Date: 20230727

File: 561-02-41865

Citation: 2023 FPSLREB 74

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

SUSAN KRUSE

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Kruse 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: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: John King

For the Respondent: Daria A. Strachan, counsel

Decided on the basis of written submissions, filed August 31 and September 8, 9 and 10, 2020, and February 17 and March 24, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] On May 28, 2020, Susan Kruse ("the complainant") made a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board"), alleging that her bargaining agent, the Public Service Alliance of Canada ("the respondent") had breached its duty of fair representation in representing her interests to her employer.

[2] The complainant works as a border services officer with the Canada Border Services Agency (CBSA), an organization within the Treasury Board, which is her legal employer. For the purposes of this decision, any reference to the employer may refer to either the Treasury Board or the CBSA. The Treasury Board has delegated its authority to the CBSA to manage its workplace and workforce. The Treasury Board and the respondent are parties to a collective agreement that covers border services officers (for the FB group; "the collective agreement").

[3] In 2011, the complainant filed four grievances concerning the employer's recovery of vacation-leave credits that had been extended to her by administrative error. Three grievances concerned the recovery of the vacation-leave credits. The fourth (for ease of reference, "the data-change grievance") concerned the employer's change to her record that modified her employment start date from 1990 to 1995, for the purpose of calculating her vacation-leave entitlement, to reflect periods in which she went on leave without pay. The respondent referred all the grievances to adjudication.

[4] On October 8, 2019, the respondent and the employer settled a number of grievances relating to the vacation-leave-credit recovery, including the complainant's four grievances. She never accepted the settlement. On May 22, 2020, the respondent withdrew her four grievances.

[5] This complaint was made in response to the withdrawal. The Board first closed the files, upon withdrawal, then reopened them. A hearing was held, and a decision was issued dismissing all four grievances.

[6] The complainant submits that the respondent's actions (refusing to pursue the grievances and settling them) constitute a breach of the duty of fair representation

found at s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which reads as follows:

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

[7] To establish the breach, the complainant must demonstrate that the bargaining agent acted in a discriminatory or arbitrary manner or in bad faith. Given the respondent's documented actions, I cannot conclude that it acted contrary to s. 187 of the *Act*. Consequently, the complaint is dismissed.

[8] The complainant requested that the matter proceed by way of an oral hearing. I requested further submissions to determine if one was necessary. She provided further submissions. I am satisfied that there is no need for an oral hearing to decide this complaint, as the underlying facts are not in dispute. The complainant sought to establish the respondent's bad faith and arbitrariness and stated that oral evidence would be necessary for that purpose.

[9] As stated, I have relied on the respondent's documented actions. I cannot see arbitrariness or bad faith in settling grievances or refusing to support a non-adjudicable grievance. There might have been friction between the complainant and the respondent. A hearing might have shed light on conflicts and disagreements. But in the end, the duty of fair representation enshrined in s. 187 of the *Act* is about the bargaining agent's actions in representing the bargaining unit members. I am satisfied that pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "*FPSLREBA*"), this decision is properly rendered on the basis of the written submissions and the documents on file.

II. Context

[10] In 2011, the federal government, as the employer, conducted an audit of vacation-leave balances. Through the audit, vacation-leave credit errors were discovered. Some employees had received more credits than they were entitled to.

[11] Following the audit, the CBSA proceeded to recover the leave that should not have been credited for a period of five years preceding the audit. The complainant was one of the employees affected by this recovery measure.

[12] The respondent filed about 40 grievances in late 2011 and early 2012 on behalf of 32 bargaining unit members, including the complainant. In her case, there were four grievances, all of which were eventually referred to adjudication.

[13] Board file no. 566-02-11661: the grievance was filed with the employer on April 15, 2011, and reads as follows:

> *I grieve my employer's decision to claw back my vacation hours in one lump sum on April 01, 2011 leaving me with 27 hours of vacation for the fiscal year. That recovery constitutes unreasonable action against me since the employer made the error.*

[14] The remedy requested was as follows:

> *I request that the employer take responsibility for its error;*
>
> *That I not be required to reimburse the 69.875 hours in one lump sum.*
>
> *That the employer restore any hours recovered,*
>
> *And any other action that would be deemed appropriate in the circumstances be taken.*

[15] The employer replied that the complainant had chosen to have the leave recovered in full from the 2011-2012 balance and that it had acted on that choice.

