident that the union representative in that case made a mistake (the representative was Ms. Ferguson). He also referred to *St-Laurent* to argue that the union's mistakes or errors could lead to grievances being dismissed.

[42] He made no reference to the two other decisions that he submitted.

[43] I asked him to clarify the basis for his allegation, whether he was relying on arbitrariness, bad faith, or both, and to address the applicable legal test.

[44] He argued that based on the evidence, he believed that he had met the test on both bases. He expressed surprise that he had finally had his day in court with respect to the complaint against the union. He had inquired into the status of his grievances numerous times and had received no updates; therefore, he had to go to extreme lengths, including making an access-to-information request with the employer to receive any information. The employer refused to deal directly with him because he had a union representative, yet he received no update from that person. The warden, Larry Ringler, never provided him a copy of the second-level abeyance agreement. All along, he was asking only two questions: 1) whether he could receive a copy of the agreement, and 2) whether his grievances had expired. He was unable to receive any clear responses to them from his union representative.

[45] The bargaining agent relied on the following decisions: *Abeysuriya v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 26; *Bergeron v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2021 FPSLREB 71; *Leach v. Public Service Alliance of Canada*, 2020 FPSLREB 101; *Martel v. Public Service Alliance of Canada*, 2008 PSLRB 19; *Cuming v. Butcher*, 2008 PSLRB 76; *Shutiak v. Public Service Alliance of Canada*, 2009 PSLRB 29; *Psyllias v. Meunier-McKay and Canada Employment and Immigration Union*, 2009 PSLRB 67; *Myles v. Professional Institute of the Public Service of Canada*, 2017 FPSLREB 30; *Noël v.*

Société d'énergie de la Baie James, 2001 SCC 39; *Presseault*, 2001 CIRB 138 (CanLII); *McRaeJackson*, 2004 CIRB 290 (CanLII); *Renaud v. Canadian Association of Professional Employees*, 2010 PSLRB 118; *Jean-Pierre v. Arcand*, 2012 PSLRB 23; *Burchill v. Attorney General of Canada*, [1981] 1 FC 109 (C.A.); *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509; *Chen v. Ouellet*, 2014 PSLRB 56; *Daigneault v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 38; *Lafrance v. Treasury Board (Statistics Canada)*, 2006 PSLRB 56; *Lemoire*; *McWilliams v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 58; *Negi v. Public Service Alliance of Canada*, 2021 FPSLREB 98; *Pannu v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 4; and *Sidhu v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 76.

[46] With respect to timeliness, s. 190(2) of the *Act* is mandatory: the Board has no jurisdiction if the 90-day deadline is not adhered to. In this case, the complaint is untimely and must be dismissed on that basis. With respect to that portion of the complaint based on grievance 58019, the complainant became aware in March 2017 of the basis for the complaint, and he admittedly indicated at that time that he would make a complaint with the CIRB. Even if one were to accept the complainant's response to question 5 on the Form 16, which was that he became aware of the events leading to the complaint on September 4, 2017, he is still out of time, since he made the complaint on December 21, 2017.

[47] The second part of the complaint, with respect to grievance 61347, is similarly untimely. In essence, the basis for the complaint is that the complainant believed that his grievances were held in abeyance and that the bargaining agent left them to expire. He formed this belief in March 2017; therefore, nothing changed between then and December 21, 2017, when he eventually made the complaint with the Board. In any event, the evidence shows that this grievance was referred to adjudication. Therefore, this portion of the complaint is moot.

[48] The bargaining agent argued in the alternative that the complainant did not meet his burden of establishing that it behaved in an arbitrary manner or in bad faith toward him in handling his grievances.

[49] The bargaining agent argued that the complainant's version of events was just not credible and that he consistently failed to collaborate with his bargaining agent steward in the processing of his grievances. He failed to provide any shred of evidence

to support the very serious allegation of collusion with the employer. Citing the Board's decision in *Negi*, the respondent argued that the complainant might have a "strongly held … belief" that union executives were colluding with the employer; however, this allegation and belief "lack any sense of reality" (see *Negi*, paras. 25 and 26).

