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*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

STACEY HELENA PAYNE ET AL.

Complainants

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Payne 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: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainants: Stacey Helena Payne, and Umar A. Sheikh, counsel

For the Respondent: Morgan Rowe, counsel

Decided on the basis of written submissions,
filed March 4 and 24, June 24, and July 8, 2022, and February 24 and March 13, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] On January 14, 2022, Stacey Helena Payne and 167 other employees made a complaint against their bargaining agent, the Public Service Alliance of Canada (“PSAC” or “the respondent”).

[2] The complaint alleges that the respondent breached its duty of fair representation when it failed to, among other things, advocate for those of its members who were unwilling to comply with the Treasury Board’s *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (“the Policy”), file a policy grievance contesting the Policy, make a statutory freeze complaint, and communicate appropriately with them about their concerns with respect to the Policy.

[3] Shortly after the complaint was made, Ms. Payne informed the Federal Public Sector Labour Relations and Employment Board (“the Board”) that she would act on behalf of the complainants. She later retained legal counsel for the purposes of filing supplemental written submissions.

[4] For the purposes of this decision, only the 155 complainants who provided written confirmation of their consent to be represented by Ms. Payne are listed as complainants. Their names are listed in the appendix to this decision. Along with Ms. Payne, they shall be referred to as “the complainants” throughout this decision.

[5] The respondent raised a preliminary objection, arguing that the complaint should be summarily dismissed because the complainants failed to demonstrate that their complaint discloses an arguable case that the respondent breached its duty of fair representation.

[6] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides that the Board may decide any matter before it without holding an oral hearing. The parties were informed that the Board intended to render a decision with respect to the respondent’s preliminary objection on the basis of written submissions. They were provided with the opportunity to file additional submissions, which they did.

[7] To determine whether this complaint should be summarily dismissed, I must determine whether the complainants have made out an arguable case that the PSAC breached its duty of fair representation. I must take their alleged facts as true and decide on that basis whether they have made an arguable case that the respondent violated its duty by acting arbitrarily, in bad faith, or in a discriminatory manner.

[8] For the following reasons, I find that the respondent's objection should be allowed, and the complaint should be dismissed.

II. Summary of the facts, as alleged

[9] The complaint contains a detailed chronology of the events that led to the Policy's adoption and implementation. That chronology lists numerous written communications and public statements that the respondent and its representatives made describing the respondent's position with respect to the Policy and its decision to proceed by a case-by-case analysis of situations in which its members were denied accommodation or had punitive action taken against them because of their vaccination status. The parties filed many of those statements and communications with the Board.

[10] The parties have no dispute as to the facts and events described in the following paragraphs. Rather, they disagree on the interpretation to be given to the facts and whether those facts make out an arguable case of a breach of the respondent's duty of fair representation.

[11] On August 10, 2021, the Treasury Board ("the employer") advised the respondent and other federal public sector bargaining agents of its intention to implement a mandatory vaccination policy for employees in the core public administration, including the Royal Canadian Mounted Police (RCMP). The respondent was provided an advance copy of the draft Policy. Three days later, on August 13, 2021, the Treasury Board publicly announced that it would impose a mandatory vaccination policy.

[12] After it received the draft copy of the Policy in August 2021, the PSAC engaged in an internal review of the Policy's framework as well as the case law, to determine whether there was a basis upon which to challenge the Policy directly. It concluded that such a challenge was unlikely to succeed.

[13] The PSAC responded to the Treasury Board's public announcement and sent a mass email to its membership. It was supportive of measures to increase vaccination rates to protect its members, colleagues, and the community but expressed concerns about privacy rights, data collection, and the provision of accommodation measures. It asked to be consulted with respect to the Policy's implementation.

[14] Over the following weeks, the PSAC issued public statements, posted a statement on its website, and sent another mass email to its members. Through these communications, it expressed its support for members who would seek exemptions on medical or human-rights grounds and stated that it would not support the disciplining or terminations of its members who chose not to be vaccinated. It urged the Treasury Board to explore alternate work arrangements and measures, such as regular screening and rapid testing.

[15] Discussions with the Treasury Board about the draft copy of the Policy were suspended for the duration of the federal election that fall. On October 6, 2021, and after the election, the Treasury Board announced the Policy's adoption.

[16] According to the respondent's submissions, it was given only 48 hours' notice to review and comment on the Policy before its final version was released. It provided comments, nonetheless. At the time that the PSAC was consulted about the Policy and its adoption, its collective agreements with the Treasury Board had all expired.

[17] In the weeks that followed the Policy's adoption, the PSAC and its national president sent mass emails and posted information to the PSAC website explaining its position on the Policy. Those communications decried the lack of meaningful consultation but also described the PSAC's support for a vaccination policy generally. They also identified the respondent's areas of concern with respect to the Policy's implementation, including privacy, human rights, bargaining rights, equity, health and safety, fairness, and consistency. The PSAC stated that the way in which the Policy would be applied mattered. It indicated that it would represent members who faced punitive action as a result of their vaccination status.

[18] PSAC members were also sent emails with links to an updated version of the frequently asked questions ("FAQs") on its website. The FAQs had been updated to inform the members of the consequences of not complying with the Policy and to indicate that they were not guaranteed representation if they refused to comply with it.

[19] On October 16, 2021, one of the complainants, Lindsay Hachey, wrote to the PSAC's national president and asked that he negotiate alternate work arrangements for those PSAC members who did not wish to disclose their vaccination status. Six days later, she received an email response that the complainants describe as "generic". The response expressed support for alternate work arrangements and those who had been or would be disciplined or terminated due to their decision not to be vaccinated. It did not include a promise to negotiate alternate work arrangements for those who did not comply with the Policy.

