Date: 20230327

File: 561-34-898

Citation: 2023 FPSLREB 29

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

JOHN COLLINS

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Collins v. Public Service Alliance of Canada

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Morgan Rowe, counsel

Heard via videoconference,
July 12, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] On February 8, 2018, John Collins (“the complainant”) made this complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) (“*FPSLRA*” or “the Act”), that his union did not meet its duty under s. 187 of the *Act* to represent him in a manner that was not arbitrary, discriminatory, or in bad faith. He works for the Canada Revenue Agency (“the employer”) and is a member of the Union of Taxation Employees (“UTE”), which is a component of the Public Service Alliance of Canada (“PSAC”). In this decision, “the union” refers to either or both entities.

[2] The employer has a National Employment Equity and Diversity Committee (“NEEDC”) that provides it with advice and recommendations on employment equity and diversity matters. On March 3, 2016, a call letter went out, seeking employees who would be interested in filling a vacant regional-point-person (“RPP”) role representing visible minorities, persons with disabilities, and women.

[3] The RPP’s task was to support the designated-group representative on the NEEDC by providing a regional perspective on issues relating to the designated group. The call letter indicated that an RPP had to self-identify as a member of a designated group and have experience in employment equity issues.

[4] On April 8, 2016, the complainant filed a grievance contesting this requirement and challenging many of the employer’s employment-equity-related practices. He wanted to apply for the RPP position and felt that this requirement discriminated against him as a person who is not a member of a designated group.

[5] UTE representatives aided him through the grievance process. His grievance was “conditionally” referred to adjudication to preserve his rights pending further information and analysis. It was then sent to the PSAC to determine if the matter should be adjudicated.

[6] On November 10, 2017, Andrew Beck, PSAC Grievance and Adjudication Analyst, determined that it would not be adjudicated and advised the UTE and the complainant of his reasons. The complainant strongly disagreed with Mr. Beck’s reasoning and conclusion, and he made this complaint.

[7] I find that the complainant did not meet his onus to show that the union breached its duty of fair representation, and I dismiss the complaint.

II. The complainant's evidence and submissions

[8] The complainant was self-represented. He filed two comprehensive written submissions and a document book in addition to the joint document book. He indicated in his opening remarks that most of what he wanted to say was in the submissions and that he was very comfortable with the Board making its decision based on them. Nevertheless, I swore the complainant in and suggested that he take the opportunity to provide the Board with any additional oral evidence or submissions that he felt would advance his case, without attempting to distinguish between the two. He indicated that he appreciated the flexibility and offered oral evidence and submissions in addition to his written material.

[9] The complainant began by stating that it was hard to believe that Mr. Beck, with all his education, could have reached the conclusion that he did. But he stressed that his complaint was not about the decision itself but about the process. He said that when someone tries, it shows, but that the union's representation in this matter was not real but merely apparent. He could not imagine how a senior analyst could reach such a conclusion and, therefore, did not believe that his grievance received an honest and careful review.

[10] His main issue was that the review was arbitrary. He felt that he kept hearing about why his grievance would not succeed but that he heard little in the way of arguments as to how it might, or could, succeed. He did not agree with Mr. Beck that s. 16, the special-programs provision of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*"), would provide the employer with a defence to his grievance.

[11] He said that although it was not necessary for him to show bad faith or discrimination on the union's part, there were elements of both, although he characterized them primarily as aspects of the prevailing political ideology within the union, with which he disagreed. He felt that the union would likely deal with a complaint from someone like him without giving it serious consideration. He said that he had a brief stint as a "scab" in the past and that he did not know if that influenced the union's response to his grievance, but in general, he felt that the context of this issue was the prevailing ideological environment.

[12] In this respect, he mentioned that the UTE's referral form to the PSAC contained the handwritten words "white man" in the margin, which were purposely (in his view) bolded or emphasized. As his status as a non-designated-group individual was duly recorded in the form's applicable field, adding those two words was redundant. Therefore, it was difficult to understand the purpose other than to serve as a heads-up or to convey a message about how the grievance was to be considered. He asked rhetorically whether a grievor might have cause for concern about union support for his grievance, "… if, instead of white man, the words in the margin had read Black man, or Indian, or Jew?… What if the grievor's union representatives were no more interested in seeing the grievance succeed than the employer was?"

[13] The complainant also related that in December 2016, one of his co-workers began "flashing Nazi salutes" at him when passing his workstation. He confronted this colleague on the behaviour after the third episode, and they engaged in the employer's conflict resolution process. He did not advise the union and, therefore, it was not involved.

[14] The complainant did not, and still does not, fully understand the motivation behind the gesture. However, when 10 months later in October, 2017, he learned that this co-worker was a union steward, which he did not know earlier, he emailed Ken Bye, UTE Regional Vice-President, to ask why the co-worker would be allowed to continue to serve in that position. It was the only time he raised this issue with the union. Mr. Bye responded as follows:

> *On the issue you had with* [the co-worker-steward] *I can only comment on what I know. To my knowledge you addressed your concerns with him through the conflict resolution process in the office. As he was not acting in a union role at the time I believe it remains an issue for you and* [him] *to address through the employer which was done.*
>
> *To continue to bring the issue up in the office is counter productive [sic] and not in the spirit of conflict resolution.*

[15] The complainant did not suggest that his co-worker's conduct was related to this complaint. He raised the incident to illustrate what he sees as the union's ideological bent as represented by Mr. Bye's response to his inquiry when he learned that his co-worker was a union steward. He explained it as follows:

…

> *The issue of the salutes links to the issue of Lyson Paquette's May 2017 referral and to the insertion of the words "white man" in the document margin. Would such acts and gestures have generated such little concern from the union if the subject of such an act or gesture had been a member of a designated EE group? Although it is not my intention to provoke or to offend, it is appropriate to ask what the position of the union would have been if a union steward had taken to waving an isis [sic] flag in the direction of an employee of the Muslim faith. Would the act have been deemed to be acceptable as long as the steward was not waving the flag in his or her capacity as union steward? Would the affected employee be chided by the UTE regional vice president for questioning the union's decision to allow the steward to continue to serve in his position?*
>
> *…*

[16] The complainant alleged that Mr. Bye's response reflected the union's inability or refusal to see past the different group designations and to uphold its stated values and obligations. He did not allege that the union representatives were responsible for the steward's actions but only that it was likely that the union's position on it would have been quite different had equivalent gestures been directed toward a union member who belonged to a designated group.

[17] The complainant also drew a link as follows from Mr. Bye's response to what he described as the union's lack of interest in his grievance that in his view, was largely attributable to the nature of the grievance and to his lack of designated-group status:

> *…*
>
> *… I believe that the respondents' discriminatory leanings were captured and reflected by the … e-mail from Andrew Beck in which he flatly acknowledged that, despite the revision carried out by the employer, the union continues to hold the view that self-identification alone is sufficient to qualify for the RPP position. I allege that this same inherent bias was reflected in the union's handling of the incident* [Nazi salutes] *described above ….*
>
> *…*

[18] Before the fourth level of the grievance process, the issue was raised as to whether the complainant was a member in good standing. It was a surprise to him, as he thought that he was in good standing. Some back-and-forth ensued as to his status and whether it had anything to do with him being represented by the union. The union representatives were confused on this issue. The local president thought incorrectly that representation depended on it. UTE Representative Lyson Paquette clarified that it

did not. Ultimately, it was clarified that the complainant was a member in good standing and that in any event, this status was irrelevant to the representation that the union would provide.

[19] The complainant was prepared to allow that the Rand issue might simply have been raised as an administrative matter to be addressed but said that it was difficult to understand why the local president would suggest otherwise:

> *…*
>
> *… Given my fleeting experience as a SCAB, and given the union's lack of enthusiasm to that date, the raising of the RAND (the potential implications for the grievance) represented a very real area of concern for me moving forward.*
>
> *…*
>
> *Unions are not fond of SCABS. There is nothing bald about that assertion. That is not to suggest that union officials can never be relied upon to fulfill their duty of fair representation to SCAB members, but to suggest that it would be naive to accept that they will, or that they have, in every case.*
>
> *Employees who file a grievance and engage the support of their union will in nearly every case have done so because they perceive, rightly or wrongly, that they have been treated unjustly by their employer. Such employees will often enter the grievance process discouraged or disaffected by the employer's unwillingness to acknowledge their concerns and to offer a satisfactory resolution. Such employees may already feel themselves to be at odds with a system that they perceive as being tilted against them and so it is incumbent upon the union to act in such a way as to not aggravate the employee's distress or to create or perpetuate the appearance of bad faith.*
>
> *…*

[20] The complainant also raised the fact that Stephanie Copeland, the first analyst to deal with his file, stated in her referral memo that he was a rude bully. It was not clear in his submissions, but I believe that he felt that this also related to him pressing unpopular opinions in an ideological environment to which he was opposed.

[21] In cross-examination, the complainant acknowledged that the RPP role was a volunteer committee role consisting of about eight hours of uncompensated work per month carried out in addition to the member's employment position. However, he explained that he saw it as an employment opportunity that offered high value for an

employee in the form of exposure, networking opportunities, and a refreshing change from the day-to-day grind.

[22] He agreed that UTE representatives represented him throughout the grievance process, attended the meetings, and took notes. He gave the union his response to the employer's third-level reply and explained the problems he saw with it. He agreed that Ms. Paquette prepared a written submission for the fourth-level hearing, that he had had an opportunity to weigh in on it, that she included a good deal of his submissions, and that she tried to convey to the employer what he wanted conveyed.

[23] However, he also noted that Ms. Paquette erred when she told the employer that the only corrective action he would accept was a re-issue of the call letter. This was not the case and mentioning it to the employer was prejudicial to his interests. It left the employer with no latitude to consider other remedies or resolutions and, in his view, likely influenced it to decline mediation. Furthermore, the union did not correct the error in a timely way. It put him in a position in which he could not raise it months after the fact without inadvertently signalling to the employer that he did not want to pursue the matter on the merits. However, having said that, he did not think that his complaint turned on that error.

[24] Although the complainant acknowledged that he had the opportunity at every stage of the process to express his views to union representatives, his complaint was focussed on what became of those submissions. He understood that the union had referred his grievance conditionally, pending further study and advice from experts, and that this did not represent a commitment to take it forward, but he thought that seeking an expert opinion would mean seeking it from someone independent of the union. He had thought that Ms. Copeland had concluded that the required expertise was not available internally, but acknowledged that that was simply his assumption.

[25] The complainant noted that the employer revised its original requirement that an RPP belong to a designated group and have experience with equity issues, such that going forward, an RPP could **either** self-identify **or** have experience with equity issues. In doing so, it effectively conceded the point that belonging to a designated group was not an essential requirement. However, with this change, being a designated-group member became sufficient, in itself, to be an RPP, while non-designated-group-members had to demonstrate experience in those issues. Therefore, it was still

discriminatory. Furthermore, the change was only for the future; the employer did not re-issue the original call letter or reverse any appointments made pursuant to it.

