Date: 20240320

File: 561-32-46039

Citation: 2024 FPSLREB 38

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

VILAN GONZAGUE

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Gonzague 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: Pierre Marc Champagne, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Marie-Hélène Tougas, counsel

Decided on the basis of written submissions, filed November 8 and December 2 and 9, 2022, and January 3 and May 1 and 19, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] Vilan Gonzague ("the complainant") made this complaint under s. 190(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), alleging that the Professional Institute of the Public Service of Canada ("the respondent" or "the bargaining agent") failed its duty of fair representation in the context of a grievance that he filed in June 2022. He mainly complains that it placed his grievance in abeyance without his consent, that it failed to provide relevant information, and that it ignored his submitted medical information.

[2] The respondent denies the allegations and requests that the Federal Public Sector Labour Relations and Employment Board ("the Board") summarily dismiss the complaint on the basis that it is premature and that it has no reasonable prospect of success.

[3] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) allows the Board to decide any matter before it without holding an oral hearing. Since the parties had the opportunity to file additional submissions, I am satisfied that it is possible to decide this case based on the documents on file as well as their written submissions.

[4] For the following reasons, I conclude that the complaint does not demonstrate an arguable case that the respondent breached s. 187 of the *Act*.

II. Request to modify the initial complaint

[5] After he filed his reply to the respondent's position on his complaint, the complainant sent the Board another document, to provide additional material to further substantiate his complaint. He also asked that two of the corrective measures he initially requested be modified for clarification and that a new corrective measure be added to his complaint.

[6] The parties were informed that this would be treated as a request from the complainant to modify his initial complaint. Therefore, they were invited to submit their positions on that request.

[7] In the additional material that the complainant submitted, he explains that after he made this complaint, the respondent notified him that it would no longer provide its support for another grievance that he had filed earlier that year. The additional documents also provide details about that other grievance and about some related exchanges that took place with the respondent on its support and representation.

[8] The complainant submits that he considers that a reprisal by the respondent because of this complaint and that the Board should consider it as substantiating his initial allegations. Therefore, he asks the Board to consider those new elements in its analysis of the present complaint.

[9] The respondent opposes the complainant's request and suggests that it is an attempt to submit documents related to another matter that is irrelevant to this complaint.

[10] As the Board recently explained in *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48 at para. 9:

> *[9] Amendments to a complaint can be accepted if they expand, clarify, or correct the essential subject matter of the allegations in the original complaint: see* Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100 (affirmed on other grounds in 2011 FCA 98). However, if the amendments add a new dimension to the complaint, it will constitute a new complaint.…*

[11] In the present case, the new information that the complainant submitted involves a matter different from the grievance at the bottom of this complaint before the Board. Moreover, it refers to the respondent's actions, decisions, and behaviours that occurred after the complaint was made. Those subsequent items cannot be part of the present complaint (see *Musolino v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46 at para. 38).

[12] Those subsequent facts could still be considered in my analysis were they directly related to the allegations in this complaint (see *Hancock v. Professional Institute of the Public Service of Canada*, 2023 FPSLREB 51 at para. 80). However, I do not find it so. Even though both grievances involved the same parties, and some similar arguments might be at play, I find the two contexts too different and far apart to be helpful to my determination of the present matter.

[13] As for the corrective actions that the complainant would like to add, modify, or clarify, here are the changes that he would like to make to his initial complaint form. The modifications are emphasized:

> …
>
> *Clarifications:*
>
> • *Grievance #**39712** should proceed to adjudication without further delay.*
>
> • *PIPSC to cover the cost of outside council for any further representation that I require.* ***Outside council representative is to be chosen by Vilan Gonzague.***
>
> *Addition:*
>
> • ***In matters where PIPSC's approval and representation is required to raise a grievance, the Board will permit me to raise the matter without the Institute's support but with the support of an outside legal representative of my choice.***
>
> …
>
> [Emphasis added]

[14] I find the requested clarifications admissible as they simply clarify the measures initially requested, without expanding the complaint's scope. For the additional corrective measure that the complainant would like to add, it seems to be speculative of future matters that would arise between the parties and seeks to grant a blanket right for him to choose his legal representative in any eventual cases. Additionally, it seems to intend to obtain from the Board the permission to circumvent some specific provisions of the *Act* related to bargaining agent representation. Certainly, the Board cannot accept it, and at any rate, it would fall outside the scope of this matter.

[15] For these reasons, the complainant's request to modify his initial complaint is granted in part. The request to consider new facts and allegations about the respondent's withdrawal of its support for a grievance different from the one involved in this complaint is denied. The clarifications of two of the initially requested corrective measures are allowed. The addition of a new corrective measure is denied.

