**Date:** 20230420

**File:** 561-02-44648

**Citation: 2023 FPSLREB 43**

*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

**WHITNEY MANSTAN**

Complainant

and

**UNION OF CANADIAN TRANSPORTATION EMPLOYEES**

Respondent

Indexed as
*Manstan v. Union of Canadian Transportation Employees*

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

**Before:** Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Herself

**For the Respondent:** Sandra Gaballa, Public Service Alliance of Canada

Decided on the basis of written submissions, filed May 24, June 6, and September 7, 2022.

**REASONS FOR DECISION**

## I. Complaint before the Board

[1] On April 28, 2022, Whitney Manstan ("the complainant") brought a complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*FPSLRA*") against the respondent, the Union of Canadian Transportation Employees ("UCTE" or "the respondent"), alleging that it breached its duty of fair representation. The UCTE is a component of the Public Service Alliance of Canada ("PSAC"). The PSAC responded to the complaint on behalf of the UCTE.

[2] The complainant was employed with Transport Canada ("the employer") as a term employee in a CR-04 position from May 17, 2021, until her resignation on February 21, 2022. She claims that the respondent acted in a manner that was arbitrary and negligent in its handling of her urgent and time-sensitive matters involving her former employer. More precisely, she claims that it was ineffective in helping her obtain a record of employment ("ROE") after she ended her employment and that it ignored her requests for assistance to make a formal complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against her former employer.

[3] In support of her duty of fair representation complaint, the complainant referred to additional events in which she had been dissatisfied with the representation that she received from the respondent. Section 190(2) of the *FPSLRA* mandates that a complaint be made no later than 90 days after the date on which the complainant knew or ought to have known of the circumstances or action giving rise to the complaint. As these additional events occurred more than 90 days before the date on which the complaint was made, they were not considered in rendering this decision (see, for example, *Mongeon v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 24).

[4] The complainant requests as corrective action an order under s. 192(1)(d) of the *FPSLRA* requiring the respondent to help her make a complaint against her former employer and to make more of an effort to secure her ROE.

[5] The respondent denies that it breached its duty of fair representation. It requests that the Board exercise its discretion and dismiss the complaint without an

oral hearing. It argues that the complainant did not present sufficient evidence to establish on a *prima facie* basis that it provided unfair representation by acting in a manner that was arbitrary, discriminatory, or in bad faith. It claims that it helped the complainant follow up with her employer after her employment ended and that ultimately, she received her ROE, T4, and final pay. It further asserts that it would have been fruitless to make the requested complaint as the matter arose from the *Employment Insurance Regulations* (SOR/96-332; "the *EI Regulations*"), not the relevant collective agreement or any legislation over which the Board has jurisdiction.

[6] The Board informed the parties that it proposed to address the complaint on the basis of written submissions and invited them to provide any additional submissions. The parties were informed that upon receipt of the submissions, the complaint could either be scheduled for an oral hearing, or it could be dismissed based on the written submissions and the file would then be closed.

[7] For the reasons set out in this decision, I am satisfied that an oral hearing is not required, and that the complaint should be dismissed.

## II. Summary of the events

[8] The facts that led to this complaint are, for the most part, not in dispute. Indeed, most of the events were captured in text messages and emails exchanged between different parties, and copies were provided to the Board as exhibits to the parties' submissions. Although the issue of whether the complainant eventually obtained a third ROE might be in dispute, it is not central to the determination, as will be explained later in this decision.

[9] The complainant states that she first informed Mike Johnson, UCTE Local President 90915, on March 8, 2022, of the fact that she was missing pay from her employer. She asked whether the UCTE could do anything to help her. Mr. Johnson told her that he would call Elyse Thibeault, the employer's human resources - labour relations advisor.

[10] She states that she followed up on March 11, 2022. Mr. Johnson informed her that Ms. Thibeault was not answering his calls and that he had been told that she was changing departments. He said that he would email her former manager, Tobi Butt. She asked him to let her know when he received a response and indicated that her next

course of action would be to go directly to the Board. Mr. Johnson responded as follows: “Most definitely I would”. He subsequently confirmed to her that day that he had emailed Mr. Butt.

[11] The complainant states that on March 14, 2022, she informed Mr. Johnson that she had contacted the Board on March 11, 2022, to make a complaint but that she had been told that her bargaining agent had to assist her with the process. She states that she explicitly asked him if he could initiate the process and that they spoke on the phone for 15 minutes that day to discuss it.

