Date: 20230627

File: 561-02-41222

Citation: 2023 FPSLREB 66

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

JACQUES (JAKE) BARRETT

Complainant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Indexed as
Barrett v. Canadian Association of Professional Employees

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

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

For the Complainant: Himself, self-represented

For the Respondent: Jean-Michel Corbeil, counsel

Decided on the basis of written submissions, filed December 12, 2019, and January 13 and 27 and March 17, 2020.

REASONS FOR DECISION

I. Complaint before the Board

[1] The complainant, Jacques (Jake) Barrett, made a complaint on November 15, 2019, under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") with the Federal Public Sector Labour Relations and Employment Board ("the Board"), alleging that the respondent, the Canadian Association of Professional Employees ("CAPE" or "the union"), violated its duty of fair representation to him, contrary to s. 187.

[2] The union disputed the allegations and requested that the complaint be summarily dismissed without a hearing because it does not disclose a *prima facie* violation of the *Act* or in the alternative that it be dismissed on the merits.

[3] Section 190(1)(g) of the *Act* requires that the Board examine and inquire into any complaint that an employee organization has committed an unfair labour practice. Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) permits the Board to decide matters before it without holding an oral hearing.

[4] The union provided its response to the complaint on December 12, 2019, and then an amended response on January 13, 2020. The complainant filed an extensive reply on January 27, 2020. On March 17, 2020, the complainant transmitted an Appendix to his reply. On October 4, 2021, the Board informed the parties that it would address the union's preliminary motion based on written representations and invited the parties to provide any additional submissions. The parties had until October 29, 2021, to submit further submissions and then until November 12, 2021, to reply to each other's submissions. The parties did not submit any further submissions by the deadline.

[5] I was appointed as a panel of the Board to determine the union's preliminary objection. I am satisfied that the parties' written submissions provide me with a sufficient basis from which to deal with the union's objection.

[6] I followed the analytical framework adopted by the Board to address these types of preliminary objections, which is the arguable case analysis. For the reasons outlined in this decision, I partially allow the respondent's preliminary objection to dismiss the

complaint. I find that there is an arguable case based on arbitrariness; I do not find that there is an arguable case based on bad faith.

II. Summary of the parties' positions

[7] Both parties made extensive submissions on the details of settlement discussions with the employer to resolve the grievance that is at the core of this complaint. They provided details of resolution options that were considered in those discussions. I do not find it necessary to my deliberation and decision to narrate or set out the details of their discussions as they are not relevant to my findings at this point.

A. For the complainant

[8] This complaint arose from how CAPE processed and handled a grievance dated October 25, 2016, which it drafted and filed on the complainant's behalf. He alleged that CAPE acted in bad faith and that it was deceitful and dishonest in its representation of him in that grievance. He also alleged that CAPE acted in an arbitrary manner.

[9] Based on the documentation that the complainant presented, it appears that several times, he interacted with the following individuals at CAPE at the relevant time: Greg Phillips, President of CAPE; Claude Vézina and Mireille Vallière, both labour relations officers; and Richard Sharpe and Alex Butler, union stewards.

1. Background

[10] In November 2014, the complainant retained private counsel to make a formal harassment complaint against his director. I find that the nature of the harassment allegations provides some context to the eventual grievance that CAPE filed on his behalf, which forms the basis of the present complaint. In his harassment complaint, he alleged that he began having workplace issues with the arrival of a new director in his workplace. The external investigator that the employer hired to investigate the complaint captured and categorized the general nature of his allegations follows:

> …
>
> *1) Isolating the Complainant by giving* [him] *too little work;*
>
> *2) Uttering threats and having inappropriate discussion [sic];*
>
> *3) Put-down, insults, and unwarranted criticism; and*

> *4) Withholding resources necessary to succeed.*
>
> …

[11] The investigator completed his investigation and issued his report on August 12, 2015. He concluded that the complaint was unfounded. The employer accepted that conclusion.

[12] It must be noted that at all relevant times, the complainant kept CAPE apprised of his harassment complaint as well as his workplace challenges and difficulties. According to Appendix 1 attached to this complaint, on November 6, 2013, he first met with Mr. Vézina, who at the time was the CAPE labour relations officer assigned to the complainant's department, Public Services and Procurement Canada. During their meeting, he briefed Mr. Vézina on the recent "management harassment" he had been experiencing, particularly with the new director's arrival.

[13] According to the complainant, it was after CAPE decided that it would not help him make a harassment complaint that he retained private counsel to pursue that avenue. In his reply to the union's response to this complaint, he explained his state of mind as follows:

> …
>
> *The fact that I felt so motivated to hire my own attorneys reveals the weight of the stress and anxiety I was suffering. I knew I needed help and I knew it would not come from CAPE.*
>
> *(Note: the three meetings I had with CAPE (Mr. Vezina) of November 6, 2013, January 7, 2014 and April 1, 2014 (see my **handwritten notes** given to CAPE in **Appendix 3**) had been pre-arranged. In the April 1, 2014 meeting Mr. Vezina did not appear welcoming and was curt.*
>
> *After having time off for health reasons in the Summer 2014, I went to CAPE headquarters, in an impromptu fashion, on **September 9, 2014** and had a fourth meeting with Mr. Vezina and provided him copies of my last batch of handwritten notes. Mr. Vezina was clearly dismissive in bearing and made it plain that despite the documentation I had provided him CAPE would not take up my case in any formal or even semi-formal sense with management.*
>
> *It was then and there – knowing that the professional help I required would not come from CAPE – I resolved to hire my own attorneys in September 2014 as I knew I needed the expertise of those who could lead me through the minutiae of labour law and its processes and options. By virtue of my*