[16] Board file no. 566-02-11662: the grievance was filed with the employer on January 19, 2011, and reads as follows:

> *I grieve my employer's decision, set out in its October, 2010 letter, to recover the vacation leave credits that it had credited to me in the past. That recovery constitutes unreasonable action against me since I am being discriminated against because I took leave for Family related reasons (family status). When buying back service years the supperenuation act [sic] does not discriminate with regards to the buy back years but the CBSA does up to and including imputing [sic] a "false" start date to retrieve these vacation credits.*

[17] The remedy requested reads as follows:

> *I request that the employer take responsibility for its error;*
>
> *That I not be required to reimburse the 69 plus hours claimed;*
>
> *That the employer restore any hours recovered, and that future vacation credits be assigned appropriately with regards to "service years" bought back.*
>
> *And any other action that would be deemed appropriate in the circumstances be taken.*

[18] The employer replied that the audit had revealed that the complainant's vacation-leave credits had been overstated because of an administrative error. It further answered the superannuation and discrimination arguments as follows:

> …
>
> *Regrettably, an audit of vacation leave credits revealed that your vacation leave credits were overstated due to an administrative error. I note management informed you of the reasons for the overstatement and presented you with different options to minimize the impact of recovering the overstated balance. I also note that buying back service years for superannuation purposes is not equal to buying back vacation credits. Vacation credits cannot be assigned to service years that are bought back. Further to my review, I am satisfied that management did not discriminate against you on the basis of your family status or your decision to take leave for family-related reasons.*
>
> …

[19] Board file no. 566-02-11663: the grievance was filed with the employer on January 24, 2011. It refers to the letter dated October 26, 2010, and asks for the reimbursement of the 69.875 hours claimed.

[20] The complainant's years of service, for the calculation of vacation leave, were modified to reflect the extended periods of leave without pay that she had taken. This gave rise to a fourth grievance, described in the next paragraph.

[21] Board file no. 566-02-06664: the grievance was filed with the employer on April 15, 2011, and was worded as follows:

> *I grieve my employer's decision to manipulate data within my personal leave status report for the years 2007, 2008, 2009, 2010 and 2011. The vacation hours have been manipulated and DO NOT reflect the actual hours forwarded to my account originally. The manipulated report indicates that I used vacation hours that I was not entitled to/and or forwarded by the CBSA and that is NOT the accurate account of events.*

[22] The complainant requested the following remedy for her grievance:

> *I request that the employer take responsibility for its error;*
>
> *That the employer restore the vacation data for the years in question to indicate the actual/original data.*
>
> *That the employer not be authorized in the future to manipulate data/information within my personal files that do not accurately reflect what transpired.*

[23] At the third level of the grievance procedure, the employer replied as follows:

> …
>
> *After a review of your vacation leave credit history, it was determined that your continuous/discontinuous service date and consequently the vacation leave hours credited to your account were inaccurate, as previous periods of leave with out pay should have been excluded from the calculation of your years of continuous/discontinuous service. Once the error was discovered the Employer initiated a recovery of the leave overstated to you and corrected your continuous/discontinuous date and your leave records to reflect the applicable revised rate and balances. Management was within its authority to correct any errors to your leave records and included amendments to reflect the actions taken. I have also considered your position that your period of leave with out pay should count towards the calculation your continuous/discontinuous service date the as per Article 34.03 (a) which states, "For the purpose of clause 34.02 only, all service within the public service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the public service, takes or has taken severance pay." You should note though, that not all types of leave without pay count towards Continuous/Discontinuous Service.*
>
> …
>
> [*Sic* throughout]

[24] This last grievance was referred to the Board on February 27, 2012, and is the data-change grievance.

[25] The other three grievances were referred to the Board on October 30, 2015, along with other grievors' grievances relating to the same subject matter. Files were opened for all the grievances, but they were dealt with as a group. They were referred to the Board under s. 209(1)(a) of the *Act*, which deals with grievances involving the

application and interpretation of a collective agreement. According to the notice of referral, article 34 (Vacation Leave with Pay) was at issue.