[26] Mr. Beck's non-referral letter put forward these two reasons for not advancing the grievance: firstly, because the discrimination argument would not succeed due to s. 16 of the *CHRA*, and secondly, because the complainant's other arguments about the NEEDC terms of reference, staffing procedures, and employment equity legislation and policy were not within the Board's jurisdiction to adjudicate. The complainant clarified that he never saw the latter issues as distinct claims but rather as matters that tied in with and provided additional arguments in support of the discrimination claim.

[27] For example, he said that staffing procedures protect the rights and interests of all stakeholders. They are consistent with employment equity policy that allows a department to restrict an area of selection to a designated group, only if it is justified by its employment equity plan. There must be evidence of a significant gap in the representation of the designated group. This is consistent with the Canadian Human Rights Commission's ("CHRC") *Policy on Special Programs*, which requires considering a program's impact on third parties. The staffing procedures, together with the CHRC's policy, represent what may be the only meaningful protections for third parties.

[28] The complainant said that the union did not address the contradiction between the staffing procedures and the use of designated-group membership as an essential requirement for the RPP. Nor did it seek to determine whether the requirement was supported by the employer's employment equity plan and, if so, what the nature and extent of the need or under-representation was, and how it was identified and measured. He felt that the union's failure to do so was arbitrary and capricious as he had raised the staffing-procedures issue with the union at the outset.

[29] Mr. Beck was wrong in his analysis of the effect of s. 16 of the *CHRA*. Those cases in which it had proved to be a successful defence to discrimination claims involved complainants asserting a special need or seeking access to a benefit provided by a special program. That was a completely different situation from his. He did not seek to avail himself of any status or benefit from a program, and Mr. Beck's failure to consider this significant factual distinction amounted to arbitrariness.

[30] Mr. Beck's conclusion was not reached by careful and thoughtful analysis. Rather, it was the result of an underlying assumption about the nature of the grievance

and its relationship to the special-program provision. Given no attempt to claim a special status or benefit, it was not rational to invoke s. 16 as a reason not to adjudicate his grievance. Section 16 is not intended to be exclusive for the sake of being exclusive, but rather to protect the principle of substantive equality in situations where the right to access a special benefit is asserted on the basis of formal equality.

[31] Mr. Beck's inquiry ended when he determined the special-program status and confirmed that the complainant was not a designated-group member. The inquiry should have considered whether being appointed to the RPP position was a special benefit in accordance with the program's purpose and objective; whether the removal of the essential requirement was injurious to the program; whether the grievance constituted an attack on the program; and whether the use of the essential requirement was consistent with the employer's staffing procedures and with the overall intent of human-rights legislation.

[32] In the complainant's view, it was not a matter of what the answers to those questions would have been, but rather a matter of them not being considered at all.

[33] He submitted that special programs do not come cloaked by s. 16 at their conception. The legislation must first be invoked, and the question of whether a program warrants the protection of s. 16 is a question of fact in every case. The NEEDC was not designed to provide employment opportunities to designated groups, and the RPP position was not conceived as a special benefit to be conferred but as a defined role to be carried out in support of the employer's broader employment equity program. It was a role that required employment equity knowledge and experience but that did not warrant the imposition of a bona fide occupational requirement. By removing the restrictive requirement, the employer conceded that it was not essential, and therefore, it could not have successfully invoked s. 16 as a defence. However, Mr. Beck devoted no consideration to this, which called into question the quality and thoroughness of his review process.

[34] The complainant confirmed that he had been given 20 days after receiving the non-referral letter to provide any further information that he felt should be considered. He agreed that he did send several emails with further comments, identifying the areas with which he disagreed. He tried to engage Mr. Beck on the question of whether the grievance could make out a *prima facie* case of discrimination

in the absence of s. 16. He was interested to know whether Mr. Beck had considered the range of responses that the employer might offer if it were called upon to defend the use of the restrictive provision.

[35] Mr. Beck allowed that a *prima facie* case might exist but declined to pursue the hypothetical question on the basis that doing so would not be productive. He said that he had nothing to add in terms of what arguments the employer might make or what the Board might be receptive to if the special-programs provision did not apply. In the complainant's view, the union's duty of fair representation required that Mr. Beck consider such questions.

[36] The complainant acknowledged that he understood that when Mr. Beck confirmed his analysis on November 29, 2017, the grievance referral would be withdrawn, but nevertheless sent several follow-up requests for documents and information and asked about the timelines for making a duty-of-fair-representation complaint. He agreed that Mr. Beck responded to these requests for additional information.

[37] On November 10, 2017, just before sending his non-referral letter, Mr. Beck sent the draft to the UTE and asked for any feedback "… particularly as it relates to UTE's Equal Opportunities committee and the engagement with the employer's NEEDC committees." The complainant said that this email was in the union's disclosure to him and that he asked union counsel if there had been any response to it. She had confirmed that there had been none. However, the following response from David Girard, UTE Labour Relations Officer, was provided as a supplementary document at the hearing:

> *Hi Andrew,*
>
> *I remember we talked about this grievance few weeks ago. You have mentioned your intention of doing a non-referral and also include a section saying that PSAC and UTE does not wish to pursue this matter since it is not in the best interest of our membership and it does not represent the values we have fought for. Immediately after our discussion, I double-checked with Shane to make sure he was OK with this and he was.*
>
> *Your letter is quite factual and we have no problems with your analysis. UTE will support this non-referral.*
>
> *David*

[38] The complainant commented that it looked like the response had been deliberately withheld, that he had asked for it, and that it was likely that someone had decided that he did not need to see it. He felt that it was significant that Mr. Girard spoke about "the values we have fought for" and that it indicated that the decision had been made for ideological reasons.

