

**Date:** 20230523

**File:** 561-02-40776

**Citation:** 2023 FPSLREB 51

*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

**SHANNON HANCOCK**

Complainant

and

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA**

Respondent

Indexed as

*Hancock v. Professional Institute of the Public Service of Canada*

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

**Before:** Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Dustin W. Klaudt, counsel

**For the Respondent:** Simon Ferrand, The Professional Institute of the Public Service of Canada

---

Decided on the basis of written submissions,  
filed July 22 and September 5, 2019, December 14, 2021, November 29 and  
December 17 and 22, 2022, and January 16 and 24 and February 18, 2023.

---

**REASONS FOR DECISION**

---

**I. Complaint before the Board**

[1] Shannon Hancock (“the complainant”) was a nurse with Veterans Affairs Canada (VAC or “the employer”). The respondent, the Professional Institute of the Public Service of Canada (“PIPSC”), is the certified bargaining agent representing nurses employed in the federal public service.

[2] On July 22, 2019, the complainant made this complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), alleging a violation of s. 187, which sets out a bargaining agent’s duty of fair representation as follows: “No employee organization ... 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.”

[3] On September 5, 2019, the respondent requested that the complaint be dismissed summarily without a hearing on the basis that it disclosed no *prima facie* violation of s. 187 of the *Act*.

[4] Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), I determined that I had sufficient material to render a decision based on written submissions. I have assumed the complainant’s alleged facts to be true, I have accepted the respondent’s unchallenged explanations for its actions, and I have considered the complainant’s reply to these explanations.

[5] The issue I must determine is whether, taking the complainant’s alleged facts to be true, there is an arguable case that the respondent acted arbitrarily, discriminatorily, or in bad faith. For the reasons set out in this decision, I have determined that the complainant has not presented an arguable case of a breach of s. 187 of the *Act*. Therefore, her complaint is dismissed.

**A. The scope of the complaint**

[6] In her complaint, the complainant alleged that VAC had violated the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). I have not addressed this allegation as the complaint is only against the respondent. In her complaint, she also requested a return to a safe workplace, a priority deployment out of her workplace, a restoration of her *Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

pay, and compensation for lost income. She also requested an acknowledgment that a performance appraisal she had received was retaliatory, inaccurate, and unfair. These requests relate to actions solely in the power of VAC, not the respondent. Accordingly, I have not addressed these issues in this decision.

## **B. The procedural history**

[7] The complainant also made a complaint (Board file no. 560-02-41422) against VAC under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2). In 2022, she requested that it be consolidated with the complaint against her employer. I denied the consolidation request. I determined that it is generally not appropriate to consolidate a complaint against a bargaining agent with a complaint against an employer. Although there may be facts common to both complaints, the legal tests are sufficiently different to render a consolidated process both cumbersome and inefficient.

[8] The complainant was initially self-represented when she made the complaint in 2019. In 2020, there was a mediation of the complaint that was unsuccessful. In 2021, she retained counsel. In 2022, another mediation attempt was unsuccessful.

[9] After receiving the respondent's reply to the complaint in 2019, including the request for its summary dismissal, the complainant requested that her complaint be held in abeyance pending the completion of a workplace-violence-complaint investigation. A Member of the Board denied the request and directed that the complainant provide her response to the respondent's reply.

[10] In February 2021, the complainant requested that she be allowed to respond to the respondent's reply orally before a Board member. She stated that this request was based on her need for accommodation. I determined that since she was able to provide a complaint in writing that she was also able to provide a response to the reply in writing. She was advised that if she required more time to prepare a response as an accommodation, she would be granted a reasonable period in which to prepare one.

[11] In July 2021, the Board asked the complainant about her intentions with respect to her complaint. She advised it that she had recently retained counsel and that a reply to the respondent's submissions would not be expected until October 2021. Her reply, prepared by counsel, was eventually received, on December 14, 2021.

[12] As noted, mediation efforts were made in 2022, so the deadline for the respondent's reply to the complainant's submissions was deferred until November 29, 2022. I allowed her to submit rebuttal submissions, which were received in December 2022.

[13] The respondent objected to the inclusion of a workplace-violence-complaint investigation report as part of her submissions, and further submissions from the parties on this issue were completed as of February 20, 2023.

[14] After the completion of the written submissions process, the complainant advised the Board that she was no longer represented by counsel.