III. The facts relevant to the complaint

[16] At all relevant times, the complainant worked as a policy officer in a position classified at the ES-02 group and level with the Canadian Food Inspection Agency ("the employer"). He filed a grievance in June 2022, challenging the accuracy and

completeness of his job description. As such, his grievance alleged that the employer breached its collective agreement with the bargaining agent for the Scientific and Analytical (S&A) group, which expired on September 30, 2022 ("the collective agreement").

[17] The complainant disputes the date on which the grievance was filed and the fact that he did not ask for reclassification but rather to be paid retroactively for the time he performed the duties of a higher classification. As those two items are not decisive or material to the decision to be made in this case, I need not resolve those discrepancies in the way the parties presented the facts.

[18] In September 2022, the employer allowed the grievance in part. It recognized that the complainant's current job description was not accurate. Therefore, it initiated a review of the work description applicable to him and advised him that the review might or might not affect his existing classification at his current group and level.

[19] With the employer's consent, the respondent decided to place the complainant's grievance in abeyance while the employer conducted its job-description review process. But he wanted to pursue his grievance to the next level of the grievance process, despite the employer's favourable decision, in part at least, at the second level.

[20] The complainant attempted multiple times to transmit his grievance to the third level without the respondent's support. The employer never acknowledged its receipt of the third-level transmittal forms as the grievance was already in abeyance.

[21] From October 3 to November 8, 2022, the complainant and different respondent representatives had a long series of emails and communications. Ultimately, the complainant understood that his grievance would remain in abeyance and that the bargaining agent would not refer it to adjudication at that time. Therefore, he made this complaint in which he alleged that the respondent breached its duty to fairly represent him in the course of his grievance process.

IV. Allegations

[22] The complainant alleges that from the start, the respondent's actions in relation to the employer's second-level grievance decision were frivolous because that decision was invalid, for the following reasons:

- First, it was untimely as it was issued after the 30-day period set out in the collective agreement. At that point, the complainant had already escalated his grievance to the third level, although the respondent had not yet agreed to do that.

- The official second-level decision that was provided to the complainant, along with the related communications, reference an erroneous and invalid grievance case number. They also contain inaccurate background information.

[23] Additionally, in his initial complaint, the complainant raised numerous allegations that are summarized as follows:

- The respondent's representatives agreed to grievance-process time-limit extensions without the complainant's knowledge or consent.

- The respondent's representatives provided the complainant with incorrect information on some regulations or collective agreement provisions applicable to presenting a grievance. The respondent allegedly also failed to provide, or provided, untimely information to him on his time-sensitive questions at the outset of the grievance process.

- The respondent's representatives mandated that the complainant be represented by the bargaining agent at the third-level grievance presentation and denied his request to escalate his grievance.

- The respondent did not clarify or assure the complainant's job security in the event that his grievance was not resolved before the collective agreement expired. He was uncertain if he could be deemed to have abandoned his duties under the collective agreement as he performed only one set of activities under a branch of the employer and not the other.

- The respondent's representative disregarded his medical documentation, which advised his employer and the respondent to process his grievance without delay because it was the aggravating cause of his medical condition.

[24] The complainant also made a few allegations against the employer. I will not consider them as this complaint is against the bargaining agent, and therefore, such allegations are either irrelevant or not useful to deciding this matter (see *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at paras. 81 and 164; *Archer v. Public Service Alliance of Canada*, 2023 FPSLREB 105 at paras. 14 and 61; and *Hancock*, at para. 6).

V. Summary of the arguments

A. For the respondent

[25] The bargaining agent responds to those allegations by stating that it acted reasonably when it exercised its discretion to agree to place the complainant's

grievance in abeyance following the employer's agreement to rewrite his job description, in collaboration with him and the respondent.

[26] The respondent suggests that several times, it explained to the complainant that it was continuing to represent him, and that if ultimately, the employer's new job description is not acceptable to him, it will then consider taking the grievance out of abeyance and moving it to the final level of the grievance process.

[27] The respondent argues that the complaint is premised on a fundamental misunderstanding of the collective agreement. As per that agreement's provisions, an employee is not entitled to file a grievance that relates to the interpretation or the application of the collective agreement unless he or she has the approval of, and is represented by, the bargaining agent. Therefore, it is up to the respondent to decide whether to file a grievance alleging a collective agreement breach and whether to proceed with it through each step of the grievance process, including the final decision as to whether to refer it to adjudication.