[39] Finally, the complainant submitted that the Board must consider whether he was right about what would happen at adjudication if the employer tried to raise s. 16 of the *CHRA* as a defence. In his view, if the Board agreed with him that the employer could not successfully raise that defence, then to decide this complaint, the Board would have to determine whether he was the only one who saw or picked up on this.

III. The union's evidence and submissions

[40] The union called Mr. Beck to give evidence. He explained that the PSAC components manage grievances; they advise stewards and locals for first-level hearing presentations, and the components' staff take over at the final level. Then the PSAC decides if a grievance will be referred to adjudication. A team comprised of 4 to 5 analysts reviews about 1000 referral requests a year or 5 per week on average. As the Board has a significant backlog and there is a long wait time before matters are heard, the union is very focussed on ensuring that the grievances it refers to adjudication have a good likelihood of success.

[41] Mr. Beck elaborated on an analyst's process, which is to first determine any deadlines, to seek an extension if needed to have time to read everything, and to acquire any clarifying information from the grievor, the component, and any others. The analyst reviews and analyzes the file to determine if the grievance should be referred to adjudication. This decision is based on legislation, case law, and any overarching principles that would be in the union's interest. For most cases, it simply comes down to the merits of the grievance.

[42] This matter was first assigned to Ms. Copeland, a grievance and adjudication analyst, who referred it to adjudication conditionally, to protect the complainant's rights while she waited to consult with human-rights specialists. When she retired, the file came to Mr. Beck, who decided to conduct a fresh analysis. He reviewed the file, cover to cover, and contacted the complainant for more information.

[43] Mr. Beck testified that his contact with the complainant, which was all by email as they both preferred, was a good deal more extensive than the contact he typically has with grievors. The back-and-forth was at the high end of the usual discussions; however, this is common for non-referrals. There is a higher obligation on the analyst to ensure that a non-referral decision is clear, and that the analyst has understood everything. In addition to being a non-referral, this file was also complex, so those exchanges were helpful.

[44] As Mr. Beck summarized in his non-referral letter, he focussed on understanding the exact nature of the complainant's claim. He noted that it was a claim of reverse discrimination; the complainant was not a member of a designated group. He had to determine whether the requirement that an RPP be a designated-group member was discriminatory.

[45] He consulted with component representatives and learned about the committee structure, which was that it was composed of both management and union members. He determined that the complainant's references to staffing principles did not apply to the NEEDC terms of reference as it was not a staffing process. He consulted Seema Lamba, PSAC Human Rights Officer, for input on employment equity issues, and Jean-Rodrigue Yoboua, PSAC Representation Officer and experienced human-rights litigator, about the effect of s. 16 of the *CHRA*.

[46] Mr. Beck considered jurisdictional issues. He concluded that the committee is a forum in which the union could engage in equity issues on a policy level. Committee membership is not covered by s. 209 of the *FPSLRA*; it was outside the Board's jurisdiction and not something that could be referred to adjudication. The same applied to the complainant's allegations that the employer did not properly apply staffing principles or employment equity legislation and policy in its process to select someone for the RPP role. Mr. Beck suggested that the complainant's concerns with these issues could be better addressed by bringing them forward to membership meetings, the UTE's Equal Opportunities committee, or the UTE representatives on employment equity committees. However, he concluded that a discrimination claim under article 19, the no-discrimination clause of the relevant collective agreement, could be referred to adjudication.

[47] Cognizant of the fact that this was a reverse-discrimination issue, Mr. Beck researched the case law to determine how labour adjudicators and courts had treated s. 16 of the *CHRA*. In his reading of the case law, a committee that the employer set up to inform itself of the concerns of equity-seeking groups was a special program within the meaning of s. 16. Therefore, it was not discriminatory for the employer to ask for a member of one of the designated groups to step forward to act as an RPP, to inform the committee of the concerns of the group or groups that they would represent. He concluded that by operation of s. 16, the call letter's requirement did not discriminate against the complainant.

[48] The employer denied the complainant's grievance but nevertheless changed the terms of reference so that the requirement to be an RPP was either membership in a designated group or experience in equity work. That did not change his analysis because the employer was entitled to accept something other than membership in a designated group if it so wished; doing so did not make its initial call letter discriminatory. The employer simply wanted to receive advice from someone who knew about these issues, whether that person was a designated-group member or experienced in representing a designated group's needs. Either way, the employer was entitled to the protection of the *CHRA*'s special-programs provision.

[49] The complainant strongly disagreed, and Mr. Beck related some of their back-and-forth discussion about the details of his analysis. For example, the complainant asked whether, in the absence of s. 16, there would be a *prima facie* case. Mr. Beck said that the question was hypothetical as s. 16 does exist to protect against reverse-discrimination claims. Therefore, it was not relevant to this case to determine whether a *prima facie* case could be established if it did not exist.

[50] The complainant also argued that when a representation gap is found, it must be filled with a member of the group that lacks proper representation but that in this case, no gap was identified. He argued that by removing the designated-group-membership requirement, the employer conceded that it was not a bona fide occupational requirement. Mr. Beck told the complainant that this was not a staffing case, so these staffing principles were not the right lens through which to view it.

[51] Mr. Beck asked the complainant to specify what he felt was wrong with the analysis because if he had missed something, he would want the complainant to tell

him what it was. While he is confident in his skills, members are the experts in the facts of their cases, so if an analyst has missed something, it is critical that it be brought to his attention. He also told the complainant that his supervisor, the grievance and adjudication coordinator, had reviewed his analysis and supported his conclusion and the process he undertook to reach it.