### **C. Objection to the introduction of an investigation report**

[15] As part of her submissions, the complainant submitted a copy of an investigation report dated August 15, 2019 ("the investigation report"). The investigation was conducted under the *Canada Occupational Health and Safety Regulations* (SOR/86-304; since replaced by the *Work Place Harassment and Violence Prevention Regulations* (SOR/2020-130)) and was commissioned by VAC.

[16] The respondent objected to the introduction of the investigation report because it was irrelevant to the complaint and would not help the Board address the complaint. The respondent also submitted that the report should be admitted only if it was binding on the respondent. It submitted that it was neither a party nor a participant in the investigation. It submitted that allowing the report to be admitted into evidence would compromise the integrity of the Board's decision-making process.

[17] The employer made brief submissions about the investigation report. It stated that it did not engage the investigator to investigate internal union matters and that it has "no interest nor right of involvement in internal union affairs".

[18] The complainant submitted that it was open to the Board to review the evidence (the investigation report) and give it the weight that it saw fit. She also noted that at that point, the investigation report findings were merely being cited as threshold evidence of an arguable case for the complaint. The issue of whether those findings are binding on the respondent is best addressed at a hearing of the complaint, she stated.

[19] The complainant submitted that denying her the opportunity to admit the investigation report would be a denial of procedural fairness and natural justice.

[20] I have allowed the admission of the investigation report on the basis that it formed part of the complainant's submissions. In an arguable-case analysis, it is appropriate to consider all the information provided by a complainant to help determine whether an oral hearing is required. I have addressed the relevance of the investigation report's findings in the reasons section of this decision.

[21] Different considerations on the admissibility of the investigation report would apply at a hearing on the merits of a complaint. Allowing a document to be introduced at the arguable-case stage of analysis does not necessarily mean that it will be admissible if there is a full hearing of the complaint.

#### **D. Confidentiality and the investigation report**

[22] The workplace-violence-complaint investigation was conducted under the *Canada Occupational Health and Safety Regulations*. At that time, the regulations required that the identities of those involved in the investigation not be revealed without their consent (see ss. 20.9(3) and (5)(b)). The investigator determined that all those interviewed in the report provided their consent.

#### **II. The context of the complaint**

[23] The complainant was appointed as a steward for the respondent in October 2017. In or around January 2018, another steward told the complainant that she would seek the removal of the complainant from her steward position. The complainant described the conversation as "condescending, disrespectful, and intimidating". She informed the respondent of her negative interaction with the other steward. The respondent appointed an investigator to examine her complaint about the other steward. It appears that the other steward also made a complaint with the respondent about the complainant. The investigator determined that the other steward's allegations were false.

[24] The complainant contacted VAC's deputy minister on January 16, 2018 and reported her workplace concerns about staffing and resource issues. She alleges that following this disclosure, "various" VAC employees and representatives of the respondent began taking retaliatory measures against her, including a) negative

employment appraisals and subsequent performance meetings with her supervisor, and b) stewards investigating her and sharing private information without authorization.

[25] The complainant made a harassment complaint against individuals employed at VAC, which VAC dismissed without an investigation. The respondent filed a grievance on her behalf that was dismissed at the final level in August 2018. The respondent declined to refer it to adjudication.

[26] After receiving a negative employment appraisal in May 2018, the complainant made a reprisal complaint, which VAC also dismissed. Initially, the Employment Relations Officer (“ERO”) representing the complainant told her that the grievance would be referred to adjudication at the Board. When her file was reassigned to a new ERO, she was advised that it would not be referred.

[27] In September 2018, the complainant advised VAC that she was refusing unsafe work under the *Canada Labour Code*. An investigator was assigned in February 2019, and the complainant participated in the investigation.

[28] The complainant experienced some issues related to her return to work from medical leave. She alleges that she asked the respondent to refer her matters to an ERO with experience in disability management and psychological and occupational health and safety concerns. The respondent denied the request to reassign her file. She asked for a reconsideration under the respondent’s “Conflict Resolution Procedures for Internal Labour Relations Matters” policy. The reconsideration request was denied at both levels of the internal dispute resolution process. The final decision from the respondent’s president was provided to the complainant on July 10, 2019.

[29] On July 19, 2019, the respondent advised the complainant that it was willing to continue representing her, conditional on her collaborating with the assigned ERO. On July 22, 2019, she advised VAC that she was no longer represented by the respondent.

[30] The complainant states that the respondent told her that she could not file her own grievance against VAC. She states that she subsequently received advice from someone not within the respondent’s organization that she could in fact refer a grievance to the Board, so she did.