[50] The complainant failed to meet his burden of proof; therefore, the complaint must be dismissed.

IV. Issues

[51] I must determine two issues, namely, 1) whether the complaint is timely, and 2) whether the bargaining agent acted in bad faith or in an arbitrary manner when it processed and handled the complainant's grievances.

V. Reasons

A. The scheme of the *Act*

[52] The relevant statutory provisions are found at ss. 185, 187, and 190(1)(g) and (2) of the *Act*, which read as follows:

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.*
…	[…]
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.*
(2) *Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not 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.*	***(2)*** *Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.*

[Emphasis in the original]

[53] Section 187 encapsulates what is commonly referred to as a bargaining agent's duty of fair representation. It is one of the fundamental principles found in most labour relations statutes across Canada, and it is the corollary to the exclusive right granted to a bargaining agent to represent or act as the agent for all employees in an identified bargaining unit in dealings with the employer. The Supreme Court of Canada described the legal landscape of a union's representational obligations in *Bernard v. Canada (Attorney General)*, 2014 SCC 13, as follows:

> …
>
> *[21] It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise.* ***A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union has the*** **exclusive** ***right to bargain on behalf of*** **all** ***employees in a given bargaining unit****, including Rand employees.* ***The union is the exclusive agent for those employees with respect to their rights under the collective agreement****. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee,* ***he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.***
>
> *[22]* ***The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith.***
>
> [Emphasis added]

[54] In *Gagnon*, the Supreme Court of Canada outlined five principles relating to a union's duty of fair representation, as follows:

> 1) The exclusive right of a bargaining agent to act as the spokesperson for employees in a bargaining unit entails a corresponding obligation on the bargaining agent to fairly represent all employees comprised in the unit.
> 2) Generally, employees represented by a bargaining agent do not have an absolute right to refer a grievance to adjudication, as the bargaining agent has considerable discretion deciding which grievances to refer to adjudication.
> 3) The bargaining agent must exercise this discretion in good faith, objectively and honestly, after thoroughly considering the grievance, taking into account the significance of the grievance and its consequences for the employee on one hand and its legitimate interests on the other.
> 4) The bargaining agent's decision must not be arbitrary, discriminatory, capricious, or wrongful.
> 5) The bargaining agent must act fairly, genuinely, and competently and without serious or major negligence or hostility toward the employee.

B. Arbitrariness

[55] In *Noël*, the Supreme Court of Canada, describing the notion of arbitrariness in the context of a union's duty of fair representation, stated as follows:

> *[50] The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.…*

[56] When reviewing the quality of bargaining agent representation, the factors that must be taken into account include the interests of the bargaining unit as a whole and the bargaining agent's resources. In *Rayonier Canada (B.C.) Ltd. v. International Woodworkers Of America, Local 1-217*, [1975] 2 Can. L.R.B.R. 196, the British Columbia Labour Relations Board (BCLRB) explained the notion of arbitrariness in terms of the union acting in a "perfunctory" manner. The union is required to take a reasonable view of the problem and to reach a thoughtful decision or conclusion. The notion of arbitrariness received further elaboration in *Judd v. Communications, Energy and*

Paperworkers' Union of Canada, Local 2000 (2003), 91 C.L.R.B.R. (2d) 33, in which the BCLRB identified three elements of arbitrariness as follows at paragraph 61:

> 1) the union must be aware of the relevant information;
> 2) it must make a reasoned decision; and
> 3) there must be an absence of "blatant or reckless disregard."