[12] The complainant states that on March 15, 2022, Mr. Johnson texted her, advising that he had reached out to Transport Canada’s Associate Director, Gerry Currie, via email that morning about her situation and that Mr. Currie had replied that he was looking into it. The complainant states that she responded to the text that she would still like to make a complaint with the Board and that Mr. Johnson replied, “Most definitely still proceed with that.”

[13] The respondent states that on March 15, 2022, the employer’s disability insurance case manager, Pierre Lefebvre, emailed her about her ROE, T4, and final pay. The email had attached a copy of the T4, indicated that she would receive a payment on March 16, 2022, and informed her that the ROE would follow the week after the payment was made. Unfortunately, she did not receive the email due to a typographical error in her email address.

[14] The complainant states that on March 17, 2022, Mr. Johnson phoned her, to advise her that he was escalating her complaint to another person at the UCTE’s head office as he was not equipped to deal with a complaint with the Board. He advised her that he had spoken to that person already, who would contact her via email.

[15] The respondent states that on that same day, Chris Bussey, UCTE Regional Vice President for the Atlantic region, emailed Human Resources Team Lead Geneviève Boisvert, requesting an update on the complainant’s ROE, T4, and final pay. Still on that same day, Ms. Boisvert responded that information had been sent to the complainant’s Gmail account on March 15, 2022, and suggested communicating directly with the employer’s Disability Insurance team about the pay issue.

[16] The complainant states that on March 23, 2022, she followed up with Mr. Johnson via text and informed him that she had not heard from the individual at the UCTE's head office. She also informed him that she had not received her T4 or ROE. Mr. Johnson indicated that he would follow up.

[17] The respondent states that on that same day, Mr. Johnson emailed Ms. Boisvert, requesting the complainant's ROE and T4, and stated, "This is our third attempt to get Whitney's ROE and T4 from her employer TC." He informed the employer that the complainant had yet to receive the information and provided the correct email to reach her.

[18] The respondent states that on March 24, 2022, Ms. Boisvert forwarded Mr. Lefebvre's email to the complainant's correct email address.

[19] The complainant states that on March 24, 2022, she followed up with Mr. Johnson via text, to ask whether he had heard back from the UCTE's head office about making the complaint with the Board. He replied that he had not heard anything yet and asked whether she had received her T4 and ROE. She informed him that she had received her T4 but still not the ROE. He asked that she respond to Ms. Boisvert's email to advise that she had still not received her ROE.

[20] The respondent states that the complainant responded to Ms. Boisvert that day, copying Mr. Johnson, stating that her ROE was still outstanding.

[21] The complainant states that on March 25, 2022, Ms. Boisvert responded to her email and advised her that she had transferred her email to the unit's management for review and action.

[22] Later that evening, an ROE was issued to the complainant.

[23] The complainant states that on March 28, 2022, she informed Ms. Boisvert that her ROE contained incorrect information. She states that it was written on the ROE that her last day of work was November 18, 2021, but it was actually February 21, 2022. She asked Ms. Boisvert to have the ROE amended and reissued with the correct information.

[24] The respondent states that on March 29, 2022, Mr. Lefebvre advised the complainant that the ROE had been completed in the Phoenix pay system and that it

was awaiting forwarding to Service Canada. He also indicated that the final outstanding pay would be received on April 13, 2022.

[25] The complainant states that on the next day, Mr. Johnson texted her to let her know that he had seen the emails that he had been copied on.

[26] The complainant states that on April 6, 2022, she followed up with Mr. Johnson via text to advise him that she still had not heard from the UCTE's national office about her situation and complaint with the Board. She advised Mr. Johnson that if the respondent was unable to assist her with those matters, she would need a letter or email from it indicating as much so that she could have a lawyer take over the case.

[27] She states that she followed up with Mr. Johnson on April 19, 2022, via text, to advise him that she still did not have her ROE, that she had not heard from the UCTE's national office, and that she did not know what was going on. Mr. Johnson responded, "This is unreal why you haven't received that", and said that he would call someone. A couple of hours later, he wrote to her again, to advise her that someone from the employer's Labour Relations division had called him and had said that again, she was looking into it.