[26] The Board scheduled the group of grievances to be heard in October 2019. The law firm retained by the respondent reviewed the grievances and suggested that the grievors be divided in two groups: Group A and Group B. The first group was composed of grievors who had sufficient leave credits at the time of the audit to cover the clawback. Group B, which included the complainant, was composed of grievors who did not have sufficient leave to cover the clawback and had had either to reimburse the CBSA or give up future vacation-leave credits.

[27] On October 8, 2019, the employer and the respondent agreed to settle the Group B grievances by reimbursing the amount of negative balance in each case that resulted from the audit. In the complainant's case, the employer agreed to reinstate 66.433 of the 69.875 hours that were at issue in the grievances. Given a difference of only 3 hours, the respondent was of the view that it was the best course of action and that it was the best award that the Board could have made had the respondent been successful at a hearing. This was communicated to the complainant on the same day. The 66.433 hours represented leave that she had already taken; the remaining 3.442 hours comprised leave that she had not yet taken but that had been overstated in her credit balance. In other words, the basis for the settlement was detrimental reliance.

[28] On January 16, 2020, the complainant was sent the "Minutes of Settlement" document for her review and signature. She did not sign it, and on February 26, 2020, she indicated that she was awaiting the Board's decision on the Group A grievances that had proceeded to a hearing. Counsel for the respondent answered that the Board's decision would have no impact on the settlement.

[29] The complainant did not sign the settlement agreement. She was duly informed that the respondent considered the four grievances settled and that it would withdraw them.

[30] On October 3, 2019, the law firm representing the respondent had provided a clear explanation as to why the respondent would not support the data-change grievance at adjudication. According to this explanation, the grievance was not adjudicable since it did not relate to any of the grounds of grievance referral under

s. 209 of the *Act*. It was not related to a term of the collective agreement, it was not disciplinary, and it did not relate to a termination or demotion.

[31] The complainant was given a final deadline to accept or decline the settlement agreement by May 14, 2020. She wrote to the respondent's president, protesting that her rights were not being respected. He responded as follows on May 8, 2020:

> …
>
> *I am writing in response to your email of May 4, 2020, concerning the grievance representation of Susan Kruse.*
>
> *It is my understanding that the questions and concerns raised in your email have already been the subject of communications between yourselves, Christopher Schulz, and Amanda Montague-Reinholdt. I am therefore not going to repeat the entirety of such communication in this letter.*
>
> *In October 2019, Ms. Montague-Reinholdt provided Sister Kruse with a comprehensive explanation regarding the non-adjudicability of her grievance concerning the employer's alteration of her Personal Leave Status Report. In this same communication, Ms. Montague-Reinholdt informed Sister Kruse that PSAC had provided instructions to not proceed with that grievance.*
>
> *Concerning the vacation clawback grievance, Ms. Montague-Reinholdt communicated with Sister Kruse on multiple occasions that the achieved settlement resolved all of her grievances. Given this settlement, there was no reason to await a further decision of the Board, nor was there an opportunity to negotiate different terms or obtain a different outcome. Further, Ms. Montague-Reinholdt informed Sister Kruse that given this settlement, PSAC had decided not to proceed further with her grievances.*
>
> *The offer of settlement remains with Sister Kruse to accept or decline. Should she decline, PSAC will withdraw her grievances, for as previously and repeatedly informed, PSAC will not be proceeding with these grievances. As such, there would be no opportunity for self-representation.*
>
> …

[32] On May 22, 2020, the respondent sent a notice to the Board withdrawing the four grievances. This complaint was made six days later.

[33] The complainant argued forcefully that she should be able to pursue her grievances before the Board. The files were reopened. On August 31, 2020, the Board dismissed all four grievances because, according to the Board, they all required the

respondent's support, which they lacked (see *Kruse v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 85 ("*Kruse* 2020-85")).