[28] The respondent interprets these provisions as giving it the authority to agree to extend a time limit in the grievance process if it has the sole carriage of the grievance, as in this case. It considers this collective agreement interpretation both logical and purposive. It would make no sense to give the bargaining agent full carriage of all grievances related to alleged collective agreement breaches and yet allow an individual grievor a veto on whether it can agree to extend a time limit in the grievance process.

[29] The respondent denies that it acted in a manner that was arbitrary, discriminatory, or in bad faith when it concluded that it had the sole authority to place the complainant's grievance in abeyance while the employer collaborated with him and his representative on developing a complete and current job description, as he requested in his grievance. The respondent's understanding that it could unilaterally place the grievance in abeyance without the complainant's consent flowed from a reasonable interpretation of the collective agreement and cannot be considered arbitrary within the meaning of s. 187 of the *Act*.

[30] The respondent repeatedly communicated with the complainant to explain its position and to assure him that if ultimately, he is unsatisfied with the new job description and the resolution of his concerns, it could consider moving his grievance to the third and final level of the grievance process. His complaint is premature as the

respondent continues to represent him in his grievance. Once a new job description is finalized with his collaboration and that of the respondent's representatives, it will consider whether to proceed to the final level of the grievance process. In any event, the complaint has no reasonable prospect of success as the respondent has acted reasonably and not in an arbitrary or discriminatory manner; nor has it acted in bad faith.

[31] The respondent refers me to the following decisions: *Tench v. Canadian Association of Professional Employees*, 2009 PSLRB 154; *Reid v. Professional Institute of the Public Service of Canada*, 2001 PSSRB 48; *Brown v. Association of Justice Counsel*, 2015 PSLREB 76; *Shouldice v. Ouellet*, 2011 PSLRB 41; *Tibilla v. Public Service Alliance of Canada*, 2021 FPSLREB 118; *Musolino*; and *Corneau v. Association of Justice Counsel*, 2023 FPSLREB 16.

B. For the complainant

[32] The complainant takes the general position that if the Board recognizes the facts and the respondent's acts and omissions that he alleged in his complaint as true, it will find that the allegations disclose an arguable case of a contravention of s. 187 of the *Act*. According to him, there is a high prospect of success if the case is heard on its merits.

[33] The employer's second-level decision was not to his satisfaction and does not address all the corrective measures that he requested. He insists that he never agreed to collaborate with the employer and to continue the process of reviewing his work description. Rather, he offered what he believes is a complete and current statement of his duties and responsibilities. For him, consequently, the respondent had no right to accept the employer's decision and to place his grievance in abeyance.

[34] Based on his collective agreement interpretation, the complainant argues that the decision as to whether to escalate the grievance to a higher level resides with the employee, not the bargaining agent. For him, the bargaining agent does not have full and sole carriage rights for a collective agreement grievance. It does only as far as the necessity for a member to obtain its consent and representation to file such a grievance or to refer it to adjudication. The bargaining agent's claims to the contrary are grossly negligent or were purposefully given to him in bad faith, to subvert the grievance process.

[35] The complainant suggests that the Board should also consider the fact that when the employer previously requested a time-limit extension between the first and second levels, the respondent respected his decision to deny that request. However, between the second and third levels, it disregarded his objection to an extension and told him that one would be granted without his consent. He suggests that a veto right exists in his favour when the bargaining agent considers grievance-process time-limit extensions. Therefore, the respondent's unilateral decision to accept the employer's decision to partially allow the grievance violated the collective agreement and was arbitrary.

[36] The complainant also submits that the respondent never clarified or answered any of his questions about grievance-presentation or escalation time limits. It should be aware of time-limit stipulations, and its inability or failure to provide such critical information was due to either incompetence, bad faith, discrimination, or gross negligence and constituted a breach of the "duty of trust" between him and the respondent. It also raises many questions and concerns with respect to the respondent's intentions and might be seen as another attempt to subvert the grievance process and have his grievance deemed abandoned.

[37] The complainant further claims that the respondent's representatives' wrongful interpretation of the grievance process has massive consequences as he might be deemed to have abandoned his grievance if he fails to present it at the next level within the prescribed time limits. The grievance is one of the aggravating causes of his medical condition, and his physician requested to proceed with the grievance without delay, to prevent further aggravation. According to the complainant, the respondent ignored that request.

[38] The complainant concludes that the respondent's illogical interpretation and application of the collective agreement, in addition to providing blatantly incorrect information to him, was either grossly negligent, incompetent, or purposefully in bad faith. Its violations of eight collective agreement articles were done to intentionally delay the process, to cause the grievance to be considered abandoned, and to compel him to agree to a grievance-settlement decision that he is entitled not to accept. Its conduct and omissions, done to deliberately subvert the complainant's grievance, highlight its discriminatory, bad-faith, and arbitrary actions that were contrary to s. 187 of the *Act*.