[20] On October 18, 2021, FedsForFreedom ("FFF") sent an open letter to the PSAC's national president, demanding that the PSAC make a statutory freeze complaint with the Board and that it challenge the Policy in Federal Court. It also asked the respondent to file a grievance alleging misrepresentation by the Treasury Board, a breach of privacy rights, and a breach of the collective agreement. It requested that the PSAC schedule "meaningful discussion" with members of FFF. The letter was signed by over 1200 individuals, including more than 50 of the complainants in this matter. A response within 3 days was requested.

[21] While the PSAC was reviewing the letter, it was advised that FFF was planning to stage a sit-in at the PSAC's national headquarters. On October 22, 2021, the PSAC's executive director emailed PSAC employees, advising them of that possibility and to not come to work should the sit-in occur. His email indicated that FFF's website contained misinformation and that some of its members were known to have made sexist, anti-Semitic, racist, or homophobic statements. The sit-in took place. According to its submissions, the PSAC did not prevent or disrupt it.

[22] According to the complainants, the signatories to the October 18, 2021, letter did not receive a response from the PSAC.

[23] Also, in mid-October 2021, in an email to its members, the executive of a local expressed its disappointment with the PSAC's acceptance of the Policy.

[24] On October 29 and 31, 2021, the PSAC sent additional mass emails to its members. The first reminded them of the deadline to attest to their vaccination status and advised those who did not wish to comply with the Policy that it would examine each case and would provide representation if the Policy had been applied unreasonably or if its application violated a collective agreement or human rights. In

its second mass email, the PSAC advised its members that the FAQs on its website had been updated once again to include information about the confidentiality of medical information, exemptions from the Policy's application, the consequences of failing to comply with the Policy, the likely unavailability of employment insurance for individuals terminated for not complying with the Policy, and the respondent's case-by-case approach to representation.

[25] On November 9, 2021, the respondent provided its labour relations officers and regional representatives with a seven-page memorandum that provided guidelines for handling individual cases and addressed common questions with respect to its duty of fair representation and its position with respect to the Policy. A copy was submitted in evidence.

[26] In the memorandum, the respondent:

- indicated that it supported a vaccine mandate in order to protect the health and safety of all employees in the workplace, citing its obligations as a party to health and safety committees mandated under the *Canada Labour Code* (R.S.C., 1985, c. L-2);
- informed its staff that the Policy was likely to be upheld if challenged directly and outlined its position according to which the remedies available under a policy grievance were unlikely to be effective or meaningful for the union or individual members;
- advised PSAC labour relations officers and regional representatives to assess each situation on its merits, as in any other situation involving potential violations of a collective agreement;
- reminded PSAC labour relations officers and regional representatives of the employer's duty to accommodate on human rights-related grounds;
- indicated that individual grievances for members choosing not to be vaccinated were very unlikely to succeed in light of jurisprudence that had held that leave without pay was a reasonable consequence of an employee's refusal to comply with a mandatory vaccination policy;
- advised that the PSAC would not support grievances by members who refused to comply with the Policy due to their personal beliefs or political convictions.

[27] The memorandum also informed its recipients that the PSAC's guidelines were subject to change as the jurisprudence evolved, stressed the fact that the Policy was subject to review in six months time and indicated that the PSAC was keeping its

options open with respect to acting on any privacy breaches that might occur or filing a policy grievance if human rights were not respected.

[28] In a second memorandum issued that same day and addressed to the same people, the respondent outlined the evolving jurisprudence on mandatory vaccination policies and the assessment of individual cases based on requests for exemptions on religious grounds.

[29] On November 12, 2021, Ms. Hachey asked the president of the local to which she belonged to file a grievance on her behalf. On the advice of the relevant PSAC component, the local president declined to file a grievance because the PSAC had taken the position that it would not represent members who refused to comply with the Policy out of personal choice.

[30] The complainants did not provide information or documents that would indicate that any of them, other than Ms. Hachey, communicated with the PSAC with respect to their individual circumstances or sought representation with respect to the Policy's application to their personal situations. At some unspecified point in this chronology, it would appear that Ms. Payne requested the PSAC's support to file an application for the judicial review of a decision of the federal government's Labour Program, however the complainants provided no additional information about this request for representation. The PSAC declined to represent her.

[31] On December 3, 2021, an internal memorandum sent to the PSAC's labour relations officers, regional representatives, and members of its National Board of Directors communicated a change in the respondent's position with respect to the Policy. The memorandum indicated that the PSAC now supported filing a policy grievance for employees who were teleworking, had little to no prospect of returning to the physical workplace in the long term, and had been placed on leave without pay, terminated, or disciplined for failing to comply with the Policy. The author of the memorandum — who has since been appointed to the Board but who has in no way been consulted or involved in the process of reaching this decision — identified a November 2021 interim decision by an Ontario labour arbitrator as relevant to the PSAC's decision to now support policy and individual grievances that met the described criteria. On December 9, 2021, the PSAC filed a policy grievance with respect to the Policy's application to teleworkers.

[32] The complaint was made on January 14, 2022. It was made under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”) and alleged a breach of s. 187.

III. Summary of the written arguments

A. For the complainants

[33] The statement of complaint that describes the matter that gave rise to this complaint is lengthy. Exclusive of the attached documents, it comprises 23 pages of allegations of fact, as well as a statement of the issues underlying the complaint.