[31] The complainant and another steward made complaints with the respondent related to their interactions, which were investigated in accordance with the respondent's internal conflict resolution policy. In June 2018, an investigator was appointed. The complainant cooperated with the investigation but did not participate in a full interview. She found the prospect of an extended interview in her word "triggering". She also raised concerns about the investigator's lack of knowledge of human rights, occupational health and safety, and nurses' professional obligations. She also raised concerns about what she saw as the sexist approach that was being used in the complaint process, namely, the panel of peers did not reflect the gender breakdown of the nursing profession.

[32] In August 2019, VAC's appointed investigator completed the investigation report into the complainant's complaint of workplace violence and harassment. The investigator determined that emails between stewards of the respondent were inappropriate and derogatory and that several of their actions had been inappropriate, including threats being made to remove the complainant as a steward; a steward speaking to other stewards about the complainant without first checking with the respondent's national office or accounting for its policy; threats being made to take action with the respondent's management that would detrimentally affect the complainant; a steward's complaint to the respondent about the complainant that further isolated the complainant by forcing her peers to take sides, which resulted in her feeling bullied and isolated; a steward's condescending tone toward her; a steward's comments about her power to control steward membership that were inappropriate and contrary to the respondent's policy; the complainant's removal from being a steward, which was outside the other steward's authority; and stewards creating a climate in which the complainant was isolated from both her peers and the bargaining agent that was supposed to support her.

[33] In her rebuttal to the respondent's reply, the complainant submitted that she had raised concerns with the respondent about a steward whom VAC temporarily appointed into a management-reporting role over her. She stated that she was concerned about the conflicting loyalties that a steward would face in having to collect private information about her at VAC management's behest.

[34] In her rebuttal, the complainant also elaborated on two grievances that she had filed. The respondent had helped her file a grievance related to VAC's failure to

accommodate her return to work for several weeks. VAC denied that grievance. The respondent informed her that it would not be referred to adjudication.

[35] The respondent filed a second grievance on her behalf against the denial of an application for paid leave pending the resolution of ongoing grievance processes. The respondent advised her that it would withdraw the grievance without precedent or prejudice. She stated that the only explanation provided was that the collective agreement was clear and that there was no chance of success. She stated that no legal precedent or advice was provided to explain the respondent's change of position.

### **III. The allegations in the complaint, and the respondent's reply**

[36] The complainant submitted that the respondent was ineffective and that it refused to acknowledge its wrongdoing or incompetence in handling her human rights, psychological, and workplace health-and-safety issues. She stated that its members were responsible for her workplace difficulties.

[37] The complainant argued that the respondent's handling of her issues was arbitrary, in bad faith, and discriminatory. In her complaint, she set out the respondent's following actions that in her view, were either arbitrary, in bad faith, or discriminatory:

- 1) The threats to remove her as a steward and the later decision to do so.
- 2) A steward speaking to other stewards about her without PIPSC's approval and outside PIPSC policy.
- 3) The other steward threatening to, in her words, "escalate to PIPSC officers".
- 4) The other steward making a false complaint against her.
- 5) The other steward fishing for compromising information about her.
- 6) The other steward using a condescending tone when addressing her.
- 7) The other steward making statements about her power to exclude stewards, which was contrary to PIPSC policy.
- 8) Emails among stewards that were inappropriate and derogatory.
- 9) Stewards creating a climate that isolated the complainant from her peers and PIPSC.
- 10) The respondent's failure to ensure that her complaint against the other steward was investigated in, in her words, "a sensitive and appropriate manner and adequately resolved".
- 11) The respondent's failure to respond to concerns about the conflict-of-interest implications of stewards serving in departmental management roles.
- 12) The respondent's failure to ensure that appropriate discipline was imposed and reforms were made in response to the workplace violence and bullying after the investigator's recommendations were released.
- 13) The denial of referrals to adjudication.



- 14) The failure of the respondent's representative to help her with VAC requests for medical information.
- 15) The respondent's rejection of her request to consult experts in human rights, occupational health and safety, mental health, and the professional regulation of nurses in assessing her grievances, complaints, and claims.
- 16) The respondent's failure to inform her that she could make a complaint on her own behalf.
- 17) The denial of her request for a new representative.
- 18) The failure to combat specific and systemic discrimination issues at PIPSC relating to disability, sex, and geographic residence.
- 19) The respondent's failure to maintain a climate in which she had access to union representation.
- 20) The respondent's failure to police the inappropriate conduct of its stewards.