[57] In *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70, a predecessor to the Board stated as follows:

> …
>
> *[133] The concept of "arbitrariness" is one of the most difficult to define and often appears to overlap with that of "negligence". In* Re City of Winnipeg and Canadian Union of Public Employees, Local 500*, 4 L.A.C. (4th) 102, the arbitrator summarized alternative definitions of "arbitrariness" found both in doctrine and jurisprudence to include:*
>
> …
>
> …"… capricious"; "… without reason"; "… at whim"; "… perfunctory"; "… demonstrate a failure to put one's mind to the issue and engage in a process of rational decision-making [*sic*]"… or a failure "… to take a reasonable view of the problem and arrive at a thoughtful judgment about what to do after considering the various relevant conflicting consideration [*sic*]"….
>
> …

[58] In *Presseault*, the CIRB explained arbitrariness as follows: "Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its member have a factual or legal basis. …"

[59] In *Jean-Pierre v. Arcand*, 2012 PSLRB 23, a predecessor to this Board explained that "the bar for establishing arbitrary conduct … is purposely set quite high" and that a complainant must adduce "independence evidence" to support their complaint. Based on the jurisprudence, I gather that in assessing arbitrariness for the purpose of section 187 of the *Act*, each specific circumstance must be examined by the Board in its proper and appropriate context based on the evidence adduced. A catalogue of questions to aid in the exercise is as follows:

> 1) was the union's treatment of the employee's grievance or complaint superficial or perfunctory?

2) Was the union careless in its consideration of the grievance or complaint?
3) Did the union investigate the grievance or complaint independently?
4) Did the union ascertain, review and assess the relevant facts?
5) Did the union seek out relevant advice and/or guidance?
6) Were the union's actions reasonable based on the circumstances.

[60] When assessing the nature of the allegations, the Board's role is not to sit in judgement or appeal of the bargaining agent's decision to determine whether it made the right or wrong decision in the circumstances. Rather, the Board must assess that decision against the hallmarks of objectivity, honesty, genuineness, integrity, competence, and absence of discrimination or hostility. The Board put forward the nature of this exercise aptly in *Fortin v. Public Service Alliance of Canada*, 2022 FPSLREB 67, in which it stated as follows:

> …
>
> *[32] The goal of the Board's review is not to determine whether the respondent was right or wrong when it decided not to challenge the Policy. The review must be about the issue of whether the respondent made the decision without discrimination, objectively and honestly, and after a thorough review of the case, the issues, and its interests and those of its members. The Board must also review the representation that the complainant was offered; that is, whether it was genuine and undertaken with integrity and competence and without hostility (see* Canadian Merchant Service Guild*).*
>
> …

C. Bad faith

[61] Bad faith in this context implies deliberate and oppressive conduct and behaviour on the part of the bargaining agent, such as proven collusion between the employer and bargaining agent. As the Supreme Court of Canada noted in *Noël*, at para. 48, acting in bad faith "… presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct …".

[62] In *Princesdomu v. Canadian Union of Public Employees, Local 1000*, [1975] O.L.R.B. Rep. 444, the Ontario Labour Relations Board explained the concepts of bad faith and discrimination as follows:

> …
>
> *[24] Bad faith and discrimination are not being alleged in the facts at hand but their meaning is well worth a brief examination… The*

> *prohibition against bad faith and discrimination describe conduct in a subjective sense — that an employee ought not to be the victim of the ill-will [sic] or hostility of trade union officials … Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent.…*
>
> …

[63] Concluding that there was bad faith requires cogent and reliable evidence to satisfy the Board that there was personal hostility, dishonesty, or ill will toward the complainant. In the absence of direct evidence, the complainant must adduce sufficient evidence from which the decision maker can infer the elements of bad faith (see *Negi*, at para. 35).

D. Timeliness

[64] It is trite law that the statutory bar in s. 190(2) is mandatory. If I find that the events underlying the complaint occurred outside the 90-day period, the Board has no jurisdiction to inquire into it. I will address the bargaining agent's timeliness objection by referring to the events relating to the two grievances underlying the complaint.

1. Grievance 58019

[65] This grievance was filed or presented at the first level on September 20, 2016, and states: "I grieve the harassment imposed upon me by Scott Thompson and possible others at Regional Headquarters and their influence on supervisors and management at Warkworth Institution". Ms. Lake transmitted it to the employer on the same day, and she explained to the complainant that since the grievance dealt with harassment and not discipline or a violation of the relevant collective agreement, it could not be referred to adjudication. She mentioned that the harassment complaint process would be a more appropriate pathway for him to achieve his desired corrective action.