[34] The complainants’ allegations are in three documents: the statement of complaint, the complainants’ reply to the respondent’s objection, and their additional written submissions of June 24, 2022. The allegations are many. The complainants allege as follows:

- the respondent’s failure to make a statutory freeze complaint was arbitrary, discriminatory, and in bad faith;
- the respondent’s failure to file a policy grievance contesting the Policy was arbitrary, discriminatory, and in bad faith;
- in deciding not to challenge the Policy, the respondent relied upon legal opinions that were flawed insofar as they were not based on all the relevant information;
- the respondent’s superficial and unreasonable assessment of the Policy was not rational, and its decision not to grieve the Policy was influenced by the personal feelings of some within the PSAC;
- the Policy was outside the parameters of the collective agreement, and the respondent breached its duty by not requiring that the Treasury Board negotiate with it before implementing the Policy;
- the respondent’s communications were inconsistent and, at times, generic in nature. In certain circumstances, the respondent failed to respond to its members’ concerns about the Policy;
- the respondent adopted a dismissive attitude toward them and other members who disagreed with the Policy and refused to comply with it. The respondent discriminated against them;
- the PSAC failed to advocate for their rights and disregarded their competing interests;

- despite the PSAC's promise to represent members who suffered punitive action as a result of the Policy, it did not; and
- the respondent failed to consider a variety of issues of relevance to the Policy and its application before deciding to support it, including issues to do with the Treasury Board's compliance with privacy-related standard operating procedures when adopting a policy and the lack of clarity with respect to health-insurance coverage and death benefits in the event that a member suffered a serious adverse reaction to the COVID-19 vaccine.

[35] The last item in this list of allegations warrants further discussion.

[36] The complainants suggest, although not directly, that the PSAC should have taken steps to confirm and ensure the availability of health and disability benefits if a member suffered adverse effects or died as a result of the mandatory vaccination imposed by the employer. On the issue of access to health-insurance benefits, the complainants submit that "members" contacted their health-care insurer to obtain confirmation of the availability of coverage for adverse effects but that they were unable to obtain answers.

[37] The complainants also imply that the respondent breached its duty of fair representation by supporting the Policy in the absence of proof that the Treasury Board had completed a privacy impact assessment before implementing it, or alternatively that it had provided the Privacy Commissioner with evidence of urgency preventing it from conducting a privacy impact assessment before the Policy was implemented. According to the complainants, an access-to-information request did not yield confirmation that such an assessment was conducted.

[38] The complainants further describe their complaint as including allegations centred on the arbitrary limitations that the respondent imposed on advancing grievances on a case-by-case basis. They argue that assessing and providing representation on a case-by-case basis allows for inherent discrimination and bias, which would allow the respondent to pick and choose those cases that it would like to support.

[39] The complainants' reply of March 24, 2022, and to a lesser extent, their additional reply of June 24, 2022, contains questions for which they want answers from the PSAC. The replies also contain questions and assurances that they argue the PSAC should have asked of, and obtained from, the Treasury Board before deciding that it would not challenge the Policy directly. The topics addressed range from the

efficacy of the vaccine in containing the spread of the COVID-19 virus to the right to medical privacy to the respondent's failure to submit the Policy's terms to its members for a vote to available therapeutic options other than vaccines.

B. The PSAC's response and preliminary objection

[40] According to the respondent, the complaint challenges two alleged failures on its part: the failure to file a policy grievance challenging the Policy as a whole, and the failure to make a statutory freeze complaint. The respondent denies that it breached its duty of fair representation in any way. It submits that it seriously and carefully considered the issues and that it conducted a thorough analysis of the Policy.

[41] When deciding whether to challenge the Policy by filing a policy grievance, the respondent reviewed the Policy and considered the direction and guidance provided by the case law addressing mandatory vaccination policies. It concluded that any policy grievance was unlikely to succeed. It felt that the Policy would likely be seen to have a legitimate purpose and to strike a reasonable balance between workplace health-and-safety concerns and the intrusion on employee rights. In reaching that conclusion, the PSAC considered the fact that in the fall of 2021, many employees were working in physical workplaces or were being asked to attend the workplace intermittently. The employer retained the right, at any time, to recall employees temporarily who were working remotely. The respondent also determined that the high vaccination rate among its members, the workplace health-and-safety concerns expressed by its vaccinated members, and the mandatory six-month review of the Policy were relevant to its analysis and decision. In the end, it decided that the best avenue for it to pursue was to examine the Policy's application case by case, considering its members' individual circumstances.

[42] The respondent also judged that pursuing a statutory freeze complaint would not be an efficient use of its resources. The remedies available in the context of freeze complaints are limited and would, the respondent concluded, be ineffective. They would not address its concerns with respect to the Policy's application to individual members.

[43] The respondent asserts that the complainants' arguments are those that they would have wished to see made in a policy grievance or statutory freeze complaint. The complainants disagree with the Policy and the PSAC's decision not to challenge it

the moment it was adopted. A disagreement cannot, alone, give rise to a breach of the duty of fair representation (see *Burns v. Unifor, Local 2182*, 2020 FPSLRB 119; *Osman v. Public Service Alliance of Canada*, 2021 FCA 227; and *Watson v. Canadian Union of Public Employees*, 2022 CIRB 1002).

[44] The respondent submits that it carefully analyzed a variety of legal strategies and that it reached a thoughtful and good-faith conclusion that representing affected members on a case-by-case basis was the preferred course of action. This would allow it to assess individual cases on their merits and in light of their unique circumstances and to identify individual cases that raised indications of unreasonableness previously identified in the mandatory vaccination case law. The respondent acted on its decision by supporting grievances filed with respect to the Policy's application. It also continued to monitor the developing case law relevant to vaccination policies and engaged in an ongoing assessment of the merits of several legal options available to it. As pandemic circumstances changed, the PSAC filed a policy grievance that conformed with its good-faith analysis of the options available to it in the context of the changing public-health context.

[45] The respondent argues that its analysis of the Policy cannot be said to have been arbitrary, discriminatory, or in bad faith. It carried out a thorough and meaningful review of the merits of the options available for challenging the Policy directly. Its decision not to challenge the Policy did not deny the complainants representation. Rather, its decision provided its members with access to representation on the merits of their individual circumstances. It presented grievances, assisted members with their individual courses of action, and provided general information as well as advice with respect to alternative courses of action. When it declined representation — as in Ms. Hachey's case — it endeavoured to explain that decision to its members and advised them of their right to pursue their grievances on their own.