[39] Furthermore, the complainant suggests that the evidence also highlights a conspiracy with the employer to subvert and sabotage his grievance. He admits that the respondent's gain is unclear, but he still considers that it undoubtedly earns favour from the employer by having grievances closed or dismissed. Its actions and misinterpretations appear malicious, calculated, and highly discriminatory as the only other reason for the grossly negligent handling of his grievance or for providing incorrect information is some form of discrimination based on genetic characteristics.

VI. Reasons

[40] The present complaint was made under s. 190(1)(g) of the *Act*, and it alleges a breach of the bargaining agent's duty of fair representation. Section 187 states that a bargaining agent should not 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.

[41] The essence of this complaint is linked to the respondent's representation in the context of a collective agreement grievance that the complainant filed. In collective agreement matters, the bargaining agent has exclusivity of representation. However, its actions and behaviours are subject to the Board's analysis to ascertain that s. 187 was respected (see *Serediuk v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2023 FPSLREB 71 at paras. 21 and 22; *Jutras Otto v. Brossard*, 2011 PSLRB 107 at para. 62; and *Lessard-Gauvin v. Public Service Alliance of Canada*, 2022 FPSLREB 4 at paras. 42 to 44).

[42] The complainant takes issue with the fact that the respondent narrows down his allegations to suggest that the main object of the complaint is that it placed his grievance in abeyance without his consent. However, one must admit that while the complaint contains several other allegations, most of them are linked one way or the other to that decision, which the respondent made unilaterally.

[43] For example, the complainant alleges that he received from the respondent incorrect or untimely information. On the basis of the documentation in the file, I understand that it relates to the calculation of the time frame in which to present a grievance, receive a response to it, or transmit it to the next level of the grievance process. None of those was really in play or discussed before the grievance was placed in abeyance.

[44] The complainant also alleges that he did not receive clarifications or assurance about his job security. I understand that he made that allegation because he believed that the fact that his grievance was placed in abeyance could have consequences on his employment. He described those concerns as his belief that his grievance could be considered abandoned or that he could be seen as having abandoned his position as he performs only a portion of its duties. He is also concerned that the expiry of the collective agreement under which he filed his grievance could impact the grievance.

[45] Finally, the complainant alleges that the respondent disregarded his medical information. I understand this one to be linked to his desire to proceed as expeditiously as possible with the grievance, so that his symptoms will not to be exacerbated by the delays. Once again, this would not be in play had the grievance not been placed in abeyance.

[46] Therefore, it is reasonable to conclude that the central allegation of the present complaint is about the respondent's decision to unilaterally place the complainant's grievance in abeyance, without his agreement. As such, I will address this first.

A. The bargaining agent's authority over a collective agreement grievance

[47] The complainant's interpretation of the collective agreement is that a bargaining agent does not have any authority with respect to a collective agreement grievance except for approving it when it is filed and its approval and representation to refer it to adjudication. According to his very narrow and selective interpretation, an employee would have full and sole authority over a collective agreement grievance at all times between those two points. I strongly disagree.

[48] In the Board's case law are disagreeing decisions when it comes to specify who, under federal public sector legislation, semantically "owns" a collective agreement grievance: the grievor or the bargaining agent. Be that as it may, I need not resolve that question for the purposes of this case as everyone agrees that a collective agreement grievance cannot exist or survive without bargaining agent support (see *Tibilla*, at para. 39; and *Farhan v. Canada Revenue Agency*, 2021 FPSLREB 48 at para. 82).

[49] The collective agreement belongs to the bargaining agent and the employer. The legislator, as unanimously recognized by the jurisprudence, gave the bargaining agent the exclusive authority as to whether to represent an employee when it comes to a

grievance related to its interpretation or application. That exclusive authority is in place throughout the grievance's existence (see *Reid*, at para. 58; and *Jakutavicius v. Public Service Alliance of Canada*, 2005 PSLRB 70 at para. 126). That is what I would qualify as the bargaining agent having sole carriage of such a grievance.

[50] Consequently, the complete and exclusive authority must include questions such as timeline extensions. The bargaining agent must have the authority to extend or suspend them, as in this case, as long as it is done within the boundaries of the *Act* or the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[51] The *Act* is simply silent with respect to grievance process timelines. As for the *Regulations*, they state at s. 61 that with respect to the presentation of a grievance at any level of the grievance process, the time prescribed to do so by that part of the *Regulations* or provided for in a grievance procedure contained in a collective agreement may be extended by agreement between the parties, either before or after the expiry of that time.