[66] It appears that a parallel harassment complaint was made. On October 6, 2016, Johanna Eberle, Acting Labour Relations Advisor, emailed Ms. Lake and the

complainant and asked if they would agree to place the grievance in abeyance until the delegated authority had assessed the harassment allegations. There does not appear to have been a response because on October 27, 2016, Ms. Eberle emailed the complainant and Ms. Lake again. She indicated that she had not received a response and that she wanted to know if they agreed with placing the grievance in abeyance. Ms. Lake responded on October 27, 2016, asking for the time frame for the abeyance and asking the complainant for his wishes with respect to the employer's request.

[67] On October 28, 2016, Ms. Eberle responded as follows:

> …
>
> *It is my understanding that Mr. Daigneault was requested to provide additional information in regards to his harassment complaint.*
> *The request is to put this grievance in abeyance from the date it was presented until a letter of decision is provided to indicate if the harassment allegations are founded. Please advise if you are in agreement.*
>
> …

[68] It would appear that the complainant did not directly respond to Ms. Eberle's email; however, on November 13, 2016, he sent a lengthy email to Don Head, Commissioner of the Correctional Service of Canada, copying Ms. Eberle and others, the subject line stating that he was "… withdrawing [his] complaint because of ongoing targeting by other management since [he] filed [his] complaint". It does not appear that anyone from the union was copied on this email.

[69] On November 23, 2016, Ms. Eberle emailed Ms. Lake to confirm a grievance meeting during which Ms. Lake agreed to put grievance 58019 in abeyance while the regional deputy commissioner reviewed the complainant's harassment complaint.

[70] There seems to have been a disconnect in communication because it appears that the complainant communicated the withdrawal of his harassment complaint on November 13, 2016, but it is unclear whether the employer confirmed that withdrawal. It is clear from the documentation that grievance 58019 was placed in abeyance.

[71] In an email dated March 3, 2017, from Joel Bruce, Acting Labour Relations Advisor for the employer, to Ms. Lake and Mr. Ringler (the warden), the following is noted: "Daigneault, M. - 58019 – UCCO to consult with status update".

[72] On March 17, 2017, the complainant emailed Kaitlynn Colasante (a human resources assistant generalist) as follows:

> …
>
> *… Re: Grievance 58019, M. Daigneault, Presentation*
>
> *Kaitlynn*
>
> *I found the number for this. Can you tell me if it has been withdrawn by my union.* ***I'm currently filing a complaint with the CIRB against my union for not moving forward with this***
>
> *Thanks*
>
> *Matt*
>
> [Emphasis added]

[73] On March 20, 2017, the following exchange took place between the complainant and Mr. Bruce:

> [From Mr. Bruce to the complainant:]
>
> …
>
> *At the last 3 UCCO Grievance Committee meetings it has been advised that UCCO has requested an update from you regarding how to proceed with the file. As such the grievance is not withdrawn though it would be deemed untimely going forward given the significant lapse in progression.*
>
> [From the complainant to Mr. Bruce:]
>
> …
>
> *My union was told to move forward. They did not. They also did not make that request.* ***I'll proceed with the complaint now that I am aware of this****.*
>
> …
>
> [Emphasis added]

[74] In March 2017, the following exchange took place between the complainant and Ms. Lake about grievance 58019:

> [Email dated March 23, 2017, from the complainant to Ms. Lake:]
>
> *Karrie*
>
> *Has this harassment grievance been left to expire time limits [sic]?*
>
> …

> [Email dated March 24, 2017, from Ms. Lake to the complainant:]
>
> *No it has not! It was placed abeyance awaiting the outcome of your harassment complaint investigation. It is my understanding that they were waiting for you to send them more information. If this file has been closed then I can remove this from abeyance and proceed to the next level.*
>
> …
>
> [Email dated March 27, 2017, from the complainant to Ms. Lake:]
>
> *Well you might want to go over this with Joel Bruce then because he has a different take on it.*
>
> ***I'm filing a complaint with the CIRB on this.***
>
> …
>
> [Emphasis added]

[75] It is clear that as of March 27, 2017, the complainant was aware of the events underlying his complaint with respect to grievance 58019. He even stated that he would make a complaint against his bargaining agent. He did not make the complaint until December 21, 2017. I find that this portion of the complaint is untimely and that it must be dismissed.