[38] In her rebuttal, the complainant also elaborated on her dissatisfaction with the representation provided by the assigned ERO, who denied her ability to refer several grievances to adjudication, dismissed her previous grievance before it could go to adjudication, failed to assist her in her physician's efforts to supply VAC with requested medical information, and did not allow her to file a grievance related to a medical evaluation mandated by VAC.

[39] In her rebuttal, the complainant stated that she was generally dissatisfied with the respondent's conduct in a variety of matters, including its handling of stewards' actions that were found to be acts of workplace violence; its handling of her grievance processes; its handling of VAC's request for medical information and its denial of assistance; its lack of accountability and action on the issue of stewards in her words "moonlighting" in VAC management roles, its general failure to provide an ERO or other advice that was competent in terms of human rights, occupational health and safety, mental health, and professional regulation of nursing issues; and its general inability and lack of appetite to combat specific and systemic discrimination issues relating to disability, sex, and geographic residence.

#### **IV. Summary of the arguments**

##### **A. For the respondent**

[40] In its response to the complaint, the respondent submitted that it had represented the complainant fairly and that it took steps to appropriately protect her rights. It submitted that the crux of the complaint was based on her issues with her employer and not with her bargaining agent.

[41] The respondent submitted that it did not withdraw its representation of the complainant but that it did advise her of what was required of her for it to effectively represent her. It noted that after being informed of these requirements, she rejected representation and informed VAC that she was no longer being represented by the respondent.

[42] The respondent submitted that the Board should exercise its discretion to dismiss the complaint without a hearing as it discloses no *prima facie* case. It submitted that the complaint does not contain any allegations that establish a violation of s. 187 of the *Act* and that it provides no insight on how the respondent might have acted in a manner inconsistent with its duty to fairly represent the complainant when it refused to advance her grievance.

[43] The respondent submitted that the complainant's decision that it would no longer represent her was a result of its denial of her request to reassign her file to another ERO, which was not a refusal to represent her.

[44] The respondent submitted that the complainant provided no clear statement of allegations that even if established, would amount to it having applied arbitrary, bad faith, or discriminatory considerations. It submitted that it was her responsibility to provide coherent statements of how she believes the *Act* was violated (see, for example, *Gibbins v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 36).

## **B. For the complainant**

[45] The complainant submitted that the facts that she provided, when assumed true, raise established legal claims that have a reasonable prospect of success, are not bound to fail, and present an arguable legal case. She submitted that the facts meet the very low standard described in *Joe v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLRB 10, and *Negi v. Public Service Alliance of Canada*, 2021 FPSLRB 98, and have an air of reality beyond mere accusations. She submitted that an independent investigator investigated and validated many of the allegations in her complaint in the investigation report. She submitted that in contrast, the respondent has failed to establish which allegations have no reasonable prospect of success, the supporting legal arguments as to why they lack a prospect of success, or the applicable legal standard to apply when weighing each allegation.

[46] She submitted that the respondent's request for a summary dismissal should be rejected, and that the complaint should proceed to a full hearing.

### C. The respondent's reply

[47] The respondent submitted that it fully represented the complainant and that it continues to, since it recently filed a grievance on her behalf, in October 2022.

[48] The respondent submitted that internal union matters do not engage the duty of fair representation under s. 187 of the *Act* (see *Burns v. Unifor, Local 2182*, 2020 FPSLRB 119, *Bernard v. Professional Institute of the Public Service of Canada*, 2020 FPSLRB 11, and *Sturkenboom v. Professional Institute of the Public Service of Canada*, 2012 PSLRB 81). It stated that the complainant and the other steward were each subject of internal union complaints that it made and investigated under its internal policy. Many of the allegations that the complainant relied on relate to internal union affairs and therefore do not engage the duty of fair representation. The respondent referred to *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLRB 4 at para. 60, which states, "... the respondent cannot be blamed for breaching a duty that it does not have."

[49] The respondent submitted that it also owes no duty of representation to its members in the context of workplace-violence complaints made under the *Canada Occupational Health and Safety Regulations*. It stated that it has no duty to represent the complainant on matters not covered by the *Act* or not involving the application of the collective agreement (see *Brown v. Union of Solicitor General Employees*, 2013 PSLRB 48, and *Elliott v. Canadian Merchant Service Guild*, 2008 PSLRB 3). The respondent also noted that the complainant never requested representation services with respect to her workplace-violence complaint.

[50] The respondent submitted that the complainant bears the onus of establishing that it breached its duty of fair representation; see *Ouellet v. St-Georges*, 2009 PSLRB 107 at para. 31. It stated that a complaint must go beyond mere allegations devoid of material facts to establish a breach of the *Act*.