[28] The respondent states that on that same day, Ms. Boisvert emailed the Disability Insurance team, inquiring as to when the complainant's ROE would be available.

[29] The complainant states that on April 26, 2022, she followed up with Mr. Johnson via text and asked if he had heard anything. He advised that he had not heard anything, stated that "this is unreal", and asked if she had received her ROE. She said that as of that point, she had been without income for more than 63 days. He replied that he would send another email. He then emailed Ms. Boisvert, advised that the complainant had not received her ROE, and asked her to assist. Later that evening, Ms. Boisvert responded that she had followed up with the head office team the day before and that she was still waiting for an official answer.

[30] The respondent states that Ms. Boisvert's response informed the parties that the ROE was to be corrected the following week.

[31] The complainant states that upon receipt of Ms. Boisvert's email, Mr. Johnson texted the complainant for confirmation that she had received it. She advised that she had received it but that the response was unacceptable to her. She asked whether they

could file a grievance. She also told him that she was still waiting to hear from the UCTE head office representative about the complaint with the Board and asked what was going on. Mr. Johnson responded that he would try to reach the UCTE head office again, that something could be done, and that he believed that they would need to file a notice of occurrence. He said that he would check with Mr. Bussey the next day.

[32] The complainant states that on April 27, 2022, she followed up with Mr. Johnson via text to ask what Mr. Bussey had to say about the notice of occurrence. She states that she did not receive a response from him. The following day, she filed this complaint with the Board, alleging that the respondent failed its duty of fair representation and requesting as corrective action that it be required to make a complaint against her former employer and to make more of an effort to support her in obtaining her ROE.

[33] The complainant states that on April 28, 2022, Ms. Boisvert emailed her and Mr. Johnson, to advise that she had "… received confirmation that there were issues with the accuracy of the ROE" and that the employer's pay advisor was "… in communication with PSPC (i.e. department issuing ROE) to have it correct[ed] …".

[34] The respondent states that on May 3, 2022, Disability Insurance Case Manager Sylvie Côté indicated that corrections had been made to the complainant's ROE and that it would be sent to Service Canada within the following two weeks. Ms. Boisvert forwarded that email to the complainant and to Mr. Johnson.

[35] The complainant states that on May 9, 2022, the employer issued a second ROE. She states that, once again, it contained incorrect information.

[36] The complainant states that as of the date on which she made her submissions to the Board (June 6, 2022), the employer had not reissued an ROE with the correct information.

[37] It is noted that in her submissions, the complainant did not indicate the nature of the error in the second ROE. It is also noted that she did not request further assistance from the respondent after April 27, 2022, but rather decided to make this complaint. As such, she did not approach the respondent directly after May 9, 2022, to inform it of the issues with the second ROE or to request its assistance in obtaining a third ROE.

[38] The complainant's additional submissions, dated September 7, 2022, did not indicate whether the employer agreed that a third ROE was required or whether one had been issued by that date.

**III. Analysis and reasons**

[39] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "*FPSLREBA*") states that the Board may decide any matter before it without holding an oral hearing. The Federal Court of Appeal has upheld that the duty of procedural fairness does not require holding an oral hearing before deciding every complaint (see *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98).

[40] I am satisfied that a decision on this complaint can be rendered based on the written submissions of the parties as the essential facts of the case are not in dispute.

[41] Section 190(1)(g) of the *FPSLRA* requires the Board to examine and inquire into any complaint made to it that an employee organization has committed an unfair labour practice within the meaning of s. 185.

[42] Section 185 of the *FPSLRA* lists unfair labour practices as including anything prohibited by s. 187, which defines the duty of fair representation owed by bargaining agents to the employees in their bargaining units. It reads as follows:

| | |
|---|---|
| *187 No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.* | *187 Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.* |

[Emphasis added]

[43] The complainant bears the burden of proof when making an unfair labour practice complaint. This burden requires the complainant to present evidence

sufficient to establish that the respondent failed to meet its duty of fair representation (see *Ouellet v. St-Georges*, 2009 PSLRB 107*).*

[44] When determining whether a bargaining agent has acted in an arbitrary, discriminatory, or bad-faith manner, the Board is guided by the principles that the Supreme Court of Canada established in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509. At page 527, it defined a union's duty of fair representation as follows:

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

[45] As has been noted in numerous decisions by the Board and its predecessors, those principles were developed to determine whether a bargaining agent appropriately used its discretionary power to file a grievance and refer it to arbitration. However, the same principles have been held to apply equally to a bargaining agent's conduct in general when handling an employee's grievance file (see *Ouellet*).