[46] The respondent submits that its decision not to challenge the Policy was clearly communicated to its members many times, including to the complainants. It communicated with its members both globally and individually. It was made clear to them how they should raise their individual concerns with either their components or their local bargaining agent representatives. The fact that the PSAC's national office did not respond to correspondence from some of the complainants in as timely or as complete a manner as they would have liked does not constitute a violation of the duty

of fair representation. The fact that the complainants feel that the response they received was unsatisfactory in its content similarly does not constitute a breach of the duty of fair representation. Concerns with the frequency or content of a bargaining agent's communication with its members cannot, in themselves, constitute a breach of the duty of fair representation without some further indications of bad faith or arbitrary or discriminatory behaviour (see *Nowen v. UCCO-SACC-CSN*, 2003 PSSRB 98; and *Cox v. Vezina*, 2007 PSLRB 100).

C. Additional written submissions

[47] In February 2023, the Board invited the parties to file supplementary written submissions with respect to the relevance, if any, of decisions it issued about bargaining agents' duty of fair representation in relation to the Policy (see *Musolino v. Professional Institute of the Public Service of Canada*, 2022 FPSLRB 46; *Fortin v. Public Service Alliance of Canada*, 2022 FPSLRB 67; and *Tran v. Professional Institute of the Public Service of Canada*, 2022 FPSLRB 101) to the complainants' factual allegations. The Board issued the latter two decisions after the parties had filed their written submissions with respect to the respondent's preliminary objection.

[48] The parties were also invited to address the legal principles pertaining to the duty of fair representation as they apply to allegations that the complainants raised that appeared to argue that the respondent breached its duty of fair representation by failing to seek assurances from the Treasury Board with respect to privacy rights and the availability of health and death benefits before deciding not to challenge the Policy. The parties' additional written submissions were received in February and March 2023.

[49] Not surprisingly, the respondent argues that *Musolino*, *Fortin*, and *Tran* support its earlier submissions according to which it did not breach its duty of fair representation. In factually similar duty-of-fair-representation complaints, the Board dismissed challenges to a bargaining agent's decision to adopt a case-by-case approach to challenging the Policy's application through individual grievances. One of those complaints involved the PSAC and examined the same assessment and decision-making process that the complainants in this case challenge (see *Fortin*).

[50] The respondent further argues that the complainants' allegations with respect to privacy rights and the availability of health and death benefits are speculative disagreements with the Policy and with the Treasury Board's approach to its

implementation. The complainants presented those allegations to support their argument that the PSAC ought to have filed a policy grievance or to have made a statutory freeze complaint. However, the record before the Board demonstrates that the PSAC did not act in bad faith or in an arbitrary or discriminatory manner when it decided to favour a case-by-case approach to individual grievances rather than file a policy grievance or make a statutory freeze complaint.

[51] The PSAC turned its mind to privacy considerations during its assessment of the legal options available to it, publicly communicated its expectations with respect to the employer's duty to respect the privacy rights of its members, advised members to bring concerns with respect to privacy breaches to its attention, and expressed its willingness to consider filing grievances about privacy breaches. It provided its labour relations officers and regional representatives with template language for privacy-breach grievances. The PSAC's decision to proceed on a case-by-case basis with respect to challenging privacy-rights breaches was not discriminatory, in bad faith, or arbitrary.

[52] Similarly, the respondent submits that none of the complainants experienced issues with access to health and death benefits; nor is it alleged that one of them became seriously ill from receiving the vaccine. None of them requested and was denied representation on the benefits issue. Had a PSAC member become seriously ill and been denied benefits by the employer, the member would have been able to request assistance from the PSAC. None did. Speculative criticism on the complainants' part with respect to the availability of benefits does not establish an arguable case of a breach of the duty of fair representation. The Board dismissed similar speculative criticism in *Fortin* as failing to establish an arguable case.

[53] In their supplemental submissions, the complainants argue that unlike the bargaining agent in *Musolino* and *Tran*, the PSAC did not undertake a thorough and objective review of the Policy before deciding not to challenge it. It did not consider its members' concerns. Its assessment of the Policy was superficial and was not based on a careful review by external legal counsel or labour relations experts. By proceeding as it did, the PSAC arbitrarily denied the bargaining unit members the right to representation. The complainants argue that the fact that the PSAC eventually filed a policy grievance in December of 2021 further supports their claim that the PSAC's

initial review of the Policy and its assessment of the possible outcome of a policy grievance were superficial.

[54] The factual allegations presented to the Board in this case also distinguish it from *Fortin*. Unlike in *Fortin*, the complainants argue that they have presented factual allegations that show that the respondent did not objectively and carefully review the situation before deciding not to challenge the Policy. It also failed to assess a policy grievance's chances of success properly and thoughtfully. The complainants argue that they presented evidence and facts beyond mere speculation, facts that if taken as true would establish an arguable case for a breach of the respondent's duty of fair representation.

[55] The complainants' supplementary submissions do not directly address their earlier allegation with respect to the respondent's failure to seek assurances as to the availability of health and death benefits. Rather, their submissions focus on the respondent's assessment and treatment of potential privacy concerns. They argue that the PSAC did not substantively demonstrate that it turned its mind to privacy considerations in its assessment of the Policy and of the legal avenues available to it. According to the complainants, the PSAC arbitrarily narrowed the circumstances in which it would assess individual privacy concerns, limited its analysis to "widespread" privacy breaches, and excluded case-by-case assessments of individual facts.

IV. Analysis

[56] As stated earlier, the respondent asked that the Board dismiss this complaint summarily on the basis that the complainants provided no *prima facie* evidence that it behaved arbitrarily, in bad faith, or in a discriminatory manner.

[57] The Board has repeatedly outlined that when deciding whether to summarily dismiss a complaint, decision makers must take the complainant's alleged facts as true and decide on that basis whether the complainant has presented an arguable case that the respondent violated its duty of fair representation by acting arbitrarily, in bad faith, or in a discriminatory manner. I will proceed on that basis.