[52] Mr. Beck was asked on cross-examination what the margin notation of “white man” on the UTE’s grievance referral request signified. He said that it signified to him that the complainant was a white man and that he was making the discrimination claim on that basis. Mr. Beck did not know who made the notation; however, he felt that it was appropriate as the union deals with many discrimination grievances, and the specific grounds upon which they are alleged is essential information.

[53] Asked about Ms. Copeland’s memo that described the complainant as a rude bully, Mr. Beck said that these words signified to him that the complainant might be a difficult member to deal with. He stressed that the comment was inappropriate and that it fell below the level of professionalism that he would expect to see in a memo.

[54] Mr. Beck was asked about his email to component representatives in which he requested feedback on his draft non-referral letter. He explained that he checked in with the component one last time, just in case he was missing something, and that doing so is always good practice in case the component is dealing with some broader issue to which the grievance is related. He wanted to know if perhaps the UTE thought that there was a need to make this challenge of which he was unaware, and despite the problems he saw with it. However, Mr. Girard confirmed that there was no such concern.

[55] Mr. Beck was asked about Mr. Girard’s comment that the UTE agreed that the union did not wish to pursue the matter as it was not in the best interest of the membership and did not represent the values for which the union had fought. He explained that in the union’s view, it was appropriate for the employer to ask that a member of a designated group step forward to represent the group’s interests. The union has a role to play to fight discrimination and did not think that this was discrimination. Therefore, it was consistent with the union’s values not to adjudicate the grievance, not only because it had no reasonable prospect of success, but also, because, in this case, the union’s values aligned with the state of the law.

[56] The union began its submissions by noting that this is the complainant's case, so he had the burden of proof. The facts are largely not in dispute. This was a difference of opinion between the PSAC and the complainant about the assessment of his grievance, the arguments that should be made, and how s. 16 of the *CHRA* applied or did not apply. It is well established that a disagreement is not a breach of the duty of fair representation and does not mean that the union acted in a manner that was arbitrary, discriminatory, or in bad faith. The issue for the Board to determine is when a decision not to proceed with a grievance violates the duty of fair representation, for which the relevant case law is well established.

[57] The union referred to the principles set out in *Ouellet v. St-Georges*, 2009 PSLRB 107, and *Langlois v. Public Service Alliance of Canada*, 2011 PSLRB 121. The *Langlois* decision, citing *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, which in turn cites *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC L.R.B.), confirms that when a union decides not to proceed because of relevant workplace considerations, including the broader interest of its membership, the union meets its duty of fair representation and its job of representing employees. *Cox v. Vezina*, 2007 PSLRB 100, expresses the same principles, including (at paragraphs 142 and 143) the proposition that not buying into a grievor's worldview or agreeing with a grievor's proposition is not a breach of the duty of fair representation but just a disagreement.

[58] The evidence shows that the union took a reasonable and thoughtful approach. The UTE represented the complainant throughout the grievance process. He had ample opportunity to present the merits of his case, after which the matter was sent to the PSAC's national office to be assessed for adjudication.

[59] Although Ms. Copeland's memo referred to him as a rude bully, which Mr. Beck indicated was inappropriate, it also concluded that there might be merit to the grievance. She also advised that she had conditionally referred it to adjudication while awaiting advice from human-rights specialists.

[60] The evidence shows that the complainant corresponded frequently with Mr. Beck, who reviewed the whole file, asked appropriate questions, and sought input from human-rights specialists. The complainant was aware that Mr. Beck was conducting a fresh analysis.

[61] Mr. Beck testified at length as to the rationale for his determination that requiring a committee member to belong to a designated group was not discriminatory due to the operation of s. 16 of the *CHRA*. The issue was whether there was a reasonable basis upon which to conclude that s. 16 would provide the employer with a defence were a non-designated-group member to argue that exclusion from a committee is discriminatory. In *Ontario (Human Rights Commission) v. Ontario*, 1994 CanLII 1590 (ON CA), the Ontario Court of Appeal found that such an exclusion is not discriminatory.

[62] Mr. Beck's letter gave the complainant 20 days to raise any issues before the conditional referral was withdrawn. He did so, and even after that period expired, he continued to request information about different matters, such as making a complaint.

[63] The union submitted that Mr. Beck's analysis was correct but that in any case, this matter is not an appeal, and it is not about whether the analysis was right or wrong or whether the complainant was right or wrong. The issue is whether Mr. Beck had all the necessary information and whether his analysis was reasonable, justifiable, and transparent. A disagreement is not a breach of the duty of fair representation. The complainant did not meet his onus to demonstrate that a violation of that duty occurred, and the complaint should be dismissed.

[64] The union noted that, besides Mr. Beck's analysis, the complainant raised several other issues but only for context, except for Ms. Paquette's alleged mischaracterization of his position on remedy at the fourth level. However, to the extent that he still sought to rely on these other issues, the union noted that they were untimely. As well, some were internal union matters, outside the Board's jurisdiction, such as the confusion over his Rand status and the union's alleged failure to discipline a steward.

IV. Reasons for decision

[65] The complainant alleged that the union breached its duty of fair representation by not adjudicating his grievance. He said that elements of discrimination and bad faith arose from the prevailing ideological environment; however, his main focus was what he termed as the arbitrariness of Mr. Beck's rationale.

