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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

TAMAR MESSER

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Messer 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: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Eve Berthelot, Public Service Alliance of Canada

Decided on the basis of written submissions,
filed November 24 and 28, 2023.

REASONS FOR DECISION

I. Overview

[1] The complainant filed a duty-of-fair-representation complaint against the Public Service Alliance of Canada (PSAC) because of PSAC's public statement on October 14, 2023 about the violence in Palestine and Israel. The complainant also complains that PSAC has joined the "Ceasefire Now" coalition. The complainant alleges that the result of these actions means that PSAC is perpetuating antisemitism and that it supports terrorism.

[2] The Board does not have the jurisdiction to hear this complaint. The duty of fair representation extends to how a bargaining agent represents employees only when the subject of the representation (1) falls under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act"), and (2) involves a dispute with the employer. A bargaining agent's statements on broader social or political issues fall outside its duty of fair representation. Therefore, the Board has no jurisdiction to hear a complaint about a bargaining agent's statements or position on broader social or political issues. The complainant's recourse, if any, lies elsewhere.

II. Framework for the decision

[3] The Federal Public Sector Labour Relations and Employment Board ("the Board") may decide any matter before it without holding an oral hearing, in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365). I have exercised that authority to decide this case based on the parties' written submissions.

[4] In rendering decisions on duty-of-fair-representation complaints, the Board has often applied an arguable-case analysis (see, for example, *Burns v. Unifor, Local 2182*, 2020 FPSLRB 119 at paras. 82 to 84, *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLRB 48 at paras. 48 and 49, *Musolino v. Professional Institute of the Public Service of Canada*, 2022 FPSLRB 46 at para. 32, *Fortin v. Public Service Alliance of Canada*, 2022 FPSLRB 67 at para. 26, *Corneau v. Association of Justice Counsel*, 2023 FPSLRB 16 at para. 17, *Serediuk v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2023 FPSLRB 71 at paras. 5 to 7, and *Archer v. Public Service Alliance of Canada*, 2023 FPSLRB 105 at paras. 27 to 29).

[5] The arguable-case analysis requires me to treat the facts alleged by the complainant as true and then determine whether the complainant has made out an arguable case that the respondent has violated the *Act*. In deciding this case, I have applied this arguable-case framework. Thus, the facts set out in this decision are taken from the complaint. I have assessed whether the facts alleged by the complainant mean that the complaint has an arguable chance of success.

III. Nature of the complaint

[6] The complainant is a member of PSAC. The complaint states that on October 14, 2023, PSAC made a public statement about the violence in Palestine and Israel. The complainant states that this statement is discriminatory against Jewish people because, among other things, it fails to call Hamas a terrorist organization and fails to request that the Israeli hostages it has kidnapped be returned safely. The complaint also states that on October 26, 2023, PSAC joined and signed the Ceasefire Now coalition, which also does not condemn terrorism or call for a return of Israeli hostages. The complaint states that by making its public statement and by joining the Ceasefire Now coalition, PSAC discriminated against Jewish people, which violated its duty of fair representation.

[7] I want to reiterate that these are only allegations at this stage. I am not ruling on whether the complainant has proven those allegations or whether she has fairly characterized PSAC's statement or the nature of Ceasefire Now. I am only ruling on whether those allegations, if proven, could mean that PSAC has violated its duty of fair representation.

IV. The complaint falls outside the Board's jurisdiction

[8] This complaint alleges that PSAC's actions breached s. 187 of the *Act*. Section 187 of the *Act* codifies a bargaining agent's duty of fair representation to the employees in the bargaining unit it is certified to represent. Section 187 states explicitly that it governs a bargaining agent's "... representation of any employee in the bargaining unit." This means that a complaint alleging a breach of PSAC's duty of fair representation must be about its representation of employees.

[9] Additionally, the Board has stated consistently that "... the duty of fair representation applies only to matters or disputes covered by either the *Act* or the applicable collective agreement ..."

Service of Canada, 2023 FPSLRB 51 at para. 84) and “... only applies to the representation of employees in issues involving their employer” (from *Serediuk*, at para. 24). In other words, as I said earlier, the duty of fair representation applies only when the subject of the representation (1) falls under the *Act*, and (2) involves a dispute with the employer.

[10] This complaint is about PSAC’s public statements and positions about the violence in Palestine and Israel. Those public statements have nothing to do with the *Act*, the collective agreement, or the complainant’s relationship with her employer. Therefore, this complaint falls outside the scope of the Board’s jurisdiction under s. 187 of the *Act*.