[46] The complainant argues that the respondent acted in an arbitrary manner when it (1) was ineffective in helping her obtain an ROE from her former employer, and (2) ignored her requests for assistance to make a formal complaint against her former employer. She does not allege bad-faith or discriminatory conduct on the respondent's

part. As such, the analysis that follows focuses on whether the respondent's conduct was arbitrary.

[47] The concept of "arbitrary" in the context of a duty of fair representation complaint was explained by the Supreme Court of Canada in *Noël v. Société d'énergie de la Baie James*, [2001] 2 SCR 207 at para. 50, 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.…*

[48] The complainant also alleges that the respondent acted in a negligent manner. "Negligence" is not an enumerated ground for a duty of fair representation complaint under s. 187. However, as indicated in *Noël*, the concepts of negligence and arbitrary conduct are closely related. Indeed, in the context of a duty of fair representation under the *FPSLRA*, the presence of serious negligence can be viewed as a form of arbitrary conduct. As a result, the following analysis of whether the respondent acted in an arbitrary manner is understood to include whether it acted in a negligent manner, without the need to analyze it separately.

[49] I turn now to the application of the above noted principles to the two grounds of alleged arbitrary conduct raised in the complaint.

**A. The respondent's level of effectiveness in assisting the complainant**

[50] The complainant claims that the respondent acted in a manner that was arbitrary and negligent in its handling of her urgent and time-sensitive matters involving her former employer and that it was ineffective in helping her obtain an ROE at the end of her employment. She requests as corrective action an order requiring the respondent "… to make more of an effort to secure [her] ROE", the insinuation being that the respondent was ineffective because it did not make sufficient efforts to help her resolve this matter.

[51] The respondent denies having acted in an arbitrary manner. It states that, to the contrary, it helped the complainant follow up with her employer after her employment ended, and that ultimately, she received her ROE, T4, and final pay.

[52] The respondent relies on the principles that the Supreme Court of Canada enunciated in *Gagnon* and the Board's subsequent application of them. It states that in *Ouellet*, the Board's predecessor noted that representation does not have to be perfect to be fair, and that in *Paquette v. Public Service Alliance of Canada*, 2018 FPSLREB 20 at para. 38, the Board held that in the absence of proof of serious wrongdoing, a complainant's mere dissatisfaction is not sufficient to establish unfair representation.

[53] Having carefully reviewed the complainant's submissions, I find that she has not met the onus of establishing that the respondent acted in an arbitrary manner on this ground. Rather, I find that the respondent's conduct throughout the events at issue was "… fair, genuine, and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee", per the principles that the Supreme Court of Canada enunciated in *Gagnon*.

[54] This conclusion is based on the following.

[55] The events that are the subject of the complaint span from March 8, 2022, to April 28, 2022. I find that throughout that period, the respondent was responsive to the complainant and that it responded to her messages in a timely manner. It was also diligent in its efforts to resolve the matter by progressively escalating it with the employer. On March 8, 11, 15, 17, and 23, 2022, it reached out to the employer's labour relations advisor, the complainant's manager, the employer's associate director, and finally, its human resources advisor. The respondent's efforts proved successful, and she received her missing pay, T4, and ROE.

[56] Unfortunately, the ROE issued on March 24, 2022, contained an error. The respondent was advised of it on March 28, 2022, when it was copied on an email from the complainant to the employer requesting that a new ROE be issued. The respondent let the complainant know on March 29, 2022, that it had seen her e-mail exchange with the employer to this effect. The respondent was informed by the complainant on April 19, 2022, that she did not have the new ROE. The respondent took immediate steps to reach out to the employer on the same day, and again on April 26, 2022, to have a new ROE issued. After each of these interventions, the employer assured it that the matter

was being looked into. On April 28, 2022, it was informed that a second ROE was to be issued. These facts support the conclusion that the respondent remained fully engaged in trying to help the complainant resolve the issues surrounding the issuance of a second ROE.

[57] In her June 6, 2022, submissions, the complainant stated that the second ROE was issued on May 9, 2022, but that once again, it contained errors. However, she did not state the nature of the errors; nor did she inform the respondent of them or request its assistance after they came to her attention. As a result, the respondent cannot be held as having acted in an arbitrary manner for events that occurred after April 28, 2022, as it was not made aware of the need for additional assistance or provided with an opportunity to assist.