III. The complaint

[34] The complainant reacted as follows to the bargaining agent's withdrawal of the grievances on May 22, 2020:

> …
>
> *… The Public Service Alliance of Canada (PSAC) contravened all three of the fundamental tenets of section 187* [arbitrary, discriminatory, or in bad faith] *when it knowingly refused to follow the standard practices of fair representation when it arbitrarily withdrew four grievances of Susan Kruse absent any reasonable justification.*
>
> …

[35] The complainant also stated that withdrawing the data-change grievance prevented her from obtaining a definitive answer as to the Board's jurisdiction to hear such a matter. It was for the Board to decide its jurisdiction, not for the respondent. Withdrawing the grievance amounted to condoning the CBSA's practice of falsifying employee records.

[36] According to the complainant, the fact that the respondent is unwilling to address the falsification of records establishes that it is not representing its membership in good faith.

[37] The complainant had no say in the negotiations to settle her grievances. She was never given the opportunity to reject the settlement offer and present her grievances to the Board herself. It was unfair of the respondent to require an answer from her on the settlement while she was waiting for a decision from the Board on the group of grievances to which hers initially belonged. She states her position as follows:

> …
>
> *If the representative had contacted Susan at the outset of possible mediation taking place, or invited her to participate in said discussions or discussed the terms of settlement with Susan before the union had agreed with the employer's final settlement offer, the representative would have known the terms were not accceptable [sic] to the complainant and that Susan's primary concern was to have her employment record made accurate by correctly reflecting the periods of leave actually taken, and that*

> *Susan would rather leave her grievances to be decided by the Board along with her coworkers in the group grievance, rather than accept unacceptable terms of which did not resolve or address the offence or the primary interests of this individual.*
>
> …

[38] The respondent intimidated and pressured the complainant to make a decision about an unsatisfactory settlement offer, even though the Board had not yet rendered a decision on the other group of grievances. That cannot constitute fair representation.

[39] The respondent did not work to protect the complainant's rights and interests and thus acted in bad faith. The respondent allowed the employer to falsify her employment record, which the settlement agreement did not correct.

[40] The complainant seeks the following remedies:

> …
>
> *#9 - Corrective action sought under subsection 192(1) of the Federal Public Sector Labour Relations Act:*
>
> *i) That the FPSLREB confirm it's jurisdiction or lack thereof in regard to addressing the related offences as noted in grievance #G11-3971-104391 (**File: 566-02-6664**), by clarifying any and all limitations it may have in regard to jurisdiction on:*
>
> *a) addressing the matter of the CBSA falsifying this employee's employment record as an offence under s. #398 of the Criminal Code of Canada;*
>
> *b) as well as addressing the falsifying of Ms. Kruse's employment record* (dates used to determine years of continuous/discontinuous service) *as relevant to the Terms and Conditions of her Employment, used by the employer to recalculate then clawback her earned and used vacation leave credits under the Collective Agreement.*
>
> *ii) That the Board rule on the meaning of Freedom of Association as per section #2 of the Charter of Rights and Freedoms as it must be applied consistently to all Canadians. We interpret the meaning of this right as an individual having a choice to belong to an association, not as an obligation by law for indiviuals to belong to an association. The Rand decision also recognizes the individual Canadian's right to seek work and to work independently of personal association with any organized group.*
>
> *As there is no law obligating one to belong to an association, we request the Board recognize this right of Susan Kruse based solely on this section of the Charter and the rule of law and direct the CBSA to cease deducting association dues upon request of the complainant Susan Kruse.*

> *Should the PSAC object to this ruling, it can file a complaint or appeal the decision of the Board if it so chooses, as is there option.*
>
> *It was never the intent of the Rand decision or any other decision to compel a worker to belong to an association or to give such authority to a union in which the memberhips' fundamental rights and right to redress could be vetoed by the bargaining agent or for the union to shield and help protect an employer that violates it's membership.*
>
> *We ask that the Board demonstrate impartiality and not argue the case for the union when responding.*
>
> *Additional corrective action to be added at a later date once the Board has determined whether to accept this complaint and proceed with a hearing.*
>
> …
>
> [*Sic* throughout]

IV. Response and objection

[41] The respondent disputes that it contravened s. 187 of the *Act*. It acted at all times with integrity to further the complainant's interests.

[42] The respondent filed four grievances for the complainant. It filed about 40 grievances for some 32 grievors for whom the employer had corrected vacation-leave balances. They were in two different scenarios: grievors who had enough vacation-leave credits to cover the shortfall (Group A), and grievors who did not (Group B, to which the complainant belonged). The respondent was advised that the Group B grievances had a better chance of success than did the Group A grievances. A settlement was reached with the employer for the Group B grievances.