[66] He sought to convey his view that the union was mired in an ideological environment so skewed in favour of the interests of designated-group members that it could not see or understand that the interests of non-designated-group members were being ignored. In the complainant's view, there was no other way to comprehend Mr. Beck's conclusion. He felt that the non-referral decision could be explained only as a product of the prevailing ideological bias and that therefore, it violated the duty of fair representation.

[67] I read all the material and have carefully considered all the complainant's submissions, but in the interests of clarity and efficiency, I will address only those issues that I consider relevant to my determination.

[68] I will deal first with the background issues. The complainant clarified that they were not complaints but that they were provided only for context, to support his argument that the union's decision was arbitrary and perhaps discriminatory and made in bad faith because it was based on its prevailing ideology.

[69] As for Ms. Paquette's alleged mischaracterization of his position on remedy at the fourth level, the complainant did not state that that allegation was provided only for context, but did refer to it as an error and said that he did not think that his complaint turned on it.

A. The "white man" notation

[70] Mr. Beck testified that he did not think that the "white man" notation was inappropriate as the union receives many discrimination claims, and it is important to know exactly which type of discrimination is being claimed. The evidence with respect to this issue was necessarily speculative on both sides as there was no direct testimony about it; no one knows who wrote those words. However, what is clear is that even if that identifier was written with ill intent and not simply to describe the specific type of discrimination being claimed (and there is no such evidence), Mr. Beck's testimony was clear that his analysis was not impacted one way or the other by those words.

[71] I further note that the complainant introduced this way of defining the issue in some of his first correspondence with the employer, later forwarded to the union. On March 29, 2016, he forwarded to Linda Collins, UTE Local President, an email that he had sent the employer on March 4, 2016, with the subject line, "Re: white men need

not apply”. On March 14, 2017, he forwarded to Ms. Paquette, UTE Representative, an email that he had sent the employer on March 10, 2016, as follows: “There must be at least a handful of white males in the region who meet the stated criteria …”. The complainant framed the issue for both the employer and the union as one of white men being excluded, in exactly that language. He could hardly complain when others used the same descriptor with which he had introduced the issue at the outset.

B. The “rude bully” comment

[72] Referring to the complainant as a rude bully was not simply a gratuitous comment. Rather, it was an attempt to convey information to the analyst who would take over the file upon Ms. Copeland’s retirement. She said this:

> *Let me start by saying that Mr. Collins is a Rude Bully. I told him to not contact me directly again and to go through the coordinator.*
>
> *He has been threatening the component that he was going to file a Duty of Fair Representation complaint throughout the grievance process.*
>
> …

[73] Ms. Copeland had taken official internal action when she told the complainant to not contact her directly and to go through the coordinator, going forward. In my view, she cannot be faulted for advising the analyst who would be assigned to take over the file about this background information and the change of procedure she had instituted for communicating with the complainant.

[74] Colleagues in any organization, including a union, have the right to advise each other as to any difficulties they may expect to encounter in a file, as well as any actions taken on the file and the reasons for them. The union took the position that the information should have been conveyed in more professional language. Perhaps so, however, given that the complainant’s correspondence with the union representatives was replete with uncivil, disrespectful, and disdainful comments made to or about them, I cannot conclude that Ms. Copeland’s assessment was inaccurate, or that it was inappropriate for her to express it in plain language in an internal memo. Unions are required to represent bargaining-unit members fairly; however, the statutory duty does not require them to accept, without comment, unwarranted personal comments or incivility.

[75] As well, before retiring, Ms. Copeland had partially analyzed the file and had initiated contact with PSAC human-rights specialists for further input. She referred the file to adjudication conditionally, to preserve the complainant's rights while she waited to meet with them. Clearly, she kept an open mind and, in fact, changed her mind about the merits of the grievance. In the same memo that refers to the complainant as a rude bully, Ms. Copeland said this about the grievance:

> …
>
> *My original position was to not refer the file. I had raised this file at our analyst meeting and it was agreed that it was a non-referral because it is an employer policy and does not form part of the collective agreement. However applying the principle of KVP and it doesn't matter if the directive is not contained or referenced in the Collective agreement. The directive cannot violate the collective agreement.*
>
> *I am now of the view that the case should go forward.*
>
> …

[76] All this indicates that regardless of her assessment of the complainant's conduct, Ms. Copeland treated the issue he raised seriously, with significant care and attention and with an open mind.

C. The "Nazi salutes"

[77] The Nazi salute incidents themselves were not related to this matter, and the complainant was clear that he did not hold the union representatives responsible for his co-worker's conduct. His only issue was what he saw as Mr. Bye's inadequate response when he raised the issue 10 months later after learning that this co-worker was a union steward. He likened it to the union not caring that "white man" was written on his referral form. And he assumed that the union would have taken a much different approach had similar conduct been aimed at a designated-group member.

[78] He sought to draw a link between Mr. Bye's response and Mr. Beck's analysis of his grievance alleging that they both arose from the same "ideological bias":

> *… I believe that the respondents' discriminatory leanings were captured and reflected by the … e-mail from Andrew Beck in which he flatly acknowledged that, despite the revision carried out by the employer, the union continues to hold the view that self-identification alone is sufficient to qualify for the RPP position. I allege that this same inherent bias was reflected in the union's handling of the incident [Nazi salutes] described above ….*

[79] Clearly, these were unpleasant workplace incidents, and the complainant's desire that his union take them seriously is understandable. However, Mr. Bye's response does not show that he failed to take the matter seriously. On the face of it, he appears to have been responding, at least in part, to the fact that he thought that it had been dealt with and resolved 10 months earlier, without the union's involvement. Undoubtedly, Mr. Bye could, and perhaps should, have shown more interest in the issue; however, there was no evidence to support the complainant's assumption that he would have taken a more proactive approach had a union steward engaged in equivalent conduct toward a designated-group member.