[52] Therefore, nothing prevents or restricts the bargaining agent from placing a grievance related to the collective agreement in abeyance, as it did in this case, with the employer's agreement. But that decision may be subject to a Board analysis to ascertain that it stays within the accepted criteria of the bargaining agent's duty of fair representation set out in s. 187 of the *Act*.

[53] In his arguments, the complainant takes the position that the respondent's decision to put his grievance in abeyance contravened multiple collective agreement provisions.

[54] In matters referred to the Board, allegations of collective agreement breaches, like the numerous ones that the complainant made against the respondent in his complaint, are normally between an employer and a bargaining agent. A duty-of-fair-representation complaint is not a vehicle for employees to raise what they consider collective agreement breaches by their bargaining agents. Such a thing is not really material and is of very little help when determining if the bargaining agent acted arbitrarily, in bad faith, or discriminatorily during the course of its representation of the complainant. As stated in *Brown*, the duty of fair representation is not with respect to the merit of a bargaining agent's interpretation of the collective agreement but

rather whether that interpretation and the bargaining agent's subsequent decisions are reasonable.

[55] In his written submissions, the complainant quotes paragraph 22 of *Brown*, which quotes *Hotel Employees Restaurant Employees Union, Local 75 v. The Delta Chelsea Inn, Delta Chelsea Hotels & Resorts*, [1996] O.L.R.D. No. 452 (QL; "*Delta*") at para. 23. He relies on that quotation to support his argument that if a bargaining agent's collective agreement interpretation is absolutely illogical, it might be considered arbitrary.

[56] However, he reproduced only half of the quotation in his submissions. The remainder of the quotation states that the arbitrator in *Delta* found that if two collective agreement interpretations compete, the Board will not prefer the complainant's interpretation as long as the bargaining agent's is reasonable. In this case, not only do I find the bargaining agent's interpretation reasonable but also, I respectfully submit that the complainant's interpretation is simply untenable.

[57] The complainant also alleges that the respondent's position would breach s. 67 of the *Regulations*. That provision does not grant an employee a right to file a grievance at his or her will, as the complainant seems to suggest, but rather tells the employee how to proceed if he or she wishes to file one. Furthermore, s. 67 cannot be interpreted in isolation to any of the other provisions in the *Regulations* or the provisions of the Act from which it derives; in this case, the *Act*.

[58] Section 208(4) of the *Act* clearly stipulates that an employee may not present an individual grievance relating to the interpretation or application of a provision of a collective agreement unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement applies.

[59] For those reasons, I conclude that the respondent had complete control over the timelines of the complainant's grievance in this case, including the authority to unilaterally place it in abeyance, with the employer's consent. I must now determine if the bargaining agent's decision to place it in abeyance, or any other of its actions or omissions, constitutes a breach of the duty of fair representation.

B. Is there an arguable case that the respondent's decisions, actions, or omissions constitute a breach of the duty of fair representation?

1. The applicable framework

[60] The Board consistently applies what is commonly known as an "arguable-case analysis", which is well established in its jurisprudence and was recently summarized in *Corneau*, at para. 17, which reads as follows:

> *[17] … In applying an arguable-case analysis, the Board is to consider all the facts alleged by the complainant as true and then determine whether the complainant has made out an arguable case that the* Act *has been violated (see also* Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2 at para. 86).*

[61] To successfully demonstrate an arguable case, the complainant's factual allegations must suggest that the respondent's decisions, actions, or omissions could be considered arbitrary or discriminatory or as resulting from bad faith (see *Tibilla*, at para. 26; and *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 at para. 28).

[62] In its analyses, the Board has consistently concluded that a complainant's unhappiness or disagreement with respect to how a bargaining agent handled a grievance is insufficient to demonstrate that it breached s. 187 of the *Act* (see *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLREB 30 at para. 102; and *Berberi v. Public Service Alliance of Canada*, 2017 PSLREB 49 at para. 48).

[63] Rather, the Board must apply the standard set out in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, to determine if the bargaining agent's decisions, actions, or inactions can be considered as a representation that is fair, genuine, and not merely apparent and that is undertaken with integrity and competence, without serious or major negligence, and without hostility toward the employee (see *Andrews*, at para. 29).

[64] The Board's role is not to second-guess the bargaining agent by assessing the merits of its actions or decisions, to determine if they were appropriate and good (see *Jutras Otto*, at para. 61). As well, the duty-of-fair-representation complaint mechanism should not be used as an attempt to resolve disputes between a complainant and an

employer (see *Burns*, at para. 164) or for internal bargaining agent matters (see *Serediuk*, at para. 25; and *Hancock*, at paras. 84 to 86).