2. Grievance 61347

[76] This grievance was filed and presented at the first level of the internal grievance procedure on September 25, 2017, and states as follows: "I grieve the harassment imposed upon me by Tom Rittwage on or about Sept 11, 2017 and previous targeting by this same CM which is deemed to not fall under the harassment policy by both Regional Deputy Commissioner's [*sic*]".

[77] The grievance was transmitted to the second level on October 26, 2017, and was heard at that level on November 28, 2017. The employer issued the second-level reply on December 14, 2017, denying the grievance. The reply stated in part as follows:

> …
>
> *As a preliminary matter I must advise you that in accordance with Treasury Board policy the authority to make determinations regarding issues related to harassment are limited only to the delegated manager… For the Ontario Region the Regional Deputy Commissioner … is the delegated manager in responding to these matters… As a result, your grievance file has been referred to the Regional Harassment Prevention Coordinator, who will assist the*

> *RDC in making a determination regarding the merits of your complaint.*
>
> *Your grievance was not heard at first-level within the time-frames indicated by your Collective Agreement. It was then held in abayence until such a time that your union could arrange a time to meet with the second level responder. It was heard at the second-level on November 28, 2017. In attendance were Warden Larry Ringer, A/Labour Relations Advisor Allison Maxwell, UCCO Executive Karrie Lake-Ruttan and UCCO Executive Lee Fitzgibbon. At this hearing the events detailed in your grievance were discussed along with supporting written communication provided by yourself in your absence. It was agreed upon by all parties that any and all avenues of resolution and alternate avenues of recourse were open for exploration. This includes enlisting assistance from the Office of Conflict Management (OCM) who can act as mediators in resolving situations of personal conflict. I understand that you have been provided with the contact information for OCM and I encourage you to follow-up accordingly. In addition, I would like to provide the contact information for the Employee Assistance Program should you feel the need to make use of its services. The confidential, 24/7 contact number for EAP is 1-800-268-7708.*
>
> *In the absence of a letter of determination from the RDC regarding the merits of your harassment complaint, I am unable to determine if the provisions of your Collective Agreement have been contravened. As a result, I must deny your grievance at this time and refer you to the Regional Harassment Prevention Coordinator for further direction regarding the determination process. I would like to reiterate that your concerns have been noted and that the employer is willing to work with you in any way possible in a joint effort in restoring harmony to your workplace.*
>
> …
>
> [*Sic* throughout]

[78] The grievance was transmitted to the third level on December 13, 2017. It was confirmed during the hearing before me that it was referred to adjudication on March 21, 2018.

[79] To assess the timeliness of the complaint on the basis of this grievance, it is important to review the events and interactions that occurred in the 90-day period before the complaint was made, which started on September 23, 2017.

[80] Email communications between the employer's human resources advisors, the complainant, and his union representative reveal that the complainant was concerned

and preoccupied with possible delays processing the grievance. It is useful to outline what transpired in greater detail.

[81] As noted, the grievance was presented at the first level of the grievance procedure on September 25, 2017. By email dated September 26, 2017, the employer's Labour Relations department notified Correctional Manager Bruce McCallum that the grievance had been assigned to him for a response at the first level. Mr. McCallum was informed that a reply was due on October 10, 2017, in accordance with the provisions of the relevant collective agreement. The complainant was copied on this email.

[82] In an email dated October 15, 2017, from the complainant to the labour relations assistant and others, he stated as follows: "So as I understand it the time limits for the 2 grievances should be moved up to the second level now. What is the hold up?"