[80] In any event, the complainant did not suggest that Mr. Bye's response was related to this matter other than by illustrating the union's ideological bent, as he saw it. He noted that Mr. Bye was the regional vice-president and his third-level representative in this matter, but made no allegation about any issues with the representation he received from Mr. Bye.

D. The Rand issue

[81] The complainant appeared to recognize that this issue resulted from internal administrative confusion about the union rules. It understandably caused him distress, but his submission suggests that he sought only to bring it to the union's attention as a situation to be avoided.

[82] I completely agree with the complainant that such matters are important and that the union should strive to eliminate the kind of confusion and misinformation that unfortunately he experienced and that undoubtedly caused him a good deal of distress in the circumstances.

E. The union met its duty of fair representation

[83] Mr. Beck concluded that the grievance was adjudicable to the extent that it related to whether the impugned requirement in the call letter was a violation of article 19, the relevant collective agreement's no-discrimination clause. He determined that the Board lacked jurisdiction to address other aspects of the grievance, such as whether the call letter requirement violated the NEEDC terms of reference or whether the employer failed to properly apply staffing directives or adhere to the *Employment*

Equity Act (S.C. 1995, c. 44). These matters did not relate to any of the categories of individual grievances that may be referred to adjudication pursuant to s. 209 of the *FPSLRA*, however, the complainant clarified that he raised these issues as context and as added arguments in support of his discrimination grievance.

[84] Although the complainant said that his complaint did not turn on this issue, he nevertheless alleged that Ms. Paquette told the employer at the fourth-level that the only resolution he would accept was a re-issue of the original call letter. He stated that that was not true and that the statement likely harmed his case. It would have left the employer with nowhere to go with respect to suggesting other resolutions and might well have caused it to decline mediation.

[85] This statement was against the complainant's interests and might have had the consequences he suggested, although that is entirely speculative. In any event, he was clear that it was an error; he made no suggestion that the statement was made in bad faith. To the contrary, he acknowledged Ms. Paquette's considerable work preparing for his fourth-level grievance hearing, including preparing a written submission incorporating his thoughts and arguments and giving him the opportunity to weigh in on it. He further acknowledged that she tried, in this submission, to convey to the employer what he wanted conveyed.

[86] Accordingly, it is clear that this error was just that — simply a human error. It is well established that such errors, in the absence of gross negligence, do not establish a violation of the duty of fair representation.

1. No reasonable chance of success due to s. 16 of the *CHRA*

[87] Mr. Beck concluded that the employer did not discriminate against the complainant because, in his view, the RPP call letter and the NEEDC and its terms of reference constituted a special program under s. 16 of the *CHRA*. He determined that by the operation of s. 16, such a requirement was not discriminatory in the context of a special program designed to reduce disadvantages related to the prohibited grounds of discrimination. As he stated in his non-referral letter:

…

> *Brother Collins is not a member of any of the four designated groups. I am of the view that his potential exclusion from the Regional Point Person position specifically, or the NEEDC*

> *committees more generally, on the basis that he is not a member of a designated group is not discriminatory. As the Ontario Court of Appeal stated in* Ontario (Human Rights Commission) v. Ontario, *1994 CanLII 1590 (ON CA), in reference to language similar to Section 16(1) of the CHRA, "exclusion of an individual from a program designed to respond to needs that individual does not have, does not constitute reviewable discrimination".*
>
> …

[88] It is clear that the PSAC took a reasonable, thoughtful, and appropriate approach to the complainant's grievance. He was able to discuss the merits of his case with his UTE representatives, who assisted and represented him throughout the grievance process. Once his grievance went to the PSAC to be assessed for adjudication, he had more than ample opportunity to provide input on the question to Mr. Beck, with whom he frequently corresponded and debated the merits of his grievance.

[89] When the file was assigned to him, Mr. Beck decided to conduct a fresh analysis. He reviewed the whole file, asked appropriate questions, informed himself about the committee structure, and consulted a human-rights officer and a representation officer with human-rights litigation experience. He reviewed relevant jurisprudence. He considered all the complainant's input and responded thoughtfully to each email.

[90] Mr. Beck explained his rationale for concluding that requiring a committee member to belong to a designated equity-seeking group was not discriminatory by operation of s. 16 of the *CHRA*. The issue in this complaint is not whether his conclusion was correct but whether he had all the necessary information and whether his analysis was reasonable, justifiable, and transparent. In my view, it clearly was.

[91] The complainant argued strenuously that Mr. Beck based his conclusion on distinguishable case law because unlike the complainants in those cases, he did not seek to establish special status or access any benefit from a special program. This argument simply highlights the fact that he disagreed with Mr. Beck about how to interpret the case law and what its likely effect would have been on the Board's determination of his grievance, had it been adjudicated. Even if he were right that his case was distinguishable from the case law (and I make no such finding), it would not mean that the union breached its duty of fair representation by reaching a different conclusion.

[92] Clearly, Mr. Beck had a reasonable basis to reach his conclusion, which is what s. 187 of the *FPSLRA* requires. His rationale was thoughtful, logical, and based on case law that he reasonably applied to the complainant's case. He gave the complainant a 20-day window to raise any issues with his decision before the conditional referral was withdrawn. The complainant availed himself of this opportunity, and continued, even after that period, to ask Mr. Beck for information about different matters.