> *lawyers filing in late November 2014 an official complaint of harassment pursuant to the TB's Policy on Harassment Prevention and Resolution I experienced not total but some measure of peace over part of the next year until the investigation process played itself out).*
>
> …
>
> [Emphasis in the original]

[14] The harassment investigation report was released in August 2015. On November 10, 2015, the complainant provided it to his CAPE representative at the time, Mr. Butler, together with a copy of his nine-page rebuttal to the report. In his rebuttal, the complainant pointed out certain factual gaps and inconsistencies. He specifically requested CAPE's assistance with responding to the investigation report, which he believed was flawed. His email stated as follows (sent to Mr. Butler on November 24, 2015, at 9:54 a.m.):

> *Alex,*
>
> *After you have a chance to consider all the documents would you be open to discuss what possible avenues CAPE could pursue?*
>
> *I am of the considered opinion that if such an obviously tainted Final Report is allowed to stand unchallenged by the union, then are we saying that it would simply be preferable to make it union policy to inform members to never engage in a formal complaint of harassment.*
>
> …
>
> *I am afraid that a stance to eschew a formal complaint of harassment (whether this stance is formal or informal by the union) would only embolden management to treat members however it chooses no matter how unfair (see again, my four Questions to management below).*
>
> *That is to say, that I do not believe members should simply take their "lumps" from management especially in the face of evidence which supports bias in a Final Report of a so-called "independent" investigator who is solely selected and paid for by management. In this regard, the question becomes why cannot members/union have some say as to who the "independent" investigator is?*
>
> *Looking forward to hearing from you.*
>
> *Regards,*
>
> *Jake*

[15] On Mr. Butler's recommendation, on November 25, 2015, the complainant provided Ms. Vallière at CAPE's national office with documentation related to the

harassment investigation report, including the preliminary and the final investigation reports.

[16] On December 14, 2015, CAPE wrote to the complainant as follows (from Ms. Vallière):

> …
>
> *After reviewing all the information that you have sent in with myself and some of my colleagues, it has been decided that unfortunately, CAPE can't do anything in your file at this point. We feel that the process that management used for your harassment request was proper.*
>
> …

2. The October 24, 2016, grievance

[17] On April 12, 2016, the complainant requested that CAPE file a grievance on his behalf as he believed that he had been the subject of retaliation because of the harassment complaint he made in 2014 against his director. He explained his request as follows:

> *Mireille,*
>
> *This afternoon (3-3:30pm) I just had my EPMA with my director who gave me a "Succeeded –".*
>
> *I believe this is "**Retaliation**" for my having filed a formal complaint of Harassment last year…*
>
> *Also, I believe that such an unjust rating this year sets me up for an even worse rating next year and the year after which is unacceptable as it is patently unfair.*
>
> *(Note: the fact that **I am 62** - though not that many years of service as compared to others my age or even younger - **might also figure into their agenda, my boss asked me at this meeting when I was thinking of retiring** and I told her in another 8 years as my wife and I had a big family and that for 24 years we had 1 income and that our financial situation makes working for another 8 years attractive.)*
>
> *Accordingly, I would appreciate CAPE's filing a **formal work grievance** on my behalf.*
>
> …
>
> [Emphasis in the original]

[18] Based on the emails that the complainant provided, the interactions outlined in the paragraphs that follow took place before CAPE drafted and filed the October 25, 2016, grievance.

[19] The complainant met with the then local CAPE vice-president, Mr. Sharpe, on September 22, 2016, to discuss his mid-year assessment as well as other issues that had transpired in the past six months with his new director. Mr. Sharpe advised him not to sign off on the appraisal until the current and past issues with his director were resolved.

[20] On September 28, 2016, the complainant provided Mr. Butler and Mr. Sharpe with documentation that according to him, demonstrated bad-faith management of his situation with his supervisor. He also stated as follows:

> …
>
> *What is really troubling is that with respect to Harassment and Discrimination according to the Stats Can Public Service survey clearly the "worst" DG in our department - and arguably across the Public Service as a whole - during the survey period (Spring/Summer 2014) was Andre Latreille.*
>
> *Prior to this and during the period of alleged harassment by José Laverdiere Andre Latreille was my DG.*
>
> *Subsequent to his being DG of SPP, Andre Latreille became A/ADM HRB.*
>
> *In this capacity, Andre Latreille maintains his decision to accept the findings of the contradictory and error filled Final Report authored by the so-called "independent" investigator (sourced and paid for by HRB). He does not refer to, refute nor provide any semblance of why he maintains his decision.*
>
> …
>
> *It is my firm belief that CAPE should engage its lawyers to present all the evidence to Federal Court for a true and impartial judicial review hereby demonstrating to the employer that senior management Conflict of Interest is not something CAPE will take lying down.*
>
> *Jake*
>
> *p.s. as stated earlier the history and* ***continuous pattern of harassment over the past 3 years*** *is clear.*
>
> [Emphasis in the original]