[43] The settlement agreement covered the complainant's four grievances. Before the settlement agreement was reached, she was informed that the respondent would not proceed with the data-change grievance. The agreement would have reimbursed her for the leave that had been erroneously granted and then clawed back. She was informed of the agreement and received a finalized version of it. She chose not to sign it. She was waiting for the Board's decision on the Group A grievances, but as was explained to her, the Board's decision would not affect the settlement.

[44] The respondent argues on a preliminary basis that the complaint, as it regards the data-change grievance, is late. On October 3, 2019, the complainant knew that the

respondent would not go forward with the grievance, yet she made the complaint eight months later, and the statutory deadline is 90 days.

[45] The respondent cites a number of decisions in its argument. I will return to the relevant jurisprudence in my analysis.

[46] The test for the duty of fair representation is whether the bargaining agent turned its mind seriously to the member's situation and acted diligently in its representation. A bargaining agent has discretion as to whether to present a grievance at adjudication. That discretion must be exercised in conformity with the duty described in s. 187 of the *Act*, but there is no obligation to present the grievance; nor is there any obligation to follow the grievor's preferred course.

[47] In this case, the respondent did act diligently to resolve the complainant's grievances. Leave that she was not entitled to but that she had taken because of the employer's administrative error would have been reimbursed through the settlement agreement. There was a discrepancy of three hours because she had not yet taken them; consequently, there was no detrimental reliance. She was not entitled to those hours, and she had not taken them.

[48] The respondent had received a legal opinion on the data-change grievance to the effect that it was not adjudicable by the Board. Consequently, it considered the matter resolved by the settlement agreement, along with the other grievances. It was part of the agreement to resolve all matters related to the vacation-leave-credit recovery.

[49] The complainant was advised that if she did not sign the settlement agreement, her grievances would simply be withdrawn. The grievances were finally withdrawn on May 22, 2020.

V. The complainant's reply

[50] The complainant argues that she should have the right to present her case herself to the Board if the respondent does not support her grievances.

[51] The complainant also submits that the employer's alleged wrongful practice of altering her start date to justify recovering the vacation-leave credits was a criminal act, as it deprived her of her rightful property — the vacation credits — and modified a federal government record.

[52] If the complaint is dismissed, then those issues will remain unresolved.

[53] The respondent failed its duty of fair representation by refusing to question the employer's method of altering employee records, which, according to the complainant, amounted to falsifying records. It also did not take into account the fact that when dealing with the vacation-leave-credit grievances, she was entitled to grandfathering protection under the collective agreement.

[54] The modification of her employment start date to calculate the vacation-leave credits will impact the severance pay that the complainant will be paid. The respondent failed to represent her in that respect.

[55] In the end, the grievances were never settled, and the complainant has received no compensation. The settlement never addressed the falsification of her record. In other words, the respondent did not adequately consider her interests.

VI. Analysis

[56] On the preliminary matter of the delay, I do not think that the objection is well founded. The complainant knew or ought to have known that the respondent did not support her data-change grievance by October 2019. However, the complaint targeted the withdrawal of the grievances, which occurred six days before the complainant made her complaint. Not supporting and withdrawing are two different matters.

[57] The issue in this case is whether the respondent failed its duty of fair representation with respect to the complainant's four grievances.

[58] The duty of fair representation is guaranteed by s. 187 of the *Act*, which for ease of reading I shall reproduce again. It reads as follows:

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

[59] The Supreme Court of Canada defined the duty of fair representation in the seminal decision, *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. The

broad parameters of the duty set out in that decision at page 527 are still applied today. They read as follows:

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

[60] There is a duty, but there is also broad discretion. That discretion is circumscribed by the obligation to be diligent when examining a grievor's situation while taking into account the union's legitimate interests.

[61] In its jurisprudence, the Board and its predecessors have consistently defined the duty of fair representation as being one of diligent and serious analysis, as stated as follows in *Cousineau v. Walker*, 2013 PSLRB 68 at para. 32: "… the respondents demonstrated that the circumstances of the complainant's case were investigated, that its merits were properly considered and that a reasoned decision was made as to whether to pursue it on her behalf."