[58] Section 187 of the *Act* provides the following:

187 No employee organization
that is certified as the

187 Il est interdit à
l'organisation syndicale, ainsi

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.

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.

[59] The respondent has the burden of demonstrating that the complaint reveals no arguable case of a breach of s. 187 of the *Act*. However, nonetheless, the complainant must, when responding to the respondent's preliminary objection, specify the factual allegations on which the complaint is based and address the issues alleged to constitute a breach of the duty of fair representation (see *McRae/Jackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290 at paras. 13 and 50).

[60] The threshold that the complainants must meet is low. However, to meet it, the factual allegations that they present must have an air of reality. They cannot be mere accusations or speculation; nor can the factual allegations be based on some future possibility that evidence supporting the claims could emerge during the hearing (see *Joe v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLRB 10 at para. 42; *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLRB 30 at paras. 80 and 81, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 455, and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 25). Similarly, a complainant may not throw out accusations and rely on the respondent's inability to disprove them (see *Joe*, at para. 42).

[61] As stated in *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37 at para. 52, and repeated in *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2 at paras. 104 to 108, when conducting the required assessment on the basis of the parties' written submissions, if I have any doubt about what the facts, assumed to be true, reveal, I must err on the side of finding that there is an arguable case that the respondent contravened s. 187 of the *Act*, and I must preserve the complainants' opportunity to have their complaint decided on the merits.

[62] When it has interpreted s. 187 of the *Act*, the Board has consistently applied the principles that the Supreme Court of Canada enunciated in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 at 527. In that decision, the Court established that

a bargaining agent enjoys considerable discretion when making its representation decision. However, it must exercise that discretion in good faith, objectively and honestly, after a thorough study of the grievance and the case. When it exercises its discretion, a bargaining agent must account for the grievance's significance and its consequences for the bargaining unit member on one hand and the bargaining agent's legitimate interests on the other. Its representation must be fair and genuine. It must be undertaken with integrity and competence. Stated differently, the bargaining agent's decision must not be arbitrary, capricious, discriminatory, or wrongful.

[63] While *Gagnon* addressed a bargaining agent's failure to support a grievance, the principles that the Supreme Court set out also apply to the respondent's actions with respect to the Policy, including its decision to adopt a case-by-case approach to representation rather than file a policy grievance or make a statutory freeze complaint. Provided that the bargaining agent did not act arbitrarily, in a discriminatory manner, or in bad faith when it exercised its judgment in reaching that decision, it was entitled to make a reasonable choice about the circumstances under which representation would be offered (see *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13 at para. 69).

[64] Recently, in *Fortin*, the Board summarily dismissed a complaint alleging that the PSAC breached its duty of fair representation. The complainant in *Fortin* challenged the PSAC's assessment of the Policy, its decision not to file a policy grievance challenging the Policy, and its communications with her and other members about the Policy. The Board held that an arguable case was not made out.

[65] The Board must strive to be as consistent as possible in its decisions. It cannot ignore its previous decisions on strikingly similar issues. Any changes to the approach taken in an earlier decision must be firmly justified and subject to rigorous review (see *Burgess v. Treasury Board (Department of Fisheries and Oceans)*, 2017 FPSLRB 20).

[66] Several of the complainants' allegations were also raised in *Fortin*. Similarly, many of the documents that the parties filed in this case were also before the Board in *Fortin*. However, in certain respects, the factual allegations raised here are more numerous, broader, and more varied than those presented in *Fortin*. Accordingly, despite the Board's decision in *Fortin*, this complaint must be assessed on its own merits and in light of the factual allegations that the complainants presented. My role

is to decide whether their factual allegations, if taken as true, could lead to a finding that the respondent acted arbitrarily, with discrimination, or in bad faith toward them.

[67] Many of the complainants' factual allegations and arguments pertain not to the respondent's actions but to their disagreement with its decision to support the Policy and their opposition to the Policy in general. They do not agree that the Policy strikes a reasonable balance between workplace health-and-safety concerns and the intrusion on employees' rights. They also disagree with the respondent's conclusion that a direct challenge to the Policy would have been unlikely to succeed.

[68] Disagreements of that nature are not relevant to the task at hand. The Board's purpose in duty-of-fair-representation cases is not to decide whether the respondent was right or wrong in its assessment of the Policy or in its decision not to file a policy grievance or make a statutory freeze complaint. Instead, my review must focus on the representation that the respondent offered and the process it followed in reaching its conclusion with respect to the Policy, specifically whether it made its decision not to challenge the Policy without discrimination, in an objective and honest manner, and after a thorough review of the case, the issues, and its members' interests.

[69] To begin, I will address the many allegations that the complainants raised that are strikingly similar to those raised by the complainants in *Fortin* and that the Board dismissed as revealing no arguable case of a breach of the duty of fair representation.

[70] The complainants in this case challenge the respondent's methods of communicating with them and with its members generally. They argue that generic mass communications do not adequately address the questions and concerns of PSAC members. They also suggest that FFF's open letter to the PSAC's national president constituted a request for the PSAC's help and that its failure to respond to the letter was a denial of representation.

[71] I am unable to find that there is an arguable case that the respondent in any way acted in an arbitrary or discriminatory manner or that it acted in bad faith in its communications with respect to the Policy and the representation available to its members. On the contrary, the documents that the complainants filed disclose that the respondent was very public and clear in its communications with its members on its review of the Policy, the conclusions it had reached, and the actions it had decided to take in response. Even though they were dissatisfied with the responses they received,

Ms. Hachey and Ms. Payne did receive responses to their correspondence. Their disagreement with the content of those communications does not, of course, found an allegation of a violation of the duty of fair representation. As the former Board found in *Nowen*, I find that if there was indeed a shortfall in communications, there is no evidence that it was the result of arbitrariness, bad faith, or discrimination.