[83] The employer responded as follows:

> *Hello Matt,*
>
> *As per your collective agreement please see the below information regarding grievance procedures:*
>
> ***20.13** If the Employer does not reply within fifteen (15) days from the date that a grievance is presented at any level, except the final level, the grievor may within the next ten (10) days, submit the grievance at the next higher level of the grievance procedure.*
>
> *Thank you,*
>
> *-Allison*

[84] The complainant replied on October 18, 2017, as follows:

> *Hello*
>
> *As I've had this position before I know what the contract says.*
>
> *What I am asking is WAS THIS GRIEVANCE MOVED TO [sic] SECOND LEVEL?*
>
> *And if not is this grievance now considered beyond [sic] time limits by the employer?*
>
> *Thank you*
>
> *Matt Daigneault*

[85] The employer responded on October 18, 2017, as follows:

> *Hello Matt,*
> *What I intended to communicate with the highlighted portions of your CA below is that it is the griever's responsibility to move the grievance to the next level should they desire to do to. LR and management will not move the grievance to a different level without a signed transmittal.*
> *If you'd like to proceed to the second level, please communicate with your union representative who will be able to assist you in submitting this paperwork and we will process accordingly upon receipt.*
> *Thank you,*
> *-Allison*
>
> [*Sic* throughout]

[86] On October 19, 2017, the complainant responded (Ms. Lake was copied) as follows:

> *Hello*
>
> *Let me try this again.*
>
> *I've given my grievance Co-ordinator the transmittal slip.*
>
> *Has she not given you the transmittal and has the Grievance Time Limit [sic] expired?*
>
> *Does the employer now consider these grievances abandoned?*
>
> *You should be able to answer me this.*
>
> *Thank You*
>
> *Matt*

[87] Presumably, there was no response, because on October 23, 2017, the complainant sent another email asking for one. On October 24, 2017, the employer sent this email:

> *Karrie,*
> *Can you please follow up with Matt on the transmittal - we do not have it on our end.*
> *As for the grievance being abandoned - no, it would only be considered so if you submitted in writing this indication.*
> *-Allison*

[88] The complainant countered with an email on October 24, 2017, as follows:

> *Hello*
>
> *I feel like I'm asking the same question. You posted below 15 days. It is now well past that.*

> *So if this grievance actually made it to adjudication would the employer not say that time limits are expired? If not why are they not expired?*
>
> *Matt*

[89] The grievance was transmitted to the second level on October 26, 2017. The complainant asked that it be moved directly to the third level, but the employer refused.

[90] Ms. Lake emailed the complainant on November 2, 2017, explaining that she was away for three weeks and that upon her return, she was posted outside the Institution, with no access to her emails. She explained that she had requested and had been granted an extension on the time frames due to her absence. She also assured him that after the second-level meeting, she would transmit it to the third level.

[91] The complainant requested a copy of the second-level abeyance agreement. His frustration was captured in an email dated November 21, 2017, as follows:

> …
>
> *Grievances run on a time limit. Basically 15, 15 and 30 business days.*
>
> *My time limits for these grievances passed. So if there is no written agreement between Karrie and the LRA/Human Resources the lawyer at CSC will point this out at trial and the grievance is [sic] thrown out.…*
>
> …
>
> *So basically I would like to know if my union has not followed the time limits. If there is a written agreement then I would like a copy.…*
>
> …

[92] Ms. Lake responded on November 23, 2017, as follows:

> …
>
> *I have received your emails and I responded to you on the 2nd of November addressing your concerns with time lines and assured you that they are not untimely.* ***There has always been an MOU with management at each site regarding grievances and being held in abeyance****. I have found this beneficial for the all members. I have asked you to provide more information for your grievances as they are claiming harassment and this should be taken serious. I would like to present it to the warden appropriately to ensure that he has everything when responding to your grievances. To*

> *this date I have not received anything. I have a 2nd level meeting with Mr. Ringler next Tuesday the 28th when your grievance will be addressed.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

[93] The complainant responded on November 24, 2017, providing the information requested to Ms. Lake. In the same email, he requested a copy of the MOU for placing grievances in abeyance.

[94] It appears that the complainant did not receive a copy of the MOU because on December 9, 2017, he emailed Ms. Lake and others as follows:

> *Karrie*
>
> *Since your [sic] not answering me I am assuming my union is working with management to ignore incidents/grievances regarding this supervisor who has [sic] had yet another altercation with yet another CX yesterday.*
>
> *I will be proceeding with a complaint with the PSLRB against my union.*
>
> *Matt*

[95] As noted, the grievance was heard at the second level on November 28, 2017. Two union representatives were present, but the complainant did not attend. The second-level reply was issued on December 14, 2017, and the grievance was referred to adjudication on March 21, 2018.