[21] In another email dated September 28, 2016, from the complainant to Mr. Butler and Mr. Sharpe, he asked CAPE to file a formal grievance on his behalf, stating as follows:

> …
>
> *Given my most recent (Sept/16) totally unsupportable and unjustified "needs improvement" mid year review in consort with previously sent information and these documents, I would say it is clear that management has with prejudice and zero objective evidence engaged in a* ***continuous 3 year pattern of harassing*** *behaviors toward me.*
>
> *I should think that with this last harassment attempt CAPE should be in a position to file a formal grievance on my behalf.*
>
> *Sincerely,*
>
> *Jake*
>
> [Emphasis in the original]

[22] On October 20, 2016, the complainant repeated his request that CAPE file a grievance on his behalf, stating in an email as follows:

> *… Mireille, this afternoon my TBAD colleague* [name redacted] *of 5 years was taken out from work on a stretcher by paramedics. Last Friday was her boss'* [name redacted] *last day here after being here merely 6 months after being hired by* [name redacted]. *You can appreciate that this is distressing and we really hope that* [the colleague] *will be okay. I have consistently contended that management not only permits but probably intends the creation of a toxic environment for their own purposes. If possible* ***I believe that directly on the heels of this latest incident the sooner the filing of the formal grievance the better this will signal to management that a serious problem exists****. Agreed? Thank you, Jake*
>
> [Emphasis added]

[23] Ms. Vallière replied on October 21, 2016, as follows:

> *Hi Jake, I also hope that your colleague is doing ok. I have a phone meeting with Alex today and the topic was your case, so I had the intension [sic] on working on this today. I agree, the sooner the better, hopefully it will be done by the end of the day, if not it will be done next Monday.*
>
> …

[24] On October 24, 2016, CAPE drafted a grievance and sent it to the complainant for his signature. Its details were as follows:

> …
>
> ***Part B – Grievance Details***
>
> 1. *I grieve that the employer has contravened the Treasury Board of Canada's policy and Departmental harassment policy on the prevention and resolution of harassment in the workplace by failing to provide me with a harassment-free workplace.*
> 2. *I grieve that the employer has contravened the Treasury Board Secretariat's Values and Ethics Code to the Public Service by failing to adhere to the application of the Code.*
>
> ***Part C - Date on which I was apprised of my Employer's actions***
>
> *Since José Laverdiere became the Director of the Treasury Board Affairs Directorate in October 2013, she exhibited a presence of harassing behaviors toward me.*
>
> ***Part D - Corrective action request:***
>
> 1. *I request that appropriate action to taken and that I am immediately provided with a harassment-free work environment, and that I am made whole.*
> 2. *That my employer takes corrective action towards those responsible for this harassment to ensure that this behavior does not occur again.*
> 3. *That my employer fosters a respectful workplace through the prevention and prompt resolution of harassment.*
> 4. *That appropriate training for all staff and management is provided.*
> 5. *That the filing of this grievance not prejudices me in any future dealings with my employer.*
> 6. *That I am compensated by the employer for any and all damages I have suffered and will continue to suffer in an ongoing manner due to* ***my employer's neglect and willful discrimination****.*
>
> [Emphasis added and in the original]
>
> [*Sic* throughout]

[25] The parties attempted to resolve the grievance through the internal grievance process. When the settlement discussions fell through, the employer issued its final-level reply on October 4, 2018. It allowed the grievance in part by amending the complainant's performance evaluation.

[26] CAPE referred the grievance to adjudication on October 17, 2018, under s. 209(1)(a) of the *Act*, which permits the reference to adjudication of grievances relating to the interpretation or application of the provisions of a collective agreement. The form used for the reference, Form 20, states as follows:

> …
>
> [Pursuant to] *subsection 209(2) of the* Federal Public Sector Labour Relations Act*, an individual grievance relating to the interpretation or application of a provision of a collective agreement or an arbitral award may not be referred to adjudication without obtaining the approval of the bargaining agent of the grievor to represent him or her in the adjudication proceedings.*
>
> …

3. The grievance's wording

[27] According to the complainant, he trusted and relied upon CAPE as the subject matter expert for the collective agreement, labour laws, and regulations in drafting the grievance, and when he was asked to sign off on it, he did.

[28] He stated that he never alleged anything pursuant to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) or the collective agreement because he knew nothing about it at that time, and CAPE never informed him that it might have any relevance. However, before the grievance was prepared, he provided CAPE with documentation that specifically referenced the fact that he felt that he was being discriminated against based on his age and ethnic origin. Specifically, he referred to the final investigation report, which he shared with CAPE in 2015 and in which the issue of discrimination based on ethnic origin was addressed.

[29] With respect to the alleged age discrimination, the complainant referred to his communication with CAPE officers in which he informed them that he believed that the fact that he was 62 might also figure in the employer's agenda and that he was asked during his performance assessment meeting about when he was going to retire. In the same communication, he asked CAPE to file a formal grievance on his behalf.