[51] The respondent referred me to *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLRB 30, for a discussion of what constitutes "facts" to be taken as proven for the purposes of establishing an arguable case under s. 187 of the *Act*. The

---

Board relied on *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, in which the Supreme Court of Canada explained as follows at paragraph 27:

*27. ...The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.*

[52] The respondent maintains that the complaint does not contain detailed material facts that establish a *prima facie* violation of s. 187 of the Act. For example, the complainant makes allegations that contain empty statements about denials to refer grievances and complaints to adjudication while acknowledging that she was provided with a rationale for the respondent's position. Similarly, she alleges that it failed to combat systemic discrimination, without presenting any material facts establishing either systemic discrimination or that it failed its duty of representation pursuant to s. 187.

[53] The respondent submitted that employees represented by a bargaining agent do not have an absolute right to refer a grievance to adjudication as the bargaining agent has considerable discretion when deciding which grievances to refer; see *Burns and Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509.

[54] The respondent also submitted that a bargaining agent can be wrong in its interpretation of collective agreements; see *McFarlane v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 27. It stated that any such interpretation must be found to have been made in an arbitrary or discriminatory manner or in bad faith to support a finding of a breach of the duty of fair representation.

[55] The respondent stated that the complainant has not agreed with its recommendations and actions. As stated in *Burns*, the Board's role with respect to duty-of-fair-representation complaints is very limited. The respondent submitted that the Board does not have general powers of inquiry that might be of assistance to a complainant having trouble with a bargaining agent.

[56] The respondent maintains that it has never withdrawn representational services from the complainant. As she acknowledged in her complaint, she did not avail herself of the representational services available to her. The respondent stated that she did not point out any clear instances in which it refused to represent her in any dealings with her employer.

#### **D. The complainant's rebuttal**

[57] The complainant submitted that despite no formal denial of representation by the respondent, its denials to pursue several substantive complaints and her concerns constituted a constructive denial of representation.

[58] The complainant stated that the respondent denied the referrals of three grievances to adjudication, withdrew a fourth grievance, and refused to file a fifth requested grievance. Also, it further generally failed to assist with VAC's medical information requests to the complainant, to respond to concerns raised about potential conflicts of interest involving union stewards serving in management roles, and to general concerns about the adequacy of its response to alleged workplace violence and harassment by several union stewards against her. She maintained that it provided insufficient justification for failing to advance these complaints and concerns, which thus denied her full, fair, and appropriate representation. The complainant noted that the respondent has made no specific submissions to support that it was justified in its decisions not to further assist her with her substantive complaints and concerns.

[59] The complainant submitted that in the context of allegations of workplace harassment and violence as well as conflicts of interest, both involving the respondent's stewards, any decisions that bargaining agents make denying representation for specific complaints against an employer (or other concerns involving an employer) should be made with heightened justification. She submitted that failing to do so would be arbitrary and would potentially evidence discriminatory or bad-faith motives.

[60] The complainant acknowledged that the respondent is representing her in a grievance against the termination of her employment. However, she noted that she had requested that an earlier grievance be filed related to similar conduct by the employer

and that no grievance was filed. She submitted that her termination of employment might have been avoided had the respondent advanced the earlier grievance.

[61] The complainant submitted that the Board's jurisprudence does not support the principle that any complaint engaging internal union affairs is automatically exempted from a review for fair representation under s. 187 of the *Act*. She stated that even if the Board views internal union affairs as generally exempt from review, an exception should be made when internal union affairs have effects that permeate into the employment relationship. She submitted that the distinction between internal union affairs and matters involving employment relations is far from a neat dichotomy. She stated that unquestioned adherence to an absolute bar on jurisdiction related to internal union affairs risks arbitrariness. She submitted that the Board should consider whether the conduct complained of is truly internal to a union or if it involves effects that transcend into employer-employee relations in which the respondent has a duty to fairly represent a complainant.

[62] The complainant stated that the decisions cited by the respondent related to internal union matters can all be distinguished on the facts as they all relate to denials of participation in collective agreement votes, which the Board determined is a highly internal union matter. In contrast, this complaint involves internal union business relating to discipline processes and assessments of workplace violence and harassment that occurred in the stewardship process.