[93] It is well established that it is not the Board's role to examine a union's decision, as on appeal. The merits of the decision are not at issue but rather whether or not the union decided the matter in a way that was arbitrary, discriminatory, or in bad faith; see *Ouellet* and many other cases. A union can assess the merits of a grievance and refuse to proceed if it determines that the grievance has little or no chance of success. Unions and their representatives are entitled to substantial latitude in that respect.

[94] The bar is set purposely high to establish a breach of the duty of fair representation on that basis because determining whether a grievance is likely to succeed is not an exact science; see *Langlois*, at paragraph 52, citing *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128. See also paragraph 50, where *Langlois* defines arbitrariness, serious negligence, and carelessness and notes that a union's review of the merits of a grievance must be perfunctory or cursory to violate the duty. Mr. Beck's analysis was certainly not negligent, careless, perfunctory, or cursory.

[95] A disagreement with respect to how case law may or may not apply to a complainant's grievance does not constitute a breach of the duty of fair representation. The union was of the view that the grievance had no, or little, chance of success, given s. 16 of the *CHRA*. It was entitled to act on that view and to refuse to adjudicate the grievance.

2. Union policy and the best interest of the membership as a whole

[96] Acting in what the union feels is the best interest of the membership as a whole, in the absence of arbitrariness, discrimination, or bad faith, does not violate the duty of fair representation. When a union decides not to proceed with a grievance because of relevant workplace considerations, including the broader interest of its membership, it meets its duty of fair representation, and its job of representing employees. See, for example, *Ouellet*, as follows:

…

> *33 The* PSLRA *provides the bargaining agent with exclusive authority over the negotiation and administration of the collective agreement because that is part of being an effective spokesperson for members of the bargaining unit as a whole. A bargaining agent's power in its relationship with the employer is derived from the fact that it fairly represents a specific group of employees and, as a consequence, is in a position to make commitments that the employer can then rely on. To receive something in return for such commitments requires that the bargaining agent consider the interests of the employee group as a whole as well as the needs of individual employees.*
>
> *34 In deciding whether to file a grievance or to refer a grievance to adjudication, the bargaining agent is doing its job of representing employees. To that end, it must determine the conditions that may have led to a breach of the collective agreement based on its experience of relations between itself and the employer. The bargaining agent must also consider the impact of a grievance on the other members of the bargaining unit. To the extent that its analysis of a case is based on relevant factors, the bargaining agent has the freedom to choose the optimal strategy in a given situation.*

…

[97] See also *Cox*, at para. 109, which quotes as follows from *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13 at para. 50:

…

> *[50] A subsequent judgment of the Supreme Court of Canada, Centre hospitalier Régina Ltée v. Québec (Labour Court), [1990] 1 S.C.R. 1330 at 1349, discussed these principles in more detail at para. 38:*
>
> …
>
> *As Gagnon pointed out, even when the union is acting as a defender of an employee's rights (which in its estimation are valid), it must take into account the interests of the bargaining unit as a whole in exercising its discretion whether or not to proceed with a grievance. The union has a discretion to weigh these divergent interests and adopt the solution which it feels is fairest.*

…

[98] The quote from *Bahniuk* in that paragraph continues to a quote from *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000* (2003), 91 CLRBR (2d) 33 (BCLRB), which summarizes "… the difficult judgment that a bargaining agent must make", as follows:

…

> ***42.*** *When a union decides not to proceed with a grievance because of relevant workplace considerations - for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit* - **it is doing its job of representing the employees**. *The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of [*the duty of fair representation*].*

…

[Emphasis in the original]

[99] Apart from Mr. Beck's opinion with respect to the application of s. 16 of the *CHRA*, it was also clear that the union views itself as having a role to play to fight discrimination and that it did not think that this was discrimination. As Mr. Beck explained to the complainant, it was consistent with the union's values to not adjudicate the grievance, not only because it had no reasonable chance of success but also because, in this case, the union's values aligned with the state of the law.

[100] In the union's view, it was appropriate for the employer to ask that a member of a designated group step forward to represent the group's interests. This view of the matter was shared with the complainant. For example, in one of the many emails exchanged between them, Mr. Beck wrote the following:

…

> *Your position that your exclusion from being a candidate for the RPP position was discriminatory is not one the Union shares. I've outlined the reasons in my non- referral letter… the union does not share your view that self-identification as a member of an equity seeking group is insufficient to qualify for the RPP position. We are of the view that the workplace experiences of a member of an equity seeking group are precisely what the employment equity committees should be seeking.*

…

[101] The union had every right to take that position and, in my view, could certainly have refused to adjudicate the grievance on that basis alone.

[102] The complainant acknowledged that the other issues he raised in addition to his disagreement with Mr. Beck's analysis were meant to show that the union had an ideological "bias" and that this was the reason for its refusal to adjudicate his grievance.

[103] The complainant was not wrong. The union did have a position in favour of the employer's policy. It was entitled to have this position and to act accordingly. What the complainant calls "an ideological bias" is better understood, in my view, as a reasoned position, adopted out of demonstrated need in response to human rights imperatives and evolving social norms. As Mr. Beck advised the complainant, "We are of the view that the workplace experiences of a member of an equity seeking group are precisely what the employment equity committees should be seeking."

[104] The duty of fair representation does not require the union to adjudicate a grievance because a member asks it to. The union must fairly represent the whole membership. It cannot meet that duty if it is required to adjudicate a grievance that challenges its own policy.

[105] For all these reasons, I find that the complainant did not meet his onus to show that the union violated its duty to fairly represent him.

[106] The Board makes the following order:

(The Order appears on the next page)

V. Order

[107] The complaint is dismissed.

March 27, 2023.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board