[65] In his submissions, the complainant outlines that in its analysis, the Board must apply the test in a fashion that errs on the side of allowing the complaint to be heard on its merits and that all that is required are facts sufficient to establish an arguable "link". He further suggests that it is certainly not appropriate to require him to reveal all the facts on which his case is based as a precondition to crossing the threshold. Whether the argument is the best interpretation of the facts or even a good interpretation, it is irrelevant. It is sufficient to satisfy the *prima facie* test that there is at least an arguable case. To support his assertions, the complainant refers to *Hager v. Statistics Survey Operations*, 2009 PSLRB 80 at paras. 35 and 41.

[66] *Hager* involved an unfair-labour-practice complaint case about alleged discrimination by the employer based on the complainants' bargaining agent activities. The reasoning that the Board applied in that context, although similar, slightly differs from the analysis in the present case. For a complaint like the one in *Hager*, a reverse burden exists in the *Act* and requires the respondent to demonstrate that it did not contravene the *Act* on the sole basis of the written allegations in the complaint. To avoid the potential misuse of that recourse, the Board applies a *prima facie* test to ascertain that there is at least an arguable link between the allegations and the respondent's impugned action.

[67] The paragraph from *Hager* that the complainant refers me to clearly indicates that it is framed in a way to not frustrate the legislator's intent to set out a reverse burden in complainants' favour. Such a reverse-burden context does not exist in the present case, and as stated earlier, the test for complaints made under s. 187 of the *Act* is already well established in the Board's jurisprudence. While the arguable-case framework is applied in both situations, I see no reason to deviate from the generally applied approach reflected in that jurisprudence that is specifically related to duty-of-fair-representation complaints to lower even more the threshold that the complainant must meet, as he seems to suggest.

[68] While the *Hager* decision could not really help the complaint in the way he would like, I understand his position with respect to the amount and type of factual allegations that he believes he must present to succeed in his case. However, he must

understand that he had the opportunity to file submissions more than once and that he had to present all the facts supporting his position without assuming that later, he would be able to supplement his position.

[69] Also, as stated in prior Board decisions, while the burden that the complainant must meet in an arguable-case analysis context like this one is quite low, the factual allegations he presents must have an air of reality and be more than mere allegations or arguments (see *Payne v. Public Service Alliance of Canada*, 2023 FPSLREB 58 at para. 60; *Sganos*, at paras. 80 and 81; and *Joe v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 10 at para. 42).

[70] Turning to the case, overall and in summary, the complainant suggests that it is clear that to him that the respondent's violation of the collective agreement, based on his interpretation, and the totality of its decisions, acts, and omissions constitutes discriminatory, arbitrary, careless, grossly negligent, and illogical conduct. For him, it illustrates bad-faith, dishonest, malicious, wrongful, not genuine, and merely apparent representation.

[71] The complainant concludes that the respondent's conduct was deliberate and that it highlights all the attributes that the Supreme Court of Canada outlined as indicative of an unfair labour practice. Therefore, I will turn to the factual allegations he presented to see if the respondent's decisions, actions, or alleged omissions could be considered arbitrary, discriminatory, or in bad faith.

2. Arbitrary

[72] The complainant refers to *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 50, for the principle that arbitrary conduct and serious negligence are closely related. Even where there is no intent to harm, a union may not process an employee's complaint superficially or carelessly. It must investigate.

[73] The complainant also refers to *McRaeJackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290 at para. 27, for examples of arbitrary conduct and behaviour by a union. He also refers to paragraph 29, which states that arbitrariness refers to union actions that have no objective or reasonable explanation and that put blind trust in the employer's argument. Finally, he refers to paragraph 30 for the idea that it is arbitrary for a union

to make decisions without concern for the employee's legitimate interest. An uncaring attitude toward the employee's interest may be considered arbitrary conduct, as may also be gross negligence and reckless disregard for the employee's interest.

[74] On that same point, the complainant further refers me to *Manella v. Public Service Alliance of Canada*, 2022 FPSLREB 7 at paras. 68 to 70 (referencing *Gagnon*), for a summary of the five principles governing the duty of fair representation. In *Manella*, the Board found that the bargaining agent acted arbitrarily as it did not thoroughly study the case or consider the significance of the employee's concerns. The complainant suggests that the same finding can be made in the present case. For him, although the respondent appears to be providing representation, its biased and illogical collective agreement interpretation discredits its genuineness with respect to resolving the issue.

[75] My analysis of those suggestions from the complainant is as follows. The facts he advances in his submissions, even if taken as true, do not support in any way the conclusions he asks me to make based on the decisions he referred me to and noted earlier in this decision.