[30] In his reply submissions, the complainant referred to article 16 of the relevant collective agreement, which provides as follows:

…

*16.01 There shall be no discrimination, interference, restriction, coercion, **harassment**, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of **age**, race, creed, colour, national or **ethnic origin**, religious affiliation, sex, sexual orientation, gender identity and expression, family status, marital status, mental or physical disability, membership or activity in the Association, a conviction for which a pardon has been granted.*

…

[Emphasis added]

4. Withdrawal of representation

[31] The complainant received a letter dated June 10, 2019, from CAPE informing him that it was withdrawing its representation at adjudication and stating as follows:

…

*You submitted a harassment complaint which was investigated. **We reviewed the report that was issued in August 2015 and observed no obvious flaws or failures to abide by the applicable legal standard**. A year after you received the report, you came to CAPE to consult us on an issue like the one addressed in the previous harassment complaint and report, being issues with your performance report (i.e. a mention of "not on track" to meet the objectives).*

A grievance was submitted in hopes of resolving the overall situation you were facing at work. You were informed at the time that the grievance was a strategy we would use to attempt to find a solution. You were also advised that the grievance was untimely and could not be adjudicated as a matter of law as it is based on an employer policy and code of values & ethics.

…

At this time, we must inform you of our decision to withdraw representation in your file with the Board. As a matter of law, it* [is] *not adjudicable under the Public Service Labour Relations Act. Although you could represent yourself in this process, we would counsel you not to proceed as there are no chances of success.

Our recommendation is that you allow us to withdraw the entire file from the Board, advising them we are in fact withdrawing, not only representation, but the grievance itself.

…

[Emphasis added]

[32] On September 30, 2019, in a conversation with a member of the Board's Registry, the complainant learned for the very first time that due to the nature of the grievance and the reference to adjudication, he had to be represented by his union and that he could not represent himself in the adjudication proceedings. According to him, he was "totally shocked" to learn of this requirement because it was in "stark contradiction" with the June 10, 2019, letter he received from CAPE to the effect that he could represent himself in the process.

[33] The complainant met with CAPE's president on November 12, 2019, and he made this complaint on November 15, 2019.

B. For the union

[34] The complainant first contacted CAPE with respect to workplace issues involving the employer in November 2013, when he spoke to Mr. Vézina. His issues broadly stemmed from a poor relationship with his new director. In the weeks and months that followed, CAPE representatives provided him with information and guidance to navigate his employment-related issues.

[35] The complainant made a workplace harassment complaint, which management investigated. A report issued in August 2015 concluded that the harassment allegations were unfounded. Over a year after the report was issued, in October 2016, he contacted CAPE for help with challenging the investigation's conclusions. He alleged that the investigation report contained numerous and substantial errors, and he wished to challenge the fact that his "Employee Performance Management Agreement" ("EPMA") for fiscal year 2016-2017 indicated a result of "need for improvement / not on track to meet".

[36] CAPE's labour relations officer, Ms. Vallière, proposed that to help resolve the complainant's workplace issues, a grievance be filed challenging the alleged harassment that was the subject of the August 2015 harassment investigation report. From the very beginning, she advised him that such a grievance would not be adjudicable by the Board. She further informed him that it would be untimely. According to her, the best way to obtain a favourable outcome for him was to reach a resolution within the grievance process.

[37] With respect to how the grievance was drafted, CAPE explained as follows:

…

> *It is noteworthy that despite the Complainant's apparent claim at paragraph 2(i) of his Complaint that the alleged harassment he suffered was "as a result of [his] age and ethnicity", the Complainant never alleged to CAPE that he was the victim of discrimination on the basis of a prohibited ground pursuant to the* Canadian Human Rights Act *(the "*CHRA*"). As such, the Grievance does not allege discrimination or make refence to the* CHRA *or the Collective Agreement's anti-discrimination clauses. The Complainant himself approved the statement of grievance by signing the Grievance form on October 25, 2016.*

…

[38] During the internal processing of the grievance, the parties explored resolution options; however, they were unsuccessful.

[39] The employer issued the final-level decision on October 4, 2018. The grievance was allowed in part to the extent that the employer agreed to modify the complainant's mid-year EPMA. With respect to the balance of the grievance, the employer decided as follows:

…

> *I have taken the arguments made by you and your union representative into consideration and I have reviewed the information available to me including the findings/conclusions of the external harassment investigation that was completed in August 2015 which found that your allegations of harassment against Ms. Laverdière were not substantiated. I am also in agreement with the second level decision maker in this case and I find that the incidents/allegations that occurred between October 2013 and September 2016 are untimely as per the collective agreement. In addition, if you were not in agreement with the findings of the external investigation, your recourse at that time was through the Federal Court process. Therefore, your grievance related to the harassment is denied on these factors.*

…

[40] CAPE referred the grievance to adjudication on October 17, 2018. In its amended response, it explained as follows:

…

> *…* ***CAPE advised the Complainant on several occasions that it was not guaranteeing that it would represent him all the way to adjudication, and in fact CAPE would review the matter after the referral and advise him of its decision regarding its***

> ***continued representation. As indicated above, CAPE was concerned that the Grievance may not fall under any of paragraphs 209(1)(a), (b), (c) or (d) of the*** **Act*****, and therefore that it was not adjudicable. CAPE decided to refer the Grievance under paragraph 209(1)(a), which is reserved for*** **[a]** ***grievance relating to "the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award", because it believed that this paragraph was the most likely to apply. Form 20, "Notice of reference to adjudication of an individual grievance – Interpretation or application of a provision of a collective agreement or an arbitral award", was used for the referral.****…*
>
> …
>
> [Emphasis in the original]

[41] In the spring of 2019, CAPE reviewed the complainant's file and concluded that it would not continue to represent him in the context of his grievance. It based its decision on these three main points: a) the August 2015 harassment investigation report contained no significant error, b) from the outset, it communicated to the complainant that the grievance did not fall within the ambit of s. 209 of the *Act*, and c) the grievance would likely be found untimely.