[72] The fact that some complainants, as signatories to an open letter to the PSAC's national president, did not receive a response from him does not, alone, found an arguable case of a breach of the respondent's duty of fair representation. The respondent had been quite clear as to how its members should communicate with it about the Policy. They were to communicate with their PSAC local representatives. The complainants did not suggest that the respondent was not entitled to establish clear means of communication to minimize confusion and to keep abreast of events. The complainants also do not suggest that they were unaware of the lines of communication that they had been asked to use. They merely disregarded them.

[73] The complainants also allege that the respondent's communications were inconsistent. They pointed only to an expression of disappointment by the executive of a local in support of their claim of inconsistent communications. Although one local indicated that it had an interest in pursuing a grievance challenging the Policy, the respondent itself, after a detailed review, concluded otherwise. That difference of opinion cannot, without more, constitute an allegation that can ground an arguable case of a violation of the respondent's duty of fair representation. A lack of complete unanimity on the part of the respondent is not an indication of arbitrariness, bad faith, or discrimination.

[74] The complainants also allege that the respondent's analysis of the Policy was superficial, flawed, and unreasonable and that its decision not to directly challenge the Policy constituted a breach of s. 187 of the *Act*.

[75] Nothing in the evidence submitted by the complainants, examined alone or as a whole, could support such an allegation. The documents filed with the Board reveal that the respondent's decision was based on health policy and jurisprudential grounds. It took numerous factors into account when it decided not to challenge the Policy directly but rather to focus its representational effort on a case-by-case analysis of the Policy's application to individual circumstances. It considered factors such as the

evolving state of the case law with respect to mandatory vaccination policies and the chances that a direct challenge would be successful. It also considered vaccination rates among its members, the Policy's inclusion of a six-month review, and the health-and-safety concerns that its vaccinated members expressed in light of employees' increased onsite presence in the fall of 2021.

[76] While the complainants take issue with the respondent's decision not to file a policy grievance or make a statutory freeze complaint, no evidence of arbitrariness was shown, no legally sustainable element of discrimination was put forward, and no element that could ground a finding of bad faith was put forward with respect to the respondent's decision-making process.

[77] The complainants also allege that the respondent relied on a flawed legal opinion, adopted an arbitrary position motivated by political considerations aimed at increasing vaccination rates, and allowed the "personal feelings" of local officers to influence decisions. However, they offered no evidence to support these allegations, and accordingly, none can ground an arguable case.

[78] I feel that it is necessary for me to comment on the complainants' vague allegations with respect to flaws in the legal opinion that the respondent relied on. The complainants provided nothing to substantiate their bald assertion. The respondent did not file a copy of the legal opinion at issue. It was not required to; nor should it be faulted for not doing so. Legal opinions are protected by solicitor-client privilege, and though a respondent may choose to waive that privilege, it should not be expected to do so to defend itself from bald assertions. The complainants had to present facts sufficient to establish an arguable case. In that respect, the respondent does not have the burden of proof.

[79] According to the complainants, the case-by-case approach to representation that the respondent adopted "allows for" inherent discrimination and bias and provides it with the ability to pick and choose who it will support. The complainants offered no evidence capable of demonstrating that it discriminated against them in its representation; nor did they offer evidence to support their claim that the respondent has not defended members who were subject to punitive actions due to the vaccination status, as it promised.

[80] The adoption of a mandatory vaccination policy such as this one was unprecedented. The circumstances required the respondent to review the Policy in an evolving situation and in light of competing interests. It had to consider its representation options carefully and thoughtfully. As mentioned, I conclude that it did just that. It decided not to challenge the Policy itself, while also making known its concerns with respect to consultation and implementation. It decided to concentrate its efforts on supporting certain types of grievances.

[81] As was established in *Gagnon*, a bargaining agent must fairly represent all employees in the bargaining unit but has considerable discretion deciding which grievances to refer to adjudication. The case law provides the bargaining agent with considerable leeway in deciding the cases it will support. Provided that it did not act arbitrarily, in bad faith, or in a discriminatory manner when deciding how it would represent its members and the grievances that it would support, the respondent respected its duty. The fact that it adopted a case-by-case approach to advancing individual grievances cannot, without more, ground an arguable case of discrimination in the context of representation.

[82] I have already held that the respondent's position with respect to the Policy was neither arbitrary, discriminatory, or taken in bad faith. However, nonetheless, I will add that there is nothing to support the complainants' allegation that the PSAC's decision in December 2021 to support a policy grievance with respect to telework demonstrates that its initial assessment of the Policy was flawed and biased. A bargaining agent can change its position. The respondent had earlier undertaken to assess changing circumstances as they arose. Its decision to change its position with respect to a policy grievance is not, in and of itself, evidence that its earlier decision was based on inaccurate information.

[83] The complainants' further allegations fault the respondent for not having "forced" the Treasury Board to negotiate the Policy's implementation with it and for not insisting on mandatory testing as an alternative to the Policy. The latter of these allegations is merely another attempt to challenge the Policy itself, and the complainants did not indicate how the respondent could have "forced" such a negotiation. The documents filed with the Board disclose that the respondent did in fact object to how the Treasury Board proceeded when it adopted the Policy. It also raised implementation concerns. No fault raising to the level of arbitrariness, bad faith,

or discrimination can reasonably be alleged against a respondent that did not have the ability to control the events that occurred.

[84] In addition to the allegations already discussed, the complainants allege that they have been discriminated against. They describe themselves as a vulnerable minority that has been “labeled horrific names” by the PSAC for questioning the Policy. They claim that they have been harassed and abused due to their desire to keep their medical information private and to uphold their right to refuse vaccination. They rely on *William Hill Jr.*, [1995] OLRB Rep. January 21; and *Alaica v. CAW-Canada Local 1524*, [1994] O.L.R.D. No. 2150 (QL), decisions of the Ontario Labour Relations Board, which they describe as having defined discrimination as actions that treat members differently, without good reason.