[63] The complainant submitted that an independent investigator determined that workplace violence and harassment had occurred in relation to the conduct of stewards toward her and made several recommendations as to improvements to avoid future workplace violence and harassment. She noted that there was no indication from the respondent as to whether any of those recommendations were implemented or that any of the perpetrators of workplace violence faced any consequences for their actions. She also noted that she was never reinstated to her steward position.

[64] The complainant submitted that the respondent's failure to address workplace violence and harassment from its stewards had further spillover effects into its representation of her in her relationship with the employer. She submitted that the conclusions in the investigation report supported the conclusion of a spillover effect. She also submitted that the identified problems of systemic discrimination in the areas

of disability, sex, and geography were effectively being suppressed through the workplace violence and harassment by the respondent's stewards.

[65] The complainant submitted that these are only a few examples of the potential connections between what the respondent terms "internal union business" and her duty-of-fair representation complaint. She submitted that at a full hearing, with the admission of evidence and comprehensive legal argument, this degree of interconnectedness would be shown in even greater depth.

[66] In the alternative, the complainant submitted that even if the incidents of workplace violence and harassment are not within the jurisdiction of the Board complaint, the findings and recommendations from the investigation report are still useful evidence for establishing facts relating to other elements of the complaint.

[67] The complainant stated that representation for complaints of workplace violence and harassment is included in the respondent's duty of representation. In the alternative, even if a full duty of representation is not established, the respondent has a duty to engage with findings of workplace violence and harassment within the course of other fair-representation matters.

[68] The complainant submitted that the relevant collective agreement includes a duty to actively consult on reasonable procedures to reduce the risk of injury or occupational illness in the workplace (the occupational-health-and-safety provision). She argued that at a minimum, this obligation should mandate that the respondent actively participate in an investigation when requested, review the investigation findings, and respond appropriately to its recommendations. She submitted that there was no indication from the respondent that such obligations were respected, and the failure to respect them has contributed to several injuries to her. She noted that these include the failures to assist with responding to VAC's medical information requests.

[69] The complainant submitted that the collective agreement obligation to consult should be taken further, to require that the respondent devote necessary resources to a complainant of workplace violence and harassment to allow the complainant's full, fair, and adequate participation in the investigation process (including legal advice and representation) to ensure that incidents of workplace violence and harassment are fully, fairly, and appropriately identified and that corresponding recommendations can be made that can then be adopted by an employer.

[70] The complainant stated that whether the Board accepts the requirement of full representation under the occupational-health-and-safety provision of the collective agreement or the obligation to participate and consider the findings and advocacy to implement the recommendations, the respondent failed to adequately dispense either fair-representation obligation. She submitted that *Lessard-Gauvin* is confined to its particular facts involving representation in a complaint to the Office of the Commissioner for Official Languages.

[71] The complainant submitted that in this case, there is an express consultative duty on the respondent about safety and health that is found in the collective agreement. She submitted that the interpretation of the scope of that duty, and whether the respondent's failure to represent her in the investigation or to further consider its findings and recommendations, or the allegations of workplace violence and harassment generally, with respect to the other employment complaints and concerns, is properly within the Board's jurisdiction.

[72] The complainant submitted that she has provided sufficiently detailed material facts to support an arguable case that a breach of the duty of fair representation occurred. The respondent's reliance on the standard from *Operation Dismantle* is unwarranted. She stated that a comparison between the speculative allegations about the harms of cruise-missile testing is not an apt analogy to the facts of this complaint. She submitted that the harms resulting from the unfair representation are not incapable of proof; rather, her psychological deterioration resulting in her disability leave from her employment, and the negative financial consequences that resulted, are well documented and very tangible. She argued that the Board should exercise its power to determine if those very tangible negative effects were contributed to by arbitrary, discriminatory, or bad-faith conduct by the respondent in the conduct of its fair-representation obligations.

[73] The complainant submitted that the allegations that the ERO breached the duty of fair representation include material facts that if assumed true could show arbitrariness, bad faith, or discrimination. She submitted that the ERO's failure to provide legal precedent, advice, or even an extended rationale beyond "the collective agreement was clear and there was no chance of success" is capable of proof, and when supplemented with legal argument and appropriate evidence, it could arguably establish unfair representation.



[74] The complainant submitted that the respondent has stated that no material facts have been established with respect to the allegations of systemic discrimination without stating how any of the alleged facts constituting systemic discrimination are incapable of proof.