[96] On the basis of the evidence presented, I find that the portion of the complaint dealing with the handling of grievance 61347 is timely. The allegation in the complaint about the second-level abeyance agreement and moving grievances forward in a timely manner occurred within the 90 days preceding the complaint.

E. The merits of the complaint

[97] Before analyzing the merits of the complaint as it relates to the handling and processing of grievance 61347, I will deal with the decisions that the complainant relied upon.

[98] The first is *Edmunds*, which involved an overtime grievance in which the grievors alleged that they were denied their equitable share of overtime allocation during a certain period. Before the hearing, the employer's counsel disclosed a list of its proposed witnesses to the grievor's representative, Ms. Ferguson. During the course of the hearing and after the grievors had closed their case, the employer decided not to call any witnesses. As a result, the grievors' representative made a motion to reopen its case, to call some of the witnesses on the employer's list. That motion was denied. Ultimately, the grievance was dismissed on the basis that the grievors failed to meet their burden of proof.

[99] I note that the bargaining agent did not seek judicial review of the former Board's decision. It is unclear to me why the complainant relied on that decision as it has no relevance to the issues in his complaint. While he failed to articulate the basis for bringing that decision to my attention, I can only surmise through some of his comments that he in essence argued that union representatives make mistakes and in *Edmunds*, Ms. Ferguson was the union representative. Even if that were his position, it would still not be relevant. I must add that I take a dim view of this underhanded attempt to attack Ms. Ferguson's competence.

[100] I note that Ms. Ferguson did file a will-say statement and that the complainant was afforded every opportunity to cross-examine her. He could have or ought to have asked her about *Edmunds* if he intended to use it to attack her competence.

[101] The complainant also relied on *Lemoire*. The grievors in that case worked at the WI and filed overtime grievances. The employer objected to three of the grievances on the ground of timeliness. On all three files, the employer's timeliness objections were dismissed as the former Board found that the grievances were timely. I note that Ms. Lake testified on behalf of the grievors in that case, although there is no summary of the content of her testimony.

[102] Again, it is unclear to me why the complainant relied on that decision, and although he had the opportunity during the hearing to articulate his reasons, he chose not to. Other than the reference to the fact that Ms. Lake testified in that case, it has no relevance to the issues raised in this complaint. In fact, although the grievances were dismissed, they were not dismissed on the ground of timeliness.

[103] The next decision that the complainant relied upon was *St-Laurent*. Ms. Ferguson was listed as representing the grievors in that case, along with Marie-Pier Dupuis-Langis. It was decided on the basis of written submissions. The grievors worked at the WI or at Bath Institution in Ontario. The bargaining agent acknowledged that the grievances were not referred to adjudication in a timely manner and applied for an extension of time under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79). The untimely referral resulted from an oversight by a bargaining agent representative. The former Board dismissed the bargaining agent's application for an extension of time on the basis that it failed to provide "… a clear, cogent and compelling reason …" for the untimely referral to adjudication.

[104] Apart from the fact that Ms. Ferguson co-represented the grievors in that case, the only inference I can draw from the complainant's reliance on it is that the bargaining agent appeared to be struggling with meeting grievance timelines and that the union's mistakes or errors lead to grievances being dismissed. Again, this bears no relevance to his case.

[105] In the complainant's case, his grievances were held in abeyance at the second level, and there was no evidence presented to me that their transmittal internally and their referral to adjudication were untimely.

[106] The final decision that the complainant relied on was *Weinstein*. It involved a termination grievance, which the Board allowed. It is unclear to me why he relied on that decision, and he did not articulate its relevance to his complaint.

[107] I will now assess the facts relating to the handling and processing of grievance 61347, to determine whether the bargaining agent's actions or inactions in the 90 days before the complaint was made rose to the level of arbitrariness or bad faith within the meaning of s. 187 of the *Act*.