[62] This serious analysis means that not every grievance will be referred to adjudication on behalf of bargaining unit members. Deciding not to proceed, or as in this case to settle a matter with the employer, is part of the bargaining agent's responsibility. As stated as follows in *Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (BC LRB) at para. 42:

> *When a union decides not to proceed with a grievance because of relevant workplace considerations -- for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit --* ***it is doing its job of representing the employees.*** *The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of Section 12.*
>
> [Emphasis in the original]

[63] The bargaining agent is not required to follow the grievor's reasoning, as stated in the following passage from *Bahniuk v. Public Service Alliance of Canada*, 2007 PSLRB 13 at para. 69:

> *… the duty of fair representation does not require the bargaining agent to take the direction of individual members when deciding what grievances to pursue, when to negotiate extensions of time and what grievances to settle. Finally, an individual member of a bargaining agent has the right to representation, but that is not an absolute or unlimited right. It does not mean, for example, that the member can insist that the bargaining agent provide a representative whenever he wants one. As long as the bargaining agent is not arbitrary or discriminatory or acting in bad faith when it exercises its judgment in these matters, it is entitled to distribute the limited resources of the organization in a reasoned fashion.*

[64] By reaching a settlement to resolve grievances, the bargaining agent acts for its members and must come to a reasoned decision to settle matters on their behalf.

[65] In this case, the respondent chose to settle the grievances, as it was entitled to on the complainant's behalf, in the interests of not only her but also the other grievors concerned. She submits that by withdrawing her grievances, the respondent prevented her from presenting her case to the Board.

[66] In the end, the complainant did present her grievances to the Board. They were dismissed (see *Kruse* 2020-85).

[67] The complainant also submits that because of the respondent's actions, she was denied compensation for the vacation-leave credits that were clawed back. She chose

not to accept the settlement that would have led to the reimbursement of approximately 66 of the 69 hours owed to her.

[68] The complainant thought that it was wrong of the respondent to suggest accepting the settlement (again, it would have reimbursed most of the clawed-back vacation-leave credits) because it would have been preferable for her to be included in the Group A of grievors, whose grievances did proceed to a hearing before the Board. Ultimately, those grievances were dismissed (see *Doucet v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 81).

[69] The complainant would have the Board address the issue of the "falsification", in her word, of her employment records. In *Kruse* 2020-85, the Board considered the data-change grievance but refused to take jurisdiction. It could not have been referred to adjudication unless it was considered a collective agreement issue, but it lacked the respondent's support. The Board also specifically declined to pronounce on any criminal wrongdoing by the employer. Nothing in the Board's enabling legislation (whether the *Act* or the *FPSLREBA*) gives it jurisdiction to pronounce on alleged *Criminal Code* (R.S.C., 1985, c. C-46) offences.

[70] The respondent's decision not to support the data-change grievance was based on a legal opinion that saw little chance of success for it before the Board. Referring to the case law already cited, the Board will not second-guess a representation decision that a bargaining agent made after seriously studying the issue.

[71] The employer explained the change to the start date as a means of accounting for the periods of leave without pay that the complainant took, for the purpose of calculating a vacation-leave entitlement. The Board simply does not have jurisdiction over such matters. Section 209 of the *Act* provides for the referral to adjudication of a grievance about a collective agreement interpretation, discipline, a termination, or a demotion. The Board cannot pronounce on the employer's accounting unless it runs counter to a collective agreement provision. The complainant produced no applicable collective agreement clause.

[72] I can find nothing discriminatory, arbitrary, or in bad faith in the respondent's actions to settle the grievances to the advantage of the grievors concerned or to refuse to support a grievance that had no chance of success before the Board. The

respondent's actions were informed by legal advice at every step; it sought the best possible resolution for the matters that it could act on.

[73] As for the complainant's request that she be freed of her obligation to pay mandatory dues to her bargaining agent, pursuant to s. 2(d) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*"), the Supreme Court of Canada has already resolved that matter, in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. Mandatory dues in a unionized setting do not violate the *Charter*.

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

(The Order appears on the next page)

VII. Order

[75] The complaint is dismissed.

July 27, 2023.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board