[42] CAPE communicated its decision to withdraw its representation of the grievance to the complainant in a letter dated June 10, 2019. I find it necessary to reproduce this letter in its entirety, as follows:

> …
>
> *Mr. Barrett,*
>
> *We have, at your request, undertaken an early review of the file sent to adjudication concerning your harassment complaint.*
>
> *You submitted a harassment complaint which was investigated. We reviewed the report that was issued in August 2015 and observed no obvious flaws or failures to abide by the applicable legal standard. A year after you received the report, you came to CAPE to consult us on an issue like the one addressed in the previous harassment complaint and report, being issues with your performance report (i.e. a mention of "not on track" to meet the objectives).*
>
> *A grievance was submitted in hopes of resolving the overall situation you were facing at work. You were informed at the time that the grievance was a strategy we would use to attempt to find a solution. You were also advised that the grievance was untimely and could not be adjudicated as a matter of law as it is based on an employer policy and code of values & ethics.*

> *Our strategy did work as the employer made an offer to settle the grievance. The employer offered to correct the 2016-17 PMA and reimburse of 81 of 162 days of sick leave you took in reaction to the unfortunate situation faced in the workplace. You refused this offer.*
>
> *At this time, we must inform you of our decision to withdraw representation in your file with the Board. As a matter of law, it not adjudicable under the Public Service Labour Relations Act. Although you could represent yourself in this process, we would counsel you not to proceed as there are no chances of success.*
>
> *Our recommendation is that you allow us to withdraw the entire file from the Board, advising them we are in fact withdrawing, not only representation, but the grievance itself.*
>
> *Before sending you this letter, we went back to the employer and were informed that the offer to settle is still available. We recommend you take this offer and ask that you please advise us as soon as possible of your decision.*
>
> *Sincerely,*
>
> [signed]
>
> *Isabelle Petrin, LL.L, B.A.*
>
> *Labour Relations Officer*
>
> [*Sic* throughout]

[43] According to CAPE, because of an internal misunderstanding, it did not fully consider the impact of the complainant's ability to pursue the grievance before the Board without its support. It admitted its mistake in its amended response as follows:

> …
>
> ***Because the Grievance had been referred to adjudication under paragraph 209(1)(a) of the*** **Act*****, by operation of subsection 209(2), CAPE's withdrawal of representation meant that the Complainant would not be able to pursue the Grievance to adjudication on his own. Unfortunately, at the time when CAPE conducted its review of the matter, an internal misunderstanding led to CAPE not fully considering the impact of the referral under paragraph 209(1)(a) on the Complainant's ability to pursue the Grievance before the Board. This in turn led CAPE to mistakenly state, in its June 10, 2019 correspondence to the Complainant, that the Complainant was able to "represent himself in the process" despite CAPE's withdrawal.***
>
> …
>
> [Emphasis in the original]

[44] The complainant did not agree to the employer's settlement proposal or to CAPE's suggested withdrawal of the grievance in its June 10, 2019, letter.

[45] Despite CAPE's position as of June 2019, it made a final attempt to assist the complainant by asking the employer to put its proposal in writing. A draft memorandum of agreement was prepared for the complainant's consideration; however, this reprised negotiation fell through because he rejected the employer's offer.

[46] On January 13, 2020, CAPE wrote to the Board to confirm that it had withdrawn its representation of the complainant in the context of his grievance.

III. Summary of the arguments

A. For the complainant

[47] The complainant's extensive submissions in reply have been retained on file at the Board. He referred to the following cases, all of which I have read: *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509 ("*Gagnon*"); *Punko v. Customs Excise Union Douanes Accise*, 2007 PSLRB 56; and *Richard v. Public Service Alliance of Canada*, 2000 PSSRB 61.

[48] After going through his several email exchanges with CAPE officers, the complainant concluded his submissions as follows:

> …
>
> ***The Employer harassed and abused me.***
>
> ***CAPE failed me.***
>
> ***Accordingly, CAPE and the Employer shared a common objective, namely, that my grievance never go to the Board for adjudication (and in addition, if possible, silence me).***
>
> …
>
> [Emphasis in the original]

[49] In response to CAPE's position that the grievance it drafted on his behalf did not refer to discrimination because the complainant never informed it that he was a victim of discrimination based on prohibited grounds under the *CHRA* or the no-discrimination clause in the collective agreement, he argued as follows:

> …
>
> *68. The real question becomes why would **CAPE deliberately**, not once, but **twice adopt an approach** which CAPE always knew that **as crafted** would in the long run – i.e., at the **Board** level – **be certain to fail**? …*
>
> *69. … **CAPE's June 10, 2019 letter** stated that my grievance **"could not be adjudicated as a matter of law as it is based on an employer policy** and **code of values & ethics."** … Clearly, this was by **CAPE's design and not accidental** for **CAPE** is **not** as **ignorant** of and **mistaken** about labour law matters ….*
>
> …
>
> [Emphasis in the original]

[50] In response to CAPE's suggestion that he approved the grievance's wording when he signed it in October 2016, the complainant argued that he relied on CAPE as the subject matter expert and that he signed off on the grievance form when it asked him to. Furthermore, he provided it with documentation supporting his belief that discrimination on the grounds of age and ethnic origin appeared to be factors in the treatment he was receiving from management. CAPE, being fully aware of these allegations as well as article 16 of the collective agreement, chose to base the grievance on the employer's policy instead, knowing full well that a harassment complaint had already been tried, without success.