[75] The complainant submitted that the request for a blanket dismissal of the entire complaint, with the respondent's references to only two narrow categories of allegedly improperly established unfair-representation conduct, is disproportionate. She submitted that if the respondent is permitted to "cherry-pick" only two examples of allegedly improperly pleaded unfair-representation allegations and to use those to invalidate the rest of the complaint, it would set an unfortunate precedent and would cast a chilling effect over future unfair-representation complaints by effectively displacing the "very low threshold" for factual allegations from the Board's past decisions.

[76] In the alternative, the complainant submitted that if the Board is of the view that the two subcategories of unfair representation are not within the duty of fair representation, there are more appropriate remedies than dismissing the entirety of the complaint. She submitted that a more proportionate and tailored remedy would be to strike only those specific allegations that are found not covered by the duty of fair representation. She submitted that a fairer approach would be to make a declaration as to the insufficiency of the grounds and allow her to amend her complaint and provide further facts to support those specific grounds of her complaint.

[77] In conclusion, the complainant submitted that the respondent has failed to establish that she has not met the arguable-case standard. She stated that she has provided sufficiently detailed material facts capable of establishing the alleged grounds of unfair representation by the respondent, should the complaint proceed to a hearing. She submitted that the respondent's summary dismissal request should be rejected and that the complaint should proceed to a full hearing.

## **V. Reasons**

[78] The complainant has the burden of proof in a complaint made under s. 187 of the *Act*, which requires the complainant to present evidence sufficient to establish that the respondent failed to meet its duty of fair representation (see *Ouellet*). The Board's duty-of-fair-representation decisions allow bargaining agents substantial latitude in

their decisions on the representation of their members. As noted in *Manella v. Treasury Board of Canada Secretariat*, 2010 PSLRB 128, at para. 38, “The bar for establishing arbitrary conduct — or discriminatory or bad faith conduct — is purposely set quite high.”

[79] The Board has adopted what is called an “arguable-case analysis” when the respondent to a duty-of-fair-representation complaint objects to a full hearing of the complaint (see, for example, *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28). This analysis is often done on the assumption that all the alleged facts in the complaint are true (see, for example, *Burns*, para. 83). The test is whether the complainant has an arguable case that the respondent acted in bad faith or in a manner that was arbitrary or discriminatory.

[80] In most cases, a decision on a complaint of an unfair labour practice is a retrospective examination of the allegations and the actions of the parties to the complaint. Actions that happen after the complaint is made are relevant to assessing it only if they directly relate to the allegations in the original complaint. If this approach is not taken, a complaint could become an ever-expanding examination of the ongoing relationship between the parties to it. For this reason, I have not considered the fact that the respondent is providing representation for a matter that arose after this complaint was made. In some cases, subsequent representation can be relevant in a duty-of-fair-representation complaint. However, it mostly arises when the representation relates to an issue with the employer that existed when the complaint was made or representation on a similar matter occurred. In this case, the respondent’s representation relates to a new dispute with the employer and is therefore not relevant to this complaint.

[81] In her submissions, the complainant suggested that should the Board find that there are insufficient material facts to support her allegations, she should be given the opportunity to amend her complaint. In my view, she has had multiple opportunities to put forward facts to support her allegations in the complaint. It would be an abuse of process to allow her to amend it.

[82] The complainant made 20 allegations against the respondent that fall under these three general categories:

- Allegations related to relationships with other stewards, the conflict of interest arising out of managers being stewards, and the respondent's failure to combat specific and systemic discrimination issues within its organization.
- The respondent's failure to ensure that appropriate discipline and remedies were implemented following the recommendations in the investigation report.
- Issues relating to her representation by the respondent.

[83] I will address each category separately.

#### **A. Stewards, conflict of interest, and systemic discrimination**

[84] The Board's jurisprudence has consistently held that the duty of fair representation applies only to matters or disputes covered by either the *Act* or the applicable collective agreement (for example, see *Millar v. Public Service Alliance of Canada*, 2021 FPSLRB 68). The duty of fair representation does not extend to internal union matters in the absence of any specific statutory provision. The duty is concerned with representation at it relates to dealings between employees and their employer and does not extend to the internal workings of the bargaining agent (*Bernard* at para. 19).

[85] The Board's limited jurisdiction over internal bargaining-agent matters is set out in s. 188 of the *Act*, which prohibits an employee organization from disciplining an employee in a discriminatory manner by either applying its standards of discipline or for the employee having exercised rights under the *Act*. In this complaint, there is no allegation that the respondent disciplined the complainant.

[86] The complainant has made several allegations against one steward as well as other stewards, which the respondent investigated. Issues relating to the behaviour or actions of stewards are clearly internal union matters and are not subject to the duty of fair representation.