[11] The closest that the complainant comes to linking PSAC’s public statements to its representation of her as an employee is when she states that its public statements have made her feel uncomfortable being represented by it as a bargaining agent and that she does not have confidence that it will advocate for her in labour relations matters. She asks, rhetorically, “... can my bargaining agent fairly represent me in labour relation [*sic*] matters while simultaneously discriminating against me in public?” This concern is hypothetical at this stage. Until the complainant has a concrete labour relations dispute with her employer, the duty of fair representation is not triggered.

[12] The complainant has cited s. 96 of the *Canada Labour Code* (R.S.C., 1985, c. L-2). That provision does not apply to her or PSAC. However, the *Act* has the same provision in s. 189(1), which provides that “... no person shall seek by intimidation or coercion to compel an employee ...” to cease to be a member of an employee organization. The complaint does not cite s. 189(1) of the *Act*, but I will address this issue anyway because of the reference to s. 96 of the *Canada Labour Code*.

[13] The complainant states that PSAC’s public statements compel her to cease her membership with it because she is uncomfortable being represented by it. The complaint must fail because a public statement of the kind complained of in this case cannot be considered “intimidation or coercion”. That phrase requires that the impugned remarks must constitute “... threats or coercion amounting to constraint or intimidation” when viewed in a labour relations context; see *Desgagnés Marine Petro Inc. and Desgagnés Marine Cargo Inc.*, 2008 CIRB 429 at paras. 72 and 83, discussing the same phrase in s. 96 of the *Canada Labour Code*. The public statements in this

case do not rise to the level of a constraint or intimidation that would fall within the scope of s. 189(1) of the *Act*.

[14] The complainant alleges that there is systemic racism within PSAC. As the Board said in *Hancock*, at para. 88, such an allegation is about the internal affairs of PSAC and does not fall within the Board's jurisdiction to resolve.

[15] Finally, the complainant's remaining submissions largely comprise a series of questions that she asks the Board to answer. The Board's role is not to provide legal advice to a complainant, and so I cannot and will not answer most of those questions. I will nevertheless expressly address one of them because it could be read as a submission about the Board's jurisdiction under the *Act*.

[16] The complainant asks whether, if political statements or social justice issues are outside the Board's jurisdiction, those actions by bargaining agents are permitted. I cannot answer that question for all purposes, but I can answer whether such actions automatically violate the *Act*. They do not. Some other jurisdictions have legislated limits or rules on what bargaining agents may do in a political context, such as 2020 amendments in Alberta requiring unions to disclose the percentage of union dues being spent on political activities and requiring members to expressly opt in to using dues for purposes other than collective bargaining; see *Labour Relations Code* (R.S.A. 2000, c. L-1, s. 26.1), and the *Election of Union Dues Regulation*, Alta. Reg. 260/2021. However, the *Act* does not contain any rules about a bargaining agent's political activity, and as I stated earlier, my role is limited to enforcing the *Act*.

[17] I also point out that the Supreme Court of Canada upheld the constitutionality of a union using the compulsory dues paid by its members for political activity in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. The concurring opinions that made up the majority in that case stated, "A strong argument can be made that to achieve their legitimate ends and maintain the proper balance between labour and management, unions must to some extent engage in political activities ..." (at page 350), and this (at page 289):

... union involvement outside the realm of strict contract negotiation and administration does advance the interests of the union at the bargaining table and in arbitration. However, I do not believe that the role of the union needs to be confined to these narrow economic functions....

[18] That Court also affirmed the appropriateness of unions' contributions to political debate in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para. 38.

[19] More directly in response to the complainant's submission, in *Sodexo MS Canada Ltd. v. Hospital Employees' Union*, 2004 CanLII 36157 (BC LRB), a group of employers argued that a particular union should not be permitted to represent its employees because the union was advocating for a change in government policy that would have caused those employers to lose their business. The British Columbia Labour Relations Board rejected that argument, stating instead, "Speaking out in the legal, public, and political arenas is one of the recognized roles of trade unions," and, "As social and political institutions, unions have an important right to speak out and take positions on political issues and may pursue legal and political goals, not just collective bargaining goals" (at paragraphs 26 and 27). Just as taking political positions did not deprive a union of the protection of the British Columbia *Labour Relations Code* (R.S.B.C. 1996, c. 244), taking a political position does not deprive PSAC of its status as a bargaining agent under the *Act* or otherwise violate the *Act*.

[20] Among her other questions, the complainant asks whether her only option is to make a complaint with the Canadian Human Rights Commission. The Board cannot advise her about that; she must take that question up with that Commission.

[21] I want to stress that I do not mean to minimize or diminish the sincerely held views of the complainant. It is not my role to condone or condemn the positions taken by bargaining agents on broader political or social issues; similarly, my decision should not be read as criticizing her views or beliefs either.

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

(The Order appears on the next page)

V. Order

[23] The complaint is dismissed.

January 12, 2024.

**Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board**