[51] The complainant questioned why CAPE would deliberately adopt an approach that it knew ultimately was certain to fail. According to him, its representation from drafting the grievance to its withdrawal was as follows:

> …
>
> *… **not fair, not genuine** but **merely apparent, not undertaken** with **integrity** and **competence** and did **not** adequately **advance nor consider** **[his]** **interests*** [CAPE failed to] "**put its mind**" *to the **merits of** **[his]** **case*** [i.e., article 16 - Ethnicity and Age], *was **arbitrary** … **seriously negligent**, engaged in **bad faith conduct.***
>
> …
>
> [Emphasis in the original]

[52] The complainant argued that through its June 10, 2019, letter, CAPE engaged in dishonest and deceitful conduct in representing him on his grievance, which led him to believe that he could pursue the grievance on his own at adjudication. The

complainant submits, based on the complaint and the submissions, that it discloses an arguable case of a violation of s. 187 of the *Act* by the respondent.

B. For the union

[53] The Board has retained on file CAPE's extensive and amended submissions. CAPE referred to the following cases, all of which I have read: *Gagnon*; *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC LRB); *Manella v. Treasury Board of Canada Secretariat and Public Service Alliance of Canada*, 2010 PSLRB 128; *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28; *Exeter v. Canadian Association of Professional Employees*, 2009 PSLRB 14; *Russell v. Canada Employment and Immigration Union*, 2011 PSLRB 7; *Therrien v. Canadian Association of Professional Employees*, 2011 PSLRB 118; and Michael MacNeil, Michael Lynk, and Peter Engelmann, *Trade Union Law in Canada*.

[54] CAPE argued that the bar for establishing arbitrary, discriminatory, or bad-faith behaviour is high. It was not sufficient for the complainant to establish that he had past disagreements with union officials; he had to show that the union's actions were motivated by inappropriate considerations and that those actions were motivated by ill will, hostility, or dishonesty. He failed to establish a *prima facie* case; therefore, the Board should dismiss the complaint, or, alternatively, the complaint must be dismissed on its merits.

[55] The Board must not inquire into the correctness of the union's decision; rather, it must examine how the union arrived at its decision and assess the union's conduct in that process. The Board must not use a yardstick of perfection to assess the union's conduct. The fact of a simple mistake does not amount to a breach of the duty of fair representation.

[56] CAPE admitted that it made a mistake when in the June 10, 2019, letter it stated that the complainant could represent himself on his grievance before the Board but categorically denied that it lied to him or otherwise acted in bad faith.

[57] CAPE argued that it had no reason to lie to the complainant in its June 10, 2019, letter, given that the letter explained to him that it was withdrawing its representation. It stated that it simply "made an honest, good faith mistake" when it failed to

appreciate the implication that withdrawing representation would have on him being able to pursue the grievance on his own at adjudication.

[58] CAPE argued that it was correct when it informed the complainant that the grievance was not adjudicable, so withdrawing its representation was legally sound. It conducted a thorough and fulsome review of the grievance's merits before deciding to withdraw its representation. There was no arbitrariness or bad faith in its conduct.

[59] Taking the complainant's allegations as true, there was no reasonable evidence to substantiate his bad-faith allegation when CAPE mistakenly advised him that he could represent himself in the adjudication process.

IV. Reasons

A. The statutory framework

[60] Section 187 of the *Act* states as follows:

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

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

> …
>
> *[21] It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise. A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union has the* exclusive *right to bargain on behalf of* all *employees in a given bargaining*

> *unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.*
>
> *[22]* ***The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith.****…*
>
> …
>
> [Emphasis added]

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

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

[63] In *Savoury v. Canadian Merchant Service Guild*, 2001 PSSRB 79, a predecessor to the Board summarized the applicable principles as follows:

> …
>
> *[125] I believe the current state of the law in Canada according to the existing jurisprudence can be summarized as follows. The power conferred upon a union, as such is found in subsection 10(2) of the PSSRA and other similar legislation, to act as spokesperson for the employees of a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit. For matters involving a complaint of unfair representation, as in section 23 of the PSSRA, the examination of the union's actions includes the union's decision to represent or not represent the member at all levels, including during the grievance process, as well as the union's decision to represent or not represent the member at arbitration.*

> *[126] When representation is undertaken by the union, such representation must be fair, genuine and not merely apparent. It must be undertaken with integrity and competence, without major negligence, and without hostility towards the employee. When a consideration is made in regard to arbitration, it is recognized that the employee does not have an absolute right to arbitration for the union enjoys considerable discretion in the making of this decision, but that discretion has limits based on the severity and impact of the disciplinary action upon the employee. The union's discretion must be exercised:*
>
> *a) in good faith, objectively and honestly;*
>
> *b) after a thorough study of the grievance and the case, and not merely cursory or perfunctory;*
>
> *c) having pondered all relevant considerations of the case;*
>
> *d) taking into account the significance of the grievance for the member and its consequences for the member;*
>
> *e) taking into account the legitimate interests of the union;*
>
> *f) with regard to proper motives only.*
>
> *[127] In the final analysis, the union's decision vis-à-vis the representation of its members will not be disturbed absent the elements of bad faith, or actions which are arbitrary, capricious, discriminatory or wrongful, providing that the union has met the criteria above.*
>
> …

[64] The principles in *Gagnon* apply to determine whether a bargaining agent appropriately used its discretionary power to file a grievance and refer it to arbitration and to the bargaining agent's conduct in handling an employee's grievance file (see *Ouellet v. St-Georges*, (2009 PSLRB 107 at para. 30).