[108] During that period, Ms. Lake helped the complainant file and present a grievance that alleged the following: "I grieve the harassment imposed upon me by Tom Rittwage on or about Sept 11 2017 and previous targeting by this same CM which is deemed to not fall under the harassment policy by both Regional Deputy Commissioner's [*sic*]."

[109] The complainant signed the grievance on September 13, 2017. Ms. Lake signed it on September 24, 2017, and the employer signed it on September 25, 2017. It was not heard at the first level. It was transmitted to the second level on October 26, 2017, where it was held in abeyance until November 28, 2017, when it was presented and heard. Ms. Lake and Lee Fitzgibbon presented it at the second level on the complainant's behalf; he was not present at the hearing.

[110] The complainant expressed concern and frustration that the timelines for presenting the grievance had expired. Ms. Lake explained that she was away for three weeks, so she requested from and was granted an extension of time by the employer for the second-level transmittal. She also explained that the grievance was held in abeyance at the second level until a hearing date could be set.

[111] The complainant requested a copy of the second-level abeyance agreement, so he could satisfy himself that indeed, the timelines had not elapsed. According to him, Ms. Lake failed to provide him with one.

[112] The documentary evidence presented, mainly email threads, was rather disjointed, but I was able to piece together the facts surrounding the complainant's request for a copy of the second-level abeyance agreement as follows:

- **November 15, 2017** - the complainant emailed Ms. Lake, requesting the copy;
- **November 21, 2017** - he repeated his request;
- **November 21, 2017** - Warden Ringler asked him to clarify what he was looking for with respect to the agreement so that he could provide it;
- **November 21, 2017** - he provided clarification; and
- **November 23, 2017** - Ms. Lake stated, "There has always been an MOU with management at each site regarding grievances … being held in abeyance."

[113] There is no record of the second-level abeyance agreement having ever been provided to the complainant. Indeed, his uncontradicted testimony was that he never received a copy of it and that he first saw it at these proceedings.

[114] I find nothing arbitrary in how Ms. Lake handled grievance 61347, from its filing at the first level up to the second-level presentation. Arbitrariness in this context connotes failing to put one's mind to an issue and acting in a perfunctory manner. Nothing could be farther from these notions in how Ms. Lake processed the complainant's grievance. She did the responsible thing by obtaining an extension of time for the second-level transmittal when she knew that she would be away for three

weeks. Similarly, there is no evidence of bad faith or of hostility or animosity toward the complainant, despite the testy tone of his emails. I found her responses to him measured and respectful in tone. The complainant has not proven that Ms. Lake colluded with the employer.

[115] With respect to the complainant's request for a copy of the second-level abeyance agreement, I conclude that there was nothing nefarious about the failure to provide him one. I can describe what seems to have occurred only as a breakdown in communication as to who would give him a copy. As noted, bad faith, in the context of the duty of fair representation, implies deliberate and oppressive conduct. I find nothing in Ms. Lake's conduct with respect to providing the agreement that rose to the level of bad faith.

[116] The complainant also alleged that he felt coerced to mediate with the employer. He adduced no evidence in support of this allegation nor was Ms. Lake questioned regarding this alleged coercion. I find this allegation unsubstantiated.

[117] Therefore, I dismiss the complaint.

[118] I would be remiss if I did not issue a word of caution about the issue of the second-level abeyance agreements. While they may be administratively convenient for the bargaining agent and the employer, I find that there may be a genuine and serious risk that certain grievances may be unduly delayed to the point of falling through the proverbial cracks. I was particularly concerned that certain grievances, raising issues of accommodation, health and safety, and discrimination, may be left in abeyance for so long that any future remedy may be hollow.

[119] The bargaining agent assured me that there are no such cases currently being held in abeyance at the Institution. That may well be true, but both the bargaining agent and employer must exercise vigilance where these abeyance agreements exist to avoid the perceptions and sentiments that the complainant expressed.

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

(The Order appears on the next page)

VI. Order

[121] The complaint is dismissed.

February 22, 2023.

Caroline Engmann,
a panel of the Federal Public Sector
Labour Relations and Employment Board