[76] The respondent received and carefully considered the employer's second-level response. It concluded that the employer had recognized the essence of the recourse that the complainant undertook, with the respondent's support. One of the main objectives of a job-description grievance, like the one that the complainant filed with the respondent's support, is to make the employer realize that there might be a discrepancy or a disconnect between the job description in place and the duties that the employees perform who it supposedly covers.

[77] In the present case, the employer agreed to review and modify, if necessary, the job description that the complainant disputes. It also acknowledged that his benefits could be adjusted eventually, depending on the results of the job-description review exercise. For the moment, the respondent found that an adequate response to the complainant's grievance. Therefore, it agreed, as it was entitled to do for the reasons that I explained earlier in this decision, to put the grievance in abeyance, to let the employer complete the review of the complainant's job description.

[78] The respondent's behaviour, reasoning, and case management of the complainant's file can in no way be qualified as arbitrary when compared to the

examples and criteria from *Noël*, *McRaeJackson*, and *Manella*, which he cited. Nor can it be described as a careless "wait and see approach" as he presented it in his written arguments.

[79] The complainant must also understand that the respondent is responsible for applying the collective agreement for all the other employees in the same bargaining unit. The employer's review of the job description applicable to the complainant might apply to and potentially affect a number of other employees at the same level and in the same classification. The respondent is completely legitimate to consider these things when deciding what it believes is the appropriate strategy with respect to the objective pursued in a grievance, even an individual one (see *Manstan v. Union of Canadian Transportation Employees*, 2023 FPSLREB 43 at paras. 71 to 74).

[80] The complainant's arguments that the respondent's handling of his case might result in his grievance being deemed abandoned is nonsense, since the crux of this case is based on the fact that the respondent and the employer mutually agreed to put his grievance in abeyance.

[81] The complainant's concerns that the other corrective measures requested in his grievance might not be considered later is also baseless, considering the facts presented to me. The employer clearly stated that it intended to revisit that aspect of the grievance after the review exercise, and the respondent abundantly and repeatedly made it clear that it would reactivate the grievance if necessary, to pursue that objective. This is heavily supported by the documentation on file, which confirms all the communications between the respondent and the complainant before he made his complaint.

[82] It is also difficult to conclude that the respondent breached its duty of fair representation given that it continues to monitor the complainant's case and that by doing so, it still actively represents him. The fact that it decided to wait for the new job description to be finalized before pushing the grievance further seems not only reasonable but also somewhat essential to achieve that objective from the grievance process. That kind of approach has been considered acceptable in the jurisprudence (see *Tibilla*, at paras. 39 and 40).

[83] The allegations that the information that the respondent provided to the complainant was deficient or inaccurate are formulated on the basis of his

interpretation of the collective agreement or the legislation. As for the suggestion that it could have been untimely, the information on file does not specify what the complainant refers to exactly. In any case, the fact is that none of this prevented him from filing a grievance and eventually moving it to the second level, where it was allowed in part. Consequently, he has felt no real impact, no matter what he did or could refer to.

[84] As for the medical information, it is inaccurate to state that the respondent disregarded it. It considered that information when scheduling the second-level hearing. When it placed the grievance in abeyance, nothing in the medical information suggested that the grievance had to be referred to the third level or to adjudication. At any rate, it was the respondent's decision to make. As well, one could think that allowing the grievance, in part at least, should have been beneficial to the complainant. The remaining claims from his grievance are subject to an exercise that the employer must complete, in collaboration with the bargaining agent. It would be unfair and unrealistic to ask the employer to decide those corrective measures before the job-description review is completed.

3. Bad faith

[85] When it comes to bad faith, the complainant refers to *Sganos*, at para. 97. That paragraph sets out that to be successful with such an allegation, the complainant must provide sufficient facts to disclose some form of personal hostility toward him or a behaviour that was oppressive, dishonest, malicious, and spiteful. He also refers to *Jackson v. Customs and Immigration Union*, 2013 PSLRB 31 at para. 66, which recognized that a bargaining agent's lack of communication with one of its members could be considered evidence of arbitrary or discriminatory conduct or of bad faith.

[86] Finally, the complainant refers to *McRaeJackson*, at para. 27, for the three examples that it describes that could be considered bad faith by a bargaining agent. According to that paragraph, they are a union officer's personal feelings influencing the decision as to whether a grievance should be pursued, the union conspiring with the employer to discipline or terminate an employee, and putting the ambition of a group of employees who support a union official ahead of an individual employee's interests.

[87] Once again, nowhere in the facts and the documents presented to me can I see the expression of any hostility from the respondent, even less any action or behaviour that could be considered oppressive, dishonest, malicious, or spiteful.