[87] The complainant has alleged that there is a conflict of interest when managers are also stewards. She referred to a situation in which a steward was temporarily her manager. The appointment of an employee who is also a steward to a manager position is a management action. Any concerns related to conflict of interest in terms of the complainant's employment relationship is a matter solely within management's control. She has not alleged any conflict of interest that had an impact on her representation by the respondent. Her concern relates solely to the respondent's

internal organization and its rules (or lack of rules) related to stewards in manager positions.

[88] The complainant has made submissions about systemic discrimination by the respondent. In her submissions she refers to the failure of the respondent “to combat, as well as complacency, with specific and systemic discrimination issues at PIPSC relating to disability, sex, and geographic residence discrimination”. This submission of the complainant relates to the internal affairs of the respondent and is not included in its duty of fair representation.

### **B. The follow up on the investigation recommendation**

[89] The complainant has asserted that the respondent was obligated to address the issues raised in the investigation report. As I have already noted, the duty of fair representation is limited to matters under the *Act* or the collective agreement. The investigation was conducted under the *Canada Labour Code*, not the *Act* or the collective agreement.

[90] The complainant has made the novel argument that the respondent was required by the collective agreement clause on occupational health and safety to participate in the investigation, follow the recommendations, and discipline the stewards found to have engaged in harassing behaviour. The responsibility for implementing the recommendations of an investigation under the *Canada Labour Code* rests with the employer, not the bargaining agent. VAC can address the investigation’s findings as part of its obligations under the *Canada Labour Code*.

[91] The respondent is not a party to a complaint under the *Canada Labour Code* and is therefore not bound by the results of any investigation. In this case, the complainant’s complaints about a particular steward were investigated by the respondent internally, which I have found does not engage its duty of fair representation under the *Act*.

### **C. Representation issues**

[92] The duty of fair representation does not require a bargaining agent to represent an employee in a dispute that is not governed by the *Act* or the collective agreement. As I have already determined, the workplace violence investigation was not carried out under the *Act*, so the respondent had no obligation to represent the complainant in

that investigation. In any event, it is not clear from the complaint that she asked for representation in this investigation.

[93] The respondent did represent the complainant in her issues involving her return to work. However, the duty of fair representation does not require a bargaining agent to follow the direction of a bargaining unit member when deciding either whether to support a grievance or how it should approach a grievance, including who is to provide that representation (see *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13). A bargaining agent is entitled to decide how it allocates its resources if it exercises this judgement fairly, without discrimination or being arbitrary. The alleged facts do not show that the respondent breached its duty of fair representation when it denied the complainant's requests for a new representative and consultation with various experts.

[94] If a bargaining agent considers the issues raised in a grievance and determines that a referral to adjudication is not appropriate, it will have fulfilled its duty to its member (see *Cox v. Vezina*, 2007 PSLRB 100, and *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52). Although the complainant might have disagreed with the respondent's decisions, it provided a rationale for not referring the grievances to adjudication. The complainant alleged that these justifications were insufficient. She did not establish that those refusals were done arbitrarily, in bad faith, or in a discriminatory manner.

[95] The complainant has alleged that the respondent failed to help her with the department's request for medical information. The complainant did not provide any details about her interactions with the respondent on this matter. She has not established that the respondent acted arbitrarily, in bad faith or in a discriminatory manner in regards to the department's request.

[96] The complainant has also alleged that the respondent told her in 2018 that she could not file a grievance on her own behalf. The complainant did file a grievance in July 2019. The complainant did not establish that the incorrect information given to her by the respondent was provided in bad faith, arbitrarily, or in a discriminatory manner. In any event, she was not prevented from exercising her right to file a grievance.

[97] The complainant also claims that the withdrawal of a grievance on a "no prejudice" basis was a breach of the *Act*. In that case, the respondent determined that

the grievance was unlikely to be successful based on its reading of the collective agreement. A bargaining agent does not have to be correct in its interpretation of a collective agreement as long as that interpretation is not made in an arbitrary or discriminatory manner or in bad faith (see *McFarlane*). In this case, the complainant has not established that the respondent's interpretation was made in an arbitrary or discriminatory manner or in bad faith.

## **VI. Conclusion**

[98] The complainant has not established that her allegations, if assumed true, constitute a breach of the respondent's duty of fair representation under the *Act*.

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

*(The Order appears on the next page)*

**VII. Order**

[100] The complaint is dismissed.

May 23, 2023.

**Ian R. Mackenzie,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**