[85] That is not the test for discrimination under s. 187 of the *Act* that the Board has retained.

[86] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, the Supreme Court of Canada defined discrimination in the context of labour relations as including attempts to put an individual or a group at a disadvantage when doing so is not otherwise justified in the labour relations context. In its analyses of duty-of-fair-representation complaints, the Board has repeatedly adopted the definitions of bad faith, discrimination and arbitrariness provided by the Supreme Court in *Noël* (see, for example, *Ménard v. Public Service Alliance of Canada*, 2010 PSLRB 95 at para. 22; *Jutras Otto v. Brossard*, 2011 PSLRB 107 at para. 64; *Xu v. Public Service Alliance of Canada*, 2020 FPSLRB 62 at para. 20; *Sganos*, at para. 96; and *Iammarrone v. Professional Institute of the Public Service of Canada*, 2022 FPSLRB 76 at para. 48).

[87] The complainants have not made out an arguable case that the respondent discriminated against them. They provided only broad claims of harassment and abuse, without further particulars. Other than pointing to an internal email written by the PSAC's executive director that stated that some members of FFF were known to have made sexist, anti-Semitic, racist, or homophobic statements, they provided no information, if taken as true, capable of supporting an arguable case of discrimination as defined in *Noël*.

[88] The documents filed with the Board demonstrate that the statement complained of was communicated to PSAC staff out of a concern for their health and safety, in

light of an upcoming sit-in at the PSAC's national headquarters. I do not read the statement as indicative of an attempt to disadvantage those complainants who were members of FFF. Rather, the statement appears to have been made out of a concern for the health and safety of PSAC staff and in support of its efforts to encourage employees to avoid coming into the office if the sit-in did take place.

[89] The executive director's statement aside, the complainants provided no allegations or information pertaining to specific examples of the harassment and abuse they claim to have been victims of. Without more, I cannot conclude that they have made out an arguable case that the respondent discriminated against them in terms of the representation that it offered.

[90] The complaint made to the Board and the complainants' written submissions also contain numerous rhetorical questions and speculative statements on a myriad of issues that seem aimed at raising suspicion and doubt about the Policy's reasonableness and the respondent's actions and intentions, without detailing how and why the answers to those questions could ground an arguable case of a breach of the duty of fair representation. For example, they ask questions pertaining to guidelines issued to physicians by their provincial regulatory bodies and the impact of those guidelines on the Policy's implementation. They inquire about the PSAC's failure to put the Policy to a vote of its members and the data available to the PSAC with respect to the vaccine's necessity. They question what training was provided to PSAC representatives to address human rights violations.

[91] As previously indicated, factual allegations presented in support of a complaint under s. 187 of the *Act* must have an air of reality to ground an arguable case of the breach of the duty of fair representation. They cannot be mere accusations or speculation. Accusations and speculation need not be taken as true in the context of an arguable-case analysis. Factual allegations can also not take the form of rhetorical questions. Rhetorical questions, alone, cannot support a duty-of-fair-representation complaint.

[92] As previously mentioned, the Board invited the parties to file supplementary written submissions addressing two of the allegations that they raised. The first pertained to privacy rights, and the second to the availability of health and death benefits.

[93] The complainants allege that there is nothing to indicate that the Treasury Board conducted a privacy impact assessment before the Policy was implemented, as required by standard operating procedures. They argue that if the urgency of the situation made such an assessment impracticable, the Treasury Board was required to justify why that was so. This allegation does not appear to pertain to the respondent's behaviour. It is a disagreement with the Policy itself, particularly with how the Treasury Board developed and implemented it.

[94] On a generous interpretation of the allegation, the complainants could be said to assert that the respondent breached its duty of fair representation by failing to seek assurances from the Treasury Board that a privacy impact assessment had been conducted before it decided not to challenge the Policy itself.

[95] Many of the respondent's public and internal communications filed with the Board reveal that it had concerns about privacy rights in the Policy's development, implementation, and application. It voiced those concerns early and repeatedly. It urged its members to communicate with it if they felt that their privacy rights were breached. It shared grievance-template wording with its staff and publicly announced its willingness to file and support policy and individual grievances related to privacy breaches and concerns. The complainants do not dispute those statements, and they described no instances in which the respondent denied a member representation on privacy issues. In the face of uncontradicted documentary evidence showing that the respondent considered privacy rights, the Board cannot conclude that the respondent did not turn its mind to privacy considerations when it assessed the Policy.

[96] The respondent was entitled to select the method by which it advocated for its members' privacy rights. It opted to make its position and concerns known and to support grievances rather than to seek general assurances that standard operating procedures had been respected. That choice was available to it. There is nothing to suggest that its decision in that respect was discriminatory, arbitrary, or made in bad faith.

[97] The complainants' factual allegations, taken as true, do not support an arguable case that the respondent failed to ensure the protection of their privacy rights or to account for privacy considerations in its decision-making process.

[98] In addition, the complainants also allege that the respondent breached its duty of fair representation by deciding not to challenge the Policy without first obtaining from the Treasury Board clear assurances that its members would benefit from health-insurance coverage and death benefits if they were to suffer a serious, adverse reaction to a COVID-19 vaccine that they had received to comply with the Policy. The complainants did not file additional written submissions on this issue when the Board invited them to.

[99] Their reply dated March 24, 2022, includes questions addressed to the respondent; that is, whether it had ensured that adverse side effects would be covered by the complainants' health-insurance plan if they occurred and whether death benefits would be paid if a complainant were to die as a result of receiving the vaccine mandated by the employer.

[100] There is nothing to suggest that these questions were previously put to the respondent. The documents filed with the Board do not contain a clear question asked of the respondent with respect to the availability of health insurance and death benefits. They contain only a generally worded question that Ms. Hachey asked in a letter to the national president by which she sought to know who would be financially responsible — the respondent or the employer — if a member were to suffer adverse effects. In another letter to the national president, she wrote that the respondent should assume financial responsibility for adverse effects. Ms. Hachey's question and statement did not directly pertain to the availability of health insurance coverage and death benefits. The respondent cannot be faulted for not responding to a question that does not appear to have been asked of it at the time of the events that gave rise to this complaint.