[88] The respondent supported the complainant when he filed his grievance. It represented him and obtained at the second level a satisfactory result as the employer allowed the grievance, at least in part. It reasonably and legitimately placed the grievance in abeyance to allow the employer to conduct, with its collaboration, a review process that could bring a final solution to the grievance and the desired corrective actions.

[89] The respondent communicated its reasoning and rationale clearly and repeatedly to the complainant between October 3 and November 8, 2022. While he alleges that the respondent demonstrated a lack of communication or that the information it provided was incomplete, erroneous, or simply absent, the documentation shows the opposite. He might not agree with the rationale in the respondent's communications or its chosen strategy, but it does not make the respondent's actions, decisions, and behaviours in this case even close to constituting arbitrariness or bad faith (see *Corneau*, at para. 110).

[90] If any sign of hostility can be found in this case, it comes from the complainant. His repeated suggestions that the respondent might have conspired with the employer, intentionally delayed his case, tried to force a settlement or abandonment, been part of some form of collusion or corruption, or tried to sabotage or subvert the grievance process is not only unsupported by the alleged facts and the documentation on file but also is very concerning. Those are serious allegations that should not be made lightly as the complainant did.

4. Discrimination

[91] With respect to the discrimination aspect of his complaint, the complainant refers to ss. 9(1)(c) and 10(a) and (b) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). He also submits that ss. 226(2) and 13 of the *Act* authorize the Board to interpret and apply the *CHRA*. Finally, he refers to *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53 at paras. 64 to 66 and 75, for the *prima facie* test that he suggests should be applied in his case. He invites the Board to apply it in its analysis of the respondent's actions, conduct, and omissions.

[92] Recently, the Board reminded that that is not the test retained in its jurisprudence for analyzing discrimination allegations in the context of a complaint made under s. 187 of the *Act* (see *Payne*, at paras. 85 and 86). As suggested in *Noël*, at para. 49, the Board should look for any attempts from the respondent to put an individual or a group at a disadvantage when doing so was not otherwise justified in the labour relations context (see also *Beniey v. Public Service Alliance of Canada*, 2020 FPSLREB 32 at para. 69).

[93] In the present matter, the complainant has not put forward one single fact that would allow me to conclude that the respondent acted in such a way. He limits his discrimination submissions to bald statements expressing his belief that the respondent's actions were discriminatory. As an example, he states that he does not believe that this is a matter of incompetence as the actions and areas of misinterpretation appear calculated. Thus, he suggests that the only other reason that the respondent's representatives would have been grossly negligent in handling his grievance or in providing incorrect information is due to some form of discrimination. This is clearly not sufficient to support a finding of discrimination under s. 187 of the *Act* and, consequently, does not demonstrate an arguable case on that basis.

5. Other allegations

[94] Finally, I will address two of the complainant's allegations that do not fall within the categories reviewed so far. He takes the position that the second-level response was invalid because it was rendered after the 30-day period expired in which to respond and because it refers to the wrong case number and contains inaccurate background information. He also submits that the bargaining agent initially supported his grievance, so it must be founded.

[95] Once again, the allegation of not respecting the deadline in which to respond is based on the complainant's interpretation of the collective agreement, which differs from that of the respondent. On October 5, 2022, the respondent clearly explained its position on that question in a lengthy email from its manager for the National Capital Region. As mentioned, I do not have to decide on the right interpretation. The bargaining agent's is reasonable, and it did not prevent the grievance from moving to the level at which it was allowed in part. Therefore, the complainant was not affected except that he is unhappy with the respondent's chosen approach.

[96] As for the wrong case number, it is immaterial and of no consequence to the complainant's case. The same can be said with respect to what he considers the inaccurate background information in the employer's response. These are simply some clerical errors or disagreements from his point of view, which at any rate have no impact on his case.

[97] As for the respondent initially supporting the grievance, it is also immaterial to this decision. The respondent still supports it, but the complainant simply does not agree with its strategy. Once again, this is insufficient to sustain his complaint about the respondent's duty of fair representation.

VII. Conclusion

[98] As I find that the complainant has not alleged anything in the respondent's conduct, decisions, actions, or potential omissions that could be considered arbitrary, discriminatory, or in bad faith, I conclude that the complaint does not demonstrate an arguable case of a breach of s. 187 by the respondent. Consequently, I need not continue my analysis on the second ground raised by the respondent, which is to determine whether the complaint was premature.

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

(The Order appears on the next page)

VIII. Order

[100] The complaint is dismissed.

March 20, 2024.

Pierre Marc Champagne,
a panel of the Federal Public Sector
Labour Relations and Employment Board