Date: 20240228

File: 561-02-48025

Citation: **2024 FPSLREB 26**

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

STÉPHANIE LEFEBVRE

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Lefebvre v. Professional Institute of the Public Service of Canada

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

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

For the Complainant: Herself

For the Respondent: Marie-Hélène Tougas, counsel

Decided on the basis of written submissions,
filed August 15 and 31 and September 8, 2023.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On August 15, 2023, Stéphanie Lefebvre (“the complainant”) made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) against her bargaining agent for failing to provide fair representation. The bargaining agent is the Professional Institute of the Public Service of Canada (“the respondent”).

[2] On August 31, 2023, the respondent submitted its reply and made a motion for summary dismissal.

[3] This decision was made on the basis of the written documents that the parties submitted, under s. 22 of *the Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365).

[4] To be determined is whether, taking the complainant’s allegations as true, there is an arguable case that the respondent breached its duty of fair representation by acting in bad faith, arbitrarily, or discriminatorily. For the reasons that follow, I find that the complainant did not establish an arguable case.

[5] Accordingly, the motion for summary dismissal is allowed, and the complaint is dismissed.

II. Background

[6] The complainant made a judicial review application with the Federal Court after the investigator that her employer (the Canadian Food Inspection Agency) appointed found a harassment complaint unfounded. The respondent agreed to represent her in Federal Court and hired counsel for that purpose.

[7] The complainant disagreed with the respondent’s instruction to counsel, namely, not to submit to the Court the amended brief that she wished to file. According to her, this action undermined her chances that the Court would allow her judicial review application. In addition, she argued that the respondent was unwilling to present evidence to the Court that she considered relevant as it would have demonstrated that the respondent failed its representation duty in the complaints against the employer.

[8] The complainant wanted to end the representation. The respondent's hired counsel filed a related request with the Federal Court.

[9] For its part, the respondent submitted that it had no obligation to ensure that the complainant was represented in a judicial review application filed against a decision that was made under the employer's anti-harassment policy since the remedy was not provided under either the relevant collective agreement or the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[10] The respondent hired counsel to act before the Federal Court at the complainant's request and directed counsel to cease the representation, at her insistence. She was free to pursue her case before the Federal Court. The respondent had no such obligation.

[11] The complainant received a letter on December 16, 2022, from the law firm representing her that clearly stated the terms of representation; namely, the respondent had retained the firm's services to represent her, and in the event of a conflict between her and the respondent over litigation strategy, the firm would have to cease representing her, as the respondent had retained and paid it.

[12] The documentation filed to support the respondent's arguments details ongoing correspondence between the complainant and counsel representing her before the Federal Court, which also advised her as to the conduct that she should adopt in the workplace. Obviously, she did not agree with the advice. One point of contention was the fact that she did not accept the investigation's findings. According to her, the harassment had been amply proven. Counsel tried to convince her that an allegation is not evidence and that as long as the investigation's findings were not overturned in judicial review, they could legitimately guide the employer's actions.

III. Summary of the arguments

A. For the respondent

[13] The duty of fair representation does not require a bargaining agent to represent an employee in a dispute that is not governed by the *Act* or a collective agreement.

[14] In addition, the respondent went beyond its obligations by retaining the services of counsel to represent the complainant's interests before the Federal Court in the judicial review application.

[15] Nothing in the respondent's conduct, which has always supported the complainant, amounts to arbitrary, discriminatory, or bad-faith conduct.

B. For the complainant

[16] The complainant argues that the respondent is obligated to defend her interests with respect to harassment and occupational health and safety.

[17] The respondent's retained lawyer was in a conflict of interest since his first loyalty was to the respondent. But according to the complainant, it is not in the respondent's interests for the Federal Court to allow her judicial review application. Exposing the harassment investigation's shortcomings would also expose the deficiencies in the respondent's representation with respect to the alleged harassment and her working conditions generally.

[18] I will now quote a passage from the complainant's arguments that it seems to me summarizes her position well:

> [Translation]
>
> …
>
> *The Institute's directors who appointed* [counsel] *as the representative demonstrated gross negligence and/or bad faith by prioritizing their protection from the failure complaints against them over the complainant's interests. However, the issues in this judicial review application are important to the complainant; she is trying to have acknowledged the harassment that she suffered, to end it and to restore a healthy workplace.*
>
> …

[19] As remedy, in addition to $2000 in damages (the amount is not explained), the complainant requests that the Board order the respondent to pay for representation by counsel of her choice for the judicial review application.