[58] I conclude that the respondent's numerous interventions and follow-ups show that it took the complainant's situation seriously and that it was diligent in its attempts to represent her. Its efforts ceased after April 28, 2022, which is the date on which the employer informed it that a second ROE would be issued, likely the following week.

[59] While it is true that the respondent was not able to obtain immediate results for the complainant, it was certainly not for lack of trying.

[60] I have seen no facts to support a finding that the respondent demonstrated an uncaring or cavalier attitude toward the complainant's interests; nor were facts adduced to support that the respondent acted out of improper motives, out of personal hostility toward her, or based on improper grounds.

[61] I conclude that the respondent's attempts to help the complainant resolve her outstanding workplace issues, even though they were unsuccessful at times, cannot be characterized as arbitrary within the meaning of the duty of fair representation as defined in *Noël* and *Gagnon*.

### B. The respondent's decision not to support the complainant in filing a grievance against her former employer

[62] The complainant claims that the respondent breached its duty of fair representation when it ignored her requests for assistance to file a grievance or formal

complaint with the Board against her former employer. She requests as corrective action an order requiring that it help her make a complaint.

[63] The respondent denies having acted in an arbitrary manner.

[64] The respondent states that a bargaining agent's discretion about filing a grievance alleging a breach of a collective agreement is enshrined in s. 208(4) of the *FPSLRA*, which provides as follows:

| | |
|---|---|
| ***208 (4)*** *An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.* | ***208 (4)*** *Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.* |

[65] The respondent again relies on the principles that the Supreme Court of Canada enunciated in *Gagnon* and submits, citing *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLREB 87, that the duty of fair representation does not oblige the respondent to proceed with a grievance every time a member requests it.

[66] Relying on *Cousineau v. Walker*, 2013 PSLRB 68, the respondent states that the complainant's disagreement with its decision not to act on her behalf is not enough to demonstrate that unfair representation occurred: evidence of improper motives, personal hostility, or discrimination is required to establish arbitrary, discriminatory, or bad-faith conduct. The union has no obligation to present a grievance, as long as it investigates the circumstances of the case and makes a reasoned decision not to proceed.

[67] The respondent points out that the employer's obligation to provide an ROE within five days of the end of employment arises from s. 19(2) of the *EI Regulations*. It asserts that it does not arise from the relevant collective agreement or from any

legislation over which the Board has jurisdiction. It argues that an attempt to nevertheless grieve or otherwise pursue this matter would be fruitless and a poor use of its resources. It concludes that it was therefore reasonable and fair not to pursue legal proceedings against the employer as the complainant requested. It states that that was not arbitrary, discriminatory, or bad-faith conduct and that the complainant did not meet her onus in this case.

[68] I concur with the respondent. This conclusion is based on the following.

[69] The summary of events shows that from March 8 to April 27, 2022, the complainant repeatedly requested that the respondent help her make a complaint against her former employer. Indeed, the summary of events shows that on March 8, 2022, she first informed the respondent that she was experiencing issues with her former employer, and that on March 11, 2022, she requested that a complaint be made. She followed up on her request on March 14, 15, 23, and 24, as well as on April 6, 19, 26, and 27, 2022.

[70] The summary of events also shows that throughout that period, Mr. Johnson confirmed to her that a complaint could be made; however, beyond those words of support, no complaint was ever made. It is regrettable that in his effort to be supportive, Mr. Johnson created an expectation for the complainant that a complaint could and would be made. However, the final decision whether to support a complaint remains with the bargaining agent and the Board will intervene only on clear, cogent, and convincing evidence that the bargaining agent acted in an arbitrary, discriminatory, or bad-faith manner.

[71] As the Supreme Court of Canada stated in *Gagnon*, an employee does not have an absolute right to arbitration, and a bargaining agent enjoys considerable discretion in this respect, provided that it exercised its discretion “in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other”.

[72] I find that that is so in this case.

[73] In making this determination, I am guided by the previous decisions made by the Board and its predecessors on this point of law.