B. Arbitrariness

[65] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, the Supreme Court of Canada, describing the notion of arbitrariness in the context of a union's duty of fair representation, stated as follows:

> …
>
> *[50] The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not*

> *entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case.…*
>
> …

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

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

C. Bad faith

[67] Bad faith in the context of the duty of fair representation implies deliberate and oppressive conduct and behaviour by the bargaining agent. As the Supreme Court of Canada noted in *Noël*, at para. 48, acting in bad faith "… presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct …".

[68] For purposes of the arguable case analysis, the alleged facts must, if taken as proven, disclose an intent to harm, spiteful or hostile conduct or maliciousness. For instance, evidence of unprofessional communication with or lying to the complainant formed the basis of the former Board's finding of bad faith in *Benoit v. Trimble*, 2014 PSLRB 46 at paras. 47 and 48.

V. Analysis

I. The arguable case analytical framework

[69] The Board has adopted the arguable-case framework when addressing preliminary motions to dismiss unfair-labour-practice complaints. This framework requires the Board to assume that the alleged facts as stated in the parties' submissions as proven and, on that basis, assess whether those facts disclose an arguable case of a violation of the *Act*. (see *Beniey v. Public Service Alliance of Canada*, 2020 FPSLREB 32 at para 57 (application for judicial dismissed in *Beniey v. Public Service Alliance of Canada*, 2021 FCA 99)

[70] The union relied on *Exeter*, at para. 14, and *Therrien* in support of its position that the complaint fails to disclose a *prima facie* violation of the *Act*. It argued as follows:

> …
>
> *53. The Board has held in previous decisions that a complaint can be dismissed if the Complainant fails to establish, on a* prima facie *basis, how its allegations relate to each of paragraphs 190(1)(a) through (g) of the* Act *which are alleged to have been violated … a* prima face *basis exists for an allegation "where the purported facts — assumed for this preliminary purpose to be true — reveal an arguable case that there has been a breach of the statute."*

[71] In *Therrien*, a predecessor to the Board ruled as follows:

> *46 The matter to be determined is whether the complainant established the foundations for an arguable complaint under paragraph 190(1)(*g*) of the* Act*, assuming that his alleged facts are true.…*
>
> …
>
> *51 The term "*prima facie*" is commonly used to describe the apparent nature of something on initial observation. In law, the term is generally used to describe the presentation of sufficient evidence by a claimant to support his or her claim (a "*prima facie*" case).*
>
> *52 To ensure that that initial onus is met, a complainant must produce enough evidence on all elements of his or her complaint to support his or her claim. This consists of an "at-first look" of the requirement to adduce sufficient material facts to establish a violation of the* Act*. That evidentiary foundation must be legally sufficient to make out a case that the* Act *was in fact violated. In other words, I must consider whether, if all the complainant's*

> *allegations are true, the Board could find that the* Act *was in fact* ***violated.****…*
>
> …
>
> [Emphasis added]

II. The salient facts

[72] I have outlined the facts that are salient to my determination of the respondent's preliminary objection in the paragraphs that follow. These are drawn largely from portions of the parties' submissions which are uncontested. I must consider these facts as proven for purposes of the arguable case analysis.

[73] In 2013, the complainant approached CAPE for assistance with addressing workplace issues that he perceived were harassing and that were negatively impacting his health. He met with Mr. Vézina, who asked him to keep CAPE apprised of what was happening to him, which he did through his local union representatives.

[74] In November 2014, he retained private counsel to make a formal harassment complaint, which the employer hired an external investigator to investigate. The investigator issued his report in August 2015 concluding that the complaint was unfounded.

[75] The complainant disagreed with the harassment investigation report's findings. On November 10, 2015, he provided CAPE with the report and his detailed rebuttal identifying gaps in the findings as well as supporting documentation. He asked CAPE to help him challenge the report.

[76] On December 14, 2015, CAPE informed the complainant as follows:

> …
>
> *After reviewing all the information that you have sent with myself and some of my colleagues, it has been decided that, unfortunately, CAPE can't do anything in your file at this point. We feel that the process that management used for your harassment request [sic] was proper.*
>
> …

[77] In April 2016, the complainant informed CAPE of a negative performance appraisal he had received, which he perceived as retaliation for making his harassment

complaint. He asked CAPE to file a grievance on his behalf, explaining that in addition to the negative rating, he believed that due to his age, the employer had a hidden agenda as to his continued employment because his manager made inquiries as to when he was thinking of retiring. The email read in full as follows:

> *Mireille,*
>
> *This afternoon (3-3:30pm) I just had my EPMA with my director who gave me a "Succeeded –".*
>
> *I believe this is "**Retaliation**" for my having filed a formal complaint of Harassment last year…*
>
> *Also, I believe that such an unjust rating this year sets me up for an even worse rating next year and the year after which is unacceptable as it is patently unfair.*
>
> *(Note: the fact **that I am 62** - though not that many years of service as compared to others my age or even younger - **might also figure into their agenda; my boss asked me at this meeting when was I thinking of retiring** and I told her in another 8 years as my wife and I had a big family and that for 24 years we had 1 income and that our financial situation makes working for another 8 years attractive.)*
>
> *Accordingly, I would appreciate CAPE's filing a **formal work grievance** on my behalf.*
>
> *The filing of a formal grievance will force management to demonstrate the bases [sic] of their rating and I can state categorically that management cannot provide any evidence even in the slightest to support this unjust rating as it is definitely Not evidence-based.*
>
> *Thank you,*
>
> *Jake*
>
> [Emphasis in the original]

[78] Between April and October 2016, he continued to keep CAPE apprised of what was happening to him through his local representatives. From the email documentation provided, CAPE representatives advised him and accompanied him to some meetings with management with respect to his performance assessment.

[79] In September 2016, CAPE representatives advised the complainant not to sign off on his EPMA until current and past issues with his appraisals were resolved. On September 28, 2016, he emailed them, stating in part as follows:

…

> *… fairness and adherence to Public Service values demand that the investigator's Final Report should be set aside as gravely incompetent and irredeemably flawed.*
>
> *It is my firm belief that CAPE should engage its lawyers to present all the evidence to Federal Court for a true and impartial judicial review hereby demonstrating to the employer that senior management Conflict of Interest is not something CAPE will take lying down.*
>
> *…*

[80] He emailed them again on September 28, 2016, stating in part as follows:

> *…*
>
> *Given my most recent (Sept/16) totally unsupportable and unjustified "needs Improvement" mid year review in consort with previously sent information and these documents, I would say it is clear that management has with prejudice and zero objective evidence engaged in a* ***continuous 3 year pattern of harassing*** *behaviors toward me.*
>
> *I should think that with this last harassment attempt CAPE should be in a position to file a formal grievance on my behalf.*
>
> *Sincerely,*
>
> *Jake*
>
> [Emphasis in the original]

[81] On October 7, 2016, Ms. Vallière confirmed that she had received all the documents that the complainant had sent in aid of filing a grievance on his behalf.

[82] On October 20, 2016, an incident occurred in his workplace that led the complainant to once again ask CAPE to file a formal grievance on his behalf. The next day, Ms. Vallière informed him that she was working on the grievance and that it would be prepared that day or by the following Monday.

[83] On October 24, 2016, CAPE drafted the grievance at the core of this complaint, and the complainant signed off on it. At this point in time, the complainant had provided CAPE with documentation regarding his interactions with the employer, including email exchanges with his manager as well as the harassment complaint reports and his rebuttal.

[84] As of October 24, 2016, CAPE had already determined that the process that management used for the complainant's harassment complaint was proper and had already decided not to do anything about the harassment issue.

[85] As the grievance progressed through the internal grievance procedure, the parties unsuccessfully attempted to settled it. The employer partially allowed the grievance at the final level by agreeing to amend the complainant's performance evaluation. It denied the balance of the grievance as untimely.

[86] CAPE referred the grievance to adjudication under s. 209(1)(a) of the *Act*. On June 10, 2019, it withdrew its representation at adjudication and informed the complainant that he could represent himself at adjudication. CAPE acknowledged in its submissions that that was an error, which it attributed to an "internal misunderstanding".

III. Conclusion

[87] I agree with the respondent that under the arguable-case framework, the facts do not support a breach of the *Act* on grounds of bad faith. However, I find that those same facts support an arguable case of a breach based on arbitrariness.

[88] As noted in *Noël*, acting in bad faith requires and intent to harm or an action that is malicious or a hostile conduct. For purposes of the arguable case analysis, the alleged facts must, if taken as proven, disclose an intent to harm, spiteful or hostile conduct or maliciousness. I have carefully reviewed the parties' submissions as well as the tone and contents of the emails between the complainant and CAPE representatives during the relevant period. In this case, I do not find that the complainant's interactions with the union representatives at various points in the drafting and processing of the October 24, 2016, grievance rise to the threshold of bad faith conduct. I found the email correspondence between the complainant and the union representatives to be cordial in tone and disclosed no intent to harm nor spiteful or hostile conduct or maliciousness.

[89] In *Noël*, the Supreme Court of Canada instructs that "even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner." Accepting the alleged facts as proven, I find that the complainant has made out an arguable case that the union breached its duty of fair representation

in the drafting, processing, and referral to adjudication of the October 24, 2016, grievance. In particular, the events leading up to the drafting of the grievance, the actual content of the grievance, the referral to adjudication, and the representations contained in the June 10, 2019, letter from CAPE to the complainant.

[90] I am of the view that the alleged facts disclose an arguable case of a violation of the duty of fair representation in the context of arbitrariness. Evidence is therefore required to determine the appropriate facts and to assess whether those facts do establish such a violation.

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

(The Order appears on the next page)

VI. Order

[92] The preliminary objection is allowed with respect to the allegation of bad faith.

[93] The preliminary objection is dismissed with respect to the allegation of arbitrariness.

[94] The Board's registry will communicate with the parties regarding next steps.

June 27, 2023.

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