IV. Analysis

[20] This decision disposes of the motion for summary dismissal. Essentially, the question at issue is to decide whether, taking all the complainant's allegations as true, there is an arguable case that could lead to the conclusion that the respondent contravened s. 187 of 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.*

[21] One of the contentious issues in this case is the extent of the "representation" that the bargaining agent must provide. The complainant argues that it has an obligation to ensure representation in judicial reviews.

[22] The requirement to fairly represent bargaining unit members does not mean that the bargaining agent must take the steps that the represented employee would like it to take. The Board's established case law makes it clear that there is no obligation on a bargaining agent to file a grievance or to refer a grievance to adjudication, let alone refer a complaint for judicial review, simply because an employee desires it.

[23] The bargaining agent is obligated to diligently review an employee's situation of conflict with the employer and to treat the matter seriously.

[24] Initially, the bargaining agent supported the complainant in her judicial review application and hired counsel to represent her. She was dissatisfied with the representation. Due to her insistence that that counsel should no longer represent her, counsel ceased to represent her.

[25] Given the parties' exchanges, it is clear that counsel took the complainant's situation seriously and that he gave her the advice that he considered most useful for her situation. There is no trace of discrimination, bad faith, or arbitrariness.

[26] The complainant wished to pursue the case in a certain way; counsel amended the brief in response to her suggestions but insufficiently, according to her. It is clear that they did not see the case in the same light. Nothing in their exchanges indicates professional misconduct by counsel.

[27] The question in this case is quite narrow: Is the bargaining agent obligated to ensure that the complainant is represented by counsel before the Federal Court?

[28] For all sorts of reasons, the answer is in the negative.

[29] First, as the Board has repeatedly stated (see, for example, *Hancock v. Professional Institute of the Public Service of Canada*, 2023 FPSLREB 51), the duty of fair representation is limited to matters arising from the *Act* or the relevant collective agreement. The judicial review application relates to an investigation initiated under the employer's anti-harassment policy that was not covered by the *Act* or the relevant collective agreement.

[30] Second, as *Hancock* points out, a disagreement as to strategy does not indicate that the bargaining agent failed its duty.

[31] Finally, at least on their face, the allegations must set out that s. 187 of the *Act* might have been violated (see *Hancock*; and *Therrien v. Canadian Association of Professional Employees*, 2011 PSLRB 118).

[32] But on their face, the allegations do not reveal any indication of arbitrary, discriminatory, or bad-faith conduct. The complainant reproaches the respondent for hiring a lawyer who did not follow her instructions and who might have been in a conflict of interest with respect to her case. According to her, counsel had an interest in not winning the case because the investigation's shortcomings, if proven by the Federal Court, would highlight the deficiencies in the respondent's representation in the harassment complaint file.

[33] The complainant has made other complaints against the respondent. It is not through a judicial review against an employer that light is shed on a third party's actions that is not a party to the case. The Federal Court's decision cannot affect complaints against the respondent, as the Court would rule on the employer-mandated investigation. I see nothing that would allow questioning counsel's integrity, who tried to build a winning case for the complainant. Once again, her disagreement is not enough to tarnish the quality of the representation.

[34] In conclusion, I see no obligation on the respondent to assure the complainant's representation before the Federal Court. Her disagreement with counsel's strategy or the respondent's directions does not constitute an allegation that its representation was arbitrary, discriminatory, or in bad faith. A bargaining agent may choose to help an employee beyond the *Act*'s obligation by making a judicial review application on

their behalf. Under the *Act*, it cannot be held responsible for the employee's dissatisfaction with the litigation strategy, given that the *Act* creates no obligation on its part.

[35] I agree with the respondent that the complainant's allegations do not reveal any violation of the *Act*. Therefore, the complaint would have no chance of success before the Board. For that reason, the motion for summary dismissal is allowed.

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

(The Order appears on the next page)

V. Order

[37] The motion for summary dismissal is allowed.

[38] The complaint is dismissed.

February 28, 2024.

FPSLREB Translation

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