[74] In *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52, the former Board examined a bargaining agent's duty of fair representation and provided the following useful guidance at paragraphs 43 and 44:

> *The role of the Board in a complaint involving the duty of fair representation is to determine whether a bargaining agent acted in bad faith or in a manner that was arbitrary or discriminatory in its representation of the complainant. The Board does not determine whether the bargaining agent's decisions on whether to represent or how to represent were correct. The bargaining agent has considerable discretion in determining whether to represent an employee on a grievance and on how to handle a grievance.…*
>
> *The Federal Court of Appeal has held that in order to prove a breach of the duty of fair representation, the complainant must satisfy the Board that the bargaining agent's investigation into the grievance "was no more than cursory or perfunctory" (International Longshore and Warehouse Union v. Empire International Stevedores Ltd., 2000 CanLII 16578 (F.C.A). It is the role of a bargaining agent to determine what grievances to proceed with and what grievances not to proceed with. This determination can be made on the basis of the resources and requirements of the employee organization as a whole (Bahniuk v. Public Service Alliance of Canada, 2007 PSLRB 13). This determination by a bargaining agent has been described as follows, in Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000, 2003 CanLII 62912 (BC L.R.B.):*
>
> …
>
> *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].*
>
> …

[75] The respondent in this case did just that. It assessed that it would not have been a good use of its resources to file a grievance on the basis that the issue did not

arise from the relevant collective agreement or from any legislation over which the Board has jurisdiction.

[76] It is important to note that the Board does not have to make a definitive finding on whether that assessment was correct. However, a cursory review of the law on that point supports that the respondent's assessment was reasonable and therefore would not support a finding of "serious or major negligence", per *Gagnon*, on its part.

[77] Indeed, the subject matter of the grievance that the complainant wished to file against the employer would have related to the employer's responsibilities under the *EI Regulations*. There is no alleged collective agreement violation. The Board and its predecessors have rendered several decisions regarding a bargaining agent's duty of fair representation with respect to matters not covered by a collective agreement or the *FPSLRA*. In a recent decision, *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLREB 83, the Board conducted an extensive review of that very issue and concluded as follows:

> …
>
> *I note that these decisions, on which the complainant supported his argument, date from 2007, 2008, and 2015 and that they all came after the FPSLRA's preamble was adopted, which came into force on April 1, 2005 (SI/2005-22). It reaffirms the role of bargaining agents and their role in resolving workplace issues.*
>
> *The preamble's wording was the same when the Board wrote in Ouellet that unless a specific commitment is made for a union organization to ensure representation outside the collective agreement's scope or a remedy provided in the FPSLRA, there can be no duty of fair representation. The preamble's wording was also the same when the Board wrote in Elliott v. Canadian Merchant Service Guild, 2008 PSLRB 3, that the duty of fair representation involves the rights, duties, and issues set out in the Public Service Staff Relations Act (R.S.C., 1985, c. P-35). The Board's 2015 Abeysuriya decision accords. And I would add that all the Board's decisions that address this same issue are in accord; the bargaining agents' duty of fair representation is restricted to representing federal public service employees in exercising rights that may be negotiated collectively or are provided by the FPSLRA.*
>
> …

[78] Although none of the decisions reviewed in *Lessard-Gauvin* dealt with the Board's jurisdiction to hear a matter arising from a violation of the *EI Regulations*,

there is a significant probability that the outcome of such a dispute would result in the same conclusion being drawn.

[79] As a result, the respondent had legitimate grounds to conclude that its chances of success might have been limited had it pursued the matter. Therefore, doing so would not have been an appropriate use of its resources. As stated in *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC LRB), when the respondent decided not to proceed with a grievance because of its assessment that the grievance did not have a likelihood of success, it was doing its job of representing the employees — as a whole — as required under the *FPSLRA*.

[80] I am satisfied that the respondent's decision not to support the complainant's grievance was motivated by genuine considerations of its chances of success and not by any improper motivation that would compel the Board's intervention.

[81] I conclude that the respondent's decision not to support the complainant in making a complaint or filing a grievance against her former employer cannot be characterized as arbitrary within the meaning of the duty of fair representation as defined in *Noël* and *Gagnon*.

**IV. Conclusion**

[82] Based on the facts, which were not in dispute, I find that the complainant did not establish that the respondent breached its duty of fair representation. The complaint is therefore dismissed.

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

*(The Order appears on the next page)*

## V. Order

[84] The complaint is dismissed.

April 20, 2023

**Audrey Lizotte,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**