[101] Moreover, a generally worded allegation in the complainants' reply of June 2022 suggests that an unspecified number of unnamed PSAC members contacted their insurer to confirm whether they would have health-insurance coverage in the event of an adverse effect from the vaccination. They were unable to obtain an answer to their question. It is unclear whether any of the complainants were among those who made such an inquiry. One can assume that if they were, they would have clearly stated so. Furthermore, there is no suggestion that the PSAC members who were unable to obtain a response from their insurer communicated with the respondent for help obtaining confirmation of insurance coverage. The complainants also do not allege that one of

them became ill after receiving the vaccine, was denied health-insurance benefits, or sought representation and was denied it.

[102] The complainants provided no information to suggest that the respondent had any reason to doubt the availability of health and death benefits offered by the employer to those of its members who complied with the Policy. Similarly, the complainants raised only mere speculation about the employer's compliance with standard operating procedures in privacy matters. I cannot conclude that the failure to insist upon receiving such assurances, in the absence of credible evidence raising a reasonable concern, before deciding whether to challenge the Policy constituted a breach of the duty of fair representation.

[103] The complainants would have the Board interpret the duty of fair representation as including an obligation to seek every assurance and ask every question of the employer in pursuing the objective of being able to respond to every question and concern of its members. Doing so would distort the duty of fair representation as it has been defined in the jurisprudence of the Supreme Court of Canada, the Board, and numerous other jurisdictions. I will not do so.

[104] Taking all the allegations in this complaint as true, I conclude that the respondent has established that no arguable case exists that it provided the complainants' representation that was arbitrary, discriminatory, or in bad faith.

[105] Although I have examined and assessed the complainants' allegations individually and have reached the conclusion that none of those allegations establish an arguable case of a breach of the duty of fair representation, my conclusion is the same when those allegations are assessed collectively.

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

(The Order appears on the next page)

V. Order

[107] The respondent's preliminary objection is allowed.

[108] The complaint is dismissed.

June 2, 2023.

**Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**

APPENDIX

The complainants, alphabetically by first name:

Adan Ali	Edward Mendoza	Marisa Valleau
Al Birtwell	Elizabeth Sheppard	Mark Broerse
Alison Vehkasalmi	Felix Paquette	Mark Smith
Amiee Gerdevich	Frances Alstrup	Mary Crlijen
Amy Jordan	Gabrielle Lefebvre	Mary Renic
Amy Knox	Gaelle Cyr	Mathieu Rheault
Angela Cripps	Glenn Ash	Matt Foy
Angela Davie	Heidi Hindrichs	Megan Dafoe
Angela McNeill	Helen Katsoulis	Melanie Paradis
Anita Bedo	Helene Cassista	Melanie Parkinson
Annie Bédard	Herb Semler	Michael Myers
Annie Hébert	Hong Ip	Michael Seamone
Anyse Gauthier	Jacob Elliott	Michele Mitchell
Arielle Rosset	Jennifer Brazeau	Micheline Hickey
Arthur Rogers	Jennifer Jokic	Mike Spice
Ashley Elliott	Jennifer Lillies	Mireille Rousseau
Assia Tiane	Jennifer Rolet	Mitchell Vanderlip
Benjamin Langley	Jessica Siegner	Mona Abraham Kiame
Brendan Knox	Jennifer Squires	Nadiah Sadighi
Brian Howells	Jennifer Thomasing	Nancy Lesage
Cari-Lynn Yablonski	Jiad Awad	Nancy Oneshuck
Carissa Demian	Jocasta Boone	Naomi Blondin
Carla Dallan	Jocelyn Curran	Natalia Goncharova
Carol DiPasquale	Jonathan Chow	Natalie Hachey
Casey Bartzen	Josee Desjardins	Natalie Lamontagne
Chanel Blair	Joy Villena	Nawal Al Haddad
Charlie Wilkins	Joyce Rissling	Niki Kmetty
Cheryl Harris	Judy Martin	Patricia Ekoko
Christie Taggart	Julie Meloche	Philippe Langlois
Christina Best	Justine Muise	Réjanne Saunois
Christina Caleb	Karine Amyot	Ryan Kroeker
Christina Morgan	Karine Giard	Ryan McKenna
Christine Armitage	Karine Lamur	Sabine Felsing
Christine Nemish	Katherine Cameron	Samantha Nicole Schemenauer
Christopher Verhagen	Katherine Cunningham	Sandra Daigle
Cindy Nychka	Kelsey Harrington	Sandra Vertolli
Colette Plourde	Kerri-Lynn Laroche	Scott Bazinet
Colleen Franklin	Kris Rasmussen	Sheelagh McComb
Corina Ramirez	Kristeena Carruthers	Sherri Hufnagel
Cory Alexander	Kristel Jutte	Stacey Mayhew
Crystal Milks	Kurtis Rissling	Stasha Markovic
Danielle McCullough	Laura L Johnston	Stephane Saucier
Darlene Oliveira	Laurel J Brooks	Susan Lockhart
David Lane	Linda Caissie	Sylvie Dorion
Dawn Winn	Lindsay Hachey	Tania Roussel
Denise Harding	Lisa Harris	Tristan Clairmont
Derek Rogers	Lisa Polkowski	Trysta Doary
Diane Towa	Lori Mills	Valerie Johnson
Dominique Beaudoin	Lori Turski	Veronica Markus
Dominique Labrie	Margarita Garcia	Vickie Godin
Dwyane Nizinkevich	Marian Boardman	Yves Rosset

APPENDIX

Edith Grenier	Marie Cleone Point-du-Jour	
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